BEFORE THE
FEDERAL MARITIME COMMISSION

PETITION OF THE COALITION FOR FAIR PORT PRACTICES FOR RULEMAKING; NOTICE OF FILING AND REQUEST FOR COMMENTS	)	**DOCKET NO. P4-16**

REPLY OF THE
PORT OF NY/NJ—PORT AUTHORITY/MARINE TERMINAL OPERATOR AGREEMENT

The Port of NY/NJ—Port Authority/Marine Terminal Operator Agreement ("PAMTOA"), FMC Agreement No. 201210, submits its reply in response to the Federal Maritime Commission's ("FMC's") Notice of Filing and Request for Comments ("FMC Notice") to the above-referenced docket, 81 Fed. Reg. 95612 (December 28, 2016). The Petition presents a regressive approach to a complex commercial issue. It seeks to resurrect archaic rules promulgated under a statutory regime that has long been superseded by an amended statute enacted to respond to contemporary issues raised by containerization and the globalization of the supply chain that containerization has spawned. For the reasons set forth herein, the PAMTOA urges the Commission to deny the Petition.

I.

Interest of the Agreement

The PAMTOA is a marine terminal conference and its members are the Port Authority of New York and New Jersey and the Port of NY/NJ Sustainable Services Agreement ("PONYNJSSA"), FMC Agreement No. 201175. The members of the PONYNJSSA are marine terminal operators ("MTOs") doing business in the Port of New York and New Jersey

("PONYNJ"). As such, they will be directly and substantially affected by some of the proposals introduced in the FMC Notice published by the Commission.

II.

Preliminary Statement

The PAMTOA has read the replies prepared by the National Association of Waterfront Employers ("NAWE") and the World Shipping Council ("WSC") and adopt them as its own as if fully restated herein. Accordingly, these comments will be brief to reinforce the arguments contained in those comments that so clearly and decisively expose the legal fallacy of the Petition and the harm and havoc that would be created if the agency were to pursue the course suggested by the Petition.

III.

Purpose of the PAMTOA

The members of the PAMTOA oppose the Petition that purports to shift to MTOs and ocean carriers the legal, operational and financial risk for port congestion or delay, such risks are otherwise best addressed through commercial arrangements. The PAMTOA became effective on February 10, 2011. The purpose of the PAMTOA is to permit its members to meet, discuss and agree on matters that relate to promoting environmentally-sensitive, efficient, and secure marine terminal operations in the Port of New York and New Jersey. In addition, the PAMTOA authorizes its members to assist the Port Authority of New York and New Jersey in implementing its Clean Air Strategy. This has been done through the multi-purposing of a port-wide RFID-based truck identification system created by the members of the PONYNJSSA.

During the term of the PAMTOA, its members have discussed matters related to reducing air emissions from cargo handling equipment, promoting the Port of New York and New Jersey

as an attractive destination for cargo interests, enhancing marine terminal security, and providing the shipping community enhanced transparency in the cargo transportation process.

In furtherance of the proactive commitment to addressing the challenges of port congestion and delays, the members of the PONYNJSSA along with the Port Authority of New York and New Jersey and the New York Shipping Association, Inc. spearheaded the formation of the Port of New York and New Jersey Port Performance Task Force (PPTF). The PPTF was the precursor to the current Port of New York and New Jersey Council on Port Performance (CPP). The members of the PONYNJSSA recognized the need for a forum for port users across the supply chain to identify challenges and potential solutions and actively participate in CPP.

In addition to the Terminal Information Portal System ("TIPS")[1] that was a recommendation of the CPP and spearheaded by the PONYNJSSA, as a means of providing supply chain transparency, another example of the efficacy of the CPP in responding to the needs of port users voluntarily established a Winter Weather Plan in the aftermath of the worst winter in the Port's history (2013-14). For every winter since that time (3 years now), a series of prescribed protocols have been pre-determined for demurrage and per diems to be utilized in the event of adverse weather conditions. This has eliminated the need for cargo shippers or receivers to request relief on a case-by-case basis. In the event that a joint decision is made for all container terminals in the Port to close for the entire day due to inclement weather, all MTOs will automatically extend free time by 24 hours for all containers not already in demurrage. At the same time, ocean carriers also extend free time by 24 hours for all containers not already in demurrage. This year's plan can be found at http://www.panynj.gov/port/weather-plan.html.

