



BEFORE THE GUAM PUBLIC UTILITIES COMMISSION

CEMENTON MICRONESIA, LLC,)
)
 Complainant,)
)
 vs.)
)
 PORT AUTHORITY OF GUAM,)
)
 Respondent.)
 _____)

PAG DOCKET NO. 16-01

ALJ REPORT

INTRODUCTION

This matter comes before the Guam Public Utilities Commission (the “PUC”) pursuant to the June 10, 2016 complaint filed by Cementon Micronesia, LLC (“Cementon”) against the Port Authority of Guam (hereinafter referred to as the “Port” or “PAG”).

BACKGROUND

On October 7, 2016, the Administrative Law Judge (the “ALJ”) assigned to this docket held a Scheduling Conference with the parties. Both PAG and Cementon were present during the conference. At the Scheduling Conference, the ALJ discussed dates related to PAG’s Answer to the Complaint, and any briefing, as well as tentative dates for a hearing on the merits. In addition, the ALJ requested that the parties file briefs concerning the issue of whether the PUC has jurisdiction to address the subject Complaint. On October 21, 2016, the parties submitted such briefs regarding jurisdiction with the PUC. On November 18, 2016, the ALJ issued a Decision and Order indicating that the PUC had jurisdiction over these proceedings.

On November 22, 2016, the parties submitted a stipulation requesting a continuance of the previously scheduled merits hearing. On November 30, 2016, the Port

requested that a merits hearing be scheduled during the second week of January, 2017. On December 13, 2016, the ALJ issued an Amended Scheduling Order indicating that a merits hearing would be scheduled for January 25, 2017. On January 10, 2017, the parties submitted another stipulation requesting continuance of the merits hearing. On January 13, 2017, the ALJ issued a Second Amended Scheduling Order indicating that a merits hearing would be held on April 19, 2017. A hearing on the merits was held on April 19 and April 20, 2017.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Parties

Cementon is a limited liability company, formed around 2008, in the business of importing cement.¹ The Port is a “public corporation and autonomous instrumentality of the government of Guam” that provides “for the needs of ocean commerce, shipping, recreational and commercial boating, and navigation of the territory of Guam.” 12 G.C.A. § 10102.

2. November 21, 2008 Lease Agreement Between the Port and Cementon, and Subsequent Amendments

Back in 2008, Cementon began negotiating a lease agreement with the Port in order to begin building structures for its cement importing business.² On November 21, 2008, Cementon entered into a Lease Agreement with the Port, for the lease of a piece of property known as “Parcel 3-1.”³ Pursuant to the Lease Agreement, Cementon is permitted to construct, use, and operate a cement exporting facility on Parcel 3-1.⁴ The lease was for an initial term of five (5) years, and provided for a monthly rent of \$28,995 per month.⁵ Section 8 of the Lease

¹ Tr., pp. 42-43 (Apr. 19, 2017).

² Tr., pp. 48-49 (Apr. 19, 2017).

³ Cementon’s “Exhibit B,” p. 2.

⁴ Cementon’s “Exhibit B,” p. 2.

⁵ Cementon’s “Exhibit B,” pp. 1, 4.

Agreement further provided that Cementon would pay to the Port one hundred percent (100%) “of all charges accruing under the schedule of rates covering the use of wharves, docks and other facilities owned, controlled or operated” by the Port.⁶

The lease was subsequently amended by the parties on August 21, 2009, to exclude certain rights of way from the calculation of the net area of the leased premises, and thereby reducing Cementon’s rent of Parcel 3-1 to \$19,847 per month.⁷ The lease, again, was amended by the parties in July, 2010, to provide for a five-year extension of the term of the Lease Agreement, as well as to provide for three (3) five-year options for renewal the lease.⁸

3. Construction on Parcel 3-1

In 2011, Cementon began construction of two silos on Parcel 3-1, which it completed in 2012.⁹ Cementon’s pipeline was also completed in 2012.¹⁰ However, there was some delay in laying the pipeline into Golf Pier.¹¹ Cementon first had to negotiate a User Agreement with Mobil Oil Guam Inc. (“Mobil”), since Mobil managed Golf Pier.¹² In October 2013, with assistance from the Port, Cementon was permitted to lay pipes in Golf Pier.¹³ Cementon spent around \$17 million for the construction of the silos and pipeline.¹⁴

⁶ Cementon’s “Exhibit B,” p. 5.

