Before the

Federal Maritime Commission

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Petition P4-16

Petition of the Coalition for Fair Port Practices for Rulemaking

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Response and Opposition of the World Shipping Council to Petitioners' Petition for Leave to Supplement the Record

April 6, 2017

The World Shipping Council (WSC), pursuant to 46 C.F.R. § 502.69(f), files this response to Petitioners' "Petition for Leave to Supplement the Record" in Petition P4-16. For the reasons stated below, WSC urges the Commission to deny the Petition to Supplement and to strike the 19-page "Exhibit A" that contains a second attempt by Petitioners to make the case that they failed to make in the original Petition.

The Petition to Supplement is procedurally deficient. Petitioners cite 46 C.F.R § 502.69(a) as the basis for their filing. However, section 502.69(a) applies to adjudications, not rulemaking proceedings. Rulemakings are governed by the Commission's rules at sections 502.51 to 502.57. Section 502.53(a) states that: "No replies to the written submissions will be allowed unless, because of the nature of the proceeding, the Commission indicates that replies would be necessary or desirable for the formulation of a just and reasonable rule. . . ." Thus, the Petition to Supplement is not authorized by the Commission rule that the Petitioners invoke, and is invalid for that reason. Similarly, the Petition to Supplement would be strongly disfavored even if it had been filed under the correct rule.

In the event that the Commission deems the Petition to Supplement as being permissible under the final sentence of 46 C.F.R § 502.69(a), then the Petition is a non-dispositive motion pursuant to 502.69(g), and the duty to confer under 502.71(a) applies. Petitioners' counsel did not confer with WSC before filing, and the Petition is thus deficient for that reason as well. In addition, the Petition to Supplement, with its 19-page "Exhibit" of supplemental legal argument in support of its original 48-page (plus appendices) Petition, violates at least the spirit, and likely also the letter of 502.71(d), which imposes a ten page limit on motions. The 19 pages of self-described "Supplemental Comments" are not "exhibits or appendices" in any recognized sense within the meaning of 46 C.F.R. § 502.71(d). They are instead simply an expansion of the legal arguments that are summarized in the first five pages of the Petition to Supplement. The pleading should be stricken for violating the page limit.

Finally as a procedural matter, the Petition to Supplement and its "Exhibit" contradict one another as to the stated purpose of the filing. Page 1 of the Petition to Supplement states that: "These Supplemental Comments are being submitted for the sole and limited purpose of clarifying and correcting the record in this proceeding." Such a characterization suggests that the Supplemental Comments would address factual issues or misunderstandings. They do not. Instead, the comments consist almost entirely of legal argument on issues that were either already addressed by the original Petition or that were reasonably foreseeable but that Petitioners chose not to address in the original Petition. The Commission should not encourage unauthorized submissions that amount to a second bite at the apple. Allowing such filings invites "sandbagging" and a resulting expansion in the number of submissions filed. Petitioners in Commission proceedings have the burden of persuasion, and they should be encouraged to make their case at the outset.

For all of the reasons stated above, WSC urges the Commission to deny the Petition to Supplement and to strike the Supplemental Comments from the record. In the event that the Commission denies the Petition to Supplement and strikes Petitioners' Supplemental Comments, WSC consents to having the Commission also strike WSC's substantive response, which begins on page 3 of this document.

The Petition to Supplement, contrary to its stated purpose of "clarifying and correcting the record," in fact mischaracterizes the arguments made by WSC and obfuscates the real issues before the Commission. WSC will not here repeat the arguments that it made in its response to the original Petition. Instead, we briefly respond to those statements in the Petition to Supplement that pose the greatest risk to a clear understanding of the issues before the Commission.

1. The Petition to Supplement and Supplemental Comments Mischaracterize WSC's Argument Regarding the Scope of the Commission's Authority.

The Supplemental Comments state that "WSC and NAWE incorrectly claim that the Commission lacks the legal authority to issue a policy statement interpreting Section 10(d)(1) of the Shipping Act of 1984 (currently codified at 46 U.S.C. § 41102(c)) with respect to demurrage and detention practices." *Supplemental Comments* at 3. WSC claims no such thing. The Commission clearly has authority to issue a policy statement. The problem here is not with the Commission's authority with respect to policy statements, but rather with the fact that the Petition seeks Commission action that would be a substantive rule, not a policy statement. Moreover, however characterized, the relief requested seeks Commission action that is beyond the agency's statutory authority.

Petitioners' proposed "policy statement," set forth at Exhibit A to the original Petition, describes detailed factual scenarios for which Petitioners seek a Commission declaration that collection of detention and demurrage charges or failure to extend free time would contravene 46 U.S.C. § 41102(c). The effect of the adoption of such detailed "guidance" would be the prescription of what marine terminal operators and carriers may and may not adopt as detention and demurrage rules. In other words, the reality of what the Petition asks for – as opposed to the label that Petitioners give to that relief – is that the Petition seeks substantive and detailed regulation of detention and demurrage.

As is the case with respect to the Commission's authority to issue a true "policy statement," WSC does not argue that the Commission lacks the authority to issue any regulations regarding detention and demurrage. What the Commission does not have the authority to do, however, is to issue a regulation that contains the vast majority of the substantive relief requested by the Petitioners. Specifically, as Petitioners necessarily concede, the 1984 Act did not carry forward the 1916 Act's authority either for the Commission to regulate rates or for the Commission to prescribe specific regulations and practices with respect to the receiving, handling, storing or delivery of property. The problem here is that most of what Petitioners seek would in fact constitute either rate setting or the prescription of very specific rules for detention and demurrage practices.

