Federal Maritime Commission
Washington, D.C. 20573

Office of the Chairman

July 2, 2010

The Honorable Blanche L. Lincoln
Chairman
U.S. Senate Committee on Agriculture, Nutrition, and Forestry
Washington, DC 20510-6000

The Honorable Saxby Chambliss
Ranking Member
U.S. Senate Committee on Agriculture, Nutrition, and Forestry
Washington, DC 20510-6000

Dear Chairman Lincoln and Ranking Member Chambliss:

Thank you for your letter expressing concern over reports that U.S. agricultural exporters are experiencing serious service issues with the ocean carrier industry. Your letter provides an apt description of the issues that prompted the Federal Maritime Commission in March to initiate an investigation led by Commissioner Rebecca Dye into vessel capacity and shipping container availability problems. We share your serious concern about reports that U.S. exporters are experiencing difficulty obtaining the vessel space or containers needed to ship their products. We have been working hard to understand the causes and extent of these problems, and to develop solutions.

Your letter inquired about steps that the Commission is taking to address these issues. Wednesday, in testimony to the House Committee on Transportation and Infrastructure's Subcommittee on Coast Guard and Maritime Transportation, Commissioner Dye and I provided preliminary findings and recommendations from Commissioner Dye's fact finding investigation. I have enclosed copies of our written statements for your review.

Commissioner Dye's statement describes her initial findings and her four recommendations that the Commission acted upon at its meeting on June 23rd:

- **Rapid Response Teams:** Teams within the Commission's Office of Consumer Affairs and Dispute Resolution Services (CADRS) have been organized to quickly address and help resolve disputes between shippers and carriers – particularly for the problems described in your letter that involve cancelled bookings, rolled cargo, and container unavailability.

- **TSA and WTSA Oversight:** The Commission will increase oversight of the Transpacific Stabilization Agreement (TSA) and the Westbound Transpacific Stabilization Agreement (WTSA) by requiring transcripts of certain Agreement meetings.

- **Global Alliance Oversight:** The Commission has directed staff to prepare recommendations for prompt Commission action on ways to increase oversight of global vessel Alliances.

- **Extend Fact-Finding Investigation:** The Fact Finding Investigation is extended to November 30, 2010. This will allow Commissioner Dye to continue the investigation through the peak shipping season and to fully develop additional solutions.

As explained in her testimony, Commissioner Dye's interim report also made the following additional recommendations that she will continue to develop during the second phase of her investigation:

- formation of best practices discussion pairs between shippers and carriers;

- a demand that ocean carriers appoint representatives to act as liaisons to Rapid Response Teams;

- development of model service contract terms; and

- establishment of industry and FMC staff working groups to address export capacity and container availability.

In addition to these efforts, the FMC has been assisting the U.S. Department of Agriculture's (USDA's) efforts to develop a pilot project to give inland agricultural exporters more information on the location and availability of empty shipping containers. With the FMC's input and assistance, the USDA has assembled a group of six agricultural exporters and four major ocean carriers who are members of the Westbound Transpacific Stabilization Agreement, the largest ocean carrier agreement on our export trade lane with Asia. We will continue to assist the USDA as they work to develop and roll out their Container Availability Pilot Project.

You also asked for my perspective on the specific authorities that the Commission has available to ensure that ocean carriers honor their service contracts, as well as my perspective on the Commission's power to penalize carriers for egregious practices. As Commissioner Dye notes in her attached testimony, the Shipping Act of 1984 contains a significant constraint on the Commission's ability to police and remedy service contract violations: it states that "[u]nless the parties agree otherwise, the exclusive remedy for a breach of a service contract is an action in an appropriate court." 46 U.S.C. § 40502(f) (formerly Section 8(c) of the Shipping Act of 1984). At the same time, the Shipping Act states that a common carrier "may not fail to establish, observe, and enforce just and reasonable regulations and practices relating to or connected with receiving, handling, storing, or delivering property." 46 U.S.C. § 41102(c) (formerly Section 10(d)(1) of the Shipping Act of 1984).

The Commission has had to grapple with the tension between these two provisions. In *Cargo One, Inc. v. Cosco Container Lines Co.*, 28 S.R.R. 1635, 1636, 2000 WL 1648961 at *1 (FMC 2000), the Commission said that in considering whether a claim can proceed before the FMC, the test is:

> whether a complainant's allegations are inherently a breach of contract claim, or whether they also involve elements peculiar to the Shipping Act. . . . [W]here the alleged violation raises issues beyond contractual obligations, the Commission will likely presume, unless the facts as proven do not support such a claim, that the matter is appropriately before the agency.