⁷ Cementon’s “Exhibit C,” pp. 1-2.

⁸ Cementon’s “Exhibit D,” p. 2.

⁹ Tr., p. 62, 64 (Apr. 19, 2017).

¹⁰ Tr., p. 67 (Apr. 19, 2017).

¹¹ Tr., p. 67 (Apr. 19, 2017).

¹² Tr., p. 68 (Apr. 19, 2017).

¹³ Tr., p. 77 (Apr. 19, 2017).

¹⁴ Tr., p. 111 (Apr. 19, 2017).

The leased property now contains two silos that are used for storage of Cementon's cement, as well as an administration building and main office.¹⁵ Also, Cementon's pipes connect from its facility to Golf Pier.¹⁶ Cementon uses these pipes to offload cement from the vessels into its silos.¹⁷ The User Access Agreement between Mobil and Cementon allows Cementon to access and utilize Golf Pier in order to discharge its operations.¹⁸ Cementon and Mobil work together to coordinate arrival of vessels to Golf Pier.¹⁹ When ships arrive, the ship pumps the cement through the pipe, all the way to the silo storage.²⁰

4. **October 8, 2013 User Access Agreement between Mobil Oil Guam Inc. and Cementon**

On October 8, 2013, Mobile and Cementon entered into an agreement that allows Cementon access to Golf Pier, for the express purpose of allowing Cementon to import and export non-petroleum products.²¹ The User Access Agreement was conditioned on Cementon's installation of motor operated valves and pipelines.²² Among other provisions, the User Access Agreement provided that Cementon would utilize its own personnel to receive its products at Golf Pier.²³ The User Access Agreement further provided that in the event it intended to construct improvements to Golf Pier, Cementon would first obtain the Port's consent.²⁴

¹⁵ Tr., p. 11 (Apr. 20, 2017).

¹⁶ Tr., p. 12 (Apr. 20, 2017).

¹⁷ Tr., p. 13 (Apr. 20, 2017).

¹⁸ Tr., p. 18 (Apr. 20, 2017).

¹⁹ Tr., p. 12 (Apr. 20, 2017).

²⁰ Tr., p. 63 (Apr. 19, 2017).

²¹ Cementon's "Exhibit Q," pp. 1-2.

²² Cementon's "Exhibit Q," p. 2.

²³ Cementon's "Exhibit Q," p. 3.

²⁴ Cementon's "Exhibit Q," p. 4.

5. Wharfage and Dockage Fees

The Port's Terminal Tariff, which rates were recently reviewed and approved by this Commission, authorizes the assessment of wharfage and dockage fees for cargo on vessels. All users of the Port, except for Hansen, pay wharfage fees.²⁵ Wharfage is for "all cargos coming or going over [the] wharf, in and out," and which is used for "repair" and "maintenance."²⁶ Wharfage rates are based on the type of cargo.²⁷ The rates depend, for instance, on whether the shipment arrived in a container, or bulk, or break bulk.²⁸

Cementon pays a "dry bulk rate" fee.²⁹ Cementon pays this wharfage fee to its shipping agent, Ambyth.³⁰ The wharfage is paid prior to docking in order for the shipping agent to release the cargo upon arrival at Golf Pier.³¹ Mobil is also assessed wharfage.³² Hansen does not pay wharfage because Hansen built its wharf.³³

In 2014, Cementon received two shipments and paid approximately \$48,000 in wharfage fees.³⁴ In 2015, Cementon received three shipments and paid approximately \$70,000 in wharfage fees.³⁵ In 2016, Cementon received five (5) shipments and paid approximately \$102,000 in wharfage fees.³⁶

²⁵ Tr., pp. 124-125 (Apr. 20, 2017).

²⁶ Tr., p. 128 (Apr. 20, 2017).

²⁷ Tr., p. 125 (Apr. 20, 2017).

²⁸ Tr., p. 126 (Apr. 20, 2017).

²⁹ Tr., p. 129 (Apr. 20, 2017).

³⁰ Tr., p. 21 (Apr. 20, 2017).

³¹ Tr., p. 21 (Apr. 20, 2017).

