FEDERAL MARITIME COMMISSION

PETITION OF THE WORLD SHIPPING COUNCIL FOR AN EXEMPTION FROM CERTAIN PROVISIONS OF THE SHIPPING ACT OF 1984, AS AMENDED, AND FOR A RULEMAKING PROCEEDING

Petition No. P3-18

Served: December 20, 2019

BY THE COMMISSION: Michael A. KHOURI, *Chairman*, Daniel B. MAFFEI, Louis E. SOLA, Carl W. BENTZEL, *Commissioners*. Rebecca F. DYE, *Commissioner*, dissenting.

ORDER DENYING IN PART AND GRANTING IN PART PETITION FOR EXEMPTION AND RULEMAKING

On September 11, 2018, the World Shipping Council (WSC) filed a petition with the Federal Maritime Commission (Commission) for an exemption from the service contract filing and concise statement of essential terms (ET) publication requirements of 46 U.S.C. § 40502(b) and (d), and for a rulemaking proceeding to amend the Commission's service contract regulations as set forth in 46 C.F.R. part 530 in a manner consistent with the requested exemption. The Notice of Filing and Request for Comments was published on September 18, 2018. 83 Fed. Reg. 47123. Comments were due by November 19, 2018, and the Commission received

three comments in support of the petition and two comments in opposition to the petition.[1]

For the following reasons, the Commission has determined to deny in part and grant in part the petition and will be proceeding with a rulemaking accordingly. The Commission is denying WSC's request for an exemption from 46 U.S.C. § 40502(b)'s requirement that ocean common carriers file service contracts with the Commission. After considering WSC's arguments, the comments, and Commission experience, the Commission is unable to find that an exemption from § 40502(b) will not be detrimental to commerce. The Commission will therefore be retaining the requirement in 46 C.F.R. part 530 that carriers confidentially file service contracts and amendments in the Commission's SERVCON system. In contrast, the Commission is granting WSC's request for an exemption from § 40502(d)'s requirement that carriers publish ETs with each service contract and will initiate a rulemaking proceeding to eliminate this requirement. The Commission has determined that an exemption from § 40502(d) will not result in a substantial reduction in competition or be detrimental to commerce.

I. BACKGROUND

WSC is a trade association comprising 20 vessel operating common carriers (VOCCs) that make up approximately 90 percent of the global liner vessel capacity.[2] WSC has petitioned the

[1] The Commission received supportive comments from Atlantic Container Line AB, Caribbean Shipowners Association, and the National Industrial Transportation League. The Commission received comments in opposition to the petition from Wheaton Grain Inc. and Frankford Candy LLC.

[2] WSC's members include large VOCCs such as Maersk, COSCO, CMA CGM, Evergreen, Hapag-Lloyd, Hyundai Merchant Marine, Mediterranean Shipping Company, Ocean Network Express, Orient Overseas Container Line, and Yang Ming Marine Transport Corporation, among others.

Commission for an exemption from 46 U.S.C. § 40502(b), which requires VOCCs to file confidentially each service contract entered into by that VOCC, with exceptions for contracts concerning bulk cargo, forest products, recycled scrap metal, new assembled motor vehicles, waste paper, or paper waste. WSC has also petitioned the Commission for an exemption from § 40502(d), which requires that VOCCs file a concise statement of certain ETs in tariff format when they file each service contract with the Commission. Lastly, WSC is seeking initiation of a rulemaking that would make changes to the Commission's service contract regulations set forth in 46 C.F.R. part 530 in accordance with their requested exemptions.

The Commission has the authority under 46 U.S.C. § 40103(a) to grant exemptions for any specified activity of persons subject to the Shipping Act from any requirement of the Act if the Commission finds that the exemption will not result in a substantial reduction in competition or be detrimental to commerce. In the past several years, the Commission has used this exemption authority to provide regulatory relief, not only for NVOCCs, but also for VOCCs by eliminating substantial regulatory burdens. For example, in the Commission's decision concerning Docket No. 16-05, VOCCs were provided significant relief in the service contract filing context by allowing up to 30 days to file service contract amendments after execution by the VOCC and shipper, along with expanded timelines for correcting service contracts. Further, VOCCs were allowed to batch file their service contract amendments so as to reduce the regulatory cost and burden.

This order begins by summarizing WSC's argument and providing an overview of comments and response to those comments as necessary, before assessing the two requested exemptions (service contract filing and ET publication) to determine whether allowing such exemptions would be detrimental to commerce or cause a substantial reduction in competition.

A. Summary of Petitioner's Argument

WSC argues that exempting service contracts from the Shipping Act's filing requirements will not result in a substantial reduction in competition or be detrimental to commerce. First, WSC argues that the filing of service contracts with the Commission "has no bearing whatsoever on the functioning of the competitive commercial marketplace" and that exempting VOCCs from the duty to file them with the Commission will not reduce competition between VOCCs or between VOCCs and non-vessel operating common carriers (NVOCCs). Pet. at 4. Similarly, WSC argues that exempting VOCCs from the duty to publish service contract ETs will not reduce competition, "since those essential terms which are made public do not include the most competitively relevant terms, i.e., the contract rates." *Id.* Further, WSC argues, granting this petition would put VOCCs on equal footing with NVOCCs "by relieving VOCCs of the same regulatory and administrative burdens that NVOCCs have been permitted to shed." *Id.* WSC also argues that the requested relief is vital "in order to give full effect to the NVOCC NSA and NRA regulatory relief that the Commission recently granted in Docket No. 17-10"[3] because the transportation offered by NVOCCs is physically provided by VOCCs, meaning that NVOCCs cannot make use of expedited contract acceptance until the VOCC files the underlying service contract. Pet. at 4–5. WSC argues that, because service contracts will continue to be

