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To: <secretary@fmc.gov>  
Date: Fri, Jan 30.2004 4:06 PM  
Subject: FMC Dkt. 03-I 5 -- FILING

Attached please find comments for filing in the above-referenced docket.

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February 2, 2004

Via E-Mail

Mr. Bryant L. VanBrakle  
Secretary  
Federal Maritime Commission  
Room 1046  
800 North Capitol Street, N.W.  
Washington, D.C. 20573

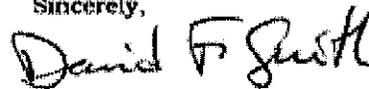
Re: Ocean Common Carrier and Marine Terminal  
Operator Agreements Subject to the Shipping Act of  
1984; FMC Docket No. 03-15

Dear Mr. VanBrakle:

Enclosed herewith please **find** attached comments of various ocean common carrier agreements and their members in the above-captioned proceeding.

Should you have any questions regarding the foregoing, please do not hesitate to contact the undersigned.

Sincerely,



David F. Smith

Attachment  
DFS:jmb

**BEFORE THE  
FEDERAL MARITIME COMMISSION**

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**OCEAN COMMON CARRIER AND  
MARINE TERMINAL OPERATOR  
AGREEMENTS SUBJECT TO  
THE SHIPPING ACT OF 1984**

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**DOCKET NO.  
03-15**

**COMMENTS OF OCEAN COMMON CARRIERS AND AGREEMENTS**

The ocean common carrier agreements and their members listed in Appendix A hereto (“Carriers”) hereby submit their comments in response to the Notice of Proposed Rulemaking, 68 *Fed. Reg.* 67509 (December 2, 2003) (the “NPR”).

**Interest of the Carriers**

The Carriers include rate agreements that will be directly and substantially affected by the proposals contained in the NPR. Many, if not all of the ocean common carriers participating in these comments, also are parties to numerous space chartering, vessel-sharing, transshipment and other operational agreements that also will be directly and substantially affected by the proposals.

**II.**

**Background and Summary of Carriers’ Position**

The NPR represents the culmination of a series of events. In 1997, the Federal Maritime Commission (“FMC” or “Commission”) instituted proceedings against two different carrier agreements, alleging that the carrier parties thereto had failed to file their complete agreements. See *Possible Unfiled Agreement between Hyundai*

*Merchant Marine Company, Ltd. and Mediterranean Shipping Co., S.A.*, 27 S.R.R. 1028 (1997) and *Possible Unfiled Agreements Among A.P. Moller-Maersk Line, P&O Nedlloyd Limited and Sea-Land Service, Inc.*, 27 S.R.R. 1032 (1997). Because those proceedings were settled without resolution of the issues presented, they left the carrier community with substantial uncertainty with respect to the requirements of the Commission's agreement regulations which, at that time, included specific requirements as to agreement content.

This uncertainty was exacerbated when the Commission revised its regulations to implement the Ocean Shipping Reform Act of 1998 ("OSRA") and, in so doing, deleted most of the requirements with respect to agreement content. Recognizing this problem, the Commission instituted its Notice of Inquiry in FMC Docket No. 99-13 as the **first** step in reviewing what actions, if any, should be taken to clarify the Commission's rules on carrier agreements. The NPR is the next logical step to address and remedy the current situation.

The Carriers generally support the proposals made in the NPR. As the supplemental information correctly notes, for some time the ocean common carrier industry has been seeking clarity in the agreement filing requirements of the Commission. In particular, the **industry** has suggested revisions to the Commission's Information Form and quarterly monitoring report requirements in various contexts. The proposals contained in the NPR positively address many of the concerns of the carrier industry.

However, as explained further below, there are certain aspects of the proposed rules that are unclear, or that would impose an undue burden on the industry, the

Commission, or both. There are also some issues that are not addressed or are addressed inadequately by the NPR. Accordingly, the Carriers suggest some modifications to the proposed regulations. The suggested changes to the regulations dealing with the content of carrier agreements, the Information Form and monitoring report requirements, the filing of minutes, and the definition of “transshipment agreement” are set forth below, in that order.

**III.**

**Content of Carrier Agreements**

A substantial portion of the NPR relates to proposed revisions to the Commission’s regulations on the content of agreements between or among ocean common carriers. The Carriers believe these proposed revisions in many respects adopt the approach to agreement filing that has developed over the past several years and are more appropriately viewed as a codification and clarification of current practice rather than a wholesale change in the Commission’s approach to agreement tiling. In light of this, the Carriers generally support the approach taken with respect to carrier agreements and the majority of the regulations proposed by the Commission.