³² Tr., p. 139 (Apr. 20, 2017).

³³ Tr., p. 137 (Apr. 20, 2017).

³⁴ Tr., p. 22 (Apr. 20, 2017).

³⁵ Tr., p. 21 (Apr. 22, 2017).

³⁶ Tr., p. 22 (Apr. 20, 2017).

6. **Cement**

Cementon imports the same cement as its competitor, Hansen.³⁷ Both Cementon and Hansen obtain their cement from the same supplier from Taiwan, Asia Cement, and use the same ship to import it to Guam.³⁸

7. **Letters to the Port Regarding Hansen and Wharfage Fees**

In 2015, Cementon learned that Hansen does not pay wharfage fees.³⁹ On August 10, 2015, Cementon wrote to the Port objecting to the increase in the tariff rates, as well as the Port's assessment of wharfage on Cementon.⁴⁰ Cementon maintained that it was "unfair and discriminatory" that Hansen was not paying wharfage.⁴¹

On February 29, 2016, Cementon again wrote to the Port objecting to the assessment of wharfage fees on Cementon, and requesting that the Port waive such wharfage fees.⁴² On April 14, 2016, Cementon again wrote to the Port disputing the assessed wharfage.⁴³ On April 27, 2016, the Port wrote a letter to Cementon responding to Cementon's April 14, 2016 letter, indicating that it will assess a "dry bulk cargo rate" on Cementon, and that the issues related to Hansen are "unique to Hanson" and do "not apply" to Cementon.⁴⁴

On June 9, 2016, Cementon indicated in a response to the Port's proposed amendment to the lease agreement, that it was requesting to amend the lease agreement to

³⁷ Tr., p. 81 (Apr. 19, 2017).

³⁸ Tr., p. 81 (Apr. 19, 2017).

³⁹ Tr., p. 89 (Apr. 19, 2017).

⁴⁰ Cementon's "Exhibit J," p. 1.

⁴¹ Cementon's "Exhibit J," p. 1.

⁴² Cementon's "Exhibit K," p. 1.

⁴³ Cementon's "Exhibit K," p. 1.

⁴⁴ Cementon's "Exhibit M," p. 1.

eliminate Section 8, the provision that requires Cementon to pay wharfage fees. It again raised similar arguments contained in its prior letters to the Port, in particular, its complaint that Cementon is treated dissimilarly to Hansen with regard to wharfage.⁴⁵

8. Cementon's Complaint

Cementon alleges in its Complaint that a lease agreement between Cementon and the Port violates both federal and Guam law because it requires Cementon to pay one hundred percent (100%) of all wharfage and dockage fees related to Cementon's use of Golf Pier.⁴⁶

Specifically, Cementon maintains that "[t]he Port's imposition of wharfage fees for Cementon's private use of Golf Pier violates 12 G.C.A. § 10104(j), as Golf Pier is not a public facility of the Port."⁴⁷ In addition, Cementon further maintains that "[t]he Port's imposition of wharfage fees to Cementon for its private use of Golf Pier constitutes an unlawful taking under the Organic Act of Guam and the Fifth Amendment of the United States Constitution."⁴⁸

Further in its Complaint, Cementon submits that "[t]here is no justification in the law for the Port to charge wharfage and dockage fees for Cementon's private use of Golf Pier" and that "[t]he Port's wharfage charges imposed on Cementon are unreasonable and/or unreasonably discriminatory."⁴⁹ Cementon also argues that the Port's assessment of wharfage

⁴⁵ Cementon's "Exhibit M," pp. 1-2.

⁴⁶ Complaint by Cementon Micronesia, LLC, PAG Docket 16-01, pp. 3, 5-6 (Jun. 10, 2016) ("Cementon Complaint").

⁴⁷ Cementon Complaint, p. 5.

⁴⁸ Cementon Complaint, pp. 5-6.

