

Secretary

From: Secretary
Sent: Tuesday, October 14, 2008 3:53 PM
To: Joseph Brennan; Harold Creel; Rebecca Dye
Cc: Steven D. Najarian; David Miles; Edward L. Lee Jr.; Peter King; Cory R. Cinque; Karen Gregory; Austin Schmitt; Rachel Dickon; Florence Carr; Rebecca Fenneman; Vern Hill; Sandra Kusumoto; Michelle Harris; Tanga FitzGibbon
Subject: Senator Boxer letter to FMC Commissioners
Attachments: Oct 08 Boxer letter to FMC.pdf

Commissioners,

Attached is a letter from Senator Barbara Boxer that relates to the Commission's October 15, 2008 meeting, Closed Session - Item No. 1, FMC Agreement No. 201170-001, *LALong Beach Port Infrastructure & Environmental Cooperative Working Agreement*. This letter was received subsequent to public announcement of the Commission's October 15th meeting. Pursuant to 46 C.F.R. § 503.82(e), the Secretary will not accept comments or information pertaining to an item scheduled for consideration subsequent to public announcement of the meeting, unless the Commission permits a departure from this limitation. At tomorrow's meeting I will call for a Commission vote directing the Secretary to accept the attached letter for the Commission's consideration.

Please let me know if you have any questions or concerns. Thanks very much.

Karen

BARBARA BOXER
CALIFORNIA

RECEIVED

STATE OF CALIFORNIA
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10/14/08 3:54
FEDERAL MARITIME COMMISSION

United States Senate

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<http://Boxer.senate.gov/contact>

October 14, 2008

Commissioner Joseph Brennan
Commissioner Harold Creel, Jr.
Commissioner Rebecca Dye
Federal Maritime Commission
800 North Capitol Street, NW
Washington, DC 20573

Dear Commissioners:

It is my understanding that the Federal Maritime Commission (FMC) intends to hold a meeting Wednesday, October 15, 2008, to make a determination as to whether the Ports of Los Angeles and Long Beach's Clean Trucks Program is in violation of the Shipping Act. In formulating your decision, I ask that you consider the important economic benefits of the Clean Trucks Program and the negative impacts that an injunction would have on operations at the ports.

In 2007, 40 percent of the goods that entered into the United States came through the Ports of L.A. and Long Beach. Because trade through the two ports is expected to more than double by the year 2020, the ports must act now to increase capacity and reduce costly congestion. The Clean Trucks Program would allow the ports to progress with their infrastructure plan and expand to capacity by the period 2020-2030. This would create 300,000 to 600,000 new jobs.

As you know, over the past decade, the ports have been unable to expand because of legal challenges based on health and environmental concerns related to air pollution. The California Air Resources Board (CARB) estimates that particulate matter air pollution in the South Coast area causes approximately 5,400 premature deaths, 980,000 lost work days, 2,400 hospitalizations, 140,000 asthma and lower respiratory cases, and a significant increase in cancer risks.

On October 1, 2008, the ports implemented the first phase of the Clean Trucks Program without incident by removing the dirtiest pre-1989 trucks from service. Since the program was implemented, only a handful of out of state long haul trucks have arrived at either port without proper credentials. These few trucks were subsequently given day passes to allow them access to the ports resulting in virtually no impact on goods movement at either port. In fact, according to the ports, as of October 1, it is estimated that 14,215 trucks and 743 trucking companies have signed up for the program at the Port of Long Beach and over 15,000 trucks and 719 truck companies have signed up at the Port of Los Angeles.

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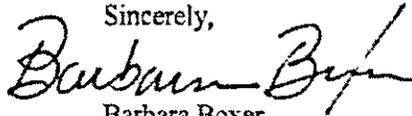
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Any interruption in the implementation of the Ports of L.A. and Long Beach's Clean Truck Program at this time would be disruptive and expensive to the ports and only lead to a compounding of transportation costs and disruption of commerce. In these tough economic times, I hope you will remember that the ports are an integral part of maintaining and expanding our economy, and we need to take appropriate steps to ensure their viability now and in the future.

Sincerely,

A handwritten signature in cursive script, appearing to read "Barbara Boxer".

Barbara Boxer
United States Senator

Michelle Harris

From: Matsuda, David (Lautenberg) [David_Matsuda@lautenberg.senate.gov]
Sent: Tuesday, October 14, 2008 5:14 PM
To: Michelle Harris
Subject: FW: Letter from Chairman Lautenberg
Attachments: FMC Ltr 10 14 08.pdf

<<FMC Ltr 10 14 08.pdf>>

-----Original Message-----

From: Matsuda, David (Lautenberg)
Sent: Tuesday, October 14, 2008 5:13 PM
To: 'secretary@fmc.gov'
Cc: 'dmiles@fmc.gov'; 'SNajarian@fmc.gov'; 'elee@fmc.gov'; 'jbrennan@fmc.gov';
'HCreel@fmc.gov'; 'rdye@fmc.gov'
Subject: Letter from Chairman Lautenberg

Hello- please find attached a letter from Senator Lautenberg, Chairman of the Senate Subcommittee on Surface Transportation and Merchant Marine Safety, Security, and Infrastructure. Feel free to contact me with any questions.

David Matsuda
Senior Counsel
202-224-3511

FRANK R. LAUTENBERG

NEW JERSEY

COMMITTEES:

APPROPRIATIONS

BUDGET

COMMERCE, SCIENCE, AND
TRANSPORTATION

ENVIRONMENT AND
PUBLIC WORKS

United States Senate

WASHINGTON, DC 20510

October 14, 2008

Rebecca F. Dye
Commissioner
Federal Maritime Commission
800 North Capitol St, NW
Washington, DC 20573

Harold J. Creel, Jr.
Commissioner
Federal Maritime Commission
800 North Capitol St, NW
Washington, DC 20573

Joseph E. Brennan
Commissioner
Federal Maritime Commission
800 North Capitol St, NW
Washington, DC 20573

Dear Commissioners Dye, Creel, and Brennan:

I write regarding recent actions by U.S. seaports to improve air quality, efficiency of maritime port operations, and accountability of companies doing business with the ports. Such programs, including the San Pedro Bay Ports' Clean Trucks Program, have laudable goals and could serve as national models for improving the efficiency and environmental impact of port operations throughout the country.

I am particularly pleased that the San Pedro Bay Ports' Clean Trucks Program in the Los Angeles/Long Beach region reflects the regional consensus of most of the nearby communities as well as the companies operating at these ports, and to the extent the Commission has played a role in facilitating this cooperation, I commend you.

While we must take steps to ensure improved air quality at our ports, I recognize the Commission has certain duties to identify and prevent certain uncompetitive practices by ports. The approach the Commission is currently taking appears to carefully balance these goals by continuing to exert jurisdiction over programs like Clean Trucks in a manner which will not unnecessarily delay or impede their implementation and the critical environmental benefits they will provide.

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I expect your continued vigilance and applaud the Commission's actions to allow programs like Clean Trucks to move forward. I ask that you keep my staff informed about the Commission's actions as you continue your oversight work.

Sincerely,

A handwritten signature in black ink that reads "Frank R. Lautenberg". The signature is written in a cursive style with a large, prominent "F" and "L".

Frank R. Lautenberg

Chairman

Subcommittee on Surface Transportation and
Merchant Marine Infrastructure, Safety, and
Security

Committee on Commerce, Science and
Transportation



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OCT 17 2008

FEDERAL MARITIME COMMISSION

October 17, 2008

Karen Gregory
Secretary
Federal Maritime Commission
Washington, DC 20573

RE: Agreement Number 201196 -- Los Angeles and Long Beach marine
Terminal Agreement

Dear Ms. Gregory:

I am writing on behalf of the Waterfront Coalition to provide comments on the above captioned agreement regarding the terms and conditions under which drayage trucks are permitted access to the ports of Los Angeles and Long Beach.

By way of background, the Waterfront Coalition is a group of concerned business interests representing shippers, transportation providers, and others in the transportation supply chain committed to educate policy makers and the public about the economic importance of U.S. ports and foreign trade, and to promote the most efficient and technologically advanced ports for the twenty-first century.

On October 1, 2008, the Ports of Los Angeles and Long Beach initiated a Clean Truck Program that has four major features: 1) It limits entry to container terminals to those licensed motor carriers that have been granted operating concessions by the ports; 2) By December 31, 2013, the Port of Los Angeles will additionally require all concession drivers to be employees of the licensed motor carrier; 3) The Port of Los Angeles has offered an incentive program for licensed motor carriers to become concessionaires; and 4) The ports will ban certain non-compliant trucks and will begin collecting container fees from beneficial cargo owners on such trucks. The revenues from this fee are to be used for the purpose of funding truck replacements. The fees are exempted in several cases, specifically for compliant trucks funded privately.

Our detailed comments on each of four key aspects of the Clean Truck Program, contained in the above referenced agreement, follow:

1. We do not believe that imposing concession requirements on licensed motor carriers is just, reasonable, or necessary to reduce air pollution at the Ports of Los Angeles and Long Beach.

P O R T M O D . O R G

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above captioned agreement are not just and reasonable because they go significantly beyond what is needed to achieve the purpose of reducing air emissions at the Ports of Los Angeles and Long Beach. We urge the FMC to strike them from the agreement.

2. We do not believe that eliminating independent contractors is just and reasonable.

The Port of Los Angeles has required that by December 31, 2013, licensed motor carriers use only employee drivers. It's hard to see how the use of employee drivers is related in any way to the goals of reducing air pollution. What is the difference between an independent contractor operating a clean truck and an employee driver operating the same truck? Absolutely nothing. The Shipping Act requires that an action or practice be reasonable and related to the ends in view. Requiring employee drivers is not reasonable by this standard.

Equally important, this requirements would put a number of independent owner-operators out of business. It is estimated that about 85% of the drayage industry is served by independent owner-operators working under contract for a licensed motor carrier. Some studies have predicted that those dislocated owner-operators will choose to work in other industries as opposed to working for a concessionaire licensed motor carrier. Many have suggested that a shortage of truck drivers, or a shortage of trucks could result. Putting independent contractors out of work, or requiring that they become employees is unjust.

For these reasons we ask the FMC to reject the employee requirements included in the above referenced agreement.

3. We have concerns about the incentive programs offered by the Port of Los Angeles

In August of 2008, The Port of Los Angeles announced an additional incentive program to encourage companies operating 2007 or newer compliant trucks to become concessionaries. They have offered a cash payment of \$20,000 for each 2007 EPA-compliant truck that is privately funded and committed to a minimum number of trips over a five-year period. The Port has also offered payments of \$10 per dray by compliant trucks if the truck achieves a minimum number of drays per year.

The Waterfront Coalition does not object to incentives. We have long believed that trucking companies can privately finance clean trucks, and that the need for public financing of these trucks has never been fully demonstrated. Indeed, private financing could free important sources of public bond money to be used on larger projects with useful lives more in keeping with 30-year financing.

Consequently we believe that providing incentives for trucking companies to privately finance clean trucks is, generally, an appropriate thing to do and could have significant taxpayer benefits. However, the Waterfront Coalition is concerned that the Port of Los Angeles has only offered this incentive to large, out-of-state, trucking companies, and has not been clear that this incentive is open to any concessionaire that meets the

requirements. Clearly if the Port picks and chooses who gets the incentive, then the incentive becomes another club used to limit competition and penalize independent contractors.

We are deeply concerned that the incentives, in conjunction with the concession requirements could result in the Port of Los Angeles getting into the business of choosing which firms it wishes to serve its terminals. That kind of manipulation of the market is unconscionable. It suggests that the concession program in the Port of Los Angeles could become a center of the worst kind of anti-competitive practices.

The FMC should require the Port of Los Angeles to provide incentives to any licensed motor carrier that meets a set of criteria. It should object to any program where the harbor commission or other political entities get in the business of choosing which companies get the incentives and which do not.

4. The Waterfront Coalition believes that Truck Mitigation Fee exemptions provided to privately funding compliant trucks are reasonable.

The Clean Truck Program includes a \$35.00/TEU fee to be paid by beneficial owner operators. Both ports have provided either full or partial exemptions from the fee for compliant trucks calling on the ports.

The Waterfront Coalition has long supported the goal of reducing air emissions from short-haul trucking at the ports of Los Angeles and Long Beach. Many of our members have been working diligently with their motor carriers to implement clean trucks with private sources of funding and in advance of the schedule laid out by the ports and anticipated by the California Air Resources Board. In addition, the Coalition has supported mitigation fees on non-compliant trucks, dating back to a position paper adopted by the group in March 2007. While we have preferred the imposition of state-wide standards and initially preferred a system of privately collected fees and private investment in trucks, the fact remains that we have not opposed the concept of levying fees on trucks that do not meet air emission standards. Indeed our members and the Coalition have tried to work with the ports to ensure that the mitigation fees send the right market signals to beneficial cargo owners.

The goal is to "recapture" the external costs imposed on the community by the movement of non-compliant trucks. It has been generally accepted that it is less expensive to move freight using an older, non-compliant truck, than it is to make the investment in a compliant truck. If the compliant truck uses an alternative fuel such as LNG, the costs of operating the truck are even higher.

So, in the absence of a market signal, carriers will make the switch to compliant trucks only as quickly as the truck ban requires it. However, the imposition of a mitigation fee has the potential to speed up the switch if it is carefully designed to send a useful and appropriate market signal to beneficial cargo owners. A well-designed fee can provide a powerful inducement for shippers to insist that their carriers use clean trucks.

The requirement by both ports that licensed motor carriers seek operating authority before being allowed to serve the ports is tangential to the goals of reducing air pollution. In our view these requirements are designed, not to limit pollution, but specifically to limit competition. The imposition of environmental standards, may reduce the number of truckers servicing the ports. But the imposition of the concession requirements is absolutely guaranteed to reduce the number of economic players in the market.

These requirements, in effect, establish a sanctioned oligopoly. Their impact will be to drive up shipping costs in a way that exceeds the costs of replacing older equipment with new, cleaner equipment.

The ports' own economic analysis makes this point. In a Port of Los Angeles-commissioned study, Dr. John Husing determined that concessions would act as a barrier to entry into the drayage market. Those remaining licensed motor carriers able to meet the obligations of a concession would be given a much greater share of the market and more negotiating power over rates. At a presentation of the study attended by representatives of the Waterfront Coalition, Dr. Husing extolled the virtues of limiting market entry because it would be the most effective way to drive up trucking rates and give truckers negotiating power over shipping rates.

In the end, the concession programs are sure to increase shipping costs. The Husing Study also found that, on average, licensed motor carriers will need to increase rates by 80% to meet the requirements of the concession (*page 74, San Pedro Bay Ports Clean Air Action Plan: Economic Analysis. September 2007. Dr. John Husing*). These rates, or a portion of these rates, paid by ocean carriers may be passed on to beneficial cargo owners through higher ocean transportation contract rates. These rate increases will have nothing, whatsoever, to do replacing old equipment.

Dr. Husing is not alone in the assessment that the concession plans will arbitrarily increase shipping costs and limit competition. Another study conducted by the Boston Consulting Group, also commissioned by the Port of Los Angeles, found that truck concessions would reduce competition for drayage services by consolidating the market into a smaller number of drayage providers able to meet the costly obligations of holding a concession.

The Waterfront Coalition is at a loss to understand why the imposition of bans on older trucks, the levying of direct mitigation fees on beneficial cargo owners, and the establishment of new trucking standards (all of which will increase shipping costs) is not sufficient to move the industry away from older trucks with higher air emissions. Why do the ports also need to limit market entrants in order to give a few trucking companies the ability to dictate trucking rates to ocean carriers, railroads and ultimately to the shippers represented by the Waterfront Coalition? Why should the port meddle in shipping rates and market entry at all?

The answer is clear: the ports do not need these requirements to meet the goals of the clean truck program. For this reason, we believe that the concession requirements of the

However, if both compliant and non-compliant trucks are assessed the same fee, the effect of the fee is the opposite of what might be intended, because it would make freight moves on compliant trucks even more expensive than they would otherwise be. The case for exemptions is demonstrated in the table below, using trucking costs that are generally reflective of actual rates:

Truck Type	Cost of Drayage	Mitigation Fee	Adjusted Cost
Non-compliant Truck	\$150	\$70	\$220
Compliant Diesel	\$200	\$70	\$270
Compliant Diesel	\$200	\$0	\$200
Compliant Diesel	\$200	\$35	\$235
LNG	\$230	\$0	\$230

In the example, imposing a \$70 fee on a compliant diesel makes that cargo move even more expensive than a move on a non-compliant truck. By exempting the clean diesel, however, a powerful market signal is created -- basically shippers will save money by moving their freight on a clean truck.

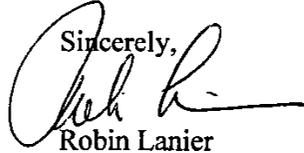
We believe that providing exemptions to the mitigation fee for compliant trucks is extremely important in achieving the clean air goals set out by the ports. We understand the Ports' insistence that only privately financed trucks receive this exemption, and we agree that such an exemption will have positive impacts in driving beneficial cargo owners to seek out trucking firms that privately finance their fleets. However, the economics of the exemption are clear: to the extent that imposing mitigation fees on publicly financed clean trucks makes them more expensive to operate, the ports may be creating an unintended market incentive to continue the use of non-compliant trucks.

For these reasons, we believe the exemptions are appropriate and reasonable. To the extent that they are extended to all compliant trucks, regardless of financing, they would provide an even more powerful incentive for carriers to make the switch to cleaner vehicles.

Conclusion

The Waterfront Coalition has long maintained that the ports of Long Beach and Los Angeles can achieve a fleet of clean burning harbor trucks without the unnecessary reduction in competition and service caused by concession programs. The elements of the Clean Truck Program that include a ban on older trucks, a standard for trucks calling at the harbor and the imposition of fees (with exemptions) should be sufficient to achieve the goals. The ports should not be arbitrarily designing programs to limit competition so as to further drive up shipping costs and limit market entry. We urge the FMC to take the appropriate steps to prohibit such activities.

If you have any further questions about the Waterfront Coalition or our views on the above referenced agreement, please contact me at 202-861-0825 ext 201.

Sincerely,

Robin Lanier
Executive Director

October 17, 2008

Federal Maritime Commission
800 North Capitol St. NW
Washington, DC 20573



CALIFORNIA TRUCKING ASSOCIATION

RE: FMC 201196

The California Trucking Association (CTA) is a non-profit trade organization representing over 3,000 trucking companies and suppliers operating in and out of California. CTA is one of the largest trucking organizations in the world, and represents a significant number of the intermodal trucking companies operating in the United States. It is because of this reason The CTA has an active interest in preserving the integrity of the drayage system within the Ports of Los Angeles and Long Beach. CTA is formally submitting these comments in response to the Federal Maritime Commission's (Commission) October 8, 2008 Federal Register notice surrounding FMC agreement No. 201196, the Marine Terminal Agreement By and Between the City of Los Angeles and Long Beach (Agreement).

The CTA is an affiliated organization of the American Trucking Association (ATA). CTA fully supports the comments of ATA's Intermodal Carrier's Conference (IMCC) and will offer these separate comments to encourage the Commission to eliminate the certain provisions of Agreement FMC No. 201196 outlined in the ATA comments.

Specifically, two separate provisions are at question; Section 4.1(I) that requires the Ports to blockade entry of drayage carriers without Concession Agreements and Attachment A which establishes minimum requirements for those Agreements. Both of these provisions need to be eliminated but done so in a way that does not hinder the progress of the infrastructure and environmental elements in the Agreement of which the IMCC and the CTA are not opposed.

CTA members have worked tirelessly to help establish emission and safety standards outside of the discriminatory Concession requirements outlined in the Clean Trucks Plan (CTP). The cities of Los Angeles and Long Beach ignored all efforts by the ATA and CTA to come to a fair agreement that accomplished the ports environmental goals without violating federal statute.

