

July 5, 2016

Via Electronic Mail

Karen V. Gregory
Secretary
Federal Maritime Commission
800 North Capitol Street, N.W.
Washington, D.C. 20573
secretary@fmc.gov

Re: Comments in Connection With Docket No. 16-08; Notice of Proposed Rulemaking Regarding Presentation of Evidence in Commission Proceedings

Dear Ms. Gregory,

The American Association of Port Authorities (“AAPA”) welcomes the opportunity to submit comments in connection with the Commission’s Notice of Proposed Rulemaking, (“NPR”) published in the Federal Register on May 3, 2016, Commission Docket No. 16-08. AAPA is the unified and collective voice of the seaport industry in the Americas. These comments are filed on behalf of AAPA’s 80 plus U.S. public port authority members.

This Notice relates to certain proposed changes to the Commission’s rules of practice and procedure, including the presentation of evidence in Commission proceedings. In the NPR, the Commission stated its particular interest in public comment on a proposed change to the language of the rule regarding the admissibility of evidence. (Rule 156/204).

The current rule provides that the Federal Rules of Evidence (“FRE”) “will be applicable” to Commission proceedings “unless inconsistent with” the requirements of the Administrative Procedure Act (“APA”). The proposed new language would remove this mandatory characterization, providing only that the Presiding Officer “may look to the [FRE] for guidance.” It is unclear whether the proposed change is intended to loosen the admissibility standard in cases before the Commission, and if so, to what degree. Under current law, certain evidence that is inadmissible in a federal court proceeding is admissible in a Commission proceeding if the evidence is relevant, material, reliable and probative. Under this standard, hearsay can be admissible evidence in Commission proceedings. Rather than serving as a gatekeeper to exclude evidence that is “questionable” and of “lesser probative value,” the ALJ is to admit the evidence, while taking into account its limited reliability in making findings of fact.

The proposed change may have limited practical impact on the ultimate outcome of a contested hearing. However, it could have a significant practical impact on motions for summary judgment. In federal court a party opposing a dispositive motion on the grounds that there are material facts in genuine dispute must show that there is admissible evidence on its side of the asserted dispute. A federal court cannot weigh the evidence, but can ignore a proffer of inadmissible evidence. Accordingly, a non-moving party cannot rest its opposition to a dispositive motion on a proffer of evidence that would not ultimately be admissible. Current

Commission rules on summary judgment apply the same principle, albeit with a relaxed admissibility standard. If the proposed new rule further loosens the already relaxed admissibility standard, this could further limit the utility of summary judgment, especially if the new rule is ambiguous on how it applies to summary judgment motions.

Private party claims under the Shipping Act are an important element of the Commission's enforcement strategy. However, such claims – and the threat of such claims – are also a potent negotiating tactic. While recent developments like the Coble Act have helped level of the playing field, the significant expense and time burden of defending against a private party claim is still a factor counseling prudent use of summary judgment when appropriate.

The AAPA believes that the current rule – requiring application of the FRE when not in conflict with the APA – is appropriate given the nature of the Commission's adjudicatory role in contested private party actions. When deciding private party claims, the Commission is performing the essential functions of a federal district court. *See Fed. Maritime Comm'n v. S. Carolina State Ports Auth.*, 535 U.S. 743 (2002) (“FMC administrative proceedings bear a remarkably strong resemblance to civil litigation in federal courts.”). Given the adversarial nature of private party proceedings and the Commission's court-like function in deciding such cases, the current incorporation of the FRE ensures that decisions are based on reliable evidence.

The concerns voiced by the Administrative Conference of the United States (“ACUS”) in 1986, cited in part in the NPR to justify the proposed change, do not compel further loosening of the rules on admissibility. The concern of the ACUS that reviewing courts will be “confused,” or that ALJs are being asked to undertake a “difficult and hazardous” task in applying the FRE, is inapposite to present day practice. Reviewing courts regularly apply and interpret language quite similar to that found in the Commission's current evidentiary rule. For example, the National Labor Relations Board (and therefore courts reviewing challenges to Board decisions) generally applies the Federal Rules of Evidence. *See* 29 C.F.R. § 102.39 (Proceedings before Board shall “so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States . . .”). Commission ALJs often deal with issues far more complicated than the FRE, and there is nothing in the record of recent cases suggesting that they have found applying the FRE – or determining when it conflicts with the APA or Commission Rules – either difficult or hazardous.

The proposed rule risks introducing uncertainty into Commission proceedings. Making reliance on the FRE completely discretionary means that a Presiding Officer may choose to follow the FRE in one case but choose not to follow it in another, or that different Presiding Officers may apply different standards. This type of unpredictable inconsistency could result in conflicting evidentiary rulings and reduce the precedential impact of prior decisions. Litigants may not be able to predict the admissibility of evidence prior to trial, which could result in increased litigation costs and make it difficult to judge the merits of an action. Significantly broadened standards of admissibility could lead to a deluge of unmeritorious litigation supported by evidence that lacks the reliability necessary for admission under the current rule.

Finally, the proposed change may lead to a perception by Presiding Officers that they are no longer accorded the discretion to exclude evidence they consider unreliable. Instead of declining to admit such evidence, Presiding Officers may feel that the new rule requires the admission of the evidence and for the Presiding Officer to expend valuable hearing and opinion

time addressing the reliability and probative value of evidence that would otherwise have been excluded. If evidence that would be excluded under the current rule begins to be admitted with regularity, the AAPA is concerned that fewer cases that should be resolved on summary judgment actually will be so resolved, thus forcing the parties to expend the time and resources necessary for a hearing.

The AAPA believes that the Commission should not adopt the proposed change to its rule regarding the admissibility of evidence. However, if the Commission decides to make the proposed change, it should consider language expressly encouraging its Presiding Officers to continue making threshold admissibility determinations and excluding unreliable evidence. Such guidance from the Commission could combat a perception that the rule change requires the admission of evidence that Commission precedent characterizes as unreliable. Moreover, Presiding Officers should be reassured that the proposed rule change does not strip them of their discretion to manage their cases and decide claims on summary judgment when it is appropriate to do so.

The AAPA appreciates the Commission's consideration of these comments and concerns.

Sincerely,

A handwritten signature in cursive script that reads "Jean C. Godwin". The signature is written in black ink and is positioned above the typed name.

Jean C. Godwin
AAPA Executive Vice President and General Counsel