⁴⁹ Cementon Complaint, p. 6.

fees against Cementon “inequitably raises Cementon’s pricing and encourages anti-competitive practices.”⁵⁰

9. Jurisdiction

The PUC’s enabling statutes, found at 12 G.C.A. § 12101 *et seq.*, provide the PUC with broad powers in regulating public utilities, like PAG.⁵¹ The Guam Legislature delegated to the PUC “regulatory oversight supervision” “over each public utility.” 12 G.C.A. § 12105(a). In aid of this regulatory authority, the PUC is empowered to “investigate and examine any rates and charges charged by any utility.” 12 G.C.A. § 12105(c). And in furtherance of this regulatory authority, the PUC is additionally empowered to examine a utility’s “compliance with contracts, covenants,” as well as a utility’s “compliance with all applicable territorial and federal laws and with the provisions of its . . . enabling legislation.” 12 G.C.A. § 12106(a)(10) and (11); *See also* 12 G.C.A. § 12115.

Further, PAG’s own enabling authority, found at 12 G.C.A. Section 10101 *et seq.*, expressly subjects PAG’s implementation of its rates, which include wharfage and dockage fees, as well as “charges for the use and occupation of public facilities,” to the “regulatory oversight supervision and approval” of the PUC. 12 G.C.A. § 10104(j).

Since this case arises out of a contract dispute concerning PAG’s assessment of rates, particularly wharfage and dockage fees, the PUC has authority to exercise regulatory oversight supervision in this instance. Accordingly, the PUC has authority to investigate and

⁵⁰ Cementon Complaint, p. 6.

⁵¹ PAG is a public utility subject to the jurisdiction of the PUC. *See* 12 G.C.A. §12101(a).

examine PAG's assessment of the wharfage and dockage fees as it relates to its lease agreement with Cementon.

10. Whether Golf Pier is a Public Facility Subject to the Port's Wharfage Fees

Cementon maintains in its Complaint that "[t]he Port's imposition of wharfage fees for Cementon's private use of Golf Pier violates 12 G.C.A. § 10104(j), as Golf Pier is not a public facility of the Port."⁵² Section 10104(j) specifically provides that the Port must "[e]stablish and modify from time to time, subject only to the regulatory oversight supervision and approval of the Public Utilities Commission, all rates, dockage, rentals, tolls, pilotage, wharfage and charges for the use and occupation of the public facilities or appliances of the Port, and for services rendered by the Port and to provide for the collection thereof." 12 G.C.A. § 10104(j).

Based on the record before this Commission, however, Golf Pier remains a public facility of the Port. In fact, Cementon's President, Dr. Johnson Ma, testified that Golf Pier is Port property.⁵³ Cementon's Administrative Manager, Michael Sarmiento, also did not dispute that the Port owned Golf Pier.⁵⁴ In addition, a March 20, 1990 Management Agreement between the Port and Mobil, including subsequent amendments, reflects that Mobil operates Golf Pier on behalf of the Port.⁵⁵ The User Access Agreement between Mobil and Cementon also expressly indicates again that Mobil simply operates and maintains Golf Pier pursuant to the Management Agreement between Mobil and the Port.⁵⁶

⁵² Cementon Complaint, p. 5.

⁵³ Tr., pp. 129-130 (Apr. 19, 2017).

⁵⁴ Tr., pp. 25-26 (Apr. 20, 2017).

⁵⁵ Cementon's "Exhibit V."

⁵⁶ Cementon's "Exhibit Q," p. 1.

The record further reflects that it was at the Port's request that Mobil agreed to make Golf Pier available to Cementon.⁵⁷ The User Access Agreement also provides that in the event Cementon "intends to construct improvements to Golf Pier to facilitate its use of Golf Pier for the receipt of its product, [Cementon] shall obtain the prior written consent of PAG"⁵⁸ All these provisions clearly indicate that Mobil serves as a managing agent, but that ownership of Golf Pier remains with the Port. The record also clearly indicates that Cementon and Mobil both simply share the use of Golf Pier.⁵⁹ Accordingly, both Cementon and Mobil are assessed wharfage fees.⁶⁰

In PAG Docket 17-01, the PUC authorized the Port to assess wharfage fees as part of its Terminal Tariff. Based on the record before this Commission, the evidence clearly indicates that Golf Pier remains public property of the Port. Golf Pier is not privately owned by any other entity. Accordingly, the Port's imposition of wharfage fees for shipments arriving at Golf Pier is lawful.

