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BEFORE THE
FEDERAL MARITIME COMMISSION

In Re: **LOS ANGELES/LONG BEACH PORT/TERMINAL OPERATOR ADMINISTRATION AND IMPLEMENTATION AGREEMENT**	**FMC AGREEMENT No. 201178**

COMMENTS OF THE INTERMODAL MOTOR CARRIERS CONFERENCE, AMERICAN TRUCKING ASSOCIATIONS

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I. SUMMARY AND INTRODUCTION

The Intermodal Motor Carriers Conference ("IMCC") of the American Trucking Associations ("ATA") files these Comments in Response to the Federal Maritime Commission's ("FMC") February 21, 2008 *Federal Register* Notice in the above-captioned matter.[1] Simply put, the Los Angeles/Long Beach Port/Terminal Operator Administration and Implementation Agreement ("the Agreement"), in significant part, represents an effort by the Cities of Los Angeles and Long Beach ("the Cities") to enlist tenant Marine Terminal Operators at their respective ports ("the Ports") as the day-to-day enforcers of an unlawful "concession" mechanism—a scheme unnecessary to achievement of the important environmental goals underlying the Ports' Clean Air Action Plan ("CAAP").

[1] 73 *Federal Register* 9569 (2008).

Through use of concession contracts, the Cities attempt to evade direct federal preemption, under 49 U.S.C. § 14501(c), of local regulation of the routes and services of licensed motor carriers. The Agreement would enlist the Ports' tenant marine terminal operators ("MTOs") as enforcers of this unlawful mechanism. More specifically, paragraph 5.1(e) authorizes the parties to discuss (and under paragraph 5.3 enter into contracts related to): "criteria and procedures to be used to determine the right of admission or non-admission of trucks, cargo, or equipment to any and all terminals at the ports..." ("the blockade provisions").

In so doing, the blockade provisions of the Agreement would sanction conduct by the parties that is "unreasonable" under the Shipping Act. Individual elements of the concession mechanism are also violative of Shipping Act prohibitions. Consequently, the Commission must use its Shipping Act powers[2] to request more detailed information regarding the nature, operation, legality, and impact of rules to be enforced through the blockade provisions. Following receipt of that information, the Commission must reject the Agreement, with the proviso that it may be resubmitted once its unlawful provisions are removed.

In making this request, the IMCC notes that on February 19, 2008, the Long Beach Harbor Board approved resolutions implementing its version of the clean trucks component of the CAAP without egregious conditions that would exclude owner-operator drayage trucks from the port. Nevertheless, the Los Angeles Harbor Board has not yet acted, and we have reason to believe that the Los Angeles Board may include restrictive provisions regarding owner-operators in their concession program.

[2] 46 U.S.C. § 40304(d).

Finally, in reviewing this matter, it is important for the Commission to keep in mind that the proposed concession mechanism addresses a problem actively being addressed by California environmental agencies. Under regulations adopted by the California Air Resources Board ("CARB") on December 7, 2007, drayage trucks serving California's ports and intermodal rail yards must meet certain clean air objectives, with a final goal of requiring all port diesel trucks to meet 2007 standards by December 31, 2013 (with interim deadlines). On February 28, 2008, CARB adopted guidelines for the distribution of $400 million in public funds for state-local programs to upgrade or replace port and rail yard trucks. The Ports of Los Angeles and Long Beach expect to participate in these efforts. Under the CARB guidelines, the funds MUST be used to achieve early compliance with the guidelines—*in many cases sooner than the Ports' own compliance deadlines.* Thus, participation in the CARB program—as the Ports plan to do—would result in achievement of Ports' clean air objectives without the need for an unlawful concession program at all.

It is their *Cities'* misguided efforts to change the business model of the port trucking industry that has led the Ports' pending adoption of an unlawful concession program—to be enforced by tenant MTOs—and thus potentially to precipitate litigation that would delay the replacement of dirty drayage trucks, an achievement that the Ports claim is their highest priority. Consequently, by facilitating an early resolution of the issues, the Commission's expeditious rejection of the Agreement in its current form should lead to a more rapid transition to clean drayage trucks, as well as to promote the ultimate legality of the Ports' conduct under the Shipping Act.