Id. at 1645. The Commission then held that, in that case, the alleged violations of the Section 10(d)(1) requirement of "just and reasonable regulations and practices" were "inherently related to Shipping Act prohibitions and therefore appropriately brought before the Commission," but the Commission did not reach the issue of what would constitute a Section 10(d)(1) violation. *Id.*

In part because of the "exclusive remedy" limitation and uncertainty over what constitutes "regulations and practices," shippers have brought very few formal cases to the Commission for violations of the "just and reasonable regulations and practices" requirement since the 2000 *Cargo One* decision. But the Commission remains available to consider and resolve such complaints, subject to the limitations described above. In addition, the Commission encourages agricultural exporters and other shippers to contact the Commission's CADRS office or our local area representatives to assist them in quickly attempting to resolve disputes with ocean carriers. From 2005 through 2009, our CADRS office has handled an average of 450 cargo-related complaints a year. This is in addition to numerous matters that CADRS or area representatives have resolved before they rose to the level of a complaint.

Finally, you inquired about "ways to potentially strengthen the Commission's authority with the carriers." I was asked a similar question at Wednesday's hearing, and I shared my own opinion that Congress could examine the Shipping Act's "exclusive remedy" limitation to clarify when the Commission could act to resolve disputes related to service contracts.

The Commission welcomes your interest in our efforts to address these issues that are so critical to individual U.S. exporters, the Obama Administration's National Export Initiative, and our economy in general. We look forward to working with you on these issues, and would be delighted to discuss these issues further with you and your staff.

Sincerely,

Richard A. Lidinsky, Jr.

Richard A. Lidinsky, Jr.
Chairman

Enclosures

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STATEMENT OF
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BEFORE THE
COMMITTEE ON TRANSPORTATION AND INFRASTRUCTURE
SUBCOMMITTEE ON COAST GUARD AND MARITIME TRANSPORTATION
UNITED STATES HOUSE OF REPRESENTATIVES

June 30, 2010

Mr. Chairman, Mr. Ranking Member, and members of the Subcommittee, thank you for this opportunity to provide an update on the work the Federal Maritime Commission (FMC or Commission) has undertaken on the critical issue of ocean vessel capacity and shipping container availability since we last testified to this Subcommittee in March of this year. As in that previous hearing, I am joined today by Commissioner Rebecca Dye and the Commission's General Counsel, Rebecca Fenneman. We also have Commissioner Michael Khouri and members of the Commission's senior staff in the audience today to assist the Subcommittee as necessary. Your former colleague, Commissioner Joe Brennan, is back manning the ship, as we like to say, and he sends his best regards.

At the Subcommittee's hearing on March 17, we announced that Commissioner Dye would be leading a fact finding investigation into difficulties U.S. exporters and importers have been experiencing due to the lack of available ocean vessel capacity and shortages of containers for exporters. During the intervening three months, Commissioner Dye and her team have done an impressive amount of work, including reviewing extensive data and documentation and holding interviews with a comprehensive array of representatives from all sectors involved in ocean shipping and equipment provision. In March, President Obama directed agencies "to use every available federal resource" to increase U.S. exports over the next five years. That directive dovetails with the Shipping Act's goal for the FMC "to promote the growth and development of United States exports through competitive and efficient ocean transportation." As you survey the government-wide response to assist U.S. exporters thus far, I cannot think of a better example than the extraordinary efforts of Commissioner Dye and her team.

Today, the Subcommittee has asked for an update on Commissioner Dye's investigation and any recommendations she and her team may have at this time. Before I turn the microphone over to Commissioner Dye to give the Subcommittee that interim report, I would like to share a couple of observations and an update on a project we discussed in March.

First, the economy and trade have continued to improve since March. Economic growth and traffic have been surging at the nation's ports and all transport segments serving our trade. The growth over 2009, which admittedly was the worst economic year in the FMC's fifty years of existence, is quite impressive. In May of this year, the Port of Long Beach saw total container volumes increase 25% year-on-year; Los Angeles rose nearly 20%; and Seattle has increased 57% (though some of that increase came at the expense of nearby Tacoma). On the East Coast, Charleston saw a year-on-year increase of 21% in May; New York-New Jersey increased 18% in April (the most recent figures available); Savannah increased 24% in April; and the list goes on. I begin with a mention of these impressive figures because it is important to keep in mind that the problems we face are the consequences of a broader recovery that was not certain last year. In 2009, both ocean carriers and shippers would have felt fortunate to sit where we are today. When we spoke in March, the ocean carriers were claiming that they were not sure if the uptick in trade was just temporary inventory restocking before a second dip. Now they appear to have accepted that the upturn is real, despite some expressions of uncertainty over whether its strength will continue through the last quarter of 2010. The growing pains and bottlenecks we confront are serious, but they are far preferable to the severe economic pain that preceded them.