11. Whether the Wharfage Fees Assessed on Cementon Constitutes an Unlawful Taking

In its Complaint, Cementon submits that "[t]he Port's imposition of wharfage fees to Cementon for its private use of Golf Pier constitutes an unlawful taking under the Organic Act of Guam and the Fifth Amendment of the United States Constitution."⁶¹ In its Hearing Brief, Cementon argued that "[t]he assessment of the tariff amounts to a taking because Cementon

⁵⁷ Cementon's "Exhibit Q," p. 1.

⁵⁸ Tr., p. 19 (Apr. 20, 2017); Cementon's "Exhibit Q," p. 4.

⁵⁹ Tr., p. 31 (Apr. 20, 2017).

⁶⁰ Tr., p. 139 (Apr. 20, 2017).

⁶¹ Cementon Complaint, pp. 5-6.

entered the Guam cement market expecting to be treated on an equal basis as Hansen.”⁶² At the April 19, 2017 hearing, Cementon further argued that “[t]he charging of wharfage fees for Cementon’s private use of its own pipelines constitutes an unlawful taking such that Cementon should be subject to a wharfage fee.”⁶³

As discussed in the subsection above, Golf Pier remains a public facility of the Port, subject to a Management Agreement between the Port and Mobil; and that it was undisputed that the Port owned Golf Pier.⁶⁴ Mobil simply operates and maintains Golf Pier on behalf of the Port.⁶⁵

With respect to Cementon’s argument that charging “wharfage fees for Cementon’s private use of its own pipelines constitutes an unlawful taking,” this argument seems misplaced. The Takings Clause of the Fifth Amendment guarantees just compensation whenever private property is “taken” for public use. A & D Auto Sales, Inc. v. United States, 748 F.3d 1142, 1150 (Fed. Cir. 2014). A categorical regulatory taking occurs where regulations “compel the property owner to suffer a physical invasion of his property” or “prohibit all economically beneficial or productive use.” A & D Auto Sales, Inc. v. United States, 748 F.3d 1142, 1151 (Fed. Cir. 2014) (citing Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1015, 112 S.Ct. 2886, 120 L.Ed.2d 798 (1992)). Neither of these instances appears to be present in this case. The Port in this case has not prohibited Cementon’s use of its pipelines. In addition, there is no evidence that the Port has either deprived, or interfered with, Cementon’s economically beneficial use of

⁶² Cementon’s Hearing Brief, p. 13 (Nov. 15, 2016).

⁶³ Tr., p. 17 (Apr. 19, 2017).

⁶⁴ Cementon’s “Exhibit Q,” p. 1; Tr., pp. 129-130 (Apr. 19, 2017); Tr., pp. 25-26 (Apr. 20, 2017).

⁶⁵ Cementon’s “Exhibit Q,” p. 1.

its pipelines. Cementon is completely free to utilize its pipelines for the purposes of transferring cement as it so desires.

It appears, however, that the taking alleged in this case is the Port's assessment of wharfage fees on Cementon's cement. Beyond the categories discussed above, courts engage in factual inquiries, which analyze the following: (1) "the character of the governmental action," (2) "the extent to which the [action] has interfered with distinct investment-backed expectations," and (3) "[t]he economic impact of the regulation on the claimant." Penn. Cent. Transp. Co. v. City of New York, 438 U.S. 104, 124, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978). Further, "the existence of a valid property interest is necessary in all takings claims." Wyatt v. United States, 271 F.3d 1090, 1097 (Fed. Cir. 2001). Balancing the facts of this case against these factors, it does not appear that Cementon's allegations qualify as a regulatory taking.

With respect to the character of the governmental action, as discussed above, the Port is authorized by the PUC to assess wharfage fees. Joann Conway, the Port's Acting Financial First Controller, testified that wharfage is for "all cargos coming or going over our wharf, in and out . . . that fee is supposed to be . . . for us to—used to repair our wharfs or keep up our wharfs. You know, maintenance and so forth. So that's what the fee was tied into."⁶⁶ It is undisputed that all users of the Port, with the exception of Hansen, pay wharfage.⁶⁷

Further, there is testimony that every company, even though they have and use their own pipelines, pay wharfage.⁶⁸ In fact, wharfage would still be assessed even if it was vessel-to-vessel unloading on the wharf.⁶⁹ According to Ms. Conway's testimony, the reason

⁶⁶ Tr., p. 128 (Apr. 20, 2017).

