FEDERAL MARITIME COMMISSION

INTERMODAL MOTOR CARRIERS CONFERENCE, AMERICAN TRUCKING ASS'N, INC., *Complainant*, v. OCEMA, ET AL., *Respondent.*	Docket No. 20-14

Served: February 13, 2024

BY THE COMMISSION: Daniel B. MAFFEI, *Chairman*; Rebecca F. DYE, Louis E. SOLA, Carl W. BENTZEL, *Commissioners*. Max M. VEKICH, *Commissioner*, dissenting.

Order Affirming Initial Decision and Remanding for Further Proceedings

This Order addresses whether certain ocean common carrier practices that restrict motor carriers' choice of chassis providers for port-to-port shipments (merchant haulage) violate 46 U.S.C. § 41102(c). The Administrative Law Judge (ALJ) ruled that Respondents' practice of designating an exclusive chassis provider for merchant haulage and using merchant haulage volume to obtain discounted carrier haulage rates where motor carriers have no choice of chassis providers violates Section 41102(c) and ordered Respondents to cease and desist engaging in those practices. The ALJ also ruled that the Commission has authority to order ocean common carriers not to withdraw from interoperable chassis pools,

but could not determine whether that relief is appropriate here until the record is further developed.

In this interlocutory appeal, Respondents challenge the ALJ's rulings on procedural and substantive grounds. Respondents argue that the Commission lacks jurisdiction because the challenged restrictions relate to their contracts with chassis providers and involve overland transportation between the ports and inland facilities, and also assert that Complainant's Section 41102(c) claims cannot be resolved without joining the major chassis providers as parties. Substantively, Respondents argue that the Commission's long-standing test for assessing the reasonableness of exclusive arrangements should not apply here and claim the ALJ misapplied the law in finding Respondents' practices unlawful under Section 41102(c) because they are not reasonably related, fit and appropriate to their goal of ensuring an adequate supply of chassis for merchant haulage. Complainant opposes Respondents' appeal and asks the Commission to affirm the ALJ's Initial Decision Partially Granting Summary Decision (I.D.) in its entirety.

The ALJ's findings on these claims and the cease-and-desist order are supported by the record and by sound reasoning. The Commission plainly has jurisdiction over allegations that ocean common carriers' practices and rules governing chassis provisioning violate Section 41102(c) and those allegations can be resolved without the chassis providers participating as parties in this case. Substantively, the Commission finds that Respondents' rules and practices designating an exclusive chassis provider for merchant haulage and using merchant haulage volume to lower their carrier haulage rates when motor carriers have no choice of providers are unreasonable under Section 41102(c).

The Commission denies Respondents' exceptions and affirms the ALJ's Initial Decision in its entirety. Respondents are ordered to cease and desist from the restrictive practices found to be unlawful under Section 41102(c) in the four regions covered by this ALJ's Initial Decision: Los Angeles/Long Beach, Chicago, Savannah, and Memphis. This case is remanded to the ALJ to resolve the remaining claims.

I. BACKGROUND

A. Factual Background

1. Parties and Intermodal Equipment Providers

Complainant Intermodal Motor Carriers Conference (Intermodal) is a conference of the American Trucking Association, Inc. that represents the interests of motor carriers hired to transport containerized cargo between U.S. ports and inland facilities. Joint Stipulation of Facts (JSF) ¶¶ 1-2.[1] Securing the chassis (wheeled metal frames) required to transport containers over the road between ports and inland facilities is an essential part of the motor carriers' business. I.D., 2. Chassis are generally owned by intermodal equipment providers who rent them at daily rates. *Id.*

Respondents Ocean Carrier Equipment Management Association Inc. (OCEMA) and Consolidated Chassis Management LLC (CCM) are associations of ocean common carriers that operate under the authority of agreements filed with the Commission. JSF ¶¶ 3-10, 14-19. OCEMA was established in 1990 to allow its ocean common carrier members to confer and collaborate on certain issues of mutual interest and concern. *Id.* ¶ 3; FMC Agreement No. 011284. OCEMA's website describes it as "an association of major U.S. and foreign flag international ocean carriers" that "operate worldwide and serve all major U.S. ports and inland locations, moving cargoes primarily in containers." *See* JSF ¶ 10; http://www.ocema.org/about.html. OCEMA members mostly transport containerized cargo, and their services include arranging intermodal transportation between ports and inland locations by motor carrier or railroad. *Id.*

CCM was established in 2005 "to provide for a cooperative working arrangement" allowing its ocean common carriers members to form and operate "local, metropolitan, and/or regional chassis pools." FMC Agreement No. 011962 (CCM Agreement),[2]

[1]Appendix A lists the docketed filings and submissions referenced in this Order. References to documents the parties submitted or proposed for confidential treatment under 46 C.F.R. § 502.5 include the descriptor "Confid."

[2]The Agreement Library is available at https://www2.fmc.gov /FMC.Agreements.Web/Public.

Art. 2; JSF ¶¶ 14, 16. The CCM Agreement authorizes the parties "to meet, discuss, exchange information and data, negotiate, and agree upon all matters related to the establishment, operation and use of Chassis Pools." CCM Agreement, Art. 5.2. OCEMA and its members are also parties to the CCM Agreement. *Id.,* Art. 3. CCM manages some regional chassis pools and has issued a manual containing rules and guidance on chassis usage and charges. I.D., 16.

Individual ocean common carriers who are OCEMA and CCM members are named as Respondents, and that list includes: CMA CGM S.A.; COSCO Shipping Lines Co. Ltd. (COSCO); Evergreen Line Joint Service Agreement (Evergreen) (FMC No. 011982); Hapag-Lloyd AG; HMM Co. Ltd.; Maersk A/S; MSC Mediterranean Shipping Company S.A. (MSC); Ocean Network Express PTE Ltd. (ONE); and Zim Integrated Shipping Services. Two carriers who do not belong to both organizations are also named as Respondents: (1) Wan Hai Lines Ltd. (Wan Hai) belongs to OCEMA but not CCM (JSF ¶ 149), and (2) Yang Ming Marine Transport Corp. (Yang Ming) belongs to CCM but is no longer a member of OCEMA (JSF ¶¶ 163-64).

The Respondent ocean carriers contract with three major chassis providers who currently dominate the U.S. chassis market: Direct Chassislink, Inc. (DCLI), Flexi-Van Leasing, LLC (Flexi-Van) and Interpool, Inc. d/b/a TRAC Intermodal (TRAC), collectively referred to as the IEPs.[3] JSF ¶¶ 188-190, 207. Respondents typically rent the chassis from the IEPs, and shippers or motor carriers are then billed for chassis usage in accordance with that ocean common carriers' contract with the IEPs and/or CCM rules, or some other prearranged system. *See* I.D., 2. North American Chassis Pool Cooperative, LLC (NACPC) also operates as an intermodal chassis provider, and it was established by a group of motor carriers. JSF ¶¶ 191, 207.

[3]In this Order, IEP refers to the three major chassis providers: DCLI, Flexi-Van, and TRAC. "Chassis provider" is used as a generic term to include the three IEPs and any others engaged in the business of supplying chassis for containerized cargo transported in U.S. foreign commerce.

2. Haulage Types and Chassis Provision Models

Customers[4] of ocean common carriers can opt for door-to-port transportation (carrier haulage) or port-to-port transportation (merchant haulage). I.D., 15 (Finding Nos. 9-12). If the customer opts for carrier haulage, the ocean common carrier is responsible for arranging and paying the cost of transporting the cargo between an inland facility and the port. *Id.* If the customer opts for merchant haulage, the customer takes responsibility for arranging and paying the cost of transporting the cargo between an inland facility and the port. *Id.* Chassis are generally provided under one of four different models depending on who owns the chassis equipment and whether the chassis are interchangeable. *Id.* at 15-18 (Finding Nos. 14-34).

Chassis Provision Models[5] (Table 1)

1. Single Chassis Provider	**2. Gray Pool**
*Chassis owned by chassis provider *Daily usage (rental) subject to individually negotiated agreements *Maintenance & repairs responsibility of chassis provider *Chassis picked up & dropped off at provider's location *Daily usage charges established by contract or at posted daily rates	*Chassis contributed by several providers *Operated under a pool manager *Chassis providers receive a share of revenue based on number of chassis they contribute *Chassis are interchangeable regardless of which provider contributed them.

[4]"Customer" in this Order generally refers to the party that contracts for ocean transportation service for containerized cargo which is consistent with the parties' use of the term. Depending on the situation, the customer might be the beneficial cargo owner (BCO), a non-vessel operating common carrier (NVOCC), or another entity that contracts with the ocean common carrier for ocean transportation service.

[5]*See* JSF ¶¶ 192-94; Complainant's Reply Stmt. Facts ¶¶ 42-43; Rodrigue Report 29 (Figure 8) (citing U.S. Government Accountability Office (2021), Commercial Shipping: Information on How Intermodal Chassis Are Made Available and the Federal Government's Oversight Role, 3, 10-13).

	*Maintenance & repairs are the responsibility of the pool manager.
3. Pool of Pools Los Angeles/Long Beach *Functions by cooperation among chassis providers *Providers are DCLI, TRAC, and Flexi-Van (the IEPs) *Pools are separately managed *Flexible pickup/drop off locations *Pool chassis are interchangeable *Maintenance and repairs are responsibility of each chassis provider *Billing rights are assigned to the provider who has a contractual relationship with the ocean common carrier whose container is being moved.	**4. Motor Carrier Controlled (Trucker-Owned Wheels)** *Chassis owned or leased long term by motor carriers *Chassis provided as part of the transportation service *Maintenance and repairs are the responsibility of the motor carrier owners.

Complainant is challenging practices Respondents employ in connection with Models 1, 2 and 3 in Table 1 when motor carriers obtain chassis for merchant haulage. Depending on how they are structured, each model has inherent features that affect choice and flexibility. Single-provider or proprietary pools, by their nature, do not offer users a choice of equipment providers. I.D., 15 (Finding No. 14); JSF ¶ 192. Fully interoperable or gray pools commingle multiple chassis providers' equipment and operate under rules that assign particular providers the right to bill for chassis usage regardless of which provider actually owns the equipment that customer used. Complainant's Reply Stmt. Facts ¶ 36.

3. CCM Rules and Chassis Pool Operations

CCM has established rules for chassis pool operations, chassis allocation, and billing for chassis usage which are set forth

in a document entitled Pools Operations Manual (Version 4.0, effective October 2019) (hereinafter CCMP Operations Manual). *See* I.D., 16 (Finding Nos. 19-22). CCM allocation rules allow an IEP to charge the ocean carrier's customer for chassis usage regardless of which IEP actually owns the equipment used. *Id.* CCM Rule 5.5 assigns chassis charges to the ocean carrier's designated or preferred provider. It provides that: "Usage Days will be assigned by default to the User associated with the Container Line Operator for the container loaded on a Chassis, (i.e., to either the User itself or to the User for whom the Container Line Operator is a customer)." *Id.* (Finding No. 21).[6] The CCMP Operations Manual defines "User" as "an entity that has entered into a written Master Chassis Use Agreement with a pool" and "Container Line Operator" is defined as "the ocean carrier that is operating the container at the time of usage." *Id.*

CCM Rule 5.7 provides that motor carriers may select the chassis provider *but only if* ocean common carriers and IEPs grant an exception. *Id.* (Finding No. 22) (emphasis added). It also describes how chassis usage charges are assigned if the "Container Line Operator" (ocean common carrier) grants the motor carrier's request for an exception. Rule 5.7 provides that:

> Notwithstanding Section 5.5, under the Choice Program, Usage Days may be directed to another User when the Container Line Operator and the User for whom the Container Line Operator is a Customer *authorizes a deviation from the default assignment*. To utilize this program, the Container Line Operator must notify CCM that it allows exceptions: at the shipment level (based on booking or bill of lading reference); upon request and approval; based on the motor carrier (for merchant haulage moves); or for all merchant haulage moves (provided the Container

[6]The rule text quoted above is not entitled to confidential treatment, but we note that the ALJ granted confidential treatment to Exhibits C and G (CX2423 and CX 2428-29) of Version 4.0 of CCM Rules 5.5 and 5.7 and Exhibit C of Version 2.7 of CCM Rules 5.5 and 5.7 (CX 2218)). I.D., 10. The ALJ also noted that CCMP Version 4.6 "is not part of the record and was not reviewed" or considered aside from addressing the parties' confidentiality requests. I.D., 10 n.4.

> Line Operator provides CCM with access to shipment data sufficient to make such assignments).

Id.

At one time, CCM chassis pool subsidiaries serviced ports and inland terminal facilities across much of the United States. *See* JSF ¶¶ 200-204. CCM-operated pools formerly included:

(1) Chicago & Ohio Valley Consolidated Chassis Pool LLC (Chicago Pool) (serving Chicago, Illinois; multiple cities in Ohio; Indianapolis, Indiana; and Louisville, Kentucky);

(2) Denver Consolidated Chassis Pool LLC (serving Denver and Salt Lake City);

(3) Gulf Consolidated Chassis Pool LLC (Gulf Pool) (serving Houston, Dallas and other Texas cities and New Orleans, Louisiana);

(4) Mid-South Consolidated Chassis Pool LLC (serving Memphis and Nashville, Tennessee);

(5) Mid-West Consolidated Chassis Pool LLC (serving St. Louis, Missouri; Kansas City, Kansas; and Omaha, Nebraska); and

(6) South Atlantic Chassis Pool LLC (serving Atlanta and Savannah, Georgia; Charleston, South Carolina; Charlotte, North Carolina; Jacksonville and Tampa, Florida).

Id.; *see also* http://www.ocema.org/ccm.html. The CCM-operated Gulf Pool and Chicago Pool ceased operating on August 19, 2020.

Evergreen is a CCM member but operates under a different chassis-provisioning model. It obtains chassis from IEPs for both carrier and merchant haulage at a single, fixed daily contract rate. I.D., 14 (Finding No. 8). Evergreen's merchant haulage customers pay a fixed chassis usage charge that covers the day of delivery plus four business days, after which the per diem charge is $20.00. *Id.*

4. Chassis Pools in Test Case Locations

At the ALJ's suggestion, the parties limited the time frame and geographic scope of this case to focus initially on the ports at Los Angeles/Long Beach and Savannah and intermodal facilities in Memphis and Chicago as test case regions. I.D. at 3, 17-18, 43.[7] The Memphis and Savannah facilities operate under CCM Rules. *Id*. at 17-18 (Finding No. 32-33). The Memphis region is serviced by the Mid-South Pool which operates as an interoperable gray pool and by proprietary pools operated by two of the major IEPs, DCLI and TRAC. JSF ¶ 200; Complainant's Reply Stmt. Facts ¶¶ 645-46. The Savannah region is serviced by the South Atlantic Chassis Pool (SACP) Agreement (FMC Agreement No. 011980) which operates an interoperable gray pool. JSF ¶¶ 200, 205-206. It services the ports and intermodal terminals at Atlanta, Charleston, Savannah, and Jacksonville. *Id.* ¶ 200. Ocean carriers using on-dock chassis at the Ports of Savannah and Jacksonville must use SACP-supplied chassis. *Id*. ¶ 200.

The Chicago region and Los Angeles and Long Beach ports are not currently serviced by CCM pools and do not operate under its rules. JSF ¶¶ 203-04; *see* I.D., 17-18 (Finding Nos. 24, 31). Following the closure of the Chicago Pool in August 2020, the Chicago region is serviced by individual proprietary pools. I.D., 17 (Finding No. 31); JSF ¶ 204. The Los Angeles and Long Beach ports are serviced by the Pool of Pools which is operated collectively by the IEPs (DCLI, TRAC Intermodal, and Flexi-Van). JSF ¶¶195-97. The Pool of Pools operates as a gray pool so a motor carrier may use any chassis in the pool. *Id*. The IEP who has a contractual

[7]The ALJ "encouraged [the parties] to identify ways to limit the time and expense associated" with litigating these complex claims and "instructed [them] to discuss" possible options, such as stipulating to facts or focusing on particular geographic areas or time periods and file a joint report on the options discussed. Order Denying Respondents' Mot. for Leave to File Interlocutory Appeal, 9 (Jan. 29, 2021). The parties conferred and "propose[d] limiting certain categories of initial Party document discovery to the following geographic areas: the Ports of Long Beach and Los Angeles, the Port of Savannah, intermodal terminals in the Chicago area, and intermodal terminals in the Memphis area." Joint Status Report and Proposed Discovery Schedule, 1 (Mar. 1, 2021).

relationship with the ocean carrier whose container is being moved bills for chassis usage. *Id*. Although the IEPs are competitors, the Department of Justice (DOJ) issued a business review letter stating it will not challenge the Pool of Pools Chassis Use Agreement under federal antitrust laws.[8] I.D., 17 (Finding No. 28).

The chart below summarizes the chassis provisioning models relevant to Complainant's claims:

Chassis-Provisioning Models in the Test Case Regions (Table 2)

Test Case Region	Regional Pools	Notable Features
Savannah	*SACP	*CCM Rules govern Interoperable gray pool *Serves ports and intermodal terminals at Atlanta, Charleston, Savannah, and Jacksonville.
Memphis	*Mid-South Pool *Single Provider Pools (operated by DCLI and TRAC)	*CCM Rules govern *Interoperable gray pool (Mid-South Pool) *Proprietary pools (DCLI and TRAC)
Chicago	*Proprietary Pools	
LA/Long Beach	*Pool of Pools	*Collectively operated by DCLI, TRAC and Flexi-Van

[8]Unlike entities regulated by the Commission, the IEPs do not qualify for the antitrust exemption conferred on FMC agreement filers by 46 U.S.C. § 40307. *See* JSF ¶ 196. As FMC-agreement filers, Respondents qualify for the exemption as long as their agreement is in effect and they are operating within its authority. *See In re Vehicle Carrier Services Antitrust Litigation*, 846 F.3d 71, 80-81 (3d Cir. 2017) *Mercedes-Benz USA, LLC v. Nippon Yusen Kabushiki Kaisha*, Civ. No. 18-13764, 2018 WL 6522487, at *4-5 (D.N.J. Dec. 12, 2018).