Nevertheless, there are certain aspects of the proposed regulations that would significantly revise present rules and practices. In some cases these new proposals are unclear or fail to take into account the many changes to the ocean transportation industry that the Commission concedes have occurred in recent years. In addition, to the extent that the proposed regulations carry forward provisions of the existing regulations, some of these provisions have been rendered obsolete by changes in the

industry and we suggest that such provisions be deleted or revised. Accordingly, the Carriers urge the Commission to revise the proposed regulations in accordance with the comments set forth below.

A. Definition Of “Capacity Rationalization”

One of the new concepts that would be introduced by the proposed regulations is that of “capacity rationalization” agreements. The Commission has proposed defining “capacity rationalization” as:

A concerted reduction, stabilization, withholding, or other limitation in any manner whatsoever by ocean common carriers on the size or number of vessels or available space offered collectively or individually to shippers in any trade or service. The term does not include sailing agreements or space charter agreements.

The supplemental information explains that the new term “capacity rationalization” is intended to replace the current term “capacity management” and to include restrictions on capacity in addition to the “artificial” reduction of space on a per vessel basis that is covered by the current term. NPR at p. 67520. Based on the supplemental information, the Commission seeks to include three types of agreements within the meaning of “capacity rationalization”: (i) an agreement that prohibits or restricts the introduction of vessels into the agreement trade in a service other than that operated under the agreement; (ii) an agreement that prohibits or restricts the use of space on non-agreement vessels in the agreement trade by an agreement party (e.g., chartering space from a non-agreement carrier); and (iii) an agreement that results in an artificial withholding of vessel capacity (i.e., a “roping off” of a portion of vessel capacity).

It is the Carrier's view that the **proposed revision** should not be adopted, and the Commission should instead retain the term "capacity management" and its current definition. Restrictions on the ability of the parties to an operational agreement (such as an alliance, cross slot charter, space charter or vessel sharing agreement) that precludes members, under certain expressed conditions, from initiating services independently from the agreement members in the trade, have been recognized as legitimate commercial restrictions that are part of the *quid pro quo* to share space or vessels and serve a valid purpose.<sup>1</sup> Indeed, such provisions are entirely understandable in the context of an arrangement to share assets. See, e.g., *Lektro-Vend Corp. v. Vendo Co.*, 660 F.2d 255 (7<sup>th</sup> Cir. 1981).<sup>2</sup> The Commission should not subject legitimate commercial behavior to heightened reporting requirements when there has been no factual basis to suggest that agreement provisions of this type have caused any problems or somehow require closer monitoring.

Alternatively, assuming *arguendo* that the Commission nevertheless determines to proceed with increased reporting for agreements that contain certain types of restrictions on its members, it should then revise the proposed definition of "capacity rationalization." The proposed definition is too broad and goes beyond the

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<sup>1</sup> See EC Regulation 823/2000, Article III(3)(a). The provisions of consortia, vessel sharing and space charter agreements have much more to do with the commitment of the lines to each other under the agreement than to competition. If the object of the alliance or vessel sharing agreement or space charter agreement is to enter into a successful relationship then it is reasonable for the parties to such agreements to agree that they will use vessels deployed under the agreement and not divert cargo away from the service. This is precisely what the EU recognized in the regulation cited.

<sup>2</sup> Such arrangements are valid if reasonable in duration, geographic scope and range of activities. See *Red Sage Ltd. Partnership v. Despa Deutsche*, 254 F.3d 1120 (D.C. Cir. 2001)(covenant not to compete in lease held valid). The types of restrictions the FMC's proposal would include within the meaning of capacity rationalization are similar to those held valid in *Red Sage*.

Commission's expressed intent of focusing on restrictions imposed on capacity to be offered outside the terms of a tiled agreement. In this regard, the breadth of the proposed regulation may inadvertently capture legitimate activities that the Commission does not intend to subject to heightened reporting requirements (for example, adjustments in capacity within a range specified in an agreement). In addition, the proposed regulation uses term "stabilization," which is not defined by the Commission. The lack of any definition of this term makes the proposed regulation susceptible to a number of possible interpretations and therefore unacceptably vague.

