Raymer McQuiston
General Counsel
(732) 635- 3835

VIA UPS OVERNIGHT AND EMAIL

February 28, 2017

Ms. Rachel E. Dickon
Assistant Secretary
Federal Maritime Commission
800 North Capitol Street NW
Washington DC 20573-0001

Re: Petition No. P4-16

Dear Assistant Secretary Dickon:

Ports America ("PA") is a U.S. company headquartered in Jersey City, New Jersey. We are the largest marine terminal operator ("MTO") and stevedore in the U.S., serving 18 port authorities at 42 ports with more than 80 service locations. Our combined workforce represents approximately 35 percent of the total U.S. marine terminals payroll. We are a diverse business with container, ro-ro, breakbulk, bulk, project cargo, intermodal, and cruise terminal services. We manage the unique needs of our customers with varied service offerings through 17 publicly-available marine terminal operator schedules, each of which can be found on our website. These various schedules represent diversity across the industry, and assist us in accommodating our customers' unique supply chain demands.

Each port and each terminal facility has unique circumstances with respect to demurrage and other transportation issues and requirements, just as virtually each shipper and trucker has individual practices that materially affect shipping efficiencies, positively and negatively. As a service provider, we recognize that long term success requires us to be active and listen to stakeholders, so we may all improve. With that perspective, PA is always ready to participate with its communities, regulators, and customers to improve its presence and capabilities. We actively participate in the Federal Maritime Commission's ("Commission") supply chain teams ("SCTs"), and we look forward to implementing solutions developed by the teams and the Commission.

In contrast to the cooperative spirit and collective efforts of the SCTs, and the Commission's Order Regarding International Ocean Transportation Supply Chain Engagement, 81 Fed. Reg. 6263 (Feb. 5, 2016) (the "Order"), the December 7, 2016, Petition For Rulemaking Submitted by the Coalition

for Fair Port Practices, FMC Docket P4-16 ("Petition") undercuts the Commission's objective of promoting industry cooperation to improve supply chain efficiency. The Petitioners use inaccurate references and inapplicable anecdotes to try to justify setting aside a century of market-based establishment of shipper free time allowances, arm's length negotiated contract demurrage risk allocations, and cost management practices under existing regulations (which have not led to any prior litigated disputes). Petitioners favor of a Commission-mandated "one-size-fits-all" arrangement which cannot possibly account for the unique business circumstances in every carrier-shipper relationship at every location.

It is also important to note that well over three-fourths of all US-foreign liner cargo now moves under freely-negotiated service contracts regulated by and filed with the Commission. These contracts, which generally contain demurrage charge arrangements and often contain negotiated free time allowances, are arm's length agreements negotiated between carriers and larger shippers with equivalent bargaining power. Thus for the preponderance of trade which the Petitioners want to subject to a forced uniform rule, the industry parties have already negotiated a market-based solution.

Petitioners' approach also ignores some of the Petitioners' own behavior, *i.e.*, those who have an economic advantage to negotiate favorable specialized demurrage and free time terms and conditions with their carriers. Notwithstanding those situations, the Petitioners seek to push the otherwise contract-managed risks and costs onto marine terminal operators (MTO) through regulatory fiat. With the same inaccuracies and incomplete references, Petitioners also seek, in part, to legitimize the inefficiencies of shippers' using the terminal as an *ad hoc* inventory storage facility. In the end, the Petitioners' proposal would erode and interfere with the market-driven allowances and contract risk-allocation mechanisms used around the world to encourage efficient terminal use.

In contrast, PA supports the SCTs and the candid solution-oriented conversations the Commission has encouraged. For these reasons and with the explanations below, we encourage the Commission to deny the Petitioners' request, and redirect their efforts to the cooperative and confidential SCT discussions.

I. The Commission Order, the Petition, and the U.S. Shipping Act

The Commission has already considered the issues and examples raised by the Petition, and taken appropriate action. On February 1, 2016, the Commission issued the Order, which appropriately noted that the "purposes of the Shipping Act include . . . 'provid[ing] an efficient and economic transportation system in the ocean commerce of the United States that is, insofar as possible, in harmony with, and responsive to, international shipping practices,' and also 'to promote the growth and development of United States exports through competitive and efficient ocean transportation and by placing a greater reliance on the marketplace.'" Having considered the relevant facts and industry stakeholders' positions and the needs of the nation, the Commission appropriately decided to issue the Order to form the SCTs and engage the industry to solve problems in a confidential, cooperative, and candid manner, favoring greater reliance on marketplace solutions, rather than initiating an adversarial rulemaking that would unnecessarily interfere with freedom of contract, upset existing market-based solutions, create unintended unfair advantages, and foster an awkward, hostile environment not likely to solve any of the perceived problems.