B. Procedural History

1. Proceedings Before the ALJ

Complainant brought this action to obtain a cease-and-desist order under 46 U.S.C. § 41102(c) directing Respondents OCEMA, CCM, and the individual ocean common carriers to refrain from establishing or following unfair or unreasonable chassis-provisioning practices. Complainant seeks an order directing Respondents to: (1) remove and stop enforcing parts of the CCMP Operations Manual; (2) refrain from adopting or enforcing any regulation restricting motor carriers' choice of chassis provider (including default designations) when the motor carrier is charged for usage or at a per diem rate; and (3) refrain from using certain single-provider chassis pools or intermodal terminals that effectively preclude chassis choice by motor carriers. Compl. ¶¶ 40-41.[9]

The ALJ denied Respondents' motion to dismiss the complaint for lack of jurisdiction, failure to join the IEPs as indispensable parties, and on other grounds. The parties then engaged in fact and expert discovery. At the ALJ's suggestion, the parties focused discovery and briefing on four geographic regions to be considered first as a test case, with the remaining claims to be decided at a later stage of the proceedings. After discovery ended, the parties jointly filed a statement of undisputed facts. All parties filed cross-motions for summary decision supplemented by their respective proposed findings of undisputed facts. The Respondents joined in a consolidated motion for summary decision. Because its practices differ somewhat from the other Respondents, Evergreen also moved separately for summary decision in its favor.

In February 2023, the ALJ issued an Initial Decision granting in part Complainant's motion and denying in their entirety the Respondents' summary decision motions. The ALJ rejected Respondents' renewed motions to dismiss on the grounds that the

[9]We note that the complaint does not allege violations of 46 U.S.C. § 41105(2), which prohibits a "group of two or more common carriers" from "engag[ing] in conduct that unreasonably restricts the use of intermodal services or technological innovations." Whether this case, or a future case, might address the potential application of this statutory provision is not presently before the Commission.

Commission lacks jurisdiction[10] because the claims involve chassis-provisioning and inland chassis pool operations, and also rejected Respondents' renewed motion to dismiss because the IEPs are not joined as parties. The ALJ also ruled on cross-motions to strike filings and on multiple requests to keep certain information confidential. *Id*. at 61.[11] The ALJ granted in part and denied in part the motions for confidential treatment of various filings and materials. *Id.*at 9-11.[12]

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[10]The ALJ addressed the jurisdictional question in three separate orders entered at different stages of the case. The ALJ rejected Respondents' arguments that the Commission lacks jurisdiction in denying: (1) Respondents' motion to dismiss the complaint (ALJ Order dated Nov. 18, 2020); (2) Respondents' request for leave to file an interlocutory appeal challenging the ALJ's denial of their motion to dismiss (ALJ Order dated Jan. 29, 2021); and (3) Respondents' cross-motion for summary decision (I.D., 20-21).

[11]In granting leave for this interlocutory appeal, the ALJ noted that an appeal filed by any party would place "the entire proceeding before" the Commission. I.D., 59. The parties did not file exceptions challenging the ALJ's rulings on these ancillary motions. This Order only addresses the issues raised by Respondents' Consolidated Exceptions and Evergreen's Exceptions as grounds for reversing the ALJ's rulings in the Initial Decision which focus solely on the rulings denying Respondents' motions for summary decision. *See generally* 46 C.F.R. § 502.227(a)(1) (exceptions "shall indicate with particularity alleged errors").

[12]Information only qualifies for confidential treatment upon a showing of good cause by demonstrating that it is "a trade secret or other confidential research, development, or commercial information." 46 C.F.R. § 502.5(b). Treating information as confidential does not affect the Commission's or the ALJ's ability to rely on that information to decide the claims. 46 C.F.R. § 502.5(c).

The ALJ granted confidentiality "as requested with the exception of the non-confidential CCMP Operations Manual portions at CX2170-2217, CX2219-20, CX2379-2422 and CX2424-27, the selected statements used in this decision, and the corrected public filings." I.D., 61. The ALJ denied the parties' requests in part as overbroad because they sought confidential treatment for entire documents, such as expert reports, declarations, or depositions, not just the portions that contained commercial information or trade secrets that qualify for protection under Rule 502.5(b). I.D., 10-11. The parties have not challenged that ruling on appeal, and even if they had, the ALJ correctly ruled that confidential treatment is limited to qualifying information and does not extend to the entire document.

On the merits of Complainant's Section 41102(c) claim, the ALJ determined that the Respondents' practices of designating an exclusive chassis provider for merchant haulage and contractually linking merchant haulage volume and carrier haulage rates are unreasonable, and directed Respondents to cease engaging in those practices in the four test case regions. *Id.* at 46-47. The ALJ also determined that the Commission has "authority to prevent regulated entities from withdrawing from interoperable pools," but found that disputed issues of material fact precluded ruling on whether the Commission should order Respondents to cease and desist from any further withdrawals from interoperable pools. *Id.* at 5. The ALJ ordered:

> Within thirty days of the date this decision becomes final, Respondents shall cease and desist from violating the Shipping Act in Chicago, Los Angeles/ Long Beach, Memphis, and Savannah *by ceasing and desisting adopting, maintaining, and/or enforcing any regulations or practices that limit the ability of a motor carrier to select the chassis provider of its choice for merchant haulage*.

Id. at 59, 61 (emphasis added).[13] The ALJ also determined that rules specifying a default (or preferred) chassis provider may promote efficiency and, at this stage of the case, have not been shown to be unreasonable so long as the motor carrier can select a different chassis provider. *Id.* at 4. The ALJ found that to the extent Evergreen's chassis provisioning practices (which differ somewhat from the other ocean carriers') deny motor carriers a choice on merchant haulage, they are likewise unreasonable under Section 41102(c). The ALJ granted the parties leave to file an interlocutory appeal challenging the summary decision rulings. *Id.* at 5, 61.

Consistent with ALJ's ruling and Rule 502.5, information that does not qualify as confidential is not treated as such, and is not redacted from the public version of the Commission's Order. *See* 46 C.F.R. § 502.5(b).

[13]The ALJ's cease-and-desist order was automatically suspended when Respondents filed exceptions to the Initial Decision. *See* 46 C.F.R. § 502.527(a)(5) ("Upon the filing of exceptions to, or review of, an initial decision, such decision shall become inoperative until the Commission determines the matter.")

2. Exceptions Before the Commission

Respondents timely filed consolidated exceptions challenging the ALJ's rulings on jurisdiction, non-joinder of the IEPs, and parts of the Section 41102(c) claim. Respondents argue that the Commission must dismiss the case for lack of jurisdiction and failure to join the IEPs as indispensable parties. If the case is not dismissed, Respondents ask the Commission to reverse the ALJ's rulings finding the exclusive designation practices and using merchant haulage volume to offset carrier haulage costs unreasonable under Section 41102(c). Exceptions, 27-34. Respondents argue that in finding their practices unreasonable, the ALJ improperly equated those practices to exclusive arrangements imposed by ports or marine terminal operators (MTOs), misapplied the law in requiring Respondents to provide a justification for those practices, and impermissibly decided disputed issues of material fact. *See id.* Respondents also argue that there is no legal basis for the cease-and-desist order and that the ALJ failed to consider how that order will interfere with supply chain efficiency and lead to increased transportation costs. Evergreen joined in the consolidated exceptions, and also filed separately to address aspects of its chassis-provisioning practices that differ from the other ocean carriers' and to specifically dispute the ALJ's findings that those practices are unreasonable and argue that it is entitled to summary decision as a matter of law.

Complainant responded to Evergreen's and Respondents' consolidated exceptions and urges the Commission to affirm the ALJ's Initial Decision in its entirety. Complainant contends that the ALJ correctly applied Commission case law on exclusive arrangements and found that the challenged practices are not a necessary or fit means of ensuring an adequate supply of chassis -- the purpose that Respondents contend justifies their existence. Complainant's Reply to Exceptions, 34-46. Complainant argues that the record shows that these practices unreasonably deprive motor carriers of choice, impede competition, increase merchant haulage rates, and unfairly require motor carriers to subsidize lower carriage haulage rates for ocean carriers.

The Commission granted the IEPs (DCLI, Flexi-Van, and TRAC) leave to file an amicus brief, in which they contend that the

ALJ erred in finding certain practices unreasonable and assert that the ALJ failed to consider the implications of ordering the ocean carriers to cease engaging in those practices.[14] The Commission also granted the American Cotton Shippers Association leave to file an amicus brief, in which it contends that the ALJ properly found Respondents' withdrawal from interoperable pools unreasonable and in violation of Section 41102(c), and urges the Commission to uphold the ALJ's findings.

II. DISCUSSION

A. Standard of Review and Burden of Proof

The Commission reviews exceptions to the ALJ's Initial Decision on motions for summary decision de novo and can exercise "all the powers" it would have had in ruling on the motion initially, and may enter its own findings. 46 C.F.R. § 502.227(a)(6). Under the Administrative Procedure Act, the complainant has the burden of proving its allegations by a preponderance of the evidence, meaning that it must persuade the Commission that the allegations are more probable than not. 5 U.S.C. § 556(d); 46 C.F.R. § 502.203; *Maher Terminals, LLC v. Port Auth. Of N.Y. & N.J.*, FMC Docket No. 08-03, 2014 WL 9966245, at *14 (FMC Dec. 17, 2014). The burden of proof never shifts to the respondents, and if the evidence is evenly balanced, complainants do not prevail. *Waterman Steamship Corp. v. General Foundries, Inc.*, Docket No. 93-15, 1994 WL 279898, at *9 (FMC June 13, 1994) (complainants "must carry the burden of proving every element of the" claim that respondent engaged in conduct prohibited by the Shipping Act).

The Commission's Rules of Practice and Procedure do not define a standard for deciding motions for summary decision. In the absence of a Commission rule, the Commission applies the Federal Rules of Civil Procedure to the extent they are consistent with sound administrative practice. 46 C.F.R. § 502.12. The Commission applies the federal summary judgment standard (Fed. R. Civ. P. 56) in deciding parties' motions for summary decision. Federal Rule 56(a) provides that a party is entitled to summary judgment if "there

[14]The IEPs did not petition to intervene in this case under 46 C.F.R. § 502.68(c)(1) (allowing non-parties to intervene as of right if "disposition of the proceeding may as a practical matter impair or impede" their ability to protect their interests).

is no genuine dispute as to any material fact and [the moving party] is entitled to judgment as matter of law." There is a genuine factual dispute "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 248 (1986). Facts are viewed in the light most favorable to the nonmoving party. *Maxwell v. FCA US, LLC*, No. 22-1356, 2023 WL 246836, at *2 (FMC Jan. 18, 2023).

Once the movant demonstrates an absence of disputed material facts, the non-movant must present evidence to create a genuine dispute of fact with respect to each "essential element" of his case or defense. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). This requires more than "simply show[ing] that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp*., 475 U.S. 574, 586 (1986). It is not the Commission's role to make credibility determinations or weigh the evidence, its role is limited to determining whether there is a genuine issue of material fact. *See Reeves v. Sanderson Plumbing Prods., Inc*., 530 U.S. 133, 150 (2000).

B. Commission's Supplemental Findings of Fact

The Commission enters the following supplemental findings based on the evidence of record:[15]

Chassis Provider Rates and Choice

35. Ocean carriers can negotiate with IEPs for lower carrier haulage rates in exchange for higher merchant haulage chassis volume and restrictions on choosing a chassis provider. Langenfeld Report ¶¶ 19-20; *see also* Confid. Compl. Reply Stmt. Facts ¶ 497 (listing contracts linking carrier haulage rates to merchant haulage volume).

36. Allowing motor carriers to choose a chassis provider affords them the potential to negotiate and contract for chassis usage rates. *See* Rodrigue Report ¶ 99.

[15]Sequential numbering for the Commission's supplemental findings begins where the ALJ's numbered findings left off.

Relevant Product and Geographic Markets

37. The relevant product market for the chassis provisioning services provided by the IEPs is daily chassis usage. Langenfeld Report ¶¶ 40-43.

38. The relevant geographic market for the chassis provisioning services provided by the IEPs is the region surrounding a particular port or inland facility where the chassis is to be used on a short-term basis. *Id.* ¶ 12; Rodrigue Report ¶ 164.

39. The relevant geographic market for the test case regions are the areas surrounding the ports at Savannah, Georgia, Los Angeles/Long Beach California and the inland terminal facilities at Memphis and Chicago. Langenfeld Report ¶ 67.

C. Jurisdiction over Complainant's Claims

The ALJ ruled that the Commission has jurisdiction because Respondents are ocean common carriers and associations operating under the authority of FMC-filed agreements that are clearly subject to the Commission's regulatory authority, and are allegedly engaged in practices that violate Section 41102(c). I.D., 22. Respondents do not deny their status as regulated entities, but challenge the ALJ's rulings rejecting their arguments that their contractual arrangements with IEPs and the nature of merchant haulage place Complainant's claims outside the Commission's jurisdiction. Exceptions, 27-35. They argue that the chassis-provision restrictions are insulated from the Commission's review because the ocean carriers are contractually bound to honor those restrictions under their contracts with the IEPs. *Id.* at 31-34, 42. They also protest jurisdiction as an overextension of the Commission's authority because merchant haulage involves transportation between the ports and inland facilities. And finally, they argue that it was reversible error for the ALJ to rely on *Norfolk S. Railway Co. v. Kirby*, 543 U.S. 14 (2004), for the general principle that maritime law does not cease to apply as soon as cargo moves away from a coastal port.

1. Jurisdictional Standards

Complainants have the initial burden of showing that the Commission has jurisdiction over their claims. *See River Parishes Co., Inc. v. Ormet Primary Aluminum Corp*., Docket No. 96-06, 1999 WL 125991, at *17 (FMC Feb. 3, 1999). Where, as here, jurisdiction is challenged in a motion for summary decision, the complainant cannot rely on allegations alone but must point to specific facts and evidence supporting the allegations. *See Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560-61 (1992) (discussing burden and evidentiary requirements when constitutional standing is challenged on summary judgment); *Indiana Coalition for Public Education—Monroe County, v. McCormick*, 338 F. Supp. 3d 926 (S.D. Ind. 2018) (applying Fed. R. Civ. P. 56).

The Commission plainly has jurisdiction over ocean common carriers[16] who are allegedly violating the Shipping Act while acting in their regulated capacity. *See Cargo One, Inc. v. COSCO Container Lines Co*., Docket No. 99-24, 2000 WL 1648961, at *15 (FMC Oct. 31, 2000) (alleged Shipping Act violations involving "just and reasonable regulations and practices, are inherently related to Shipping Act prohibitions and are therefore appropriately brought before the Commission."). The Commission's "jurisdiction extends to all alleged violations of the Act." *Chief Cargo Services. v. Fed. Mar. Comm'n*, 586 Fed. Appx. 730, 731 (2d Cir. 2014); *Cf. Auction Block Co. v. Fed. Mar. Comm'n,* 606 Fed. Appx. 347, 348 (9th Cir. 2015) (distinguishing conduct within and outside scope of MTO's regulated activities).

The individual ocean common carriers' status as regulated entities are not in dispute.[17] OCEMA and CCM did not stipulate to their status as regulated entities, but undisputed facts demonstrate that is clearly the case. They operate solely under the authority of

[16]The Shipping Act's definition of "ocean common carrier" relies on the description of a common carrier. A common carrier is defined as a person that holds itself out to the general public as providing water-borne transportation for passengers or cargo between the United States and a foreign country for compensation that assumes responsibility for the transportation and uses for all or part of that transportation a vessel operating on the high seas between a port in the U.S. and a port in a foreign country. 46 U.S.C. § 40102(7)(A) and (18).

[17]*See* JSF ¶¶ 25, 42, 58, 72, 87, 102, 117, 132, 148, 162, 176.

their FMC-filed agreements, represent the interests of their ocean common carrier members and act on their behalf. The OCEMA Agreement expressly authorizes it to engage in discussions and activities related to "equipment pools or pool-owning companies" and act on behalf of its members who are described as "major U.S. and foreign flag international ocean common carriers." JSF ¶¶ 3, 7, 10. The CCM Agreement specifically provides that it "is authorized by and is subject to the Shipping Act of 1984, as amended, and regulations issued pursuant thereto." CCM Agreement, Art. 9; JSF ¶¶ 16-17. The CCM Agreement also specifically authorizes activities related to the chassis pool rules and operations that the Complainant challenges as unreasonable under Section 41102(c), such as entering into exclusive contracts and agreements and allowing a governing board to establish chassis pool operating rules. CCM Agreement, Arts. 5.9, 6.1. The Commission exercises continuing oversight over activities conducted under FMC-filed agreements by, for example, reviewing meeting minutes to ensure that the parties are operating within the bounds of the agreement. JSF ¶¶ 13, 21; *see generally Anchor Shipping Co. v. Aliança Navegação E Logística Ltda*., Docket No. 02-04, 2006 WL 200788, at *12 (FMC May 10, 2006) (noting Commission's ongoing oversight responsibilities over filed agreements).