In light of the foregoing, if the Commission decides to adopt the concept of "capacity rationalization," the Carriers suggest that the proposed definition of the term be revised to read as follows:

*Capacity rationalization* means any agreement between or among two or more ocean common carriers that: (i) restricts or limits the ability of any or all of those carriers to provide transportation in a trade on vessels other than those utilized under that agreement; (ii) restricts or limits the ability of any or all of those carriers to provide services that are alternate to or in competition with the services provided under that agreement; or (iii) which results in the withholding of vessel capacity on vessels being operated in the trade covered by that agreement. The term does not include adjustments to capacity made by adding or removing vessels or strings of vessels pursuant to and within the authority of sailing agreements, consortia, vessel sharing agreements or space charter agreements.

The foregoing definition would eliminate the potential ambiguities contained in the proposed definition while capturing the activities that are of concern to the Commission.

### B. Vessel Operating Cost Data

Under both current FMC regulations and the proposed regulations, the authority to discuss or exchange vessel operating cost data is one of the types of authority that subjects an agreement to more extensive Information Form and monitoring report requirements. For the reasons set forth immediately below, the Commission should not treat the discussion or exchange of vessel operating cost data as triggering heightened reporting requirements, and should revise the proposed regulations accordingly.

As an initial matter, the discussion or exchange of vessel operating cost data is not mentioned in Section 4(a) of the Shipping Act or in section 535.20 1 of the Commission's current regulations. Indeed, this concept was first introduced into the Commission's regulations in 1996, when the Commission adopted its current Information Form and Monitoring Report requirements. See 27 S.R.R. 479, 482 (1996). In that rulemaking, the Commission explained that it had received a number of agreements that did not authorize rate discussions or agreements, but did authorize discussion or exchange of cost data. It cited two Supreme Court cases from the 1920s and 1930s for the proposition that the antitrust laws have been applied to such exchanges because the "sharing of pricing information can have a significant impact on price competition." Id. (emphasis added). On that basis, the Commission concluded that agreements which authorize discussion or exchange of vessel operating cost data must be subject to careful scrutiny.

In retrospect, the validity of the foregoing rationale is questionable at best. As an initial matter, the Supreme Court cases relied on by the Commission are inapposite

because they involved the exchange of price information rather than cost information. As a general rule, the exchange of cost information raises fewer antitrust concerns than the exchange of price information. ABA Section of Antitrust Law, *Antitrust Law Developments* (4<sup>th</sup> Ed. 1997), p. 93. In fact, in *United States v. National Malleable Steel & Castings Co.*, 1957 Trade Cas. (CCH) 768,890 (N.D. Ohio 1957) *aff'd per curiam* 358 U.S. 38 (1958), the sharing of cost information by competing manufacturers of railcar couplings was found lawful on the grounds that it improved efficiency and lowered costs. Thus, the Commission's past analysis is questionable legally.

Moreover, the analysis is flawed from a practical perspective. Although in the abstract the exchange of cost information could potentially have an impact on price, this is not true of vessel operating costs. Aside from market conditions, Carriers price based on total costs, of which vessel operating costs represent only a portion. There are numerous other carrier costs (e.g., overhead, financing/debt service, office, terminal and equipment leases, etc.) that are not vessel operating costs. Simply put, there is no basis upon which the Commission could conclude that the exchange of some cost information does or could have any meaningful impact on price.

It is also clear that the exchange of vessel operating cost data would not impact price because the most important elements of vessel operating costs (e.g., charter hire, fuel, and insurance) are publicly available even when not exchanged by carriers. The terms of vessel charters, often referred to as **fixtures**, are reported by ship brokers and are available in trade publications such as *Containerisation* International. Similarly, although carriers may pay slightly different prices for fuel under the terms of their individual contracts with bunker suppliers, the general level of fuel prices is available

in widely disseminated publications and is well-known to everyone. Insurance costs may vary depending on the individual vessel, but again carriers are all familiar with insurance rates (they frequently are members of the same mutual insurance clubs) and changes in those rates (e.g., imposition of war risk premiums) are normally announced to the public by the insurance industry. Given the public availability of much of this information, the discussion or exchange of it would not have any incremental impact on price.

Moreover, carriers are most likely to discuss or exchange such costs in the context of vessel-sharing agreements under which they seek to deploy and maintain the most cost-effective service possible. The Commission should not erect barriers to the efficiency created by such agreements by increasing the burden of reporting that would be imposed on such agreements as a result of including authority to discuss or exchange vessel operating cost data.

