

BEFORE THE  
FEDERAL MARITIME COMMISSION

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DOCKET NO. 22-30

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SAMSUNG ELECTRONICS

AMERICA, INC.,

COMPLAINANT,

v.

ZIM INTEGRATED SHIPPING SERVICES LTD.,

RESPONDENT.

**RESPONDENT’S MOTION FOR EXTENSION OF SCHEDULING ORDER**

ZIM Integrated Shipping Services Ltd. (“ZIM” or “Respondent”) by and through its undersigned counsel, hereby moves for an amendment extending the current Scheduling Order dated January 12, 2023 (“Scheduling Order”) as set forth below.

**STATEMENT OF FACTS**

The initial scheduling order in this proceeding was issued on January 12, 2023. It called for fact depositions to be completed on April 21, 2023, and for expert discovery to take place between April 22 and May 18, 2023. On April 3, 2023, the scheduling order was amended to provide for the completion of fact depositions on May 22, 2023, and for expert discovery to take place between May 23, 2023 and June 19, 2023.

As noted in the parties' May 22, 2023 status report, fact discovery was largely concluded by that date, with the exception of the deposition of a ZIM fact witness held on May 25, 2023.

The Supplemental Status Report of the parties filed on June 16, 2023, indicated that complainant Samsung Electronics America, Inc. ("SEA") intended to serve its expert reports on the expert deadline of June 19, 2023 (or June 20 to account for the federal holiday), and that Respondent would be submitting only rebuttal reports. SEA served its expert reports as indicated, and Respondent has consulted with its experts as to the time needed to issue rebuttal reports.

Having received that input, on June 26 Respondent's counsel made a proposal to SEA's counsel for a revised schedule for the completion of expert discovery, which included an acceptance of SEA's original suggestion that all parties forego depositions of the other party's expert witnesses. On June 27, SEA responded with a counterproposal that would not permit Respondent's experts sufficient time to prepare rebuttal reports and which would have permitted SEA to depose Respondent's expert witnesses, but would not provide an opportunity for Respondent to depose SEA's witnesses. Accordingly, the parties have been unable to agree on a schedule for the submission of rebuttal reports and subsequent briefing.

#### **REQUEST FOR EXTENSION OF SCHEDULING ORDER**

The Commission's regulations require that discovery be completed within 150 days of the service of a respondent's answer. 46 C.F.R. §502.141(g). While that may be a reasonable time to complete discovery in a less complex case, this case involves tens of thousands of shipments, more than two hundred thousand pages of documents, and the depositions of 13 fact witnesses (all of which were conducted in less than a month).

SEA has served two affirmative expert reports (one of which is 30 pages in length and has 168 pages of exhibits, and the other of which is 50 pages in length with 82 footnotes purporting to refer to supporting evidence that was not attached to the report). As Respondent, ZIM did not have any affirmative expert reports. ZIM does not have the burden of proof and requires expert testimony solely to rebut the testimony of SEA's witnesses.

With SEA's expert reports served at the previously scheduled close of expert testimony, compliance with that deadline would have required ZIM's experts to guess at the content of the SEA expert reports and issue speculative reports that may or may not have addressed the issues raised by SEA's experts. That makes no sense. In order for Respondent to be afforded due process, it and its expert witnesses must be afforded adequate time to prepare meaningful rebuttal reports.

Commission precedent supports allowing sufficient time for a full development of the evidentiary record before an agency over strict adherence to a particular schedule. *Hudson Shipping (Hong Kong) Ltd. d/b/a Hudson Express Lines – Possible Violations of Section 10(a)(1) of the Shipping Act of 1984*, 29 S.R.R. 1376, 1377 (ALJ 2002)(policy and responsibility of Commission and, by delegation of authority, presiding judge, to inquire into and consider all relevant facts; of even greater importance than the concept of fairness between the parties, as they maneuver to develop a record which fits their positions, is the need to ensure that justice is served and all relevant facts are considered by the Commission). Adherence to a schedule should not override these policy considerations. See also, *Anderson International Transport and Own Anderson – Possible Violations of Sections 8(a) and 19 of the Shipping Act of 1984*, 31 S.R.R. 1091 (FMC 2009)(citing policy considerations discussed in *Hudson* as basis for reopening the record).

In light of the foregoing, ZIM respectfully moves that the scheduling order be revised as follows:

<b><u>Event</u></b>	<b><u>Current Deadline</u></b>	<b><u>Requested Deadline</u></b>
Submit expert rebuttal reports	No express deadline	August 11, 2023
Complainant's brief, proposed findings of fact, and appendix	July 19, 2023	September 8, 2023
Respondent's opposition brief, responses to proposed findings of fact, proposed findings of fact and appendix	August 18, 2023	October 6, 2023
Complainant's reply brief and responses to proposed findings of fact	September 5, 2023	October 20, 2023

As to expert depositions, ZIM is willing to waive this aspect of discovery but the process must be even handed. If SEA intends to conduct depositions of ZIM's experts, then ZIM must be given an opportunity to depose SEA's experts. If SEA insists on expert depositions, ZIM proposes that they be scheduled promptly after service of its rebuttal reports on August 11, 2023.

ZIM acknowledges that prompt resolution of claims and disputes arising under the statutes administered by the Commission is a laudable goal, one which the deadlines for issuance of initial and final decisions are intended to achieve. Scheduling orders are an important part of this process and are not taken lightly, and ZIM is cognizant that granting the foregoing request will require an extension of the deadline for the issuance of the Presiding Officer's initial decision. However, at the same time, it must be noted that it is not unusual for the deadlines for completion of discovery and/or for the issuance of initial and final decisions to be extended by administrative law judges and the Commission, and for scheduling orders to be revised accordingly. Indeed, ZIM believes that absent resolution via settlement or dispositive motion, it

is likely more common for decisions on the merits to require more time than allotted under the regulations than not.<sup>1</sup>

### **CONCLUSION**

For the reasons explained above, ZIM respectfully requests that this motion be granted and that the scheduling order in this proceeding be amended in accordance with the request set forth above.

COZEN O'CONNOR, P.C.

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<sup>1</sup> Some recent examples of this include FMC Docket No. 15-11 (complaint filed November 16, 2015, FMC decision now due October 18, 2021); FMC Docket No. 17-05 (complaint filed May 23, 2017, initial decision issued May 24, 2019, Commission decision issued July 26, 2021); FMC Docket No. 19-02 (complaint filed December 20, 2018, initial decision issues March 30, 2021, case stayed from June to November of 2020).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 27th day of June, 2023, a true and correct copy of the foregoing Motion was served via email on counsel for the Complainant in FMC Docket No. 22-30.

s/ Wayne R. Rohde