II. THE INTEREST OF THE IMCC AND ITS MEMBERS

The IMCC is an affiliated conference of the ATA. The ATA is the non-profit national trade association for the trucking industry established as a federation of affiliated state trucking associations, conferences and organizations that includes more than 37,000 motor carrier members representing every type and class of motor carrier in the country. The IMCC provides educational and training services to the intermodal motor carrier members of the ATA, as well as representing the interests of these members in a broad range of federal, state, local and industry policy forums. Numerous IMCC members provide drayage services to and from the Ports of Los Angeles and Long Beach.

Since the adoption of the CAAP by the Ports in November 2006, the IMCC and its members have worked cooperatively and constructively with the Ports' staff members to develop methods of upgrading or replacing the most "dirty" of the diesel trucks in port drayage service in a manner that actually could be accomplished by the motor carrier industry. For this reason, the IMCC and its members have viewed with increasing concern the introduction into the CAAP of a different agenda whose implementation by the Ports would lead to a disruption of commerce at the Ports as well as to disruption of the port trucking industry itself: the transformation of the port drayage industry.

In October 2007, the IMCC wrote to the Commission, setting out its concerns regarding the Ports' use of a mandatory concession mechanism focused on changing the port drayage business model. In that letter, the IMCC urged "that the Commission, through its powers of persuasion and enforcement should take an immediate and active oversight role in this critical national policy debate." The filing of the Agreement has

placed the concession issue expressly on the Commission's agenda and we believe that the situation is now ripe for constructive Commission intervention.

III. THE CURRENT STATUS OF THE LOS ANGELES/LONG BEACH CONCESSION MECHANISM

Port drayage operates today under a competitive, open-entry business model based on a motor carrier's business choice to use employee-drivers, trucks driven by independent owner-operators under contract, or a combination of both. As initially proposed by the Ports,[3] the current business model would be replaced by a restrictive "concession" system in which the right to dray cargo containers to and from the Ports would be limited to motor carriers with whom the Ports had entered into contractual concession agreements that required, among other things:

- Employee drivers (after a transition period)
- A preference for existing owner-operators as drivers under the employee-only requirement
- Use of trucks that comply with the Port's clean trucks standards
- Implementation of maintenance and training programs approved by the Ports
- Participation in Los Angeles/Long Beach city workforce development initiatives.

At present, the final form of the concession program is uncertain, in particular whether it will contain an employee-driver only mandate—a question that apparently depends on how Long Beach and the mayor of Los Angeles resolve their differing

[3] Port of Los Angeles and Port of Long Beach, "San Pedro Bay Ports Clean Air Action Plan, Proposed Clean Trucks Program Fact Sheet" (May 31, 2007).

perspectives on the subject.[4] Nevertheless it is clear that the Ports will adopt some form of restrictive concession system, limiting entry into the Ports only to licensed motor carriers that enter into multi-year concession contracts jointly with the cities of Los Angeles and Long Beach. The plan adopted by Long Beach on February 19, 2008, requires that concession holders, among other things:[5]

- Pay a one-time fee of $250, plus an annual fee of $100 per truck
- Give preference to drivers with previous drayage service at the ports
- Provide proof that health insurance was made available to all its drivers
- Agree to scheduled maintenance
- Meet Port "clean truck" standards
- Comply with a schedule of indemnification and insurance requirements and a schedule of reporting and audit requirements.

As preliminary steps in the adoption of the concession mechanism, in November 2007, the Harbor Boards of both Ports adopted "Clean Truck" standards as amendments to their respective harbor tariffs that excluded "dirty" trucks from the Ports on the following schedule:[6]

- Ban pre-1989 trucks from Port service by 10/1/2008
- Ban 1989-1993 trucks from Port service by 1/1/2010

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[4] See, e.g., "Long Beach wants LA to drop employee-driver mandate," *Journal of Commerce Online* (February 27, 2008) ("[Long Beach Mayor Bob] Foster said only one significant issue divides the ports. Los Angeles, at the insistence of Mayor Antonio Villaraigosa, will issue port concessions and provide subsidies only to licensed motor carriers with employee drivers.")

[5] Port of Long Beach, "Clean Trucks Program Fact Sheet" (February 25, 2008); Draft "Concession Agreement for Access to the San Pedro Bay Ports" (Long Beach version, February 14, 2008).

[6] Port of Long Beach and Port of Los Angeles, "Los Angeles and Long Beach Harbor Commissions Approve Clean Trucks Tariff" (Press Release, November 8, 2007).

- Ban unretrofitted 1994-2003 trucks from Port service by 1/1/2010
- Ban trucks not meeting 2007 emissions standards from Port service by 1/1/2012.