OCEMA and CCM could not engage in these antitrust-exempt activities outside the bounds of their FMC-filed agreement. In antitrust terms, the ocean common carriers are in a horizontal relationship—they compete against one another in the market for container transportation services in U.S. foreign commerce.[18] Federal antitrust laws prohibit collaboration and information sharing among competitors and OCEMA; CCM and their members are only exempt from those restrictions because they are operating under an FMC-filed agreement currently in effect. *See* 46 U.S.C. § 40307(a). Respondents cannot use the Shipping Act's antitrust exemption to carry out activities that would otherwise be scrutinized by the Department of Justice (DOJ) or Federal Trade Commission (FTC) as possible antitrust violations, but then seek to exempt those same activities from the Commission's scrutiny. Their argument, if accepted, would effectively give Respondents free rein to adopt

[18]*See* I.D., 32 (citing *Eastman Kodak Co. v. Image Tech. Services*, 504 U.S. 451, 471 n.18 (1992); *Sprint Nextel Corp. v. AT&T Inc*., 821 F. Supp. 2d 308, 317-18 (D.D.C. 2011)).

practices that restrain competition or impose unjust and unreasonable conditions on other transportation service providers or shippers. OCEMA's and CCM's role in framing and enforcing chassis-provisioning practices leaves no doubt that they were acting on behalf of their ocean common carrier members in promoting the challenged practices, and they are bound by the same Shipping Act prohibitions as their members.

The Shipping Act gives any person the right to file Shipping Act claims with the Commission and imposes a corollary duty on the Commission to adjudicate those claims. Section 40301(a) gives person(s) the right to file with the Commission "a sworn complaint alleging a violation" of any Shipping Act provision (with one exception not relevant here). 46 U.S.C. § 41301. Section 41301(c) provides that: "If the complaint is not satisfied, the Commission shall investigate the complaint in an appropriate manner and make an appropriate order." These provisions have been read in tandem as giving complainants a right to file and have their complaints of Shipping Act violations adjudicated by the Commission if they are not otherwise "satisfied." *S.C. State Ports Auth. v. Fed. Mar. Comm'n*, 243 F.3d 165, 176 (4th Cir. 2001) ("[if] a private party file[s] a complaint … [t]he FMC ha[s] no choice but to adjudicate this dispute"), *aff'd sub nom. Fed. Mar. Comm'n v. S.C. State Ports Auth*., 535 U.S. 743 (2002) (holding that state sovereign immunity barred Commission from adjudicating private party complaint alleging state-run port violated the Shipping Act); *see also Anchor Shipping*, 2006 WL 200788, at *12 (Chairman Blust and Commissioner Dye, concurring) (noting that the Shipping Act "makes clear that the Commission does not have discretion whether to hear filed complaints"). Adjudicating sworn complainants is also part of the Commission's mission of promoting an ocean transportation system that is "efficient, competitive, and economical." 46 U.S.C. § 40101(2).

Section 41301(a) is plainly worded and does not carve out exceptions. The Supreme Court has cautioned the Commission against circumscribing its jurisdiction too narrowly when the Shipping Act confers authority in plain language or uses expansive terms. *See Volkswagenwerk Aktiengesellschaft v. Fed. Mar. Comm'n*, 390 U.S. 261, 273-75 (1968) (reversing Commission's "extremely narrow" interpretation of "expansive [statutory] language"). The Commission has heeded that caution in other cases

and found that broadly drafted Shipping Act provisions "should not be narrowly construed" to limit the Commission's jurisdiction. *Int'l Ass'n of NVOCCs v. Atlantic Container Line*, Docket No. 81-5, 1990 WL 427461, at *14 (FMC Feb. 5, 1990). *Cf. Landstar Express America Inc. v. Fed. Mar. Comm'n*, 569 F.3d 493, 496 (D. C. Cir. 2009) ("Where the Shipping Act includes a precise definition, 'the limits of the Commission's jurisdiction to regulate carriers under [the Act] must necessarily depend upon the meaning and interpretation of the [statutory] definition.'") (quoting *Austasia Intermodal Lines, Ltd. v. Fed. Mar. Comm'n*, 580 F.2d 642, 644 (D.C. Cir. 1978)).

Avoiding an overly restrictive interpretation is also important because no other forum has original jurisdiction over Shipping Act claims. The Commission has "exclusive primary jurisdiction" over alleged Shipping Act violations and complainants cannot choose another forum. *Gov't of Guam v. Am. President Lines*, 28 F.3d at 142, 149 (D.C. Cir. 1994). Bringing a different cause of action in state or federal court would still leave the complainant without recourse for actual harm caused by a Shipping Act violation. The Commission is also uniquely positioned to judge whether its regulated entities' practices are reasonable and fair. The Commission's experience monitoring ocean common carriers and expertise in assessing supply chain logistics and chassis-related issues is particularly relevant in this case. *See generally A/S Ivarans Rederi v. United States*, 895 F.2d 1441, 1447 (D.C. Cir. 1990) ("Congress specifically authorized the FMC" to review, approve, and monitor "agreements among ocean common carriers. This delegation of authority by Congress, coupled with the FMC's technical knowledge of the subject matter, cautions us to accord great weight to the agency's judgment.").

2. Respondents' Objections to Jurisdiction

Notwithstanding Respondents' regulated status and the Shipping Act violations alleged, Respondents raise multiple objections to jurisdiction. Initially they assert that the Commission cannot grant relief that conflicts with their contractual commitments to the IEPs. Exceptions, 42. This argument is not persuasive. As the ALJ properly determined, parties cannot evade Shipping Act prohibitions by entering into a contract, then proclaiming that any commitment embodied in that contract is exempt from Commission

review. *See* I.D., 23. As the Commission explained in the Interpretative Rule on Demurrage and Detention:

> Ocean carriers and [MTOs] do not have an unbounded right to contract for whatever they want. They are limited by the prohibitions of the Shipping Act, one of which is section 41102(c). Although the general trend in the industry has been deregulatory, Congress retained section 41102(c) when it enacted the Ocean Shipping Reform Act in 1998.

85 Fed. Reg. 29639, 29649 (May 18, 2020) (codified at 46 C.F.R. § 545.5).

Nor is the Commission's jurisdiction constrained by the fact that Shipping Act claims may become intertwined with breach of contract issues. *See generally Anchor Shipping Co.,* 2006 WL 200788, *12; *New York Shipping Ass'n v. Fed. Mar. Comm'n*, 854 F.2d 1338, 1364, 1371 (D.C. Cir. 1988). Respondents argue that cases the ALJ relied on for this principle are factually distinguishable. Exceptions, 40; *see* I.D. 28. For example, Respondents contend that *Sealand Serv., Inc. & Gulf Puerto Rico Lines v. Proposed Rules on Containers*, 21 F.M.C. 1 (FMC 1978), does not apply because it involved a collective bargaining agreement. The factual distinctions that Respondents point to are immaterial and do not undermine the general principle that regulated entities cannot use contractual obligations to insulate their activities from Commission review.

Respondents' related argument that the Commission is impermissibly asserting jurisdiction over their chassis usage contracts with the IEPs is grounded on an erroneous premise. *See* Exceptions, 40. The issue before the Commission is whether Respondents' chassis-provisioning practices are unreasonable or unjust under Section 41102(c). Respondents' contractual obligations to the IEPs are a separate issue. The ALJ did not make any determination about those obligations, and they are not before the Commission. *See generally California Stevedore Ballast Co. v Stockton Port District* (*Stockton*), 7 F.M.C. 75, 81 (1962) (Commission action "condemning and preventing . . . unjust and unreasonable practices" by stevedores engaged in vessel loading

"does not constitute regulation of stevedoring"). Respondents' argument that Complainant failed to show that it cannot bring a cause of action in another forum is also meritless. *See* Exceptions, 44 n.24. Complainant is not required to prove there is no remedy in another forum in order to establish Commission jurisdiction.

Respondents' argument that the Commission lacks jurisdiction over merchant haulage issues because they involve overland transportation is likewise untenable. The Commission and the courts have repeatedly recognized that the Shipping Act's authority does not end at the port's boundary. *See, e.g., Mitsui O.S.K. Lines Ltd. v. Global Link Logistics, Inc*., Docket No. 09-01, 2011 WL 7144008, at *5-8 (FMC Aug. 1, 2011) (recognizing jurisdiction over "split routing" claim that involved transportation inland). Whether the Shipping Act applies depends on the nature of the activity, namely, its connection to ocean transportation service for foreign shipments, not where the activity takes place or whether it is carried out at the port or offsite. *See id.*[19]

Respondents recognized this established principle and used it to their advantage to expansively define the geographic scope of the CCM Agreement by including moving loaded or empty chassis to or from inland destinations as authorized activities. Article 4 of the CCM Agreement describes authorized activities as covering:

> Inland Intermodal Terminals located within the United States at which containers moving to or from Marine Terminals in the foreign commerce of the United States, *or chassis which transport such containers*, are received, delivered, handled, stored, repaired, maintained, loaded, unloaded, inspected, or interchanged. *Loaded or empty containers moved on chassis via such Marine Terminals or Inland Intermodal Terminals may be moving to or from any origins, or to or from any destinations, within the United States, its territories or possessions.*

[19]The Shipping Act defines various terms related to inland transportation segments. *See* 46 U.S.C. § 40102(12) ("inland division"); § 40102(13) ("inland portion"); § 40102(25) ("through rate"); and § 40102(26) ("through transportation"). The Commission's regulations also define marine terminal facilities as including "inland locations." 46 C.F.R. § 535.104(p).

CCM Agreement, Art. 4 (emphasis added). By including these activities, CCM signaled an intent to bring them under the Section 40307 exemption and insulate them from scrutiny by DOJ and FTC for potential antitrust violations. Respondents cannot now claim that activities they declared within the scope of their FMC-filed agreement are at the same time outside the Commission's jurisdiction and cannot be policed or restricted under the Shipping Act.

Respondents' "inland segment" argument is also contradicted by the Ocean Shipping Reform Act of 2022 (OSRA 2022) and Commission precedent, which make clear that chassis, and by inference chassis pools, are integral components of the ocean transportation system. In fact, OSRA 2022 directs the Commission to partner with the Transportation Research Board of the National Academies of Sciences, Engineering, and Medicine to study the "best practices for on-terminal or near-terminal chassis pools" servicing MTOs, motor carriers and other stakeholders [to] optimize supply chain efficiency and effectiveness." Public Law 117-146, 136 Stat. 1272 (June 16, 2022); https://www.fmc.gov/commission-contracts-with-national-academies-for- osra-mandated-chassis-study/. Even before the passage of OSRA in June 2022, the Commission examined chassis practices as an integral component of the ocean supply chain. *See, e.g.,* Fact Finding No. 29 Final Report to the Commission, 29 (May 31, 2022); Fact Finding No. 28 Final Report to the Commission, 29 (Dec. 3, 2018); Memphis Supply Chain Innovation Team, "A Single Gray Chassis Pool Fosters Fluid Commerce and Improves Supply Chain Velocity."[20] The Commission has also held that the Shipping Act applies to regulated entities' handling of chassis issues. *See, e.g., Marine Repair Services of Maryland, Inc. v. Ports America Chesapeake*, LLC, Docket No. 11-11, 2013 WL 9808672, at *21 (ALJ Jan. 10, 2013) (holding that maintenance and repair work on chassis and refrigerated containers "have a direct and close connection to the cargo operations of oceangoing vessels"), (admin. Final Mar. 20, 2013). The Commission's regulations exempt equipment interchange agreements among carriers from 46 U.S.C. § 40302 filing requirements which would not be necessary if those

[20] *See* https://fmc2.fmc.gov/wp-content/uploads/2019/05/Memphis SupplyChainWhitepaper.pdf.

agreements were already outside the Commission's jurisdiction. *See* 46 C.F.R. §§ 535.304-535.305.

Finally, Respondents' argument that the ALJ misapplied the law by citing to *Norfolk S. Railway Co. v. Kirby*, 543 U.S. 14 (2004) ignores the ALJ's discussion entirely. Respondents argue that citing *Kirby* shows that the ALJ misapplied the law because that case involved a claim under the Carriage of Goods by Sea Act (COGSA).[21] *See* Exceptions, 29-31. The ALJ only cited *Kirby* to make the point that whether maritime law applies depends on the nature of the conduct at issue, not where it occurred, and that it does not cease to apply the moment cargo leaves the port. *See* I.D., 23-24 (quoting *Kirby*, 543 U.S. at 27). The ALJ cited *Kirby* as authority for a universal principle that guides maritime law, not for any principle unique to COGSA.

In sum, Complainant's allegations that regulated entities violated the Shipping Act while acting in their regulated capacity places this case squarely within the Commission's jurisdiction, Respondents do not establish any basis for finding otherwise.

The ALJ's ruling denying Respondents' motion for summary decision for lack of jurisdiction is affirmed.

D. IEPs' Alleged Status as Indispensable Parties

The ALJ found that the three major IEPs (DCLI, Flexi-Van, and TRAC) who supply chassis equipment to the Respondent ocean common carriers are not necessary parties and that the case can be adjudicated without joining them as parties. I.D., 26-29. Because the Commission's Rules of Practice and Procedure do not specifically address joinder of non-parties, the ALJ applied the corresponding federal rule, Federal Rule of Civil Procedure 19. Respondents argue that the ALJ erred in finding that the IEPs are not indispensable because the carriers are contractually bound to them and the IEPs have an interest in the outcome since the chassis-provisioning rules they apply are being contested. Exceptions, 39-44. Notably, the record does include the IEPs' position on the points on which they

[21]The Commission joined several other federal agencies in signing onto an amicus brief filed by the U.S. Department of Justice in *Kirby* in support of Norfolk Southern's position. Br. for the United States as Amicus Curiae Supporting Petitioner, 2004 WL 587237 (Mar. 24, 2004).

claim the ALJ erred in finding exclusive provisioning practices unreasonable. *See* IEP Amicus Br., 11-36.[22]

Federal Rule of Civil Procedure 19 applies a three-part test to determine whether litigation may proceed in the absence of a particular party "who is subject to service of process and whose joinder will not deprive the court of subject-matter jurisdiction." *Stand Up for California! v. U.S. Dep't of the Interior*, 204 F. Supp. 3d 212, 251 (D.D.C. 2016) (citing *Kickapoo Tribe of Indians of Kickapoo Reservation in Kansas v. Babbitt*, 43 F.3d 1491, 1494. (D.C. Cir. 1995). The first step is determining whether the absent party is required (or necessary) for a just adjudication under the criteria identified in Rule 19(a). A party is necessary to the proceeding if either of the following apply: (1) the court cannot grant "complete relief" in their absence; *or* (2) they claim to have an interest related to the case *and* disposing of the claims in their absence impedes their ability to protect that interest or creates a "substantial risk" of double, multiple or inconsistent obligations. Fed. R. Civ. P. 19(a); *see Republic of the Philippines v. Pimentel*, 553 U.S. 851, 862 (2008); *De Csepel v. Republic of Hungary*, 27 F.4th 736, 746-47 (D.D.C. 2022). The second step is determining whether the non-party's joinder is feasible. Fed. R. Civ. P. 19(b); *Kickapoo Tribe*, 43 F.3d at 1494. The third and final step considers whether the case can proceed "in equity and good conscience" if the absent (but necessary) party cannot be joined or whether the case should be dismissed. Fed. R. Civ. P. 19(b); *see Pimentel*, 553 U.S. at 862.

Respondents fail to clear the test's first hurdle because the IEPs are not necessary parties under either prong of Rule 19(a). The IEPs do not need to be parties for the agency to grant Complainant

[22]The IEPs argue that granting Complainant the relief it seeks will undermine supply chain efficiency and directly interfere with their contractual and business arrangements. IEP Amicus Br., 19-23. They claim that Commission case law on exclusive arrangements does not apply because the IEPs do not dominate the market. *Id.* at 2. The IEPs also contend that the relief ordered by the ALJ will "directly upset the competitive arrangements the marketplace has developed." *Id.* As discussed below, these arguments are not legally or factually supported and do not countermand Complainant's evidence that the challenged practices fail the Commission's reasonableness test for exclusive arrangements.

the relief it seeks by ordering Respondents to cease designating exclusive chassis providers for merchant haulage, using merchant haulage volume to obtain better carrier haulage rates, or withdrawing from interoperable pools. *See* I.D., 27. Complainant is not seeking any relief directly against the IEPs, either in the form of reparations or a cease-and-desist order. *See* Compl. ¶¶ 40-41. As for the second prong of the Rule 19(a) test, the IEPs claim and may be able to demonstrate an indirect interest in whether Respondents may continue designating exclusive providers for merchant haulage or withdrawing from interoperable pools at will because those activities may impact volume or demand for a particular IEP's chassis. But the IEPs do not face a "substantial risk" of being ordered to satisfy multiple or inconsistent obligations. Respondents will need to bring their practices into line with the Commission's cease-and-desist order and modify their dealings with shippers, motor carriers, and chassis providers accordingly—but granting that relief will not subject the IEPs to conflicting or inconsistent demands.

Respondents' arguments that Rule 19(a) requirements have been met are not supported by the record and overstate the potential impact of awarding relief on the IEPs' business operations. Respondents characterize the impact on the IEPs as "direct, immediate, adverse and dramatic" but do not point to statistics, expert opinion or clear evidence to substantiate that claim. *See* Exceptions, 36-40. This argument also inaccurately suggests that how IEPs allocate and bill for chassis usage is an immutable or permanent fixture of IEP/ocean carrier contracts and that cannot be shifted to a system that relies on default (preferred) chassis providers for merchant haulage without making their business model unsustainable. *See id*.

Respondents acknowledge that certain ocean common carriers allow exceptions from exclusive designations for merchant haulage cargo.[23] While that is different than disallowing exclusive designation practices entirely, the difference is a matter of degree. The exception allowance shows that IEPs can function or adjust in a climate where motor carriers or shippers can exercise a choice. Under the current system, opt-outs may only occur infrequently and on an ad hoc basis, but the fact that they can and presumably do occur undercuts Respondents' argument that exclusive designations are necessary and allowing motor carriers a choice is not sustainable and will endanger the chassis supply. As with any operational change, switching away from exclusive designations may require a period of adjustment as the IEPs assess changes in demand, but Respondents do not point to any reason why that would not be a temporary phenomenon, and a new equilibrium would eventually be established as IEPs adjust to new chassis usage trends and make corresponding adjustments to their chassis supplies and positioning.