[3] "Docket No. 17-10" refers to the Commission's rulemaking, completed in 2018, that amended the regulations in 46 C.F.R. parts 531 and 532 governing NVOCC negotiated rate arrangement (NRAs) and NVOCC service arrangements (NSAs). Of relevance to the petition currently before the Commission, the rulemaking in Docket No. 17-10 removed the NSA filing and publication requirements. *See* Final Rule: Amendments to Regulations Governing NVOCC Negotiated Rate Arrangements and NVOCC Service Arrangements, 83 Fed. Reg. 34780 (July 23, 2018).

negotiated on a confidential basis, granting this petition would not reduce competition between shippers. *Id.* at 5.

Next, WSC argues that granting the petition would not result in a detriment to commerce, because no economic harm would result to shippers if the petition is granted. According to WSC, few, if any, other countries require the filing of contractual arrangements between VOCCs and shippers, and there has been no indication that the lack of a filing requirement has been detrimental to shippers or to the commerce of those other countries. *Id.* WSC points to the commodities exempted in 46 U.S.C. § 40502(b)(2) and states that "[t]here is no indication that this exemption has been detrimental to commerce insofar as these exempt commodities are concerned," and that these commodities were exempted to benefit commerce. Pet. at 5–6. WSC also points to the Commission's year of experience with the rules adopted in Docket No. 16-05,[4] which permitted VOCCs to file amendments to service contracts up to 30 days after cargo moves under the subject amendment. WSC argues that it is unaware of any problems arising from the delayed filing of amendments, and this "strongly suggests that filing is not critical to competition, commerce, or regulatory oversight." Pet. at 6.

Lastly, WSC argues that granting the petition would relieve the VOCC industry of a substantial regulatory burden. WSC cites to Docket No. 17-10, in which the Commission found that relieving NVOCCs of the obligation to file NSAs and publish NSA ETs would reduce the regulatory burden on these NVOCCs by 162 hours, or approximately $10,728. WSC states that, due to the magnitude of service contracts and amendments, the burden

[4] "Docket 16-05" refers to the Commission's rulemaking, finalized in 2017, in which the Commission made amendments to its rules governing service contracts and NSAs—namely, permitting the filing of service contract and NSA amendments up to 30 days after the effective date of the amendment. *See* Final Rule: Amendments to Regulations Governing Service Contracts and NVOCC Service Arrangements, 82 Fed. Reg. 16288 (Apr. 4, 2017).

reduction for VOCCs if the exemption were granted would be much larger than that of NVOCCs and their customers. WSC states that "[t]hese savings are particularly important in light of the Commission's determination that retaining the filing and essential terms publication requirements for NSAs provides little or no regulatory benefit." *Id.* at 7. WSC argues that the same is true for service contracts, and that exempting them from filing would not impair any Commission monitoring functions because: (1) the use of service contracts to monitor trade conditions is unclear; and (2) the Commission can impose alternative requirements on VOCCs to get more concise and usable information.

Finally, WSC argues that the service contract filing and service contract ET publication requirements "are vestiges of a much more rigid system of economic regulation that no longer exists" following passage of the Shipping Act of 1984 and the Ocean Shipping Reform Act of 1998, which moved regulation of the industry toward "a market-based, confidential contract-based structure." *Id.* at 8. WSC concludes that "[s]ervice contract filing and essential terms publication no longer serve a purpose" in the ocean liner shipping marketplace. *Id.*

B. Overview of Comments

1. Atlantic Container Line AB (ACL)

ACL is an independent VOCC headquartered in Westfield, New Jersey. ACL is not a member of WSC but supports the elimination of service contract filing. ACL claims that the exemption would eliminate a significant cost to every stakeholder in ocean transportation due to the administrative cost of preparing and filing huge amounts of data that, according to ACL, has no use. ACL argues that these data compilation costs are enormous for the Commission and its stakeholders, and that eliminating this

requirement would allow for the Commission "to focus more attention on proactively regulating ocean commerce." ACL lists several "factors" behind their reasoning. First, as service contracts are now confidential, public information on the FMC rate and contract database is now commercially meaningless. Second, the filing requirement has a disparate impact on U.S. shippers importing through U.S. ports versus U.S. shippers importing via Canadian ports. Third, ACL provides a number of "examples of frequent problems caused by the filing requirement," which include difficulty in resolving issues related to the re-rating of cargo, incorrect rate charges, missing signatures, the assessment of liquidated damages, and changes of destination.

ACL states that carriers would save "a huge amount of money in personnel costs and filing costs" if service contract filing were eliminated. Without these filing requirements, ACL believes that "most cargo would move under a simple one-page contract with service and volume commitments." Carriers would maintain this data, and an "FMC auditor" could conduct carrier audits to review incidences of shipper complaints.