Second, vessel capacity is returning. In the nation's largest trade lanes, the Transpacific between the U.S. and Asia, we are projecting that capacity for July will be 18.7% larger than when we last testified in March. Some of this increase is seasonal, as we begin to head into the peak season of stocking for the holidays. On a year-over-year basis, we expect July 2010 capacity in the Transpacific to be 5.8% larger than July 2009 capacity, whereas March 2010 capacity was still 7.8% below March 2009 capacity. But at the same time, capacity has not returned to 2008 levels. We project July 2010 capacity to be 3.5% below July 2008 levels.

Third, as capacity returns, I believe the more pressing shortage has become containers. In March, much of the problem was the location of empty containers: agricultural exporters in the upper Midwest and rural Pacific Northwest especially had trouble obtaining containers that were bringing imports to the nation's ports and large metropolitan distribution centers. Now this recurring problem of positioning has been exacerbated by a worldwide container shortage. During the recession in 2009, major container manufacturers in China suspended production. During the past few months, production has not ramped back up to keep pace with new orders from ocean carriers and the container leasing companies that own more than half of the world's containers. Analysts forecast global output of containers at only 1.5 to 2 million twenty-foot equivalent units (TEUs) this year, down from a peak of 4.2 million TEUs in 2007. I know that Commissioner Dye and her team have been looking closely at this issue, which I believe will eclipse the vessel capacity issue in severity during the coming peak season.

On the same subject, I'd like to give the Subcommittee a brief update on a project that I mentioned in my testimony in March: our initial discussions with the U.S. Department of Agriculture (USDA) and a group of ocean carriers in the Westbound Transpacific Stabilization Agreement (WTSA) about developing a pilot project to give inland agricultural exporters more information on locations and availability of empty shipping containers. Since March, work on this Container Availability Pilot Project has progressed. The FMC has worked with the USDA and WTSA-member ocean carriers, and has gathered input and ideas from the Army's experts on container tracking at the Surface Deployment and Distribution Command. At this point, a group of six agricultural exporters and four WTSA-member carriers has been assembled to help determine the type of data to present that would be the most helpful to exporters. The carriers have submitted a first round of sample data, the USDA has compiled it into a sample report format, and the exporters have submitted initial comments to the USDA. We will continue to assist the USDA and the ocean carriers on their project to give more transparency regarding container location. This is in addition to FMC proposals on the container issue that Commissioner Dye will share with the Subcommittee both today and in her final report.

With those preliminary thoughts, I'll hand things over to Commissioner Dye, who has been living and breathing these issues in interviews with importers and exporters around the country, as well as with the ocean carriers that serve them. After she shares her update on her investigation, recent Commission actions in response, and initial proposals going forward, we would be pleased to answer any questions you may have. Again, Mr. Chairman, Mr. Ranking Member, and members of the Subcommittee, thank you for the opportunity to address you today.

STATEMENT OF
COMMISSIONER REBECCA F. DYE
FEDERAL MARITIME COMMISSION
BEFORE THE
COMMITTEE ON TRANSPORTATION AND INFRASTRUCTURE
SUBCOMMITTEE ON COAST GUARD AND
MARITIME TRANSPORTATION
UNITED STATES HOUSE OF REPRESENTATIVES

JUNE 30, 2010

Mr. Chairman and members of the Subcommittee, I am pleased to appear before you today to discuss the interim report on the Federal Maritime Commission's Fact-Finding Investigation Number 26. As you know, on March 17th, the Commission instituted this investigation on Vessel Capacity and Equipment Availability in the United States Export and Import Liner Trades. On June 23rd, the Commission considered the confidential interim report on the investigation in closed session.

I want to thank Chairman Lidinsky and Commissioners Khouri and Brennan for their support and advice during the first phase of this investigation. I also want to thank the members of the Federal Maritime Commission staff who continue to provide invaluable assistance to this investigation.

Mr. Chairman, I especially want to thank the many American exporters and importers who committed their time and resources to this investigation. Many of them discussed not only their current problems with ocean transportation, but also their suggestions for long-term improvements in the efficiency of the global supply chain. Their insights involving international ocean shipping formed the basis for several of our recommendations adopted by the Commission.

Finally, I want to thank the executives of the ocean carriers who have also participated in our investigation. They have provided us with valuable information on current capacity problems and have been forthcoming and cooperative in this investigation. We look forward to their continued participation as we move forward into the next phase of this investigation.

