U.S. DEPARTMENT OF JUSTICE
Antitrust Division

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Rachel E. Dickon
Secretary
Federal Maritime Commission
800 North Capitol Street, NW
Washington, DC 20573-0001

Re: Puerto Nuevo Terminals, LLC, Cooperative Working Agreement, Amended FMC Agreement No. 201292-001

Dear Ms. Dickon:

The Antitrust Division of the United States Department of Justice ("Department") respectfully submits these comments in response to the filing of the amended Puerto Nuevo Terminals, LLC, Cooperative Working Agreement, No. 201292-001 ("Amended Agreement"), by Puerto Rico Terminals, LLC ("PRT") and Luis A. Ayala Colon Sucrs., Inc. ("Ayala"). *See* 85 Fed. Reg. 13161 (March 2, 2020).

Based on the Department's review to date, the Amended Agreement appears to be economically tantamount to a merger of PRT and Ayala's terminal operations in San Juan. The Department strongly urges the Commission to carefully scrutinize the Amended Agreement to determine whether the Commission has jurisdiction over the agreement under the Shipping Act of 1984 ("the Act"). If the Commission determines that it does have jurisdiction, the Department urges the Commission to consider carefully whether the Amended Agreement is narrowly tailored to achieve procompetitive benefits while limiting the risk of anticompetitive harm, and if the Amended Agreement is not so tailored, the Commission should seek to enjoin the agreement or require its modification.

If the Amended Agreement falls within the scope of the Act, the conduct covered in the Amended Agreement could enjoy total immunity from the U.S. antitrust laws. The

Department has long taken the position that the general antitrust exemption provided by the Act is no longer justified.[1] To the extent that agreements continue to be immunized under the Act, it is important for those agreements to be limited and precise, as it is well-settled that antitrust immunities should be construed as narrowly as possible.[2] In fact, Congress explicitly excluded from the Act "an acquisition by any person, directly or indirectly, of any voting security or assets of any other person." 46 U.S.C. § 40301(c). Pursuant to this section, mergers and acquisitions are outside the jurisdiction of the Commission and are not eligible for antitrust immunity.[3] The Commission should be wary of agreements that attempt to immunize conduct outside the scope of the Act by using legal formalities to obscure de facto mergers or acquisitions.

The original Cooperative Working Agreement filed by PRT and Ayala on March 27, 2019, enabled the parties to create the joint venture Puerto Nuevo Terminals, LLC ("PNT"). After review of that agreement, the Commission indicated it had not reached consensus as to whether it fell within the scope of the Act. Chairman Khouri stated that, in his judgment, the agreement as originally filed in effect sought to extend the protections of the Act to a de facto merger or acquisition in the guise of a joint venture.[4] The Commission should revisit Chairman Khouri's concerns and carefully scrutinize all relevant facts to determine whether the Amended Agreement is a de facto merger or acquisition that falls outside the scope of the Act.

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[1] *See, e.g.*, Letter from Renata B. Hesse, Acting Assistant Attorney General, to Secretary, FMC, Re: The OCEAN Alliance Agreement, at 2, FMC No. 012426, Sept. 19, 2016, https://www.justice.gov/atr/file/909131/download.

[2] *See, e.g.*, *Union Labor Life Ins. Co. v. Pireno*, 458 U.S. 119, 126 (1982) (antitrust exemptions must be construed narrowly); *Carnation Co. v. Pac. Westbound Conference*, 383 U.S. 213, 218 (1966) (the Shipping Act of 1916 does not exempt the entire shipping industry from the antitrust laws); *Otter Tail Power Co. v. United States,* 410 U.S. 366, 374 (1973) (narrowly construing antitrust exemptions in the Federal Power Act); *Group Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205, 231-32 (1979) (narrowly construing antitrust exemptions in the McCarran-Ferguson Act); *United States v. McKesson & Robbins, Inc.,* 351 U.S. 305, 316 (1956) (narrowly construing antitrust exemptions in the Miller-Tydings and McGuire Acts); *United States v. Borden Co.*, 308 U.S. 188, 198-200 (1939) (narrowly construing antitrust exemptions in the Agricultural Marketing Agreement Act).

[3] Section 40301(c) codifies the Supreme Court's decision in *FMC v. Seatrain Lines, Inc.*, 411 U.S.726 (1973), in which the Court rejected the Commission's argument that mergers and acquisitions fell within the scope of the Shipping Act of 1916.

[4] *See* Statement of Chairman Michael A. Khouri, Puerto Nuevo Terminals LLC Cooperative Working Agreement, FMC No. 201292 (Oct. 15, 2019), https://www.fmc.gov/statement-chairman-khouri-puerto-nuevo-terminals-llc/.

Based on the Department's review to date, the amendments made to the original agreement do not appear to change the nature of the agreement or any of the facts that led to Chairman Khouri's concerns. Specifically, the addition of language in Section 5.3 of the Amended Agreement, which provides for the continued operations of PRT at the Army Terminal at the Port of San Juan, is unlikely to change the underlying economic realities between the parties to the agreement. The Antitrust Division recognizes that joint ventures may "have competitive effects that are identical to those that would arise if the participants merged in whole or in part."[5] We treat such a joint venture as a horizontal merger and analyze it pursuant to the *Horizontal Merger Guidelines*.[6] Such analysis is particularly warranted where, as here, it appears that the joint venture partners are competitors in a relevant market, the integration on its face appears to eliminate all competition between them, and the collaboration does not terminate within a sufficiently limited period by its own specific and express terms.[7] The amendments do not appear to alter these facts, and so likely would not alter how the Department would analyze this joint venture under the antitrust laws.

If the Amended Agreement is outside the scope of the Act, the Department will investigate whether the Amended Agreement violates the antitrust laws and, if appropriate, act to protect competition and consumers.

If the Commission concludes that it does have jurisdiction over the Amended Agreement, the Commission should carefully scrutinize the potential competitive effects of the arrangement and ensure that it is narrowly tailored to achieve procompetitive benefits while limiting the risk of anticompetitive harm. The Department is aware of serious competitive concerns regarding the initial agreement raised by numerous parties. Commenters indicated that there would be little or no competition to PNT in the provision of terminal services to container vessels operated by international carriers at the Port of San Juan. Such concerns are worthy of close consideration. The Department believes that the Amended Agreement does nothing to mitigate the potential anticompetitive effects of the joint venture, as the amendments do not appear to change the fact that PRT and Ayala will no longer compete independently in the future.

Carriers, their customers, and all consumers benefit from vigorous competition in the shipping industry, including among marine terminal operators. The Commission, through the enforcement of the Act, and the Department, through the enforcement of the antitrust laws, both play an important role in protecting competition in the shipping industry. The Commission should rigorously police its jurisdiction and prevent the Act's antitrust immunity provisions from being used improperly to insulate conduct outside the

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[5] Fed. Trade Comm'n & U.S. Dep't of Justice, *Antitrust Guidelines for Collaborations Among Competitors,* § 1.3 (2000), *available at* https://www.ftc.gov/sites/default/files/documents/public_events/joint-venture-hearings-antitrust-guidelines-collaboration-among-competitors/ftcdojguidelines-2.pdf.
[6] *Id.*
[7] *Id.*

scope of the Act. To the extent that the Commission concludes that the Amended Agreement is immune from the antitrust laws, it is especially important that the Commission rigorously scrutinize the agreement to ensure that it does not harm competition.

Sincerely,

Makan Delrahim