Further, in December 2007, the Ports each adopted a "Clean Trucks Fee" of $35 per loaded TEU not moving by train, to be assessed against beneficial cargo owners, to help fund the upgrade or replacement of trucks not meeting the above standards.[7] Finally, on February 19, the Port of Long Beach adopted a program of financial assistance, intended to be funded in part by the Clean Trucks Fees and funds provided by CARB, to replace or upgrade trucks not meeting the Clean Truck standards. Plan options include:[8]

- A lease-to-own program
- An up-front grant for purchase
- An upfront-grant for retrofit.

The first two options include prepaid maintenance.

IV. LOS ANGELES' AND LONG BEACH'S USE OF DRAYAGE CONCESSION CONTRACTS TO LIMIT ENTRY INTO THEIR PORTS IS PREEMPTED BY FEDERAL LAW.

A. The Supreme Court's February 20, 2008 Decision in *Rowe v. New Hampshire Motor Transport Association* Underscores the Preemption of the Drayage Concession Mechanism.

Under 49 U.S.C. § 14501(c)(1), states and their political subdivisions may not enact laws or regulations "related to a price, route, or service" of motor carriers of property, with only narrow exceptions concerning, e.g., traditional state motor carrier safety requirements. At present, all California-based and interstate motor carriers may

[7] Port of Long Beach, "Commission Approves Cargo Fee to Fund Clean Trucks" (Press Release, December 17, 2007); Port of Los Angeles, "Port of Los Angeles Harbor Commissioners Follow Long Beach Vote and Approve Clean Trucks Fee" (Press Release, December 20, 2007).

[8] Port of Long Beach, "Clean Trucks Program Fact Sheet" (February 25, 2008).

provide drayage services to the Ports using any truck lawfully on the roads of California, and may use independent-owner operators under contract, employee-drivers, or a combination of each to provide drayage services.

The adoption by the cities of Los Angeles and Long Beach of a requirement prohibiting motor carriers from serving the largest port complex in the United States unless and until those carriers sign multi-year contracts with the cities—containing such contractual conditions as the cities may, from time-to-time, see fit to include—directly affects the routes licensed motor carriers may serve as well as they services they may provide (i.e., port drayage). Further, independent owner-operators individually may apply to be licensed motor carriers under California law.[9] Consequently, a requirement that only employee-drivers of concession holders be able to serve the ports also directly would affect the services that such licensed owner-operators could provide, since the cities' requirement would prevent them from providing the service of subcontracting with concession holders. In short, because the concession mechanism directly and materially affects the routes and services of licensed motor carriers, preemption is required.

The Supreme Court's recent decision in *Rowe v. New Hampshire Motor Carriers Association* makes clear that even a genuine public health and welfare motive behind a restriction on routes and services will not save a route-and-service restriction from preemption. The *Rowe* case involved Maine tobacco-delivery regulations that effectively required motor carriers to provide a special kind of "recipient-verification" service regarding certain packages that contained tobacco products. In determining whether those provisions were preempted, the Supreme Court began by explaining the scope of

[9] California Vehicle Code § 34624.

the federal preemption provision. Relying on its prior interpretation of an identical Airline Deregulation Act preemption statute, the Court found that state requirements are preempted if they have "'a connection with, or [make] reference to' carrier 'rates, routes, or services.'" Slip. op. at 4. The Court further explained that preemption may occur even if the effect of a state law "is only indirect" if that effect has a "significant impact" on carrier rates, routes, and services. In fact, the Court noted that a regulation would have a significant impact unless its effect on a carrier was "tenuous, remote, or peripheral." *Ibid.* at 4-5.

Finally, the Court also described Congress' purpose behind the preemption provision as ensuring that motor carrier rates, routes, and services "reflect 'maximum reliance on competitive market forces,' thereby stimulating 'efficiency, innovation, and low prices,' as well as 'variety' and 'quality.'" *Ibid.* at 5 (citation omitted). The Court further noted that the result the preemption provision sought to eliminate was "a State's direct substitution of its own governmental commands for 'competitive market forces' in determining (to a significant degree) the services that motor carriers will provide." *Ibid.* at 6 (citation omitted). In rejecting the existence of a public health purpose as a justification for allowing Maine's restriction to stand, a *unanimous* Court stated:

> Maine's primary arguments focus upon the *reason why* it has enacted the provisions in question. Maine argues for an exception from pre-emption on the ground that its laws help it prevent minors from obtaining cigarettes. In Maine's view, federal law does not pre-empt a State's efforts to protect its citizens' public health, particularly when those laws regulate so dangerous an activity as underage smoking.
>
> Despite the importance of the public health objective, we cannot agree with Maine that the federal law creates an exception on that basis, exempting state laws that it would otherwise pre-empt. The Act says nothing about a public health exception. To the contrary, it explicitly lists a set of exceptions (governing motor vehicle safety, certain local route controls, and the like), but the list says nothing

> about public health. See 49 U. S. C. §§14501(c)(2) to (c)(3).... Maine suggests that the provision's history indicates that Congress' primary concern was not with the sort of law it has enacted, but instead with state "economic" regulation. ... But it is frequently difficult to distinguish between a State's "economic"-related and "health"-related motivations ... and, indeed, the parties vigorously dispute Maine's actual motivation for the laws at issue here. Consequently, it is not surprising that Congress declined to insert the term "economic" into the operative language now before us, despite having at one time considered doing so. Slip Op. at 7-8.

The history of the concession mechanism demonstrates the true purpose of the Cities' concession scheme is to undertake "economic" regulation of the drayage trucking business model. Nevertheless, under *Rowe*, that elements of the concession contract are intended to affect public health (e.g., clean air, availability of health insurance to drivers) or welfare (e.g., employee income or workforce development) simply cannot overcome the fact that the concession mechanism *inherently* is direct local regulation of motor carrier routes and services and is thus preempted.[10]

B. The Ports' Status as Proprietary Departments of Their Respective Cities Does Not Save The Concession Mechanism From Preemption.

It is IMCC's belief that the Ports may attempt to rely on their status as proprietary departments so as to immunize their cities' concession mechanisms from preemption. For example (and presumably at the behest of the Ports), CARB's resolution adopting its state-level clean drayage truck plan asserts: "public ports retain certain 'proprietary powers' as trustee owners, and public entities have been recognized by the state and

[10] It might be argued that the maintenance requirement of the draft concession agreement could fall under the "safety" exception to preemption. But that single element could hardly justify the entire concession mechanism, particularly in view of the fact that most, if not all, independent-owner operators and smaller motor carriers would seek financial assistance from the Ports to replace or upgrade non-conforming trucks. As noted in Section III, financial assistance programs, such as that adopted by Long Beach, are likely to include pre-paid maintenance services.

federal courts as having authority to contract or engage in other activities as market participants."[11]

However, 49 U.S.C. § 14501(c)(1) contains no "proprietary powers" exception for ports or other such entities with respect to motor carriers of property. In contrast, Congress expressly authorized *passenger* terminal operators to enter into concession-type arrangements, providing that nothing in § 14501's provisions preempting state and local regulation of certain passenger motor carriers should be construed "as prohibiting or restricting an airport, train, or bus terminal operator from contracting to provide preferential access or facilities to one or more providers of pre-arranged[12] ground transportation service." 49 U.S.C. § 14501(d)(3)(B). Presumably, Congress would not have added this proviso unless it believed "proprietary" public terminals would otherwise have been preempted by the statute from establishing concession arrangements.

Further, the Ports' concession mechanism cannot escape preemption through application of the judicial "market participant" exception to preemption statutes. In essence, this doctrine provides that federal preemption occurs only when a local agency operates in a "regulatory" capacity, rather than as a market actor. More specifically, the market participant doctrine limits preemption in two circumstances:[13]

> First, state action is proprietary if it "essentially reflect[s] the [governmental] entity's own interest in its efficient procurement of needed goods and services, as measured by comparison with the typical behavior of private parties in similar circumstances." ... Second, state action is proprietary if "the narrow scope of the challenged action defeat[s] an inference that its primary goal was to encourage a

[11] California Air Resources Board, Resolution 07-58, at 9 (December 7, 2007).
[12] The federal government neither regulates taxicab service nor prevents state or local governments from doing so. See 49 U.S.C. § § 14501(a)(1)(A), 14501(d)(3)(A)
[13] *Engine Manufacturers Association v. South Coast Air Quality Management District,* 498 F. 3d 1031, 1041 (9th Circuit, 2007) (citations omitted, emphasis added).