2. Caribbean Shipowners Association (CSO)

CSO (FMC Agreement No. 010979) is a forum wherein its members can "discuss and agree, on a voluntary basis, on rates, charges, rules, classifications, and practices governing the transportation of cargo" in the subject trade. CSO members (one of which is a WSC member) support the petition because, in addition to the reasoning listed in the petition itself, CSO argues that granting the petition and revising Commission regulations accordingly "would be entirely consistent with, and greatly further, the FMC's voluntary effort to provide regulatory reform consistent with Executive Order 13771" and "would advance the work of the FMC's Regulatory Reform Task Force."

3. National Industrial Transportation League (NITL)

NITL, a national organization of shippers and other companies engaged in freight transportation throughout the United States and internationally, submitted a comment in support of WSC's petition because granting the petition "would benefit the ocean transportation industry by eliminating unnecessary and costly regulatory burdens on ocean carriers" and "would promote competition between ocean carriers and non-vessel operating common carriers." NITL Comment at 1. NITL believes that the service contract filing and ET publication requirements "impose regulatory costs and burdens without any meaningful corresponding benefit." *Id.* at 2. NITL also argues that granting the exemption would increase flexibility and responsiveness to the market by allowing shippers to start shipping without waiting for the service contracts to be filed. The exemption would also level the playing field between VOCCs and NVOCCs, which "are no longer burdened by contract-filing and essential-terms publication requirements." *Id.* Therefore, according to NITL, the Commission should find that eliminating these requirements would not substantially reduce competition or be detrimental to commerce.

NITL also argues that the Commission can obtain service contracts through its existing recordkeeping rules, and that therefore continuing to require service contract filing and service contract ET publication is unnecessary. NITL states that the Commission should ensure that the existing service contract recordkeeping and audit rule at 46 C.F.R. § 530.15 be retained, as this "will be a critical mechanism for the Commission to compel disclosure of service contracts in response to an industry issue or a shipper complaint" if the petition is granted. NITL Comment at 2.

4. Wheaton Grain Inc.

Wheaton Grain Inc., a small-medium shipper in the agricultural industry, submitted a comment in opposition to the petition. In their comment, Wheaton Grain states that service contracts are their main tool to ensure that they are treated fairly by carriers. The company asserts that service contracts are useful in disputing charges and fees levied by the carriers.

5. Frankford Candy LLC

Frankford Candy LLC, an importer, filed a comment in opposition to WSC's petition. Frankford Candy argues that they have benefitted from the Commission's oversight of service contracts, which they feel provide a level of cost certainty. Frankford Candy worries that, without the service contract filing requirement, they may be subject to potentially arbitrary charges that would result in additional costs without the ability to dispute or negotiate them. Frankford Candy proposed the establishment of a stakeholder committee to review and make recommendations providing more data.

II. DISCUSSION

The Commission has the authority under 46 U.S.C. § 40103 to grant exemptions for "any specified activity of those persons [subject to the Shipping Act] from any requirement of [the Act] if the Commission finds that the exemption will not result in substantial reduction in competition or be detrimental to commerce." Through this provision, Congress granted the

Commission broad authority to determine whether to provide regulatory relief under certain conditions.[5]

A. Mandatory Service Contract Filing

WSC requests an exemption from 46 U.S.C. § 40502(b), which requires that "[e]ach service contract entered into under [§ 40502] by an individual ocean common carrier or an agreement shall be filed confidentially with the Federal Maritime Commission," unless that contract pertains to bulk cargo, forest products, recycled metal scrap, new assembled motor vehicles, waste paper, or paper waste. WSC is also seeking amendments that would make corresponding changes to the Commission's regulations at 46 C.F.R. part 530 to remove the requirement that VOCCs file service contracts with the Commission. For the following reasons, the Commission is unable to find that an exemption from the filing requirements of 46 U.S.C. § 40502(b) would not be detrimental to commerce and is therefore denying this portion of WSC's petition.

1. Detriment to Commerce

WSC argues that exempting service contracts from the Shipping Act's filing requirements will not be detrimental to commerce because the Commission has previously "held that an exemption would not be detrimental where no shipper alleged that the exemption would result in economic harm and where the exemption would reduce operating costs and increase competition."

[5] *See* S. Rep. No. 105-61, at 30 (1997). Prior to the enactment of the Ocean Shipping Reform Act of 1998 (OSRA), section 16 of the Shipping Act (codified at 46 U.S.C. § 40103) included four criteria for granting a statutory exemption. OSRA deleted the first two criteria (that the exemption would not substantially impair effective regulation by the Commission or be unjustly discriminatory), leaving only the latter two criteria (that the exemption would not result in substantial reduction in competition or be detrimental to commerce). *See* Pub. L. No. 105-258, § 114.

Pet. at 5. While we agree that the Commission looks to the potential harm to shippers and the potential positive effects on competition resulting from an exemption, the Commission does not require that shippers allege these potential harms themselves. *See* Final Rule: Non-Vessel-Operating Common Carrier Service Arrangements, 69 Fed. Reg. 63981, 63987-88 (Nov. 3, 2004); Final Rule: Non-Vessel-Operating Common Carrier Negotiated Rate Agreements, 76 Fed. Reg. 11351, 11353 (Mar. 2, 2011) (NRA Rulemaking). In the 2011 NRA Rulemaking, for instance, the Commission noted that it was "significant" that no shipper or carrier (NVOCC or VOCC) had filed a comment opposing the requested exemption or alleging economic harm that would result from providing NVOCCs the option of entering into NRAs. NRA Rulemaking, 76 Fed. Reg. at 11353. The Commission did not state, however, that the lack of comments was dispositive of there being no detriment to commerce. Moreover, the Commission has, in fact, received two comments from shippers alleging that harm *will* result from granting the requested exemption. Indeed, were the Commission to view the presence or absence of shipper allegations of economic harm from an exemption as dispositive of that harm, then in the present case the Commission would not need to look any further than the two comments making such allegations.