[1] TIPS is more fully discussed in the reply of the PONYNJSSA at 3-4.

Inasmuch as MTOs across the Nation are exploring and implementing measures to increase transparency in the supply change and to enhance operational efficiencies as recommended by the Commission, the Commission should deny the Petition and instead continue to foster these commercial solutions, many of which have been fostered in FMC-filed agreements.

IV.

Summary of the Comments

The Petition should be denied for the following reasons:

- The FMC lacks the legal authority to grant the relief sought by the Petition;
- The Petition does not demonstrate an adequate factual basis for the requested relief;
- The present regulatory framework provides adequate remedies; and
- The proposed rule will not remedy the situation it seeks to address but will create confusion, undue agency action, and exacerbate congestion.

A. The FMC lacks the legal authority to grant the relief sought by the Petition.

The legal basis for the Petition relies on the Commission's adoption of truck detention rules for the Port of New York in the 1960s and 1970s. This presents an insurmountable legal hurdle to the Petition inasmuch as the law as well as the commercial circumstances under which those rules were promulgated changed dramatically. Those rules were based on authorities granted to the Commission under the Shipping Act, 1916 (46 U.S.C. §816), which was amended by the Shipping Act of 1984. Curiously, the Petition does not address or otherwise explain this reliance on subsequently-amended regulations that pre-date containerization. The purpose of the Shipping Act of 1984 was to legislatively articulate a necessary response to the embrace of containerization as the primary means of international cargo transportation. In doing so, it was

necessary to establish a non-discriminatory regulatory process with minimum government intervention and regulatory costs to ensure that domestic law conformed to international standards. *See* 46 U.S.C. §40101(1) (West 2007). Most significantly to this inquiry, the Shipping Act of 1984 eliminated the language of both Sections 17 and 18 of the 1916 Act that granted the Commission the authority to prescribe commercial rules and practices and regulate the level of rates and charges respectively. *See* 46 U.S.C. App. §1709(d)(1) now codified at 46 U.S.C. §41102(c) (West 2007). Ironically, Petitioner is asking the Commission to magically turn back time to a pre-containerization world to exercise precisely the same authorities that Congress removed from the 1916 Act by encouraging the agency to now prescribe "a just and reasonable regulation or practice" and "to regulate the level of rates and charges."

The Petition would require MTOs to adopt rules under which they could not assess demurrage if the failure to pick up the cargo within free time was due to a "disability." Disability is broadly-defined therein as including but not limited to port congestion, port disruption, weather-related events, and delays as a result of governmental action or requirements, unless such delays could have been prevented by the shipper or receiver. *See* Petition, Exhibit A, paragraph (b). Such events would be considered disabilities under the proposed regulation, even if the cause was not the fault of, and was beyond the control of, the MTO or ocean carrier. It would also require MTOs to limit their charges for demurrage for periods between the expiration of free time and the commencement of a disability. *See id.* at paragraph (c). In addition, charges for demurrage would be limited to a "compensatory rate," which is not to exceed the marine terminal's "storage costs." *See id.* at paragraph (d). Certainly such a rule cannot pass muster under current law because the Commission lacks the statutory authority to dictate the level of rates and charges assessed. Accordingly, it does not have the authority to adopt a rule that in

essence dictates the level of rates and charges assessed. Thus, the Petition should be denied because the Commission lacks the legal authority to grant the relief sought.

B. The Petition Does Not Demonstrate An Adequate Factual Basis For The Requested Relief

As noted by the FMC in its *See Report: Rules, Rates, and Practices Relating to Detention, Demurrage, and Free Time for Containerized Imports and Exports Moving Through Selected United States Ports* (April 3, 2015) (hereinafter referred to as the "*FMC Report*"), ports across the Nation have different ownership and operational structures that generate the need for different commercial arrangements. Yet, the Petition without regard to regional differences and unique operational challenges seeks to impose its overly-broad and statutorily unsupportable rules on all MTOs and carriers throughout the Nation. Notwithstanding the obvious legal flaw in ascribing all financial risk for port congestion or delay, no matter what the cause, on MTOs and ocean carriers, as previously noted, the proposed regulation seeks to limit what costs an MTO or ocean carrier may potentially recover for the failure of a shipper or receiver of cargo in retrieving cargo in a timely manner. *See* Petition, Exhibit A at paragraph (d).