The Agreement in its current form is unlawful; the concession requirements of the CTP violate the principles that underline the obligations established under the Shipping Act section 6. There is no question in the collective mind of CTA that these specific provisions of the Agreement will in effect "produce an unreasonable reduction in transportation service or an unreasonable increase in transportation cost" These specific provisions run counter to the spirit of free, unrestrained trade. CTA supports Commission actions to fulfill its responsibilities under section 6 and act expeditiously to ensure that these Concession-related provisions are indeed removed from the Agreement, while also ensuring that the infrastructure and environmental elements of the Agreement proceed unhindered.

Sincerely,

Eric Sauer, Vice President Policy Development
California Trucking Association

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ECON & AGRIC ANAL



National Association of Waterfront Employers

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October 20, 2008

Karen V. Gregory, Secretary
Federal Maritime Commission
Room 1046
800 North Capitol Street, NW
Washington DC 20573

Re: Marine Terminal Agreement by and between the City of Los Angeles and the City
of Long Beach
FMC Agreement No. 201196, September 30, 2008

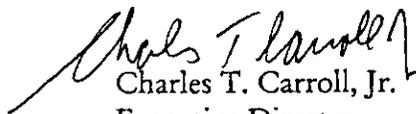
Dear Ms. Gregory:

Attached are the original and 10 copies of comments written on behalf of the National Association of Waterfront Employers on the above referenced FMC Agreement. Included with the comments is the Declaration of John M. Holmes.

A copy of the attached comments was sent by First Class Mail to:

Matthew J. Thomas, Esq.
Troutman Sanders LLP
401 Ninth Street, NW
Suite 1000
Washington, DC 20004

Sincerely,


Charles T. Carroll, Jr.
Executive Director



National Association of Waterfront Employers

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CERTIFICATE OF SERVICE

I hereby certify that on October 20, 2008 a copy of the attached comments of the National Association of Waterfront Employers was sent by First Class Mail to:

Matthew J. Thomas, Esq.
Troutman Sanders LLP
401 Ninth Street, NW
Suite 1000
Washington, DC 20004

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



Charles T. Carroll, Jr.
Executive Director

October 20, 2008

Secretary
Federal Maritime Commission
Washington, DC 20573 – 0001

Re: Marine Terminal Agreement by and between The City of Los Angeles and the City of Long Beach,
FMC Agreement No. 201196, September 30, 2008

I am writing on behalf of the National Association of Waterfront Employers (NAWE) to comment on the Marine Terminal Agreement by and between The City of Los Angeles and the City of Long Beach, FMC Agreement No. 201196, September 30, 2008 (LA/LB Agreement or Agreement). NAWE represents many of the nation's private sector marine terminal operators (MTOs) and stevedoring companies. The majority of the MTOs/stevedores who operate in the ports of The City of Los Angeles and the City of Long Beach (LA/LB Ports) are NAWE members. The majority of the members of the West Coast MTO Agreement (WCMTOA), FMC Agreement No. 201143-008, are also NAWE members.

On behalf of NAWE members, I would like to make three points: (1) the Federal Maritime Commission (FMC) clearly has jurisdiction over the "Clean Truck Program;" (2) the FMC should issue a show cause order and seek an injunction because the LA/LB Agreement establishes regulations and practices that are unreasonable in that there are numerous, less burdensome and less discriminatory alternatives; and (3) the FMC should issue a show cause order and seek an injunction because the LA/LB Agreement is incomplete and not "otherwise unlawful."

The FMC Has Jurisdiction.

If there were any doubt that LA/LB Ports have not conceded FMC jurisdiction over the Clean Truck Program by the filing of two agreements, The Shipping Act itself leaves no such doubt. The LA/LB Ports are both "a person engaged in the United States in the business of providing wharfage, dock, warehouse, or other terminal facilities in connection with a common carrier, or in connection with a common carrier and a water carrier subject to subchapter II of chapter 135 of title 49." 46 U.S.C. § 40102(14).

The agreement between the LA/LB Ports concerning the Clean Truck Program is clearly an "agreement between or among marine terminal operators . . . to—(1) discuss, fix, or regulate rates or other conditions of service; or (2) engage in exclusive, preferential, or cooperative working arrangements, to the extent the agreement involves ocean transportation in the foreign commerce of the United States." 46 U.S.C. § 40301(b).

Therefore, The Shipping Act requires a "true copy of every agreement referred to in section 40301(a) or (b) of this title shall be filed with the Federal Maritime Commission. If the agreement is oral, a complete memorandum specifying in detail the substance of the agreement shall be filed." 46 U.S.C. § 40302(a).

To the extent there might have been some question in the past about the broad reach of The Shipping Act, that question was long ago answered by the Supreme Court in Volkswagenwerk AG v. FMC, 390 U.S. 261, 273 (1968) (interpreting the predecessor to the current Act) where the Supreme Court rejected the FMC's position that the agreement filing requirements only apply to agreements which "affect competition." The broad reach of The Shipping Act was subsequently reaffirmed in FMC v. Pacific Maritime Assn., 435 U.S. 40, 56 (1978) where the Supreme Court "emphasize the breadth of the statutory language and the determination of Congress, reflected in [the Act], to 'subject to the scrutiny of a specialized governmental agency the myriad of restrictive agreements in the maritime industry.'" Nothing in any subsequent Congressional amendments to The Shipping Act did anything but affirm the broad application of The Shipping Act.

The LA/LB Agreement should be rejected until all of the requirements of The Shipping Act have been met.

Under The Shipping Act, a marine terminal (including public port authorities), "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). To be just and reasonable, a regulation or practice must be tailored to meet its intended purpose. It may have a valid purpose and yet be unreasonable because it goes beyond what is necessary to achieve that purpose. Distribution Services, Ltd. v. TransPacific Freight Confer. of Japan, 24 SRR 714, 722 (FMC, 1988). The test for just and reasonableness requires that regulations or practices "be otherwise lawful, not excessive and reasonably related, fit and appropriate to the ends in view." Exclusive Tug Arrangements in Port Canaveral, 29 SRR 487, 489 (FMC, 2002) and West Gulf Maritime Association v. Port of Houston, 18 SRR 783, 790 (1978), 610 F2d 100 (D.C. Cir. 1979), cert. denied, 449 U.S. 822 (1980).

To the extent a marine terminal or marine terminal agreement may violate any of these Shipping Act requirements, the FMC has the authority to issue a "show cause" order.

The Commission may institute a proceeding by order to show cause. The order shall be served upon all persons named therein, shall include the information specified in § 502.143, may require the person named therein to answer, and shall require such person to appear at a specified time and place and present evidence upon the matters specified. [Rule 66.]

46 C.F.R. § 502.66. Furthermore, to the extent the Commission believes that there are violations, it has the authority to seek an injunction under 46 U.S.C. § 41307 (a) and (b).

The LA/LB Agreement should be rejected because the LA/LB Ports have failed to file the entire agreement between the parties.

Under The Shipping Act, MTOs are required to file the complete agreement between the parties. An agreement "(A) means a written or oral understanding, arrangement, or association, and any modification or cancellation thereof; but (B) does not include a maritime labor agreement." 46 U.S.C. § 40102(1). MTOs are not free to file part of an agreement, while holding back other parts. Instead, The

Shipping Act requires a “true copy of every agreement . . .” 46. U.S.C. § 40301(a) (emphasis added). If MTOs have failed to provide all of the material policies and regulations that are part of an agreement or disclose all of the purposes behind the policies and regulations, the submission to the FMC is not a “true copy of every agreement.”

NAWE attaches for the FMC’s consideration the declaration of John M. Holmes, filed under oath with the United States District Court for the Central District of Columbia (Holmes Declaration) on behalf of the LA/LB Ports. Even a cursory review of the Holmes Declaration and other submissions to the Federal Courts quickly reveals that there are multiple addition material “policies and regulations” that have been agreed to by the LA/LB Ports, but which are not reflected in the LA/LB Agreement.

The Holmes Declaration clearly indicates that the Clean Truck Program is only a small part of a larger “Truck Security Program” that has been adopted and agreed to by the LA/LB Ports. Holmes Declaration at p. 11. Because there is extrinsic evidence that the LA/LB Ports have failed to file a “true copy of every agreement,” the FMC should issue a show cause order requiring the LA/LB Ports to provide a true copy, sworn under oath, of every agreement reached. Until such time as a true copy of every agreement has been filed, the LA/LB Ports should be enjoined.

The Clean Air Purpose of the Clean Truck Program is Valid for Purposes of The Shipping Act.

NAWE member companies share the clean air objectives of the Clean Truck Program. NAWE member companies remain committed to working with the LA/LB Ports within the restrictions of federal law to achieve the clean air goals of the Clean Truck Program. Because NAWE members support the clean air objectives of the Clean Truck Program, NAWE urges the FMC to find that the clean air goals are valid goals for purposes of The Shipping Act.

The LA/LB Ports have admitted to other purposes, including cargo and port security, behind the Clean Truck Program. NAWE suggests that these other purposes require careful attention from the FMC. Port and cargo security can be legitimate purposes for a marine terminal agreement, but not in this case. As discussed further below, the LA/LB Ports are not the regulated parties when it comes to port and cargo security and have no regulatory authority concerning port and cargo security. Therefore, to the extent the purpose of any regulation or policy is to allow the LA/LB Ports to impose port or cargo security obligations on others, the LA/LB Agreement does not serve a legitimate purpose and must be enjoined on that basis alone.

The Means are not Just or Reasonable.

As noted above, while the clean air goal of the Clean Truck Program may be valid, the means used to achieve that goal must not be excessive and must be appropriate to achieve those ends. To the extent there are alternative means to achieving the clean air goal that are less burdensome and/or less discriminatory to the maritime commerce of the United States, the means chosen are not just and reasonable. Distribution Services, Ltd. v. TransPacific Freight Confer. of Japan, 24 SRR 714, 722 (FMC, 1988).

There can be no doubt that there are a myriad of less burdensome and less discriminatory options available to the LA/LB Ports for achieving the clean air goal of the Clean Truck Program. Those alternatives start with the LA/LB Ports adopting a simple timetable to phase in clean truck engines, stripped of all other provisions. Such a timetable would fully achieve the legitimate clean air goals of both ports, without any of the discrimination and burdens to maritime commerce presented in the LA/LB Agreement.

Because alternatives are both obvious to even a casual observer and readily available to the LA/LB Ports, a show cause order should be issued, requiring the LA/LB Ports to show why less discriminatory and burdensome alternatives should not have been used and the LA/LB Agreement should be enjoined pending such a showing.

The Means are not "Otherwise Lawful"

The FMC has the authority and an obligation to make a determination as to whether MTO regulations and practices are "otherwise lawful" as part of its inquiry into whether the regulations and practices are just and reasonable. The LA/LB Agreement is not just and reasonable because it raises the real possibility that its regulations and practices will conflict with other federal treaties, laws and regulations, and the lawful orders of federal officials.

As the FMC knows, the personnel of the LA/LB Ports do not actually touch cargo. Instead, it is the private sector MTOs who actually handle the cargo, whether containerized or non-containerized. Furthermore, the LA/LB Ports do not contract for drayage. Instead, those drayage contracts are between third parties other than the public or private sector MTOs.

Because the federal government recognizes that it is the private sector MTOs that actually handle the cargo in the LA/LB Ports, the federal government has made private sector MTOs the responsible party for purposes of federal port security requirements. It is the private sector MTO that is responsible for filing facility security plans (FSPs) with, and obtaining the approval of, the United States Coast Guard (USCG). It is the private sector MTO that is responsible for complying with United States Customs and Border Protection (CBP) regulations and orders, including cargo hold orders and cargo inspection orders. It is the private sector MTO that will be responsible for applying the transportation worker identification credential (TWIC) requirements at their gates in the LA/LB Ports, including implementing the biometric reader requirements once the Transportation Security Administration (TSA) has approved readers.

These examples are in no way exhaustive of the large number of federal regulations and federal regulators who have authority over the maritime cargo handled by private sector MTOs in the LA/LB Ports. As a bottom line, the LA/LB Ports are neither the regulated party concerning port and cargo security, nor a regulating authority when it comes to port and cargo security. Therefore, the FMC should issue a show cause order requiring the LA/LB Ports to show how they intend to avoid conflicting with and/or violating the myriad of federal treaties, statutes, and regulations that apply to ports and cargo as well as how they intend to resolve conflicts between the lawful orders of federal officials and

their proposed clean truck program. Until such a showing has been made, the LA/LB Agreement should be enjoined.

There can be no dispute that to the extent any federal treaty, statute or regulation, or the lawful order of any federal official, conflicts with any regulation or practice of the LA/LB Agreement, the LA/LB Agreement must give way or the Agreement would be unjust and unreasonable under The Shipping Act because it is not "otherwise lawful."

Unfortunately, based on the current record available, a provision-by-provision analysis of where the LA/LB Agreement could or does conflict with federal law is impossible for many reasons: First, the LA/LB Agreement is extremely vague and appears to be incomplete. Most of the details on how the Clean Truck Program would actually work in practice are left to the imagination (or may exist in other documents that further outline the agreements between the parties, but are not before the FMC.)

Second, a number of the federal requirements that may conflict with the LA/LB Agreement are contained in the FSPs that have been approved by the USCG. These FSPs, as a matter of federal law, are required to outline access control rules which would appear to at least overlap with some of the potential requirements of the Clean Truck Program and would certainly overlap with a broader Truck Security Program apparently being implemented by the LA/LB Ports. Unfortunately, a full analysis of these potential conflicts is not possible in the public record because the FSPs are considered Sensitive Security Information (SSI) under federal law. 49 C.F.R. 1520. As such, the FSPs are not available for analysis.

Third, the federal requirements governing maritime commerce, port, and cargo security may change in the future on short notice because of changes in federal treaties, laws and regulation; because a federal official issues a lawful order to a private sector MTO; or because the USCG approves an amendment to an FSP.

These reasons make it impossible for commenters or the FMC to undertake a requirement-by-requirement analysis concerning every federal treaty, law or regulation that might conflict in part with the LA/LB Agreement. NAWA notes that if such an inquiry is undertaken, it is the LA/LB Ports who have the burdens of production and persuasion because they are the proponent of the LA/LB Agreement. For these reasons, a show cause order requiring the LA/LB Ports to show how they intend to avoid these actual and potential conflicts with federal laws is especially appropriate.

In the alternative, the issue of conflicts with federal law could be avoided if the LA/LB Ports would add the following language to the LA/LB Agreement:

SAVING CLAUSE:

- (1) GENERAL. (a) Any regulation or practice of this Agreement that conflicts with or is inconsistent with any federal treaty, law or regulation or the lawful order of any federal official is null and void. (b) Nothing in this Agreement should be construed as

establishing any regulation or practice concerning port or cargo security that is binding on any third party.

(2) FACILITY SECURITY PLANS. To the extent any regulation or practice under this Agreement conflicts with or is inconsistent with any provision of a facility security plan that has been approved by the United States Coast Guard, the facility security plan shall control and the conflicting Agreement regulation or practice is null and void.

This proposed amendment does nothing more than state existing federal law, so it can in no way be objectionable to the LA/LB Ports.

Conclusions

In conclusion, NAWE fully supports the FMC asserting jurisdiction over any and all agreements between the LA/LB Ports, including the LA/LB Agreement now under consideration. NAWE believes that the FMC should issue a show cause order and seek an injunction because the LA/LB Agreement establishes regulations and practices that are unreasonable in that there are numerous, less burdensome and less discriminatory alternatives. Finally, NAWE believes that the FMC should issue a show cause order and seek an injunction because the LA/LB Agreement is incomplete and potentially not "otherwise unlawful" under numerous federal treaties, statutes and regulations.

We look forward to working with the FMC and supporting its efforts in this extremely important matter.

Sincerely yours,



Win Froelich, MD, JD
General Counsel
National Association of Waterfront Employers

**BEFORE THE
FEDERAL MARITIME COMMISSION**

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FEDERAL MARITIME COMMISSION

In Re:

**MARINE TERMINAL
AGREEMENT
BY AND BETWEEN
THE CITY OF LOS ANGELES
AND
THE CITY OF LONG BEACH**

**FMC AGREEMENT
No. 201196**

**COMMENTS OF THE INTERMODAL MOTOR CARRIERS CONFERENCE,
AMERICAN TRUCKING ASSOCIATIONS, INC.**

October 20, 2008

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TABLE OF CONTENTS

	PAGE
I. SUMMARY AND INTRODUCTION.....	1
II. THE IMCC’S INTEREST	2
III. THE COMMISSION SHOULD REQUIRE THE PARTIES TO ELIMINATE SECTION 4.2(I) AND ATTACHMENT A FROM THE AGREEMENT	4
A. The Agreement Includes Provisions—Unnecessary to Achievement of Environmental and Infrastructure Goals—that Mandate Collective Port Action to Exclude Drayage Carriers That Do Not Accede to a List Of Burdensome and Costly Requirements.....	4
B. The Agreement Violates the Shipping Act So Long As it Contains § 4.1(I) and Attachment A	6
IV. CONCLUSION	8

While one could infer from the Ports' delay in submitting the Agreement a lack of concern for Commission scrutiny, no subtle inferences are necessary to ascertain the Agreement's injurious effects. Simply put, the Agreement, in its current form, is unlawful. Any legitimate environmental and port safety elements of the CTP could be—and are being—implemented through elements of the CTP that need not require motor carriers to become Concessionaires.³ However, the Agreement requires each Port: (1) to establish the signing of a Concession agreement as a prerequisite to drayage carriers serving each Port; (2) to include a minimum set of complex and burdensome provisions in each Concession; and (3) to mandate their tenant Terminal Operators establish a blockade of drayage carriers that do not accede to those Concession Agreement burdens. See Agreement Article 3 (definition of “concession”), Article 4.1(l), and Attachment A.

These Concession requirements will adversely affect drayage services and prices. Thus, the Commission should fulfill its responsibilities under section 6⁴ and act expeditiously to ensure that these Concession-related provisions are removed from the Agreement, while also ensuring that the infrastructure and environmental elements of the Agreement proceed unhindered.

II. THE IMCC'S INTEREST

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

³ The ATA is challenging both Ports' Concession requirements as preempted by 49 U.S.C. § 14501 in *American Trucking Associations, Inc. v. City of Los Angeles, et al.*, No. CV 08-04920 CAS (CTx), currently pending in the U.S. District Court for the Central District of California.

⁴ As currently codified at 46 U.S.C. §§ 40304, 41307.

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.

On February 21, 2008, the Commission noticed⁵ the Los Angeles/Long Beach Port/Terminal Operator Administration and Implementation Agreement, FMC Agreement No. 201178, in part, an effort by the Ports to enlist their tenant Marine Terminal Operators as the day-to-day enforcers of the Ports' unlawful concession mechanisms. On March 3, 2008, ATA and the IMCC filed comments challenging the "blockade" provisions of the Agreement (sections 5.1(e) and 5.3), and suggesting several areas of inquiry of that Agreement's parties to permit the Commission to fulfill its obligations under the Shipping Act regarding review of filed agreements. In so doing, the IMCC argued that the Concession mechanisms: (a) were an effort by the Ports to evade preemption under federal transportation statutes; and (b) were "unreasonable" under various provisions of the Shipping Act.

On August 8, 2008, the Commission noticed⁶ the Amended and Restated Los Angeles and Long Beach Port Infrastructure and Environmental Program Cooperative Working Agreement, FMC Agreement No. 201170-001. On August 18, 2008, the IMCC filed comments with the Commission regarding the Amended Agreement. The IMCC argued, in part, that the Commission should undertake the required competitive review and analysis under Shipping Act section 6 regarding the effects of the Ports' Concession

⁵ 73 *Federal Register* 9569 (2008).

⁶ 73 *Federal Register* 46271(2008).