While WSC goes on to argue that no economic harm would result to shippers if the Commission were to grant their requested exemption, commenters have indicated and Commission experience has shown that shippers view service contract filing with the Commission as discouraging VOCCs from engaging in conduct that would be harmful to shippers. In particular, shippers view the filing requirement as encouraging VOCCs to adhere to contract terms and deterring VOCCs from introducing unreasonable terms into service contract boilerplate language. *See, e.g.*, ANPRM: Service Contracts and NVOCC Service Arrangements, 81 Fed. Reg. 10198, 10201 (Feb. 29, 2016) ("Shippers advised the Commission that carriers

were responsive to their rate requests and the shippers were confident that VOCCs would honor the rates and contract commitments *knowing their contracts were being filed with the Commission*.") (emphasis added). Without the mandatory filing of service contracts acting as a deterrent, shippers fear, and the Commission recognizes, the risk that VOCCs may attempt to include unreasonable surcharges or unfair or unreasonable terms in their service contracts. The shipper commenters on this petition noted this as well.

Furthermore, although WSC alleges that "few, if any, other countries require the filing of contractual arrangements between VOCCs and shippers," this point is both irrelevant and inaccurate. Pet. at 5. The People's Republic of China, for instance, requires similar filings to those required by the Shipping Act. China requires VOCCs to file with the Shanghai Shipping Exchange both tariff rates and negotiated rates, including the ocean freight and maritime-related surcharges, for transport from Chinese to foreign ports.[6] Additionally, China has investigated VOCC rate practices in the recent past. The National Development and Reform Commission and the Ministry of Transport investigated surcharges, most notably terminal handling charges, on the grounds that the charges were potentially "arbitrary," and these agencies were successful in negotiating rate reductions from a number of VOCCs.[7] Thus, such

[6] Circular No. 64 (2013) on the Implementing Rules of the International Container Liner Precise Freight Filing, Issued by the Ministry of Transport of People's Republic of China, available at http://en.sse.net.cn/filingen/aboutfiling.jsp.

[7] *See* Chris Dupin, *China Investigating Shipping Companies for 'Arbitrary Charges,'* AMERICAN SHIPPER, Sept. 25, 2015, https://www.freightwaves.com/news/china-investigating-shipping-companies-for-arbitrary-charges; *see also* Lee Hong Liang, *Eleven Major Lines Lower Terminal Handling Charges in China*, SEATRADE MARITIME NEWS, Mar. 3, 2017, https://www.seatrade-maritime.com/news/asia/eleven-major-lines-lower-terminal-handling-charges-in-china/.

filing requirements do exist elsewhere in the world, where they have potentially played a role in enforcement actions against VOCCs.

In addition to stemming from a faulty premise, WSC provides no basis for its statement that there is no indication that the lack of service contract filing requirements elsewhere in the world has caused harm to shippers or the commerce of those countries. WSC has provided no evidence that shippers are not harmed in other countries that lack service contract filing requirements. Ultimately, the Commission finds this argument to be unpersuasive.

For further support, WSC then turns to the Shipping Act's exclusion from filing service contracts that cover a number of commodities. *See* 46 U.S.C. § 40502(b)(2) (exempting contracts regarding bulk cargo, forest products, recycled metal scrap, new assembled motor vehicles, waste paper, or paper waste from the service contract filing requirements of § 40502(b)(1)). WSC states that there is no indication of harm stemming from exempting these commodities, which WSC argues were exempted by Congress to promote competition in their transportation "and hence to benefit commerce." Pet. at 5–6.

We disagree with WSC's assertion that the existing statutory exemption supports the petition. As discussed below, Congress determined that these commodities had distinguishing characteristics that justified their exemption from the service contract filing requirements. The statutory exemption does not, therefore, support exempting all other commodities from the current requirements.

The legislative history behind the 1961 Amendment to the Shipping Act of 1916 addressed what Congress viewed as the distinction between so-called "general cargo" and bulk cargo, the first commodity type to be excluded from what was then the dual-

rate contract filing requirements. Congress noted that the inherent difference between packaged or general cargo and bulk cargo was that "bulk cargoes such as coal, ore, and fertilizer are often carried by a contract carrier in full shipload lots for a shipper who hires the vessel for a single trip" whereas "conference liner cargoes range from bobbypins to electric generators and are carried for hundreds of shippers, many of whom ship regularly in the trade but seldom, if ever, in shipload lots." S. Rep. No. 87-860, at 4 (1961). Importantly, Congress noted that "[t]he needs of the businessmen who import and export general cargo are worlds apart from the needs of those who import and export bulk cargo." *Id.*

The Shipping Act of 1984 allowed carriage by service contracts and, in addition to exempting bulk cargo from the service contract and tariff filing requirements, included additional exempted commodities, i.e., forest products, recycled metal scrap, waste paper, or paper waste). Pub. L. No. 98-237, § 8(c), 98 Stat. 75 (1984). The legislative history makes clear that Congress's intent was to ensure that competing goods, i.e., new and recycled bulk cargoes, were treated the same. H.R. Rep. No. 98-600, at 38 (1984) (Conf. Rep.).

