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ATTORNEYS AT LAW

A LIMITED LIABILITY PARTNERSHIP

November 21, 2008



Via Messenger

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

Re: Petition for Commission Review of Staff Action –
Port Fee Services Agreement, FMC No. 201199

Dear Ms. Gregory:

Pursuant to Rule 69 of the Commission's rules, 46 C.F.R. § 502.69, the marine terminal operator parties to FMC Agreement No. 210199 and PortCheck LLC (the "MTOs") hereby petition the Commission to review a staff action and determine that the above Agreement is subject to the exemption in 46 C.F.R. §535.308 and therefore effective upon filing. However, in view of the urgent nature of this matter, we request pursuant to 46 C.F.R. §502.103 that the Commission shorten the comment period for interested parties from the usual 15 days. Specifically, we request that any comment period end on Friday, November 28, 2008. Since the public has had notice of this Agreement since its publication in the Federal Register on November 13, 2008, and will have had the opportunity to comment on it, using the foregoing comment period would provide sufficient opportunity to comment.

Agreement No. 201199 was filed with the Commission on November 3, 2008. In this Agreement, the parties (the Ports of Los Angeles and Long Beach, the MTOs, and PortCheck LLC, a company formed by the MTOs) agree to the terms and conditions under which the MTOs and PortCheck will administer certain aspects of the ports' clean truck program. It provides for compensation for these services, procedures that will be followed in connection with the performance of the services, and other administrative provisions relating to fee collection and gate access. The Agreement does not establish the ports' substantive program, nor does it determine the amount of the clean truck fee, who will pay the fee, or any conditions for access to port property. The substantive aspects of the ports' programs have been determined previously pursuant to other agreements or in other contexts.

The parties filed the Agreement as a "marine terminal agreement" under 46 C.F.R. § 535.308(a), which agreements are exempt from the 45-day waiting period of the Shipping Act pursuant to 46 C.F.R. § 535.308(e). This was based on the language

Ms. Karen V. Gregory, Secretary
Federal Maritime Commission
November 21, 2008
Page 2

of the exemption and on the fact that the ports had previously filed Agreement No. 201196 on September 30, 2008. Agreement 201196 went into effect upon filing pursuant to the exemption in Section 535.308(e).

However, on November 14, 2008, the parties received an acknowledgment letter for the Agreement in which the Commission staff stated "it is the staff's opinion that the agreement is ineligible for that exemption[535.308]." Accordingly, the staff took the position that the Agreement would become effective after the standard 45-day waiting period, on December 17, 2008. Although the legal effect of the position taken by the staff is subject to question, the MTOs nonetheless respectfully request that the Commission reverse the staff's determination and recognize that the Agreement is a marine terminal agreement as defined in 46 C.F.R. § 535.308(a) and therefore exempt from the statutory waiting period pursuant to 46 C.F.R. § 535.308(e). The reasons for the position of the MTOs are set forth below.

Treating this Agreement differently from the ports' agreement would be arbitrary and capricious. As noted, the Ports of Los Angeles and Long Beach filed an agreement on September 30 (FMC No. 201196) that was appropriately permitted to go into effect upon filing pursuant to 46 C.F.R. §535.308. The Agreement covers similar subject matter as the agreement filed by the ports. However, whereas Agreement No. 201196 relates to the substance of the clean air program established by the ports, Agreement No. 201199 relates only to the terms under which the program will be administered. Thus, it is far narrower in scope than Agreement No. 201196, which qualified for the exemption.

For example, the Agreement does not establish substantive rules or standards. All fees, rules and standards have been established by the two ports pursuant to the agreements among them or through individual actions of each port. This Agreement merely sets forth the administrative mechanism by which the terminal operators at the two ports will implement the decisions made by the ports, either jointly or separately, and the terms for that administration. Shippers and truckers will not be affected by the amount of compensation paid to the MTOs by the ports, the records the MTOs are required to keep, or the other protections afforded to the MTOs under the Agreement. Regardless of these issues, shippers will still pay the same clean truck fee under the ports' program. Truckers will still be subject to the same clean truck requirements. Thus, the Agreement will have far less substantive impact than Agreement No. 201196.

