

# FEDERAL MARITIME COMMISSION

MEDITERRANEAN SHIPPING  
COMPANY – INVESTIGATION  
FOR COMPLIANCE WITH §§  
41104(a) AND 41102 OF  
DEMURRAGE OR DETENTION  
CHARGES UNDER THE CHARGE  
COMPLAINT PROCEDURES OF  
46 U.S.C. § 41310

**Docket No. CC-001**

Served: September 29, 2023

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**BY THE COMMISSION:** Daniel B. MAFFEI, *Chairman*, Rebecca F. DYE, and Carl W. BENTZEL, *Commissioners*. Louis E. SOLA, *Commissioner*, concurring. Max M. VEKICH, *Commissioner*, concurring in part and dissenting in part.

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## **Order Dismissing Charge Complaint and Discontinuing Order to Show Cause**

This is a charge complaint proceeding under the Shipping Act, 46 U.S.C. § 41310. On February 3, 2023, upon charge complaint information submitted, the Federal Maritime Commission (Commission) issued an Order to Show Cause (OSC) directing Mediterranean Shipping Company, S.A. (MSC) to show cause why it should not be ordered to refund or waive charges assessed or paid for failure to comply with the Shipping Act.

For the reasons discussed below, the Commission dismisses the Charge Complaint against MSC and discontinues the OSC proceeding.

**I. BACKGROUND**

Under the Shipping Act's charge complaint provision at 46 U.S.C. § 41310, a person may submit to the Commission information concerning complaints about charges assessed by a common carrier. 46 U.S.C. § 41310(a). Once the Commission receives such a submission, the agency will promptly investigate whether the charge in question is in compliance with section 41104(a) and 41102 of the Shipping Act. 46 U.S.C. § 41310(b).

If the Commission determines that a charge does not comply with the Shipping Act, the Commission will promptly order the refund of charges paid (or waiver of charges assessed but not yet paid). 46 U.S.C. § 41310(c). The Commission may also assess a civil penalty under section 41107, in addition to or in lieu of ordering a refund. 46 U.S.C. § 41310(d).

This proceeding was commenced pursuant to the Shipping Act's charge complaint provision at 46 U.S.C. § 41310 and the Commission's order to show cause rule at 46 C.F.R. § 502.91, based on information submitted by Complainant SOFi Paper Products (SOFi). The Commission received a complaint from SOFi, a party billed or assessed for certain charges by MSC. OSC at 3. MSC assessed a congestion surcharge in the amount of \$1,000 to SOFi with respect to bill of lading No. MEDUI0745188 dated July 14, 2022. MSC claimed to have assessed the surcharge in accordance with its published tariff rule. As a billed party, SOFi requested justification for the charge, which MSC had not provided as of the time of the issuance of the OSC. *Id.*

Stating that MSC's failure to show the reasonableness of the surcharge or provide a justification for the surcharge demonstrates that the surcharge may constitute an unreasonable action or practice in violation of 46 U.S.C. §§ 41102(c) and 41104(a)(14), the Commission issued the OSC on February 3, 2023, and directed MSC to show cause why the Commission should not order it to refund charges paid or waive charges assessed, and/or impose a civil penalty, under 46 U.S.C. §§ 41310(d) and 41107, for failure to comply with 46 U.S.C. § 41102(c) and 41104(a). *Id.* at 2-4. The Commission's Office of Enforcement (OOE) was named a party to the proceeding. *Id.* at 4.

## II. DISCUSSION

### A. Whether MSC is the proper party in this proceeding

MSC claimed that the Commission has issued the Order to Show Cause to the wrong party because “MSC did not bill SOFi for the congestion surcharge in the amount of \$1,000,” and MSC’s customer was an NVOCC (which is not a party to this proceeding). MSC Response at 10. MSC stated that “while [the NVOCC] had the contractual obligation to pay certain rates to MSC, [the NVOCC] had its own discretion and contractual arrangement to charge its customers, including SOFi.” *Id.* at 15. MSC further alleged that “[i]f there had been a problem with MSC’s congestion surcharge, it would be [the NVOCC] as the ‘shipper’ to MSC who could have lodged the complaint had it believed the charge to be unreasonable; however, it has not done do.” *Id.*

The Shipping Act’s charge complaints provision provides as follows:

If the common carrier assessing the charge is acting in the capacity of a non-vessel-operating common carrier, the Commission shall, while conducting an investigation under subsection (b), consider—

- (1) whether the non-vessel-operating common carrier is responsible for the noncompliant assessment of the charge, in whole or in part; and
- (2) whether another party is ultimately responsible in whole or in part and potentially subject to action under subsections (c) and (d).