The 1998 Ocean Shipping Reform Act amendments added "new, assembled motor vehicles" to the list of exempted commodities because the common carriage of these vehicles is conducted by specialized roll-on roll-off vessels, typically in large quantity, single shipment lots under a service contract that more closely resembles unregulated contract carriage. S. Rep. No. 105-61, at 22 (1997). Because the new, assembled automobile shipper market is concentrated and employs unique shipping practices, and because common carriage requirements are intended to protect

shipper interests, Congress did not believe it was appropriate to apply common carriage requirements to this market. *Id.*[8]

The relevant legislative history thus establishes that the exempted commodities in § 40502(b)(2) are conceptually distinct from traditional containerized cargo that moves by common carriage. Therefore, WSC's reference to these commodities does not justify exempting other types of cargo from the service contract filing requirements.

A final note on exempt commodities: the Commission addressed the expansion of the list of exempt commodities briefly in Docket No. 16-05. In that rulemaking, WSC and Crowley filed comments that supported expanding the list of exempt commodities, and the Commission expressly noted "[c]oncerns regarding expansion of the list of exempt commodities centered around shipper experiences pertaining to *currently exempt commodities*." Service Contracts and NSAs Final Rule, 82 Fed. Reg. at 16294. These concerns were described as follows:

[8] In 2014, the Department of Justice (DOJ) prosecuted vessel operators engaged in the carriage of new, assembled automobiles for conspiring to suppress and eliminate competition by allocating customers and routes, rigging bids, and fixing prices for the international ocean shipments of roll-on, roll-off (RO/RO) cargo to and from the United States and elsewhere. Contemporaneously, the Commission pursued some of these same ocean carriers under section 10(a) of the Shipping Act, 46 U.S.C. §41102, for acting in concert with respect to the transportation of automobile and other motorized vehicles by RO/RO or specialized car carrier vessels, where such agreements had not been filed with the Commission or become effective under the Shipping Act. While, as noted above, "new assembled motor vehicles" are included in the list of commodities exempted from the service contract filing requirement, one could consider whether the Commission might, if provided the reasonable opportunity, have detected market anomalies in the pricing and the servicing of customers by particular carriers in the assembled automobile shipper market earlier if these service contracts had been filed at the Commission.

> Exporters of currently exempt commodities have expressed frustration regarding the ocean carrier practice of offering exempt commodity tariff rates with periods of limited duration, in some cases for only 30 to 60 days, rather than for the longer periods that are customary in service contracts. Further, exempt commodity tariffs are not published and do not provide shippers with 30 days' notice prior to implementation of rate increases. Whereas service contracts allow shippers to negotiate rates and terms with carriers to tailor services and terms to the shipper's specific needs, many exporters advise that shippers of exempt commodities are not afforded this opportunity.

Id. Thus, contrary to WSC's assertion in their petition, the experience with commodities exempt from the service contract filing requirements indicates that the *lack* of such a requirement may be detrimental to shippers of those commodities.

Finally, WSC discusses the Commission's allowance of service contract and NSA amendments up to 30 days after cargo moves under the subject amendments. The Commission disagrees with WSC's contention that allowing the delayed filing of amendments to service contracts and NSAs by VOCCs and NVOCCs suggests that this filing is not critical to competition or commerce. In the final rule making these changes, the Commission expressly stated that allowing delayed filings "reduce[d] the filing burdens on the shipping industry while maintaining the Commission's ability to protect the shipping public." *Id.* at 16290. The Commission continues to view the filing of service contracts and amendments as a critical way of preventing harm to the shipping public.

ACL raises several issues that have already been addressed by the Commission. The Commission amended its regulations in 2017 so that carriers no longer need wait until amendments to contracts are filed before moving the cargo. A carrier now has up to 30 days to process a contract amendment pursuant to regulatory changes by the Commission in 2017. So long as the parties agree to extend a contract prior to expiration, a carrier has up to 30 days to process that amendment. In addition, many standard terms are included most every service contract, whether inside or outside of the United States.

Based on the foregoing, the Commission is unable to find that the requested exemption will not be detrimental to commerce. After reviewing WSC's arguments and other's comments, and the concerns put forth by shippers, both as part of this proceeding and in other interactions with the Commission, the Commission has determined that granting this exemption could potentially result in a detriment to commerce. Accordingly, the Commission is denying WSC's request for an exemption from 46 U.S.C. § 40502(b), the requirement to file service contracts with the Commission.

2. Substantial Reduction in Competition

Because the Commission is unable to find that the requested exemption will not be detrimental to commerce, the Commission need not consider whether granting WSC an exemption from 46 U.S.C. § 40502(b) would result in a substantial reduction in competition.