In light of the foregoing, the Carriers urge the Commission to delete proposed Section **535.104(kk)** from the regulations, and to delete references to vessel operating cost data from proposed sections 535.502(b)(v), **535.503(b)(iv)**, **535.702(a)(2)(iv)**, and **535.704(a)(1)**, as well as from the Information Form **and** monitoring report form.

### C. The Exemption For Low Market Share Agreements

The Carriers support the exemption of low market share agreements from the waiting period and Information Form requirements so that such agreements would become effective upon tiling. The exemption proposed by the Commission would

permit agreements that do not contain rate or capacity rationalization<sup>3</sup> authority and which have a market share of less than 15% (if all the parties have pricing or capacity rationalization authority pursuant to another agreement in the trade) or 20% (if they do not have such authority) to become effective upon filing. The Carriers urge the Commission to make three revisions to the proposed exemption.

First, only the market share in the entire agreement scope, and not in each agreement sub-trade, should be used to determine an agreement's eligibility for the low market share exemption. Requiring the market share for each agreement **sub-trade** as well as the overall market share to be below ~~the~~ threshold would greatly reduce the relief that would otherwise be provided by this exemption. It is not uncommon for an agreement with a low overall market share to include one or more small sub-trades in which it has a large market share.<sup>4</sup> The existence of a small number of anomalous sub-trades should not disqualify an agreement with little or no anti-competitive impact from availing itself of this exemption where it is otherwise eligible based on its overall market share and authority. Accordingly, the Commission should base eligibility for the low market share exemption on overall market share only.

Second, the regulation should state the time period that will be used to determine the market share of the proposed agreement for purposes of the exemption.

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<sup>3</sup> If the Commission retains its "capacity rationalization" proposal, then it is likely that very few "low market share" agreements will qualify for the exemption because those agreements will probably fall within the proposed definition, unless it is withdrawn or amended, as proposed, *supra*.

<sup>4</sup> There are cases in which agreements have a market share in a sub-trade well in excess of the threshold by virtue of moving fewer than 10 **TEUs** in that sub-trade during the quarter.

At present, the proposed regulation is not clear in this regard. The regulation should specify that the market share used to determine whether or not a proposed agreement qualifies for this exemption is the market share for the most recent calendar quarter for which such data is available. This is the period for which market share is normally provided in the Information Form. By using this same period and so stating in the proposed regulation, the Commission will avoid arguments about whether or not an agreement qualifies for this exemption.

Third, the market share threshold to qualify as a low market share agreement should be increased from 15% and 20% to 30% and **35%**, respectively. The 20% figure contained in the proposed regulation appears to be based on the “safety zone” established by *the Antitrust Guidelines for Collaborations Among Competitors* issued by the U.S. Department of Justice and the Federal Trade Commission (“Guidelines”). NPR at p. 67520, n. 27. To the extent this is the case, the Commission has adopted an unnecessarily conservative interpretation of the Guidelines. The Guidelines themselves state:

The safety zones set out below are designed to provide participants in a competitor collaboration with a degree of certainty in those situations in which anticompetitive effects are so unlikely that the Agencies presume the arrangements to be lawful without inquiring into particular circumstances. They are not intended to discourage competitor collaborations that fall outside the safety zones.

The Agencies **emphasize** that competitor collaborations are not anticompetitive merely because they fall outside the safety zones. Indeed, many competitor collaborations **falling** outside the safety zones are procompetitive or **competitively** neutral.

(emphasis added.) Guidelines at p. 25. The types of agreements eligible for the low market share exception (i.e., those without pricing or capacity rationalization

authority) are the types of efficiency enhancing and/or or competitively neutral arrangements contemplated by the Guidelines and the definition of “low market share” may therefore properly be increased beyond the 15% and 20% levels contemplated by the proposed regulations.

As noted, the Carriers propose that these thresholds be increased to 30% and 35%, respectively. There is precedent for use of these market **shares**<sup>5</sup>, and increasing the availability of this exemption will increase carrier flexibility and ability to respond quickly to changes in markets with agreements that have little or no anti-competitive impact while at the same time minimizing government intrusion into the market.

D. Exemptions From Filing Requirements, Section 535.408(b)

In proposed section 535.408(b), the Commission sets forth a list of technical or operational matters which do not require further filing if undertaken pursuant to express enabling authority in a filed and effective agreement. This section is a recognition of the flexibility required, particularly by operational agreements such as vessel sharing agreements, to make decisions and implement them quickly, without a further filing and waiting period, in order to meet the needs of the shipping public.