Agreements—prior to allowing Amended and Restated Agreement 201170 to become effective. The IMCC suggested that the Commission’s review should place particular emphasis on the unreasonable burdens that would be imposed by the Port of Los Angeles by requiring drayage trucks operating under Port of Long Beach concessions also to sign the separate, and more burdensome, Los Angeles concession simply to cross the Long Beach city line to pick up or drop off cargo containers at the Port of Los Angeles.

III. THE COMMISSION SHOULD REQUIRE THE PARTIES TO ELIMINATE SECTION 4.2(I) AND ATTACHMENT A FROM THE AGREEMENT.

On June 13, 2008, the Commission permitted FMC Agreement No. 201178, the Los Angeles/Long Beach Port/Terminal Operator Administration and Implementation Agreement, to become effective, notwithstanding that the agreements necessary to implement the CTP had not yet been finalized. According to the Commission, its decision was based on the requirement that “related agreements of the Ports of Los Angeles and Long Beach, must be timely filed with the Commission....”⁷ The Ports filed FMC Agreement No. 201196 on September 30, 2008, one day prior to the implementation of major elements of the CTP on October 1.

A. The Agreement Includes Provisions—Unnecessary to Achievement of Environmental and Infrastructure Goals—that Mandate Collective Port Action to Exclude Drayage Carriers That Do Not Accede to a List Of Burdensome and Costly Requirements.

Article 4 of the Agreement commits Los Angeles and Long Beach to undertake a series of 12 activities with the claimed purpose of “(a) improving Port-related transportation infrastructure; (b) increasing cargo movement efficiencies and Port

⁷ “FMC Grants Early Clearance to Ports/Terminals Agreement; Calls for San Pedro Ports to File Clean Truck Program” (NR 08-07, June 13, 2008).

capacities; (c) improving the safety and security of Port terminals and properties; and (d) decreasing Port-related air pollution emissions in the San Pedro Bay area.” Agreement

Article 2. The IMCC does not object to the first 11 of the implementing activities:

- Requiring Port terminal operators to install RFID receivers or other automatic truck identification device readers (§ 4.1(a));
- Initiating the phased-in elimination of the oldest and most polluting diesel trucks from port drayage service (§§ 4.1(b)-(d));
- Requiring all drayage trucks to be registered in a drayage truck registry (“DTR”), with supporting documentation in verifiable form, including a motor carrier’s obligation to keep such information current (§§ 4.1(e)-(f));
- Requiring the establishment of Clean Truck and Infrastructure Fees and requiring the first terminal operator to handle containerized merchandise to collect and remit those fees to the relevant Port (§§ 4.1(g-j)); and
- Requiring the establishment of safety and security programs, including “the development and implementation of requirements and common security systems at egress and access points in Port terminals” (§ 4.1(k)).

The IMCC believes that these requirements are capable of successful implementation in a manner consistent with the parties’ obligations under section 6 of the Shipping Act to avoid conduct under agreements that “produce an unreasonable reduction in transportation service or an unreasonable increase in transportation cost,” *see* 46 U.S.C. § 41307(b)(1). Indeed, the IMCC has attempted to work with the Ports to achieve workable solutions to the phased elimination of older drayage trucks and the

implementation of the DTR in a manner that lawfully achieves the Ports' environmental and port security objectives.

B. The Agreement Violates the Shipping Act So Long As it Contains § 4.1(l) and Attachment A .

In contrast to the relatively unobjectionable provisions of Agreement §§ 4.1(a)-(k), § 4.1(l) commits each Port, "beginning October 1, 2008, at 8:00 am *to require all Terminal Operator [sic] to deny access* to any Drayage Truck unless such Drayage Truck is registered in the DTR *under a Concession* or a Day Pass [for drayage trucks calling at a Port infrequently]." (Emphasis added.) In turn, "Concession" is defined in Article 3 to include terms as specified in Attachment A to the Agreement. And Attachment A sets out 37 requirements (and 25 enumerated subrequirements) that each Port's Concession Agreement with a prospective drayage concession holder "shall include" (and the parties expressly are not limited to only those terms).

Agreement § 4.1(l) is yet another manifestation of the "blockade" provisions of the Concession Program to which the IMCC first objected in its March 3, 2008 Comments on FMC Agreement No. 201178. Since that time, the provisions of the Concession Agreements have been the subject of Commission review as details of the Ports' implementation of the Clean Truck Program have become clearer. Indeed, on September 12, the Commission requested further information from the Ports following its initial review of FMC Agreement No. 201170-001, finding that "it has serious concerns about potentially unreasonable increases in transportation costs or decreases in transportation services that may result from the CTP."⁸ Significantly, however, the

⁸ Federal Maritime Commission, "FMC Requests Additional Information from San Pedro Ports on Clean Trucks Program (Press Release, September 12, 2008).

Agreement takes the Concession process *beyond* even the burdensome elements seen by the Commission to date by *requiring* each Port to include a *minimum* set of 37 requirements set out in Attachment A (“shall include, but is not limited to”) in their drayage Concession Agreements that neither Port may vary without the consent of the other, Article 8.4 (“This Agreement may be amended or supplemented only by a written instrument executed by both Parties.”).

Simply put, there is no justification for one of the Ports to require the other Port to impose a Concession Agreement and for the Ports to deny each other the right of independent action in determining minimum terms for each Port’s drayage Concession agreements on matters as varied as financial oversight and concession transfers, insurance requirements, parking plans, use of truck placards with phone numbers for citizen complaints, and audit and enforcement procedures. This is particularly so since the Ports refuse to grant reciprocal rights of entry to drayage trucks operating under a Concession issued by the other Port,⁹ and thus one Port cannot argue that it needs to ensure that the other Port’s Concession agreements meet some minimum standards in order to protect the first Port’s claimed interests when it allow trucks licensed by the other Port to enter. Even without Concession agreements, drayage trucks will still have to meet the Ports’ environmental and security standards pursuant to Agreement §§ 4.1(a)-(k).

Finally, the potential impact on drayage “services” and “costs,” 46 U.S.C. § 41307(b)(1), from the Ports’ Agreement to impose minimum Concession requirements is potentially enormous: the Ports are responsible for over 40 percent of total container traffic in U.S. ocean commerce and control a near-monopoly of access for port drayage

⁹ See Comments of the Intermodal Carriers Conference, American Trucking Associations, FMC Agreement No. 201170-001, at 14-16 (August 18, 2008).

services in southern California. The consultants' report commissioned by the Port of Los Angeles as a basis for its Concession Plan estimating that the annual costs imposed on the port drayage industry from adoption of the Los Angeles Concession Plan to be \$1.1 billion annually.¹⁰ In this context, any agreement between the Ports that reduces a Port's independent ability to minimize the burdens on the drayage industry from a Concession requirement or to eliminate the need for Concessions at all, is unreasonable.

In short, the Agreement ties achievement of goals important to the movement of intermodal traffic at the Ports and to the people of southern California—better port infrastructure and cleaner air—with anticompetitive, collectively-imposed measures to re-regulate the port drayage industry. The result will be higher costs and fewer service choices for shippers at precisely the wrong time for imposing such unnecessary burdens on the United States' import and export trade. Consequently, the Commission should find that the Agreement presumptively will operate unreasonably to raise drayage costs and decrease drayage services in violation of the Shipping Act unless and until § 4.2(1) and Attachment A are eliminated.

IV. CONCLUSION

For the reasons set out above, the Commission should act expeditiously to ensure the elimination of the provisions of Agreement FMC No. 201196 that require the Ports to blockade entry to the Ports of drayage carriers without Concession Agreements and to establish minimum requirements for those Agreements, while also ensuring that the infrastructure and environmental elements of the Agreement proceed unhindered.

¹⁰ Boston Consulting Group, *San Pedro Bay Clean Truck Program- CTP Options Analysis* at 79 (March 2008).

Respectfully submitted,

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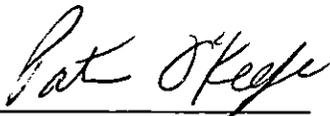
October 20, 2008

CERTIFICATE OF SERVICE

I, Patricia O'Keefe, hereby certify that I have today, October 20, 2008, sent a copy of the attached Comments of the Intermodal Motor Carriers Conference of the American Trucking Associations, by First Class mail, to:

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Washington, D.C. 20004

Counsel for the Los Angeles and Long Beach



Patricia O'Keefe

BEFORE THE
FEDERAL MARITIME COMMISSION

RECEIVED

In Re:)
)
MARINE TERMINAL AGREEMENT) FMC AGREEMENT NO.
BY AND BETWEEN THE CITY OF) 201196
LOS ANGELES AND THE CITY OF)
LONG BEACH)

COMMENTS OF THE NATIONAL RETAIL FEDERATION

The National Retail Federation files these comments pursuant to the Federal Maritime Commission ("FMC") October 8, 2008 *Federal Register* notice (73 Fed. Reg. 58964) on Agreement No. 201196 between the Cities of Los Angeles and Long Beach, acting through their respective Boards of Harbor Commissioners (the "Ports").

The National Retail Federation ("NRF") is the world's largest retail trade association, with membership that comprises all retail formats and channels of distribution including department, specialty, discount, catalog, Internet, independent stores, chain restaurants, drug stores and grocery stores as well as the industry's key trading partners of retail goods and services. NRF represents an industry with more than 1.6 million U.S. retail companies, more than 25 million employees – about one in five American workers – and 2007 sales of \$4.5 trillion.

NRF member companies comprise both large retail chains and many small and medium-sized businesses, such as smaller specialty stores. Many consumer products sold at retail in the United States are shipped by ocean carriers in cargo containers. Collectively, retail shipments constitute a significant portion of total containerized cargo that moves through the nation's seaports, including the Ports of Los Angeles and Long Beach. Much of this containerized cargo is drayed by truck from quayside and through the ports to rail heads, distribution centers, or directly to stores. The cost of the motor carriage is ultimately borne by the retailer, and set, in part, by the supply and demand of available trucks. Accordingly, any matter that affects either the cost of carriage or the supply of trucks affects the retailers' supply chain, which is critical to retailers' operations and financial condition. The ability to transport merchandise into and out of ports in a timely, efficient and cost-effective manner is key to the health of the retail sector, which is already suffering in the current economic climate. It is also important to consumers – retail customers – who expect timely delivery and supply of merchandise (whether to stores or to their homes).

Therefore, the NRF and its member companies clearly have a vested and direct interest in the FMC's consideration and disposition of Agreement No. 201196, which purports to regulate the terms and conditions under which

drayage trucks are permitted access to the Ports,¹ and would, by its express terms affect the cost and supply of motor carriage, and, in turn, the very viability of the retailers' supply chains.

Agreement No. 201196² is an extension of Agreement No. 201170 that was submitted to the FMC on August 20, 2006, and later amended. That agreement lays out the proposed structure of the Ports' Clean Air Action Plan ("CAAP"), including a proposal to replace the harbor truck fleet with cleaner vehicles. Agreement No. 201196 specifies many of the details of that plan including the following core components:

1. A Truck Concession Plan: Only those trucks owned by licensed motor carriers that have obtained an operating concession or a day pass in the amount of \$100 from the Ports are allowed entry to container terminals;
2. Driver Employee Plan: After December 31, 2013, the Port of Los Angeles will allow access to container terminals only to those truck drivers that are employees of concessionaire licensed motor carriers;
3. Incentive Plan: The Port of Los Angeles is offering financial incentives to licensed motor carriers to apply for concessions;
4. Truck Ban: The Ports are implementing a phased-in plan to ban from container terminals by January 1, 2012, all non-compliant trucks that do not meet engine, fuel, and emissions specifications and standards;
5. Container Fees: The Ports will begin collecting a \$35 per Twenty-Foot Equivalent Unit ("TEU") fee from beneficial cargo owners ("BCOs") moving containerized cargo to or from the Ports by drayage truck, the revenue from which will be used to fund replacement and retrofit of the harbor drayage truck fleet. Certain containerized merchandise is exempt from the fee, including cargo moving on compliant trucks purchased through private-revenue sources. A separate \$15 per TEU fee will be collected from BCOs moving containerized cargo to and from the Ports, revenue from which will be used to fund infrastructure projects in and around the Ports.

As a preliminary point, NRF acknowledges that the stated purposes of Agreement No. 201196 are to: (1) improve Port-related transportation infrastructure; (2) increase cargo movement efficiencies and Port capacities; (3) improve the safety and security of port terminals and properties; and (4) decrease port-related air pollution emissions in the San Pedro Bay area where the two ports are located.³

¹ Article 2 of the Agreement states "[t]he purpose of this Agreement is to completely set forth terms and conditions under with drayage trucks are permitted access to Port owned and controlled properties"

² We note that the copy of FMC Agreement No. 201196 available on the FMC website is shown to be effective on September 30, 2008. In light of the provisions of 46 CFR 535.308(b) and (e), it seems clear to NRF that Agreement No. 201196, which, *inter alia*, is an agreement to fix the charges for a Clean Truck Fee and an Infrastructure Fee is subject to the 45 day waiting period and was not effective on filing.

³ FMC Agreement 201196, Article 2.

NRF and its member companies strongly support these goals. NRF and its members endorse reasonable regulation of truck emissions, as well as the activities of the Coalition for Responsible Transportation ("CRT"), a group of retail and transportation companies having as one of its core purposes the goal of reducing "the impact of diesel-related emissions on the communities surrounding our nation's ports, particularly the Ports of Los Angeles and Long Beach."⁴ NRF members do not, as a rule, own the drayage trucks that operate at the ports, but rather contract the carriage of their goods, either directly with an independent trucking company, or indirectly through an ocean carrier or third-party logistics provider ("3PL"). Nonetheless, in the spirit of corporate social responsibility, the retail members of CRT, many who are also members of NRF, have pledged to help their trucking partners and independent owner-operators serving the Ports to finance the replacement or upgrade of aging vehicles. Accordingly, we support the incentives contained in the agreements by the Ports to enable truckers to make these upgrades. NRF and its members have also endorsed an industry White Paper⁵ released in March 2007 that lays out an effective plan to address truck diesel emissions and fund specific transportation infrastructure projects in and around the Ports through the establishment of tolling authorities and public-private partnerships. Some NRF members are also members of the EPA SmartWay Partnership Program, and voluntarily partner with trucking companies to reduce air pollution from trucks.

As laudable as the goals in the Agreement are, and notwithstanding our support for their underlying objectives, the legal question under the Shipping Act of 1984 is whether the terms of the Agreement are just, reasonable, and necessary means to accomplish those stated goals. The ends cannot justify the means, and so the means that the Ports are using to implement its objectives must be reviewed. NRF believes, as explained below, that the Ports are adopting practices which are *not necessary* to achieve these goals, and *unreasonably* and in an *unjustly discriminatory* fashion burden NRF members with additional costs and reduced services by threatening to create an inadequate supply of motor carriers to bring their goods to and from the Ports. The end result is to jeopardize retailers' supply chains for getting merchandise from the Ports into stores and customers' homes.

Standards For Agreements Filed With The Federal Maritime Commission

Agreements filed under the Shipping Act of 1984, as amended, must be definite, complete and specific with respect to the authority contained within. Amendments to Rules Governing Agreements by Ocean Common Carriers and

⁴ See CRT website at <http://responsibletrans.org/members.html>.

⁵ See Waterfront Coalition website at <http://www.portmod.org/INDUSTRY%20INFO/March07paper.pdf>

Other Persons Subject to the Shipping Act of 1984, 22 SRR 1175 (FMC 1984).
See also, 46 CFR 535.402:

§ 535.402 Complete and definite agreements.

An agreement filed under the Act must be clear and definite in its terms, must embody the complete, present understanding of the parties, and must set forth the specific authorities and conditions under which the parties to the agreement will conduct their operations and regulate the relationships among the agreement members, unless those details are matters specifically enumerated as exempt from the filing requirements of this part.

The FMC has the authority to reject an agreement because it is unclear or indefinite. Rejection of an agreement may occur where the agreement is so severely deficient that, on its face, it could not be construed as complete and where even the most basic analysis under the general standard would not be possible. Rules Governing Agreements by Ocean Common Carrier and Other Persons Subject to the Shipping Act of 1984 (FMC 1984).

The FMC also has the authority to request additional information, investigate, or seek an injunction against an agreement. Sections 6(d) and (h) and 11 of the Shipping Act of 1984 as amended, 46 USC 40304, 41302, 41307. Marine terminal operators, which, under the Act would also include the Ports of Los Angeles and Long Beach, "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 USC §41102(c). Nor through an agreement or in practice may they as marine terminal operators "give any undue or unreasonable preference or advantage or impose any undue or unreasonable preference or advantage or impose any undue or unreasonable prejudice or disadvantage with respect to any person." 46 USC §41106(2). Lastly, the Ports of Los Angeles and Long Beach are prohibited from unreasonably refusing to deal or negotiate with a person. 46 USC §41106(3).

As stated in the FMC's Order of Investigation served September 24, 2008, FMC Docket No. 08-05, at pages 6 and 7:

"The Commission is responsible for ensuring that the practices and regulations of marine terminal operators are just and reasonable. Under Section 10(d), a regulation or practice must be tailored to meet its intended purpose. It may have a valid purpose and yet be unreasonable because it goes beyond what is necessary to achieve that purpose. Distribution Services, Ltd. v. TransPacific Freight Confer. Of Japan, 24 SRR 714, 722 (FMC 1988). The test of reasonableness as applied to MTOs requires that actions and practices 'be otherwise lawful, not excessive and reasonably related, fit and appropriate to the ends in view.' Exclusive Tug Arrangements in Port Canaveral, 29 SRR 487, 489 (FMC 2002) and West Coast Maritime Association v. Port of Houston, 18 SRR 783, 790 (1978) (D.C. Cir 1979) *cert. denied*, 449 U.S. 822 (1980).

We now turn to a review of FMC Agreement No. 201196 under these standards.⁶

Preliminary Points Regarding FMC Agreement No. 201196

1. Issues With the Scope of the Agreement

Although the Agreement, *inter alia*, jointly fixes the price of the Clean Truck Fee on containerized cargo at \$35 per TEU (Section 4.1(g)), the Infrastructure Fee on containerized cargo at \$15 a TEU (Section 4.1 (i)), and the level of the Day Pass at \$100 per day (Section 4.1 (l)), the Agreement claims in Article 7 to be effective upon filing rather than subject to the normal waiting period for agreements between marine terminals that fix prices or conditions of service. *See* n. 2, *supra*. The FMC should immediately clarify that Agreement No. 201196 is not yet effective, as required by the provisions of 46 CFR 535.308(b) and (e).

Without any reference to another agreement between the Ports, FMC Agreement No. 201196 contains language identical to that in the earlier Agreement No. 201170, which also has in its statement of purposes the goal to “improve the safety and security of port terminals and properties” and “decrease port-related air pollution emissions in the San Pedro Bay area.” As in Agreement 201170, Agreement No. 201196 purports to provide authority for the two Ports to limit access of drayage trucks to the Ports’ facilities to certain model years or model year engines within limits set in later years on the amounts of emissions, and to deny entry to the Ports to all other trucks that do not meet the criteria or specified exemptions from the criteria. As in Agreement 201170, the new agreement further requires that all licensed motor carriers wishing to provide drayage service to the Ports either be granted a Concession Agreement and pay the fees or secure a “Day Pass” as defined in the Agreement.

Agreement No. 201196 further provides for the companies subject to the Concession Agreements to adhere to an appropriate maintenance program for trucks used at the Ports, to ensure that the trucks comply with safety, regulatory and security requirements, and that the truck drivers obtain their Transportation Worker Identification Credential (“TWIC”) card. In the earlier agreement, both Ports required a concessionaire licensed motor carrier to register its drayage trucks in a Drayage Truck Registry along with certain information, and to submit a parking plan for the vehicles. To fund designated truck retrofits and new trucks, and to support certain identified infrastructure projects, the \$35 per TEU Clean Truck Fee will be levied on the cargo owner for every container entering or exiting the Ports by truck, with certain specific exemptions. In addition, the Ports will require the terminal operators in the Ports to collect an infrastructure fee of

⁶ We note that in view of the fact that Article 6 specifically limits the authority to file the Agreement to a single named individual, and the Agreement was not filed by that individual, there is a serious question of whether the Agreement should be accepted by the FMC as properly filed.

