March 4, 2021

Ms. Rachel E. Dickon, Secretary
Federal Maritime Commission
800 North Capitol Street N.W.
Washington, DC 20573-0001
Via email: Secretary@fmc.gov

RE: Docket No. 20-22
Comments on Service Contract Rulemaking

Dear Secretary Dickon,

I am writing to you today as a logistics professional with decades of experience in ocean transport, having spent 20 years working on the ocean carrier side of the business, including during the time of the game-changing implementation of the Ocean Shipping Reform Act of 1998. For the past 10+ years, I have worked for US headquartered BCO's, both large and small, managing their international transportation activities.

The Federal Maritime Commission's decision to issue a temporary blanket exemption to extend filing flexibility for Original Service Contracts was a fair and considered action to prevent any commercial harm that could have followed had carriers been unable to meet their standard Service Contract filing requirements during that time of severe disruption by COVID-19. As organizations have now creatively adapted to meeting all sorts of business obligations in this new environment and as, hopefully, the end of the pandemic is within sight, the reasons for temporary accommodation the past year do not justify making this arrangement permanent. Respectfully, there is also no reason to expect that our experiences of the past year are indicative of the full impact of this regulatory change moving forward. Further, the initial petition from The World Shipping Council for elimination of Service Contract filing requirements pre-dated the pandemic and was certainly, therefore, otherwise motivated. It is hard to believe that global ocean carrier organizations, capable of so much, find that the timely filing a Service Contract with the FMC – an action that is, at worst, as difficult as attaching a file to an email – is too burden-

400 Kelby St, 17th Fl
Fort Lee, NJ 07024
P: +1 201.569.8686
F: +1 201.569.7511
www.basstechintl.com

some or unable to be simplified through technology. For this reason, the persistent request from the World Shipping Council to relax regulations regarding the filing of Original Service Contracts would seem to be a wolf in sheep's clothing. The end results will predictably have a negative impact on US commerce.

Frankly, any BCO should certainly not care a whit about a carrier's Service Contract filing obligation and any failure by the carrier to meet those obligations should have no impact on the BCO. To ensure this, it would be important for any new rule to specify what happens to the rating of cargo that has shipped during the 30 day deferred filing window if the carrier neglects to eventually file the relevant Service Contract by the later deadline. To this end, it is suggested that the new rule expressly state that any duly signed Service Contract will prevail regardless of the filing status of the Service Contract. This, of course, then logically suggests that a Service Contract can be in force regardless of when – or if – it is filed with the Commission, a step unappealingly further than the incremental proposal being made today under this docket.

The proposed new rule requires that Service Contracts continue to have only a prospective effect. The effective date of a Service Contract cannot be earlier than the date on which all the parties have signed the Service Contract. This presumes that carriers, who apparently find challenging the responsibility to perform timely the simple act of filing a Service Contract document, foresee no problem to accomplish the more complex tasks of negotiating, accurately drafting and securing signatures for Original Service Contracts in time to meet the commercial deadlines of urgent shipping needs or prior Service Contract expirations. This again raises doubts, as if they can build a rocket but just don't have the remaining wherewithal to press the blast-off button promptly. But, if this is the truth, then again, there is no reason for a BCO to have any concern.

As anyone who has negotiated an ocean Service Contract will attest, even where debate over rates or terms are not protracted, multiple document iterations that cost days or weeks are often required before the carrier produces a document that reflects the intended agreement well enough to be signed. It is not uncommon that expiring Service Contracts are extended for 30 days to cover any would-be lapse in coverage while the contracting process continues (although this is certainly the last thing a carrier would want to do in today's market). It is also not uncommon that, due to urgency, less than perfect Service Contracts are signed and filed with the handshake understanding that a subsequent amendment will be issued to correct the outstanding anomalies. Without the pressure of a filing obligation, it is hard to imagine that carrier performance of this task

will be better or faster. It is easy to imagine a scenario where a BCO is encouraged to ship on the expectation that eventually, and within the 30 day filing limit, a pending Service Contract document to their satisfaction will be presented for signing. While this is not what the proposed rule permits, the reality of the negotiation process as driven by and at the pace of the carriers, combined with, in many cases, an enormous imbalance of power between the parties, lends itself to cargo moving on a promise before a final Service Contract is "technically" in force. Removing that hard-stop external obligation has the potential to diminish the already weak negotiating position of the small or medium-sized BCO, anxious to keep their cargo moving, and could, consequently, have a negative impact on US commerce.