The Commission will, however, address WSC and NITL's argument that the requested exemption is procompetitive with respect to competition between VOCCs and NVOCCs. WSC and NITL argue that granting this exemption puts VOCCs on a level playing field with NVOCCs, who are no longer required to file

NSAs and publish NSA ETs. The Commission disagrees with this blanket contention because there are a number of factors that place VOCCs at an advantage when compared to NVOCCs. VOCCs hold market power through the antitrust immunity secured pursuant to their filed agreements as well as their ability to discuss and coordinate freight rates and/or vessel capacity and services. This is relevant because all members of WSC, with the exception of Tote, participate in agreements on file with the Commission, and many are members of the global alliances. Because VOCCs have stronger negotiating positions, they are able to set service contract terms and conditions with NVOCCs; indeed, the majority of service contracts on file with the Commission use boilerplate terms and conditions written by the VOCC.

It must be noted that the number of major global liner shipping companies decreased over the last several years from 21 to 12. At the end of 2018, the nine VOCCs that participate in the three global alliances controlled 86% of vessel capacity in the primary transatlantic and transpacific U.S. trades. By contrast, there are over 4,800 NVOCCs licensed and/or registered with the Commission. None of these NVOCCs have significant market share or significant market influence. These NVOCCs compete vigorously without benefit of the limited antitrust immunity enjoyed by VOCCs under cooperative agreements filed at the Commission.

In addition, there are significant differences between VOCC service contracts and NSAs. VOCC service contracts for major shippers have global rate matrices and minimum quantity requirements that cover thousands or tens of thousands of TEUs annually, while NSAs are typically limited to smaller cargo volumes and specific trade lanes. Further, the VOCC is the seller of space, whereas the NVOCC is the buyer of space. While VOCCs and NVOCCs may compete to some degree, the Commission views them as competitively separate. In other words, the continued

scrutiny of VOCCs through confidentially filed service contracts does not put VOCCs at a competitive disadvantage to NVOCCs.

WSC also makes the argument that eliminating the service contract filing requirement is necessary "to give full effect" to the Commission's decision in Docket No. 17-10, in which the Commission removed NSA filing and publication requirements. Pet. at 4. WSC argues that the ocean transportation offered by NVOCCs is physically provided by VOCCs, requiring a service contract between the NVOCC and VOCC. "If VOCCs must file their contracts before they can provide transportation to NVOCCs under those service contracts, then NVOCCs cannot in turn provide service to their customers or make use of the expedited contract acceptance and effective date provisions now applicable to NSAs and NRAs until the underlying VOCC service contract is filed." Pet. at 4–5. But WSC's argument is flawed, as it relies upon the premise that the service contract filing requirement delays the effectiveness of service contracts. WSC does not allege that this delay exists, nor has Commission experience shown that there is such a delay. If a service contract is filed on its effective date, then there can be no delay between the filing and effectiveness of the service contract. In the absence of any showing that there is a delay caused by the filing itself, the Commission does not believe that granting WSC's petition is necessary to give any further effectiveness to the outcome of Docket No. 17-10.

B. Mandatory Publication of Essential Terms Tariff

WSC is also petitioning for an exemption from 46 U.S.C. § 40502(d), which requires publishing a concise statement of essential terms (as defined in § 40502(c)(1), (3), (4), and (6)) in tariff format when a service contract is filed confidentially with the Commission. WSC, and commenters in support of their petition, argue that eradicating the mandatory publication of the ETs would

not result in a substantial reduction in competition, would not cause a detriment to commerce, and would relieve the industry of a substantial regulatory burden. Because the Commission has found that eliminating the ET publication requirement will not be detrimental to commerce or result in a substantial reduction in competition, the Commission is granting this request.

1. Detriment to Commerce

At the time of the formulation of the Shipping Act of 1984, Congress voiced concerns over the potential for service contracts to "be employed so as to discriminate against all who rely upon the common carriage tradition of the liner system." H.R. Rep. No. 98-53 pt. 1 at 17. Congress "hoped that the requirement that a service contract's essential terms be filed publicly so that those terms are available to all other shippers who may wish to use them, will preserve an important element of the common-carriage concept" upon which the 1984 Act was based. *Id.*

Fourteen years later, OSRA reduced the scope of service contract essential terms required to be made public to protect U.S. exporters who were "disadvantaged in the world market because their foreign competitors [were] able to ascertain proprietary business information from their published service contract essential terms." S. Rep. No. 105-61, at 24 (1997). At the same time, however, Congress retained the requirement to publish some essential terms because the publication "provides U.S. ports, longshore labor, ocean transportation intermediaries, and others useful information for determining cargo flows and facilitat[ing] strategic planning and marketing efforts." *Id.* Congress also stated that the ET publication requirement would help "ensure that antitrust immunity is not abused." *Id.*

The past 20 years of Commission experience indicates that the ET publication requirement corresponding to individual service contracts is of questionable value. Commission staff has the ability to access complete service contracts, including rate matrices and contract terms, through SERVCON. This allows the Commission to review service contracts for the potential abuse identified by Congress while drafting the 1984 Act and OSRA. And while the Commission received comments in Docket No. 16-05 that indicated that ETs are relied upon "for various purposes, such as during a grievance proceeding under collective bargaining agreements," no such comments have been submitted in response to this petition, and the Commission therefore does not view this as an ongoing concern. Service Contracts and NSAs Final Rule, 82 Fed. Reg. at 16293–94. Further, no commenters have claimed any other use for these publications or argued that the loss of the service contract ET publication requirement would harm the industry in any way. Removing the requirement to publish service contract ETs would cause no economic harm to fall upon shippers or any other participants in the industry. The Commission therefore finds that no detriment to commerce will result from eliminating the requirement that VOCCs publish concise statements of essential terms with the filing of each confidential service contract.

