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 SUSTAINABLE SERVICES AGREEMENT

The Port of NY/NJ Sustainable Services Agreement ("PONYNJSSA"), FMC Agreement No. 201175, 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 It seeks to resurrect archaic rules promulgated under a statutory regime that has long been superseded by an amended statute enacted to respond to contemporary issues raised by containerization and the globalization of the supply chain that containerization has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 PONYNJSSA urges the Commission to deny the Petition.

I.

Interest of the Agreement

The PONYNJSSA is a marine terminal conference and its members 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 PONYNJSSA 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 PONYNJSSA

The members of the PONYNJSSA oppose the Petition that purports to shift to MTOs the legal, operational and financial risk for port congestion or delay, such risks are otherwise best addressed through commercial arrangements. The PONYNJSSA became effective on December 6, 2007. The purpose of the PONYNJSSA 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 PONYNJ. The members of the PONYNJSSA are the six container terminal operators in the PONYNJ.

During the term of the PONYNJSSA, 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 September of 2015, through a nonprofit corporation created under the authority of the PONYNJSSA, a port-wide information portal system known commercially as the Terminal

Information Portal System ("TIPS") was made available to port stakeholders without cost to provide cargo interests and the motor carrier community a one-stop on-line tool to assist them in managing their business in the port.

TIPS was the first-of-its-kind information system designed to enhance terminal efficiencies by reducing uncertainty regarding container availability and unnecessary "trouble ticket" transactions. While the Petition is based on the faulty premise that all matters attendant with port delays are "beyond the control of the shipper, receiver, or drayage provider," in fact shippers, receivers, and drayage providers exercise a great deal of control and do not necessarily utilize tools provided by terminal operators in general and the members of the PONYNJSSA in particular to hasten terminal transactions. Often drayage providers dispatch truckers to marine terminals before containers are available for pick-up or without ensuring that outstanding charges have been paid and necessary releases issued. Utilizing TIPS would prevent these unnecessary trips or delays. The Port Authority of New York and Jersey has reported that "seven of the top 10 causes of trouble tickets in the PONYNJ can be avoided by checking TIPS in advance."[1] In addition to general information regarding port wide matters and terminal-specific announcements regarding special conditions or changed operating hours, TIPS provides information about container availability and location, regulatory holds, any charges or demurrage as well as the status of free time. The United States Department of Commerce has singled out TIPS as one of its "Best Practices" for improving the Nation's competitiveness.[2]

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[1] Alan M. Field, *Port of New York and New Jersey Inaugurates the TIPS System* (September 2015) at 4 available at https://www.panynj.gov/port/pdf/JoC_WP-NYNJ0915-v3.pdf.

[2] *Improving American Competitiveness: Best Practices by U.S. Port Communities*, 21st Century U.S. Port Competiveness Initiative, U.S. Department of Commerce, December 2016 at 12, available at

The example of TIPS should be noted because TIPS was implemented by MTOs not as the product of government regulation but as a commercial solution created with input provided by cargo interests and the port drayage community. TIPS has been well-received, which has prompted the members of the PONYNJSSA to work with its system developers to enhance its information capabilities. Projects like TIPS are consistent with the mission of FMC and efforts of the Commissioners in encouraging commercial solutions to supply chain challenges. TIPS, which is now being followed by other regional information portals, is consistent with the notion of a nationwide information portal being considered by Supply Chain Innovations Teams project authorized by the Commission and spearheaded by Commissioner Dye.

Under the PONYNJSSA, members discuss challenges presented by port and terminal congestion and potential remediating measures. In addition to TIPS, the PONYNJSSA has implemented a RFID-based truck identification system that was also designed to hasten gate operations at member terminals. Another such measure to hasten gate time at the terminal that has been explored by agreement members and recently implemented by one member terminal is a truck reservation system. While this system has been in effect for a short period of time at this particular terminal, dramatic performance enhancements have been reported. Cargo interests and draymen that may have in the past been reluctant to embrace this new paradigm have articulated a positive response to this new protocol for terminal access. However, changing behaviors is not something that can be achieved overnight and terminal operators are proceeding carefully to implement measures, including truck reservations systems, in a way that does not cause unintended congestion resulting from cargo interests that do not make reservations and fail to retrieve their cargo within their allotted free time.

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http://trade.gov/td/services/oscpb/supplychain/acscc/resources/documents/USDOCBestPracticesByUSPortCommunitiesReportFINAL2017.pdf.

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 working groups. Inasmuch as MTOs in the PONYNJ and 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 has 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.A. §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 must under current law because the Commission lacks the statutory authority to dictate the level of rates and charges assessed, it certainly does not have the authority to adopt a rule that in essence dictates 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 at ports 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 also 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. As previously noted by the FMC, 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 factors supporting the Petition. However, as articulated by NAWE, "[u]nique 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 PONYNJSSA 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 regulation to deal with issues arising from regional port congestion. The PONYNJSSA 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 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 free time 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 overwhelming and unduly burdensome for MTOs, 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. These 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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