As the Commission observed and documented in the Order, non-public industry discussions are appropriate and authorized. The Commission even notes on its website that "[e]ngagement in [solving the nation's problems] will depend on the willingness of all parties to share information and views fully and candidly. In that regard, confidentiality of discussions is critical." In sharp contrast, the Petition is gamesmanship that is likely to frustrate the Commission's and industry efforts. The Petition does not inform the Commission of anything new that the Commission has not already considered. This reason alone is sufficient for the Commission to deny the Petition and re-direct the Petitioners back to the SCTs for discussions consistent with the Order.

Furthermore, while the Petition suggests an industry rampant with inequities and violations of the U.S. Shipping Act (the "Act"), it does not reference even a single violation or a single filed complaint or enforcement action attempting to prove a violation based on a real-world fact situation, or asking the Commission to grant the relief the Petition outlines. PA reviewed the Commission's docket for the last three years (2014-16), and we did not find a single complaint that could be categorized as within the allegations and characterizations provided in the Petition. The Petition completely ignores this lack of historical evidence. It likewise disregards the many apparent sources for delays and demurrage that often arise from shipper and inland carrier practices, seeking a generic solution that does not address these contributing causes. But most of all, the Petition is a distraction that seeks to have the Commission take sides with a broad "policy" statement that would arbitrarily shift operating costs and economics without considering the many radically differing individual situations in which such a rule could be applied – all premised on a Petition that does not present evidence of a single violation of the Act.

II. Industry Relationships

To understand better the inappropriateness of the Petition, it is important to understand the industry relationships in detail. The Commission Report: Rules, Rates, and Practices Relating to Detention, Demurrage, and Free Time for Containerized Imports and Exports Moving Through Selected United States Ports, dated April 3, 2015 (the "FMC Report"), provides the necessary background. In PA's case, we may provide any number of MTO and related services to our customers, depending on the customer and the location's specific requirements. In some locations, we may provide labor to an operating port, while we may retain the rights to operate a terminal in another port. The services and situations are as unique as the number of ports and terminals and cargo interests. Generally, however, PA is the intermediate service provider in the string of transportation and logistics relationships. We are typically operating on instructions from a carrier or cargo interest.

Carriers negotiate the terms of services they provide to their customers, and cargo interests control the negotiations with the carriers over the terms of their service agreements. PA is in the middle and acts a temporary storage location to facilitate cargo loading and unloading and equipment cycling and distribution. When other participants in the supply chain are inefficient, PA is often the stakeholder left absorbing costs and risks. Even so, PA acknowledges that the current arrangements are usually contractual relationships with varying degrees of complexity, and we know that the industry cannot be simplified to uniform "practices" that can be neatly defined and uniformly and rigidly applied by interpretive policy. The Commission's legislative mandate and policies require due regard for the uniqueness of each location, provider, service, and cargo interests, all of which are also subject to the various stakeholders' ability to enter into private

contracts and comply with the existing regulatory framework. This would include members of the Petitioner class who actively negotiate special and different treatment that would not fit within the Petition's stated policy. The industry stakeholders' relationships are clearly managed – in part – by a mix of provider choice, international and domestic law, and private contract. The Petition does not cite a single inappropriate response among the contractual relationships or provide the Commission with any unintended result from the existing regulatory regime that logically warrants a rulemaking.

III. Deceptive Anecdotal Examples

The Petition references congestion, framing the industry, and MTOs, as having some unfair advantage in the free market, but does not cite a single breach of contract, Shipping Act violation or enforcement action, or otherwise provide any new data to support its position. The Petition acknowledges that carriers, MTOs and ports through their schedules and agreements, provide appropriate methodologies for managing delays and congestion. The Petition cites the Commission's prior observations and specific examples regarding stakeholders appropriately managing demurrage issues. Additionally, many of the comments filed in support of the Petition actually contradict the Petitioners' rulemaking requests by specifically asking that the Commission not undertake any additional regulation. The confused presentation of arguments and examples masks the real basis of the Petition, *i.e.*, the Petitioners want the Commission to override private contract negotiation with a rigid regulation and to provide cargo interests with a new artificial advantage in marketplace discussions. This presentation is not sufficient to warrant a rulemaking or other Commission action, and it certainly does not align with the SCTs' efforts and discussions.