Aside from compensating for the inability of carriers to conclude Service Contracts and file them in time for their BCO customer to avoid interruption to their shipping needs, what other significant benefit might the World Shipping Council hope to gain through relaxed Service Contract filing?

Anyone involved in TransPacific Trade today will know that rates are being offered in the market for less than a 30 day validity, often 15 days. Since traditional tariff publication does not permit rate increases on a less than a 30 day notification, application of these rates must be through use of a Service Contract. Typically, one sees this spot-market activity facilitated through NVOCC's. The NVOCC secures service and rates from the carrier that are then incorporated into the NVOCC's existing Service Contract with the carrier, frequently with an expiry date after which the particular rate is no longer valid. Thanks to a loosening of Service Contract Amendment filing obligations, the high volume of Service Contract amendments that result from this process have become less burdensome for the carrier and the mechanics of offering rates for a validity period of less than 30 days, or even for specific shipments, have become more practical. So far, this ability for short-term pricing is not achievable directly between the carrier and the BCO who is buying on the spot-market.

We have entered into a market where ocean carriers are more highly focused than ever on managing vessel and equipment utilization. They have proven that capacity control will result in improved per TEU revenue levels and they have recently shown a keen ability to successfully remove capacity in reaction to reduced demand. Forward capacity planning based on predictable demand is the next step. To this end, ocean carriers are generally approaching the current contracting season with a requirement that, to secure space, BCO's commit weekly volumes on a lane-by-lane basis and will be restricted to

shipping only those volumes at the contracted rates. Seen another way, if a BCO's volumes or shipping patterns do not support weekly volumes in individual lanes, that BCO is not going to be eligible to ship under Service Contract arrangements. This will leave small and medium-sized US businesses that rely on importing or exporting to secure ocean carriage through some alternative means. There may be the traditional options of working with an NVOCC or a Shippers' Association. Another option, certainly, is the spot market, where rates will be reflective of the supply and demand at the moment.

With ocean carriers relying on dependable volume commitments from their Service Contract customers and managing utilization so precisely, it is conceivable that there could be no excess space available on the market. Thankfully, we also know that the carriers understand that the spot market demands the highest rates. The amount of excess space that a carrier has on any given voyage will be determined by a combination of fall-down and design. We should expect that ocean carriers will use their abilities to control capacity in a way that allows them to service the volumes that they have committed to under Service Contracts while keeping the balance of available space at a level that will continue to earn high freight rates.

Carrier after carrier has introduced more and more sophisticated on-line rate request applications. What this does from the carrier perspective is to create the opportunity for unique request-by-request pricing that considers, among other factors, the specific shipping date and, by extension, the vessel voyage of the shipment being quoted. This is what we now know as "dynamic pricing". The resulting rate offers are often not likely to be compatible with current FMC regulations regarding the publication of tariff rates and must therefore be used only as part of a Service Contract. Considering that requestors are likely to be small and medium-sized BCO's who do not hold a Service Contract with the carrier, for the quoted rate to be used, one creative way to administer the application will be through a "mini" Service Contract. And this is why relaxing the filing requirements of Original Service Contracts is very helpful to carriers. This opens the door for very-short-term pricing that circumvents 30 day tariff publication requirements by facilitating rapidly concluded, single shipment, "mini" Service Contracts through on-line rate quotation applications. Carriers will be not only able to control capacity but will also be able to ensure that any space over and above that which they have set aside for traditional "long-term" Service Contract cargo is filled at the best possible market levels and done directly between the BCO and the carrier, without the need for an intermediary NVOCC.