However, there must be a "good reason" for granting relief on a national scale and that the relief sought must be reasonable. *Petition of National Customs Brokers and Forwarders Association of America, Inc. for Rulemaking*, 30 S.R.R. 76, 78 (FMC 2004); *see also Petition of Olympus Growth Fund III, L.P. and Olympus Executive Fund, L.P. for Declaratory Order, Rulemaking or Other Relief*, 31 S.R.R. 718, 724 (FMC 2009) (Petition rejected as unsupported by an adequate factual basis to justify a rulemaking or the adoption of broad regulatory relief on a national scale). The Petition, inclusive of its supporting declarations, fails to establish that there is a "good reason" for granting the relief sought on a regional let alone "on a national scale."

A petition for a rulemaking must be supported by facts and data "so as to convince the Commission of the need for broad regulatory relief." *Petition of Olympus Growth Fund III, L.P.*, 31 S.R.R. at 724, citing *Marine Terminal Tariff Provisions Regarding Liability of Vessel Agents*, 27 S.R.R. 611, 614 (FMC 1996). A petition will be denied that lacks the necessary support to grant "relief on a nationwide scale" and when a petitioner has not provided "evidence of pervasive conditions requiring a broad rule of applicability." *Id.* That is the situation with the Petition at issue.

While the Petition attempts to tar marine terminal operators throughout the Nation with the same brush based on trade press accounts of regional delays and port congestion occurring in 2014 and 2015, it fails to provide the requisite quantifiable factual showing to warrant the requested relief on a national scale. *See Petition of Bi-State Motor Carriers, Inc. to Investigate Truck Detention Practices of the New York Terminal Conference at the New York/New Jersey Port District* (P3-02) (February 20, 2004) (rejecting petition based on pre-containerization regulations supported by newspaper articles regarding port congestion). The verified statements that accompany the Petition fail to rehabilitate this fatal flaw. The comments submitted by NAWE and the WSC provide a detailed analysis of the deficiencies in the supporting declarations.

Remarkably absent from the Petition is recognition that cargo interests have a great deal of control over the supply chain. Cargo interests can pick and choose the ports, ocean carriers, marine terminals and inland carriers they utilize for the arrival and departure of their cargo. If cargo interests fail to exercise their choice in selecting carriers who offer more favorable demurrage or detention terms or service levels, that is a commercial choice and not a reason for government intervention into commercial relationships. The FMC has noted that shippers have

the leverage to negotiate for more free days and lower demurrage and detention rates through confidential service contracts or through pressuring carriers to change their tariffs. *See FMC Report* at 25.

The Petition and the verified statements attempt to link limited and unique regional circumstances such as the labor situation on the West Coast and severe weather in the Northeast in late 2014 and early 2015 as determinative factors supporting the Petition. However, as articulated by NAWE, "unique episodic conditions do not justify a blanket, broad-brush policy on demurrage charges…congestion is almost always the result of unique circumstances (labor dispute, unusually bad weather) and is almost always limited in duration and geographic scope." *See Reply of the National Association of Waterfront Employers* at 10. The Petition does not mention congestion at other regional ports or congestion-causing events outside the limited 2014-2015 time period. The PAMTOA is not aware of substantial, on-going congestion or systematic problems having occurred at any U.S. ports during 2016. Moreover, the Petition fails to recognize any of the regional commercial solutions being offered to shippers and receivers some of which have been described in this reply.

Curiously, while the Petition is laden with references to the West Coast labor situation of 2014 and 2015, there are no references to the considerable efforts of both longshore labor and management on both the West and East and Gulf Coasts to begin labor negotiations well in advance of contract expirations to avoid uncertainty for cargo interests. *See* Jennifer Smith, *Longshore Union, Employers Seek Early Pact at U.S. East Coast Ports*, Wall St. Jour., February 16, 2017, available at https://www.wsj.com/articles/longshore-union-employers-seek-early-pact-at-u-s-east-coast-ports-1487275920; *see also* Bill Mongelluzzo, *ILWU, PMA to Soon Consider Contract Extension*, Jour. of Comm., September 27, 2016, available at http://www.joc.com/port-

news/longshoreman-labor/international-longshore-and-warehouse-union/ilwu-pma-soon-consider-contract-extension_20160927.html.