Market Conditions

In October of 2008, demand for vessel space in the U.S. trades plunged dramatically. Vessels that had been sailing 95 percent full from Asia to the United States were soon sailing 75 percent full. During fiscal year 2009, U.S. exports fell by 14 percent and imports fell by 16 percent. Freight rates dropped precipitously. For example, during one 12-month period from mid-2008 to mid-2009, average revenues per container declined about 40 percent. At one point, carriers had laid up more than 575 vessels worldwide, idling about 12 percent of the world's containership fleet. However, in the fourth quarter of 2009, and continuing into 2010, cargo volumes shipped to the United States from Asia began to recover and demand for U.S. exports surged.

By early 2010, increases in import volumes collided with previous vessel capacity reductions. The resulting supply and demand mismatch created serious supply chain disruptions for American importers and exporters. Cargo bookings under service contracts were denied, abruptly cancelled, or rolled to a later voyage. A rapid series of incremental price increases were imposed. U.S. exporters experienced severe problems with the availability of shipping containers for their goods.

Fact-Finding Number 26

As we developed our approach under the order of investigation, we decided to solicit information on problems in three main areas: (1) vessel space shortages, now and in the near future, inbound and outbound in the U.S. trades; (2) chronic container shortages in certain parts of the country; and (3) since international ocean cargo is carried almost exclusively under contract today, common carrier practices regarding service contracts. Our goal was to gather as much information as possible before the interim investigation deadline, followed immediately by appropriate recommendations to intervene in the serious situation that exists in international ocean shipping.

The first phase of the investigation has involved an intensive series of confidential interviews with American exporters and importers, including some of the country's largest importers and exporters. We also interviewed executives of 14 ocean carriers operating in the U.S. transpacific trade. In addition, we interviewed shipper associations, ocean transportation intermediaries, freight software providers, chassis pool experts, container lessors, transportation academics, and international ocean carrier investment consultants. We talked to port officials and railroad executives. We consulted with the American Association of Railroads and the Intermodal Association of America. Finally, we had an extremely valuable discussion with the Surface Transportation Board.

These interviews were conducted in Portland, Oregon, San Antonio, Texas, New York, New York, Washington, D.C., and twice in San Francisco, California. Many participants provided extensive documentation to support the investigation. We plan to continue the interview process for as long as the investigation continues.

The shippers and carriers that have participated in the investigation generally agree about the economic and commercial conditions that gave rise to the scarcity of vessel capacity, problems with container availability for export cargo, and the need for carrier price increases. Their disagreements tend to be about why those conditions arose, and the ways in which carriers handled them.

In the eastbound Pacific trade, both shippers and carriers identified the fundamental problem as a lack of additional capacity to handle the increase in cargo as international trade began to recover from the industry crisis of 2008 and 2009.

Shippers expressed the opinion that the ocean carriers continued to withhold vessel capacity from the market in a collective effort to raise prices by leveraging access to scarce capacity and equipment. They believed that carrier practices involving rolled cargo, cancelled bookings, and successive price increases were in conflict with protections in their existing service contracts.

Carriers responded that they were reluctant to bring vessel capacity back into the U.S. trades quickly, given the precariousness of their financial positions and the lack of certainty that recent, unanticipated increases in import and export demand would be sustainable. They explained their capacity decisions as sound business decisions made by individual lines, and said they believed that problems with rolled cargo and cancelled bookings have been exacerbated as a result of multiple bookings by shippers.

In the westbound Pacific trade, shippers and carriers agree that U.S. exports face additional problems obtaining vessel capacity.

In the transpacific, average freight rates are higher eastbound than westbound. For this reason, ocean carriers deployed vessel capacity based on demand for U.S. imports. When available capacity for U.S. imports is limited, U.S. exporters also experience higher levels of vessel capacity shortages.

Another vessel capacity problem facing exporters concerns the issue of vessels "weighing out." Container vessels are subject to both weight and volume limitations. Because US imports tend to be relatively light, vessels departing Asia can carry a full complement of loaded containers to the U.S. West Coast. However, U.S. exports, such as forestry products and grain, can weigh, on average, twice as much as imports. This weight disparity limits the number of filled export containers that may be carried on an outbound vessel.

During the interviews, shippers and carriers agreed that ocean container shortages exist throughout the country for a number of reasons, including the fact that many containers carrying imports arrive at distribution centers far removed from many export locations. A shortage of containers worldwide is exacerbated due to the virtual halt in container manufacturing from late 2008 though 2009. Imports are increasingly trans-loaded into larger domestic containers near ports of entry increasing the likelihood that empty ocean containers will be shipped back to Asia to be used for higher paying Asian exports.