This argument also ignores the fact that the heart of the case is the reasonableness of *Respondents'* restrictions on motor carriers' choices for merchant haulage. Resolving that question may affect who IEPs can bill for chassis usage and how they allocate chassis usage charges but does not place the indirect impact on their

[23]Respondents also contend that the ocean common carriers do not have free rein in granting or denying motor carriers' request to choose a chassis provider for merchant haulage because the IEPs can veto the carriers' decision, but again they do not point to data or statistics indicating either how frequently motor carriers request an exception, how frequently the ocean carrier grants or denies those requests, or how frequently IEPs veto the ocean carrier's decision to grant an exception. *See* Exceptions, 38-40. In fact, these are some of the disputed factual questions that led the ALJ to conclude that it is not possible to decide whether the exclusive designation rules are unreasonable as applied (or in actual practice). *See* I.D., 39.

allocation and billing procedures at the center of this case or make the IEPs a necessary party under Rule 19(a). That is simply not the type or degree of impact on non-parties that Rule 19(a) requires to show they are necessary to fairly and justly adjudicate the issues. *See* I.D., 27. This is not a situation in which the Respondents or the IEPs will be confronted with multiple damage awards for the same cause of action or inconsistent outcomes in other forums—the harm that Rule 19(a) is meant to prevent. Accepting Respondents' argument that indirect impact on the business practices of a non-party forecloses Commission review of alleged Shipping Act violations would allow regulated entities to claim Rule 19 requires dismissal anytime the relief granted may impact their contractual relationships with non-regulated entities. That would be an untenable result and an overly broad interpretation of Rule 19.

Even if Respondents had cleared the first Rule 19 hurdle and demonstrated that the IEPs qualify as necessary parties, they would not clear the second. Joining the IEPs as additional respondents is not feasible. *See* Fed. R. Civ. P. 19(b). The sole claim alleged is brought under Section 41102(c) which only regulates the conduct of ocean common carriers, MTOs, and ocean transportation intermediaries, so its requirements do not govern the IEPs' business practices. *See* 46 U.S.C. § 41102(c).

And finally, even if Respondents had cleared the first and second Rule 19(a) hurdles, the fairness and equity considerations applicable under Rule 19(b) weigh in favor of allowing the case to proceed. Rule 19(b) provides a non-exhaustive list of factors to be considered in deciding whether the case should go forward in the non-party's absence, consisting of:

> (1) the extent to which a judgment rendered in the person's absence might prejudice that person or the existing parties; (2) the extent to which any prejudice could be lessened or avoided by: (A) protective provisions in the judgment; (B) shaping the relief; or (C) other measures; (3) whether a judgment rendered in the person's absence would be adequate; and (4) whether the plaintiff would have an adequate remedy if the action were dismissed for nonjoinder.

Id.

Complainant's inability to bring its Shipping Act claim in any other forum weighs against dismissing this case. Bringing a different cause of action in federal or state court would not give the Complainant the same opportunity to seek a cease-and-desist order because Respondents' chassis-provisioning practices do not meet Section 41102(c) reasonableness standards. A different claim may also be litigated in a forum without the Commission's unique experience and expertise in ocean transportation logistics and chassis provisioning.

Respondents' and the IEPs' similar interest in defending the chassis provider rules and maintaining the status quo also weighs against dismissal. The IEPs expressed their position on allowing the rules to remain in place, and their interests are aligned with the Respondents' in defending the exclusive provider rules as fair and reasonable and continuing to apply those rules to merchant haulage shipments. Respondents are both eminently capable of defending the chassis provider rules and interested in achieving the same outcome in this case as the IEPs—a ruling declaring the rules fair and reasonable and denying Complainant's Section 41102(c) request for a cease-and-desist order blocking their continued enforcement. *See De Csepel*, 27 F.4th at 746-47 ("If a party remaining in the case is both capable of and interested in representing the interests of the absent party, the party's exit or exclusion from the suit exposes it to no additional risk of an adverse decision.")

The Commission finds that the IEPs are not necessary or indispensable parties, and the case can fairly and equitably proceed without joining them as parties. Respondents' motion for summary decision for failure to join indispensable parties is denied.

E. Merits of Complainant's Section 41102(c) Claims

We examine the reasonableness under Section 41102(c) of five practices related to merchant haulage in the four test case locations: Savannah, Memphis, Chicago and the Ports of Los Angeles and Long Beach. I.D., 30. Complainant alleges that Respondents' restrictive practices unreasonably deprive motor carriers of choice, stifle competition among chassis providers, and raise transportation costs for motor carriers, shippers, and the public in general.

Two challenged practices relate to CCM-managed chassis pools servicing Memphis and Savannah: (1) designating exclusive or preferred/default chassis providers; and (2) contractually linking merchant haulage volume and carrier haulage rates to give ocean common carriers the benefit of lower rates for carrier haulage. *Id.* at 16, 36. The challenged practices of withdrawing from interoperable pools and designating proprietary pools relate to the Chicago region and the Ports of Los Angeles and Long Beach. And finally, a third challenged practice questions the reasonableness of merchant haulage restrictions at the Los Angeles/Long Beach Pool of Pools. *Id.*

The ALJ found the following practices unreasonable as a matter of law: (1) enforcing or applying CCM Rule 5.7, *as written*, to designate an exclusive chassis provider for merchant haulage; and (2) contractually linking carrier haulage rates to merchant haulage volume when the motor carrier does not have a choice of chassis providers. *Id*. at 42, 46-47, 61. The ALJ found that designating a preferred or default chassis provider is not necessarily unreasonable "as long as the motor carrier is not required to use the preferred IEP," can "select from any available pools or chassis providers," and their selection cannot be overridden by the ocean carrier. *Id.* at 4, 48. The ALJ agreed with Respondents' assertion that designating a default provider is not unreasonable and serves a legitimate purpose by ensuring there is a system to efficiently assign a chassis provider and incentivize "the efficient flow of cargo." *Id.* at 48. Finally, the ALJ also determined that the Commission has "authority to prevent regulated entities from withdrawing from interoperable pools, where multiple equipment providers contribute chassis" but found insufficient evidence on the present record to issue an order granting relief based on that finding. *Id.* at 5. Based on the findings that certain practices are unreasonable, the ALJ ordered Respondents to cease and desist "from violating the Shipping Act in Chicago, Los Angeles/Long Beach, Memphis, and Savannah *by ceasing and desisting adopting, maintaining, and/or enforcing any regulations or practices that limit the ability of a motor carrier to select the*

chassis provider of its choice for merchant haulage." I.D., 61 (emphasis added).[24]

The ALJ did not rule on the reasonableness of CCM Rule 5.7 *as applied* by the ocean common carriers, because material facts are in dispute about how frequently or readily ocean carriers grant or deny exceptions requested by the motor carrier. The ALJ found that "resolving this issue would require a factual determination not appropriate at the summary decision stage." I.D., 36. As the ALJ explained:

> The parties agree that requests for choice under Rule 5.7 are made; those requests are sometimes granted and sometimes denied; and *different ocean carriers impose different requirements to process such requests*. It is not necessary to determine the precise number of requests that are made or that would be made if requests for exceptions were not required. Also, given the current Rule 5.7, even if an ocean carrier were to grant a request for an exception today, it would be free to deny a similar request tomorrow, with no recourse available to motor carriers.

Id. at 38 (emphasis added). Respondents acknowledge that ocean carriers follow different approaches in dealing with exception requests. *See id.*; JSF ¶¶ 200-206.

1. Elements of a Section 41102(c) Claim

Section 41102(c) provides that common carriers and other regulated entities "may not fail to establish, observe, and enforce just and reasonable regulations and practices relating to or connected with receiving, handling, storing, or delivering property." 46 U.S.C. § 41102(c). Proving a Section 41102(c) claim requires the Complainant to show that: (1) the respondent is an ocean common carrier, MTO, or ocean transportation intermediary (OTI); (2) the "claimed acts or omissions" occurred on a "normal, customary, and continuous basis;" (3) the challenged practice or regulation relates

[24]The ALJ left open the question of whether Complainant has alleged and can seek reparations. That question is not before the Commission at this point, and we express no view at this stage of the proceedings.

to or is connected with "receiving, handling, storing or delivering property;" (4) the practice is unjust or unreasonable; and (5) the practice proximately caused the claimed loss. 46 C.F.R. § 545.4. Where, as in this case, the complainant is seeking a cease-and-desist order, it needs to prove that the order will address harm proximately caused by violating Section 41102(c). *See generally Maher Terminals, LLC v. Port Authority of New York and New Jersey*, Docket No. 08-03, 2013 WL 9808667, at *3 n.8 (FMC Jan. 31, 2013).

Respondents limit their challenges to the ALJ's findings on unreasonableness (element 4) and proximate harm (element 5). The ALJ's findings that Complainant met the first three elements required to prove a Section 41102(c) claim are fully supported by evidence that is not in dispute. *See* Complainant's Reply to Exceptions, 47-48. As discussed in Section II-C above, the individual Respondents meet the Shipping Act's definition of ocean common carriers and were plainly acting in that capacity in establishing and following the challenged practices. OCEMA and CCM were likewise clearly acting on behalf of their ocean common carrier members in establishing and following the challenged practices. Nor is there any dispute about whether the challenged conduct qualifies as acts "occurring on a normal and customary basis"—the practices were defined and established as the carriers' policy in CCM rules and in other respects. Finally, the challenged practices clearly relate to handling and delivering containerized cargo transported in U.S. foreign commerce.

The Respondents focus their exceptions on two of the required elements—whether the challenged practices are unreasonable and proximately caused harm that justifies a cease-and-desist order. Respondents contend that in finding the challenged practices unreasonable, the ALJ misapplied Commission case law, improperly relied on antitrust principles, improperly weighed conflicting evidence, and failed to give proper deference to Respondents' stated justifications. Complainant counters these arguments by pointing to case law and evidence that support the ALJ's findings that the challenged practices unreasonably deprive motor carriers of choice and detrimentally impact competition. *See* Complainant's Reply to Exceptions, 1, 3, 19, 27, 34. Complainant also asserts that CCM's self-described "choice program" under Rule 5.7 is illusory because it is rarely effective in practice. *See id*.

Complainant challenges the practices overall as unduly restrictive and unnecessary to ensure an adequate supply of chassis. *See id.*

2. Exclusive Arrangements under the Shipping Act

Historically, the Commission has tested the reasonableness of ocean carriers' and MTOs' practices, including exclusive arrangements with service providers, by examining how closely the challenged practices are aligned with their stated purpose. That was the standard the ALJ applied in this case. *See* I.D., 30-34. This long-standing test, originally applied under the Shipping Act of 1916, asks whether the challenged practices are "otherwise lawful, not excessive, and reasonably related, fit and appropriate to the ends in view." *Investigation of Free Time Practices--Port of San Diego*, 9 F.M.C. 525, 547 (1966).[25] *See Plaquemines Port, Harbor and Terminal Dist. v. Fed. Mar. Comm'n*, 838 F.2d 536, 546 (D.C. Cir. 1988); *W. Gulf Mar. Ass'n v. Port of Hous. Auth*, 21 F.M.C. 244, 248 (FMC 1978), *aff'd without opinion sub nom. W. Gulf Mar. Ass'n. v. Fed. Mar. Comm'n*, 610 F.2d 1001 (D.C. Cir. 1979). This test remains the benchmark for assessing whether terminal practices are unjust or unreasonable under Section 41102(c). *See Port Elizabeth Terminal & Warehouse Corp. v. Port Auth. of New York and New Jersey*, Docket No. 17-07, 1 F.M.C. 2d 29, 2018 WL 1942720 (ALJ Apr. 17, 2018).

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[25]This test was originally applied to claims arising under Section 17 of the Shipping Act of 1916, the second paragraph of which was the precursor to Section 41102(c) and provided that:

> *Every such carrier and every other person subject to this chapter shall establish, observe, and enforce just and reasonable regulations and practices relating to or connected with the receiving, handling, storing, or delivering of property.* Whenever the Commission finds that any such regulation or practice is unjust or unreasonable it may determine, prescribe, and order enforced a just and reasonable regulation or practice.

Former 46 U.S.C. § 816 (emphasis added). Cases decided under the Shipping Act of 1984 before it was codified refer to what is currently Section 41102(c) as Section 10(d)(1) of the Shipping Act of 1984.

The Commission has applied this test to various practices including policies for allocating or charging for terminal equipment and services. In *Puerto Rico Ports Auth. v. Fed. Mar. Comm'n*, 642 F.2d 471, 485 (D.C. Cir. 1980), the Commission applied this test to determine whether a decision "not to exact a crane-sharing agreement" from the Puerto Rico Maritime Shipping Authority was unreasonable under Section 17 of the 1916 Act. In *Indiana Port Comm'n v. Fed Mar. Comm'n,* 521 F.2d 281, 285 (D.C. Cir. 1975), the Commission applied this test to decide the reasonableness of a harbor service charge levied on all vessels entering the port to cover improvement costs.

Against the backdrop of the general "reasonably related" test for actions challenged as unreasonable, the Commission has also adopted specific criteria for determining whether an "exclusive arrangement" for the use of terminal facilities or equipment is unjust or unreasonable. The practices examined in *Stockton* parallel Respondents' chassis-provisioning restrictions and offer a fair basis for analyzing whether Respondents' practices are reasonable under Section 41102(c). *Stockton*, 7 F.M.C. at 82. Respondent Stockton Elevators owned and operated grain elevators and terminal facilities as a public utility at the Port of Stockton, California. *Id*. at 77. Stockton Elevators granted the Port "the exclusive right to perform all the usual or necessary dockside and other wharfinger and stevedoring services" for loading and unloading grain and other bulk commodities at the Port. *Id.* at 76. The Commission evaluated that practice under Section 17 of the 1916 Act (a precursor to Section 41102(c)) and found the arrangement was "prima facie unjust, not only to stevedoring companies seeking work, but to carriers they might serve, and the general public which is entitled to have the benefit of competition among stevedoring companies." *Id*. at 83. The Commission found this practice in essence set up a stevedoring monopoly at a U.S. port and prevented "carriers from selecting stevedores of their choice to serve their ships." *Id.* at 82. This practice, the Commission found, "runs counter to the anti-monopoly tradition of the United States[] upsets the long-established custom by which carriers pick their own stevedoring companies, deprives complainants and other stevedoring companies of an opportunity to contract for stevedoring work . . . and opens the door to evils which are likely to accompany monopoly, such as poor service and excessive costs." *Id*. at 82-83. The Complainant did not need to prove "these evils" actually exist at the Port, the Commission stated,

because "[h]ealthy competition for business" is the best insurance and prevention. *Id.* at 83 n.5.

The ALJ's analysis and Commission's affirmance of the ALJ's ruling in *Perry's Crane Serv., Inc. v. Port of Houston Authority of Harris County*, also provide useful guidance. Docket No. 75-51, 16 S.R.R. at 1459 (ALJ Sept. 28, 1976) (*Perry's Crane* ALJ), *aff'd in part,* 19 F.M.C. 548 (FMC Feb. 25, 1977) (*Perry's Crane FMC*). The ALJ examined the reasonableness of the Port of Houston's tariff that gave the port's crane operator first priority to service vessels and authorized "bumping" another crane operator off the job even if they had already begun working. 16 S.R.R. at 1472-76. A competing crane operator challenged the practice as unreasonable because it deprived stevedores of the right to choose their crane operator, disrupted operations, and led to higher costs. *Id.* The Port justified the practice as affording stevedores *some* choice because they could select which crane operator to displace and also relied on the port's status as a state agency with a sizable investment in port equipment. *Id*. The ALJ found that the Port's first priority practice was unreasonable and should be modified to restore stevedores' ability to choose the crane operator and equipment best suited to the task without the Port's interference insofar as circumstances allow. *Id.* The ALJ found that the Port was not trying to monopolize the crane market "in the sense of seeking an exclusive right to carry on the business" but was operating as a "limited mini-monopoly" which it needed to justify and that its justifications fell short. *Id.* at 1472, 1476.

The Commission affirmed the ALJ's ruling finding the Port's practice unreasonable and went a step further—finding that even the "limited bumping" the ALJ allowed with modifications was not a reasonable practice. *Perry's Crane FMC*, 19 FMC at 552-53. The Commission did not outlaw the Port's practice entirely but modified it to conform to the Shipping Act's standards of reasonableness. Instead of an absolute right of first refusal that gave the port the right to bump crane operators even if already on the job, the Commission modified the practice to allow a preference for the port's cranes if they are available and equally suitable for the job and eliminated the port's ability to bump or displace a privately-owned crane already on the job. *Id.* at 551-52. The Commission identified multiple factors as justifying this modified preference: the ports' investment in the equipment, private cranes portability which

the port's cranes lacked, the fact that the port had constructed and paid for the facilities used by the private crane operators, and finally the absence of any evidence that the port was attempting to monopolize the crane rental business at its facilities. *Id*.

