

**BEFORE THE  
FEDERAL MARITIME COMMISSION**

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**OCEAN COMMON CARRIER AND  
MARINE TERMINAL OPERATOR  
AGREEMENTS SUBJECT TO  
THE SHIPPING ACT OF 1984**

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**DOCKET NO.  
16-04**

**COMMENTS OF THE WEST COAST MTO AGREEMENT,  
THE OAKLAND MTO AGREEMENT, AND THEIR MEMBERS**

The West Coast MTO Agreement (FMC Agreement No. 201143), the Oakland MTO Agreement (FMC Agreement No. 201202), and their members (together, the “Agreements”), submit their comments in response to the Federal Maritime Commission’s Advance Notice of Proposed Rulemaking in the above-captioned proceeding, 81 *Fed. Reg.* 10188 (February 29, 2016) (the “ANPRM”).

**I.**

**Interest of the Agreements**

The Agreements are marine terminal conferences and their members are marine terminal operators. As such, they will be affected directly and substantially by some of the proposals contained in the ANPRM. These comments are limited to those portions of the ANPRM of relevance to marine terminal operators (“MTOs”) and marine terminal operator agreements.

## II.

### **Submission of Marine Terminal Services Agreements**

The Agreements oppose the requirement that marine terminal operators that belong to a conference or discussion agreement be required to submit their marine terminal services agreements (“MTSAs”) to the FMC.<sup>1</sup>

The Executive Order which prompted the Commission’s review of its agreement regulations calls for agencies to evaluate which regulations can be revised to make regulatory programs more effective or less burdensome. A requirement for MTOs to submit copies of MTSAs would do nothing to enhance the FMC’s regulatory programs, and would greatly increase the burden on the industry.

With respect to the enhancement of regulatory programs, the FMC claims that MTSAs are “relevant in analyzing the competitive impact of programs and actions of MTOs in conferences and discussion agreements.” 81 *Fed. Reg.* at 10193. However, any MTSA that contains matter agreed upon in a marine terminal conference or discussion agreement such as the Agreements is already required to be filed with the FMC. See, 46 C.F.R. §535.309(a) and (b). Thus, if any terms agreed by the members of either of the Agreements are incorporated into a MTSA, the FMC is being provided with the MTSAs necessary to monitor that impact, and the proposal imposes a requirement that is unnecessarily duplicative and overly broad.

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<sup>1</sup> The Agreements assume that the requirement to submit “all” marine terminal services agreements means all marine terminal services agreements that apply within the geographic scope of the marine terminal conference or discussion agreement to which the MTO in question belongs. In the unfortunate event the FMC decides to proceed with this proposal, it should clarify this point.

The Agreements understand that it is appropriate for the Commission to “analyze and monitor the competitive impact of MTO agreements [like the Agreements] and take necessary action to seek to prevent or enjoin activities that would likely result in an unreasonable decrease in transportation service or an unreasonable increase in transportation cost.” 81 *Fed. Reg.* at 10193. However, a requirement to submit all MTSAAs entered into by members of the Agreements would do nothing to further that regulatory objective.

The FMC already receives the minutes of meetings of the Agreements and other marine terminal conferences and discussion agreements. Some agreements of this type (such as WCMTOA) provide the FMC with extensive data about the operations of the agreement and its members. As noted above, MTSAAs that contain terms agreed upon in a marine terminal operator conference or discussion agreement are already required to be filed with the agency. Thus, the Commission should already have all of the information it needs to determine the impact of the Agreements on the terms of MTSAAs. It is unclear to the Agreements how the filing of MTSAAs which contain no terms agreed upon within the Agreements would be useful in evaluating the Agreements. The same questions would apply to other marine terminal operator conference and discussion agreements.

The proposal is also overbroad. The Commission has shown no pressing need for these MTSAAs on a generic basis. If there is a need for such MTSAAs in a particular instance, the Commission can seek the relevant agreements in a focused inquiry. There is no need for a blanket requirement that all MTSAAs in a trade be submitted.

Moreover, the marine terminal operators at a given port compete with one another for the business of ocean carriers. This means that MTSA's are negotiated individually and confidentially by an individual marine terminal operator and its carrier customer. As a result, the Agreements have little or no impact on the terms and conditions agreed upon by an individual MTO and an ocean carrier in an MTSA. There is little or no regulatory value in requiring the filing of MTSA's that do not contain terms agreed upon within a marine terminal conference or discussion agreement.

It would also be difficult if not impossible for the FMC to draw any conclusions about the terminal services market at a given port on the basis of MTSA's. Each terminal is unique in its physical configuration and conditions, its efficiency level, its operating procedures and abilities, and the needs of its carrier customers. Where different terminals have different berthing capabilities, different cranes and other operating equipment, different customers with different vessels and cargo volumes, and other unique features, attempting to compare the MTSA's of one terminal to that of another is a difficult challenge unless one has a full understanding of the unique operating circumstances at each terminal. Even if one can make such a comparison, for the reasons set forth above, the similarities and differences between MTSA's would shed no light on the activities of WCMTOA.