Finally, the investigation found that many shipper service contracts with ocean carriers did not contain provisions which adequately protected the shipper from numerous rate and surcharge increases. Moreover, in certain cases where shippers had negotiated all-inclusive rates in contracts that did not allow the imposition of rate increases and surcharges, they stated that some carriers still attempted to impose rate increases.

The interim report on this investigation recommended seven approaches for timely action to address the severe disruptions in the ocean leg of the global supply chain experienced by U.S. exporters and importers. As you know, Mr. Chairman, The Federal Maritime Commission does not have the statutory authority to require ocean carriers to add vessel capacity. Also, unless the parties agree otherwise, the exclusive remedy for breach of contract under the Shipping Act of 1984 is an action in an appropriate court. However, we believe there are actions that the Commission can take immediately, within our statutory authority, to intervene in the situation that exists in international ocean shipping and produce positive results.

Commission Action

At the Commission meeting held on June 23rd, the Commission adopted the recommendations of the interim report, with immediate action in four areas:

Rapid Response Teams

The Commission established "Rapid Response Teams" within the Commission's Office of Consumer Affairs and Dispute Resolution Services to quickly address and help resolve disputes between shippers and carriers. These problems include cancelled bookings, rolled cargo, and container unavailability. We encourage shippers to call our Consumer Affairs Office and identify their problem as urgent. We will do our best to resolve the problem as soon as possible.

TSA and WTSA Oversight

The Commission voted to increase oversight of the Transpacific Stabilization Agreement (TSA) and the Westbound Transpacific Stabilization Agreement (WTSA) by requiring verbatim transcripts of certain Agreement meetings.

Global Alliance Oversight

The Commission directed our staff to prepare recommendations for prompt Commission action on ways to increase oversight of global vessel Alliances.

Extend Fact-Finding Investigation

The Commission extended Fact-Finding Investigation No. 26 from July 31 to November 30, 2010. This will allow the Commission to continue the investigation through the peak shipping season and to fully develop additional solutions.

Developing Solutions

The following additional solutions will involve working with shippers, carriers, and intermodal transportation groups within the confidentiality of the continuing investigation to develop solutions to the problems identified in the investigation. This approach will produce pragmatic improvements that will serve the commercial interests of U.S. importers, exporters, and ocean carriers.

Best Practices

We will organize "best practices" discussion pairs between shippers and carriers to consider ways to resolve the most pressing problems with current carrier practices. The initial problems for resolution are booking cancellations and cargo rolling.

Rapid Response Teams and Carrier Representatives

We will encourage each ocean carrier to name a representative to work directly with our recently established Rapid Response Teams to quickly address capacity problems and other urgent problems that arise between shippers and carriers. This carrier representative will be available at all times to respond to the inquiries of the Commission on behalf of U.S. shippers.

Model Contract Terms

Based upon our discussions with shippers and carriers about the shortcomings of certain ocean service contracts, our Commission staff has already developed suggestions for areas that may be addressed and language that may be included in ocean contracts that will improve the mutuality of understanding that is necessary for successful business arrangements. Our goal is to provide improvements in ocean service contracting and allow shippers and carriers to enjoy the full benefits of contracting envisioned in the Ocean Shipping Reform Act of 1998.

Export Capacity Working Group

The Commission will establish a group of shippers and ocean carriers to meet with the Commission to discuss availability of vessel capacity for U.S. exports. These discussions will be held regularly, but only under the direction of the Commission. These working groups appear to be one of the more promising approaches to assure sufficient capacity for export cargo.

Intermodal Working Group on Container Availability

Based upon our discussions with ocean carriers, shippers, trucking intermediaries, software providers, chassis pool experts and railroad representatives, the Commission will organize an intermodal working group to address the chronic unavailability of export containers for certain American exporters. This shortage is particularly severe in certain parts of the country, and we believe it is urgent to begin work on a solution as soon as possible.

Conclusion

Today, freight rates from Asia to the United States are approaching, but are still below, the mid-2008 level. A number of carriers have recently announced decisions to increase vessel capacity in several U.S. trade lanes, particularly the U.S.-Asia trades. This month, we expect available weekly vessel capacity to return to June 2009 levels.

Nevertheless, growth in demand for container imports and exports in the upcoming peak shipping season may strain current vessel capacity. Container availability for export cargo in some regions of the country likely will continue to be difficult and expensive to arrange. Finally, the cost of ocean transportation service is likely to increase as demand for service increases.

Mr. Chairman and members of the Subcommittee, we realize that we have laid out an extremely ambitious agenda for the next few months. We will keep you and your staff informed of our progress in these areas. Thank you so much for your support, and I'll be glad to answer any questions you may have.