⁶⁷ Tr., pp. 124-125 (Apr. 20, 2017).

⁶⁸ Tr., p. 145 (Apr. 20, 2017).

⁶⁹ Tr., p. 146 (Apr. 20, 2017).

Hansen does not pay wharfage is because Hansen “built the wharf area where they’re discharging.”⁷⁰ Based on the above, the Port’s imposition of wharfage fees for shipments arriving at Golf Pier does not constitute a regulatory taking.

With respect to “the extent to which the [action] has interfered with distinct investment-backed expectations,” Cementon was completely aware of its obligation to pay wharfage prior to the execution of its lease. The record is clear that Section 8 of the original Lease Agreement required Cementon to pay one hundred percent (100%) “of all charges accruing under the schedule of rates covering the use of wharves, docks and other facilities owned, controlled or operated” by the Port.⁷¹ Cementon was fully aware of this requirement, yet entered into the Lease Agreement anyway.⁷²

Cementon was also fully aware, when it entered into the Lease Agreement, that it would need access to Golf Pier in order to operate, which is why it needed to negotiate with Mobil in order to secure that access to Golf Pier. The Lease Agreement, in fact, contained a provision that permitted Cementon to “terminate the lease within eight months of commencement of the term of the lease in the even lessee is unable to obtain access toward the use of the area known as Golf Pier”⁷³ Based on these facts, it is clear that the Port did not interfere with Cementon’s expectations. Cementon was well aware of its circumstances prior to its entry into the Lease Agreement back in 2008. It was not until Cementon discovered in 2015 that a competitor, Hansen, was not being assessed wharfage did this controversy arise.

⁷⁰ Tr., p. 137 (Apr. 20, 2017).

⁷¹ Cementon’s “Exhibit B,” p. 5.

⁷² Tr., p. 228 (Apr. 19, 2017).

⁷³ Tr., p. 124 (Apr. 19, 2017); Cementon’s “Exhibit B,” p. 11.

With respect to the “[t]he economic impact of the regulation on the claimant,” wharfage for “dry bulk cargo” at the time was assessed at \$4.25 per ton. In 2014, Cementon received two shipments and paid approximately \$48,000 in wharfage fees.⁷⁴ In 2015, Cementon received three shipments and paid approximately \$70,000 in wharfage fees.⁷⁵ In 2016, Cementon received five (5) shipments and paid approximately \$102,000 in wharfage fees.⁷⁶ The issue in this case, however, is not the amount of wharfage being assessed on Cementon, but the fact that wharfage is being assessed at all.

The record is clear, based on the testimony provided, and based on numerous letters Cementon sent to the Port spanning several years, that it merely wanted equality with Hansen. Since 2015, Cementon has been opposing the Port’s assessment of wharfage as “unfair and discriminatory.”⁷⁷ Cementon has consistently argued that if Hansen pays no wharfage at all, then so should Cementon.⁷⁸ However, in this instance, there is simply no authority for the Port to waive Cementon’s wharfage fees. Again, all users of the Port, except for Hansen, pay wharfage fees.⁷⁹ Wharfage is for “all cargos coming or going over [the] wharf, in and out,” and which is used for “repair” and “maintenance.”⁸⁰ Hansen does not pay wharfage because Hansen built its wharf.⁸¹ Again, based on the discussions above, the Port’s imposition of wharfage fees for shipments arriving at Golf Pier does not constitute a regulatory taking.

⁷⁴ Tr., p. 22 (Apr. 20, 2017).

⁷⁵ Tr., p. 21 (Apr. 22, 2017).

⁷⁶ Tr., p. 22 (Apr. 20, 2017).

⁷⁷ Cementon’s “Exhibit J.”

⁷⁸ Cementon’s “Exhibit J.”

⁷⁹ Tr., pp. 124-125 (Apr. 20, 2017).

⁸⁰ Tr., p. 128 (Apr. 20, 2017).

⁸¹ Tr., p. 137 (Apr. 20, 2017).