2. Substantial Reduction in Competition

Removing the service contract ET publication requirement will not cause a substantial reduction in competition. The Commission agrees with WSC's argument that "essential terms which are made public do not include the most competitively relevant terms, i.e., the contract rates." Pet. at 4. Further, no commenters have argued that removing the service contract ET publication requirement will have a negative competitive impact. There is no change to competition between and among VOCCs that results from eliminating this requirement. For that reason, the

Commission finds that granting an exemption from the requirement to publish service contract ETs will not result in a substantial reduction in competition.

C. Rulemaking

As the Commission has determined to grant the petitioners' requested exemption from the requirements of 46 U.S.C. § 40502(d), it is necessary to amend the Commission's service contract essential terms regulations accordingly. The Commission will make those changes in a forthcoming rulemaking.

III. CONCLUSION

The Commission is unable to find that WSC's petition for an exemption from the requirements in 46 U.S.C. § 40502(b) would not be detrimental to commerce, and that portion of the petition is therefore denied. The Commission has found, however, that WSC's petition for an exemption from the requirements in § 40502(d) will not result in a substantial reduction in competition or be detrimental to commerce, and that portion of the petition is therefore granted. The Commission will initiate a rulemaking proceeding to eliminate the requirement that a vessel operating common carrier publish a concise statement of essential terms corresponding to each filed service contract or amendment.

THEREFORE, IT IS ORDERED, that WSC's request that vessel operating common carriers be exempted from the requirement of 46 U.S.C. § 40502(b) that they must file each service contract confidentially with the Commission is DENIED.

IT IS FURTHER ORDERED, WSC's request that vessel operating common carriers be exempted from the requirement of 46 U.S.C. § 40502(d) that they must file a concise statement of essential terms

when confidentially filing service contracts with the Commission is GRANTED.

IT IS FURTHER ORDERED, that the Commission will initiate a rulemaking to implement the exemption from 46 U.S.C. § 40502(d) where relevant in Commission regulations.

FINALLY, IT IS ORDERED, that this proceeding is discontinued.

By the Commission.

Rachel E. Dickon
Secretary

Commissioner Dye, concurring in part and dissenting in part:

I concur in the finding of the Majority's Order that eliminating the requirement under 46 U.S.C. § 40502(d) that VOCC's publish concise statements of essential terms with the filing of each confidential service contract will not result in a substantial reduction in competition or be detrimental to commerce. I dissent from the Order's finding that the Commission is unable to find that the World Shipping Council's petition for an exemption from the service contract filing requirements under 46 U.S.C. § 40502(d) would not be detrimental to commerce.

Shipper Harm and Existing VOCC Service Contract Record Keeping and Audit Requirements

After reviewing the World Shipping Council's arguments and the concerns put forth by shippers, both as part of this

proceeding and in other interactions with the Commission, the Majority has determined that granting the requested exemption could *potentially* result in a detriment to commerce. Order at 16. Because the Majority continues to view the filing of service contracts and amendments as a critical way of preventing harm to the shipping public, the Majority has determined that it is *unable to find* that the requested exemption will not be detrimental to commerce. Order at 16.

The Majority, "continues to view the filing of service contracts as a critical way of preventing harm to the shipping public." Order at 16. The Order describes the "*potential* for harm," such as "the risk that VOCCs may attempt to include unreasonable surcharges or unfair or unreasonable terms in their service contracts." (Order at 11, emphasis added). The Majority also refers to "Commission experience" that shippers view service contract filing with the Commission as discouraging VOCCs from engaging in conduct that would be harmful to shippers. Order at 11.

In making this determination, the Majority ignores the ability of the Commission to use existing ocean common carrier service contract record keeping and audit requirements to exercise adequate Commission oversight and prevent harm to shippers. Under 46 C.F.R. § 530.15, every common carrier, conference, or agreement shall maintain original signed service contracts, amendments, and their associated records in an organized, readily accessible or retrievable manner for a period of five years from the termination of each contract. Every carrier or agreement shall, upon written request of the FMC's Director, Bureau of Enforcement, any Area Representative, or the Director, Bureau of Economics and Agreements Analysis (Bureau of Transportation Analysis), submit copies of requested original service contracts or their associated record within thirty days of the date of the request.

The Majority implies that, absent mass filing of service contract information, the Commission cannot protect shippers from harm and for that reason, is unable to find that the requested

exemption will not be detrimental to commerce. In fact, the service contracts maintained under Commission record keeping and audit regulations are signed, organized, and retrievable in a readily accessible manner, and are thus in a more useful condition to respond to shipper complaints than the contract information mass-filed in the Commission database. If these record keeping requirements are insufficient to protect shippers from harm, the Commission should revise the carrier record keeping and audit requirements, rather than insist on a continuation of mass service contract filing with the Commission.