The Commission's analysis of an exclusive contract in *Petchem, Inc. v. Canaveral Port Authority* (*Petchem FMC)* is likewise instructive for examining the conduct challenged in this case and marks a milestone in developing the Commission's "reasonableness" test. *Petchem* involved dual claims challenging the Canaveral Port Authority's decision to grant one tug operator an exclusive contract to service the commercial vessels at the port and its refusal to grant non-exclusive rights to a potential competitor (Petchem). Docket No. 84-28, 1986 WL 170038, 28 F.M.C. 281, 296 (FMC Mar. 28, 1986), *aff'd, Petchem v. Fed. Mar. Comm'n,* 853 F.2d 958 (D.C. Cir. 1988). The Commission synthesized two trends in Commission case law analyzing exclusive arrangements. *Id.* at 296-98. One trend, the *Stockton* approach, followed an approach which *Petchem FMC* described as declaring "such arrangements unreasonable per se which meant that the proponent had to justify the arrangement" which might be done by demonstrating that the arrangement was necessary for economic efficiency or other reasons. *Id.* at 296; *see also A.P. St. Philip, Inc. v. Atlantic Land & Improvement Co.* (*St. Philip*), 13 F.M.C. 166, 173 (1969) (endorsing the *Stockton* approach as applicable to "a situation where a vessel owner's right to select a tugboat operator is denied by exclusive contract"). The second approach was applied in *In the Matter of Agreement No. T-2598*, Docket No. 72-24, 17 F.M.C. 286 (FMC Mar. 20, 1974) and was described in *Petchem FMC* as a two-part test which involved first determining whether the challenged "decision was reasonable at the time it was made" and second, "whether it was still reasonable in light of its subsequent effects." *Petchem FMC*, 1986 WL 170038, at *14.

In *Petchem FMC*, the Commission adopted a standard for evaluating exclusive arrangements that combines the two approaches and summarized its reasoning as follows:

> *Such arrangements are generally undesirable and in the absence of justification by their proponents may be unlawful under the Shipping Act*. However in certain circumstances such arrangements may be

> necessary to provide adequate and consistent service to a port's carriers or shippers to ensure attractive prices for such services and generally to advance the port's economic well being.

Petchem, 1986 WL 170038, at *15 (emphasis added). The Commission further explained that the proponent of an exclusive arrangement generally bears the burden of proving it is justified because it is the one championing the arrangement and generally controls evidence justifying its existence or alleged benefits. *Id.* However, the Commission was careful to note the ultimate burden of proving that the challenged practice is unreasonable remains on the complainant. *Id*. (citing 5 U.S.C. § 556(d)).

Petchem's "synthesized" test was affirmed on appeal, with the court emphasizing that the starting point for any analysis is the premise that the Shipping Act "does not favor exclusive arrangements except in exceptional circumstances." *Petchem, Inc. v. Fed. Mar. Comm'n*, 853 F.2d 958 (D.C. Cir. 1988). The court observed that even though the Shipping Act disfavors exclusive arrangements, it affords the Commission flexibility in applying those restrictions "in light of the particular circumstances existing at a given port." *Id.* at 963. "This flexibility is served by a rule that, in the first instance, holds restrictive port service arrangements to be presumptively illegal, but allows the proponents to meet the presumption of illegality through the offer of evidence in support of the restrictive arrangements reasonableness." *Id.*

The Commission has applied *Petchem's* synthesized test in subsequent cases challenging exclusive arrangements as unreasonable under the Shipping Act. *See, e.g*., *Docking and Lease Agreement by and Between City of Portland, Main and Scotia Prince Cruises Ltd.,* Docket No. 04-10, 2004 WL 1895827, at *3 (FMC Aug. 23, 2004); *Exclusive Tug Arrangements in Port Canaveral, Florida*, Docket No. 02-03, 2002 WL 418057, at *2-3 (FMC Feb. 25, 2002); *Ocean Common Carriers Serving the Lower Mississippi River*, Docket No. 01-06, 2000 WL 128688, at *2 (FMC Aug. 21, 2000).

The Commission's established standard for exclusive arrangements as explained in *Petche*m, is the proper test for assessing the reasonableness of Respondents' practices.

3. Claims Against Respondents' Practices

Complainant Intermodal has the initial burden of demonstrating a prima facie case that the Rule 5.5 and 5.7 restrictions and practice of linking carrier haulage rates to merchant haulage volume are unreasonable. *See River Parishes,* 1999 WL 125991, at *12. That requires a two-part inquiry identifying, first, the relevant product and geographic markets and, second, the "degree of actual harm or harm likely to be caused by the practice within that market." *Id.; Marine Repair Services of Maryland, Inc. v. Ports America Chesapeake, LLC,* Docket No. 11-11, 2013 WL 9808672, at *31 (ALJ Jan. 10, 2013). If Intermodal meets its initial burden, the onus shifts to the Respondents to offer a justification for restricting motor carriers/shippers to the ocean carriers' designated IEP and linking rates paid by the ocean carrier to merchant haulage volume. *See Maher Terminals, LLC v. Port Auth. of New York and New Jersey*, Docket No. 12-02, 2015 WL 435475, at *8 (ALJ Jan. 30, 2015); *Petchem FMC*, 1986 WL 170038, at *15. Complainant still has the ultimate burden of proving that these challenged practices are unreasonable under Section 41102(c). *See River Parishes*, 1999 WL 125991, at *12.

a. Prima Facie Showing of Unreasonableness

The first element--the relevant product market--is defined as "the boundaries within which competition meaningfully exists." *Marine Repair*, 2013 WL 9808672, at *6. The relevant geographic market is the "area in which consumers can practically turn for alternative sources of the product and to which the antitrust defendants face competition." *Id.* Complainant submitted reports from two experts addressing the relevant product and geographical markets. James Langenfeld, Ph.D., provided his opinion as an expert on market economics, competition, and antitrust principles. Jean-Paul Rodrigue, Ph.D., provided his opinion as an expert on the U.S. intermodal supply chain and transportation industry. Respondents submitted an expert report from MICP Capital prepared by Roger A. Passal, an experienced transportation industry analysis, and J. Douglass Coates, a self-described "innovator in international and domestic transportation and logistics." MICP Report, 34-35. The MICP Report did not define the relevant product or geographic

markets but addressed the chassis usage market in general. *See id.* at 11-12, 34-35.

Complainant's experts identified the relevant product market as daily chassis usage. Dr. Langenfeld arrived at this definition by examining the competition boundaries for chassis used for merchant haulage. *See* Langenfeld Report ¶¶ 40-43. Dr. Langenfeld assessed whether motor carriers have a reasonable alternative or substitute for daily chassis rentals from the designated IEP to transport containers between the port and inland facilities. *Id.* In theory, motor carriers locked into an arrangement with a designated (exclusive) IEP could still supply their own chassis, either by renting the equipment long-term or purchasing it outright. *Id.* Dr. Langenfeld examined that option but found that would not make economic sense in most situations for several reasons: (1) daily usage charges for chassis are a small percentage of the overall cost of ocean transportation; (2) chassis equipment is costly and would require a significant initial outlay to purchase the equipment outright or an on-going commitment to regular rental payments; and (3) there is considerable risk that trucker-owned (or leased)[26] equipment could be underutilized. *Id.* Using trucker-owned wheels may add time and expense to container moves because it may require more chassis splits (moving the chassis without a container) and chassis flips (switching chassis) which also increase turn times and fewer trips per workday. *Id.* ¶¶ 45-51. Dr. Langenfeld cited these additional expenses and logistical complications in finding that trucker-owned wheels are not a reasonable substitute for daily rentals for merchant haulage shipments. *Id.* That conclusion is also consistent with statistics, he cited, indicating that trucker-owned wheels are uncommon. [redacted]

Respondents' expert, MICP, acknowledges the economic realities that limit the usage of trucker-owned wheels. *See* MICP

[26]Trucker-owned wheels in this Order refers to equipment owned outright or leased long-term by the motor carrier.

[redacted]

Report, 11-12. MICP states that: "[T]he acquisition or long-term lease of a chassis only makes sense where utilization rates are high and causes a motor carrier to assume more risk than taking on daily rental rates." *Id*. at 11. MICP also notes, however, that this may be changing in some U.S. locations, "where spot rates for daily chassis use" are high—motor carriers may increasingly view trucker-owned wheels as a viable option. *Id.*

The undisputed economic realities associated with using trucker-owned wheels for merchant haulage in most situations and the statistics on current ownership support Dr. Langenfeld's conclusion that daily chassis usage is the relevant product market. As he explained, the commitment to ownership or a long-term lease for equipment at risk of sitting idle some of the time does not make financial sense in most situations. *See* Langenfeld Report ¶ 67. For smaller carriers, purchasing or leasing may not be an option at all, since they may lack the up-front capital to purchase or revenue to commit to a long-term lease—particularly if that equipment may sit idle part of the time. So, the record clearly supports Dr. Langenfeld's opinion that daily chassis usage is the relevant product market.

Dr. Langenfeld defined the relevant geographic market as "the regions around major port and inland terminals." *Id.* ¶ 12; *see also* Rodrigue Report, ¶ 164. Dr. Langenfeld explained the practical and economic constraints that define the market boundaries:

> Motor carriers cannot substitute between ports in response to an increase in daily usage prices for chassis; the motor carrier is charged with transport from the port where the Ocean Carrier discharges the container to the end destination (or vice-versa). *Procuring chassis from an alternate location and carrying that bare chassis between ports or terminals in response to a price increase in the daily usage rate for chassis is cost prohibitive*.

Langenfeld Report ¶ 17 (emphasis added); *see also id.* ¶¶ 65-66. As he explains, ferrying the chassis any significant distance would quickly cancel out the cost-savings of a lower daily rental fee. *Id*. ¶¶ 65-67. Dr. Rodrigue also described how practicalities restrict the distance motor carriers can realistically travel to collect a chassis for short-term usage:

> Unlike container leasing markets, which are usually international and interoperable, chassis leasing and usage are predominantly regional. Chassis are rarely exchanged between markets, unless as part of a deliberate repositioning strategy by an equipment provider. For instance, due to changes in demand, an IEP may decide to relocate some chassis from one regional pool to another. Once the chassis have been relocated, they become part of the regional pool and are no longer available from the pool they were repositioned from.

Rodrigue Report ¶ 164. Collectively, these considerations led Dr. Langenfeld to conclude that the relevant geographic market is the area surrounding ports and inland terminals. Langenfeld Report ¶ 67.

Respondents' expert, MICP, did not define the geographic market or offer a contrary analysis. *See* MICP Report. Dr. Langenfeld's definition is supported by the record and reasoned analysis. The Commission adopts the Complainant's definition of the relevant geographic market as circumscribed by the region surrounding a particular port or inland facility where the chassis is to be used on a short-term basis.

The final prima facie case consideration is the degree of actual harm or harm likely to be caused by the practice within the relevant product and geographic markets. Dr. Langenfeld and Dr. Rodigue analyzed and stated their opinions on the effect the challenged practices have on rates and competition. Dr. Langenfeld explained that rates are negatively affected by the lack of choice which deprives motor carriers of the opportunity to compare and negotiate rates and service terms. That impact is apparent, Dr. Langenfeld states, because merchant haulage rates have increased while comparable carriage haulage rates have decreased or remained constant. Langenfeld Report, ¶ 20-22. As he explains, market dynamics allow IEPs designated as the exclusive provider to raise rates with impunity, because they do not risk losing business to a competitor offering better rates or more favor service terms. *See id.*

Dr. Langenfeld buttresses this assessment of rate trends with examples from areas serviced by CCM pools. *Id*. ¶ 22. He points to (1) Intermodal Cartage's increases between 3 and 50 percent, and (2) Evans Delivery's increase between 17 and 40 percent. *Id.* ¶ 58. He also notes that CCM's own data shows substantial price increases:

> For example, in the SACP, prices from non-NACPC providers increased from just under $15 in 2013 to around $20 by early 2018. In the years following . . . [merchant haulage] rates continued to rise substantially. Standard TRAC per diem rates at SACP (the same location as depicted below) reached $28.50 as of December 1, 2020, which is approximately a 35% increase from the depicted early 2018 rates.

Id. ¶ 60. Summarizing this price trend, Dr. Langenfeld states: "Excluding NACPC, prices for chassis on [merchant haulage] movements have increased by between 18 and 45 percent." *Id.* ¶ 59.

Dr. Langenfeld explains that it is telling that these marked price increases are only seen for merchant haulage and that carrier haulage rates have not increased over the same time period. He notes that: "List prices for [merchant haulage] daily chassis usage have increased significantly since 2016 . . . . in stark contrast to the rates that the Ocean Carriers negotiated in their contracts for chassis usage for [carrier haulage] . . . rates [which] have remained relatively flat over time, or, in some cases, have decreased. *Id.* ¶ 93. Because Dr. Langenfeld saw "no indication that daily rentals fell significantly during the period of these significant increases in daily prices by the IEPs," he interpreted that as evidence that IEPs can raise rates with impunity because motor carriers cannot readily take their business to a competing provider or decide to rely on trucker-owned wheels instead. *Id.* ¶¶ 61, 77, 81.

Dr. Langenfeld states that ocean carriers may have a built-in incentive to designate exclusive chassis providers because they may obtain monthly payments or lower carrier haulage rates if they do so. *Id.* ¶ 69. This leads to artificially low (below cost) carrier haulage rates and merchant haulage rates that are artificially high. Ocean carriers benefit from this arrangement at motor carriers' expense. *Id.*

¶ 81. These dynamics led Dr. Langenfeld to conclude that: "Economic analysis of relevant contracting terms and econometric analysis of chassis prices, controlling for relevant variables, shows that the absence of [c]hoice is associated with higher [merchant haulage] prices." *Id.* ¶ 91.

Complainant's second expert, Dr. Rodrigue, also explained how designating an exclusive chassis provider effectively shuts out potential competitors and increases merchant haulage rates. Rodrigue Report ¶ 108. Motor carriers cannot divert their business to a competitor unless they first obtain permission from the ocean carrier and in some cases, from the IEP as well. *See id.* The net effect is it leads to higher merchant haulage rates because IEPs can raise rates without losing business to competitors. *Id*.

Respondents' expert, Douglass Coates, acknowledged that some ocean carrier/IEP contracts reward the carrier for increased merchant haulage volume. Mr. Coates is Respondents' expert on the "design, organization and operation of the U.S. chassis provisioning system," and he states that:

> Some of the user agreements contain clauses which provide that the ocean carrier may receive a discounted [carrier haulage] rate or a direct payment if the [merchant haulage] chassis usage volume exceeds a certain amount or [merchant haulage] movements under the agreement exceeds a certain percentage.

Decl. of J. Douglass Coates ¶¶ 4, 14. However, Mr. Coates, discounts the effect of these contract clauses and states that evidence indicates that ocean carriers are not actually motivated by these provisions. *Id.* In his opinion, the "driving force" behind their decisions is the BCO and supply chain strategies, not financial incentives in their contracts with IEPs. *Id.*

Dr. Langenfeld's and Dr. Rodrigue's opinions about the exclusivity restrictions have on prices and competition are supported by facts and sound reasoning. It is clear from merchant haulage pricing trends, particularly when compared with carrier haulage pricing trends, that these choice restrictions are tied to higher prices with no attendant drop in business volume. In most situations, motor

carriers do not have a viable alternative to paying the price the designated IEP imposes. Chassis are a necessity and substituting trucker-owned wheels is generally not economically feasible. These restrictions also effectively shut out potential chassis provider competitors or at least markedly impede their ability to compete for motor carriers' merchant haulage business.

Complainant has clearly demonstrated a prima facie case that the Rule 5.5 and 5.7 restrictions and contract linkages are unreasonable and will actually or likely cause harm in the relevant product and geographical markets. These impacts establish a prima facie case of unreasonableness. *See, e.g., Stockton*, 7 F.M.C. at 82-83 (evidence that a common carrier restricted competition and gave pricing power to a third party establishes a prima facie case of unreasonableness); *All Marine Moorings v. ITO Corp. of Baltimore*, Docket No. 94-10, 1996 WL 264720, at *10 (FMC May 15, 1996) (practices tending to support a monopoly are prima facie unreasonable); *St. Philip*, 13 F.M.C. at 172-73 (declaring an arrangement "where a vessel owner's right to select a tugboat operator is denied by exclusive contract" and thereby eliminated competition prima facie unjust and unreasonable, making it "incumbent upon respondents to furnish the justification").

The Commission defines the relevant product market as daily chassis usage and the relevant geographic market as the region surrounding a particular port or inland facility and finds that Complainant met its burden of establishing a prima case of unreasonableness.

b. Respondents' Justification for the Challenged Practices

Respondents state that the need to ensure an adequate supply of chassis justifies the challenged practices. Exceptions, 11-14.[28]

[28]The ALJ stated that motor carriers share that general objective, and Respondents challenge that statement. *See* Exceptions, 13-14. Motor carriers, like ocean carriers, plainly have a vested interest in ensuring an adequate supply of chassis so their operations can function smoothly. The fact that Complainant and Respondent have a shared goal is not the determining factor in weighing Respondents' justification, but it was not error for the ALJ to point out this truism.

Without the challenged restrictions, Respondents contend there is no practical means of ensuring a sufficient supply of chassis at ports and inland facilities around the country. *Id*. at 14. Respondents' expert cited the advantages of this arrangement in its report from the perspective of the IEPs and the benefits they derive from it. MICP Report, 27-28. MICP explains that IEPs commit to make their assets available at particular locations in exchange for the assurance that they will not be underutilized and that assurance "comes primarily from IEP's contracts with container lines." *Id.* at 27. Without that assurance, in MICP's opinion, there is a risk that IEPs would find their equipment are underutilized and "this would endanger the ability of the container lines to ensure a chassis supply sufficient to handle cargo." *Id.* at 27-28. MICP states that IEPs could decide either to relocate some equipment (potentially creating a shortfall at the original location) or they could lower merchant haulage rates to attract more business. *Id*. at 28. In MICP's view, either scenario is undesirable, because relocating would potentially leave the original location undersupplied and lowering prices would lead to a decline in chassis quality and maintenance. *Id.* MICP does not predict how likely these negative consequences are or cite supporting data or statistics. *See id.*

Respondents argue that the ALJ improperly weighed the evidence in addressing their justifications for Rules 5.5 and 5.7, failed to construe evidence in their favor, and unfairly discounted their experts' opinions. Exceptions, 8-9 (citing MICP Report, 14-16, 27-28).

c. Challenged Restrictions Reasonableness

To prevail on the reasonableness element of its Section 41102(c) claim, Complainant must show that the Rule 5.5 and 5.7 restrictions and contracts linking merchant haulage volume to lower carrier haulage rates are not reasonably related, fit or appropriate to the justification Respondents identified--maintaining an adequate supply of chassis for merchant haulage. *See River Parishes*, 1999 WL 125991, at *12; *Stockton*, 7 F.M.C. at 83 (weighing exclusive stevedoring arrangement's alleged benefits against "the disadvantage to complainants, carriers, and the public inherent in a stevedoring monopoly"); *Petchem*, 853 F.2d at 964; *Petchem*, 1986

WL 170038, at *15. *Compare St. Philip*, 13 F.M.C. at 173 (justifying exclusive arrangements is "a heavy" burden and arrangements not justified will be struck down).