The risks such as congestion associated with each of the examples cited by the Petitioners are either covered by federal law (*e.g.*, bankruptcy) or subject to private contract (*e.g.*, provisions dealing with weather as a *force majeure* condition). The existing contractual relationships between cargo interests, carriers and MTOs fairly address these issues without the need for more policy that tips the balance in favor of the Petitioners. In most situations, the cargo interests have absolute control over selecting their service providers and negotiating for services with those providers, including the ability to obtain contractual key performance indicators or other service level metrics. Cargo interests who apparently lack the ability to negotiate specific terms may still choose another provider or another carrier alliance offering different terms. Additionally, the cargo interests can identify which carrier is part of what alliance and adjust their selection of services accordingly. The Petitioners are not deprived of choices. An MTO like PA, on the other hand, bears the costs of operating the terminal and providing temporary storage implementing the transport and logistics agreements between carriers and cargo interests, and should not be deprived artificially of the right to negotiate fair solutions. These anecdotal examples were and are accounted for in existing contractual relationships among the stakeholders, and do not demonstrate anything new or contrary to the Act that requires additional regulation.

A. Weather

On occasion, weather interferes with terminal operations, and in such cases, the terminals make every effort to ensure customers are treated fairly and consistently with the terms of the MTO schedule and any applicable agreements. The Petition references both Superstorm Sandy in late 2012 and the severe winter of 2013-14. In both instances, PA acted in good faith to comply with

its MTO legal requirements and the private contractual agreements with its customers, making substantial expenditures to continue and resume terminal operations as soon as possible following these *force majeure* occurrences. In the aftermath of Sandy, Port Newark Container Terminal was originally inundated beneath four feet of water. Nevertheless, PA's operator, PNCT, was able to deploy $10M in funding immediately to obtain new equipment and managed to get the gates reopened in only four days. This response was unprecedented and exceeded our competitors' response times considerably. Likewise in the 2013 winter storm, PA expended $3M for the cost of snow removal at PNCT and kept the container facility fully operational. and These situations illustrate the unfairness and impracticality of artificially forcing the MTO to absorb all costs of a force majeure event.

In most instances, weather causes very few days of schedule dislocations. Weather related disruptions are routinely managed by carriers, ports, and MTOs under their existing contracts and schedules by free time allowances and related rules that cover such contingencies. However, in many instances where demurrage charges arise, if the cargo interests had acted expeditiously throughout the free time period, then the container could have been returned within the free time days before the weather event occurred. Decisions about when to move equipment are beyond the control of carriers, ports, or MTOs.

B. Labor

The Petition also suggests a need for more regulation on labor, mentioning port congestion in 2014, 2015, and 2016 as examples. Labor issues are generally subject to the same negotiations and considerations as weather, *i.e.*, risk is allocated by the parties. In this context, however, it is entirely unfair and inaccurate to blame any single component of the nation's supply chain for any congestion, including labor and labor related activities. Moreover, the recent congestion examples referenced in the Petition were not nationwide, but affected only certain regions, and were driven, in large part, by the decisions of the cargo interests and other members of the Petitioner class. In many instances they raced to the terminals and jockeyed with their service providers for priority, while also shipping away from congested ports to "premium" alternatives, that eventually become locally congested. The situation was further caused in part or exacerbated by cargo interests using carriers and MTOs as alternative "just in time" inventory warehousing facilities, in lieu of shipping foreseeable volumes on a more regular basis over time in advance of peak season flows to be ready for market responses, or for some other reason economically advantageous to the cargo. Here, again, the Petition makes no specific reference to any violation of the Act or any enforcement action that would support the Petition. Instead, it blames labor, carriers, and MTOs for the congestion, conveniently ignoring Petitioners' own role in causing the congestion, and ignoring the realities.

C. Hanjin Bankruptcy

Finally, the Petition puts the Hanjin bankruptcy at the feet of PA and other MTOs, suggesting that the risks allocated by private contract should be absorbed by those other than the Petitioner class, who also entered private contracts. This first requires the Commission to ignore that the Petitioner class chose to ship with Hanjin – likely due to unsustainable low rates driven by the cargo interests' negotiating power in the marketplace. Even if they initially chose to ship via an alliance partner – Hanjin was still a known alliance member and the information regarding its increasing financial

risks was readily available to the Petitioners when they made their bookings. Having chosen their carrier in hopes of achieving some freight cost savings or network risk dispersion, Petitioners now seek to force other carriers and terminals – who had no upside to gain from their decisions – to mitigate their losses by foregoing demurrage charges.