Most importantly, the Commission recently found with respect to the elimination of the requirement for Non-Vessel Operating Common Carriers to file Negotiated Service Arrangements (NSAs, contracts with their shipper customers) that the Commission's recordkeeping requirements "will ensure adequate Commission oversight." NVOCCs must continue to retain NSAs, amendments, and associated records for five years from the termination of an NSA and must provide them to Commission staff within 30 days of a request. The Commission stated that, "[t]hese requirements will permit the Commission to investigate any disputes or issues with respect to particular NSAs." Final Rule: Amendments to Regulations Governing NVOCC Negotiated Rate Arrangements and NVOCC Service Arrangements, 83 Fed. Reg. 34780, 34785 (July 23, 2018).

There is no difference in the ability of the Commission to protect shippers from harm with respect to NVOCC Negotiated Service Agreements or Ocean Common Carrier Service Contracts. The Majority's attempt to distinguish between VOCCs and NVOCCs on grounds of availability of antitrust immunity is not persuasive. If there are competition concerns raised involving concerted behavior of VOCCs, the Commission should investigate. The fact that VOCCs have limited antitrust immunity, however, is irrelevant to whether the Commission must maintain a database of tens of thousands of filed contracts and amendments to protect shippers from harm.

I would find that the exemption will not be detrimental to commerce because existing record keeping and audit requirements for ocean carrier service contracts will permit the Commission to investigate any alleged harm to shippers, with respect to particular service contracts, as the Commission found with NVOCC Negotiated Service Arrangements.

Exemption from Service Contract Filing is Not Detrimental to Commerce

The Commission has developed no standard as to how the Commission would determine whether a requested exemption is not detrimental to commerce under 46 U.S.C. § 40103. Without an articulable standard fully explaining the Commission's approach to "detrimental to commerce", any reason, including those involving incidental Commission regulatory convenience, can be used to defeat the benefits of Shipping Act deregulation to international ocean commerce.

I believe as part of evaluating whether an exemption is "detrimental to commerce," the Commission should balance the known regulatory costs and burdens, and the harm that would be experienced by shippers and consumers if it relieved an identified regulatory burden.

The following arguments of the World Shipping Council and the comments in this proceeding properly focus on the effect of the regulatory requirement to file contracts on international commerce, including the economic benefits of regulatory deregulation.

World Shipping Council Petition

The most compelling argument in favor of granting the World Shipping Council's petition is that the service contract filing requirements are vestiges of a much more rigid system of economic regulation that no longer exists. Beginning with the Shipping Act

of 1984 and continuing with the Ocean Shipping Reform Act, Congress moved regulation of international liner shipping away from a highly structured tariff-based common carriage system to a market-based, confidential contract structure. Along with those legislative changes, the industry itself has evolved into a highly competitive global marketplace in which rates and service terms are set by supply and demand and negotiations among commercial parties. The WSC petition concludes that service contract filing and essential terms publication no longer serve a purpose in that marketplace, and the Commission should remove those outdated requirements.

Atlantic Container Line

The comments of Atlantic Container Line (ACL) emphasize that granting the petition would eliminate a significant cost to every stakeholder engaged in ocean transportation, including ocean carriers, shippers, freight forwarders, NVOCCs and the FMC. The ACL comments also explain the competitive complications that the service contract filing regime create for U.S. cross border cargo movements via Canada versus U.S. cargo movements via U.S. ports; explain why stakeholders did not mind tariff and contract filing before 1999; and offer examples of frequent problems caused by the U.S. service contract filing system. Finally, ACL offers that it would be more productive for all stakeholders and for the Commission to engage in an active ocean carrier auditing process that would allow the Commission to review any shipper complaints and review each carrier's ratemaking practices.

The Caribbean Shipowners Association

The Caribbean Shipowners Association (CSA) supports the petition in full for the reasons articulated in the petition, but specifically, because the CSA members believe that granting the petition and revising the Commission's regulations as suggested would be entirely consistent with and greatly further, the Commission's voluntary effort to provide regulatory reform

consistent with Executive Order 13771, Reducing Regulations and Controlling Regulatory Costs and Executive Order 13777, Enforcing the Regulatory Reform Agenda. The CSA recognizes that granting the petition would advance the work of the FMC's Regulatory Reform Task Force.

The National Industrial Transportation League

Founded in 1907, the League is a national organization of shippers and other companies engaged in freight transportation throughout the United States and the world.

The League believes that granting the requested exemption would benefit the ocean transportation industry by eliminating unnecessary and costly regulatory burdens on ocean carriers. If the exemption is granted, the League also believes that Commission oversight of ocean carrier contracting activities can and should continue under the Commission's complaint and recordkeeping procedures.

The League supports eliminating the service contract filing and essential terms publication requirements because they impose regulatory costs and burdens without any meaningful corresponding benefit.

Conclusion

The mass service contract filing requirement is burdensome, unnecessary, and represents the worst of an ocean shipping regulatory regime that has outlived its usefulness. In today's freight delivery system, contract filing increases ocean carrier personnel expenses that could be devoted to other operational priorities and impedes dynamic carrier service offerings by VOCCs to American exporters and importers.

I would find that the requested exemption will not "potentially" result in a detriment to commerce because current

Commission service contract record keeping and audit requirements allow the Commission to exercise adequate oversight over individual service contracts, provide deterrence from carrier misconduct, and protect shippers from harm.

For the reasons explained, I dissent from the Majority's Order. I would grant the petition and amend the accompanying rulemaking accordingly.