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April 30, 2012

VIA E-MAIL

secretary@fmc.gov

Karen V. Gregory, Secretary
Federal Maritime Commission
800 North Capitol Street, N.W.
Washington, D.C. 20573-0001

Re: Docket No. 11-05 [Lawrence I. Kiern, Bryant E. Gardner, Gerald A. Morrissey, Winston & Strawn LLP]

Dear Ms. Gregory:

This letter responds to the Commission's request for comments from practitioners regarding proposed changes to certain rules of practice and procedure. We have all been practicing before the Commission for many years and have represented diverse parties on major Shipping Act matters. We also have decades of practice experience in diverse federal courts around the country. We welcome the Commission's desire to modernize its rules and reduce the burden on parties consistent with its duty to regulate the industry to prevent violations of the Act.

In this same vein, we respectfully offer the following comments:

- (1) The proposed changes to the rules to presumptively limit the number of depositions and interrogatories should not be adopted. All the presumptive limit will do is restrict the access to evidence, further undercut the already severely limited ability of the Commission to enforce the Shipping Act which necessarily depends on vigorous private party complaint proceedings, and prompt further litigation and burden on the parties in order to overcome the presumptive limits. In our experience, the current rules work well and permit discovery without needless disputes and motion practice necessary to overcome presumptive limits. The Commission's well-established presumption of liberal discovery will be substantially undercut by the proposal. In our experience handling major disputes before the Commission both as counsel for complainant and respondent, the numbers proposed are woefully inadequate and unnecessary. Had those numbers applied, they would only have needlessly obstructed those proceedings. If a party truly believes that it is being subjected to unreasonable discovery, it may bring a motion for a protective order. Therefore, the rules already provide an

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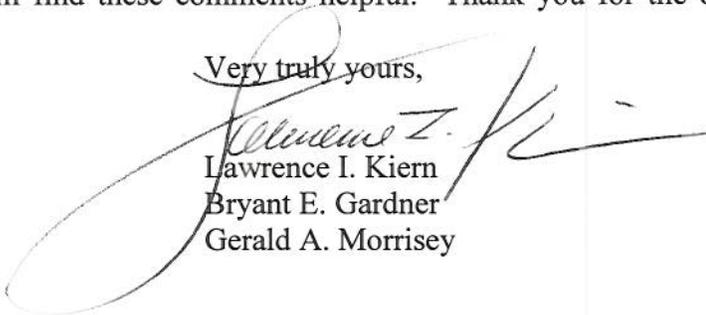
appropriate safeguard. In this instance, the old adage “if it ain’t broke, don’t fix it,” rings true.

- (2) Likewise, the proposal to reduce under Rule 71 the amount of time for a reply to a non-dispositive motion to seven days from 14 is unnecessary, unfair, and unduly burdensome. The proposed rule offers no evidence that the current period is responsible for any material delay in Commission proceedings. Indeed, experience handling major and minor proceedings alike before the Commission teaches us that the causes of delay of proceedings lie elsewhere. Since as a practical matter the movant has no limit on the time it may take to prepare a motion and has the advantage of deciding when to file it, it is manifestly unfair to so strictly limit the time for a reply. Moreover, the shortened period presents a significant hardship to counsel who are engaged in the proceeding at hand, have other cases to handle, and who travel as part of their practice by unduly shortening the amount of time for a reply to such a short period. Finally, the current rules permit the Presiding Officer to limit the time for a reply where the circumstances warrant, therefore, the current rules suffice if there is a genuine need to expedite.
- (3) In the same vein, the proposal to impose limits on the amount of time for responses to non-dispositive motions under Rule 70 should not undercut the ability of the Presiding Officer to afford more time on a case-by-case basis when appropriate. The ability of the Presiding Officer to manage the docket and account for the unique factors in play should not be undercut.
- (4) We also do not believe that the 30-page and 15-page limits for dispositive motions and replies under Rule 70 is appropriate for the more complex cases. Without adequate space to address numerous issues in cases with multiple claims, efficiency will be sacrificed, and the ability of the Commission to obtain a full and clear record for review will be undercut. Similarly, the 10-page limits on non-dispositive motions will severely and unduly restrict the ability of parties in making their cases. We are unaware of any evidence supporting the notion that overly long motion papers is responsible for any delay in Commission proceedings. No limit should be imposed on non-dispositive motions and for dispositive motions, if a limit is to be set, it should be the same as that for exceptions, i.e. 50 pages, and expressly allowing leave for the parties to request enlargement.
- (5) With respect to Rule 203, the Rule should be clarified so that it is clear that that a party may record a deposition using stenographic *and* video recordation.
- (6) Additionally, since the proposal aims “to reduce the burden on parties to proceedings,” the Commission should take real and practical steps to meaningfully reduce the protracted delay that parties encounter in obtaining decisions from the Commission and its administrative law judges. Sadly, the Commission’s reputation suffers badly for the extraordinary length of time that it takes to get initial decisions on even the simplest matters. Proceedings languish for years for no good reason. In our experience in recent years, simple discovery motions have taken up to 20 months for a decision and merits decisions up to a year. The reasons for the delays are not disclosed to the parties, but the chronic delays present a real and heavy burden on the parties which the Commission should take seriously and fix.

- (7) Finally, the Commission should completely abandon its no-reply-to-a-reply rule. Rather than expediting matters, it frequently results in the opposing party raising new arguments (and misrepresentations, errors, etc.) for the first time in opposition. It also facilitates parties that all too often avoid actually joining the movant's arguments on the substance, which leaves some motion papers little more than ships passing. This prejudices the movant and is a disserve to the Commission, and it promotes bench advocacy wherein the movant has no opportunity to even address the basis for the decision. This rule only leads to exceptions and further motions for leave to file a reply, etc. The practice would be aided by allowing this simple change which is more in accord with the practice of most courts.

We trust that you will find these comments helpful. Thank you for the opportunity to provide comments.

Very truly yours,



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