

**UNITED STATES SENATE
COMMITTEE ON COMMERCE, SCIENCE AND TRANSPORTATION**

May 19, 2015

**REPOSSES FOR THE RECORD
CHAIRMAN MARIO CORDERO
FEDERAL MARITIME COMMISSION**

Dear Senator Thune and Committee Members:

Thank you for the opportunity to appear before you on May 6, 2015, and for this opportunity to address the Committee's questions on the FMC's regulations and the impact of service contracts on the ocean transportation community. I recognize the importance of these questions to the Committee, and to the public. These questions address issues currently being reviewed by the FMC staff. The results of that staff effort will be delivered to the Commission, and my fellow Commissioners and I will thoroughly review the regulations and consider potential changes and reforms to the existing regulations. The Commission's deliberative process with respect to the service contracts and non-vessel-operating common carrier service arrangements (NSAs) is likely to begin by the end of the summer, and should be concluded this calendar year. To better address your specific questions, I will respond to each question in turn.

- 1. Chairman Cordero, do you believe that the FMC's regulations surrounding service contract filings are in keeping with the flexibility envisioned by the Ocean Shipping Reform Act of 1998 (OSRA). Some have expressed concern that the requirements are more burdensome and extensive than necessary, and have hampered the ability of shippers and carriers to react to the market as quickly as possible. Specifically, 1) the regulations surrounding contract filings make agreed-upon contracts and amendments effective only upon their date of filing with FMC, not upon the date on which the agreement is reached between the parties, and 2) regulations mandate that cargo cannot be moved under a contract or amendment until the contract or amendment is filed with the FMC. Both of these regulations appear to erect unnecessary roadblocks to carriers' ability to react quickly to market changes, and consequently, are often costly barriers to successful commerce.**

What in fact does the FMC do with these extensive filings, and what actions do you think the agency should take to improve and facilitate the filing process in order to avoid undue delays?

The Ocean Shipping Reform Act of 1998 expanded individual pricing options for shippers and common carriers by, in part, allowing for electronic filing of service contracts, and providing for confidentiality for contractual arrangements filed with the FMC – all in lieu of tariff pricing. Current statutory law provides that an ocean common carrier must provide all of its rates and

charges either in a published tariff or in a confidentially filed service contract, with the publication of certain essential terms. 46 U.S.C. §§ 40501- 40502. The FMC's regulations enable the Commission to accomplish its Congressional mandate for receipt of service contracts to ensure compliance with the Shipping Act, while allowing the industry to make the business arrangements and transactions that best respond to the needs of the shipping public. Regulations, however, can and should be reviewed to ensure that they accomplish their purposes without unduly hampering those regulated. I fully support the FMC's review of its regulations on service contract filing and plan on carefully considering recommendations made as a result of that review.

The FMC receives filed service contracts and amendments as part of its critical mission to protect the U.S. shipping public. The FMC uses filed service contracts and amendments to: (1) provide assistance when appropriate should disputes arise between a shipper and carrier; (2) monitor activities of carriers by reviewing General Rate Increases (GRIs), Peak Season Surcharges and other surcharges or assessorial charges that are filed in vessel-operating common carriers' (VOCCs) tariffs and determining whether or not such charges are implemented through service contracts; (3) determine if the industry is dealing with rate volatility by agreeing to index-linked contracts (ILCs); (4) monitor contracts to determine how bunker costs, one of the carriers' highest, are being recovered; (5) follow contracting practices between VOCCs and beneficial cargo owners (BCOs) that have a long standing relationships; (6) review for compliance regarding such items as the essential terms contained in contracts and the effective date in the actual contract or amendment; (7) review the activities of BCOs and non-vessel-operating common carriers (NVOCCs), including oversight of their Minimum Quantity Commitments; (8) follow certain export rates, such as, for agricultural goods; (9) address inquiries from BCOs and NVOCCs on questions they have pertaining to their contracts; (10) follow up with VOCCs on questionable shipper status in service contracts; and (11) assist in the FMC's mandated enforcement of the Shipping Act. In addition to FMC review, other Federal agencies access and utilize the FMC's service contracts and amendment filings. 46 CFR § 530.4. Currently, the U.S. Agency for International Development (USAID), the Department of Agriculture, and the U.S. Transportation Command (TRANSCOM) access SERVCON to accomplish their missions.

Carriers have indicated that the requirement to file service contracts and amendments prior to moving the cargo may limit their flexibility in reacting to market factors. Through electronic filing of service contracts and amendments, the Commission has made efforts to reduce the filing burden. Through its web services program, the FMC is already taking steps to improve the filing process. Ocean carriers' process thousands of shipments through "auto-rating systems" tied into their contract managements systems. Carriers can minimize their burden by filing amendments directly from their contract management systems through the FMC's automated web services into the Commission's service contract system (SERVCON) without requiring any manual input. A number of carriers are already using this option and have reported that web services have reduced their burden and reduced manual input errors significantly, thereby cutting costs.

Further improvements, such as revising FMC regulations, are done through rulemaking at the Commission level. I am committed to examining at the existing regulations and participating with the full Commission in the deliberation process to fully accomplish the purposes of the Shipping Act and OSRA.

2. In what way, if any, do you believe the efforts of the FMC would be hampered if contracts and amendments became effective when the agreement is reached between the parties, and if carriers were allowed to file these contracts and amendments within some reasonable time after an agreement is reached?

