

**BEFORE THE
FEDERAL MARITIME COMMISSION**

OCEAN CARRIER AND)
MARINE TERMINAL OPERATOR)
AGREEMENTS SUBJECT TO)
THE SHIPPING ACT OF 1984)
_____)

**DOCKET NO.
16-04**

**COMMENTS OF
THE PORT OF NY/NJ SUSTAINABLE TERMINAL SERVICES AGREEMENT
AND
THE PORT OF NY/NJ—PORT AUTHORITY/MARINE TERMINAL OPERATOR
AGREEMENT**

The Port of NY/NJ Sustainable Terminal Services Agreement (PONYNJSSA), FMC Agreement No. 201175, the Port of NY/NJ—Port Authority/Marine Terminal Operator Agreement (PAMTOA), FMC Agreement No. 201210, and their members (together the “Agreements”), submit their comments in response to the Federal Maritime Commission’s (FMC’s) Advanced Notice of Proposed Rulemaking in the above captioned proceeding, 81 Fed. Reg. 10188 (February 29, 2016) hereinafter referred to as the “ANPRM.”

I.

Interest of the Agreements

The Agreements are marine terminal conferences and their members are marine terminal operators (MTOs) doing business in the Port of New York and New Jersey. As such, they will be directly and substantially affected by some of the proposals introduced in the ANPRM. These comments are limited to the provisions of the ANPRM that seek to amend regulations regarding marine terminal operators and any FMC agreements to which marine terminal operators can be a party.

II.

Summary of the Comments

- The Agreements oppose the proposed modification to FMC regulations that would require MTOs that belong to a conference or discussion agreement submit their marine terminal service agreements (MTSAs) to the FMC.
- The Agreements oppose the proposed modifications to FMC regulations that would 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 agreement authority without a subsequent agreement filing.
- The Agreements also urge the Commission to maintain the *status quo* with respect to the treatment of requests for additional information.

III.

Purpose of the Agreements

The PONYNJSSA became effective on December 6, 2007. The purpose of the PONYNJSSA is to permit its members to meet, discuss and agree on matters that relate to promoting environmentally-sensitive, efficient, and secure marine terminal operations in the Port of New York and New Jersey. The PONYNJSSA does not meet, discuss or agree on matters relating to MTSAs or the charges or fees covered under such agreements. During the term of the PONYNJSSA, the members have discussed matters related to reducing air emissions from cargo handling equipment, promoting the Port of New York and New Jersey as an attractive destination for cargo interests, enhancing marine terminal security, and providing the shipping

community enhanced transparency in the cargo transportation process through a port-wide information portal system. These discussions have also involved issues with port and terminal congestion and potential remediating measures that might be implemented to address such congestion. Most recently, cyber security has become a topic of discussion as well. As the FMC is aware, a representative from the PONYNJSSA came down to Washington, DC to make a presentation at the FMC's forum on February 20, 2015 to describe the projects that the PONYNJSSA has been involved with since its inception.

The PAMTOA became effective on February 10, 2011. The purpose of the PAMTOA is also to permit its members to meet, discuss and agree on matters that relate to promoting environmentally-sensitive, efficient, and secure marine terminal operations in the Port of New York and New Jersey. In addition, the PAMTOA authorizes its members to assist the Port Authority of New York and New Jersey in implementing its Clean Air Strategy. This has been done through the multi-purposing of a port-wide RFID-based truck identification system created by the members of the PONYNJSSA. The PAMTOA does not meet, discuss or agree on matters relating to MTSAs or the charges or fees covered under such agreements.

IV.

Submission of Marine Terminal Services Agreements

The Agreements respectfully reject the FMC's contention that the exemption from filing MTSAs has a reasonable nexus to cooperative working agreements that relate to environmental issues, security and safety, or even port congestion. The Agreements provide far reaching benefits to many different port stakeholders. Requiring the filing of MTSAs for all discussion agreement members will significantly increase the burden on and costs of the administration of such agreements without any enhanced benefit to the cargo transportation public. More

importantly, requiring the filing of MTSA's will discourage the legitimate use of such agreements to the detriment of the nation's marine transportation system and cargo interests, which have been the beneficiary of enhanced port-wide environmental action, security and operational efficiencies. At a minimum, the proposed requirement is in direct contravention of the Executive Order requiring administrative agencies to evaluate regulatory programs and revise them to make them more effective and less burdensome.

The proposed regulation requiring the submission of all MTSA's is unclear as to whether the requirement applies only within the geographic scope of a specific agreement to which a MTO may belong or to all MTSA's to which a member marine terminal company may be a party. The complete lack of a nexus between the proposed filing requirements and the geographic scope of a conference agreement serves to highlight the unduly broad nature and policy behind the proposed repeal of the filing exemption.

With regard to the FMC's assertion that such a requirement may enhance its regulatory programs, the FMC claims that MTSA's are "relevant in analyzing the competitive impact of programs and actions of MTO's 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 the Agreements are incorporated into a MTSA, the FMC is being provided with the MTSA's necessary to monitor that impact, and the proposal imposes a requirement that is unnecessarily duplicative and overly broad.

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 provide the FMC with extensive data about the operations of the agreement and its members. Agreement members have participated in FMC forums and meetings that seek information about the impact of agreement programs. 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 how the filing of MTSAAs, which contain no terms agreed upon within the Agreements, would provide more information than what is already contained in the materials currently made available to the FMC on a regular basis. The same questions would apply to other MTO conference and discussion agreements.

The proposal is overbroad. The Commission has shown no pressing need for these MTSAAs on an across-the-board basis. If there is such a need for a particular MTSA, the Commission can seek the relevant agreement in a focused inquiry. There is no need for a blanket requirement that all MTSAAs in trade be submitted. Moreover, to seek to do this through MTO agreements that do not address similar aspects of service makes no sense.

Moreover, MTOs at a given port compete with one another for the business of ocean carriers. This means that MTSAAs are negotiated individually and confidentially by an individual MTO and its carrier customer. As a result, the impact that the Agreements have on the terms and conditions agreed upon by an individual MTO and an ocean carrier in an MTSA is not always

readily discernable. There is no regulatory value in requiring the filing of MTSAAs 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 MTSAAs. 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. Different terminals have different berthing capabilities, different operating equipment, different customers with different vessels and cargo volumes, and other unique features, thus, attempting to compare the MTSAAs 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 and an algorithm to account for the differences. Even if one can make such a comparison, for the reasons set forth above, the similarities and differences between MTSAAs would not be nearly as valuable a source of information as the FMC has suggested.

In addition, the burden of submitting MTSAAs far outweighs any regulatory benefit that might exist. MTSAAs 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 and might harken the death knell of agreements that have done so much to address non-competitive challenges to port performance and environmental cooperation. MTOs might be reluctant to join such agreements, if they will be required to file all of their MTSAAs with the FMC.

The members of the Agreements are also concerned about preserving the confidentiality of MTSAs. 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.

For these reasons, the Commission should not adopt a requirement that MTOs submit all MTSAs to the Commission.

V.

Activities That May Be Conducted Without Further Filings

The Agreements also 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.

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.

VI.

Requests for Additional Information/Public Information

The Agreements also 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.

VII.

Conclusion

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

Respectfully submitted,

S/S Carol N. Lambos

Carol N. Lambos

Filing Representative

The Lambos Firm, LLP

303 South Broadway—Suite 410

Tarrytown, NY 10591

212-381-9700

cnlambos@lambosfirm.com

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