46 U.S.C. § 41310(e).

MSC is claiming that it is the wrong party in this proceeding because its customer was an NVOCC. Under the Shipping Act’s charge complaints provision, however, when the common carrier assessing a charge is an NVOCC, the Commission must consider whether another party, such as an ocean common carrier, is ultimately responsible. The facts demonstrate that MSC acted as the ocean common carrier with respect to SOFi’s shipment. As the ocean common carrier with respect to the shipment in question, MSC is the proper party in this charge complaint proceeding.

## **B. MSC’s petition to dismiss the charge complaint and OSC**

On February 24, 2024, MSC filed a Petition to Dismiss the Charge Complaint and the Order to Show Cause (Petition to Dismiss). In its Petition to Dismiss, MSC stated that “[p]ursuant to 46 C.F.R. § 502.69, [MSC] hereby petitions for an order dismissing with prejudice the Charge Complaint No. 001 and the related Order Directing MSC to Show Cause . . . in its entirety.” Petition to Dismiss at 1. The Commission, however, waived its rules of practice and procedure in 46 C.F.R Subparts A-E, I-L, P, and all other provisions not consistent with the OSC. OSC at 5. The Commission’s rule at 46 C.F.R. § 502.69 is part of the Commission’s rules of practice and procedure in Subpart E – Private Complaints and Commission Investigations. Therefore, the provision under which MSC filed its Petition to Dismiss was specifically waived by the Commission in this charge complaint and OSC proceeding.

In its response to MSC’s Petition to Dismiss, OOE asserted that MSC’s Petition to Dismiss is “improper under the procedural rules governing this proceeding, is inconsistent with the OSC, and should be summarily denied on those grounds.” OOE Response to Petition at 2. OOE stated that “the Commission has expressly disabled Subpart A, including § 502.12 with regards to the applicability of the FRCP, as well as the Subpart E, which [MSC] relies upon as the basis for its request.” *Id.* at 2-3. OOE further stated that “[t]his proceeding is instead governed by the Show Cause process pursuant to 46 C.F.R. § 502.91, found within Subpart F of the Commission’s regulations,” and “[i]nasmuch as the OSC supersedes the provisions of Subpart A-E, [MSC]’s Petition is improper and should be denied.” *Id.* at 3.

OOE is correct. The Commission’s OSC expressly waived 46 C.F.R. § 502.69, pursuant to which MSC filed its Petition to Dismiss. If a respondent is permitted to file disallowed substantive pleadings, it may hinder the Commission from “promptly investigat[ing] the charge with regard to compliance with section 41104(a) and section 41102” as required under the Shipping Act’s charge complaints provisions at 46 U.S.C. § 41310. MSC’s Petition to Dismiss is denied.

## **C. MSC’s motion for confidential treatment for portions of its response**

On February 28, 2023, MSC filed Motion for Confidential Treatment for Portions of its Response, and on March 3, 2023, MSC filed Amended Motion for Confidential Treatment for Portions of its

Response (Motion for Confidential Treatment). MSC stated that its Response to the OSC references its ocean agreement with a non-party, and the submitted ocean agreement includes an attached exhibit that is subject to a confidentiality provision that prevents the disclosure of its terms. Motion for Confidential Treatment at 1. MSC further stated that the contractually agreed upon rates that are enclosed to the ocean agreement were privately negotiated between MSC and the non-party and are thus confidential. *Id.* at 1-2. MSC alleged that “[d]isclosure of the Rates would damage the commercial interests and competitiveness of the parties to the Ocean Agreement.” *Id.* at 2.