However, proposed section 408(b) does not include all of the activities that the supplemental information indicates the Commission intends to exempt. In order to avoid possible confusion in the future, the Commission should add the following activities that are listed in the supplemental information to proposed section 408(b):

- insurance
- procedures for resolution of disputes relating to loss and/or damage to cargo
- maintenance of books and records

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<sup>5</sup> See Article 6(1) of EC Regulation 823/2000.

- . force majeure clauses
- procedures for allocating space and forecasting demand
- . schedule adjustments

See NPR at p. 67518.

Adding the above items would not modify or limit the other exemptions already included in section 408(b). In particular, the catch-all provision in section 408(b)(5), which generally covers operational matters and is not restricted to a specific list, would not be modified or limited in any way by the addition of these items.

#### E. A New Exemption Relating To Acquisitions

The Carriers urge the Commission to adopt an exemption from the notice and waiting period requirements for agreement amendments that reflect a change in the parties to an agreement as a result of corporate acquisitions and which have no other impact on existing agreements.

Under Section 4(c) of the Shipping Act, the Commission has no jurisdiction over the acquisition of voting securities or assets. Yet, when one ocean common carrier acquires the assets or securities of another ocean common carrier, it is often necessary to reflect that acquisition by amending all the agreements to which one or more is a party. Presently, the majority of such amendments are subject to the 45-day waiting period requirement of the Shipping Act.

The application of the waning period to such amendments presents problems for the lines involved, since the exact closing date of the transaction is often not known until a few days prior to closing and may be advanced or delayed for reasons wholly unrelated to the Shipping Act (financing, pre-merger clearances from antitrust agencies, due diligence issues, etc.). This means that it is difficult (if not impossible)

to file amendments for effect on the exact closing date, thus potentially depriving the parties of antitrust immunity for some period of time prior to or after closing. To the extent the effective date of an amendment does not coincide with the closing date of an acquisition, the parties might also be in violation of §10(a) of the Shipping Act. Where an amendment is required simply to reflect a transaction over which the Commission has no jurisdiction, exposing the parties to the risks described above is unnecessary.

This issue should be addressed by adding a new section 535.302(b)(5) to the proposed regulations, which would read as follows:

- (5) Replaces a party to the agreement with a different entity as a result of a merger or an acquisition of voting securities or assets and which makes no substantive changes to the agreement.

The foregoing exception would be a narrow one available only if the amendment does not make substantive changes to the agreement. If this proposal were adopted, any amendment which made substantive changes to an agreement would still be subject to the notice and waiting period requirements of the Shipping Act, thereby enabling the Commission to review any amendments which might have potential anti-competitive impact. This proposal addresses the issue of acquisitions in a way that removes a burden from the industry while preserving the Commission's ability to review substantive revisions to agreements that may have an anti-competitive impact.

#### F. Miscellaneous Revisions

There are a small number of miscellaneous, technical corrections which the Carriers recommend the Commission make to the proposed regulations. These are as follows:

1. Sections 535.103(b) and 535.103(d) – Both of these sections refer to “classes” of agreements. However, the proposed regulations eliminate the various classes (A, B and C) of agreements that have been used in the past. Accordingly, the Carriers recommend that the word “classes” in these two provisions be replaced with a more generic word, such as “types.”

2. Section 535.302(b)(1) -The Carriers suggest the words “or a portion **thereof**” be added to the end of this provision. Historically, the Commission staff has treated termination of a portion of an agreement (e.g., the deletion of a portion of the geographic scope of the agreement or of authority) as being effective upon filing. The addition of the words “or a portion thereof” would codify this practice.

3. Section 535.502(b)(2) -The Carriers suggest that the words “discussion of” be deleted from this provision as unnecessary. An amendment adding authority to discuss capacity rationalization to an agreement should not trigger the Information Form requirements because such authority would not enable the parties to engage in any capacity rationalization. A further amendment reflecting any agreement reached on capacity rationalization would need to be filed before any such rationalization could take place, and it should be this second amendment, not an amendment to discuss possible rationalization, which should trigger the Information Form requirement. Requiring submission of an Information Form for both such amendments would be unnecessarily duplicative and burdensome.

