FEDERAL MARITIME COMMISSION

PETITION OF CERTAIN MARINE TERMINAL OPERATOR PARTIES TO AGREEMENT NO. 201199[1]	Petition No. P2-08

Served: January 16, 2009

BY THE COMMISSION: Joseph E. BRENNAN, Harold J. CREEL, Jr., and Rebecca F. DYE, *Commissioners*.

ORDER

This matter is before the Commission upon appeal of a staff determination taken November 14, 2008 with respect to the effective date of FMC Agreement No. 201199, the Port Fee Services Agreement. On that date, staff advised filing counsel by letter that FMC Agreement No. 201199 was ineligible for exemption under 46 C.F.R. § 535.308 (e) from the statutory 45-day

[1] Petitioners include: APM Terminals Pacific Ltd.; California United Terminals, Inc.; Eagle Marine Services, Ltd.; International Transportation Services, Inc.; Long Beach Container Terminal, Inc.; Seaside Transportation Service LLC; Total Terminals LLC; West Basin Container Terminal LLC; Pacific Maritime Services, LLC.; SSA Terminal (Long Beach), LLC; Trans Pacific Container Service Corporation; Yusen Terminals, Inc.; and SSA Terminals, LLC, ("Marine Terminal Operators"); and PortCheck LLC.

waiting period. For reasons discussed below, we sustain the staff's determination with respect to the effective date of FMC Agreement No. 201199.

I. BACKGROUND

FMC Agreement No. 201199, between thirteen marine terminal operators (MTOs), PortCheck LLC and the Ports of Los Angeles and Long Beach, respectively, was filed on November 3, 2008. In the accompanying transmittal letter from filing counsel, the agreement parties asserted that Agreement No. 201199 became effective upon filing, pursuant to 46 C.F.R. § 535.308 (e). The Federal Register Notice was published on November 13, 2008, 73 FR 67158. By letter from the Commission's Secretary, dated November 14, 2008, staff advised that FMC Agreement No. 201199 was ineligible for exemption under 46 C.F.R. § 535.308 (e) from the statutory 45-day waiting period. Following informal discussions, filing counsel was informed that the parties could appeal the staff's action directly to the Commission or seek expedited effectiveness for the Agreement.

Counsel subsequently elected to pursue both options. On November 21, 2008, the MTO parties to Agreement No. 201199, together with PortCheck LLC, filed a request for expedited review. Following consideration at the Commission's meeting of December 3, 2008, the Commission voted to deny the MTOs' request for expedited review for failure to adequately show good cause under 46 C.F.R. § 535.605. See News Release NR 08-18 (December 5, 2008).

Also on November 21, 2008, the MTO parties[2] filed a Petition for Commission Review of Staff Action, as provided

[2] The private MTOs comprise less than all the agreement parties to Agreement No. 201199, as the Ports are not participating in the instant appeal.

under 46 C.F.R. §502.69. In view of comments already received from Swift Transportation and others, the Commission's Secretary published the instant appeal as a Petition to give public notice of the Commission's intention to accept comments. The comment period expired December 15, 2008.

The Petition filed by the MTOs argues six points in relation to the application of section 535.308: First, they insist that the Agreement qualifies under 46 C.F.R. §535.308 because the Agreement applies only to "future, prospective activities." Second, the MTOs assert that the Agreement qualifies under 46 C.F.R. §535.308 because it relates "solely to marine terminal facilities and/or services." Third, they assert that the presence of PortCheck LLC as an additional party to the agreement does not defeat applicability of the exemption. Fourth, they assert that Agreement No. 201199 reflects the "complete agreement" between the parties, in that any agreements between PortCheck and "third parties" with respect to collection of the clean truck fees are not part of agreement between the parties. Fifth, the MTOs assert that it would be arbitrary and contrary to historical practice for the Commission to treat Agreement No. 201199 differently than the Commission's handling of Agreement No. 201196 (the Los Angeles/Long Beach MTO Agreement), which was permitted to go into effect on filing. Sixth, they argue that the exemption in 46 C.F.R. §535.308 was intended to apply broadly to all marine terminal agreements other than four categories specifically named therein.