OOE stated that “[d]espite the Commission previously waiving the provisions [MSC] relies on to request [confidential] treatment, the matter of confidentiality must be addressed to protect trade secrets and minimize dangers to private entities.” OOE Reply to Respondent’s Answer to OSC (OOE Reply) at 2 (footnote and citation omitted). OOE further stated that “[t]he Commission’s own regulations regarding service contracts filed with the Commission require confidentiality under 46 C.F.R. § 530.4.” *Id.* OOE, therefore, “has no objection to [MSC]’s request that the information and materials indicated in its Motion for Confidential Treatment be kept confidential, nor does [OOE] object to [MSC] filing both public and confidential versions of its Response to Show Cause.” *Id.*

Although MSC relied on waived provisions in filing its Motion for Confidential Treatment, protecting commercial entities’ trade secrets and confidential rates information is an important consideration. Further, as OOE stated, service contracts are filed with the Commission confidentially under the Shipping Act and the Commission’s regulations. *See* 46 U.S.C. § 40502(b)(1) and 46 C.F.R. § 530.4. In addition, granting MSC’s Motion will not delay the Commission’s prompt investigation of this charge complaint. MSC’s Motion for Confidential Treatment for Portions of its Response is granted.

#### **D. MSC’s petition to file sur-reply**

On April 13, 2023, MSC filed a Petition for Leave to File Sur-Reply (Petition for Leave) and its attached Sur-reply to the OSC. MSC stated that after carefully reviewing OOE’s Reply to MSC’s Answer to Order to Show Cause, MSC believes that “a brief response to the Reply is necessary to address certain points and matters contained in that filing, which could aid the Commission in its ruling.” Petition for Leave at 1. MSC’s counsel conferred with the OOE and understood that OOE is of the view that the regulations do

not give MSC a right to response to the OOE Reply. *Id.* MSC thus filed the Petition for Leave and requested leave to file its Sur-Reply. *Id.* at 2.

On April 19, 2023, OOE filed its Response to MSC’s Petition to File Sur-Reply (OOE Response to Sur-Reply). OOE asserted that MSC’s Petition for Leave and its enclosed Sur-Reply “is improper under the procedural rules governing this proceeding, is inconsistent with the OSC, and should be summarily denied by the Commission on those grounds.” OOE Response to Sur-Reply at 2. OOE stated that the regulation at 46 C.F.R. §§ 502.61-502.75, under which MSC filed its Petition for Leave, has been expressly disabled by the Commission’s OSC. *Id.* at 2. OOE alleged that “[p]olicy issues reintroduced in [MSC’s Sur-Reply] that were previously raised by [MSC] in their earlier Petition and Answer[,] are already before the Commission.” *Id.* OOE further stated that if any new policy issues introduced by MSC deserve attention by the Commission, “such review will have an opportunity to occur during the penalty phase of this proceeding, should the Commission refer this matter to the Administrative Law Judge for a hearing on the assessment of a civil penalty pursuant to 46 U.S.C. §§ 41107 and 41109.” *Id.* OOE also asserted that MSC “[has] not shown good cause for the significant delay such a petition, if granted, would impose upon this proceeding” when MSC “had previous opportunity to submit the assertions and materials within [MSC’s] sur-reply, as part of their Answer to the OSC.” *Id.* at 2-3.

Again, OOE is correct. The Commission’s OSC expressly waived 46 C.F.R. §§ 502.61-502.75, which is Subpart E of the Commission’s rules of practice and procedure. The OSC stated that “pursuant to 46 C.F.R. § 502.10, the Commission hereby waives the provisions of Subparts A-E . . . of Part 520, and all other provisions of the Commission’s Rules of Practice and Procedure except as consistent with this Order.” OSC at 5. As with MSC’s Petition to Dismiss, if a respondent in a charge complaint proceeding is permitted to file expressly disallowed substantive pleadings, it may hinder the Commission’s prompt investigation of charges under the Shipping Act’s charge complaints provisions at 46 U.S.C. § 41310. MSC’s Petition for Leave is denied.

**E. Whether MSC should be ordered to refund charges paid or waive charges assessed**

The Commission ordered MSC to show cause why the Commission should not find that MSC’s action in assessing a congestion surcharge with respect to bill of lading No.

