

March 4, 2021

Ms. Rachel E. Dickon  
Secretary  
Federal Maritime Commission  
800 N. Capitol St., N.W.  
Washington, D.C. 20036

Re: Docket No. 20-22, *Service Contracts*, Comments of the National Industrial Transportation League

Dear Secretary Dickon:

The National Industrial Transportation League (“NITL” or the “League”) respectfully submits its comments in response to the notice of proposed rulemaking issued by the Federal Maritime Commission (“FMC” or the “Commission”) on January 15, 2021 and published in the Federal Register on January 19, 2021.<sup>1</sup>

The League was founded in 1907 and represents companies engaged in the transportation of goods in both domestic and international commerce. The majority of the League’s members include shippers and receivers of goods; however, third party intermediaries, logistics companies, and other entities engaged in the transportation of goods are also members of the League. Competitive ocean transportation is vitally important to League members and their suppliers and customers, and many League members depend highly upon efficient and effective ocean transportation services for both importing and exporting their goods.

In the NPRM, the Commission proposed to amend its service contract filing requirements to permit ocean common carriers to file original service contracts up to 30 days after the contract goes into effect. The proposal follows prior actions by the Commission to modify or relax its service contract filing requirements, including the April 4, 2017 final rule permitting filing of service contract amendments up to 30 days after the effective date,<sup>2</sup> and the Commission’s recent temporary exemption extending the filing flexibilities for service contract amendments to original service contracts in response to the COVID-19 pandemic.<sup>3</sup> Under the proposal, and similar to the current rule for amendments, original service contracts “will continue to be

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<sup>1</sup> Notice of Proposed Rulemaking: Service Contracts 86 Fed. Reg. 5106 (Jan. 19, 2021) (“NPRM”).

<sup>2</sup> Final Rule: Amendments to Regulations Governing Service Contracts and NVOCC Service Arrangements, 82 Fed. Reg. 16288 (Apr. 4, 2017) (“2017 Rule”).

<sup>3</sup> Temporary Exemption from Certain Service Contract Requirements, FMC Docket No. 20-06 (April 27, 2020) (“2020 Temporary Exemption”) (The exemption was originally set to expire December 31, 2020, but the Commission extended it until June 1, 2021).

prospective in nature, ensuring that the parties have reached agreement before cargo moves under the contract.”<sup>4</sup>

In the NPRM, the Commission explained that it “has tentatively concluded that permanently allowing delayed filing of original service contracts will provide the same type of benefits as delayed filing of service contract amendments, namely avoiding the commercial harm associated with situations in which cargo is received after the parties have agreed to a service contract but before the service contract is filed with the Commission.”<sup>5</sup> The Commission commented that its experience with the temporary exemption has not raised concerns or complaints from shippers and that it has “tentatively concluded” that the proposed change “will not materially impact the agency’s ability to provide oversight and protect the shipping public.”<sup>6</sup> Especially important to the League is that “the Commission believes that the service contract filing requirement will continue to ensure adherence to service contract terms and deter the introduction of unreasonable terms, regardless of whether original service contracts are filed before, on, or after the effective date.”<sup>7</sup>

NITL is pleased to submit its comments on the proposed changes to the filing requirements for original service contracts. NITL previously supported the Commission’s rule to permit service contract amendments to be filed within 30 days of the parties’ agreement and it supports the Commission’s present proposal to revise its service contract regulations in Part 530 to permit original service contracts be filed up to 30 days after the effective date. Notwithstanding the benefits to be derived from the proposal, it is important to note that some League members have concerns with the proposal. Specifically, some shippers believe that the relaxed filing requirement could adversely impact small and mid-sized shippers if carriers use the modified filing rule to pressure such shippers into accepting unfavorable contract rates or terms by manipulating the contract effective date. These concerns are exacerbated by the present-day market disruption and problems that shippers are having now with enforcing their existing contract rates and terms and getting timely access to equipment and vessel capacity. Thus, the League’s support is tempered by its request for the Commission to closely monitor ocean carrier contracting practices if the proposed rule allowing original contract filings within 30 days of the parties’ agreement is adopted and to address any unreasonable contracting practices that may develop.