\$15 per TEU for each loaded container entering or exiting the Ports by truck, with certain exemptions.

Agreement No. 201196 is ambiguous, and, therefore, leaves to each individual Port complete discretion to determine: the form of the parking plan; the limits on the employment status of the drivers for the Concession holder; the requirements on Concessionaires regarding the financial capability to perform the requirements specified in the concession agreement; the full information that must be included in the Drayage Truck Registry and two other registries – the Concession Registry and the Driver Registry, neither of which is otherwise defined or explained in the Agreement. Further, under the Agreement Attachment A section (e), either Port may adopt additional requirements for Concessionaires unilaterally. So, all terms and conditions that the Ports plan to utilize are not known at this time. Thus, it is clear that many of the provisions in the Agreement are not clear, definite or complete, making the Agreement deficient in several respects.

2. Issues Whether the Agreement is Full and Complete

Even a cursory examination of Agreement No. 201196, in addition to what has been stated above, shows it is not a full and complete agreement between the Ports and lacks the specificity to make clear what authority is to be vested in the Ports. As such, it violates not only the Shipping Act of 1984 but fails to meet the requirements of 46 CFR 535.402. By not setting forth with specificity what regulated parties are required to do, the Agreement may also violate fundamental principles of due process.

It is evident that Agreement No. 201196 is related to and intertwined with FMC Agreement No. 201170 between the Ports. Both agreements address the same concession programs that the Ports are attempting to implement, and indeed, as noted previously, employ the exact same language to describe the authority of each agreement. Therefore, one ought to conclude that Agreement No. 201196 simply amends Agreement No. 201170 in an attempt to explain in further detail the concession program. Instead, because the Ports apparently aimed to have Agreement No. 201196 enter into effect immediately, whereas Agreement No. 201170 was subjected to the Commission's normal review period, the filing of Agreement No. 201196 engenders confusion as to what its relationship to Agreement No. 201170 is, and which terms the Ports are really operating under.

As previously noted, because Agreement 201196 fixes fees that will be charged by each Port under its terms, it clearly "provides for the fixing of and adherence to uniform maritime terminal rates, charges, [etc.]"

46 CFR 535.308(b) states:

(b) *Marine terminal conference agreement* means an agreement between or among two or more marine terminal operators and/or ocean common carriers for the conduct or facilitation of marine terminal operations *that provides for the fixing of and adherence to uniform maritime terminal rates, charges, practices and conditions of service relating to the receipt, handling, and/or delivery of passengers or cargo for all members.* (Emphasis added.)

As such, on this basis alone, under subsection (e) of 46 CFR 535.308, Agreement 201196 is subject to the waiting period requirements imposed for such agreements and cannot lawfully go into effect immediately.

This question is not a matter of FMC discretion. The FMC is bound by its regulations and must apply a waiting period to it. See *Service v. Dulles*, 354 U.S. 363, (1957) and its progeny regarding the binding nature of regulations on the actions of departments and agencies of government.

Agreement No. 201196 is incomplete and confusing in a number of other respects, which argue against allowing it to enter into immediate effect. First, registration in the Drayage Truck Registry is a threshold requirement for motor carriers to serve the Ports. Yet, in Section 4.1(e) of the Agreement, the registration is subject to such "supporting documentation as may be required by the Ports." What exactly is required is unknown. Surely truckers have the right to know what documentation is required to participate in the Concession Plan, absence of which will bar them from entering the port facilities. In Section 4.1(g), the Ports note the exceptions to application of the Clean Truck Fee, but caveat the granting of those exceptions with the statement "under certain circumstances determined by each Port". Again, the terms under which the requirements apply, and the discretion purported to be exercised in granting or denying access to the port facilities raise the question whether this exemption is real, or subject to the whim of port officials. Arbitrary exclusion of trucks from the Ports based on the exercise of such undefined terms and discretion threaten to create truck shortages and generate a substantial loss of trucking services for NRF members and other shippers, jeopardizing their supply chain and timely delivery of products to the consumer. If nothing else, this lack of clarity makes supply chain planning difficult to do, impacting not only truckers but also retailers and consumers.

A second problem arises from the fact that funds generated from the Infrastructure Fees can be used not only for the projects identified in the Agreement but for "additional infrastructure projects of similar utility". See, Section 4.1(j). As parties bearing the burden of these fees, and as a simple matter of fairness, due process and transparency in government, NRF members

have the right to know what the funds they will pay are used for and when those fees may end.

Finally, Section 4.1(k) of the Agreement discusses the issuance of a "Day Pass" in lieu of a concession, which it states will cost \$100 per day. NRF has been informed that in addition to this required fee, there is a limit on the number of Day Passes to 12 a year. As such, this limitation could create a substantial shortage of truck and drayage services for NRF members and other shippers, thereby jeopardizing the retailer supply chain and timely delivery of products to the consumer.

For all these reasons, the FMC should find that Agreement 201196 is an amendment of the prior Agreement 201170, may not enter into effect immediately, and is vague and incomplete in its terms and conditions, raising questions as to whether the Agreement was even properly filed in the first place.

Substantive Elements of FMC Agreement No. 201196

1. The Truck Concession Plan Is Not a Just, Reasonable, or Necessary Means to Achieve the Objectives of the Agreement

By its terms and operation, the primary objective of the Ports' plan to limit truck access to concessionaire licensed motor carriers appears to be mainly motivated, not to reduce air pollution or accomplish any of the other stated goals, but as a means to limit competition. By establishing essentially a sanctioned monopoly for trucking services, the truck concession plan amounts to a reregulation of the trucking industry (even though Congress has deregulated it) that will reduce the availability of drayage trucks servicing the ports and jeopardize the retailers' supply chain. While a reduction in the number of trucks may tangentially reduce air pollution, it will, as a simple matter of supply and demand economics, most certainly drive up trucking costs for retailers and other shippers well beyond the level necessary to replace and retrofit the harbor truck fleet.

Two reports – one by Dr. John Husing and the other by the Boston Consulting Group – commissioned by the Port of Los Angeles independently underscore this point. Both reports conclude that the truck concession plan will impose a barrier to entry into the port drayage market for many independent truckers currently serving the port complex. The Husing report further notes that those few licensed motor carriers capable of meeting the requirements for obtaining a concession will obtain a greater market share and negotiating leverage on rates.

In public meetings on his report, Dr. Husing argued this very point, contending that a benefit of the limiting market entry through the concession plan would be to increase trucking rates. Dr. Husing also reported that, on average,

licensed motor carriers will need to increase rates by 80 percent in order to meet the requirements of the port concession plan (See, Dr. John Husing, San Pedro Bay Ports Clean Air Action Plan: Economic Analysis (Sept. 2007), p. 74).

As noted above, the contracting for trucking services is done by ocean carriers or 3PLs, and therefore retailers are not directly involved in nor have any influence over which trucking companies are chosen to dray their cargo. In such instances, retailers may be twice removed from the trucking company relationship, and so have no control over whether clean trucks are used. Yet retailers will have to pay the Clean Truck Fee if clean trucks are not used. There is no incentive built in for ocean carriers or 3PL's to use clean trucks, as they know that they will not have to pay the Clean Truck Fee. So, there is no relationship to the environmental goals of the truck concession plan. Yet the already financially-stressed retail industry will have to pay, and will be forced to pass on those increased costs to the consumer.

As to the other stated goals of the Clean Truck Program, it is evident that limiting the supply of drayage trucks operating at the Ports bears no relationship at all, reasonable or otherwise, to the objectives of improving transportation infrastructure, cargo movement efficiencies and capacities, and safety and security. As stated above, NRF and stakeholder groups have put together a proposal to achieve the first two goals in an effective and fair manner that completely avoids limiting trucking services at the Ports. With respect to the objective of improving security, as explained below, federal and state law already provides the means to maintain security of the motor carrier industry without the Ports' concession requirements turning carriers into law enforcers.⁷ Thus, all three of these objectives can be achieved in a more effective, reasonable and equitable manner than through a scheme designed mainly to limit competition and drive up trucking rates for beneficial cargo owners. Accordingly, we believe with respect to its conformity to the requirements of the Shipping Act, the FMC should find that the truck concession plan is not just, reasonable or necessary to accomplish the stated goals.

2. The Port of Los Angeles Driver Employee Plan to Eliminate Independent Truckers Is Not Just or Reasonable

As listed above, the Port of Los Angeles will allow access to container terminals after December 31, 2013, only to those truck drivers that are employees of concessionaire licensed motor carriers. This driver employee scheme will effectively eliminate independent truckers, thousands of whom currently provide approximately 80 percent of the drayage services in the Port. Again, there is no evidence that this requirement is in any way related to the goal of reducing air pollution, improving infrastructure, efficiency, or security of the ports. With respect specifically to security, every truck driver entering the Ports

⁷ See, e.g., Maritime Transportation Security Act (codified at 46 USC §70107-17) and the Security and Accountability for Every (SAFE) Port Act of 2006 (Pub. L. No. 109-347).

will be required to have a TWIC card irrespective of whether they are an independent contractor or an employee of large trucking firm. Moreover, the safety of the motor carrier industry is handled effectively by the State of California through its Department of Motor Vehicles and Highway Patrol,⁸ and local municipalities without having to resort to the drastic measure of eliminating the jobs of thousands of independent truckers.

Instead of a means to achieve the stated objectives of the Agreement, the driver employee plan seems motivated primarily to facilitate union organizing of port truckers and increasing trucking rates to retailers and other shippers. The result will be a substantial risk of a serious driver shortage, jeopardizing the supply chain of retailers and their ability to get timely delivery of products to consumers. Accordingly, NRF urges the FMC to find that the Port of Los Angeles' driver employee mandate is not just, reasonable or necessary under the Shipping Act to accomplish the stated goals.

3. The Port of Los Angeles Incentive Plan for Concessionaires Raises Several Questions and Concerns

As listed above, the Port of Los Angeles announced in August 2008 that it is offering financial incentives to encourage licensed motor carriers using 2007 or newer compliant trucks to apply for concessions to operate in the Port. These incentives include a cash payment of \$20,000 for each 2007 EPA-compliant truck that is procured from private funding undertakes a minimum number of trips over a five-year period. In addition, the Port is offering a payment of \$10 per dray by compliant trucks that undertake a minimum number of drays annually.

NRF does not object to the incentives per se. We are of the view that trucking companies are capable of raising funds privately for the purchase of clean trucks, which can be facilitated by private initiatives, such as the CRT, without the need for public financing. It also makes little sense to fund short-term depreciating assets, such as trucks, with long term public bonds. Reliance on private financing would conserve public bond money that would be better spent on other projects, such as infrastructure, that have a longer depreciation.

Therefore, we support incentives from the Ports to encourage the private financing of compliant trucks as an alternative to public financing. But we have concerns and reservations about an incentive program that permitted the Port unfettered discretion as to who may receive those incentives without the benefit of any guidelines or criteria. Therefore, we are disturbed by reports that the Port has offered the incentive only to large, out-of-state trucking companies, and not to any trucker that meets the requirement for obtaining a concession. This situation reinforces the impression that the Port of Los Angeles is motivated to manipulate the market for trucking services by limiting competition and

⁸ The Department of the California Highway Patrol has exclusive jurisdiction in regulating the safety of operation of motor carriers of property. Cal. Vehicle Code §34623(a).

handicapping independent truckers. As stated previously, this will adversely impact the retailers' supply chain and ability to timely deliver merchandise to consumers.

4. The Clean Truck Fee Should be Borne By the Party Directly Contracting for Trucking Services

NRF does not object to the principle of imposing a gate fee at marine terminals as a means to ensure compliance by the trucking industry with clean air standards. Indeed, the March 2007 White Paper endorsed by NRF envisions such an enforcement mechanism. However, as stated above, in many instances trucking services are contracted by an ocean carrier or 3PL. As an enforcement tool, it therefore, makes little sense to impose the fee on a party (shipper) that has little or no influence on the choice of which trucks will be used to dray cargo.

5. The NRF Strongly Supports Exempting Privately-Funded Compliant Trucks from the Truck Mitigation Fee

While there are many troubling aspect to FMC Agreement 201196, there are several provisions in the Agreement that the NRF and its members strongly support as consistent with the Shipping Act and with the goals of the retail industry and the Ports to replace older drayage trucks and reduce emissions in the Ports and surrounding communities.

In particular, we support the provision in the Clean Truck Program as stated in the Agreement creating exemptions from the \$35 per TEU fee on BCOs using compliant trucks for drayage services in the Ports. In our view, any truck meeting the relevant engine and emissions standards should not be subject to the fee. Maintaining such exemptions is essential to achieving the improvements in air quality envisioned in both the CAAP and the March 2007 industry White Paper. We also believe that the exemption should not be tied to clean trucks being ordered by October 1, 2008, as in Long Beach, in order to qualify for the exemption. The 100 percent exemption should apply whenever a clean truck is used, even if it is after October 1.

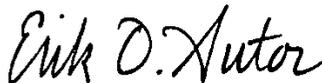
In any event, without the exemption, imposition of the fee on (e.g.) clean diesel trucks will result in a higher cost to move cargo on that cleaner equipment than on older, dirtier, non-compliant trucks. Such a result is obviously to be avoided.

In sum, these aspects of the Ports' plans, along with the incentives that the Ports intend to offer or have offered motor carriers for using newer trucks that reduce emissions in drayage services to the Ports (provided that guidelines and criteria for their availability are clarified), cannot but improve the environment, and need to be fully supported.

Conclusion

The NRF and other stakeholder groups have long argued that the Ports can construct a fleet of clean burning harbor trucks, while improving infrastructure, efficiency, and security without reducing competition and service, and without needlessly driving up shipping costs through ill-considered concession schemes or putting independent truckers out of business. In our view, those elements of the Clean Truck Program that include a ban on older trucks, a standard for trucks calling at the harbor and the imposition of fees (with exemptions) should be sufficient to achieve those goals. Other terms and conditions in the Agreement are, at best, questionable as they are not just, reasonable or necessary means to accomplish the Ports' stated goals. Although the Ports' goals are just, the ends can never justify the means. We urge the FMC to take the appropriate steps to address these issues pursuant to its authority under the Shipping Act.⁹ This is especially important because other ports may be watching the outcome of this matter, and the precedent it may create can span well beyond the two ports at issue. The FMC's decision can most definitely have far-reaching consequences.

Respectfully Submitted,



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Vice President, International Trade Counsel
National Retail Federation
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October 21, 2008

⁹ NRF's comments herein are limited to the Shipping Act, but NRF encourages the FMC to also consider other legal issues, including but not limited to, the Clean Air Act which establishes federal preemption over the regulation of new motor vehicles and motor vehicle engines. The Import-Export Clause and Commerce Clause of the U.S. Constitution may also come into play as to how commerce is being regulated by the Ports. There is also the Customs Convention on Containers, which restricts the ability of signatory countries (and by extension the States and Ports) from taxing cargo containers. The risk of the Agreement's terms and conditions running afoul of such constitutional, treaty and statutory provisions also raises the question of whether the means chosen by the Ports are just, reasonable or necessary to accomplish their stated goals.

From: broadcastemail@emodal.com [mailto:broadcastemail@emodal.com]

Sent: Monday, October 27, 2008 5:54 AM

Subject: PORT OF LOS ANGELES: Important Message to LMCs - Executed Concessions Must Be Complete by Nov. 1st



**ATTENTION – ALL APPLICANTS FOR CONCESSIONS TO OPERATE IN THE
PORT OF LOS ANGELES**

**EXECUTED CONCESSION AGREEMENTS MUST BE RECEIVED BY THE PORT BY
NOVEMBER 1 OR YOUR ACCESS TO TERMINALS
WILL BE IN JEOPARDY!**

The Port of Los Angeles is in the process of formalizing concession agreements with Licensed Motor Carriers (LMCs) that have applied to provide drayage operations. The Port cannot proceed with the finalization of any concession until such time as the concession applicant has provided **five** copies of the concession agreement, each with original signatures on page 7, as well as completed maintenance and parking plans and the required insurance forms. If you previously submitted the attachments with the old agreement, you need to resubmit the attachments. Photocopies of the signature page will not be accepted.

LMCs seeking concessions to operate in the Port of Los Angeles will not be allowed entry to marine container terminals after November 1, 2008 if they do not have an executed concession agreement with the Port.

The Port urges all concession applicants who have not downloaded the Port's new concession agreement to do so. The new concession agreement can be found at http://www.portoflosangeles.org/environment/ctp_con.asp. The concession applicant must print out five copies of the agreement and sign each one of them. All five agreements **with original signatures** must then be mailed to:

Port of Los Angeles Clean Truck Program
c/o Tetra Tech, Inc.
3475 East Foothill Boulevard
Pasadena, California 91107-6024
ATTN: Concession Agreement Administrator

If you have any questions regarding your concession application or agreement status, please call the Clean Truck Program Help Line at 866-721-5686 or send an email to POLA@tetrattech.com. For more information about the Port of Los Angeles Clean Truck Program, please visit <http://www.portoflosangeles.org/cleantrucks>.

This email is sent to you by PORT OF LOS ANGELES via the eModal Broadcast Email Center. **DO NOT REPLY TO THIS EMAIL, IT IS FOR INFORMATION PURPOSES ONLY.**

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ELIJAH E. CUMMINGS
7TH DISTRICT, MARYLAND

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RECEIVED
Congress of the United States
House of Representatives
Washington, DC 20515
FEDERAL MARITIME COMMISSION

October 28, 2008

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Rebecca F. Dye
Commissioner
Federal Maritime Commission
800 North Capitol St., NW
Washington, DC 20573

Harold Creel, Jr
Commissioner
Federal Maritime Commission
800 North Capitol St., NW
Washington, DC 20573

Joseph E. Brennan
Commissioner
Federal Maritime Commission
800 North Capitol St., NW
Washington, DC 20573

Dear Commissioners Dye, Creel, and Brennan:

I write to you today to express my support for the recent actions of the Commission in allowing the implementation of the Ports of Los Angeles and Long Beach Cooperative Working Agreement. The Agreement will reduce truck emissions by a significant percentage within the next few years.

While the Commission's action authorizing the implementation of the Southern California plan has allowed the Ports of Los Angeles and Long Beach to begin roll out of their Clean Trucks Program, the Commission's determination to continue to exert jurisdiction over the implementation of the agreement should provide necessary oversight to ensure that the actions taken by the Ports do not violate the prohibited actions of the Shipping Act of 1984.

Further, while this Working Agreement is drastically different from carrier price fixing agreements, or carrier or marine terminal cooperative working agreements, I contend that it is important as we move forward to try to pro-actively help address growth issues in an accountable, environmentally safe and secure fashion. I ask that you keep my staff informed as you continue your oversight work. Thank you for your time and consideration of these comments.

Sincerely,

Elijah E. Cummings
Chair
Subcommittee on Coast Guard and Maritime Transportation

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Congress of the United States
House of Representatives
Washington, DC 20515

COMMITTEE ON
TRANSPORTATION AND
INFRASTRUCTURE
SUBCOMMITTEE ON
AVIATION
HIGHWAY, TRAFFIC
AND PIPELINES
COAST GUARD AND
MARITIME TRANSPORTATION

COMMITTEE ON
SCIENCE AND TECHNOLOGY
SUBCOMMITTEE ON
TECHNOLOGY AND INNOVATION

October 28, 2008

Rebecca F. Dye
Commissioner
Federal Maritime Commission
800 North Capitol St, NW
Washington, DC 20573

Harold Creel, Jr
Commissioner
Federal Maritime Commission
800 North Capitol St, NW
Washington, DC 20573

Joseph E. Brennan
Commissioner
Federal Maritime Commission
800 North Capitol St, NW
Washington, DC 20573

Dear Commissioners Dye, Creel, and Brennan:

As you are aware, I represent California's 37th Congressional District, which serves as the gateway to the United States, moving goods from the largest ports in the nation (the Ports of Los Angeles and Long Beach) and over 45% of the entire nation's cargo. I write to you today to express my concerns on the potential Commission action of challenging the Port of Los Angeles Truck Concession Program in District Court regarding the requirement that trucking companies be licensed as motor carriers and ultimately ensure that the drivers they use would be company employees.

