



WORLD SHIPPING COUNCIL
PARTNERS IN TRADE

**Before the
FEDERAL MARITIME COMMISSION
Washington, DC 20573**

**Docket No. 20-22
Service Contracts**

COMMENTS OF THE WORLD SHIPPING COUNCIL

The World Shipping Council (“WSC” or the “Council”) files these comments in response to the Federal Maritime Commission’s (“FMC” or “Commission”) Notice of Proposed Rulemaking (“NRPM”) published in the *Federal Register* on January 19, 2021. WSC is a non-profit trade association that represents the liner shipping industry, which is comprised of operators of containerships and roll-on/roll-off vessels (including vehicle carriers). Together, WSC’s members operate approximately 90% of the world’s liner vessel services. WSC’s member companies operate more than 5,000 ocean-going liner vessels of which approximately 1,500 vessels make more than 27,000 calls at ports in the United States each year.¹ As the NPRM is focused on the formation and filing of service contracts, under which WSC’s members move the

¹ A full description of the Council and a list of its members are available at www.worldshipping.org.

vast majority of their cargo in the U.S. trades, WSC and its members have a direct interest in this proceeding.

The NPRM would revise 46 C.F.R. §530.8 to permit ocean common carriers to file service contracts no later than thirty (30) days after the effective date, rather than requiring that such contracts be filed before any cargo moves under such contracts. As the Background information in the NPRM indicates, WSC has long advocated for a reduction in the administrative burdens associated with service contracts. Accordingly, WSC generally supports the NPRM. While the NPRM would not eliminate the requirement that ocean common carriers file service contracts (as WSC has urged the Commission to do in the past), it does provide ocean common carriers with additional flexibility, and WSC urges that the proposed rule be adopted with one clarification discussed below.

WSC is concerned that the proposed definition of “effective date” may have unintended consequences that limit the usefulness of the proposed regulatory changes. At present, ocean common carriers may file service contract amendments no later than thirty (30) days after cargo moves under the amendment. 46 C.F.R. §530.8(a)(2). As explained in the NPRM, linking the deadline for filing of a service contract amendment to the movement of cargo rather than the execution of the contract amendment helped avoid the difficulties encountered when cargo is received by a carrier before an amendment is signed by the shipper. 86 Fed. Reg. 5107.

Despite the Commission’s recognition of this problem, which the Commission previously addressed with respect to contract amendments, the proposed definition of “effective date” would withdraw the relief previously granted and perpetuate this problem with respect to both

original service contracts and amendments. The cause of this problem is that the NPRM would amend the definition of the “effective date” of a service contract or amendment as being no earlier than the date on which all parties have signed the service contract or amendment. As discussed below, that formulation is unnecessarily narrow, especially in light of modern electronic contract formation and documentation practices.

To be clear, at least for the purposes of the current NPRM, WSC does not seek to change the Commission’s intention that “original service contracts and amendments will continue to be prospective in nature” 86 Fed. Reg. 5108. That the proposed signature requirement is driven by the prospective effect purpose is made clear at 86 Fed. Reg 5109, where the Commission states that:

“the Commission is also adding language to the definition of “Effective date” to reflect the continuing requirement that service contracts and amendments may only have prospective effect. The added language specifies that the effective date cannot be earlier than the date on which all the parties have signed the service contract or amendment.”

Our concern is that using an unnecessarily limited concept of a “signature” as the sole trigger for contract effectiveness restricts commercial flexibility more than is necessary to implement the Commission’s “prospective application only” policy. This sole reliance on a “signature” as the measure of the effective date is out of step with general contract law principles of offer and acceptance. For example, section 2-206 of the Uniform Commercial Code (“UCC”) provides that an offer to make a contract is to be construed as inviting

acceptance in any manner and by any medium reasonable in the circumstances. The official comment to this section of the UCC states:

Any reasonable manner of acceptance is intended to be regarded as available unless the offeror has made quite clear that it will not be acceptable. Former technical rules as to acceptance, such as requiring that telegraphic offers be accepted by telegraphed acceptance, etc., are rejected and a criterion that the acceptance be "in any manner and by any medium reasonable under the circumstances," is substituted. This section is intended to remain flexible and its applicability to be enlarged as new media of communication develop or as the more time-saving present day media come into general use.

Similarly, the Restatement (Second) of Contracts, § 30(2), states:

Unless otherwise indicated by the language or the circumstances, an offer invites acceptance in any manner and by any medium reasonable in the circumstances.

If adopted, the proposed definition of "effective date" would contravene these settled principles of contract law by requiring that a service contract offer may be accepted only via a signature. WSC respectfully submits that the FMC's administrative filing requirements ought not supersede general contract law principles of offer and acceptance. As we discuss further below, there is a way for the Commission to preserve its "prospective effect only" policy while still providing additional and appropriate commercial flexibility in keeping with the spirit of the proposed rule.

In addition to the fact that the law regarding contract offer and acceptance is far more flexible than the NPRM would make it with the proposed definition of "effective date," the concept of what constitutes a "signature" has also evolved over time, in particular to address electronic commerce. Ocean carriers form contracts in many ways, but newer methods include automated electronic processes in which offer and acceptance are defined by some variation of

a sequence consisting of a shipper requesting a quote, the carrier providing terms in response, and the shipper pressing a button or key to accept. It is entirely unclear whether the Commission's signature-based definition of "effective date" would include such processes. It should.

15 U.S.C. § 7006(5) (part of the Electronic Signatures in Global and National Commerce Act (E-SIGN)) defines "Electronic signature" as follows:

"The term 'electronic signature' means an electronic sound, symbol, or process, attached to or logically associated with a contract or other record and executed or adopted by a person with the intent to sign the record."

This statutory definition of "electronic signature" reflects the fact that an intent to form a contract can be expressed by a variety of actions, with the core element being the intent to form an agreement. That definition is consistent with both the UCC commentary and the Restatement of Contracts authorities cited above. Moreover, and equally important in this context, the E-SIGN Act definition of "signature" recognizes the reality of today's modern business environment. If an ocean common carrier and shipper have been negotiating a contract or an amendment and one of the parties finds the other party's most recent proposal acceptable, then their mutual assent through whatever means both parties recognize as binding is sufficient to form a contract.

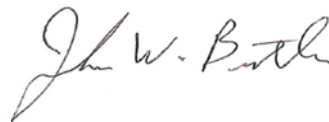
For these reasons, WSC urges the Commission to adopt the NRPM, but to revise the definition of "effective date" so that it is consistent with applicable contract law principles, avoids unnecessary regulatory issues, and permits all parties concerned to do business

efficiently and effectively. This could be achieved by revising the last sentence of the proposed definition of “effective date” to read:

The effective date may not be earlier than the date on which all parties have taken actions that manifest their mutual agreement to the terms of the service contract or amendment, or the date on which performance documentable as associated with that service contract or amendment begins.

This suggested revision would allow the parties to a service contract to implement the contract or amendment on the basis of whatever documentable contract formation process to which they agree. This avoids the difficulties outlined above without undermining the prohibition against retroactive service contracts and amendments, since the Commission would always be able to obtain the service contract records necessary to determine the date on which performance began or the contract/amendment was agreed by the parties, and the revised definition of “effective date” would continue to draw a line that prevents parties from reaching back to prior transactions that are not clearly linked to the contract or amendment for which the effective date is being defined.

Respectfully submitted,



By: _____

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March 5, 2021