MEDUI0745188 dated July 14, 2022, constitutes a violation of 46 U.S.C. §§ 41102(c) and 41104(a)(14). OSC at 3-4. The Commission further ordered MSC to show cause “why the Commission should not promptly order the refund of charges paid by SOFi Paper Products with respect to charges that do not comply with § 41102 and § 41104(a)(14), as provided under § 41310(c).” *Id.* at 4.

With respect to a refund, the charge complaints provision provides that “[u]pon receipt of submissions under subsection (a), if the Commission determines that a charge does not comply with section 41104(a) or 41102, the Commission shall promptly order the refund of charges paid.” 46 C.F.R. § 41310(c). The Commission may order a waiver of charges assessed but not yet paid, in addition to ordering a refund of charges already paid.

In its Response to Order to Show Cause dated February 28, 2023 (MSC Response), MSC stated that the issue of a refund is moot because “MSC in fact did make a refund when it sent the check for the total amount in the Charge claim of \$1,000 to SOFi’s office in Florida on February 13, 2023, and that check was confirmed delivered to SOFi’s office on the following day by FedEx.” MSC Response at 25-27. MSC stated that it sent the refund check “prior to any decision by the FMC in respect to SOFi’s complaint,” and “MSC’s voluntary action constitutes a full satisfaction of SOFi’s rights under 46 U.S.C. § 41310 *et seq.* and no further demand can be made by SOFi to MSC pursuant to the facts of this case.” *Id.* at 27.

On March 27, 2023, OOE submitted its Reply to Respondent’s Answer to Order to Show Cause (OOE Reply). OOE acknowledged that “on February 13, 2023, after the OSC was served, MSC issued a check refunding the charges in question, in full, to SOFi at its legal business address.” OOE Reply at 2. OOE further acknowledges that “[MSC] also submitted evidence that this check was cashed by SOFi on March 6, 2023.” *Id.* at 2-3 (citation omitted). Stating “[t]he sole relief authorized to the Complainant under the Charge Complaint statutory provisions in 46 U.S.C. § 41310 is a refund or waiver” and that the full refund has already been remitted, OOE further stated that it does not propose that any further relief be ordered to the Complainant under the charge complaint. *Id.* at 3.

The Commission agrees with OOE. MSC fully refunded the surcharge in question to SOFi (the charge complainant) after the Commission initiated this Show Cause proceeding. Accordingly, the refund issue is now moot. In addition, as further discussed below, the Commission does not find that violations of the Shipping Act were

proven in this proceeding. Therefore, SOFi's charge complaint for refund is dismissed.

**F. Whether MSC's surcharge to SOFi was a violation of the Shipping Act**

1. Whether the Commission may assess a civil penalty in addition to or in lieu of a refund

After acknowledging that the refund issue is moot because MSC already refunded the surcharge in question to SOFi, OOE stated that "pursuant to the OSC, the Commission may still make a determination as to whether the charge was noncompliant and whether a civil penalty should therefore [be issued] pursuant to 46 U.S.C. §§ 41107 and 41109." OOE Reply at 3.

MSC claimed that "[a]ccording to the FMC's policies and procedures, as well as its Charge Complaint guidelines and related interim procedures, [MSC's] voluntary refund in full of the charge at issue prevents the Commission from taking any further action on this Charge Complaint including the imposition of a penalty." MSC Response at 31. MSC further stated that "[a] penalty is also not warranted in this matter because [MSC] negotiated in good faith with SOFi throughout this proceeding. Good faith that SOFi lacked when it breached the settlement by seeking to recover in excess of the full amount of its claim." *Id.* at 31-32. MSC is incorrect in asserting that a penalty under the Shipping Act charge complaints' penalty provision at 46 U.S.C. § 41310(d) may not be assessed once a refund or waiver of the charge is made.

The Shipping Act's charge complaints provision for penalties provides that "[i]n the event of a finding that a charge does not comply with section 41104(a) or 41102 after submission under subsection (a), a civil penalty under section 41107 shall be applied to the common carrier making such charge." 46 U.S.C. § 41310(d). The Shipping Act's penalty provision at section 41107 provides that "[a] person that violates this part or a regulation or order of the Federal Maritime Commission issued under this part is liable to the United States Government for a civil penalty or, in addition to or in lieu of a civil penalty, is liable for the refund of a charge." 46 U.S.C. § 41107(a) (emphasis added). The Shipping Act's penalty assessment provision at section 41109 also provides that the Commission may "assess a civil penalty" or "in addition to, or in lieu of, assessing a civil penalty . . . , order a refund of money." 46 U.S.C. § 41109(a).