Since this month's launch of The Port of Los Angeles Truck Concession Program, there has been a 100 percent compliant rate among participating licensed motor carriers, representing over 600 concessionaires with 20,000 trucks enrolled in the program. With the program's launch there have been no reported negative impacts on harbor drayage transportation rates or measurable increases in transportation price, allowing the program's goal of an 80 percent reduction in truck emissions to be reached.

The success of the program is based on the requirement that licensed motor carrier operators are used and held accountable in compliance with the environmental, safety, security and financial ability requirement that are mandated in the program. Using licensed motor carrier operators reflects the local consensus, after three years of negotiations, over how to control problems that negatively impact the community due to current port operations. Removing the licensed motor carrier requirement would have dire consequences on the core integrity of the Truck Concession Program.

This year the Federal Maritime Commission has evaluated the Ports of Los Angeles and Long Beach Clean Truck Program. I look forward to working with you in the 111th Congress as we evaluate the national "interstate" implications as considered in the H.R. 7002, the MOVEMENT Act; however, I support the Commission's previous action of authorizing the Ports of Los Angeles and Long Beach to implement the Clean Truck Program. I firmly oppose any steps to

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remove license motor carrier requirements from the current agreement. I look forward to the review of the Clean Truck Program successes and continuing to work with the Federal Maritime Commission on matters affecting our nation's maritime policy.

Sincerely,

A handwritten signature in black ink, appearing to read "Laura Richardson". The signature is fluid and cursive, with a large initial "L" and "R".

Laura Richardson
Member of Congress



**THE PORT
OF LOS ANGELES**

425 S. Palos Verdes Street Post Office Box 151 San Pedro, CA 90733-0151 TEL/TDD 310 SEA-PORT www.portoflosangeles.org

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Mayor, City of Los Angeles

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Geraldine Kratz, Ph.D

Executive Director

October 28, 2008

Commissioner Joseph E. Brennan
Commissioner Harold J. Creel, Jr.
Commissioner Rebecca F. Dye
Federal Maritime Commission
800 N. Capitol Street, NW
Washington DC 20573

Dear Commissioners:

**SUBJECT: (1) FMC Agreement No. 201170-001, Los Angeles /Long Beach Port
Infrastructure & Environmental Cooperative Working Agreement, and
(2) FMC Agreement No. 201196 – The Los Angeles and Long Beach
Marine Terminal Agreement**

On behalf of the Port of Los Angeles (Port), this letter expresses our continuing concern about the Federal Maritime Commission's intended actions regarding the Clean Truck Program. The Port has been very surprised to hear from various sources that the FMC staff intends this week to recommend an injunctive relief action against the Port, justified in part by what FMC staff has told others was a refusal to negotiate by the Port, or a failure of the Port to respond to the FMC's suggestions. The Port's position is, in fact, the opposite. In an October 14, 2008 letter jointly sent by the Executive Directors of the Ports of Los Angeles and Long Beach, we requested that the FMC communicate with the Port regarding its position on the Clean Truck Program prior to proceeding with any further litigation action.

We reiterate our call to the FMC to delay taking any action against the Port's Clean Truck Program until we have had the opportunity to meet with you for direct, two-way discussion about your concerns and suggestions. We will give serious attention to the FMC's suggestions and analysis, which have not been previously shared with us, and are open to listening to the FMC's input regarding program measures.



To date, the FMC has only generated extensive lists of written questions and requests for Port documents, to which the Port has responded. But, the FMC has not given the Port information in return, such as the reasons why the FMC has a different analysis of the Port's program. The Port observes, by the nature of the questions asked and documents requested, that the FMC staff is studying the details of individual program measures while lacking the understanding of the strategic integration and purposes of such measures.

The Clean Truck Program is a comprehensive program that achieves multiple goals of the Port, including environmental, safety, and security. The Concession Program and Concession Agreement are integral to achieving the Clean Truck Program's goals. The Concession Agreement creates, for the first time, contractual relationships between the Port and the licensed motor carriers (LMCs) that access Port property for the purpose of transporting cargo – activities that directly impact the environmental, safety and security conditions on Port land. The Concession Program makes Concessionaires accountable for the safety and environmental maintenance of trucks and safety training of drivers, thereby improving the public safety conditions operating on Port property. The Concession Program closes the security gap that currently exists on Port property, by correlating drivers, trucks, cargo and the responsible licensed motor carriers.

Exemptions from the Clean Truck Fee and financial incentives will accelerate the number of clean trucks operating at the Port to achieve emissions reduction sooner and with less public money. The initial round of incentive applications yielded a number of Clean Trucks that were scheduled to be implemented by LMCs of all sizes in the first quarter of the Clean Truck Program, between October 1 and December 31, 2008, well in advance of initial projections without such incentives. This will result in cleaning the air sooner, with less public money than replacement trucks funded by the Clean Truck grant program.

We are disappointed by the FMC's apparent preference to act without consultation or discussion, by its filing of Order for Investigation Docket No. 08-05. We are concerned that the FMC may rush to act in formal proceedings before fully understanding the program it is attacking, and may run into court to litigate matters without having any substantive two-way dialogues with the Port.

We know of no reason why the FMC needs to take any action at this particular time, as there is no particular deadline by which the FMC must take action. In one area the Port believes is an FMC concern, the Port's employee requirement will not be reviewed for concessionaire compliance until 2010, following the close of measurement period (the fourth quarter of 2009). Similarly, the Port's parking plan requirement will not be reviewed for compliance until the second quarter of 2009. These are just two examples of lengthy program implementation lead time, which dispels the need for urgency to litigate.

October 28, 2008
Page 3

It would be more productive and within the FMC's role to advise the Port on its ideas for reducing costs rather than draining its resources on a questionable proceeding in subject areas of environment, safety and security operations of the Port. The Clean Truck Program is a complex operational program about which, from our observations, the FMC is confused and could benefit from a deeper understanding.

We call upon the Federal Maritime Commission to have the FMC staff engage in a meaningful two-way conversation with the Port for the parties to better understand their respective positions, prior to any decisions being made regarding the Clean Truck Program. We believe that, given a chance for such dialogue, the FMC will understand why the Port maintains that the Clean Truck Program can achieve sustained success only if all the elements of this intricate, integrated program remain in place. As the Port's Executive Director, I need to be personally involved in such a meeting, so I request that FMC staff contact my assistant, Eileen Tankersley, at (310) 732-3244 or ETankersley@portla.org to schedule a mutually convenient meeting date. We invite FMC staff to come to the Port of Los Angeles, where they can see firsthand the Clean Truck Program in successful operation.

Finally, the FMC has received a Petition from the Natural Resources Defense Council, Coalition for Clean Air, and Sierra Club related to Federal Maritime Commission Evaluation and Actions on the Ports of Los Angeles and Long Beach's Clean Truck Program. We understand that the FMC has denied the Petition, but that the NRDC and other environmental petitioners have appealed that denial and have raised serious issues for the FMC's consideration. For all of the above reasons, the FMC should delay any decision until these issues are addressed.

Sincerely,



for GERALDINE KNATZ, Ph.D.
Executive Director
City of Los Angeles, Harbor Department

FEDERAL MARITIME COMMISSION

Federal Maritime Commission

Washington , D.C.

NR 08-16

**FMC ACTS TO BLOCK ANTI-COMPETITIVE ASPECTS OF SAN PEDRO BAY PORTS
CONCESSION REQUIREMENTS**

CONTACT: KAREN V. GREGORY (202) 523-5725; e-mail: secretary@fmc.gov

FOR RELEASE OCTOBER 29, 2008

The Federal Maritime Commission ("FMC" or "Commission") today determined by 2-1 vote that implementation of certain portions of the Clean Truck Programs ("CTP") by the Ports of Los Angeles and Long Beach under FMC Agreement No. 201170, are likely, by a reduction in competition, to produce an unreasonable increase in transportation cost or unreasonable reduction in service. The Commission, therefore, authorized staff to file a complaint with the U.S. District Court for the District of Columbia pursuant to section 6(h) of the Shipping Act of 1984, to enjoin aspects of Agreement No. 201170, including concession requirements that mandate exclusive use of employee-drivers. Commissioner Joseph E. Brennan dissented from this determination.

In authorizing this action, the Commission appreciates the potential environmental and public health goals of the Ports' CTP, and recognizes that some transportation cost increases may be necessary to generate clean air and public health benefits. However, the Commission concluded that the reduction in competition resulting from certain agreement-related activities will result in substantial transportation cost increases, beyond what is necessary to generate the public benefits asserted by the Ports. The Commission believes that surgical removal of substantially anti-competitive elements of the Agreement, such as the employee mandate, will permit the Ports to implement on schedule, those elements of the CTP that produce clean air and improve public health.

The Shipping Act directs the Federal Maritime Commission to evaluate the potential anti-competitive impacts of all agreements. The Ports of Los Angeles and Long Beach are marine terminal operators under the Shipping Act, and are permitted to collectively develop and implement their CTP pursuant to an agreement on file with the FMC. Subject to the Commission's jurisdiction and ongoing oversight, parties to agreements receive immunity from the U.S. anti-trust laws. This oversight ensures that activities of the Agreement parties do not result in unreasonable increases in transportation cost or reductions in service, or otherwise give rise to unreasonable practices under the Shipping Act.

Commission staff worked with Agreement filing parties to collect and analyze information to understand how the CTP would work and to minimize Commission intervention. The Commission requested additional information both informally and formally from the Agreement parties to assist the Commission in making its determination.

Commissioners Creel and Dye commented that the Federal Maritime Commission must ensure that our foreign trades operate free from substantially anticompetitive activities. The shipping public should be afforded the full benefit of the protections of the Shipping Act

* * * * *

Press Contact: Karen V. Gregory (202) 523-5725; e-mail: secretary@fmc.gov

FEDERAL MARITIME COMMISSION

Commissioner Brennan Dissents from FMC Action against Clean Trucks Program; Calls Commission Vote a Colossal Mistake

October 30, 2008

Commissioner Brennan's statement:

In an October 29th closed-session meeting of the Federal Maritime Commission, Commissioner Joseph E. Brennan voted against a motion to seek a federal injunction to stop the Clean Trucks Program (CTP) of the Port of Los Angeles.

Commissioner Brennan considers it a colossal mistake for the Commission to try to block a program of environmental protection and economic expansion that has been endorsed as reasonable and necessary by, among others, Los Angeles Mayor Antonio Villaraigosa, the Los Angeles Board of Harbor Commissioners, U.S. Senators Dianne Feinstein and Barbara Boxer, Speaker of the House Nancy Pelosi, U.S. Representatives Laura Richardson and Loretta Sanchez, and some 30 other members of the California delegation of the U.S. House of Representatives.

In Mr. Brennan's view, the Commission should give more deference to the policy judgments made in this matter by elected officials. Following years of extensive study in a public process with input from all concerned, Los Angeles has adopted a Clean Trucks Program that fairly falls within the broad definition of "reasonable" under the Shipping Act. Under these circumstances, the Commission majority has no basis for forcing the Port of Los Angeles to adopt an alternative port-management model that individual commissioners happen to think is reasonable.

Commissioner Brennan's vote against going to court represents his recognition that Los Angeles has superior knowledge of port operations and a direct interest in seeing the Clean Trucks Program succeed so as to clean up the air, allow expansion of the infrastructure, and promote efficient port operations. Brennan said he is appalled that the Commission's decision to seek an injunction displays a bureaucratic arrogance and ignores the felt needs of the citizens of Los Angeles to clean up their air, expand their port, and promote a living wage for truck drivers working at the port.

Brennan noted that the federal courts in California recently on two occasions rebuffed attempts by the trucking lobby to block the Clean Trucks Program. Brennan says he believes the FMC's attempt to block the CTP should, and will, meet the same fate in court.

For the Commissioner, the basic question under the Shipping Act is whether it is reasonable for the Port of Los Angeles to require truck drivers to be employees. It is likely, as Los Angeles argues, that so-called independent owner-operators will not have the control, capital, and economies of scale needed to keep their trucks within environmental standards. On that basis alone, it would be reasonable for Los Angeles to phase in its employee requirement.

Commissioner Brennan noted that the so-called independent owner-operators in Los Angeles earn, on average, only \$29,000 annually, which qualifies a family of four for over

\$18,000 in public assistance, such as the earned-income tax credit, Section 8 housing, reduced-price school meals, and Women, Infants, and Children (WIC). In addition, a task force authorized by the Office of the Attorney General in California found numerous instances of trucking companies' illegally misclassifying workers as "independent contractors" to avoid the cost of workers' compensation, disability, and minimum wage laws. Attorney General Jerry Brown has brought suit on the basis of these alleged violations.

Commissioner Brennan asked his fellow commissioners to recognize these and other economic realities when evaluating whether any increased costs associated with the Clean Trucks Program would arguably be outweighed by positive effects on the health, safety, and welfare of the citizens of Los Angeles. He believes the Commission can legitimately take into account that the employee mandate could cause large numbers of truck drivers to no longer need government assistance, effectively ending taxpayer subsidies of large commercial shippers that can well afford to make payments supporting a living wage for truck drivers. There is simply no cause for the taxpayers of Los Angeles to subsidize large shippers.

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FEDERAL MARITIME COMMISSION

November 3, 2008

Via Messenger

Karen V. Gregory, Secretary
Federal Maritime Commission
Room 1046
800 North Capitol Street, N.W.
Washington, D.C. 20573

Re: Port Fee Services Agreement

Dear Ms. Gregory:

Enclosed herewith for filing pursuant to 46 U.S.C. § 40302, and 46 U.S.C. § 40301(b)(1), are a true copy and seven (7) additional copies of the Port Fee Services Agreement (the "Agreement").

The parties to the Agreement are the City of Los Angeles, acting by and through its Board of Harbor Commissioners; the City of Long Beach, acting by and through its Board of Harbor Commissioners; PortCheck LLC; and the following marine terminal operators: APM Terminals Pacific Ltd.; California United Terminals, Inc.; Eagle Marine Services, Ltd.; International Transportation Service, Inc.; Long Beach Container Terminal, Inc.; Seaside Transportation Service LLC; Total Terminals LLC; West Basin Container Terminal LLC; Pacific Maritime Services, L.L.C.; SSA Terminal (Long Beach), LLC; Trans Pacific Container Service Corporation; Yusen Terminals, Inc.; and SSA Terminals, LLC. The full legal names and office addresses of the ports and PortCheck LLC are found in Section 12.6 of the Agreement. The full legal names and addresses of the marine terminal operators are found in Appendix A.

The Agreement completely sets forth terms and conditions under which PortCheck LLC and the marine terminal operators will provide certain services to the ports as provided for in tariffs published by the ports. These services relate to the collection of a clean truck fee and control of access to port property, and related activities, as provided in the ports' tariffs. The Agreement applies only to future, prospective activities of the ports relating to marine terminal facilities. The Agreement completely sets forth the applicable rates, charges, terms and conditions agreed to by the parties for the facilities and/or services provided for under the Agreement. The Agreement is not a marine terminal conference, a marine terminal discussion agreement, or a marine terminal interconference agreement.

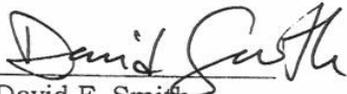
The Agreement is a marine terminal agreement as defined in 46 CFR § 535.308(a). It is therefore exempt from the waiting period requirements of the Shipping Act of 1984, as amended, and is effective on filing pursuant to 46 CFR § 535.308(e).

Secretary
Federal Maritime Commission
November 3, 2008
Page 2

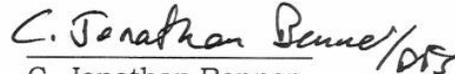
A check in the amount of the appropriate filing fee is enclosed. A copy of this letter and its enclosures has been provided for your acknowledgement of receipt.

Should you or the staff have any questions regarding the Agreement, please do not hesitate to contact the undersigned.

Sincerely,



David F. Smith
Wayne R. Rohde
Counsel to PortCheck LLC
and marine terminal operators



C. Jonathan Benner
Matthew J. Thomas
Counsel to the City of Los
Angeles and the City of Long
Beach, acting through their
respective Boards of Harbor
Commissioners

Enclosures

ORIGINAL
Original Title Page

Nov. 3, 2008

FEDERAL MARITIME COMMISSION

PORT FEE SERVICES AGREEMENT

FMC Agreement No. 201199

A Marine Terminal Agreement

Expiration Date: See Section 6.1

TABLE OF CONTENTS

<u>Section</u>	<u>Provision</u>	<u>Page</u>
1	Services to be Provided by Vendor or MTOs	2
2	Compensation to Vendor	5
3	Covenants and Obligations	8
4	Representations and Warranties	11
5	Limitation of MTO Liability	12
6	Effective Date, Duration and Termination	13
7	Time for Performance	14
8	Ports' Tariffs	15
9	Relationship Between Parties	15
10	Confidentiality	15
11	Governing Law and Venue	16
	Signature Page	
	Appendix A	
	Exhibit A	
	Exhibit B	
	Exhibit C	
	Exhibit D	
	Exhibit E	
	Exhibit F	
	Exhibit G	
	Exhibit H	

Harbor Department
Agreement 08-2720
City of Los Angeles

PORT FEE SERVICES AGREEMENT

This **PORT FEE SERVICES AGREEMENT** (the "Agreement"), is entered into this 20th day of October, 2008, by and among the City of Los Angeles, acting by and through its Board of Harbor Commissioners ("POLA"), and the City of Long Beach, acting by and through its Board of Harbor Commissioners ("POLB") on the one hand (POLA and POLB are hereinafter referred to jointly as the "Ports"), and PortCheck LLC ("Vendor") and each of the marine terminal operators listed in Appendix A hereto (hereinafter referred to individually as an "MTO" and jointly as the "MTOs"), on the other hand.

WHEREAS, the Ports, as part of their Clean Air Action Plan, have adopted a Clean Truck Program (the terms "Clean Air Action Plan" and "Clean Truck Program" refer to the plans and programs set forth in Section 20 of Port of Los Angeles Tariff No. 4 and Rule 34-J; Section 10 of Port of Long Beach Tariff No. 004 (collectively the "Tariffs" as such Tariffs may from time to time be amended)) pursuant to which they seek to exclude certain trucks from port property, provide financing to replace such trucks with environmentally cleaner trucks, and impose a truck fee ("TF") on certain cargo leaving and/or entering the Ports; and

WHEREAS, the Ports also have adopted an infrastructure fee ("IF") as set forth in Section 21 of Port of Los Angeles Tariff No. 4 and Rule 34-K; Section 11 of Port of Long Beach Tariff No. 004 (the TF and IF are referred to jointly as the "Fees") on certain cargo leaving and/or entering the Ports in order to fund infrastructure improvements, including improvements intended to mitigate the environmental impact of port operations; and

LONG BEACH HD - 7359

WHEREAS, the Ports wish to have the MTOs (who lease and/or operate marine terminals within the Ports) collect the Fees and administer certain other aspects of the Ports' Clean Truck Program; and

WHEREAS, the MTOs are prepared to collect the Fees and administer other aspects of the Ports' Clean Truck Program in exchange for reimbursement of their incremental costs and other valuable consideration as set forth herein, and have established the Vendor to collect the Fees for each of them.