Substantially identical comments were filed electronically by five licensed motor carriers: Fox Transportation, 3PL Transportation Inc., Pacific 9 Transportation Inc., Green Fleet Systems and South Counties Express. One comment was submitted jointly by Swift Transportation Co. and Knight

Transportation, Inc. ("Swift and Knight").[3] Swift and Knight request the Commission to allow the Agreement to become immediately effective "as provided for in the agency's rules and regulations." They contend that the delay in the implementation of the Agreement will result in the delay of the collection of the Clean Truck Fee, thereby causing them "significant harm." They explain that they have expended significant financial resources in acquiring EPA 2007 compliant trucks with the expectation that the Clean Truck Program (CTP) would be in effect on October 1, 2008.[4]

Swift and Knight state that the collection process must be allowed to take place so that there is a fee structure that provides incentives for the use of the U.S. Environmental Protection Agency 2007-compliant trucks, enabling Swift and Knight to recover their equipment, operational and staff investments incurred to support the CTP. Swift and Knight contend that without immediate effectiveness of the Agreement, "over 100 trucking companies" trying to be environmentally responsible and supporting the Ports' efforts will be at a financial disadvantage and could become financially unstable.

By letter received December 15, 2008, Long Beach and Los Angeles submitted a comment indicating that they "support" the arguments made by the Marine Terminal Operators and PortCheck in their Petition. While asserting the view that the Agreement is "currently in effect," the Ports nonetheless urge that there is "no basis" for the Commission to seek to delay the

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[3] Swift Transportation Co. is said to be a truckload motor carrier with 37 major terminals in 26 states and Mexico. Knight Transportation Inc. is publicly traded on the New York Stock Exchange and operates as a truckload motor carrier with 35 service centers throughout the United States. Both are based in Arizona.

[4] Significantly, this date precedes the filing of the instant Agreement and any controversy over the first effectiveness of the Agreement under the Shipping Act of 1984.

effectiveness of the Agreement on December 18, 2008. Also on December 15, the National Resources Defense Council (NRDC) submitted comments indicating that NRDC "generally agrees" with the legal analysis presented in the Petition. Additional points raised in NRDC's letter purport to comment substantively as to the Commission's section 6 review process as to Agreement No. 201199, and are not germane to the instant appeal.

II. DISCUSSION

The MTOs argue six points in asking that the Commission now reverse staff's determination that the agreement is not exempt from the 45-day statutory waiting period. That determination is premised upon staff's review of section 535.308(a), which states as follows:

> § 535.308 Marine terminal agreements -- exemption.
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> (a) *Marine terminal agreement* means an agreement, understanding, or association written or oral (including any modification or appendix) that applies to future, prospective activities between or among the parties and that relates solely to marine terminal facilities and/or services among marine terminal operators and among one or more marine terminal operators and one or more ocean common carriers that 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 term does not include a joint venture arrangement among marine terminal operators to establish a separate, distinct entity that fixes its own rates and publishes its own tariff.

46 C.F.R. §535.308 (a). In considering the plain text of the cited provision, the operative requirements of the foregoing exemption specify application of the exemption only to: 1) an agreement, written or oral; 2) that applies to future, prospective activities; 3) that relates solely to marine terminal facilities and/or services; 4) among marine terminal operators and among one or more marine terminal operators and one or more ocean common carriers; and 5) that completely sets forth the applicable rates, charges, terms and conditions agreed to by the parties for the facilities and/or services. The burden of establishing the applicability of an exemption falls on the person claiming the exemption. *See, e.g., SEC v. Ralston Purina Co.*, 346 U.S. 119, 126 (1953) ("[I]mposition of the burden of proof on an issuer who would plead the exemption seems to us fair and reasonable."); *Schlemmer v. Buffalo R & P R Co.*, 205 U.S. 1, 10 (1907) ("The general rule of law is, that a proviso carves special exceptions only out of the body of the act; and those who set up any such exception must establish it."); *Motor Vehicle Manufacturer's Ass'n of the United States, Inc - Application for Exemption of Vehicle Shipments from Portions of the Shipping Act of 1984,* 25 S.R.R. 849, 850 (FMC 1990). *See also* 46 C.F.R. § 502.155 (burden of proof is on the proponent of a rule or order.)