> general policy rather than address a specific proprietary problem." ...Thus, the doctrine also "protects narrow spending decisions that do not necessarily reflect a state's interest in the efficient procurement of goods or services, but that also *lack the effect of broader social regulation.*"

Particularly careful scrutiny of the challenged action is required in applying the market participant doctrine in the specific context of § 14501(c)(1): "In analyzing this exception, it is vital to examine the substance of the transaction because 'a city may not use the guise of privity of contract to conduct otherwise forbidden regulatory activity.'"[14]

Because the concession mechanism does not involve the Ports' procurement of goods or services, the first prong of the market participant test is inapplicable. With respect to the second, it is apparent that the cities of Los Angeles and Long Beach do *not* intend that the Port's concession mechanisms "address a specific proprietary problem" of the Ports but, rather, that the concession contracts "effect broader social regulation" objectives such as the income and health care situation of truck drivers. Thus, the proposed concession mechanism falls outside the scope of the market participant doctrine.

Finally, and most significantly for the Commission, the Commission's jurisdiction over the Ports and its tenants arises precisely *because* the parties to the Agreement are regulated as "marine terminal operators" under the Shipping Act, regardless of their public or proprietary status. The Commission, of course, is not charged with the direct enforcement of 49 U.S.C. § 14501(c)(1). Rather, as analyzed in the next section, the Commission is charged with determining the lawfulness of the Agreement as an enforcement tool for the Los Angeles/Long Beach concession mechanism by reference to

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[14] *Tocher v. City of Santa Ana,* 219 F.3d 1040, 1049 (9th Cir., 2000) (citations omitted) (city tow truck permitting scheme subject to preemption; city rules for acceptance to "rotational list" for providing contractual towing services to the city fall within market participant exception).

the Shipping Act and Commission precedents. Those precedents require that an MTO's violation of the terms of § 14501(c)(1), which is an element of national transportation policy, be a key factor in judging legality under the Shipping Act.

V. THE COMMISSION MUST REJECT THE AGREEMENT IN ITS PRESENT FORM AS AUTHORIZING MTOs TO ENGAGE IN AN UNLAWFUL "BLOCKADE" OF PORT DRAYAGE OPERATORS.

A. Implementation of the Concession Mechanism Would Violate the Shipping Act By Excluding Motor Carriers With a Lawful Right to Enter the Ports.

Multiple provisions of the Shipping Act govern the pending Los Angeles/Long Beach port concession mechanism. First, 46 U.S.C. § 41102(c) directs that a marine terminal operator "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." The Commission expressly has held that this provision governs rules affecting the intermodal interchange of containers at ports and their ultimate delivery to shippers.[15] The Commission has summarized and affirmed its precedents regarding predecessor Shipping Act provisions currently codified in § 41102(c):[16]

> Section 17 requires that the practices of terminals be just and reasonable. "Reasonable" may mean or imply "just, proper," "ordinary or usual," "not immoderate or excessive," "equitable," or "fit and appropriate to the ends in view." Black's Law Dictionary, Fourth Edition. It is by application to the particular situation or subject matter that words such as "reasonable" take on concrete and specific meaning. As used in section 17 and as applied to terminal practices, we think that "just and reasonable practice" most appropriately means a practice *otherwise lawful* but not excessive and which is fit and appropriate to the end in view.

[15] *Petition of the Association of Bi-State Motor Carriers,* 30 SRR 104 (2004).
[16] As quoted in *Ceres Marine Terminal v. Maryland Port Administration,* 27 SRR 1251, 1274-75 (1997) (citations omitted, emphasis added).

Rules adopted by the Ports that interfere with the ability of shippers and ocean carriers to contract with motor carriers of their choice to dray cargo containers directly implicate the federal interest in promoting the free movement of international trade that is embodied in Commission's Shipping Act mission. Actions by Los Angeles and Long Beach that burden the flow of this commerce falls precisely within the purposes articulated by Congress in enacting 49 U.S.C. § 14501(c)(1). In analyzing the law that became § 14501, Supreme Court observed:

> [I]n the Act itself Congress reported its finding that "the regulation of intrastate transportation of property by the States" unreasonably burdened free trade, interstate commerce, and American consumers. ... Congress therefore concluded that "certain aspects of the State regulatory process should be preempted." [17]

And, in *Rowe, supra,* the Court emphasized the broad scope of that preemption. Consequently, because the pending concession mechanism violates the express prohibitions and purposes of § 14501(c)(1), MTO rules and practices that implement and enforce the concession mechanism cannot be "reasonable" within the meaning of the Shipping Act.