NOW THEREFORE, the parties, intending to be legally bound, hereby agree as follows:

SECTION 1. SERVICES TO BE PROVIDED BY VENDOR OR MTOS.

The Vendor, or the MTOs if specifically so provided herein, shall provide the services set forth below to the Ports, with respect to cargo moving in the foreign and/or domestic commerce of the United States, to the extent such cargo falls within the scope of the Ports' Tariffs.

1.1 Appropriate Identification. Vendor shall provide or cause to be provided an appropriate means of identifying and obtaining relevant information with respect to trucks serving terminals at the Ports of Los Angeles and Long Beach through accessing the Ports' Drayage Truck Registry.

1.2 Collection of Fees. The Vendor agrees to use commercially reasonable efforts to collect, on behalf of the Ports, all Fees on cargo moving to/from the terminals of the MTOs in Los Angeles or Long Beach in accordance with the Ports' respective Tariffs, subject to Section 2.4 hereof, and to keep all Fees collected in an interest-bearing account for the benefit of the Ports. Vendor is authorized to establish such payment methods and procedures as it may deem advisable, and may permit payments on credit pursuant to such credit terms and agreements as it may establish,

but the substantive provisions of the Ports' Clean Truck Program and Infrastructure Fee Program (including, but not limited to the amount of the Fees, the persons by whom payment is to be made, and the criteria for truck access to terminals) shall be determined solely by the Ports. Except with respect to those items which are the responsibility of the Ports pursuant to Section 3 hereof, Vendor shall be responsible for obtaining and providing all computer hardware, software, personnel, and related goods and services necessary to collect the Fees.

1.3 Remittance of Fees. Vendor agrees to remit all Fees collected and interest earned thereon to the Ports in accordance with the payment parameters attached hereto as Exhibit A and incorporated by this reference. The Vendor or an MTO shall not be liable for uncollected Fees provided Vendor uses commercially reasonable collection practices. Reasonableness in this context shall take into account the time and expense involved in collection relative to the amount to be collected as well as the creditworthiness and financial standing of the debtor.

1.4 Access to Terminals. To the extent the Ports' Tariffs establish criteria which trucks and their owners or operators must meet in order to gain access to marine terminals at the Ports and/or a deadline by which such criteria must be met, the MTOs shall permit access only to trucks that meet the criteria/deadlines established by the Ports, provided that the relevant information as to whether a truck meets the criteria is timely provided to the MTOs through the Ports' Drayage Truck Registry ("DTR").

1.5 Use of Contractor(s) Permitted. Vendor may, at its discretion, fulfill its obligations under Sections 1.1 through 1.3 of this Agreement directly, through the use of one or more contractor(s), or through a combination thereof.

1.6 Reports/Audits/Accounting. The intent of the parties to this Agreement is that Vendor shall remit all Fees collected to the Ports without deduction or offset and that in exchange Ports shall pay as compensation to Vendor all costs attributable to the services provided by Vendor pursuant to this Agreement ("Incremental Costs") The Incremental Costs are further described in Section 2. Vendor shall keep full and accurate books, records and accounts relating to its operations under this Agreement, including without limitation, the amount of Fees collected and not collected, from whom collected, shipments on which Fees are collected, and Incremental Costs. Vendor shall provide to the Ports periodic reports accounting for Fees collected, shipments on which Fees are collected, and any Fees not collected. Ports shall have the right and privilege, through their respective representatives at all reasonable times and on reasonable notice, and at their expense, to inspect Vendor's books, records and accounts in order to verify the accuracy of information, including without limitation, the Fees, Incremental Costs and other information described in this Section 1.6. Vendor agrees that such books, records and accounts shall be made available to the Ports or their representatives at a mutually agreed location in either the City of Los Angeles or the City of Long Beach, as the case may be.

1.7 Ownership of Materials. Vendor and MTOs acknowledge and agree that any and all work product, including data relating to Fees, identification of the MTOs, payment records, invoices, account information, ideas, specifications, drawings, designs, writings, concepts, hardware and standard, off-the-shelf software created by or purchased by Vendor at any time with respect to or for exclusive use in connection with the Clean Truck Program, but excluding proprietary or customized software of Vendor or its contractor and all component parts and codes thereof (collectively, the "Work") is "work made for hire" within the meaning of all relevant copyright laws; if

any such Work is not "work made for hire" for any reason, then Vendor assigns all right, title, and interest in the Work to the Ports as follows: For good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, Vendor and MTOs hereby assign and agree to assign to the Ports all right, title, and interest in and to the Work, including without limitation any and all worldwide copyrights for the full term of copyrights and all renewals, extensions, revivals, resuscitations, and reissuances thereof, in the name of the Ports jointly and severally, together with all present and future rights of every kind pertaining to the Work whether or not such rights are now known, recognized or contemplated, in all media now known or hereafter developed. Such right, title, and interest shall include without limitation the unrestricted right to adapt, change, transpose, add to, interpolate in and subtract from the Work to such extent as the Ports in their sole discretion may deem expedient, and to use parts of the Work in conjunction with any other work or works, in any manner. Vendor and MTOs shall execute and deliver, at no expense to themselves, to the Ports all further documents that may be necessary to effectuate the purposes of this paragraph and to convey to the Ports all rights in the Work.

1.8 Service Levels. Vendor shall make commercially reasonable efforts to ensure that any systems used to provide the services described in this Agreement ("Systems") are available in the manner and at the times set forth in Exhibit B, Service Levels for Vendor's Systems, attached hereto and incorporated by this reference. Ports shall make commercially reasonable efforts to ensure that the DTR is available in the manner and at the times set forth in Exhibit C, Drayage Truck Registry Service Levels, attached hereto and incorporated by this reference.

SECTION 2. COMPENSATION TO VENDOR.

In exchange for the services provided under this Agreement, the Ports shall be jointly and severally liable to compensate Vendor as set forth below.

2.1 Development Costs. Within 30 days of the effective date of this Agreement, the Ports shall each pay Vendor one half of the Incremental Costs of developing the Systems as set forth in Exhibit D, attached hereto and incorporated by this reference, in the total amount of \$3,844,787 ("Development Costs").

2.2 Operating Costs. In addition to Development Costs, the Ports shall pay Vendor the Incremental Costs of operating the Systems and performing all other services pursuant to this Agreement as set forth in Exhibit E, attached hereto and incorporated by this reference, in a total annual amount not to exceed \$7,638,055, as such annual amount may be adjusted by the budgets agreed to under this Section (subject to such Board approval as may be required) ("Operating Costs"). The Vendor shall submit invoices for Operating Costs to the Ports every month on or about the first day of the month for Incremental Costs projected to be incurred during the month in accordance with the then-current version of Exhibit E. The Operating Costs for that month shall be apportioned between POLA and POLB according to the respective volume of merchandise for each port assessed the Fees, measured in twenty-foot equivalent units. All payments to Vendor shall be made by the Ports in due course, but not to exceed 30 days after receipt of the invoices by the Ports, without prejudice to or waiver of the right to subsequent adjustment of the amounts due pursuant to Section 2.3 hereof.

2.3 Adjustment of Payments for Development Costs and Operating Costs. Exhibits D and E reflect the parties' current expectations regarding Development Costs and Operating Costs and the actual amounts may vary. With respect to Development Costs, within 90 days after payment of the Development Costs pursuant to Section 2.1 hereof, the parties shall reconcile the actual amount of Development Costs to the amount projected in Exhibit D and the Ports shall pay any additional

amount so determined or the Vendor shall reimburse any excess amount so paid by the Ports. With respect to Operating Costs, every six months from the receipt of the first invoice for Operating Costs, the parties shall reconcile the actual Operating Costs for the prior six month period to the amount projected in the then-current version of Exhibit E and the Ports shall pay any additional amount so determined or the Vendor shall reimburse any excess amount so paid by the Ports. All amounts invoiced under this Agreement are subject to audit by the Ports pursuant to Section 1.6 of this Agreement. Development Costs and Operating Costs shall be paid by the regardless of whether Fees are collected or in what amount, unless noncollection of Fees results from a material breach of this Agreement by the Vendor.

2.4 Other Adjustments in Compensation. In the event POLA, POLB, or both, revise its/their Tariff(s) in a manner that necessitates a change in the scope of the services hereunder, requires a change in the Systems, and/or services to be provided by Vendor or MTOs, or otherwise results in additional costs to the Vendor or MTOs which are not provided for in Section 2.1 and 2.2 above and Exhibits D and E, the parties agree to negotiate in good faith for an appropriate adjustment to the Agreement and the compensation payable hereunder. If the parties cannot agree, the Vendor and MTOs (the latter pursuant to the vote required under Article VII(i) of the West Coast MTO Agreement) may terminate this Agreement on not less than ninety (90) days written notice to the Ports. If the Agreement is terminated for this reason or any other, the Vendor shall provide to the Ports, in electronic format, all Work as defined by Section 1.7 of this Agreement.

2.5 Payment of Compensation An On-Going Obligation. Unless the Agreement has been terminated, and subject to the parenthetical in the last sentence of this Section, the Ports shall remain liable for payment of the compensation set forth

in Sections 2.1 through 2.4 of this Agreement even if the Fees or either of them are not imposed and/or cannot be collected on either a permanent or temporary basis.

During the term of this Agreement, the Ports shall not be relieved of their obligation to pay compensation to Vendor in the event any aspect of the Fees, the Clean Truck Program and/or the Clean Air Action Plan is not implemented, is delayed or suspended, or is discontinued for any reason whatsoever including, but not limited to, any interim or final order of a court (but not if the noncollection results from a material breach of this Agreement by Vendor). If any aspect of the Fees, the Clean Truck Program and/or the Clean Air Action Plan is not implemented, is delayed or suspended, or is discontinued for any reason whatsoever, including, but not limited to any interim or final order of a court, Vendor and MTOs agree to reduce and avoid Development Costs and Operating Costs to the maximum extent feasible.

SECTION 3. COVENANTS AND OBLIGATIONS

3.1 Cooperation. The parties shall cooperate fully with each other, and shall cause any contractor(s) to cooperate with the parties, in connection with the performance by Ports, Vendor and MTOs of their respective obligations hereunder. The parties and their contractor(s) shall provide to each other, all information which the parties or their contractor(s) may deem reasonably necessary for the complete and efficient collection of the Fees and administration of those aspects of the Ports' Clean Truck Program for which Vendor and MTOs are responsible hereunder, including but not limited to information from the DTR and information with respect to the Ports' truck concession program relevant to application of the Fees and/or access of trucks to the MTOs' terminals, records of collections and transactions. Vendor shall not be responsible for the accuracy of information provided to it by the Ports or the Ports' contractors for purposes of performing Vendor's services under this Agreement.

3.2 Public Outreach. In order to permit the efficient and timely collection of the Fees by Vendor and administration of other aspects of the Clean Truck Program by MTOs, the Ports, at their own expense, shall engage in all public outreach and education efforts reasonably necessary to inform all parties liable for payment of the Fees of the requirement to pay the Fees and the procedures and timing thereof, and to inform licensed motor carriers of all obligations imposed on them under the Ports' Clean Truck Program including, but not limited to, the need to meet certain environmental and other criteria and to obtain concessions and truck identification. Such outreach and education efforts shall be conducted in a manner and at a time reasonably satisfactory to the Vendor, MTOs and its/their contractor(s) in order to ensure that information disseminated through such efforts is accurate, consistent and timely.

3.3 Maintenance of and Access To Database. The Ports, at their expense, shall be responsible for the maintenance of a complete, accurate and up-to-date DTR that identifies the status of all trucks regularly serving the Ports with respect to the environmental and concession requirements for trucks established by the Ports. The Ports, at their expense, shall provide Vendor, MTOs and its/their contractor(s) with access to such database to the extent necessary to fulfill their obligations under this Agreement but the Ports shall not be responsible for costs related to such access. Vendor and MTOs shall not be liable for the consequences of any errors or omissions in the content or transmission of the data in the database maintained by the Ports. Upon accurate transmission of the data to the Vendor and MTOs, they shall be responsible for maintaining accurate copies of the data transmitted and stored on their Systems.

3.4 Effective Date of System Changes. In the event that a revision in POLA's, POLB's or both Ports' Tariffs requires a modification to Vendor's System, Vendor will endeavor to implement any such modification as soon as possible, but in any event, no later than ninety (90) days from the effective date of such Tariff change.

3.5 Indemnification. The Ports hereby undertake and agree to protect, defend, hold harmless and indemnify Vendor, each of the MTOs, and their respective owners, members, and employees ("Indemnitees") against any and all claims, demands, losses, damages, fines and/or liabilities brought or imposed by a third-party (hereinafter "Claims") arising from or relating to the collection of one or both of the Fees or the enforcement of criteria imposed by Ports for truck access to marine terminals at the Ports. The indemnity set forth in this Section shall apply to and cover litigation by any third party challenging the Fees, Ports-imposed truck access criteria, or any actions by Vendor or the MTOs taken pursuant to this Agreement to collect or administer any of the foregoing (including, but not limited to, any enforcement or civil penalty action brought by a federal agency with jurisdiction over the subject matter of this Agreement), except to the extent such Claims are caused by any negligent act, recklessness or willful misconduct by any of the Indemnitees. Said indemnity shall include reasonable attorneys' fees and costs of the defense of any proceedings brought against the Indemnitees in court or by or before any agency. Said indemnity is expressly conditioned upon Indemnitees giving the Ports prompt written notice of any threatened, anticipated, or initiated Claims. Ports shall have the right to select legal counsel and control the defense of any Claims and the Indemnitees agree to assist the Ports, as may be reasonably requested, in such defense. Indemnitees shall have the right to consult with respect to the defense of their interests. In the event that any Indemnitee(s) elects to defend itself with respect to any Claim or Claims or control the

defense thereof, this Section shall not apply and the Ports shall not be responsible for indemnification of such Claim or Claims; provided, however, that if the Ports and Indemnitees have conflicting or inconsistent interests in the defense of any Claims, the Indemnitees shall be permitted to engage independent counsel to provide their defense at the Ports' expense. Furthermore, Indemnitees shall not be entitled to indemnity with respect to any Claim(s) initiated against the Ports by said Indemnitees.

SECTION 4. REPRESENTATIONS AND WARRANTIES.

4.1 Representations and Warranties of Vendor. Vendor hereby represents and warrants to the Ports that:

(a) It is a limited liability company duly organized and validly existing under the laws of the State of California and has all requisite power, capacity, and authority to enter into this Agreement and perform its obligations hereunder.

(b) This Agreement has been duly executed and delivered by Vendor and constitutes the legal, valid, and binding obligation of Vendor enforceable against Vendor in accordance with its terms, subject to bankruptcy, insolvency and other similar laws relating to or affecting the enforceability of creditors' rights generally, and to general principles of equity.

(c) The execution, delivery and performance of this Agreement by Vendor, will not violate any agreements or instruments to which Vendor is a party, and does not require the consent of any third party.

4.2 Representations and Warranties of MTOs. Each MTO hereby represents and warrants to the Ports that:

(a) It is duly organized and validly existing under the laws of the jurisdiction in which it is incorporated and has all requisite power, capacity, and authority to enter into this Agreement and perform its obligations hereunder.

(b) This Agreement has been duly executed and delivered by it or on its behalf and constitutes the legal, valid, and binding obligation of the MTO enforceable against it in accordance with its terms, subject to bankruptcy, insolvency and other similar laws relating to or affecting the enforceability of creditors' rights generally, and to general principles of equity.

(c) The execution, delivery and performance of this Agreement it will not violate any agreements or instruments to which MTO is a party, and does not require the consent of any third party.

4.3 Representations and Warranties of Ports. Each of the Ports hereby represents and warrants to Vendor that:

(a) This Agreement has been duly executed and delivered by it and constitutes the legal, valid and binding obligation of POLA or POLB (as the case may be), enforceable against each of them in accordance with its terms.

(b) The execution, delivery and performance of this Agreement by POLA and POLB will not violate any agreement or instrument to which they or either of them is a party, and does not require the consent of any third party.

(c) Ports have complied with all applicable laws, ordinances and regulations applicable to procurement, approval and execution of this Agreement.

(d) The Ports are not immune from suit for claims arising under this Agreement providing any claimant complies with the procedures set forth in California Government Code Section 900 and following.

SECTION 5. LIMITATION OF MTO LIABILITY

Each MTO shall be liable only for the performance or non-performance of those obligations expressly imposed on it by Sections 4.2 and 7.3 of this Agreement. No

MTO shall be liable for any act or omission on the part of the Vendor or any other MTO including, but not limited to, non-collection of any Fee(s).

SECTION 6. EFFECTIVE DATE, DURATION AND TERMINATION

6.1 Effective Date and Duration. This Agreement shall become effective on the later of the date last signed below or the date it becomes effective pursuant to the Shipping Act of 1984, as amended ("Shipping Act), to the extent applicable, and shall remain in effect for an initial term of two (2) years. Unless any party has given notice of termination pursuant to any applicable provision of this Agreement, the Agreement shall be automatically extended for successive one-year periods thereafter, up to a maximum of five years. In the event the Agreement extends beyond three years from the effective date, POLA shall seek City Council approval pursuant to its City charter.

6.2 Termination Without Cause. The Vendor/MTOs (the latter pursuant to the vote required under Article VII(i) of the West Coast MTO Agreement) and the Ports may terminate this Agreement by providing advance written notice of termination to the other party not less than six (6) months prior to the expiration date of the Agreement term then in effect (the initial two-year term or any of the successive one-year terms).

6.3 Termination Due to Material Breach. Notwithstanding anything to the contrary in Sections 6.1 and 6.2 hereof, the Ports (on the one hand) or the Vendor/MTOs (on the other hand, and the latter pursuant to the vote required under Article VII(i) of the West Coast MTO Agreement) may terminate this Agreement on not less than thirty (30) days written notice in the event of a material breach of this Agreement by the other party after first giving the breaching party written notice of such breach and ten (10) days in which to cure such breach.

6.4 Termination Due To Discontinuation of Clean Truck Program. This Agreement shall terminate immediately with respect to POLA and/or POLB if such port discontinues its Clean Truck Program and/or deletes the Fees from its Tariffs upon the effective date of such Port action.

SECTION 7. TIME FOR PERFORMANCE

7.1 Collection of TF. The Vendor and MTOs shall use their best commercial efforts, individually and collectively, to begin collection of the TF beginning on October 1, 2008. However, because the ability of the Vendor to collect the TF beginning on that date is subject to the completion of various tasks by the Ports, Vendor cannot and does not guarantee that the TF will be collected beginning on that date. Vendor and MTOs shall not be liable for any loss of any nature whatsoever incurred by the Ports as a result of collection of the TF beginning after October 1, 2008.

7.2 Collection of IF. The Vendor and MTOs shall use their best commercial efforts, individually and collectively, to begin collection of the IF beginning on January 1, 2009. However, because the ability of the Vendor to collect the IF beginning on that date is subject to the completion of various tasks by the Ports, Vendor cannot and does not guarantee that the IF will be collected beginning on that date. Vendor and MTOs shall not be liable for any loss of any nature whatsoever incurred by the Ports as a result of collection of the IF beginning after January 1, 2009.

7.3 Implementation of Marine Terminal Access Criteria. Each of the MTOs shall use its best commercial efforts to begin implementation of criteria established by the Ports for truck access to marine terminals beginning on October 1, 2008. However, because the ability of MTOs to implement such criteria is subject to the completion of various tasks by the Ports, MTOs cannot and do not guarantee that said criteria will be implemented beginning on that date. MTOs shall not be liable for any

loss of any nature whatsoever incurred by the Ports as a result of implementation of marine terminal access criteria beginning after October 1, 2008.

SECTION 8. PORTS' TARIFFS

The Vendor and/or MTOs shall be deemed to have fulfilled any obligations they may have to collect or remit the Fees or administer or enforce any other aspect of the Ports' Clean Truck Program under the Ports' Tariffs by performance of Vendor or MTOs as required under this agreement, or in the event any failure to perform by the Vendor and/or any MTO is due to any act or omission on the part of one or both Ports or their contractor(s).