Complainant's expert on the U.S. intermodal system, Dr. Rodrigue opined that Rule 5.7 is "more restrictive than needed to promote a reliable supply of intermodal chassis at a fair and reasonable price." Rodrigue Report, 8. He explained that it "give[s] IEPs unreasonable negotiating leverage, which leads to higher prices for motor carriers and their customers and creates inefficiencies in the supply chain, such as chassis splits and chassis flips" and these problems would be alleviated if motor carriers "were free to obtain chassis from the provider of their choice." *Id.* Dr. Rodrigue supported his opinion with an analysis of market dynamics that reduce competition and give IEPs the freedom to raise prices at will without risking that motor carriers will divert their business to another chassis provider. *Id.* ¶ 108. As he explained, the challenged restrictions:

> fail to promote the availability of a reliable supply of intermodal chassis at a fair and reasonable price. This is so because the existing Choice Rules give IEPs unreasonable negotiating leverage since motor carriers must request choice [sic], and IEPs have the discretion to accept or refuse the request.

Id. ¶ 114. In Dr. Rodrigue's opinion, ocean carriers have an incentive to adopt these restrictive practices because they benefit in the short term from lower carrier haulage rates and are not penalized by the higher merchant haulage rates. *Id.* ¶ 157. As he explains: "While such decisions may benefit individual ocean carriers" profit and loss statements in the short term, they externalize those costs to motor carriers, [beneficial cargo owners], and other stakeholders and reduce supply chain fluidity and velocity." *Id.*

Dr. Rodrigue cites evidence supporting his opinion that Rules 5.5 and 5.7 "create unreasonable negotiating leverage for the [designated] IEP" which leads to "higher [merchant haulage] prices and inefficient bargaining." *Id.* He cited [redacted] negotiated contract with an IEP [redacted] as an example of a contract "that severely restricted [redacted] ability to approve choice." *Id.* "As a consequence, when a motor carrier or its customer requests choice,

[redacted] internal guidelines dictate that the request is at first denied, although [redacted] might then refer the requesting entity to the IEP to negotiate a lower rate." *Id.* So even though the motor carrier may nominally have the option of requesting a different chassis provider, that option may be illusory when the IEP has little incentive to negotiate a lower rate. *Id.* ¶ 101.

Dr. Rodrigue also points to ocean carriers' conduct as evidence that Rules 5.5 and 5.7 "are more restrictive than they need to be to" support an efficient chassis system. *Id.* ¶ 106. He states that carriers have successfully allowed motor carriers open choices which supports his opinion that "[l]imiting chassis choice for [merchant haulage] moves is not necessary for an ocean carrier to meet its own chassis provision goals." *Id*. Dr. Rodrigue explained that Rule 5.7's restrictions also have negative impacts that go beyond rates and competition because they may lead to IEPs withdrawing from gray pools, which in turn leads to "increased operational costs" for motor carriers and possibly lower quality service. *Id.* ¶ 108.

Dr. Rodrigue also explained how freeing motor carriers from these constraints will tend to lower merchant haulage rates:

> This price-reducing competition can occur in two ways. First, using choice, motor carriers (or BCOs/OTIs) may be able to substitute a lower-price IEP for the ocean carrier's default IEP as its daily chassis rental provider. Second, using choice, motor carriers and their customers may be able to obtain lower [merchant haulage] prices from the ocean carrier's default IEP, by negotiating a chassis supply contract with either the ocean carrier's default IEP or some other IEP. The motor carrier would have much greater ability to obtain a competitive rate than they do without choice, since the IEPs would know that the motor carrier or its customer could choose among IEP s for their [merchant haulage] business as a result of choice.

Id. ¶ 99.

Respondents' expert, MICP, does not analyze the restrictions and contract linkage on merchant haulage rates and competition among chassis providers. MICP simply states, without supporting analysis or citations to specific facts and data, that "the evidence does not support [Complainant's] claims that the status quo harms the shipping public." MICP Report, 27, Section V-C. MICP opines that, contrary to the opinions expressed by Complainant's experts--the "unfettered, unilateral Choice [Complainant] advocates is likely to be harmful to the shipping public." *Id.* MICP also states that the exclusivity provisions give IEPs the assurance they require to commit to retaining equipment at particular locations and without that commitment, IEPs "would be faced with a greater degree of financial uncertainty than they face at present." *Id.* Faced with that uncertainty and the possibility of assets being underutilized, MICP states that IEPs would have two options--both of which they it states would be detrimental to the shipping public. *Id.* at 28. IEPs could either relocate underutilized chassis to a different market or lower prices to increase business. *Id.* In MICP's opinion, neither outcome is desirable, because any short-term benefit motor carriers and shippers derive from lower rates would be short-lived and leave the IEPs lacking the revenue needed to support a well-maintained fleet of chassis. *Id.* MICP also opines that allowing free choice to "all motor carriers in all locations on demand" will require revising chassis pool operations and the shipping public will bear the cost of those adjustments. *Id.* MICP does not address whether these adjustment costs will be transitory or long-lasting or the likelihood that the market will adjust to a "free choice" model and reach a new sustainable equilibrium. *See id.*

The rationale that MICP offers as justification for linking merchant haulage volume and carrier haulage rates does not address the issue in this case. MICP states that industry discounts for high-volume customers are "not unusual in the international ocean transportation industry." MICP Report, 15-16. But the question is not whether volume discounts are permissible, but rather whether a practice that subsidizes ocean carrier expenses by limiting motor carriers' or shippers' free choice and imposing higher rates on them is reasonable. MICP does not address that question or point to evidence that justifies that practice.

Complainant makes a compelling case supported by its experts' analysis that the challenged practices impose unfair

restrictions on competition and raise merchant haulage prices.[29] *Cf. River Parishes*, 1999 WL 125991, at *12 (complainant failed to show that respondents' exclusive tug arrangement resulted in poor service or excessive costs, or resulted in unlawful anticompetitive effects). Respondents have not refuted Complainant's evidence with facts, data, or well-supported analysis. *See* MICP Report; Exceptions 11-14. Their expert, MICP, principally relies on conclusory assertions that without the challenged restrictions, the chassis supply system will become dysfunctional. Balanced against Complainant's well-supported expert analysis, Respondents' arguments are not persuasive. *See generally All Marine Moorings*, (approving ALJ's observation that "the greater the degree of preference or monopoly, the greater the evidentiary burden of justification"); *Distribution Services, Ltd. v. Trans-Pacific Freight Conference of Japan*, Docket No. 86-12, 1988 WL 340659, at *7 (Jan. 6, 1988) (general statements or universal goals are insufficient to justify exclusive arrangements).

The Commission finds that Respondents' practices restricting motor carriers to the designated IEP and linking carrier and merchant haulage to obtain lower rates for ocean carriers are unreasonable under Section 41102(c).

4. ALJ's Alleged Reliance on Antitrust Standards

Notwithstanding the courts' and the Commission's acceptance of the *Petchem* synthesized approach as the standard for reviewing exclusive arrangements, Respondents argue that the ALJ should have applied a different test. They contend that the challenged chassis-provisioning arrangements are not "akin to exclusive dealing," and even if the two were comparable, the ALJ misapplied the Commission's test. Exceptions, 10-17. Respondents contend that: (1) the ALJ's legal analysis is "rooted in antitrust law" primarily meant to prevent monopolies, which is not the concern

[29]Unlike cases in which the respondent is a public port entrusted with a duty to act in the public interest, this is not a case in which Respondents are duty-bound to act in the public's best interest. When the respondent has that duty, the Commission has assumed that it will honor the public trust placed in it and fulfill that duty. *See Petchem FMC*, 1986 WL 170038, at *14. That same assumption does not apply here where the entities are private companies and associations with a duty to act in the best interest of their shareholders and members.

here; (2) the antitrust concepts the ALJ applied are outdated and have fallen into disfavor; (3) the ALJ improperly shifted the burden of justifying the practices to the Respondents; and (4) the ALJ failed to consider their practices' procompetitive benefits which are supported by antitrust law.

As the discussion in Section 2 above highlights, the synthesized *Petchem* test that the ALJ applied is firmly rooted in established Commission case law developed under the Shipping Act. *See* I.D., 30-34. The ALJ did not judge the reasonableness of Respondents' practices by applying antitrust law. In fact, the ALJ expressly stated that antitrust principles have only a "limited role" in evaluating whether practices are reasonable under the Shipping Act and that limited utility is basically their use as a tool to understand the structure and potential impact of exclusive arrangements. *See id.* at 31. As the Commission explained in *All Marine Moorings*: "While no determination of whether a particular practice or action would be considered violative of the antitrust laws is necessary to a determination of reasonableness under the Shipping Act, the concepts, terminology, and framing and analysis of issues involved in antitrust cases are frequently useful in such determinations." 1996 WL 264720, at *29. That was the strategy the ALJ used in this case in referring to antitrust concepts as a mechanism for understanding the chassis market and how the various participants are affected by Respondents' practices. I.D., 31-32. Following that strategy was consistent with sound reasoning and established Commission case law and is not reversible error. *See id.*

Respondents raise several related arguments about the ALJ's alleged misapplication of federal antitrust law that are equally unfounded. *See* Exceptions, 10-11. First, they contend that the ALJ applied an "outdated and incorrect interpretation of the antitrust law." *Id*. Ignoring the fact that the ALJ did not decide the claims by applying antitrust law, Respondents nevertheless contend that the ALJ relied on outdated antitrust principles that the federal courts have since rejected. Their only basis for that assertion is a sentence the ALJ quoted from *Sanofi-Aventis U.S., LLC v. Myland, Inc*., 44 F.4th 959, 983 (10th Cir. 2022): "The primary antitrust concern with exclusive dealing arrangements is that they may be used by a monopolist to strengthen its position, which may ultimately harm competition." I.D., 32. The ALJ quoted *Sanofi* only to to illustrate the risk that exclusive dealing can pose to competition, but did not

quote the sentences that followed because they were not germane. *See id*. As the ALJ made clear in the sentence immediately following the *Sanofi* quotation. "Reliance on antitrust principles is not necessary, however." *Id.* Respondents ignore that disclaimer entirely and argue that the ALJ misapplied federal antitrust law because the ALJ did not quote *Sanofi's* commentary about the law moving away from an outright rejection of exclusive dealing as presumptively harmful. *See* Exceptions, 10-11. It is plain that the ALJ did not base the reasonableness determination on antitrust law and Respondent's criticism of the ALJ's isolated quotation from *Sanofi* is simply irrelevant. *See id.*

In a second argument based on *Sanofi's* discussion about the federal courts' evolving views on exclusive dealing contracts, Respondents argue that the line of cases synthesized in *Petchem*, which the ALJ relied on, was grounded in federal antitrust law as it existed decades ago and that the Commission's standards for judging exclusive arrangements need to evolve in tandem with federal law. Exceptions, 10-11. *Sanofi* stated that: "Despite some initial confusion, today exclusive dealing contracts are not disfavored by the antitrust laws," and listed potential benefits such arrangements might offer. 44 F.4th at 998. Respondents argue that the Commission should follow *Sanofi's* lead and abandon Commission precedent treating exclusive dealing as presumptively or potentially harmful or requiring Respondents to justify those arrangements. *See id*.

This argument is not persuasive for two reasons. First, it incorrectly assumes that the Shipping Act and federal antitrust statutes rely on the same elements of proof and therefore must evolve in tandem. That is simply not the case. Proving a Section 41102(c) claim depends on evidence demonstrating that the respondent engages in unjust or unreasonable practices in handling, delivering or transport ocean-borne cargo. That question is highly fact-dependent and is analyzed through the prism of Commision case law and regulations. *See Port Elizabeth Terminal*, 1 F.M.C. 2d 29, 2018 WL 1942720, at *12 (describing the benchmark test for unreasonableness as whether the practice is "otherwise lawful, not excessive" and "fit and appropriate to the ends in view"). Here, as the ALJ accurately stated, the legal question is whether ocean carriers' policy of designating chassis providers exclusively or by

default is reasonable. I.D., 37. Whereas in *Sanofi,* the court was addressing a claim brought under Section 2 of the Sherman Act, and that claim required evidence of: (1) "the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." *Sanofi*, 44 F.4th at 980 (quoting *United States v. Grinnell Corp*., 384 U.S. 563 (1966)). The stark differences between antitrust and Shipping Act claims defeat Respondents' starting premise that the Shipping Act's reasonableness test is tethered to federal antitrust law and that the two must evolve in tandem. As the Commission has repeatedly cautioned, antitrust principles are useful in comprehending and explaining market behavior and impact on competition, but they are not the factors that determine whether a regulated entity violated the Shipping Act.

Second, Respondents' contend that the ALJ failed to consider the challenged practice's potential benefits. *See* Exceptions, 10-11. On the contrary, the ALJ expressly acknowledged the CCM rules' potential procompetitive effects, but found that they did not outweigh the negative effects or counteract the essential unfairness of eliminating motor carriers' choice. I.D., 54. The ALJ found that, as "a captive audience," motor carriers "must pay the rate determined by the IEP" the ocean common carrier designates but have no opportunity to negotiate rates or terms of service. *Id*.; JSF ¶¶ 195, 197.

Respondents raise two additional arguments in claiming that the ALJ misapplied controlling law. They contend that the ALJ erroneously relied on principles that govern monopolies, and simultaneously criticize the ALJ for not finding that this case involves a monopoly. *See* Exceptions, 12-13; I.D., 32. This argument is contradicted by the ALJ's analysis. The ALJ had no reason to address whether the Respondents are operating as a monopoly—since that is not part of the reasonableness test. Further, as already noted, the ALJ applied the Commission's case law, not federal antitrust law, to determine whether the practices violate Section 41102(c). I.D., 32. Respondents' criticism of the ALJ's citation to *Fed. Mar. Comm'n v. Aktiebolaget Svenska Amerika Linien*, 390 U.S. 238, 243 (1968) is equally misplaced. Respondents

argue that its holding was superseded by statute. The ALJ cited *Aktiebolaget* and *Agreement No. 57-96, Pac. Westbound Conference Extension of Authority for Intermodal Svs*., 19 F.M.C. 291, 301 (FMC Sept. 15, 1976) to explain that "the necessity of FMC [agreement] review in exchange for limited antitrust immunity is central to the purpose of the Shipping Act itself." *See* I.D., 28-29, 31. That principle has not changed.

The Commission finds that the ALJ did not misinterpret or misapply the Shipping Act or federal antitrust law in finding Respondents' restrictive practices unreasonable under Section 41102(c).

5. Objections to Exclusive Arrangement Standard

Respondents object to the ALJ's reliance on the *Petchem* test and argue that this is not an exclusive arrangement case. The ALJ's analysis of Respondents' chassis-provisioning practices was guided by long-standing Commission case law on exclusive arangements for terminal services. *See* I.D., 36. That is unquestionably an apt comparison. CCM Rules 5.5 and 5.7 restrict motor carriers' ability to select the chassis provider to supply equipment for merchant haulage cargo. *Id.* In the two test case regions where CCM pools operate (Memphis and Savannah), Rule 5.5 assigns chassis charges to the ocean carriers' designated provider and Rule 5.7 allows the motor carrier to switch to another chassis provider only if the ocean carrier supports that request and, in some cases, if the request is not vetoed by the IEP. *Id.*

Despite the clear parallels between these exclusive chassis-provisioning rules and exclusive arrangements addressed in other Commission decisions, Respondents argue that the ALJ's reliance on those exclusive arrangement cases, like *Petchem and Perry's Crane*, is reversible error. Exceptions, 11-13. Respondents contend that those cases were addressing the reasonableness of exclusive arrangements imposed by MTOs and ports, but the chassis-provisioning restrictions here are materially different. *Id.* This argument fails on several levels. The ALJ acknowledged that this case "does not involve an exclusive arrangement" for services provided by an MTO or a public port and consequently treated the exclusive arrangement cases as "instructive and provid[ing] a useful analytical framework" but did not reflexively apply *Petchem* or the

line of cases it represents. I.D., 34. Rather, the ALJ applied the test to the facts presented in this case. Further, this line of cases is not restricted to factually-identical claims as Respondents' contend. Exceptions, 11-13. The *Petchem* test originated from the general principle that reasonableness under the Shipping Act should be tested against how well a challenged practice is suited to achieve its intended objective. That underscores that it is not restricted to a narrow set of cases involving ports' or MTOs' services.

Moreover, this case is factually similar to *Petchem* and *Perry's Crane,* where shippers or service providers protested restrictions on their ability to retain or choose among service providers. *See* I.D., 38-39. Here, as in those cases, complainants' freedom to choose and negotiate with a provider for essential services was restricted by an arrangement put in place or endorsed by the respondents. In *Perry's Crane*, the port's assigment of right of first refusal to its crane operator restricted complainant's ability to work with other crane operators. In *Petchem*, the restrictions affected tug service and stymied potential competitors' efforts to offer a choice among competiting tug operators. Not only are the facts and claims materially similar to this case, it is telling that the defenses and justifications Respondents raise in this case are notably similar to those raised in *Petchem*. *See id.* The cross-overs in terms of the restrictions on necessary transportation-related services and potential impact on the quality and cost of those services clearly signal that the ALJ appropriately relied on Commission precedent examining exclusive arrangements—represented most notably by the analysis in *Petchem* and *Perry's Crane*.