The Commission agrees with OOE that even after a refund or waiver of the charge in question, the Commission may still assess a civil penalty in a charge complaint proceeding if it finds that the charge does not comply with sections 41104(a) or 41102 of the Shipping Act. Pursuant to sections 41310, 41107, and 41109 of the Act, 46 U.S.C. §§ 41310, 41107, 41109, the Commission may assess a civil penalty in addition to or in lieu of a refund in charge complaint proceedings under 46 U.S.C. § 41310. Otherwise, common carriers could nullify the charge complaint penalty provision at 46 U.S.C. § 41310(d) by simply refunding or waiving the charge in question, even when there might be violations of the Shipping Act. Whether or not to impose a penalty under the charge complaint proceeding must be determined by the Commission, not by a common carrier's litigation strategy. The Commission disagrees, however, with OOE that a violation has been proven in this case.

2. Whether the congestion surcharge is a violation of 46 C.F.R. § 545.5

OOE alleges that MSC's congestion surcharge to SOFi may constitute a violation of 46 U.S.C. §§ 41102(c) and 41104(a)(14). OOE Reply at 7. Section 41104(a)(14) of the Shipping Act provides that a common carrier shall not "assess any party for a charge that is inconsistent or does not comply with all applicable provisions and regulations, including [46 U.S.C. § 41102(c)] or [46 C.F.R. part 545]." Read together with other Shipping Act provisions and OOE's analysis, 46 C.F.R. part 545 in this proceeding refers to the Commission's interpretive rule at 46 C.F.R. § 545.5 entitled *Interpretation of Shipping Act of 1984 - Unjust and unreasonable practices with respect to demurrage and detention*.

The interpretive rule explains that "[t]he purpose of this rule is to provide guidance about how the Commission will interpret 46 U.S.C. 41102(c) . . . in the context of demurrage and detention." 46 C.F.R. § 545.5. It further clarifies that "[t]his rule applies to practices and regulations relating to demurrage and detention for containerized cargo." 46 C.F.R. § 545.5(b). The interpretive rule is applicable only to demurrage and detention charges. The interpretive rule defines demurrage and detention charges as "any charges, including 'per diem,' assessed by ocean common carriers, marine terminal operators, or ocean transportation intermediaries ('regulated entities') related to the use of marine terminal space (e.g., land) or shipping containers, not including freight charges." *Id.* There is no indication that either SOFi or OOE claims that the congestion surcharge is a demurrage and detention charge. MSC claims that "the

surcharge herein at issue is not either demurrage or detention charge” and “[a]ccordingly, Part 545 is inapplicable.” MSC Response at 22.

Demurrage and detention charges are generally assessed after the expiration of free time, which allows shippers and/or consignees to use terminal space or shipping containers free of charge for certain limited length of time. The amount of demurrage and detention charges, including “per diem,” generally depends on the length of the use of space or containers after the free time. It does not appear, however, that the assessment of the congestion surcharge depended on the expiration of any free time. Nor does it appear that the amount of the congestion surcharge depended on any period of use. The congestion surcharge appears to be assessed equally to all customers regardless of free time and length of use of land or containers. Rather than specific use of land or containers, it appears that the congestion surcharge was assessed for each container with respect to the overall flow of transportation. The Commission believes the congestion surcharge was not a demurrage and detention charge, and thus not subject to the interpretive rule at 46 C.F.R. § 545.5. As the interpretive rule at 46 C.F.R. § 545.5 is not applicable to the congestion surcharge, the surcharge does not constitute a violation of that rule.

3. Whether the congestion surcharge is a violation of 46 U.S.C. § 41102(c)

The Commission now turns to the remaining issue of whether the congestion surcharge is a violation of the Shipping Act at 46 U.S.C. § 41102(c). Section 41102(c) states as follows:

**(c) Practices in Handling Property.—**

A common carrier, marine terminal operator, or ocean transportation intermediary 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).