In light of this, a rulemaking applicable nationwide is an unnecessary overreaction to the extraordinary factual circumstances identified in the Petition and verified statements.

C. The Present Regulatory Framework Provides Adequate Remedies

The Petition seeks adoption of a nationwide federal regulation to deal with issues arising from regional port congestion. The PAMTOA asserts and the FMC recognizes that there are several options available to address demurrage and detention issues without additional regulation. *See* FMC Report at 31-36. In view of the many avenues presently available and being pursued that are narrowly-tailored to specific circumstances, the overly-broad regulation sought by the Petition is unnecessary.

Even though the Petition acknowledges that many MTO schedules and carrier tariffs provide for the extension of free time and the waiver or refund of demurrage or detention charges, Petitioner is still seeking its proposed rule. *See* Petition at 7-8. As admitted by the Petitioner, the proposed rule is simply not necessary to abrogate commercial arrangements that are successfully being accomplished by a substantial portion of the industry. The Petition also imprudently seeks to disrupt the well-established means of dispute resolution for complaints already available. The Commission's Office of Consumer Affairs and Dispute Resolution Services assist in resolving such disputes and aggrieved parties may file complaints with the Commission for conduct that violates the Shipping Act.

Given the many forms of recourse and resolution already available including FMC dispute resolution mechanisms and commercial solutions, a rulemaking on this issue is not necessary. If the Commission determines that some action is required with respect to this issue,

it should be accomplished through cooperation among stakeholders such as recommended best practices from the Commission's Supply Chain Innovation Teams, the Department of Transportation's FAST Act Port Performance Freight Statistics Working Group and regional groups such as the CPP, rather than through regulation.

D. The Proposed Rule Will Not Remedy The Situation It Seeks To Address But Will Create Confusion, Undue Agency Action, And Exacerbate Congestion

Contrary to the stated purposes of the Shipping Act, the proposed rule would discriminate against MTOs and ocean carriers by arbitrarily, and without factual analysis or support, allocating all risk for delays on the MTO or ocean carrier. This is in contrast to permitting some of that risk to be assigned through commercial agreement to the shipper, receiver, or motor carrier. Such a regulation cannot be considered non-discriminatory. If a shipper is unable to pick up cargo because of a problem beyond its control at a distribution center or warehouse, or a problem with an agent of the shipper, or a highway closure, the MTO or carrier should not be required to absorb the demurrage.

Thus, the proposed rule would increase, rather than minimize, government intervention and regulatory costs by raising the number of disputes that would result in litigation over demurrage and detention issues. This would dramatically increase the case-load burden of the administrative law judges at the FMC and exponentially increase government intervention and regulatory costs.

The Petition is contrary to well-established current law and will create confusion. For example, the proposed rule would preclude marine terminals and carriers from assessing demurrage for *any* reason beyond the control of the shipper, including Customs inspections. *See* Petition at 31-32; 39. Yet the Commission has held that it is reasonable to apply charges to

cargo that exceeds free time as a result of a Customs inspection. *Free Time and Demurrage Charges at New York,* 3 U.S.M.C. 89, 96 (1948).

In addition, the proposed rule would prohibit assessing charges when the disability which prevents cargo interests from picking up cargo or delivery equipment starts after free time ends. *See* Petition at 37. This is also contrary to well-established law holding that the assessment of charges is lawful under such circumstances. *Boston Shipping Ass'n, v. Port of Boston Marine Terminal Ass'n,* 10 F.M.C. 409, 417-18 (1967) ("Once free time has expired, the vessel's transportation obligation has ended."). Rather than being a "clarification" of a statutory provision, the Petition seeks an impermissible expansion and substantive change of existing law.

The Petition is based on the unsubstantiated assertion that the proposed rule would incentivize terminals and carriers to reduce future delays and congestion. This is not true as the proposed rule is merely a cost avoidance mechanism and MTOs and carriers are already highly motivated to reduce delays and congestion. As noted, the proposed rule seeks to shift financial risk to MTOs and carriers for delay even when the delay is not the responsibility of or within the control of the MTO or carrier. *See* Petition, Exhibit A, paragraph (d). Since there is nothing these entities could do to prevent such events, there is no attendant impact on delays or congestion. Hence the purported incentive to reduce port congestion supporting the Petition is illusionary.