The Shipping Act requires the publication of certain service contract terms. 46 U.S.C. § 40502. The FMC's current regulations require that the terms included in a service contract must not be uncertain, vague, or ambiguous. 46 CFR § 530.8(c). In my opinion, certainty of terms is crucial to a valid, enforceable contract. It is not clear whether a delay in filing service contracts and amendments with the FMC will increase misunderstandings or create a lack of certainty as to what a shipper's total charges and terms would be as its cargo is transported. As identified above, other Federal agencies and parties in labor disputes accessing the FMC's service contract information may also have questions as to whether a service contract or amendment exists, and its applicable terms. It is my hope that the public will file comments during the rulemaking process that will fully address the issue of certainty of terms. Accordingly, I would consider public comments and staff recommendations on this matter in determining whether to adopt any changes to the current regulations in this area.

3. In 2011 the FMC set a schedule for reviewing its regulations. However, perhaps in recognition of the shipping industry's growing concern with the burden imposed by excessive service contract filing regulations, in early 2013 and under your leadership the FMC prioritized the review of service contract regulations, putting them under immediate review, and asked for the shipping industry's input on the reform process?

What is the status of the review of service contract filing regulations? If you are reconfirmed, can we expect definitive regulatory reform with respect to carriers filing service contracts? If so, when?

The Commission is currently reviewing its major regulations pursuant to Executive Orders 13563 (applicable to executive agencies) and 13579 (issued to encourage independent regulatory agencies to pursue the goals stated in Executive Order 13563). The Working Group for the Retrospective Review of Service Contracts and NSAs (Service Contract/NSA Working Group) convened in the fall of 2013 to begin a comprehensive review of FMC regulations in 46 CFR Part 530, Service Contracts, and Part 531, NVOCC Service Arrangements. These two Parts are being reviewed together because Service Contracts and NSAs share many of the same contracting attributes, and both must be filed into the Commission's SERVCON system by the VOCCs and NVOCCs. In addition, VOCCs and NVOCCs are also required to publish the essential terms for each of their contracts in a tariff format.

The Commission prioritized the retrospective review with regard for the concerns of the industry and the importance service contracts to oceanborne commerce. In 2014, not long after the immediate review of service contracts and NSAs was announced, the FMC completed its 2014-2018 Information Resources Management Strategic Plan. A major component of that plan will significantly upgrade our internal IT systems to improve data support for all Commission programs and research projects, as well as providing the technical foundation to simplify stakeholder filing processes.

The Service Contract/NSA Working Group has not submitted its recommendations to the Commission. I have been advised that the group met with numerous stakeholders to receive their views on changes to the Commission's regulations. In the course of those meetings, the Service Contract/NSA Working Group received numerous suggestions, for example, one suggestion is delayed batch filings as to contract amendments albeit on a monthly, rather than a quarterly basis. The Service Contract/NSA Working Group is reviewing the feasibility of such a change from the standpoint of our information technology infrastructure and from a staff resources standpoint. The Service Contract/NSA Working Group has also received, and is assessing, suggestions from some stakeholders that the contract correction process be modified, including the question of changes related to the supporting affidavit required for each service contract or NSA correction.

I have been informed that the staff recommendations of the Service Contract/NSA Working Group will be finalized in the coming months. The staff review will be transmitted to the Commission for potential action through rulemaking. If reconfirmed, I resolve to carefully weigh the input from the Service Contract/NSA Working Group, the industry, and the public, and consider all potential reforms to service contract filing in conjunction with my fellow Commissioners. I remain committed to lessening unnecessary regulatory burdens on regulated entities while allowing the Commission to fulfill its oversight role effectively under the Shipping Act. The Commission will likely issue either an Advanced Notice of Proposed Rulemaking or a Notice of Proposed Rulemaking in order to obtain comments from all interested stakeholders that would be affected by recommended rules changes. The notice seeking comments should be issued this year.

4. Please provide an update on the status of your review of congestion in U.S. ports, and any planned future action relating to your report on this issue.

Modern ports that move the nation's goods are vital to economic growth, increasing jobs, and enhancing the country's ability to compete globally. At the same time, US ports have faced increased congestion and delays that deeply impact both the import and export markets in the United States. The FMC undertook a number of regional Port Forums in 2014 to provide an opportunity for public comment and industry stakeholders to share their views on the causes and challenges surrounding port congestion. After the Forums, the FMC resolved to take the shared information and provide a detailed, organized overview of the comments made at the Port Forums, and ultimately synthesize the main issues, ideas, and potential lessons learned and provide it to the public with a goal to shed light on those root causes that can be identified, and potential solutions.

The FMC also determined that detention and demurrage issues surrounding port congestion should be separately reviewed. Staff completed a report on entitled *Report: Rules, Rates, and Practices Relating to Detention, Demurrage, and Free Time for Containerized Imports and Exports Moving through Selected United States Ports*, which was issued by the Commission and is available on the FMC's website, www.fmc.gov. Later this summer a further report aimed at promoting further dialogue on and discussion of unsettled port congestion issues will be completed. This will be an issues-based, in-depth synopsis of the comments and arguments provided at the Port Forums. Lastly, there will be a research synthesis of U.S. port congestion causes, consequences, and challenges that will be released prior to the end of the fiscal year. There has been no decision on a set course for Commission action at this time – all options remain on the table.

Thank you again for the opportunity to address your questions and provide the Committee with information relating to the FMC's treatment of these matters.