SECTION 9. RELATIONSHIP BETWEEN PARTIES

Vendor and MTOs, in collecting the Fees and administering other aspects of the Ports' Clean Truck Program on behalf of the Ports, act as independent contractors. Nothing herein is intended to create or shall be interpreted as creating any other relationship between the Ports and Vendor/MTOs. Except to the extent the Vendor is authorized to act as agent for the MTOs, no party to this Agreement has authority to bind any other party with respect to any matters whatsoever.

SECTION 10. CONFIDENTIALITY

10.1 Each party hereto shall keep confidential any and all information disclosed to it by any other party and which has been identified and labeled as "Confidential", including, but not limited to, the identity of and all other information relating to any cargo interests. Any and all information obtained by the Ports in the course of audits pursuant to Section 1.6 of this Agreement is hereby identified and labeled as "Confidential" by Vendor, and shall be treated as such by Ports and their contractor(s). Information received by a party shall be secured and protected from unauthorized use or disclosure using at least the same degree of care as the receiving

party employs to avoid unauthorized use or disclosure of its own confidential information, but in no event less than reasonable care.

10.2 Notwithstanding Section 10.1, as necessary to accomplish the purposes of this Agreement a party may disclose information received by it to any employee, officer, director, attorney, auditor, accountant, contractor, service provider, agent or representative ("Recipient") who has a legitimate need to know the information in question for the purposes of this Agreement. Any Recipient to whom information is disclosed shall be advised of this confidentiality provision and shall secure and protect such information from unauthorized use or disclosure using at least the same degree of care as the Recipient employs to avoid unauthorized use or disclosure of its own confidential information, but in no event less than reasonable care.

10.3 Section 10.1 and the second sentence of Section 10.2 shall not apply to any information (i) which is or becomes available other than through a breach of this Agreement by the disclosing party, (ii) which is lawfully obtained from third parties, (iii) which was known prior to its disclosure, (iv) which is independently developed without the use of the confidential information, (v) which is independently acquired from a third party who is not under confidentiality obligations to the non-disclosing party to this Agreement, (vi) which is used to enforce any party's rights hereunder, or (vii) the disclosure of which is required by or done in connection with any compulsory legal process or law, including without limitation, a court order or the California Public Records Act.

SECTION 11. GOVERNING LAW AND VENUE

This Agreement shall be governed by and construed in accordance with the laws of the State of California, without giving effect to any conflict of law principles, and shall be subject to Federal law to the extent applicable. The venue of any dispute

between the parties to this Agreement shall be the appropriate federal court having personal and subject matter jurisdiction in Los Angeles, CA (or state court, if the otherwise appropriate federal court lacks jurisdiction) or the appropriate federal agency having jurisdiction over any dispute arising under applicable Federal law.

SECTION 12. MISCELLANEOUS

12.1 Amendments. This Agreement may not be amended or modified, nor may any provision hereof be waived, except pursuant to an instrument in writing signed by each of the parties hereto.

12.2 Integration. This Agreement, together with the documents contemplated hereby, sets forth the entire understanding between the parties relating to the subject matter hereof.

12.3 No Waiver. No waiver of any of the provisions of this Agreement shall be deemed, or shall constitute, a waiver of any other provision, whether or not similar, nor shall any waiver constitute a continuing waiver. No waiver shall be binding unless executed in writing by the party making the waiver and delivered to the other party.

12.4 Force Majeure. Except as otherwise provided in this Agreement, no party hereto shall be liable for failure or delay in carrying out its obligations under this Agreement when such failure or delay results from any cause which is beyond the reasonable control of the party including, but not limited to, work stoppages, strikes, accidents, casualties, labor disputes, fire, road, marine or rail disasters, acts of God, governmental restraints, war or hostilities, acts of terrorism, embargoes or other similar conditions beyond the control of the affected party. In the event of happening of any of such contingencies, the party delayed from performance shall promptly give the other party written notice of such contingency, specifying the cause for delay or failure. The party so delayed shall use reasonable diligence to remove the cause of

delay, and if and when the occurrence or condition which delayed or prevented the performance shall cease or be removed, the party delayed shall notify the other party immediately, and the delayed party shall recommence its performance of the terms, covenants and conditions of this Agreement.

12.5 Tax and Permit Matters. Each party shall be fully responsible for any income, sales, excise, use and transfer tax or any other governmental fees or exactions, including fees for any required permits, applicable to its performance under this Agreement. Vendor shall obtain and submit on all invoices for payment, its Business Tax Registration Certificate number from the Cities of Los Angeles and Long Beach.

12.6 Notices. Any notice required or permitted to be given under this Agreement shall be in writing and shall be sent by a recognized reputable private courier company or by United States or other national mail system, return receipt requested, or by facsimile transmission followed by such means, to:

If to POLA:

City of Los Angeles Harbor Department
P.O. Box 151
San Pedro, California 90733-0151
Attention: Executive Director
Fax: (310) 831-6936

With a copy to:

City of Los Angeles
Office of the City Attorney
425 South Palos Verdes Street
San Pedro, California 90731
Attention: General Counsel
Fax: (310) 831-9778

If to POLB:

City of Long Beach
Long Beach Harbor Department
P.O. Box 570
Long Beach, California 90801
Attention: Executive Director
Fax: (562) 901-1733

with a copy to:

City of Long Beach
Office of the City Attorney
City Hall, 8th Floor
333 West Ocean Boulevard
Long Beach, California 90801
Attention: Harbor Division
Fax: (562) 570-2232

If to Vendor/MTO(s):

PortCheck LLC
100 Ocean Gate, Suite 600
Long Beach, CA 90802
Attention: Mr. Bruce Wargo
Fax: (562) 437-9960

With a copy to:

David Smith/Wayne Rohde
Sher & Blackwell LLP
Suite 900
1850 M Street, N.W.
Washington, D.C. 20036
Fax: (202) 463-4950

12.7 Existing Obligations/Rights. Except as otherwise expressly provided herein, neither execution of this Agreement by the parties nor performance hereunder shall affect any otherwise existing obligations of the MTOs to the Ports, including but not limited to any obligations the MTOs may have under the Ports' Tariffs, nor shall execution of this Agreement or performance hereunder constitute a waiver of any party's legal rights.

12.8 Counterparts. This Agreement may be executed in any number of counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same instrument.

12.9 City Required Provisions. The City of Los Angeles requires the provisions set forth on Exhibit F, attached hereto and incorporated by this reference.

12.10 Insurance. Vendor shall comply with the insurance provisions set forth on Exhibit G, attached hereto and incorporated by this reference.

IN WITNESS WHEREOF, the parties have executed this Agreement as of the date first written above.

**THE CITY OF LOS ANGELES,
 acting by and through
 its Board of Harbor Commissioners**

By: Molly Campbell
 for Geraldine Knatz, Ph.D.
 Executive Director

Attest: Rose M. Dwarshak
 Board Secretary

APPROVED AS TO FORM
October 20, 2008

ROCKARD J. DELGADILLO, City Attorney
 By: Joy M. Crose
 Joy Crose, Assistant General Counsel

**THE CITY OF LONG BEACH,
 acting by and through
 its Board of Harbor Commissioners**

By: _____
 Richard D. Steinke
 Executive Director

Account#	59967	W.O. #	08220
Ctr/Div#	210	Job Fac.#	
Proj/Prog#	652		
Budget FY:		Amount:	
08/09		\$2,870,711	
09/10		\$2,870,711	
TOTAL		\$5,741,422	
For Acct/Budget Div. Use Only			
Verified by:	<u>T. GREEN</u>		
Verified Funds Available:	<u>Complete</u>		
Date Approved:	<u>10/22/08</u>		

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IN WITNESS WHEREOF, the parties have executed this Agreement as of the date first written above.

**THE CITY OF LOS ANGELES,
acting by and through
its Board of Harbor Commissioners**

By: _____
Geraldine Knatz, Ph.D.
Executive Director

Attest: _____
Board Secretary

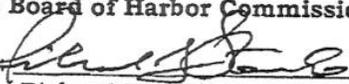
APPROVED AS TO FORM

_____, 2008

ROCKARD J. DELGADILLO, City Attorney

By _____
Joy Crose, Assistant General Counsel

**THE CITY OF LONG BEACH,
acting by and through
its Board of Harbor Commissioners**

By: 
Richard D. Steinke
Executive Director

APPROVED AS TO FORM

10/17, 2008

ROBERT E. SHANNON, City Attorney

By Dominic Holzhaus
Dominic Holzhaus, Principal Deputy

PORTCHECK LLC

By: Bruce C. Wargo
Name: BRUCE C. WARGO
Title: President

APM TERMINALS PACIFIC LTD.

By: Adam McConnell
Name: ADAM MCCONNELL
Title: SRVP

EAGLE MARINE SERVICES, LTD.

By: Jack Cutler
Name: Jack Cutler
Title: Port Manager

**LONG BEACH CONTAINER
TERMINAL, INC.**

By: Anthony Otto
Name: Anthony Otto
Title: President

**TOTAL TERMINALS
INTERNATIONAL**

By: Larry Bennett
Name: Larry Bennett
Title: VP Ops

**CALIFORNIA UNITED TERMINALS,
INC.**

By: George Lane
Name: GEORGE LANE
Title: S. J. P.

**INTERNATIONAL TRANSPORTATION
SERVICE, INC.**

By: Phil Feldhus
Name: PHIL FELDHUS
Title: V.P. of OPERATIONS

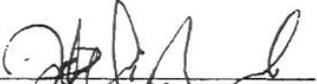
**SEASIDE TRANSPORTATION
SERVICE LLC**

By: Eric Wilson
Name: ERIC WILSON
Title: VICE PRESIDENT / GENERAL MANAGER

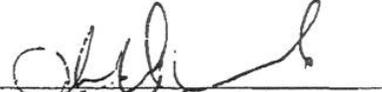
**WEST BASIN CONTAINER TERMINAL
LLC**

By: Mark Wheeler
Name: Mark Wheeler
Title: General Manager

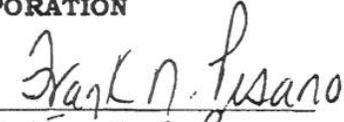
PACIFIC MARITIME SERVICES, L.L.C.

By: 
Name: JOHN DiBERNARD0
Title: VP

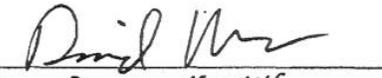
SSA TERMINAL (LONG BEACH), LLC

By: 
Name: JOHN DiBERNARD0
Title: VP

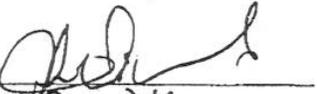
TRANS PACIFIC CONTAINER SERVICE CORPORATION

By: 
Name: Frank N. Pisano
Title: Vice-President

YUSEN TERMINALS, INC.

By: 
Name: DAVID METHUS
Title: VP

SSA TERMINALS, LLC

By: 
Name: JOHN DiBERNARD0
Title: VP

APPENDIX A TO PORT FEE SERVICES AGREEMENT

APM TERMINALS PACIFIC LTD.
2500 Navy Way
Terminal Island, CA

CALIFORNIA UNITED TERMINALS, INC.
1200 Pier E Street
Long Beach, CA 90822

EAGLE MARINE SERVICES, LTD.
1111 Broadway
Oakland, CA 94607

INTERNATIONAL TRANSPORTATION SERVICE, INC.
1281 Pier J Avenue
Long Beach, CA 90802-6393

LONG BEACH CONTAINER TERMINAL, INC.
1171 Pier F Avenue
Long Beach, CA 90802

SEASIDE TRANSPORTATION SERVICE LLC
1999 Harrison St., Suite 550
Oakland, CA 94612-3520

TOTAL TERMINALS LLC
1999 Harrison St., Suite 550
Oakland, CA 94612-3520

WEST BASIN CONTAINER TERMINAL LLC
1999 Harrison St., Suite 550
Oakland, CA 94612-3520

PACIFIC MARITIME SERVICES, L.L.C.
1131 SW Klickitat Way
Seattle, WA 98134

SSA TERMINAL (LONG BEACH), LLC
1131 SW Klickitat Way
Seattle, WA 98134

TRANS PACIFIC CONTAINER SERVICE CORPORATION
920 West Harry Bridges Boulevard
Wilmington, CA 90744-5230

YUSEN TERMINALS, INC.
701 New Dock Street
Terminal Island, CA 90731

APPENDIX A TO PORT FEE SERVICES AGREEMENT (continued)

SSA TERMINALS, LLC
1131 SW Klickitat Way
Seattle, WA 98134

Exhibit A Payment Remittance Parameters

On or before the 21st calendar day after the end of each calendar month during the term of the Agreement in which the TF and/or IF are in effect:

- a. Vendor shall wire all TF and IF Fee payments received and interest earned thereon during the previous calendar month in full without setoff or deduction to each Port's bank account as set forth below, as such account information may be changed from time to time with prior written notice to Vendor.
- b. Vendor shall submit a statement under separate cover to each Port indicating for each terminal the total volume of merchandise (in TEUs) subject to the TF and the total volume of merchandise (in TEUs) subject to the IF in the previous calendar month.

For the Port of Long Beach, Vendor shall remit funds to:

Union Bank of California
Los Angeles, CA
ABA: 122 000 496
Account No.: 274 00 23139
(800) 238 – 4486

For the Port of Los Angeles, Vendor shall remit funds to:

Bank of America
Government Banking, Southern California
Account No. : 1459950632
Account Name: City of L A Department of Harbors
ABA No.: 122000661 (ACH)
ABA No.:121000358 (wire)
Ref: Clean Truck Fees

Exhibit B
Service Levels For Vendor's Systems

Exhibit B

Area	SLA No. & Title	Service Level (See Note 1)	Measurement Tool and Description	Amount of Credit
PortCheck Sys.	1.1 System Availability	<p>For the purpose of measuring individual downtime incidents less than four hours in duration, the PortCheck system (including all servers, equipment, EDI and applications hosted by Supplier that are not related to the website: "the System") shall have at least 99.5% availability each calendar month.</p> <p>Measurement of performance under this SLA is a cumulative measurement of all minutes of downtime, (excluding maintenance periods that are approved by PortCheck in advance) less than (4) continuous hours in duration. It is not an average of all downtime in the month.</p> <p>Downtime does not include any time where normal system availability and functionality is maintained through the use of the Supplier's back-up system.</p> <p>"Availability" means the number of minutes each month during which the PortCheck System is operating within normal operating parameters, and can be accessed and used by all classes of end users in accordance with its intended functionality. Availability is measured on a 7 x 24 basis excluding a maximum of four (4) hours of scheduled downtime each month and during previously-agreed maintenance events.</p>	Zabbix	\$10,000 per month
PortCheck Sys.	1.2 System Availability- Major Failure	<p>The PortCheck System (including all servers, equipment, and applications, including EDI, hosted by Supplier that are not related to the website) cannot have a single continuous period of downtime in any month (other than scheduled, previously-agreed maintenance events) that exceeds four (4) hours.</p> <p>If supplier pays a credit for a Major Failure, the period of downtime representing that Major Failure will be excluded from the calculation of downtime for the purposes of the System Availability SLA in item 1.1 above.</p>	Zabbix	\$30,000 per incident

Exhibit B

Area	SLA No. & Title	Service Level (See Note 1)	Measurement Tool and Description	Amount of Credit
PortCheck Sys.	1.3 <u>Website Availability</u>	The website interface of the PortCheck System shall have at least 99.5% availability each calendar month. Measurement of performance under this SLA is limited to the website and does not include any PortCheck System downtime measured under SLA 1.1 or 1.2. Measurement of performance under this SLA is a cumulative measurement of all non-maintenance website downtime, less than four continuous hours in duration. It is not an average of all website downtime in the month. "Availability" means the percentage of minutes of each month during which the website is accessible to end users and operating within normal operating parameters.	Zabbix	\$10,000 per month
PortCheck Sys.	1.4 <u>Website Availability- Major Failure</u>	The website interface of the System cannot have a single continuous period of downtime in any calendar month, that exceeds four (4) hours. Measurement of performance under this SLA is does not include any PortCheck System downtime measured under SLA 1.1 or 1.2.	Zabbix	\$30,000 per incident
PortCheck Sys.	1.5 <u>EDI Translation and Processing - Inbound</u>	Supplier will complete the processing of 99.5%, calculated on a monthly basis, of all inbound files received via an EDI interface within 30 minutes of receipt of EDI files that comply with all technical specifications published for the EDI interface ("good EDI").	Supplier-provided monthly automated query of business rules engine which calculates the difference between the "start time" and "finish time" time stamps for each record processed in the month.	\$1,000 per file below the 99.5% level - See Note 2

Exhibit B

Area	SLA No. & Title	Service Level (See Note 1)	Measurement Tool and Description	Amount of Credit
PortCheck Sys.	1.6 EDJ Translation and Processing - Outbound	Supplier will send to each MTO or make available a "release notice" ("outbound EDI") to each MTO within five (5) minutes of the time that BCO completes the PortCheck payment transaction, as an average during the month. The maximum time for processing any individual outbound EDI transaction during a month will not exceed 15 minutes.	Supplier-provided monthly automated query of business rules engine which calculates the difference between the "start time" and "finish time" time stamps for each record processed in the month.	\$1,000 per non-compliant release - See Note 2
Call Center	2.1 Call Center- Wait Time	Only as a goal for the first three months of the call center operations, the monthly average call "pick-up" wait time shall not exceed 30 seconds. As an SLA for the first three months of call center operations, the monthly average call pick up time shall not exceed 45 seconds. After three months' operation, the SLA will be adjusted to a monthly average call pick up time that shall not exceed 30 seconds.	Cisco UCCE Unified Contact Center Enterprise Package	\$5,000 per month
Call Center	2.2 Call Center- Hold Time	Average monthly call "on hold" wait time (amount of time that a caller is placed "on hold") shall not exceed (2) minutes at any time.	Cisco UCCE Unified Contact Center Enterprise Package	\$7,000 per month
Call Center	2.3 Call Center- Call Abandon Rate	The percentage of calls that are abandoned will not exceed (3%) in any one calendar month.	Cisco UCCE Unified Contact Center Enterprise Package	\$5,000 per month
Call Center	2.4 Customer Service Center - Response Time	Supplier will respond to ninety five percent (95%) of all customer service requests, within a month, that are not initially resolved by the Supplier customer service representative over the telephone, within two (2) PortCheck business days. 100% within (4) PortCheck business days.	VTX-CSC Customer Service Module and VTX-RPT Reports Module	\$1,000 per incident
		This Service Level will measure response time based on the elapsed time between the time: (i) a customer service request is initiated, and (ii) delivery of a response to the customer requests through phone, fax, or e-mail.		