In their Petition, the MTOs insist that the Agreement qualifies under 46 C.F.R. §535.308 because it applies only to "future, prospective activities." While they assert that references to the date of October 1 within Agreement No. 201199 solely refer to the "originally intended effective date" of the ports' program, Petition at 4, other aspects of the parties' activities appear to demonstrate individual and joint activities in furtherance of the subject matter program envisioned under Agreement No. 201199. Such activities appear to include installation of Radio Frequency Identification Device (RFID) readers at the gates of private MTO terminal facilities prior to November 1, 2008; implementation of truck placarding requirements for licensed motor carriers (LMCs) and public announcement of intended enforcement at MTO

facilities prior to November 1, 2008;[6] and related activities of PortCheck LLC, prior to the filing of Agreement No. 201199, in advising trucker and shipper accounts to utilize the PIERPASS registration process in advance of migration to a future PortCheck database.[7] The Commission may not exempt, or otherwise grant antitrust immunity to an agreement or agreement activity that occurred prior to the agreement being made lawful under the Shipping Act. *Marine Terminal Agreements*, 24 S.R.R. 192, 194 (FMC 1987), citing *Mediterranean Pools Investigation*, 9 F.M.C. 264 (1966). Accordingly, Petitioners have not met the burden to demonstrate that they qualify for the exemption on this basis.

Second, the MTOs assert that the Agreement qualifies under 46 C.F.R. §535.308 because it relates "solely to marine terminal facilities and/or services." Under the Commission's agreement regulations, "marine terminal services" are described in section 535.309 as those "provided to and paid for by an ocean common carrier," and include checking, dockage, free time, handling, etc.. "Marine terminal facilities" are described in section 535.310 as those relating to "rights to operate any marine terminal facility by means of lease, license, permit, assignment, land rental, or other similar arrangement for the use of marine terminal facilities or property." See also 46 C.F.R. § 535.104(p). As noted in *Marine Terminal Agreements,* "Marine terminal facility and services agreements are often 'mixed' in their characteristics," 24 S.R.R. at 196, thus justifying the Commission's decision to

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[6] See POLA press release of September 30, 2008 at http://www.portoflosangeles.org/newsroom/2008_releases/news_093008ctpoct1.pdf; and POLB release of September 26, 2008 at http://www1.polb.com/news/displaynews.asp?NewsID=459&TargetID=1.

[7] See, e.g. PortCheck Factsheet at https://www.pierpass-tmf.org/Documents/PortCheck_Factsheet.PDF; and POLB's Powerpoint Presentation at Beneficial Cargo Owner Workshop, dated October 22, 2008, at http://www1.polb.com/civica/filebank/blobdload.asp?BlobID=5771.

harmonize regulatory treatment between like classes of agreements relating to marine terminal services, marine terminal facilities and agreements having mixed attributes of both. Petitioners attempt to derive greater breadth of exemption for marine terminal facilities agreements under 46 C.F.R. §535.308 than for such agreements under 46 C.F.R. §535.310 thus cannot be sustained. Inasmuch as the services envisioned under the PortCheck agreement are primarily intended to enforce the concession and Clean Truck provisions of the Ports, rather than directly related to the operation of the marine terminals themselves, such agreements are not exempt from the waiting period requirements of the Shipping Act.

Third, the MTOs assert that the presence of PortCheck LLC as an additional party to the agreement does not defeat applicability of the exemption. Section 535.308 specifies that the exemption applies to agreements "among marine terminal operators and among one or more marine terminal operators and one or more ocean common carriers." The Commission's enumeration of a class or classes of agreement parties must be read to exclude others not enumerated in that class. They cite no authority supporting their argument. Accordingly, the Commission declines to read section 535.308 as containing an implied authorization for the inclusion of other parties within an otherwise exempt agreement, whether such parties are regulated or unregulated by the Commission.

