

PMSA



April 4, 2016

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

Re: Comments of the Pacific Merchant Shipping Association in *Ocean Common Carrier and Marine Terminal Operator Agreements Subject to the Shipping Act of 1984*, FMC Docket No. 16-04

Dear Ms. Gregory:

The Pacific Merchant Shipping Association ("PMSA") is an independent, not-for-profit association focused on global trade. Its members (which are listed in the attachment thereto) include owners and operators of U.S. West Coast marine terminals and ocean carriers serving U.S. West Coast ports. Most of our members are marine terminal operators and ocean common carriers within the meaning of those terms as defined by the U.S. Shipping Act of 1984, as amended. As such, those members would be directly affected by the proposals contained in the Federal Maritime Commission's Advance Notice of Proposed Rulemaking in the above-captioned proceeding, 81 *Fed. Reg.* 10188 (February 29, 2016) (the "ANPRM"). PMSA is submitting these comments to express its opposition to certain of the proposals contained in the ANPRM.

I. Filing of Marine Terminal Services Agreements. PMSA opposes the proposal that marine terminal operators ("MTOs") which belong to a conference or discussion agreement be required to submit their marine terminal services agreements ("MTSAs") to the FMC. PMSA believes this requirement would be burdensome and serve no valid purpose.

It appears that this proposal is the result of the Commission staff having "difficulty obtaining complete information from the PPOIA parties." 81 *Fed. Reg.* at page 10193. PMSA questions whether a single instance in which the Commission had "difficulty" obtaining information warrants a new requirement that all MTOs that belong to a marine terminal conference or discussion agreement file all of their MTSAs with the FMC.

As the Commission is aware, MTSAs are currently exempt from filing unless they contain matter agreed upon in a marine terminal conference. 46 C.F.R. §§535.309(a) and (b). According to the Commission's website, there are presently 19 MTSAs on file, at least 14 of which involve the Port of Houston and appear to have been filed voluntarily. Thus, it appears to PMSA that there are few (if any) MTSAs presently on file which contain terms agreed upon within a marine terminal conference. This strongly suggests a lack of a factual basis upon which to conclude that marine

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terminal conferences play a role in the terms agreed upon by individual marine terminal operators and their carrier customers in MTSAs. Despite this lack of evidence showing a connection between marine terminal conferences and MTSAs, the Commission is proposing a radical about-face from its historic position that MTSAs do not raise competitive issues and are exempt from filing. In the view of PMSA, the Commission has not set forth in the ANPRM sufficient factual or regulatory justification for such a burdensome change in its treatment of MTSAs.

In addition, given the lack of connection between marine terminal conferences and MTSAs, it appears that requiring submission of MTSAs would not provide the Commission with any useful information about marine terminal conferences and discussion agreements, which are in and of themselves already subject to filing. Such agreements also file minutes of their meetings and are subject to oversight by the Commission. In light of the existing regulatory mechanisms which enable the Commission to oversee such MTO agreements, the adoption of a requirement that MTOs file their MTSAs would be unduly burdensome, particularly in light of the lack of useful information that MTSAs provide with respect to marine terminal conferences and discussion agreements.

Such a filing requirement, in addition to being unnecessary, would impose significant burdens on MTOs. MTSAs are commercial and operational documents that can be quite extensive and detailed. They are frequently amended or adjusted to take into account a variety of ever-changing considerations, such as operating conditions, competitive factors, labor issues, the requirements of carriers and cargo interests, environmental laws, port requirements, inland transport issues, and others. 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. Such burden would certainly outweigh any benefit to the Commission of such filings.

The proposed requirement could also have a chilling effect on the operation of marine terminal conferences and discussion agreements. MTOs may be reluctant to join such agreements if membership means that they must provide their MTSAs to the FMC. This could hamper the ability of such agreements to address issues affecting the international ocean transportation industry, such as port congestion and its causes. The Commission should not hinder the operation of such agreements and the benefits they provide by creating a disincentive for MTOs to join them.

PMSA urges the Commission not to adopt a requirement that MTOs submit their MTSAs to the agency.

II. Revision of 46 C.F.R. §535.408(b)(3). PMSA also opposes the proposal to replace the existing filing exemption in section 535.408(b)(3) of the Commission's regulations (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) with a more detailed list of exempt activities.

As with the proposal to require filing of MTSAs, PMSA questions the need to revise the exemption currently found in existing 46 C.F.R. §408(b)(3). PMSA and its members are not aware of any major issues in this regard, and the concerns expressed by the FMC appear to be purely

speculative and insufficient to warrant such a revision to existing regulations. Moreover, the proposed revision is likely to be problematic.

If the existing exemption is replaced by a list, then any service omitted from the list would require a further filing, even if the omitted service was a routine, operational matter with little or no competitive impact. This means that operational or business requirements of commercial parties would be delayed by the filing process and waiting period, despite the very low likelihood of any anti-competitive impact.

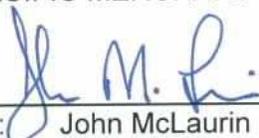
Moreover, it would be an extremely difficult task to make a comprehensive list of all services that would be exempt from filing, and any omission would require the filing of an amendment to an agreement, and a 45-day waiting period, before the parties could proceed. To the extent any services are omitted 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. Even if an appropriate and exhaustive list of services could be developed now, elements of that list could very well be rendered obsolete as future developments (e.g., technology, labor practices, work rules, terminal and transportation infrastructure, environmental rules) impact the provision of terminal and stevedoring services. Rather than risk the problems that would result from replacing the current exemption with a list of services, the Commission should retain the existing exemption.

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We trust the foregoing comments are of assistance to the Commission in considering these proposals, which PMSA urges not be adopted.

Respectfully submitted,

PACIFIC MERCHANT SHIPPING ASSOCIATION


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