With respect to the fact the Commission has not had ratemaking authority in many years, a key feature of the Petition's requested relief (paragraph (d) of Exhibit A to the original Petition) is that only "compensatory" (as opposed to "penal") charges could be imposed in specific

circumstances. Making such a distinction would require the Commission to adjudicate factually complex questions regarding terminal and carrier operating cost structures and reasonable returns on investment. That process would be classic ratemaking, which the Commission does not have the statutory authority to do. This would be a very different kind of inquiry than the port/MTO discrimination cases cited at page 6 of the Supplemental Comments. Those cited cases turn on whether there are legitimate "transportation factors" to justify different arrangements for different MTOs in the same port, subject to substantial business discretion by port authorities. The difference between that analysis and what the Commission would have to do under Petitioners' proposed detention and demurrage pricing regime could not be more stark.

On the question of whether the requested relief would, if adopted, constitute a substantive regulation as opposed to a policy statement, we will not repeat the extensive discussion of the issue from our original response. We do wish to make two points, however.

First, the Commission must look beyond labels to the substance of what Petitioners are asking the Commission to do. The rules proposed in Exhibit A to the original Petition are both detailed and extensive, and those proposed rules would substantively change current law in several ways. For example:

- The proposed rules would make carriers and MTOs responsible for delays associated with government inspections of cargo. The Commission has rejected that proposal before.
- The proposed rules would make carriers and MTOs responsible for a shipper's failure to pick up cargo even after free time had expired. The Commission has rejected that proposal before.
- The proposed rules would look only to the cargo interest or trucker's "fault," with no regard to whether the MTO or carrier is equally without "fault." That is an approach that the Commission has never recognized in the past and that would be fraught with serious problems of reasonableness and fairness.

If such requirements were adopted, they would change both the nature of the facts that are relevant under section 41102(c) and also the manner in which those facts would be evaluated. As such, adopting the requested relief would constitute a substantive change to the law.

Second, the Petitioners expressly stated in the original Petition that: "The interpretive rule proposed by Petitioners would essentially revive rules that the Commission had in place for the port of New York for over 40 years." *Petition* at 32. The New York rules were substantive rules adopted through notice and comment rulemaking and subject to judicial review. The Petitioners are saying in unambiguous terms that they want the Commission to resurrect and apply nationally an old substantive regulation, but that the Commission should call the regulation a "policy statement" this time around, presumably because Petitioners believe that such a label would overcome or insulate from judicial review the serious legal issues that such a regulation would raise.

Petitioners' only argument for this facially implausible approach is that they are asking the Commission to adopt anew an expanded version of an old rule, rather than amending that old rule (which could not simply be amended, because it no longer exists). *See Petition to Supplement* at 14-15. The Petitioners state the argument as:

> "*The distinction between adopting and amending a legislative rule is material*. An amendment to a legislative rule must also be legislative in order to have the same binding effect as the original legislative rule being amended. In contrast, citing to a prior legislative rule addressing free time and demurrage practices (and the circumstances resulting in adoption of that rule) to support adoption of the policy statement intended to address similar port congestion circumstances and free time, demurrage and detention practices does not require the policy statement to be a binding legislative rule." *Id*. (emphasis added)

Petitioners cite no authority for their assertion that whether a rule is substantive or not turns on whether a prior rule is being amended or resurrected, and there is none. Petitioners here do not merely "cite" to the Commission's old New York regulations as support; they expressly state that they want the Commission to re-adopt those old legislative rules and apply them to the entire country. In addition, the rules that Petitioners propose are substantially more prescriptive than the old New York rules, and, as discussed above, the proposed rules would alter the equities among affected parties in ways that the Commission has expressly rejected in the past. It is the substance of what is being proposed, not the label, that determines its legal nature.

2. <u>Neither the Petition to Supplement nor the Supplemental Comments Contest WSC's Analysis of the Factual Basis for the Petition</u>.

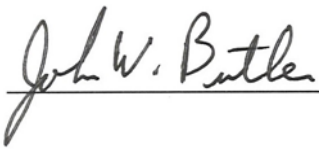
In its February 28, 2017, comments, the Council devoted six pages (pages 10-15) to a detailed analysis of the verified statements that Petitioners offered as the factual basis of their request for relief. The conclusion of that analysis was that the exhibits, both singly and in the aggregate, fail to provide anything close to an adequate factual basis for the Commission to proceed with a rulemaking on this topic.

In their Petition to Supplement and their Supplemental Comments, Petitioners do not attempt to contest WSC's factual analysis and conclusions with respect to the original Petition's fifteen exhibits, thereby conceding WSC's argument that those exhibits fail to constitute a sufficient factual basis for the Commission to proceed. All that Petitioners do in the Supplemental Comments is to cite back to the original Petition and the sources there. However, contrary to the statement in the Petition to Supplement that: "These Supplemental Comments are being submitted for the sole and limited purpose of clarifying and correcting the record in this proceeding," Petitioners offer nothing new about the facts. That failure to make the factual case even in a second-round pleading after having been explicitly challenged on the factual basis for the Petition is fatal to both the original Petition and the Petition to Supplement.

The Petition for Leave to Supplement the Record should be denied, and the proffered Supplemental Comments should be stricken from the record in Petition P4-16.

Respectfully submitted,

The World Shipping Council



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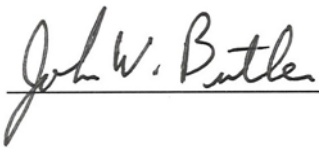
Certificate of Service

I hereby certify that I have this day served the foregoing document on all prior participants in the proceeding as identified in the Commission's service list by mailing and/or emailing a copy to each such participant.

Dated this 6th day of April, 2017.



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