OOE stated that the provision “applies to unreasonable charges or fees that common carriers, such as MSC, may levy against their customers.” OOE Reply at 4. OOE alleged that “[a] lack of information regarding what circumstances may either trigger or extinguish such a charge is unreasonable and contrary to 46 U.S.C. § 41102(c)” and “[a]n absence of detail into the justification and the timeframe as to when a charge will be levied by a common carrier

similarly frustrates a party's ability to contest the charge, engage in any substantive decision-making regarding how to avoid it, or to compare rates between one carrier and another." *Id.* OOE averred that "[t]he Commission has held that a charge is unreasonable if it is not reasonably related, either to an actual service performed for, or a benefit conferred upon, the person being charged." *Id.* at 5. OOE also alleged that pursuant to the Commission's regulation, "tariff terms must be clear and definite" and "[a] common carrier leaving the shipping public to guess as to when and how a surcharge will apply renders that charge neither clear nor definite." *Id.* at 5 (footnotes omitted).

OOE claimed that "notwithstanding the resolution of the refund to SOFi, the issue of MSC's congestion surcharge remains ongoing as further demonstrated by the update to its tariff effective February 21, 2023, regarding such charges in the inbound U.S. trades." *Id.* at 3 (footnote omitted). OOE provided its analysis "[g]iven the possibility that the surcharge may have been levied upon more of MSC's customers in addition to SOFi since the enactment of the Ocean Shipping Reform Act of 2022 (OSRA 2022)." *Id.* OOE averred that considering MSC's insistence on actively maintaining in its tariff the congestion surcharge that is at the heart of this proceeding, "the Commission is presented with an opportunity . . . to make a determination as to the reasonableness of MSC's congestion surcharge and whether it may constitute a violation of 46 U.S.C. §§ 41102(c) and 41104(a)(14)." *Id.* at 7. OOE further stated that "[s]uch an undertaking would arguably be to the benefit of all members of the Shipping public who may have been billed by MSC for this ambiguous surcharge subsequent to the enactment of OSRA 2022." *Id.*

MSC claims that "[w]hile the Commission has determined that demurrage and detention relate to 'receiving, handling, storing or delivering property[,] . . . the charge at issue in this case is not demurrage nor detention." MSC Response at 19-20 (emphasis in the original). It also claimed that "the congestion surcharge herein does not relate to receiving, handling, storing or delivering property – it relates to the transportation of the property," and "[t]he congestion surcharge at issue relates to the water transportation of the cargo, and hence falls outside the scope of Section 41102(c)." *Id.* at 20. MSC alleged that "the Commission lacks the legal authority to challenge the amount of the charge," and "MSC is under no legal obligation to justify the congestion surcharge any more that [sic] it is required to justify other surcharges, such as fuel surcharges, bill of lading surcharges, hazardous goods charges, overweight cargo surcharges, or other charges." *Id.* at 20-21. MSC further alleged that "[a] tariff

rule imposing a congestion surcharge might potentially be subject of a legal challenge on the basis of clarity if the application of the charge turned on criteria specified in the tariff rule and those criteria were not clear,” but “there is no requirement that tariff rules contain such criteria.” *Id.* at 21. MSC further claimed that “there is no issue of clarity here – the charge applies on all cargo subject to the tariff in question, and there is nothing ambiguous or unclear in the application of the charge.” *Id.* MSC also claimed that “if the charge had been styled as a peak season surcharge or general rate increase, it is highly unlikely that this proceeding would have been initiated,” and “[b]y focusing on the name of the charge, rather than the clarity and application of the charge, the Commission is missing the point and elevating form above substance.” *Id.*

The Commission need not address these arguments in this case. In charge complaint proceedings, the Commission determines whether there is a violation with respect to specific charges assessed or paid, rather than with respect to a common carrier’s entire practice. *See* 46 U.S.C. § 41310(b) (upon receipt of a charge complaint with respect to a charge assessed by a common carrier, the Commission shall promptly investigate the charge with regard to compliance with section 41104(a) and section 41102), 46 U.S.C. § 41310(c) (if the Commission determines that a charge does not comply with section 41104(a) or 41102, the Commission shall promptly order the refund of charges paid), and 46 U.S.C. § 41310(d) (in the event of a finding that a charge does not comply with section 41104(a) or 41102, a civil penalty under section 41107 shall be applied to the common carrier making such charge). Here, the Commission finds that the record is insufficient to establish that a violation of section 41102(c) occurred in this charge complaint proceeding.