In light of the foregoing, it would be arbitrary and capricious for the Commission to apply the exemption contained in Section 308 to Agreement No. 201196, but not to the Agreement.

Ms. Karen V. Gregory, Secretary
Federal Maritime Commission
November 21, 2008
Page 3

The exemption in Section 535.308 was intended to apply broadly to marine terminal agreements other than marine terminal conference, discussion, and inter-conference agreements, and joint ventures. There is no question that the current agreement does not fall within any of the categories that fall outside the exemption.

When adopting the exemption now found in Section 535.308 in 1987, the Commission emphasized its intended broad application:

After careful consideration of the comments, we are establishing a uniform waiting period/approval exemption for all classes of marine terminal agreements, other than marine terminal conference, interconference, joint venture and discussion agreements.

Marine Terminal Agreements, 24 S.R.R. 192, 193 (1987) (emphasis added). The Commission also stated:

The Final Rule adopts the Paragraph (b) Exemption for all classes of marine terminal agreements, other than marine terminal conference, interconference, joint venture and discussions agreements, with the exemption becoming effective upon the filing of an agreement with the Commission.

Id. at 197. In other words, the Commission intended that all marine terminal agreements except conference, interconference, joint venture and discussion agreements would be exempt from the waiting period requirement of the Shipping Act. Thus, for the Commission or its staff to deny the exemption to this Agreement and apply a waiting period, would be contrary to the wording and spirit of the exemption.

This Agreement "relates solely to marine terminal facilities and/or services" as provided in 46 C.F.R. §535.308(a). The Agreement relates to two basic functions the MTOs are agreeing to undertake for the ports. The first is collection of a clean truck fee with respect to cargo entering or leaving terminal facilities at the ports. The second is the administration of certain port criteria for access to terminal facilities. The Agreement provides for the terms and conditions of the MTOs' administration in those areas. Both functions relate directly to the terminal facilities operated by the terminal operators at the Ports of Los Angeles and Long Beach.

In informal discussions regarding the agreement, the Commission staff questioned whether the Agreement relates to the "operation" of a marine terminal as contemplated 46 C.F.R. §535.310(a). As discussed above, the Agreement does relate directly to the MTOs' operation of their facilities and determination of access to their gates. In any event, however, relation to "operation" of a terminal facility is a

Ms. Karen V. Gregory, Secretary
Federal Maritime Commission
November 21, 2008
Page 4

condition of a different exemption (section 535.310) for terminal facilities agreements. The parties here rely on the exemption in Section 535.308, which requires merely that the agreement relate to terminal facilities.

It is a fundamental principle of statutory and regulatory construction that each provision must be given meaning whenever it is possible to reasonably do so. *Freytag v. Commissioner of Internal Revenue*, 501 U.S. 608 (1991); see also Uniform Statute and Rule Construction Act (1995), Sections 10(b) and 18. Given this principle, Section 308(a) of the Commission's regulations must be interpreted as exempting agreements that relate to marine terminal facilities, but which may not be marine terminal facilities agreements within the meaning of Section 310(a), from the statutory waiting period. Any other interpretation would violate the foregoing principle and be arbitrary and capricious. Similarly, finding that an agreement must be a marine terminal facilities agreement within the meaning of Section 310(a) in order to qualify for the exemption from the waiting period provided in Section 308(a) would likewise be incorrect and unlawful.

The fact that PortCheck is a party to the Agreement does not defeat applicability of the exemption. The staff also objected that the Agreement includes a party (PortCheck LLC) that is not a marine terminal operator. The presence of a non-MTO party does not place the Agreement outside the exemption. It is still an agreement "among marine terminal operators" as provided in the exemption. There is no question that all remaining parties are marine terminal operators. A number of agreements filed with the Commission include non-regulated parties, and there is no question that they are nevertheless agreements "between or among ocean common carriers" or "between or among marine terminal operators" subject to filing under the Act.