Fourth, Petitioners assert that Agreement No. 201199 in fact reflects the "complete agreement" between the parties, in that any agreements between PortCheck and "third parties" with respect to collection of the clean truck fees are not part of the agreement between the parties. In this regard, the agreement fails to reflect the interface of FMC-related agreement authorities between PortCheck and PIERPASS. As noted above, it appears that PortCheck is utilizing the existing facilities of PIERPASS, *inter alia*, to advise truckers and others to utilize PIERPASS

registration, and that PIERPASS will later migrate such registrations to PortCheck. The PIERPASS program itself operates pursuant to an FMC-filed agreement, No. 201178. Moreover, both entities are companies owned, directly or indirectly, by the MTO parties to Agreement No. 201199. The administrative structures adopted by an agreement, moreover, may well have an effect upon the level of competition among the members, or upon interested persons who are not parties to the agreement, *Compania Sud Americana Vapores S.A. v. Inter-American Freight Conference*, 28 S.R.R. 137, 143 (FMC 1998), and accordingly, cannot be assumed to be of such routine, interstitial nature that they need not be referenced. See 46 C.F.R. § 535.408. The Commission and the public should be able to reasonably rely on the filed content of FMC agreements to ascertain the substantive responsibilities and substantive authorities undertaken by the parties.

Petitioners next claim that it would be "arbitrary" and inconsistent with "historical practice" to construe Agreement No. 201199 differently under section 535.308 than the Commission is said to have done with the Ports' Marine Terminal Agreement, No. 201196. Such argument assumes that Agreement No. 201199 is identical in all major respects to Agreement No. 201196, and thus entitled to the same exemption. Thus, if substantive differences between these respective agreements are found in the operative requirements of section 535.308, the MTOs' argument must fail. As shown above, there exist significant variances such as the inclusion of non-MTO parties (PortCheck LLC), which preclude application of the exemption as to Agreement No. 201199.

Finally, Petitioners assert that the exemption was intended to apply broadly to all categories of marine terminal agreements, noting only the exclusion of four categories of terminal agreements not otherwise relevant here. The MTOs thus correctly assert that the Commission intended that all other marine terminal agreements

would be exempt from the waiting period requirement of the Shipping Act. Petition at 3, citing *Marine Terminal Agreements*, 24 S.R.R. 192, 193, 197 (1987). In construing an exemption from the waiting requirements of section 6, however, the Commission must consider the specific context in which the language of the exemption is used, and the broader context of the statute as a whole. Cf. *United States v Photogrammetric Data Services Inc.*, 259 F.3d 229, 247 (4th Cir. 2001), citing *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997). In this instance, the broader context of the exemption as a whole demonstrates that the Commission intended only agreements having minimal anticompetitive effects be so exempted. Docket No. 85-10, *Marine Terminal Agreements*, Final Rule, 24 S.R.R. at 197; Docket No. 85-10, *Marine Terminal Agreements,* Notice of Proposed Rulemaking, 50 Fed. Reg. 13617, 13619 (referencing "classes of marine terminal agreements which historically have not had anticompetitive or other adverse consequences"); Docket No. 83-38, *Notice of Inquiry and Intent to Review Regulation of Ports and Marine Terminal Operators*, Report of Inquiry Officer – Part 1 (1984) at 14 (concluding that "there appears to be a body of terminal agreements of little or no potential for anticompetitive impact…") and 16 ("These exemptions will relieve the Commission from excessive processing of non-anticompetitive agreements.")

Having submitted Agreement No. 201199 under claim that an exemption attached, the burden of establishing any exemption properly falls upon the agreement parties claiming the exemption. *Ralston Purina Co.*, 346 U.S. at 126; *Schlemmer*, 205 U.S. at 10. Petitioners have not met that burden here.

CONCLUSION

NOW THEREFORE, IT IS ORDERED That the Appeal filed by the MTO parties to Agreement No. 201199 of staff's determination, dated November 14, 2008, finding that the Port Fee Services Agreement is subject to filing on 45-day effectiveness is hereby DENIED.

By the Commission.*

Karen V. Gregory
Secretary

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* Commissioner Joseph E. Brennan, concurring:

On December 3, 2008, I dissented from the Commission majority's decision to deny expedited review of this agreement (FMC Agreement No. 201199). The Commission should have granted the expedited review requested by the parties pursuant to 46 C.F.R. §535.605. Granting that request would have allowed the agreement to take effect immediately.

I concur, however, with the staff determination that the agreement does not qualify for the exemption of 46 C.F.R. §535.308 (a) and, therefore, cannot become effective immediately on that basis.

To be exempt from the 45-day waiting period, the agreement must apply only to "future, prospective activities." The agreement under consideration encompasses activity that took place before the effective date of the agreement. Not limited to future activity, it does not qualify for the exemption under §535.308 (a).