In addition, the burden of submitting MTSA's far outweighs any regulatory benefit that might exist. MTSA's are frequently amended or adjusted to take into account operating conditions, equipment variations, competitive factors, labor issues, the requirements of carriers and cargo interests, environmental laws, port

requirements, inland transport issues, and numerous other factors. If MTOs are required to make a submission to the FMC every time there is a permanent or temporary adjustment to the terms of a MTSA, the burden on the industry and the Commission would be considerable.

The members of the Agreements are also concerned about preserving the confidentiality of MTSAAs. Such agreements contain extremely sensitive and competitively significant information on not only rates, but duration, throughput and other terms. If these terms were to become available to non-parties (whether through subpoena, FOIA request, Congressional inquiry or otherwise), the parties to the disclosed agreement would suffer serious commercial harm, as would any marine terminal operator that was forced to adjust the terms it offers to its customers as a result of the disclosure.

The Commission should not adopt a requirement that MTOs submit all MTSAAs to the Commission.

### **III.**

#### **Activities That May Be Conducted Without Further Filings**

The Agreements oppose the proposal to replace the existing filing exemption which permits further agreements with respect to stevedoring, terminal and related services to be reached and implemented pursuant to existing authority without a further agreement filing. This proposal would unduly limit necessary operational flexibility and increase regulatory burden.

The Agreements believe that the ANRPM overstates concerns with respect to the clarity of existing 46 C.F.R. §408(b)(3), and the potential for abuse of that provision.

There have been very few situations in which the scope of this provision has come into play or been discussed by affected parties and the Commission staff. The proposal appears to be a solution in search of a problem.

Of equal or greater concern is the potential impact of the Commission's proposal. If the existing exemption is replaced by a list, then presumably any service omitted from the list would require a further filing, no matter how minimal the competitive impact (or how great the benefit to the public) of an agreement with respect to that service might be. In other words, it would be an extremely difficult task to make a comprehensive list of all services of this type that would be exempt from filing, and any omission would require the filing of an amendment to an agreement, and a 45-day waiting period, before the parties could proceed. The ANPRM appears to acknowledge the difficulty involved in compiling an appropriate list.

To the extent any services are omitted from the list, the burden on the parties of filing amendments, and the burden on the Commission and its staff of reviewing such amendments, would be increased and could be significant.

As the Commission is aware, agreements evolve over time. Even if an appropriate and exhaustive list of services could be developed now, that list might be obsolete in a few years as technology, labor practices, work rules, terminal and transportation infrastructure, environmental rules, and other factors impact the provision of terminal and stevedoring services. Rather than risk the problems that the Agreements believe would result from replacing the current exemption with a list of services, the Agreements encourage the Commission to retain the existing exemption.

If the Commission believes additional oversight is needed with respect to how the exemption is being used, then perhaps it might consider adopting a requirement that agreements which reach further understandings with respect to stevedoring, terminal and related services provide confidential notice of such further understandings to the Commission, rather than requiring a full-blown agreement amendment. Such an approach would provide the Commission with the insight it needs into these activities without the risks and burdens associated with the proposal contained in the ANPRM. Further, such an approach would enable the Commission to better understand the extent to which general authority regarding stevedoring, terminal and related services is being used, and provide it with sufficient information to make a more reasoned determination about whether further action on this issue is required in the future.

#### IV.

##### **Requests for Additional Information/Public Information**

The Agreements urge the Commission to maintain the status quo with respect to the treatment of requests for additional information (“RFAIs”), i.e., RFAIs and the responses thereto should be confidential, and the public should continue to receive notice of the fact that a request for additional information has been filed.

Under the Shipping Act, the response to an RFAI is confidential. The Commission should not change this. The Commission should also keep RFAIs themselves confidential in order to promote a complete and frank exchange of questions and responses on issues of concern to the Commission. If the questions being posed by the Commission are made public, this could lead to questions being

asked for reasons other than legitimate regulatory concerns, and could also prejudice the parties to an agreement as a result of public reaction to the questions. Making the process public simply creates too great a risk that factors other than the applicable statutory standards would be taken into account when reviewing an agreement or amendment thereto.

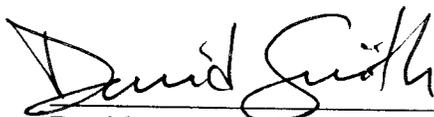
In contrast, third-party comments on a filed agreement should be made public, unless the comments assert that they fall within one of the exemptions from disclosure under FOIA (see, e.g., 552(b)(4) and the Commission determines that assertion to be valid. Making comments public encourages accuracy in such submissions, and affords the parties to the agreement the opportunity to provide the Commission with their perspective on the issues raised by the comments. It also promotes dialogue between the agreement parties and the parties filing the comments.

**V.**

**Conclusion**

The Agreements urge the Commission to modify its proposals in accordance with the foregoing comments.

Respectfully submitted,



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