Second, 46 U.S.C. § 41106(2) prohibits MTOs from imposing "any undue or unreasonable prejudice or disadvantage with respect to any person." Clearly, specific provisions of the proposed concession contracts would violate this prohibition (if not the overall concession mechanism, itself). For example, Los Angeles' concession contract would exclude from access to its port the class of motor carriers who utilize the services of independent owner-operators. Under FMC precedent, it is "unreasonably prejudicial" to treat particular entities differently just because they are members of a different class of applicant, without regard to the specific situation of each. For example, the Commission

[17] *City of Columbus vs. Ours Garage and Wrecker Service, Inc.,* 536 U.S. 424, 440 (2002).

has held unlawful a practice in which a public MTO granted certain preferential lease terms to ocean carriers, but not to tenant marine terminal operators, based on the supposition that ocean carriers could guarantee more traffic than terminal operators:

> MPA offered no reason other than Ceres' status as an MTO as justification for refusing Ceres the Maersk lease terms. ... In order to differentiate between port users and offer favorable lease terms to some users and not to others, however, the port must ensure that any such differentiation is reasonable, based on the particular facts and circumstances of potential lessees. *Status alone is not a sufficient basis by which to distinguish between lessees.*[18]

A concession rule prohibiting motor carriers who contract with owner-operators from serving the Ports would violate the holding that "status alone" is insufficient grounds for prejudicial treatment. Such a rule would, for example, exclude motor carriers using independent owner-operators operators from the Ports' facilities even in circumstances in which the motor carriers' contract owner-operators operated diesel trucks that were operating in compliance with emissions standards and were fully maintained.

Third, a concession mechanism that excluded categories of motor carriers from the ports would violate 46 U.S.C. § 41106(3)'s prohibition against MTOs "unreasonably refus[ing] to deal or negotiate." For example, the Commission has upheld an administrative law judge's use of a "reasonable transportation-related factors" test in assessing a port's refusal to allow the complainant to use various port facilities:

> The ALJ found that the Shipping Act does not guarantee "the right to enter into a contract, much less a contract with any specific terms. . .[A]ll that is required is that ... *MTOs refrain from 'shutting out' any person for reasons having no relation to legitimate transportation-related factors.*" ... After a review of the

[18] *Ceres Marine Terminal, Inc, v. Maryland Port Administration* 27 SRR 1251, 1273 (1997) (emphasis added).

record, we believe that although NOS was "shut out," it was done for legitimate, transportation-related reasons.[19]

Unlike the outcome in that case, however, the "shutting out" of motor carriers using independent owner-operators would not be—and under the policies behind 49 U.S.C. § 14501 cannot be—for "legitimate transportation-related factors." Rather, for example, Los Angeles' pending concession mechanism's objective is to eliminate the independent owner-operator business model from port service *regardless of the negative impacts of such requirements* on transportation services provided by drayage operators to shippers and on the overall flow of container commerce through the Ports.

B. The Agreement Has an Intent and Effect of Enlisting Tenant MTO's in an Unlawful Blockade of Motor Carriers to The Detriment of the Flow of Container Commerce.

From IMCC's perspective, the key offending provisions of the Agreement are contained in paragraph 5.1(e), which, among other elements, authorizes the Ports and its tenant MTOs to discuss (and under paragraph 5.3, enter into contracts related to): "criteria and procedures to be used *to determine the right of admission or non-admission of trucks*, cargo, or equipment *to any and all terminals at the ports*...." (Emphasis added). Clearly, this provision is intended to authorize Los Angeles and Long Beach to enlist tenant MTOs as enforcers of its unlawful concession mechanism by using the MTOs to block the entry into the Ports of motor carriers who will not agree to its unlawful concession requirements. The situation is thus analogous to the statute struck down by the Supreme Court in *Rowe* by which Maine unlawfully "sought to enlist the motor

[19] *New Orleans Stevedoring Co. v. Board of Commissioners of the Port of New Orleans*, 29 SRR 1066, 1070 (2002, emphasis added).

carrier operators as allies in its enforcement efforts" to restrict under-age smoking.[20] Here, the cities seek to enlist MTO's "as allies in its enforcement efforts" to change, in whole or part, the open, competitive business model under which the drayage business operates pursuant to federal deregulation mandates.

Implementation of the proposed collective MTO blockade promises severely to disrupt container commerce at the Ports. The availability of drayage trucks and operators is already under stress: implementation of the transportation worker identification credential ("TWIC") program has already begun at the Ports.[21] The Ports' own consultant estimates that 15-22 percent of existing port drayage drivers will be ineligible for a TWIC card.[22] This situation undoubtedly will lead to driver shortages and disruptions as the TWIC program becomes mandatory. Implementation of a concession program, particularly one containing owner-operator restrictions, potentially will exclude from the Ports hundreds of motor carriers and thousands of owner-operator drivers and their trucks. Finally, if not carefully synchronized with the availability of funding and replacement equipment, physical exclusion of drayage diesels not meeting the Ports' "clean truck" standards—even if lawful under CARB's state-wide drayage truck rules—will lead to yet another layer of transportation shortage and disruption of container traffic at the Ports.

