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September 8, 2009

Karen V. Gregory  
Federal Maritime Commission  
800 North Capitol Street, N.W.  
Room 1046  
Washington, D.C. 20573-0001

**Re: Docket No. 09-02, RIN 3072-AC35; Notice of Proposed Rulemaking—Repeal of Marine Terminal Agreement Exemption**

Dear Secretary Gregory:

The National Industrial Transportation League ("League") hereby submits its comments in support of the Federal Maritime Commission's proposal to repeal an existing exemption from the 45-day waiting period applicable to certain marine terminal operator ("MTO") agreements. The FMC's proposal was published as a Notice of Proposed Rulemaking ("NPRM") on July 2, 2009 in the Federal Register. 74 Fed. Reg. 31666.

The League is a national association that represents approximately 700 member companies that tender goods to carriers for transportation in interstate and international commerce, or that arrange or perform transportation services. The League's membership includes large multinational and national corporations as well as small and medium-sized companies. The majority of the League's members are companies that own or control the goods being transported and delivered, i.e. shippers and receivers of freight. The League's shipper members span a multitude of industries, such as retail, automotive, petroleum, chemicals, paper, computer, and electronics, among others, and use all modes of transportation for the shipment of raw materials and finished products. As many League members are U.S. importers and exporters, certain marine terminal operator agreements have an impact on the shipment of their goods.

In 1987, the FMC issued the exemption for MTO agreements which is the subject of the instant NPRM, finding that the exemption "would not substantially impair effective regulation by the Commission, be unjustly discriminatory or detrimental to commerce, nor result in a substantial reduction of competition." See FMC Docket 85-10, *Marine Terminal Agreements*, 24 S.R.R. 192, 193-4. The FMC also granted the exemption based on the desire to reduce regulatory delays for largely routine operational agreements. See *id.*

The existing exemption applies to future activities among the parties to the agreements which involve marine terminal facilities and/or services but does not apply to marine terminal conference, interconference or discussion agreements. The exemption is published at 46 C.F.R. § 535.308 and states in relevant part:

(a) Marine terminal agreement means an agreement, understanding, or association written or oral (including any modification or appendix) that applies to future, prospective activities between or among the parties and that relates solely to marine terminal facilities and/or

services among marine terminal operators and among one or more marine terminal operators and one or more ocean common carriers that completely sets forth the applicable rates, charges, terms and conditions agreed to by the parties for the facilities and/or services provided for under the agreement. The term does not include a joint venture arrangement among marine terminal operators to establish a separate, distinct entity that fixes its own rates and publishes its own tariff.

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(e) All marine terminal agreements, as defined in § 535.308(a), with the exception of marine terminal conference, marine terminal interconference, and marine terminal discussion agreements as defined in § 535.308(b), (c), and (d), are exempt from the waiting period requirements of the Act and this part and will, accordingly, be effective on filing with the Commission.

By allowing MTO agreements within the scope of section 535.308(a) to take effect upon their filing with the FMC, such agreements among two or more MTOs are afforded antitrust immunity without being subject to FMC analysis or public review and comment. Although the exemption has not proven problematic in the past, the League fully agrees with the Commission that, in recent years, some MTO agreements have become more complex and broader in scope, with greater potential for anticompetitive impacts on the shipping public and other operators at the ports. This has created a legitimate concern as to whether such MTO agreements should be granted immunity from the antitrust laws immediately upon their filing with the Commission.

An example of an unconventional MTO Agreement filed under the exemption which resulted in significant impacts on the industry was Marine Terminal Operator Agreement No. 201196 filed in September 2008 by the City of Los Angeles and the City of Long Beach. Agreement No. 201196 sought to implement aspects of a comprehensive and controversial Clean Truck Program at the ports of Los Angeles and Long Beach and set forth the terms by which "drayage trucks are permitted access to Port owned and controlled properties for the purpose of: (a) improving Port-related transportation infrastructure; (b) increasing cargo movement efficiencies and Port capacities; (c) improving the safety and security of Port terminals and properties; and (d) decreasing Port-related air pollution emissions in the San Pedro Bay area." See MTO Agreement No. 201196, Art. 2 (Purpose of Agreement). The Agreement also set forth specific activities to be undertaken by the parties to the agreement, including the requirement for terminal operators to deny access to drayage trucks that failed to meet defined equipment and emissions standards, and established various fees to be paid by cargo owners and drayage operators, among other requirements. MTO Agreement No. 201196, Art. 4 (Agreement Applicability).<sup>1</sup>

The scope and complexity of MTO Agreement No. 201196 which delves into matters far beyond the traditional landlord/tenant MTO agreements filed with the FMC, demonstrates the need

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<sup>1</sup> Indeed, another MTO agreement related to the Clean Truck Program (Agreement No. 201170) that was filed with the FMC by the Cities of Los Angeles and Long Beach but was not subject to the existing exemption, was challenged by the FMC as an "anticompetitive agreement" under Section 6(g) of the Shipping Act of 1984, codified at 46 U.S.C. § 41307. *Fed. Maritime Comm'n v. City of Los Angeles et al.*, 602 F.Supp.2d 192 (D.D.C. 2009).

for greater scrutiny and public review of such agreements before they are permitted to take effect.<sup>2</sup> The removal of the existing exemption and reinstatement of the 45-day waiting period would provide the FMC and the public with an opportunity to review and analyze the impacts of such agreements, including potential anticompetitive consequences, before any potential harm occurs. Advance review of joint MTO agreements would permit the agency to obtain valuable input from the industry and to seek additional information about an agreement, when necessary, to ensure that it fully understands the impacts. Moreover, because the tools of the FMC for addressing anticompetitive agreements are limited and costly once the agreement has taken effect (i.e. the commencement of a legal challenge in court to enjoin the agreement under 46 U.S.C. § 41307), applying the 45-day waiting period would provide an opportunity for potential concerns with an agreement to be corrected before more drastic measures must be undertaken.

Accordingly, the League supports the proposal of the FMC to repeal the existing exemption from the 45-day waiting period for MTO Agreements, published at 46 C.F.R. § 535.308.

Respectfully submitted,



Bruce J. Carlton  
President & CEO  
The National Industrial Transportation League

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<sup>2</sup> See also Marine Terminal Operator Agreement No. 201202 filed by the Port of Oakland on June 2, 2009; Marine Terminal Operator Agreement No. 201143-005 (3rd Edition) filed by the West Coast Marine Terminal Agreement on March 16, 2005.