The staff appears to argue that the word "solely" as used in 46 C.F.R. §535.308(a) modifies the parties to an agreement, rather than to the subject matter of an agreement. This is a misreading of the regulation. Particularly when viewed in light of the history of the regulation set forth above, the word "solely" in Section 308(a) is clearly used to ensure that agreements which relate to marine terminal facilities or services -- but which might also be categorized as marine terminal conferences, marine terminal discussion agreements, or marine terminal interconference agreements -- do not benefit from the exemption. In other words, "solely" is used in relation to the subject matter of an agreement.

The Agreement applies only to future, prospective activities as required by 46 C.F.R. §535.308(a). In discussions, the staff questioned whether the Agreement has retroactive effect, given certain references to October 1 in Articles 7.1 and 7.3 of the Agreement as originally filed. October 1 was the originally intended effective date of the ports' program, which is the reason for the reference. However, the parties did not

Ms. Karen V. Gregory, Secretary
Federal Maritime Commission
November 21, 2008
Page 5

begin implementation of the Agreement on October 1 and have not yet begun implementation. Indeed, Articles 7.1 and 7.3 specifically contemplate the possibility that implementation would not begin on October 1. Thus, the Agreement is not intended to authorize retroactive activity, and does not do so.

The Agreement is the complete agreement between the parties. The staff has alleged that the Agreement may not be complete because it does not reflect certain understandings between PortCheck and third parties in connection with collection of the clean truck fee. This position is without merit, since any such understanding does not involve the two ports and thus is not part of the agreement between the parties that is required to be filed. The Agreement merely provides that PortCheck agrees to collect the fees in a commercially reasonable manner. The manner of that collection, and specifics of procedures or information, is left up to PortCheck.

For the reasons set forth above, the Agreement qualifies for the exemption in Section 535.308. However, should the Commission determine for whatever reason that the Agreement does not qualify for the exemption, the MTOs respectfully request that the Commission clearly set forth the basis on which that determination is made, for the parties' guidance for the future.

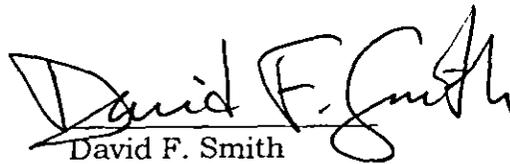
The MTOs recognize that the exemption contained in Section 308 is not often used and that the Commission and/or its staff may view the exemption as being overly broad as currently drafted. It may even be possible to question whether the rationale for the exemption when it was promulgated in 1987 remains valid today. However, if that is the case, the remedy is to revise the regulation going forward after review of current circumstances and conditions. It is not appropriate to apply it in a manner that is inconsistent with both the purpose for which it was adopted and historical practice. The Commission is bound to apply its regulations as they are drafted, not in the way it wishes they were drafted. It would be arbitrary and capricious for the Commission to disregard the plain applicability of this regulation, particularly after permitting Agreement No. 201196 to go into effect upon filing.

For the foregoing reasons, the MTOs respectfully request the Commission to determine that Agreement No. 201199 falls within the exemption set forth in 46 C.F.R. § 535.308 (a) and is effective upon filing as of November 3, 2008.

Ms. Karen V. Gregory, Secretary
Federal Maritime Commission
November 21, 2008
Page 6

A check for \$241 in payment of the filing fee for this petition is enclosed. In addition, a copy of this petition has been provided for your acknowledgement of receipt.

Sincerely,

A handwritten signature in black ink that reads "David F. Smith". The signature is written in a cursive style with a horizontal line drawn through the middle of the name.

David F. Smith
Wayne R. Rohde
Sher & Blackwell LLP
Suite 900
1850 M Street, N.W.
Washington, D.C. 20036

Counsel to the marine terminal operator
parties to FMC Agreement No. 201199

CERTIFICATE OF SERVICE

I, Wayne R. Rohde, hereby certify that on this 21st day of November, 2008, the foregoing petition for review of staff action was served by first-class mail, postage pre-paid, on:

C. Jonathan Benner, Esq.
Matthew Thomas, Esq.
401 9th Street, N. W.
Suite 1000
Washington, DC 20004-2134
United States of America

Counsel for the City of Los Angeles
and the City of Long Beach,
acting through their respective
Boards of Harbor Commissioners



Wayne R. Rohde