Cumulatively, then, the blockade provisions of the Agreement threaten complete disruption of container traffic at the Ports. Failure of the Commission to act now, in

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[20] Slip Op. at 10.

[21] Transportation Security Administration, "DHS Agencies Announce Date for TWIC Program Enrollment at LA/Long Beach" (Press Release, December 12, 2007).

[22] John H. Husing, et. al., *Economic Analysis- Proposed Clean Truck Program,* at iii (September 7, 2007).

favor of awaiting the creation of an actual crisis at America's largest port complex, due to unlawful exclusion of motor carriers—compounded by TWIC implementation-driven driver shortages—is in the interest neither of the Commission nor of any of its stakeholders.

C. Commission Review of the Agreement at the Present Time Will Facilitate, Not Delay the Clean-Up of Port Drayage Diesel Trucks.

Close scrutiny of the Agreement by the Commission—including finding illegal the Los Angeles/Long Beach concession mechanism—need not have a negative effect on the removal of "dirty" diesel trucks from port drayage service. Insofar as the concession mechanism purports to be premised on the need to ensure the rapid retrofit/replacement of the most-polluting trucks, the concession mechanism addresses a problem that is already being solved. The state of California has adopted deadlines for removing the most polluting drayage trucks from service, and a funding mechanism to ensure those trucks are replaced or retrofitted *well in advance* of those deadlines. The concession mechanism is not necessary to implement the state funding plans. Litigation over the concession mechanism will needlessly delay the Ports' ability to participate effectively in the state-sponsored funding mechanism.

More specifically, under regulations adopted by CARB on December 7, 2007,[23] drayage trucks serving California's ports and intermodal rail yards must meet two clean-air deadlines: (a) by December 31, 2009, all pre-1993 trucks are prohibited from port service and 1994-2003 trucks must be retrofitted with specified clean-air technology; and (b) by December 31, 2013, all trucks in port service must meet 2007 emission

[23] California Air Resources Board, Resolution 07-58, at 9 and B-6 (December 7, 2007).

standards.[24] However, on February 28, 2008, CARB adopted guidelines for the distribution of $400 million in public funds for state-local programs to upgrade or replace port and rail yard trucks.[25] The Ports of Los Angeles and Long Beach expect to participate in these efforts. Under the CARB guidelines, the funds MUST be used to achieve *early compliance* with the guidelines. For example, truck operators desiring replacement or repowering assistance to meet the December 31, 2013 CARB deadline would have to place their vehicles in service by December 31, 2011 for trucks owned by independent owner-operators and by December 31, 2010 for other trucks. These goals *exceed* the Ports' own time tables.

Thus, participation in the CARB program—as the Ports plan to do—would achieve the Ports' clean air objectives without the need for an unlawful concession program at all. It is the Ports' misguided efforts to imposed extraneous economic and social mandates on the trucking industry that has led them to attempt an unlawful concession program—and unnecessarily delay achievement of the precise environmental objectives they claim are their highest priority.

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[24] CARB's rules governing drayage diesel emissions apparently would survive preemption because they are the product of the federal-state partnership that establishes vehicle emissions standards under the federal Clean Air Act. See *Association of American Railroads v. South Coast Air Quality Management District,* 2007 WL 2439499 at 4-5 (C. D. Cal., 2007), *appeal pending,* Ninth Circuit Docket No. 07-55804.

[25] California Air Resources Board, "ARB approves funding targets for $1 billion from Proposition 1B" (Press Release, February 28, 2008); California Air Resources Board, *Proposition 1B: Goods Movement Emissions Reduction Program- Proposed Guidelines for Implementation,* at A-1 to A-3 (February 4, 2008).

D. After Investigation In this Proceeding, the Commission Should Act to Reject or Require Modification of the Agreement to Remove the Blockade Provisions.

Under 46 U.S.C. § 40304(d), the Commission has the authority to request further information from an agreement's applicants during the statutory post-filing review period. Under § 41302(a), the Commission "on complaint or its own motion may investigate any conduct or agreement that the Commission believes may be in violation of" Shipping Act prohibitions. Further, the Commission "may by order disapprove, cancel, or modify any agreement that operates in violation of" those prohibitions.