Respondents also contend that even if the analytical framework used in *Petchem* and *Perry's Crane* applies, this case is distinguishable because Respondents are not public ports or MTOs. Exceptions, 12. That is not a material difference. The ALJ examined the impact of Respondents' practices on motor carriers' inability to choose among chassis providers or negotiate for more favorable terms and justifiably found those restrictions are unfair. Respondents also point to the impact on competition as a material difference. *See id.* at 11-13. They contend that unlike the restrictions imposed by ports and MTOs, here motor carriers retain the ability to compete with one another for ocean carriers' business. *See id.* That argument is a non sequitur. The restrictions limit motor carriers' ability to choose among competing chassis providers—

which precisely parallels the situations in *Petchem* and *Perry's Crane*. *See* I.D. 38-39.

Respondents also argue that even if their practices qualify as exclusive dealing (which they deny), the ALJ "erred in requiring Respondents to justify their conduct" and misapplied the burden-shifting framework and also contend they have justified the challenged practices. Exceptions, 11, 13. Respondents contend that the ALJ should have considered whether the chassis provisioning restrictions are "not excessive" and "fit" the ends in view. Exceptions, 13, 19. That is in fact what the ALJ did. The ALJ applied the "fitness" standard, which Respondents seem to acknowledge in making their second argument, which claims that the ALJ erroneously failed to identify the "end in view" for Respondents' restrictions. *See id*. This second argument reverses the order of the analysis. It is incumbent on Respondents in the first instance to identify what they meant to achieve with the restrictions and point to evidence showing how the restrictions further that objective. *See, e.g., All Marine Moorings*, 1996 WL 264720, at *3; *River Parishes*, 1999 WL 125991, at *27; *Petchem* (explaining that "[t]he burden of adducing evidence of such circumstances falls upon the port and the other parties to the exclusive arrangement both because they are the arrangement's proponents and because evidence of that nature usually lies within their control"). In their third "fitness standard" argument, Respondents partially concede that the ALJ did identify the restrictions' objective but then quibble with what the ALJ identified as that objective. The ALJ mentioned as likely objectives: establishing an orderly system for assigning chassis providers and allocating charges to incentivize the efficient flow of cargo. *See* I.D., 36, 38.

Respondents quarrel with those objectives and claim they are not sufficiently definite or specific and are inconsistent. Exceptions, 19. Again, Respondents have flipped the order of proceeding on its head—they ignore the fact that it was their responsbility in the first instance to identify the restrictions' objective. The ALJ was not responsible for defining the objectives Respondents meant to achieve. To the extent that Respondents argue that the ALJ failed to adequately describe *their* objectives, the Respondents, not the ALJ are at fault. It was their responsibility to clearly articulate the objectives their practices were meant to serve and explain how the restrictions are tailored to serve that intended purpose. The ALJ

examined the objectives Respondents identified, such as the need to ensure a safe supply of chassis, but found them insufficient. I.D., 38-39 (acknowledging a "[s]ufficient supply of safe chassis" as a "legitimate concern" but finding that Respondents did not "sufficiently explain how ocean carrier control over chassis" are necessary to attain that objective and that it "does not justify the restraints on competition.")

The Commission finds that the ALJ did not err in requiring Respondents to offer a justification for their challenged practices and in evaluating whether those practices are otherwise lawful, not excessive, fit and appropriate to the stated purpose. The Commission therefore denies Respondents' exceptions challenging the ALJ's analysis on those points.

6. Objections to ALJ's Rejection of Respondents' Justifications

The ALJ found Respondents' exclusive designation of an IEP and the practice of linking carrier haulage rates paid by ocean carrier to merchant haulage volume unreasonable as a matter of law. I.D., 43-46. Respondents contend that in making that determination, the ALJ impermissibly required them to justify these restrictions as necessary or fit for the intended goal and improperly weighed conflicting testimony and other evidence and failed to construe evidence in their favor. Exceptions, 9. Respondents also contend that the ALJ failed to consider evidence that motor carriers can negotiate for discounts. *See id.* Complainant argues that this practice unfairly allows Respondents to negotiate for lower carrier haulage rates in exchange for guaranteeing a certain level of merchant haulage volume which in effect results in motor carriers subsidizing lower carrier haulage rates. *See* I.D., 42-43.

The ALJ agreed with Complainant that the choices ostensibly allowed under CCM Rule 5.7 are illusory because the ocean common carriers have veto power. I.D., 36. Respondents do not dispute that motor carriers' exemption requests are subject to approval by the ocean carrier and the IEP. *Id.* The ALJ also considered whether CCM Rules 5.5 and 5.7 were tailored to meet their intended purpose by considering whether they incentivize the efficient flow of cargo for merchant and carrier haulage. I.D., 36-37. To answer that question, the ALJ considered ocean carriers' veto

power over motor carriers' choice of alternative chassis providers and found it equivalent to giving "the selected IEP an exclusive right to provide chassis" or in effect, "a de facto mini-monopoly." *Id*. at 37. The ALJ determined that designating a chassis provider for merchant haulage unreasonably limits motor carriers' freedom of choice. *Id*. at 35.

Respondents dispute Complainant's assertion that removing the designated chassis provider restrictions will tend to lower the cost of renting chassis for merchant haulage and contend that lower rental costs paid by the motor carrier will not necessarily be passed along to the shipper (or beneficial cargo owner) billed for the motor carrier's service—since motor carriers' bills to their customers generally include a markup. Exceptions, 14-15. The ALJ acknowledged that granting motor carriers the freedom to choose would not necessarily lower costs and might even lead to higher costs since motor carriers would not have the same bargaining power as ocean common carriers. I.D., 35. But, the ALJ found that that: "With freedom to compete, however, the market may freely adjust," rather than be constrained by arrangements the carriers dictate to the motor carriers. *Id.*

Under the *Petchem* burden-shifting framework, once the ALJ found certain challenged practices unreasonable, the burden shifted to Respondents to offer a justification and explain why the restrictions should be allowed to stand. *See id.* The justification they offered was the need to ensure an adequate supply of safe chassis. *See* Exceptions, 13-14, 17-18. Respondents also relied heavily on what they described as their willingness to voluntarily step forward and make the financial commitment to establish and operate interoperable pools. *See id.* The ALJ acknowledged that ensuring a sufficient chassis supply is a legitimate goal but was not persuaded that designating an exclusive chassis provider was either a necessary or the least restrictive means of achieving that goal. I.D., 38. The ALJ determined that the "choice program" embodied in CCM Rule 5.7 is more restrictive than necessary because in the end, the choice of a chassis provider for merchant haulage is in the hands of the ocean common carrier, not the motor carrier responsible for arranging and paying for chassis usage. *Id.* at 30, 36. The ALJ also observed that motor carriers have the same interest as ocean carriers in ensuring an adequate supply of safe chassis is available. I.D., 38-39; *see generally Stockton Port District*, 7 F.M.C. at 75-76.

Respondents challenge the ALJ's reasoning and cite this proceeding as evidence that motor carriers and ocean common carriers have divergent interests. Exceptions, 17. Respondents contend that they have a unique interest in and commitment to structuring an efficient chassis-provisioning system. Exceptions, 17-18.[30] In making this argument, Respondents rely on two assertions that are not in dispute, but fail to acknowledge or provide evidence on a critical link between those two assertions. *See id.* The importance of ensuring an adequate supply of safe chassis and interoperable pools' potential role in facilitating that goal are not in dispute. What Respondents fail to show, however, is how or why their exclusive provider restrictions are the least restrictive means to reach that goal. *See id.*

It is possible to infer that designating an exclusive provider gives the IEPs some assurance of minimum volume or demand at particular locations which lets them predict the number of chassis needed to serve that demand and gives them some assurance of a predictable revenue stream. But even if the Commission accepts that inference, Respondents do not point to evidence showing that their exclusive designation practice is the least restrictive means of ensuring an adequate supply of chassis. While Respondents suggest that without the guarantee of a certain minimum of merchant haulage, IEPs will be reluctant to commit to position chassis at needed locations, they do not point to supporting evidence. *See id.* Changing or eliminating the exclusivity restrictions presumably would not change the overall demand for chassis at a particular location, but on a more granular level, it might shift demand or usage among chassis providers, particularly if they compete for motor carriers' and shippers' business. IEPs would not have the built-in assurance they currently have under their exclusive designation arrangements with the ocean carriers. So even if the Commission considers ensuring an adequate chassis supply a valid justification, Respondents are still not entitled to prevail because they have not shown why designating an exclusive provider is a necessary or the least restrictive means to achieve that goal.

[30]Complainant counters that argument by contending that maintaining an adequate supply of safe chassis cannot be a legitimate objective for the restrictions because ocean carriers do not arrange or pay the cost of merchant haulage. *See* Complainant's Mot. for Summary Decision, 18-19.

Respondents argue that the ALJ improperly weighed the evidence and relied on disputed facts in finding that the practices of designating chassis providers for merchant haulage and linking carrier and merchant haulage are unreasonable. Exceptions, 4-8. This argument overlooks the distinction between deciding whether the rules are unreasonable or overly restrictive as written and/or as applied to motor carriers engaged in merchant haulage and the evidence relevant to each question. The ALJ resolved the first question in finding that the rules are unreasonable and overly restrictive as applied, but not the second. *See* I.D., 36. The ALJ found that it was not possible to determine at this stage of the case whether the rules are unreasonable or overly restrictive as applied, because material facts are in dispute. *See Anderson*, 477 U.S. at 248 (explaining that facts are material fact if they may affect the outcome under the governing law).

Finally, Respondents argue that the restrictions are a discretionary business decision entitled to deference. While the Commission gives appropriate deference to a port's business decisions, that does mean those decisions are exempt from scrutiny when they are challenged as unreasonable. *See Petchem*, 1986 WL 170038, at *17-18; *Seacon Terminals, Inc. v. Port of Seattle*, Docket No. 90-16, 1993 WL 197325, *19 (FMC Apr. 14, 1993). Business decisions are still subject to review under the applicable legal standard, and that is what the ALJ conducted in this case.

In sum, once Complainant established a prima facie case of unreasonableness, Respondents needed to offer a justification for the challenged practices. Respondents did not support that proffered justification with relevant facts, data, or sound expert analysis, and the ALJ appropriately found it unpersuasive. The Commission denies Respondents' exceptions challenging the ALJ's analysis and determination on that point.

7. Objections to ALJ's Findings on Exclusivity Arrangement at the Pool of Pools

CCM does not manage the Pool of Pools (POP) servicing the Ports of Los Angeles and Long Beach. The POP does not operate under CCM rules, but does operate under similar exclusivity rules. I.D., 54. The POP is an interoperable pool operated collectively by the IEPs (DCLI, TRAC, and Flexi-Van). *Id.* at 52; JSF ¶ 195. The

ocean carrier whose container is being moved selects the IEP for merchant and carrier haulage, and motor carriers must use that provider. I.D., 52; JSF ¶ 197. Ocean carriers can negotiate volume discounts based on both carrier and merchant haulage but those savings are not passed along to the motor carrier or shipper. I.D., 52; JSF ¶ 197. The ALJ found these restrictions unreasonable because motor carriers are deprived of choice and an opportunity to negotiate for better rates or terms of service on merchant haulage and they are more restrictive than necessary to operate the POP as an interoperable pool. I.D., 55. The ALJ also found that these operating practices conflict with representations the IEPs made to the DOJ in obtaining the business review letter that allows them to operate the POP collabroatively without risking accusations that they are violating federal antitrust law. *Id.* at 54-55.

Respondents argue that they are not responsible for the restrictions because the IEPs establish and enforce operating rules for the POP, which Respondents merely follow. Exceptions, 37-38. That argument lacks merit. As the ALJ pointed out, ocean carriers select a particular IEP to provide chassis for their containers and are fully cognizant of the fact that their selection will lock in the motor carrier while giving the ocean carrier the benefit of better rates linked to increased merchant haulage volume. I.D., 54. The ALJ reasonably concluded that Respondents failed to support their stated justification with relevant evidence.

The Commission denies Respondents' exceptions and affirms the ALJ's findings on the challenged practices applicable to the Pool of Pools.

8. Withdrawing from Interoperable Pools and Designating Proprietary Pools

Complainant alleges Respondents' practice of withdrawing from interoperable pools in favor of designating proprietary pools unreasonably restricts motor carriers' choices for merchant haulage. *See* I.D. 48-52. This practice allegedly leads to inefficiency and drives up costs. *Id.* at 22-25. The ALJ found that the Commission has authority to order "Respondents to cease and desist withdrawing from interoperable CCM pools" if that practice violates the Shipping Act, to determine which chassis-provisioning model is most efficient, and to direct Respondents to continue using that model.

I.D., 48-52. The ALJ also concurred with concerns Complainant raised about the impact ocean carriers' withdrawals may have on supply chain efficiency and cited the Commission's Memphis Supply Chain Innovation Team study findings about the state of its chassis provisioning model and the need for immediate improvements. *Id.* at 51 (signaling that "final briefing on Memphis" may be "the next step" if this case proceeds to the next level). However, the ALJ did not direct Respondents to cease or desist from withdrawing or order them to remain participants in interoperable pools. *Id.* The ALJ found that "the facts necessary to determine the reasonableness of decisions to withdraw from interoperable pools are disputed. Therefore, it cannot be determined by summary decision whether the decisions to withdraw from interoperable pools in the four geographic regions at issue are unreasonable." *Id.*

Respondents do not directly challenge the ALJ's determination that the Commission has authority to decide whether withdrawing from an interoperable pool violates the Shipping Act and can be the subject of a cease-and-desist order. *See* Exceptions. The ALJ based the Commission's authority over this practice on its power to determine whether that conduct violates the Shipping Act and to order that conduct to cease when a violation is found. I.D., 50. The ALJ also relied in part on the Commission's mission and inherent responsibility for "ensuring an efficient transportation system for ocean commerce." *Id*. The ALJ appropriately rejected Respondents' contention that the Commission lacks authority to order them to remain in interoperable pools. *See id.* at 52. The Commission can require regulated entities to conform their practices to the Shipping Act's requirements. As redefined by OSRA 2022, the Shipping Act's purposes include ensuring that the U.S. ocean transportation system is "efficient, competitive, and economical." 46 U.S.C. § 40101; *see also American Export-Isbrandtsen Lines*, 444 F.2d at 828-29.

To fairly assess whether that determination is sound and its potential implications, it is helpful to consider separately as the ALJ did in part, whether: (1) the Commission has authority to decide whether an ocean carrier acted unreasonably or unjustly in withdrawing from an interoperable pool; (2) if so, whether a complainant has demonstrated actual harm that can be addressed by the Commission, either in the form of reparations or a cease-and-desist order; and (3) if the appropriate remedy is a cease-and-desist

order, whether that order can issue and provide meaningful relief without requiring action or forbearance by non-regulated entities. The ALJ answered the first question but not the second as it involved disputed issues of fact, and did not reach the third question.

The ALJ's determination that the Commission has authority to decide whether an ocean common carrier's decision to withdraw from an interoperable pool and switch their carrier and merchant haulage business to an interoperable pool is unreasonable or unjust is soundly grounded in the Shipping Act and Commission case law. As the ALJ explained, the Commission clearly has authority and oversight responsibility to determine whether ocean common carriers' chassis provisioning practices are unreasonable. I.D., 48-52. It also clearly has authority to determine whether a complainant has sustained actual harm that can be addressed through reparations or a cease-and-desist order. The IEPs assert in their amicus brief that Complainant has failed to show how the market is harmed by the exclusive restrictions it challenges. IEP Amicus Br., 4. Complainant is not required to demonstrate a detrimental impact on the chassis-provisioning market to justify the cease-and-desist order issued by the ALJ. Demonstrating motor carriers' inability to use a chassis provider they choose for a service they are responsible for providing and will be billed for is sufficient to show harm justifying a cease-and-desist order.

The third question, which the ALJ did not reach and which the Commission need not and does not resolve at this stage of the case, is more complicated both legally and factually. Assuming, as Respondents contend, the IEPs operate independently and are not regulated by the Commission (i.e., not directly or indirectly controlled by ocean common carriers or operating under FMC-filed agreements), it is difficult to conceive in the abstract of how the Commission might structure injunctive relief that is meaningful while simultaneously avoiding directing the IEPs to act or refrain from acting. Since Respondents depend on chassis use agreements with IEPs and do not own the chassis used for carriage or merchant haulage, any relief the Commission awards would need to consider those constraints and frame the relief to require meaningful compliance from the ocean common carriers but not require action or forbearance by the IEPs who are outside the Commission's regulatory authority under Section 41102(c). Whether that is feasible will depend in part on how ocean common carriers have

structured their relationship with the IEPs, and will need to be tailored to differences between regions where interoperable chassis pools are still operating versus locations where proprietary pools now exist and other location-specific conditions.

The ALJ also tacitly proposed an unreasonableness test for this particular claim derived from the Supreme Court's test applied in *Aspen Skiing Co. v. Aspen Highlands Skiing Corp*., 472 U.S. 585, 603-04, 608-611 (1985) to decide whether an entity's voluntary withdrawal from a cooperative joint venture violates antitrust laws. I.D., 50. The ALJ accurately observed that interoperable pools are essentially "joint ventures between competing IEPs authorized by ocean carriers." *Id. Aspen* involved a claim that a dominant firm's withdrawal from a joint venture with smaller competitors offering combined ski passes violated the Sherman Act. In *Aspen*, the court considered the dominant's firm's decision to withdraw from what was presumably a profitable and beneficial joint venture as potential evidence of their willingness to forgo short-term profits for an opportunity to dominate the market or achieve some other anticompetitive result. *See Verizon Communications, Inc. v. Law Offs. of Curtis V. Trinko*, LLP, 540 U.S. 398, 409 (2004) (interpreting *Aspen,* 472 U.S. at 608, 610-11). *Aspen* also considered the impact the dominant ski operator's withdrawal had on consumers and competition and the fact that it continued participating in similar ticket ventures in other markets. *Aspen,* 472 U.S. at 608, 610-11. The *Aspen* test is a reasonable proxy for examining whether ocean carriers' withdrawal from an interoperable pool is based on reasonable objectives or calculated to achieve some other end.