Overall, the League concurs with the Commission’s findings that permitting delayed filings for original service contracts will provide necessary flexibility to both carriers and shippers to address their commercial contracting needs and shipping requirements by relaxing the requirement that a contract be filed with the Commission before the shipper may tender cargo

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<sup>4</sup> NPRM at 5108.

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

under the contract. The delayed filing of original service contracts will enable the parties to avoid a potential regulatory violation if a shipper mistakenly tenders cargo to the carrier, or tenders cargo based on an urgent need to access the contract lanes, pricing or terms, before the contract has actually been filed.<sup>8</sup> The League also agrees that the proposal should not materially impact the Commission's ability to oversee and protect the shipping public given the expanded filing requirement is limited to up to 30-days from the contract's effective date.<sup>9</sup>

As the League expressed in its comments to the Commission's 2016 proposal to permit delayed filings for service contract amendments, "service contracts have been adopted as the preferred means for conduction transactions between carriers and shippers."<sup>10</sup> This reality continues to hold true today as carriers must file tens of thousands of contacts annually. Contract filings impose a regulatory cost on the industry and the League believes that administrative efficiencies will flow from the Commission's adoption of the proposed rules since carriers could adjust their contracting operations to engage in batch filings or otherwise reduce administrative costs.

NITL is supportive of the proposed amendments in 49 C.F.R. 530.3 to the extent that they clarify that the effective date of the original service contract is the date upon which a service contract is scheduled to go into effect, and not the filing date. NITL also agrees that the effective date should not be earlier than the date on which all parties have signed the service contract, and that, at least for the time-being, service contracts (like amendments) should have a prospective effect. Ensuring that contract performance may not begin until the parties have agreed upon the terms and effective date.

Also, it will be important for the FMC to clarify that a shipper who tenders cargo under a service contract during the 30-day filing window will not be penalized by re-rating of shipments under tariff, or otherwise, if the service contract is not actually filed by the deadline by the carrier. Currently, shippers typically get notice of the filing date from the carrier so that they know when the contract rates and terms begin to apply. However, if the filing period is extended for up to 30-days, the shipper will base its shipments on the contract effective date and not the filing date. Thus, the shipper should not be adversely impacted if the carrier fails to adhere to its filing obligation in a timely manner.

Likewise, NITL agrees with the proposed changes in §§ 530.8 and 530.14. The League believes that a single trigger for the 30-day filing period applicable to both original service contracts and amendments is appropriate, and that performance under a contract should not begin until the effective date. NITL also concurs with the proposed changes addressing the filings made during

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<sup>8</sup> NPRM at 5108.

<sup>9</sup> *Id.*

<sup>10</sup> Comments of the National Industrial Transportation League, FMC Docket No. 16-05 (Sept. 23, 2016) ("NITL 2016 Comments") at 1.

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a 24-hour period when the Commission's system is down. Finally, the League agrees with all technical amendments proposed by the Commission in the NPRM.

Notwithstanding its noted support for the proposed rule, the League continues to believe that the Commission should not relax its oversight capabilities in order to protect the shipping community. Perhaps now more than ever, with the increasing concentration amongst ocean carriers and the impacts of the alliance structure on competition and capacity, League members have growing concerns with ocean carrier rates and practices, including the failure by carriers to follow their service contract terms. These concerns are greatest amongst the League's small and mid-sized shippers who lack the negotiating leverage of large shippers, and who believe that ocean carriers could manipulate contract effective dates to their benefit, depending on the spot-market and other industry conditions. Thus, the League's support for the rule is tempered by its request for the Commission to closely monitor ocean carrier contracting practices if the filing rule is modified to allow original contract filings within 30 days of the contract effective date, and to address any unreasonable contracting practices that may develop.

Respectfully submitted,

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