12. Whether the Port is Justified in Assessing Wharfage Fees for Cementon's Use of Golf Pier

Further in its Complaint, Cementon submits that “[t]here is no justification in the law for the Port to charge wharfage and dockage fees for Cementon’s private use of Golf Pier” and that “[t]he Port’s wharfage charges imposed on Cementon are unreasonable and/or unreasonably discriminatory.”⁸²

As discussed in subpart 5 above, wharfage is for “all cargos coming or going over our wharf, in and out . . . that fee is . . . used to repair [the] wharfs”⁸³ Pursuant to 12 G.C.A. §10104(j), the Port is tasked with establishing “all rates, dockage, rentals, tolls, pilotage, wharfage and charges for the use and occupation of the public facilities or appliances of the Port, and for services rendered by the Port and to provide for the collection thereof.” Indeed, this Commission in PAG Docket 17-01 has authorized the Port to assess such wharfage and dockage fees.

Therefore, no matter how the cargo arrives at the Port, wharfage is assessed. It is undisputed that all users of the Port, with the exception of Hansen, pay wharfage.⁸⁴ In fact, both Mobil and Cementon, the two companies that share the use of Golf Pier, are assessed wharfage fees. Further, the record reflects that every company, even though they have and use their own pipelines, pay wharfage.⁸⁵ Indeed, wharfage would still be assessed even if it was vessel-to-vessel unloading on the wharf.⁸⁶ Since wharfage is assessed against all users, it cannot be said that this assessment of charges is unreasonable or discriminatory—every user, besides Hansen, is

⁸² Cementon Complaint, p. 6.

⁸³ Tr., p. 128 (Apr. 20, 2017).

⁸⁴ Tr., pp. 124-125 (Apr. 20, 2017).

⁸⁵ Tr., p. 145 (Apr. 20, 2017).

⁸⁶ Tr., p. 146 (Apr. 20, 2017).

assessed the wharfage fees. The only reason wharfage is not assessed against Hansen is because it was determined by a court that Hansen should not pay wharfage because it built its own wharf and privately owns it.

13. **Whether the Imposition of Wharfage Fees Encourages Anti-Competitive Practices**

Cementon maintains in its Complaint that the Port's assessment of wharfage fees against Cementon "inequitably raises Cementon's pricing and encourages anti-competitive practices."⁸⁷ There was testimony that Cementon does not pass the wharfage fees onto its customers.⁸⁸ There was also some testimony regarding Cementon receiving rent deferment from the Port, for approximately \$300,000.⁸⁹ And there was testimony that Cementon has about twenty-six (26%) of the market share.⁹⁰ It is unclear on these facts how the wharfage fees encourage anti-competitive practices.

Again, all users of the Port, except for Hansen, pay wharfage fees.⁹¹ No matter how the cargo arrives at the Port, wharfage is assessed. Wharfage is not assessed against Hansen is because it was determined by a court that Hansen should not pay wharfage because it built its own wharf and privately owns it. Indeed, it can be argued that should another company engage in the business of importing cement, it is likely that such a company would also be subject to wharfage fees.

Ultimately, the Port should not be in the business of implementing differing rates, or waiving such rates, based on the particular needs or profile of its users. The Port should

⁸⁷ Cementon Complaint, p. 6.

⁸⁸ Tr., p. 103 (Apr. 19, 2017).

⁸⁹ Tr., pp. 113, 115 (Apr. 19, 2017).

⁹⁰ Tr., p. 50 (Apr. 19, 2017).

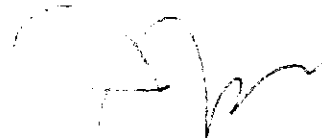
⁹¹ Tr., pp. 124-125 (Apr. 20, 2017).

implement such applicable rates fairly across the board. The only reason why Hansen is not assessed wharfage fees is that a court of law has made a determination based on the specific circumstances of Hansen's case, and its particular relationship with the Port. So unless a piece of legislation, or a court of law determines, and exempts certain users from being assessed wharfage, all users should be treated equally under the current rates of the Port's Terminal Tariff.

RECOMMENDATION

Based on the administrative record before the Commission, the ALJ recommends that the Commission find in favor of the Port, and that Cementon take nothing from its Complaint. Accordingly, the ALJ recommends dismissal of the instant Complaint. The ALJ further recommends that the administrative costs associated with the instant docket and proceedings be split evenly between the parties.

SO ORDERED this 30th day of August, 2017.



JOEPHET R. ALCANTARA
Administrative Law Judge

P173017.JRA