Exhibit B

Area	SLA No. & Title	Service Level (See Note 1)	Measurement Tool and Description	Amount of Credit
Acctg.	3.1 <u>Monthly General Ledger Entry</u>	Supplier will provide month end General Ledger Journal entries, in accordance with GAAP, for each accounting period (calendar or 4-4-5 basis) within five (5) business days after the accounting period ending date (to be provided annually by PortCheck). The penalty for any failure to provide a general ledger journal entry shall be cumulative from month to month (i.e. the number of failures for any one month continue to accumulate monthly until the missing general ledger journal entry is provided)	As reported by VES	\$7,000 per incident
Acctg.	3.2 <u>Payment Posting (Cash Application)</u>	Supplier will post all payments received either to (a) individual customer accounts, or (b) to an "unapplied payment account," within one business day of the payment receipt.	As reported by VES	\$1,000 per day
Acctg.	3.3 <u>Weekly Bank Deposit Reconciliation</u>	On Thursday of each week Supplier will send to PortCheck a weekly deposit reconciliation report, covering activity for the immediate prior week (ending upon the close of business, Friday), which includes for each day of the prior week: (a) amounts submitted for payment of PortCheck Fees (purchases), (b) amounts collected and deposited (payments), and (c) all exception items, including charge backs (charge backs initiated and charge back adjustments, separately reported) and other credits Any failure to provide the weekly bank deposit reconciliation shall be cumulative (i.e. the credit will continue to accumulate weekly until the missing weekly reconciliation is provided)	As reported by VES	\$7,000 per week

Exhibit B

Area	SLA No. & Title	Service Level (See Note 1)	Measurement Tool and Description	Amount of Credit
Acctg.	3.4 Monthly Bank Deposit Reconciliation	Within five (5) business days of the end of each month, Supplier will send to PortCheck a month-end deposit reconciliation report, covering activity for the immediate prior month (ending upon the close of business, of the last Friday of each month), which includes: (a) total monthly amount submitted for payment of PortCheck Fees (purchases), (b) amounts collected and deposited (payments) during the month, and (c) all exception items, including charge backs (charge backs initiated and charge back adjustments, separately reported) and other credits, as of the end of the month. Any failure to provide the monthly deposit reconciliation shall be cumulative (i.e. the credit will continue to accumulate monthly until the missing monthly reconciliation is provided)	Billing Register prepared from VTX-CSC Customer Service Module and VTX-RPT Reports Module	\$7,000 per month
Acctg.	3.5 Invoicing	Each of the following requirements must be satisfied on a weekly basis: 1. All Beneficial Cargo Owner (BCO; customer) accounts with a PortCheck approved credit agreement, will be electronically invoiced weekly in accordance with terms of PPI's approved credit agreement. 2. Weekly invoices will include and report all transactions with the individual BCO for the seven day period which ends at midnight, each Friday (the billing closing date). 3. Invoices will be sent to BCO's within five (5) business days of the billing closing date.	Billing Register prepared from VTX-CSC Customer Service Module and VTX-RPT Reports Module	\$10,000 per weekly closing cycle in which full compliance is not achieved

PortCheck
 Service Levels for Port Fee Services Agreement
 October, 2008

Exhibit B

Port Fee Services Agreement
 FMC Agreement No.
 Original Page No. B-7

Area	SLA No. & Title	Service Level (See Note 1)	Measurement Tool and Description	Amount of Credit
Acctg.	3.6 Reports	Supplier will provide the reports specified in the PortCheck System Requirements within the following deadlines: (a) within one business day of the report due date, for daily reports, (b) within one business day of the report due date, for weekly reports, and (c) within five business days of the report due date, for monthly reports.	VTX-CSC Customer Service Module and VTX-RPT Reports Module	\$1,000 per late report
Exceptions	4.1 Exception Processing- Reporting	Within 24 hours of the release of freight (import containers) or within 24 hours of receipt of freight (export containers), without BCO claiming of the associated container (imports) or booking (exports), Supplier will notify responsible terminal, and have a report available for PortCheck of the release or receipt.	VTX-CSC Customer Service Module and VTX-RPT Reports Module	\$1,000 per week in which 100% compliance is not achieved
Exceptions	4.2 Exception Processing	Within five (5) days of the release of freight (import containers) or of receipt of freight (export containers), without payment of TMF (as described in SLA 4.1), Supplier will either: (a) obtain and report to PortCheck from the responsible terminal an explanation for such release/receipt or (b) report that no explanation was received within five (5) days.	VTX-CSC Customer Service Module and VTX-RPT Reports Module	\$1,000 per week in which 100% compliance is not achieved

Note 1: All SLA's will be reported to PortCheck monthly, within six business days of the end of each (calendar or fiscal) month.
 Note 2: SLA Credits for all items that are subject to 'Note 2' are limited to \$10,000 per month in the aggregate.

Exhibit C Drayage Truck Registry Service Levels

The Agreement for Information Technology Products and Services Between and Among the City of Los Angeles, the City of Long Beach and eModal.com, LLC, provides in Exhibit A, Section VII as follows:

Consultant shall make commercially reasonable efforts to ensure the DTR is available 24 hours per day, every day of the year, except for scheduled maintenance periods during low activity periods. Scheduled maintenance periods must be clearly stated on the Login page of the web portal and communicated via e-mail to the registered DTR users at least 3 days before the period.

1. The targeted system quality is:
 - At least 99.97% full system availability by all users during non-maintenance periods.
 - No more than 70% average CPU utilization over any 5 minute period of time for any server.
 - No less than 20% free space on any hard disk storage system used by the system.
 - Level 1 Errors – Begin professional resolution efforts within 1 hour of receiving error notification. Summary of efforts must be e-mailed every 2 hours detailing issues and attempts at resolution.
 - Level 2 Errors – Begin professional resolution efforts within 4 hours of receiving error notification. Summary of efforts must be e-mailed every 4 hours detailing issues and attempts at resolution.
 - Level 3 Errors – Begin professional resolution efforts within 8 “business” hours of receiving error notification. Summary of efforts must be e-mailed every 8 “business” hours detailing issues and attempts at resolution.

**Exhibit D
 Development Costs**

**PortCheck
 Detailed Budget for Development Costs**

1. Implementation Hardware/Software	Amount
Hardware	\$471,622
Software Purchase and Licensing	302,766
Software Customization Costs	1,659,000
Implementation Costs	1,034,000
Training	30,000
Travel, Communication and other costs	75,000
	3,572,388
2. Business Processing Outsource (BPO) Implementation Costs	
Infrastructure Costs	62,835
Office Equipment & Supplies	40,970
Furniture	57,834
Telephone System	16,178
Personnel	94,582
	272,399
Total Due	\$3,844,787

Exhibit E Operating Costs

PortCheck Detailed Budget of Operating Costs

Cost Elements		Amount	
Bank Transaction Fees			
Credit Card - Visa/Mastercard	1,202,215		
Credit Card - American Express	1,343,466		
Telecheck Fees	353,685		
Bank Fees - Other	301,474		
		3,200,840	
Bad Debt Expense		882,000	
Staff Compensation		0	***
Operational Costs			
Truck Identification Support Maintenance		0	****
Truck Identification Replacement Expense		0	****
Professional fees			
Legal	150,000		
Financial	104,400		
Public Relations	120,000		
		374,400	
System Operations and Customer Service Center			
IT Post Implementation		18,835	
BPO Post Implementation		2,934,235	
Other Expenses			
Occupancy	27,000		
Office Expense	83,440		
Office IT Costs	10,000		
Audit Expense	50,000		
Insurance Expense	43,200		
Taxes & Licenses	14,105		
		227,745	
		7,638,055	

*** To be determined on incremental staffing requirements

**** Does not include future truck identification costs agreed to by both Ports

Exhibit F City Required Provisions

The City of Los Angeles requires all City contracts to contain the following provisions.

1. AFFIRMATIVE ACTION

Vendor, during the performance of this Agreement, shall not discriminate in its employment practices against any employee or applicant for employment because of employee's or applicant's race, religion, national origin, ancestry, sex, age, sexual orientation, disability, marital status, domestic partner status, or medical condition. The provisions of Section 10.8.4 of the Los Angeles Administrative Code shall be incorporated and made a part of this Agreement. All subcontracts awarded shall contain a like nondiscrimination provision. See Exhibit "F-1."

2. SMALL BUSINESS DEVELOPMENT PROGRAM

It is the policy of the Harbor Department to provide Small Business Enterprises (SBE) and Minority-Owned, Women-Owned and all Other Business Enterprises (MBE/WBE/OBE) an equal opportunity to participate in the performance of all City contracts in all areas where such contracts afford such participation opportunities. Vendor shall assist the City in implementing this policy and shall use its best efforts to afford the opportunity for SBEs, MBEs, WBEs, and OBEs to achieve participation in subcontracts where such participation opportunities present themselves and attempt to ensure that all available business enterprises, including SBEs, MBEs, WBEs, and OBEs, have equal participation opportunity which might be presented under this Agreement. See Exhibit "F-2." NOTE: Prior to being awarded a contract with the City, Vendor and all subconsultants must be registered with the Harbor Department's Contracts Management Database, e-DiversityXchange.

3. CONFLICT OF INTEREST

It is hereby understood and agreed that the parties to this Agreement have read and are aware of the provisions of Section 1090 et seq. and Section 87100 et seq. of the California Government Code relating to conflict of interest of public officers and employees, as well as the Los Angeles Municipal Code (LAMC) Municipal Ethics and Conflict of Interest provisions of Section 49.5.1 et seq. and the Conflict of Interest Codes of the City and Department. All parties hereto agree that they are unaware of any financial or economic interest of any public officer or employee of City relating to this Agreement. Notwithstanding any other provision of this Agreement, it is further understood and agreed that if such financial interest does exist at the inception of this Agreement, City may immediately terminate this Agreement by giving written notice thereof.

4. SERVICE CONTRACTOR WORKER RETENTION POLICY AND LIVING WAGE POLICY REQUIREMENTS

The Board of Harbor Commissioners of the City of Los Angeles adopted Resolution No. 5771 on January 13, 1999, agreeing to adopt the provisions of Los Angeles City Ordinance No. 171004 relating to Service Contractor Worker Retention (SCWR), Section 10.36 et seq. of the Los Angeles Administrative Code, as the policy of the Department. Further, Charter Section 378 requires compliance with the City's Living Wage requirements as set forth by ordinance, Section 10.37 et seq. of the Los Angeles Administrative Code. Vendor shall comply with the policy wherever applicable. Violation of this provision, where applicable, shall entitle the City to terminate this Agreement and otherwise pursue legal remedies that may be available.

5. WAGE AND EARNINGS ASSIGNMENT ORDERS/NOTICES OF ASSIGNMENTS

Vendor and/or any subconsultant are obligated to fully comply with all applicable state and federal employment reporting requirements for the Consultant and/or subconsultant's employees. Vendor and/or subconsultant shall certify that the principal owner(s) are in compliance with any Wage and Earnings Assignment Orders and Notices of Assignments applicable to them personally. Vendor and/or subconsultant will fully comply with all lawfully served Wage and Earnings Assignment Orders and Notices of Assignments in accordance with Cal. Family Code Sections 5230 et seq. Vendor or subconsultant will maintain such compliance throughout the term of this Agreement.

6. EQUAL BENEFITS POLICY

The Board of Harbor Commissioners of the City of Los Angeles adopted Resolution No. 6328 on January 12, 2005, agreeing to adopt the provisions of Los Angeles City Ordinance No. 172,908, as amended, relating to Equal Benefits, Section 10.8.2.1 et seq. of the Los Angeles Administrative Code, as a policy of the Department. Vendor shall comply with the policy wherever applicable. Violation of this policy shall entitle the City to terminate any Agreement with Consultant and pursue any and all other legal remedies that may be available. See Exhibit "F-3."

Exhibit G Insurance Provisions

1. General Liability Insurance. Vendor shall procure and maintain in effect throughout the term of this Agreement, without requiring additional compensation from the City, commercial general liability insurance covering personal and advertising injury, bodily injury, and property damage providing contractual liability, independent contractors, products and completed operations, and premises/operations coverages written by an insurance company authorized to do business in the State of California rated VII, A- or better in Best's Insurance Guide (or an alternate guide acceptable to City if Best's is not available) within Consultant's normal limits of liability but not less than One Million Dollars (\$1,000,000) combined single limit for injury or claim. Said limits shall provide first dollar coverage except that Executive Director may permit a self-insured retention or self-insurance in those cases where, in his or her judgment, such retention or self-insurance is justified by the net worth of Vendor. The insurance provided shall contain a severability of interest clause and shall provide that any other insurance maintained by Department shall be excess of Vendor's insurance and shall not contribute to it. In all cases, regardless of any deductible or retention, said insurance shall contain a defense of suits provision. Each policy shall contain an additional insured endorsement naming the City of Los Angeles Harbor Department, its boards, officers, agents, and employees and a 30-day notice of cancellation by receipted mail as shown in Attachment "G-1."

2. Workers' Compensation. Vendor shall certify that it is aware of the provisions of Section 3700 of the California Labor Code which requires every employer to be insured against liability for Workers' Compensation or to undertake self-insurance in accordance with the provisions of that Code, and that Vendor shall comply with such provisions before commencing the performance of the tasks under this Agreement. Vendor shall submit Workers' Compensation policies, whether underwritten by the state insurance fund or private carrier, which provide that the public or private carrier waives its right of subrogation against the City in any circumstance in which it is alleged that actions or omissions of the City contributed to the accident. See Attachment "G-2."

3. Notice of Cancellation. Each insurance policy described above shall provide that it will not be canceled or reduced in coverage until after the Board of Harbor Commissioners, Attention: Risk Managers and the City Attorneys of City have each been given thirty (30) days' prior written notice by registered mail addressed to City of Los Angeles Harbor Department, 425 S. Palos Verdes Street, San Pedro, California 90731 and City of Long Beach Harbor Department, 925 Harbor Plaza, P.O. Box 570, Long Beach, CA 90801.

4. Copies of Policies. Two certified copies of each policy containing the additional insured and 30-day cancellation notice language shall be furnished to Executive Director. Alternatively, two duplicate original additional insured

endorsements on forms provided by the Department, as indicated above, may be submitted. The form of such policy or endorsement shall be subject to the approval of the Risk Managers of the Cities.

5. Modification of Coverage. Executive Director, at his or her discretion, based upon recommendation of independent insurance consultants to Cities, may increase or decrease amounts and types of insurance coverage required hereunder at any time during the term hereof by giving ninety (90) days' prior written notice to Vendor.

6. Renewal of Policies. At least thirty (30) days prior to the expiration of each policy, Vendor shall furnish to Executive Director a renewal endorsement or renewal certificate showing that the policy has been renewed or extended or, if new insurance has been obtained, evidence of insurance as specified above. If Vendor neglects or fails to secure or maintain the insurance required above, Executive Director may, at his or her own option but without any obligation, obtain such insurance to protect City's interests. The cost of such insurance will be deducted from the next payment due Vendor.

7. Right to Self-Insure. Upon written approval by the Executive Director, Vendor may self-insure if the following conditions are met:

Vendor has a formal self-insurance program in place prior to execution of this Agreement. If a corporation, Vendor must have a formal resolution of its board of directors authorizing self-insurance.

Vendor agrees to protect the City, its boards, officers, agents and employees at the same level as would be provided by full insurance with respect to types of coverage and minimum limits of liability required by this Agreement.

Vendor agrees to defend the City, its boards, officers, agents and employees in any lawsuit that would otherwise be defended by an insurance carrier.

Vendor agrees that any insurance carried by Department is excess of Vendor's self-insurance and will not contribute to it.

Vendor provides the name and address of its claims administrator.

Vendor submits a Financial Statement or Balance Sheet prior to Executive Director's consideration of approval of self-insurance and annually thereafter evidence of financial capacity to cover the self-insurance.

Vendor agrees to inform Department in writing immediately of any change in its status or policy which would materially affect the protection afforded Department by this self-insurance.

Vendor has complied with all laws pertaining to self-insurance.

8. Accident Reports. Vendor shall report in writing to Executive Director within fifteen (15) calendar days after it, its officers or managing agents have knowledge of any accident or occurrence involving death of or injury to any person or persons, or damage in excess of Five Hundred Dollars (\$500.00) to property, occurring upon the premises, or elsewhere within the Cities if Vendor's officers, agents or

employees are involved in such an accident or occurrence. Such report shall contain to the extent available (1) the name and address of the persons involved, (2) a general statement as to the nature and extent of injury or damage, (3) the date and hour of occurrence, (4) the names and addresses of known witnesses, and (5) such other information as may be known to Vendor, its officers or managing agents.

EXHIBIT H
GEOGRAPHIC SCOPE/FILING AUTHORITY

The geographic scope of this Agreement is the area in and around marine terminals at the ports of Los Angeles and Long Beach, California.

Legal counsel for either of the Ports and/or PortCheck LLC is authorized to execute and/or file this Agreement or amendments thereto on behalf of the relevant party.

From: broadcastemail@emodal.com [mailto:broadcastemail@emodal.com]
Sent: Sunday, November 09, 2008 8:25 AM

Subject: Port of Long Beach: Attention LMCs: Electronic Gate Access Starts on Monday, November 10th

IMPORTANT REMINDER TO LICENSED MOTOR CARRIERS

ELECTRONIC GATE ACCESS BEGINS AT PORTS' MARINE CONTAINER TERMINALS ON NOVEMBER 10, 2008

Effective November 10, 2008, marine container terminals will begin electronic gate access at the Ports of Los Angeles and Long Beach. Electronic gate access will determine whether a truck entering the marine container terminal is operating under a valid port concession and allowed entry or if the truck is prohibited by the progressive truck ban. Trucks without a Radio Frequency Identification (RFID) tag that identifies the vehicle as working under a valid port concessionaire will not be allowed entry into the ports' container terminals.

In order to enter the ports' marine container terminals on November 10th, all trucks operating for a Licensed Motor Carrier (LMC) with a valid port concession are required to be registered with the Drayage Truck Registry (DTR), have paid the \$100/truck DTR registration

fee, and have obtained and mounted a RFID tag. Trucks that do not meet these requirements will not be permitted into the ports' marine container terminals.

The ports request that all LMCs who operate trucks with Temporary Access Permits (Port of Los Angeles green and purple concession stickers and Port of Long Beach orange concession decal) to leave them on their vehicles until notified by the ports to remove them.

For more information on the Clean Trucks Program please visit the following websites - <http://www.portoflosangeles.org/cleantrucks> <<http://www.portoflosangeles.org/cleantrucks>> and <http://www.polb.com/cleantrucks> <<http://www.polb.com/cleantrucks>> .

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Levy of Clean Trucks Fee Begins Nov. 17

Only trucks with RFID tags will be allowed access starting Nov. 10



The Port of Long Beach will launch a major phase in its Clean Trucks Program, shifting to an electronic gate reader system on November 10, and beginning the assessment of a Clean Trucks Fee on container cargo on November 17 to fund the replacement of polluting trucks with a fleet of new clean trucks.

PortCheck, a nonprofit organization of port terminal operators, will collect the fee on the ports' behalf from beneficial cargo owners. The fee and the PortCheck system for collecting will be

phased in over the next two weeks.

On Monday, November 3, PortCheck will allow cargo owners to familiarize themselves with its system for claiming cargo by visiting the PortCheck page at www.pierpass-tmf.org. Cargo owners that are already registered in PierPASS will automatically be uploaded in to PortCheck. Cargo owners that are automatically uploaded from PierPASS in to PortCheck will first have to accept the terms and conditions of PortCheck before their account will get extended in to PortCheck.

On Monday, November 10, the electronic gate reader system for PortCheck will go live. Container terminal operators will turn away concession trucks without Radio Frequency Identification (RFID) tags. The only trucks allowed to access terminals will be trucks working for Licensed Motor Carriers with port-approved concessions that are registered in the port's online Drayage Truck Registry, have paid their \$100 per truck registration fee and that have RFID tags.

Beginning immediately, trucking companies can complete their vehicle registrations by paying their \$100 truck fees in the Drayage Truck Registry (<http://dtr.cleanairactionplan.org>).

On November 10, the bright orange Temporary Access Permit stickers will no longer be valid.

On Thursday, Nov. 13, cargo owners may begin paying the fee - \$35 for 20-foot and shorter containers and \$70 for longer containers.

On Monday, Nov. 17 at 7 a.m., only container cargo cleared through PortCheck will be allowed to move in and out of the Port's container terminals.

With the Clean Trucks Program, the Port will reduce truck-related air pollution 80 percent by 2012. The Program began with a ban on 1988 and older trucks on October 1, 2008, and will progressively ban more of the older trucks. Beginning January 2012, only trucks that meet the tough 2007 EPA emission standards will be allowed access to the Port. The Clean Trucks Fee will help the trucking industry to quickly replace their trucks

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