And now the question is whether or not this is in the interest of BCO's; whether or not this has the potential to cause commercial harm.

For large and strategic BCO's who are shipping under long-term Service Contracts this will have little impact to their core, contracted business. In many cases, the mutually beneficial business relationship between the parties will assure that carriage terms for *ad hoc* or new traffic that arises during the validity of a Service Contract will be negotiated and added to the existing Service Contract in a way that will be agreeable for the BCO. We should not deny, however, that in some instances, the ocean carrier will defer such requests from a BCO Service Contract holder to other arrangements outside of the current Service Contract, such as the carrier's available on-line rate quote application. We have seen this happen during the past year. This means that a BCO's incremental business, historically added to an existing Service Contract at rates compatible with those in the Service Contract for similar traffic, is instead be relegated to the spot market, without the on-going surety of service or predictable rates that a traditional Service Contract would afford.

For small and medium-sized BCO's, this is one more step that enables carriers to exclude them from eligibility for the stability that a traditional long-term Service Contract provides. The greater filing flexibility afforded by the proposed rule under discussion here is one more box ticked on the carrier's list of challenges to remove in their pursuit to secure discretional cargo volumes without having to commit to a Service Contract with those smaller BCO's (or any other cargo sectors as they may determine incompatible with their strategic goals) as they traditionally have done in the past. Removing the pre-shipment filing obligation means less administrative impediment to the instantaneous conversion of a shipment-specific rate quotation to a very-short-term Service Contract at spot market rate levels. We should expect that these will be concluded under unilateral and non-negotiable "boilerplate" contract terms, undoubtedly including penalties for no-shows and an understanding of confidentiality. The prospect of this model should concern every small and mid-sized shipper whose business relies importing or exporting by sea.

There should also be concern as to how this adds to the increasing trend toward a lack a transparency that disadvantages the shipping public. With an unused and effectively pointless published rate tariff, fellow BCO's bound by the confidentiality of a Service Contract for even spot-market traffic and, since the elimination of Essential Terms publication requirements,

no publicly available information about carrier Service Contracting behavior (for example, the number of Service Contracts entered into, contracted MQC levels and duration of Service Contracts), members of the shipping public will be ill-equipped to even attempt to challenge an ocean carrier's stance that their policy prevents entering a Service Contract of the size, duration *etc.* being proposed by the BCO.

Lastly, it is worth mentioning that NVOCC's should likewise expect damaging impact to a portion of their trade by the carrier's improved ease of entering into very-short-term Service Contracts directly with BCO's.

The 1998 Ocean Shipping Reform Act was lauded for its contemporary and practical vision that individual, confidential Service Contracts would replace the archaic conference system Service Contract process, bringing greater market responsiveness and encouraging commerce, particularly US exports. It was not envisioned that individual, confidential Service Contracts should become a tool for ocean carriers to sell limited shipping space to the highest bidder.

After the consolidation of ocean carriers and the emergence of three "super-Alliances", there has been growing concern over the imbalance of power between the ocean carriers and all but the largest BCO's (and NVOCC's). This imbalance has slowly but surely disadvantaged BCO's in their ability to negotiate unique terms in Service Contracts until the point at which we now find ourselves, where ocean carriers are selectively negotiating Service Contracts with limited BCO's for discreet cargo and relegating the balance to seek *ad hoc* carriage through a dynamic pricing model. Nothing about this is encouraging to those US businesses that rely on importing or exporting by ocean. On the face of it, the proposed rulemaking under Docket No. 20-22 may benefit a BCO by preventing any negative impact of delays or failure in carrier filing activity. However, the elimination of any regulation that will have the effect of reducing transparency and meaningful Commission oversight of ocean carrier behavior is not recommended and will predictably have a negative impact on those US businesses that rely on importing and exporting by ocean transport.

Respectfully,

Lori Fellmer
BassTech International
VP Logistics & Carrier Management