This suggestion ignores the fact that MTOs and many other stakeholders also suffered tremendous losses and incurred massive additional costs as a direct result of Hanjin's collapse. Again, the Petition does not reference a single violation of the Act or complaint filed with the Commission as a result of the Hanjin situation. Yet it seeks to shift the otherwise contractually-allocated risks to PA and other stakeholders that took extraordinary measures to facilitate cargo flows at their own expense in the wake of the Hanjin disruption. The Hanjin bankruptcy and the related issues are not justification for a rulemaking that artificially shifts risks away from the Petitioner class who made the relevant booking decisions.

IV. Freedom of Contract

Under U.S. law, commercial parties have freedom of contract. Free time allowances have been set for decades by market forces and private agreement – subject to the Commission's existing regulations. The Petition seeks to change this balance and disrupt established practice by limiting or reducing flexibility in the marketplace, which will shift the risks and costs to PA and other MTOs. If the Commission were to step in and force parties to change this practice, it not only would interfere with the stakeholders' freedom of contract, a basic principle of U.S. law and free commerce, but also would artificially push costs in one direction against the MTOs contrary to the equilibrium established over many years by regulated market conditions. As we note below, this will result in undesired collateral results with increased costs and decreased efficiency.

V. Efficiency Incentives

A terminal is only as efficient as its ability to move containers, and efficiency is the key to being a successful terminal and successful supply chain intermediary. Demurrage is one of the international transportation and logistics industry's tools used to encourage efficiency among those who use equipment and terminal space. The Petition seeks to replace the adaptable mix of negotiated private contracts regulated by the Commission under the Act with a rigid policy, which will erode the efficiency incentives of demurrage in a manner inconsistent with international practices. This will lead to artificial realignment of terminal logistics and management practices designed to cope with a regulatory burdens rather than designing practices best suited toward efficient cargo flows and optimal equipment utilization at the specific port and terminal and with the specific carrier and cargo interests. In turn, this will produce more congestion and more disputes, and will eventually increase costs for cargo interests. Concurrently, it will decrease efficiencies and move the U.S. away from standardized international practices and the adaptability of private contract and the Act.

VI. Opportunity to Remove

With the free time allowance and related risks allocated by agreement, MTOs and carriers provide ample opportunity to remove or return containers. The opportunities within any particular system

are numerous. PA and other U.S. terminals enable the Petitioner class to arrange for the pickup or return of containers.

The Commission should also take note of the Petitioner class' own conduct more recently. For the New Year 2017 holiday period, an MTO in the Port of New York and New Jersey offered to provide additional gate hours and remain open, so the cargo interests would have additional pickup opportunities to mitigate congestion risk by moving containers on a predictably light-traffic day. Ironically – roughly one week after submitting this Petition – members of the Petitioner class complained about the MTO providing opportunities to remove or return containers in response to the then existing volume, *i.e.*, the MTO was responding in real time to the supply chain needs and members of the Petitioner class complained. (Hugh R. Morley, Truckers Urge NY-NJ Terminal to Stay Closed Jan. 2, *Journal of Commerce*, December 21, 2016) This inconsistent message and contrarian behavior is in sharp contrast to the positions taken in the Petition. It is clear that the Petition is regulatory gamesmanship rather than a legitimate proposal to solve real problems. The Commission should not indulge the Petitioners by overriding longstanding negotiated arrangements and market-driven solutions with an artificial shift of costs in their favor.

VII. Conclusion

The Petition does not offer the Commission anything useful, new or different from its original analysis that led to the Order. It offers over-dramatized allegations, but tellingly, does not reference a single filed complaint or historical violation of the Act. Granting this Petition would undermine the Commission's discussions and collaborative SCTs' efforts that are much more likely to serve the national interests and the differing individual situations.

As of this drafting, the Commission has received various comments from individual members of the Petitioner class, and a substantial number – including many from parties seemingly in the Petitioner class – notably emphasize that the Commission does not need any additional regulations. PA agrees. The Commission should reject the Petition and redirect efforts to the supply chain teams.

Should the Commission need any additional information or have specific questions, please feel free to contact me via email at Ray.McQuiston@PortsAmerica.com.

Sincerely yours,

Raymer McQuiston
General Counsel