### **III. CONCLUSION**

It is hereby **ORDERED** that:

- (1) MSC’s Petition to Dismiss is **DENIED**;
- (2) MSC’s Motion for Confidential Treatment for Portions of its Response is **GRANTED**, and the requested portions of MSC’s Response are **CONFIDENTIAL**;
- (3) MSC’s Petition for Leave to File Sur-Reply is **DENIED**;
- (4) SOFi’s Charge Complaint against MSC is **DISMISSED**; and

(5) The Charge Complaint and Order to Show Cause proceeding against MSC is **DISCONTINUED**.

By the Commission.

*Amy Strauss*  
Amy Strauss  
Acting Secretary

*Commissioner Louis E. SOLA, concurring:*

Although I concur with this ruling, it is imperative to consider the multifaceted concerns regarding auxiliary charges across various industries. The growing frequency of auxiliary charges is an issue we must be prepared to address and set forth frameworks to ensure these fees serve the best interests of the shipping industry.

*Commissioner Max M. VEKICH, concurring in part and dissenting in part:*

I concur with the Majority's opinion with respect to parts A, B, C, D, E and F.1 and F.2. I disagree with the Majority's holding in F.3 and therefore dissent from the holding of the Majority.

On February 3, 2023, the Commission's Order to Show Cause directed MSC to show cause why the Commission should not impose a civil penalty, under §§ 41310(d) and 41107 upon such finding of noncompliance with § 41102 and § 41104(a)(14); and provided that, in such event, MSC shall have the opportunity for a hearing prior to assessment of a civil penalty, as provided under § 41109(a). Order to Show Cause at 4.

I disagree with the Majority that the record is insufficient to establish a violation of § 41102 (c). I would find MSC's congestion surcharge is in violation of 46 C.F.R. 520.7 (a)(1) since it is neither clear nor definite. In as much as the charge does not meet the requirements of part 520.7, it is a violation of § 41104 (14). Accordingly, I would find a violation of § 41102(c) since I believe it is an unreasonable practice to assess a charge pursuant to a tariff which does not satisfy tariff requirements and is therefore in violation of the Commission's rules.

The salient issue in this case is whether the tariff rule implemented and assessed by MSC was clear and definite. The record supports a finding that it is not. The Majority's focus on whether the record contained sufficient evidence of congestion in the port of unloading, or elsewhere, is misplaced. No matter the answer, under the tariff rule, the charge would still apply. I don't believe a tariff rule that allows implementation of a congestion charge without sufficiently identifying the degree of congestion warranting the charge is clear and definite, or, for that matter, reasonable. On its face, MSC's tariff rule requires assessment of the charge even for voyages that did not incur congestion and does not include any

indication of when the congestion charge would cease to be assessed.<sup>1</sup> If the charge is assessed in the absence of congestion, then I believe that that is an unreasonable practice. Further, there is no additional service provided to justify the charge; quite the opposite, the charge is assessed when the cargo cannot be delivered as scheduled. Under the facts as presented, I believe MSC committed a violation when it assessed its congestion charge pursuant to a tariff rule that was not clear and definite. Therefore, and consistent with the Order to Show Cause, I would initiate a separate penalty proceeding to be referred to the Commission's Administrative Law Judge for consideration of penalties.

I further disagree with the Majority that a charge complaint proceeding under § 41310(b) cannot determine whether there is a violation of "a common carrier's entire practice." Majority opinion at 12. The Majority cites to the language of 46 U.S.C. § 41310(b), which specifically contemplates the finding of a violation under § 41102. § 41102(c) is the prohibition against unreasonable or unjust common carrier practices. It is illogical that the Commission couldn't review a common carrier's 'entire practice' when § 41310(b) specifically contemplates investigating compliance with § 41102 (c).

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<sup>1</sup> Although not controlling, I am mindful that MSC assessed the additional \$1000 charge at a time when freight rates had been driven to historic and astronomical levels. MSC was not losing money and needing to recoup losses.