The Commission finds that it has authority to direct Respondents not to withdraw from interoperable chassis pools if their withdrawal is found to be unreasonable under Section 41102(c).

9. Evergreen's Objections to the ALJ's Findings

Evergreen joined in Respondents' consolidated exceptions, and also filed individual exceptions to address what it contends are unique aspects of its chassis-pool arrangements with IEPs and motor carriers. Evergreen asserts that it provides chassis to motor carriers free of charge, does not differentiate between carriage and merchant

haulage when fees are charged, and affords motor carriers a choice of merchant haulage. Evergreen contracts with IEPs to secure chassis for carrier and merchant haulage, then imposes a chassis usage charge on its customers and motor carriers for both carrier and merchant haulage. JSF ¶¶ 63-65. If the chassis is not returned within the allotted free time, Evergreen assesses a per diem charge until the chassis is returned, under the terms of the UIIA Agreement[31] signed by the motor carrier and Evergreen. *Id*. Evergreen's merchant haulage terms are defined in its filed tariff. *Id.*

Evergreen moved for summary decision based on its chassis-provisioning model for the four test case regions and opposed Complainant's motion for summary decision. The ALJ determined that to the extent Evergreen's practices mirror those of the other Respondents in limiting motor carriers' choice of chassis providers for merchant haulage, those practices violate the Shipping Act. I.D., 61. The ALJ also denied Evergreen's cross-motion for summary decision on the basis of its chassis-provisioning model for the four test case regions. *Id.* The ALJ found that "[b]y obtaining chassis from exclusive chassis providers at a single, fixed contractual daily rate for use in both [carrier and merchant haulage] moves, Evergreen is presumably benefitting from volume discounts as well as profiting from any upcharges on chassis daily late fees." *Id.* at 60. The ALJ found that undisputed evidence shows that Evergreen pays the same rate whether the chassis is used for merchant or carrier haulage, but that Evergreen does not pass its rates directly along to the motor carrier. *Id.* Instead, Evergreen links merchant haulage volume to obtain discounted rates for both merchant and carrier haulage and charges motor carriers a "daily late fee" after the first 5 days and keeps any profit over the charges it pays to the IEP. *Id.*

Evergreen argues that the ALJ erred in denying its motion for summary decision and undisputed facts entitle it to judgment as a matter of law. Evergreen's Exceptions, 2. The facts that Evergreen asserts are dispositive are: (1) motor carriers' ability in theory to use their own chassis or a chassis provided by an IEP they or the customer select; and (2) the absence of charges during the initial 5-day free time. Complainant argues that Evergreen's model is not materially distinct from the other common carriers' because motor

[31]The Uniform Intermodal Exchange and Facilities Access Agreement (UIIA) is available online at https://intermodal.org/uiia/.

carriers still lack freedom of choice and Evergreen bills them or the beneficial cargo owner directly for a chassis usage fee even if the chassis is returned within the 5 days of "free time." Complainant's Reply to Exceptions, 46-47.

Evergreen is correct in that these facts it relies on are not disputed, but accepting these facts as true does not address or erase the fundamental problem with Evergreen's approach. Evergreen's model may differ from the other Respondents' but it still has the same fundamental flaw. That flaw is the built-in assumption that the motor carrier will use Evergreen's chassis at the rates Evergreen has set unless the motor carrier provides its own chassis or contracts separately with an IEP. That built-in assumption places Evergreen's model on the same footing as the other Respondents' practices in terms of placing the onus on the motor carrier to make alternate arrangements if they do not want to use Evergreen's chassis for merchant haulage or pay its preset rates. Evergreen's assertion that motor carriers can opt out of its model by providing their own chassis or independently contracting with an IEP is a defense that may show that the Evergreen's policy is reasonable as applied, but the record is not sufficiently developed to establish that as a matter of law at this point. While Evergreen points to motor carriers' ability to exercise this opt-out feature in theory, it does not recite statistics or undisputed facts to show that the opt-out alternative is something more than a theoretical option and is actually available to motor carriers for the asking.

The Commission denies Evergreen's exceptions and affirms the ALJ's Initial Decision as to the claims against Evergreen.

10. Objections to Cease-and-Desist Order

The ALJ directed Respondents to cease violating Section 41102(c) in the four test case regions (Chicago, Los Angeles/Long Beach, Memphis and Savannah) and directed them to cease adopting, maintaining, or enforcing regulations or practices that limit motor carriers' ability to use the chassis provider of their choice for merchant haulage. I.D., 61. The ALJ based that order on findings that these practices proximately cause financial harm to motor carriers, generally restrain competition, and detrimentally impact transportation system efficiency. *Id*. at 46-47, 57. The harm derives from motor carriers' lost opportunities to negotiate more

favorable rates or service terms from a chassis provider of their choosing. *Id*. Although the order is limited to the four test case regions, the ALJ noted that the same legal analysis would apply if Respondents engaged in those practices in other locations. *Id*. at 58.

Respondents argue that the ALJ improperly ignored undisputed evidence that motor carriers suffer no harm because they mark up their costs and receive more from shippers than they pay out for chassis usage. Exceptions, 18. They assert that Complainant failed to prove financial harm proximately caused by the merchant haulage practices and argue that the ALJ should also have considered this absence of harm in assessing whether the practices are reasonable under 46 C.F.R. § 545.4. *Id.* Complainant defends the ALJ's order as supported by the record and appropriately tailored to address the consequences of conduct the ALJ found unlawful under Section 41102(c). Complainant's Reply to Exceptions, 48. Complainant asserts that there is evidence of actual harm in the form of increased rates prices for merchant haulage chassis and the collapse of interoperable pools which impacts motor carriers and the shipping public in the form of higher transportation costs and inefficiencies. *Id*. at 1, 14. Complainant claims that Respondents' practices caused the collapse of regional interoperable CCM pools including Chicago and that Memphis could be the next casualty. *Id.* at 14.

The Commission has the authority to order regulated entities to cease violating the Shipping Act. *See American Export-Isbrandtsen Lines,* 444 F.2d at 828. A cease-and-desist order is justified if the Commission finds a Shipping Act violation and has determined that the unlawful conduct is likely to continue or resume unless Respondents are ordered to stop. *Maher Terminals,* 2013 WL 9808667, at *3 n.8; *see also, e.g., Alex Parsinia d/b/a Pac. Int'l Shipping and Cargo Express,* Docket No. 97-01, 27 SRR 1335, 1342 (ALJ 1997) (cease-and-desist orders are "appropriate when the record shows that there is a likelihood that offenses will continue absent the order and when the record discloses persistent offenses"); *Portman Square Ltd.-Possible Violations of Section 10(a)(1) of the Shipping Act of 1984*, Docket No. 96-17, 28 S.R.R. 80, 86 (ALJ 1998) (cease-and-desist orders are appropriate if respondents are likely to resume their unlawful activities).

Beyond vindicating the interests of the Complainant in a particular case, cease-and-desist orders also provide broader relief and protections for industry stakeholders and the shipping public. *See Pacific Champion Express Co. – Possible Violations of Section 10(b)(1) of the Shipping Act of 1984*, Docket No. 99-02, 1999 WL 1126489, at *9 (ALJ Nov. 17, 1999). They alert the shipping industry to practices found to be unreasonable and unjust, help to prevent future violations, and facilitate addressing future violations of the same kind. Such orders should be narrowly tailored to address harms the Commission has found are occurring and violate Shipping Act prohibitions. *See id.*

Respondents' objections to the cease-and-desist order here are unfounded. *See* Exceptions, 18. While it is true that the ALJ did not find financial harm, that is not a prerequisite for an order directing unreasonable practices to cease. *See* I.D., 57 (acknowledging that ending the exclusivity restrictions could actually lead to an increase in merchant haulage rates because motor carriers may lack the same bargaining power as ocean common carriers); *see also Stockton Port District,* 7 F.M.C. at 76. When the conduct at issue is an exclusive arrangement that restricts choice or opportunities to compete, those conditions alone can support ordering a respondent to cease engaging in those practices. *See Stockton Port District,* 7 F.M.C. at 76. In *Stockton*, the Commission granted a cease-and-desist order based on findings that Stockton Elevators' exclusive arrangement with the port over "dockside and other wharfinger and stevedoring services" was unjust and unreasonable. *Id*. This arrangement prevented ocean common carriers from using stevedores they selected to unload their vessels. *Id*. at 82. That arrangement was found to "operate[] to the detriment of the commerce of the United States . . . contrary to the public interest," and upended the long-standing custom of carriers working with stevedoring companies of their own choosing and "opens the door to evils which are likely to accompany monopoly, such as poor service and excessive costs." *Id.* at 82-83. These considerations led the Commission to conclude that:

> Such a practice is prima facie unjust not only to stevedoring companies seeking work but to carriers they might serve and the general public which is entitled to have the benefit of competition among stevedoring companies serving ships carrying goods

> in which the public is interested as shipper or consumer for the same reasons it is prima facie unreasonable.

Id. at 83. The Commission cautioned that it was not declaring "all monopolistic stevedoring agreements are necessarily and inevitably unjust and unreasonable practices which must be prohibited at any cost." *Id*. at 84. But the Commission also hastened to add that "the burden of sustaining such practices as just and reasonable is a heavy one." *Id*. at 84 n.6.

Importantly, for purposes of this case, *Stockton* made clear that a complainant need not prove actual harm has already occurred to justify the Commission directing unreasonable restrictions to cease. As the Commission explained: "It is not significant that these evils have not been proved to actually exist yet at Stockton [Port]. Healthy competition for business which is the best-known insurance against such evils has been destroyed." *Id.* at 83 n.5. It is sufficient to show that the challenged practice denies the complainant a choice of service providers which in and of itself creates the potential for exploitation if there is no competition on costs or terms of service. *See id.* at 82-83.

Here, Respondents' practice of designating a chassis provider for merchant haulage moves deprives motor carriers of choice and denies them the opportunity to negotiate rates and terms of service. Interfering with motor carriers' ability to choose among chassis providers affects basic interests that promote economic efficiency. Here, as in *Stockton*, proving these practices exist is sufficient to justify an order directing Respondents to cease-and-desist. Complainant is not required to show that the restrictions have or will inexorably cause higher prices. Proving that the restrictions foreclose free choice and opportunities to negotiate rates and terms of service is sufficient. *See, e.g., Perry's Crane* ALJ, 16 S.R.R. at 1477.

Given that a showing of actual harm is not a prerequisite for a cease-and-desist order, Respondents' arguments that the Complainant failed to prove financial harm or actual loss are legally immaterial. Exceptions, 14. Further, even if that were not the case, their arguments lack merit. Respondents' argument that motor carriers will suffer no harm if chassis usage prices are higher is

defeated by the direct purchaser rule.[32] *See In re Vehicle Carrier Servs.*, 1 F.M.C. 2d 440, 446 (FMC 2019). For the past 90 years, the Commission and its predecessor agencies have followed Supreme Court precedent in applying what has become known as the "direct purchaser rule." From the complainant's side, the direct purchaser rule deems the person that paid illegal overcharges (or directly sustained the harm) as the only person "directly damaged" regardless of what may have occurred later, *i.e.,* even if they passed the overcharges or loss on to their customer. *Id*. (citing *Oakland Motor Car Co. v. Great Lakes Transit Corp*., 1 U.S.S.B.B. 308, 310-311 (1934)). From the respondents' side, the direct purchaser rule means that they cannot defend claimed overcharges or other financial loss by asserting that the complainant could pass the overcharge or loss along to their customer. *Id.* (citing *Southern Pacific Co. v. Darnell Taenzer Lumber Co*., 245 U.S. 531 (1918)). The Supreme Court reaffirmed the direct purchaser rule in May 2019 in finding that plaintiffs in that case could sue the defendant under the antitrust laws because they were direct purchasers. *Apple Inc. v. Pepper*, 139 S. Ct. 1514, 1519 (2019).

Respondents also argue that their exclusive arrangements with the IEPs are a stabilizing force that ensure a reliable supply chain and ordering them to halt their current practices will obliterate those benefits and may potentially disrupt the supply chain. Exceptions, 15. They contend that if chassis providers cannot be certain of a minimum level of demand, they are likely to move eqiupment to higher demand locations, leaving some regions struggling to find enough equipment to meet the demand. *See id.* Respondents contrast that with the status quo where "each chassis provider places chassis at locations where they are needed" and where they have ocean carriers' contractual assurance that they will be utilized. *Id.* Without that assurance, Respondents contend, chassis providers will look to motor carriers and shippers to commit to use their equipment for merchant haulage moves and there is nothing in the record to suggest that motor carriers will provide that level of commitment. *See id.* at 15-17. Respondents also raise concerns about the practical aspects of implementing the ALJ's cease-and-desist order and the impacts it may have on overland

[32]The IEPs make the same assertion, claiming that motor carriers profit by marking up the chassis charges billed to their customers. IEP Amicus Br. 3-4.

transportation, and potential difficultes it may experience with railroads. *Id.*

Respondents do not point to statistics or expert evidence indicating the likelihood that the scenario they paint of supply chain disruption, inadequate chassis supplies, or other difficulties stemming from the cease-and-desist order will actually occur. While a period of readjustment is certainly possible if ocean carriers stop using exclusive arrangements, it is equally possible that the chassis supply market will adjust within a reasonable time frame and reach a new equilibrium. Changing which provider supplies the chassis will not alter traffic volume or demand—the same number of chassis will still be required—but who supplies them will be open to competition.

Respondents and the IEPs who filed as amici also theorize that the motor carriers may collectively step into the role of securing minimum commitments for chassis usage and contend that have a self-interest in promoting NACPC, a chassis provider operated by several motor carriers. Exceptions, 16. The IEPs also claim that ordering the ocean carriers to cease designating exclusive chassis providers or withdrawing from interoperable pools will benefit NACPC and that NACPC is positioning itself as a potential competitor that will unfairly benefit from IEP's investment. IEP Amicus Br., 3, 11-17. The IEPs contend that Complainant is trying to dictate a pool model that will allow NACPC to bill for the use of the IEPs' equipment without making the same commitment of assets required of other pool members. *Id*. at 3.

Motor carriers' ownership or operation of a chassis-provisioning enterprise that does or may aspire to compete with the IEPs who currently dominate the market does not detract from Complainant's arguments or provide a reason for refusing to direct Respondents to cease engaging in unreasonable practices. If declaring exclusive arrangements unlawful opens the playing field up to more potential competitors, owned by the motor carriers or another entity, that is a positive development. The fact that Complainant's constituents and members may have an interest in competing with the IEPs is not a reason to allow Respondents' to continue restrictive practices that make it more difficult for other chassis providers to compete for merchant haulage contracts.

In framing the relief to address Respondents' violation of Section 41102(c), the ALJ appropriately ordered Respondents to cease and desist from designating an exclusive chassis provider, enforcing rules that restrict motor carriers to the chassis provider the ocean common carrier has chosen, and practices that lock in the motor carrier to the chassis provider the ocean carrier selected.

The Commission affirms the cease-and-desist order issued by the ALJ.

III. CONCLUSION

The Commission hereby:

(1) **DENIES** Respondents' March 7, 2023 Consolidated Exceptions to the ALJ's Initial Decision Partially Granting Summary Decision;

(2) **DENIES** Respondent Evergreen's March 7, 2023 Exceptions to the ALJ's Initial Decision Partially Granting Summary Decision;

(3) **AFFIRMS** the Initial Decision Partially Granting Summary Decision;

(4) **ORDERS** Respondents to cease and desist from engaging in the practices for merchant haulage the Commission has determined violate 46 U.S.C. § 41102(c) in the four test case regions addressed in this Order: Chicago, Los Angeles/Long Beach, Memphis, and Savannah; and

(5) **REMANDS** this case to the ALJ to resolve the remaining claims and for further proceedings consistent with this Order.

By the Commission.

David Eng
Secretary

APPENDIX A

DATE	DOCKET ENTRY/SUBMISSION
08/17/20	Complaint (**Compl.**)
02/28/22	Joint Statement of Facts (**JSF**)
[redacted]	
04/29/22	Decl. of J. Douglass Coates (Public Version)
04/29/22	Complainant's Mot. for Summary Decision (Public Version)
06/02/22	Respondents' Response to Complainant's Statement of Material Facts
06/02/22	Complainant's Supplemental Statement of Undisputed Material Facts
06/16/22	Complainant's Reply to Respondents' Response to Intermodal's Statements of Undisputed Material Fact (**Complainant's Reply Stmt. Facts**) (Public Version)
[redacted]	
12/21/22	Respondents' Response to Complainant's Stmt. Of Undisputed Facts (Public Version)
12/19/22	Complainant's Response to Mot. for Summary Decision (Corrected Public Version)
02/06/23	Initial Decision Partially Granting Summary Decision (**I.D.**)
03/07/23	Respondents' Exceptions to Initial Decision Partially Granting Summary Decision (**Exceptions**)
03/07/23	Evergreen's Exceptions to Denial of Mot. for Summary Decision (**Evergreen's Exceptions**)
04/05/23	Complainant's Consolidated Reply to Respondents' and Evergreen's Exceptions (**Complainant's Reply to Exceptions**)
04/14/23	Brief Amici. Curiae Direct Chassis Link, Flexivan Leasing & Interpool, Inc. (**IEP Amicus Br.**)
05/08/23	Brief of Amicus Curiae American Cotton Shippers

[redacted]