It is instructive to consider examples provided by NAWE of events beyond the control of a shipper or a MTO or carrier, which could prevent the shipper from picking up cargo when the MTO is ready, willing and able to make it available that demonstrates the faulty logic of the proposed regulation. For example:

- the customer of the receiver has gone bankrupt and the receiver must find an alternate buyer of the goods being imported;

- the warehouse used by the receiver to store the goods is unable to accept the goods;
- the container is discovered to be overweight and the receiver needs to make arrangements for an alternate means of transport or for a special overweight permit;
- the goods in question cannot clear Customs because they are subject to a quota which has been filled, and arrangements must be made for storage in a duly authorized facility; and
- the receiver is unable to pick up the goods because a protest (*e.g.*, "Occupy Oakland") is blocking access to the port.

See Reply of the National Association of Waterfront Employers at 19. The Petition does not address such or similar scenarios or explain why the MTO should absorb the financial risk for the failure of a shipper or receiver to timely retrieve cargo. The proposed rule would likely exacerbate congestion because it would eliminate the incentive to retrieve cargo during the free time period causing cargo interests to treat marine terminals as storage facilities.

At best, the Petition is short-sighted and does not project beyond seeking exoneration from all risk for the failure to timely retrieve cargo. At worst, the proposed rule would create confusion regarding the definition of the term "disability" and what other non-enumerated events would constitute a disability. Notwithstanding this deficiency, the proposed rule also relies on the phrase "including but not limited to" as a catchall, which suggests that there are other events not enumerated in the proposed rule, which cargo interests could assert would constitute a disability. There is nothing in the rule that provides any guidance on how a marine terminal would know that a failure to retrieve cargo was due to a disability requiring relief or applicable burdens of proof in adjudicating inevitable disputes. Most significantly, the proposed rule does not explain how the "costs" identified in paragraph (d) would be defined.

It is clear that serious consequences would result if such a rule was adopted. The administrative burden and expense of addressing these new issues would be massive and prohibitive for marine terminal operators, carriers, their customers, as well as the Commission.

V.

Closing Statement

As the Commission knows, MTOs in the PONYNJ and throughout the country have collectively invested billions of dollars in enhancements to their facilities in order to efficiently service the larger containerships and to improve landside service. Port Authorities have also invested billions in building infrastructure to permit accessible waterside and landside port access. These ports and terminals are fixed in their locations and cannot move. In order to realize a return on their investments these terminals must provide the level of service that satisfies the needs of their ocean carrier customers. In serving the needs of their customers they must ensure the efficient operations of their terminals on both the water and land sides. Because customers can exercise choice if a terminal's service is not sufficient, MTOs are highly motivated to service port draymen in a time-effective manner and to clear their terminals of congestion-causing containers. Contrary to the assertions in the Petition, demurrage does not fully compensate a marine terminal operator for operational efficiencies lost and enhanced costs resulting from terminal congestion.

The Petition is not offering solutions to the challenges of port congestion and delays; it is just a cost-shifting measure that will in fact exacerbate the problem. Such a proposed rule will remove any incentives on the part of cargo interests and port draymen to retrieve cargo and return equipment in a timely manner. The Petition does not realistically address the nuanced problems that the Commission is tackling as it simply seeks to insulate the Petitioners from financial risks and responsibility for their role in the supply chain. In essence, Petitioner is treating the precious real estate of marine terminals as extended-use storage facilities, except they do not want to pay for the usage. MTOs are entitled to just compensation for providing this

storage and the attendant costs involved with stacking and repositioning containers that have over stayed free time in the yard. As the FMC has noted, landside productivity consequently declines when equipment operators have to move multiple containers to access the desired container. *See FMC Report* at 21. The complained of demurrage does not compensate a terminal for the exponential productivity impact of the failure to timely retrieve containers and this conduct should not be rewarded with regulatory exoneration.

For the reasons cited herein, the Commission should deny the Petition and continue its efforts in addressing port congestion and delays by fostering commercial solutions.

Respectfully submitted,

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