The IMCC believes that the interest of the shipping public would best be served if the Commission used its information gathering powers during the post-filing period to make its own assessment of the nature, purposes, and likely effect of the blockade provisions. If the Commission agrees that the blockade provisions will "operate in violation of" the Shipping Act by enlisting tenant MTOs as enforcers of Los Angeles' and Long Beach's unlawful motor carrier exclusions, it should so advise the Applicants and either reject the Agreement or advise the parties to refile the Agreement with appropriate modifications to the blockade provisions. By acting now, rather than awaiting institution of a post-effectiveness investigation, the Commission will help ensure that the interrelated steps needed successfully to clean-up drayage diesels in a timely fashion not be undercut as a result of Commission enforcement actions undertaken in mid-stream of the Clean Trucks Program's implementation.

To appropriately assess the scope, impact, and legality of the blockade provisions, the Commission should request the Agreement's applicants to provide information addressing issues such as the following:

1. The nature, context, and legal basis of each and every anticipated rule, regulation, or program that would give rise to a determination denying "the right of admission or non-admission of trucks, cargo, or equipment to any and all terminals at the ports."
2. The ability of other elements of the Agreement to accomplish the functions of the blockade provisions if they are eliminated from the Agreement.
3. The processes and procedures, if any, for obtaining the views of motor carriers and other stakeholders in establishing "the criteria and procedures to be used" in determining that "trucks, cargo, or equipment" be denied access to the Ports' terminals.
4. The methods and measurements that would be used, on an on-going basis: (a) to assess the impact of collective access denial to the Ports' terminals on the flow of container commerce through the Ports in general, and specific impacts on shippers, ocean carriers, and motor carriers; and (b) to determine the appropriate remedial measures, if any, to alleviate any identified harms.
5. The impact on container commerce at the Ports if the blockade provisions were removed from the Agreement.

VI. CONCLUSION

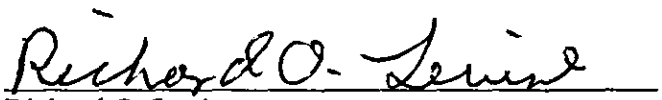
Under the express language of 49 U.S.C. § 14501(c)(1), and in light of the Supreme Court decision in *Rowe*, there can be no reasonable question but that the function of the blockade provisions of the Agreement is to enforce a concession

mechanism preempted by federal law. Prompt Commission action to remove the offending provisions from the Agreement would best serve the salutary goal of cleaning up drayage diesel trucks. Therefore, the Commission must promptly request that the applicants provide detailed information regarding the justification for, and operation of, the blockade provisions as set out above. At the conclusion of its inquiry, the Commission must: (a) either reject the agreement or require removal of that portion of paragraph 5.1(e) that authorizes the Ports and its tenant MTOs to discuss (and pursuant to paragraph 5.3 to enter into contracts related to): "criteria and procedures to be used to determine the right of admission or non-admission of trucks, cargo, or equipment to any and all terminals at the ports;" and (b) clarify that other elements of the Agreement cannot be used to a similar purpose and effect.

Respectfully submitted,

Curtis E. Whalen
Executive Director
Intermodal Motor Carriers Conference
American Trucking Associations
950 North Glebe Road, Suite 210
Arlington, VA 22203

By its Counsel:



Richard O. Levine
Stephen S. Anderson, Jr.
Constantine Cannon LLP
1627 Eye Street, N.W., Suite 1000
Washington, D.C. 20006
202-204-3511
rlevine@constantinecannon.com

March 3, 2008

CERTIFICATE OF SERVICE

I, Patricia O'Keefe, hereby certify that I have today, March 3, 2008, sent copies of the attached Comments of the Intermodal Motor Carriers Conference of the American Trucking Associations, by First Class mail, to:

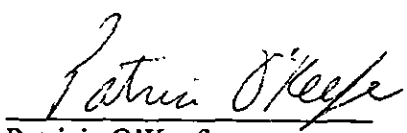
David F. Smith, Esq.
Sher & Blackwell LLP
1850 M Street, N.W.
Washington, D.C. 20036

Counsel for the West Coast MTO Agreement

And

C. Jonathan Benner, Esq.
Troutman Sanders LLP
401 9th Street, N.W.
Washington, D.C. 20004

Counsel for the Port of Los Angeles and the Port of Long Beach



Patricia O'Keefe