#### G. Implementation Of The New Agreement Regulations

Conspicuous by its absence from the NPR is any indication of how and when the new agreement content regulations will be implemented, particularly since this

issue is addressed with respect to the new Information Form and monitoring report requirements.<sup>6</sup>

As noted at the outset of these comments, the proposed regulations are in large part a codification of current practice. Nevertheless, there may be some agreements that require revisions in order to comply with the new requirements. The Carriers recommend the Commission provide that any agreements not in compliance with the new regulations at the time they are adopted shall have a period of time (e.g., 6 months) in which to become compliant with the new content requirements and that, as is customary, none of the changes will have retroactive application.

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### **Information Form and Monitoring Report Requirements**

The Carriers recognize and accept the Commission's need to obtain information from ocean carriers in order to carry out its statutory mandates. However, for some time the carrier industry has urged the Commission to review and revise its monitoring report requirements, which were adopted prior to OSRA. Since OSRA, agreements have been required to permit their members to enter into individual service contracts, many service contract terms now may be kept confidential, and the role of conferences in the U.S. trades has been greatly reduced. In the view of the Carriers, these fundamental changes in the U.S. trades warrant review and revision of the existing Information Form and monitoring report requirements. In addition, the

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<sup>6</sup> The implementation of the minute filing requirements is addressed in the section of these comments dealing with that subject.

Carriers have long viewed the current reporting requirements as unduly burdensome for both the industry and the Commission.

The majority of the proposed changes to the Information Form and monitoring report requirements will reduce the burdens the current requirements place on both the industry and the Commission and will result in a more streamlined program that will be beneficial for all parties. Accordingly, the Carriers support most of the proposed changes. However, they do have some suggestions for further improvements in the Information Form and monitoring report requirements.

A. Elimination of Revenue Information For Leading Commodities

The elimination of the requirement that certain agreements provide cargo volume and average revenue per TEU data for the leading commodities in each agreement sub-trade is probably the single most significant change the Commission could make in the current regulations to reduce the burden on the industry. The Carriers support this change whole-heartedly. Unfortunately, the Commission does not go far enough in this regard and retains the requirement that certain agreements provide this information on an agreement-wide basis in both the Information Form and quarterly monitoring reports.

Carriers generally do not track average revenue per TEU on a per-commodity basis and providing this information to the Commission in the Information Form and on a quarterly basis is a significant burden on them. Moreover, given that a very high percentage of cargo now moves under confidential service contracts (many of which contain a single rate applicable to multiple commodities, such as a GDSM or FAK rate), it is questionable whether this data tells the Commission staff anything of value.

For example, does the increase in the revenue earned by a particular carrier on a particular commodity reflect some action taken by the agreement (unlikely, since the customer's service contract cannot be amended without its consent), a change in the routing of the commodity, a change in the exchange rate of currencies, or some other factor(s)? Even assuming that this revenue data is of some use to the Commission, the burden of providing it outweighs its usefulness. The Commission should eliminate completely the requirement that revenue data be provided on leading commodities.<sup>7</sup>

B. Other Changes To The Proposed Information Form

In addition to the foregoing change, the Carriers suggest that the Commission delete Parts 2, 4(D) and 4(J) of Section I of the proposed Information Form.

Part 2(A) of Section I asks for a narrative statement of the agreement purpose. Most if not all filed agreements contain such a statement, making this requirement unnecessarily duplicative.

Part 2(B) of Section I asks for a narrative statement of the commercial or other circumstances "requiring" the agreement. Since the vast majority of agreements filed with the Commission are operational agreements designed to reduce costs and/or expand services, or rate agreements filed so the parties may discuss rates, the inclusion of this requirement in the Information Form appears to be unnecessary. Further, a statement of why the parties believe the agreement is "required" does not appear to advance the analysis of whether the agreement is likely to result in an unreasonable increase in transportation costs or an unreasonable increase in

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<sup>7</sup> If the Commission were to do so, it could of course require that such data be provided by a particular agreement on an "as needed" basis to address specific issues or concerns.

transportation service, the standard under which the agreement is reviewed pursuant to section 6(g) of the Shipping Act. Thus, this requirement appears to serve no legitimate regulatory purpose and Part 2(B) of Section I should be eliminated.

Part 4(D) of Section I relates to vessel operating cost data and should be eliminated from the Information Form for the reasons set forth in Section **III.B** of these comments.

Part 4(J) of Section I of the Information Form, which requires that the parties identify "other authority" contained in the agreement, should be eliminated because it is unnecessarily duplicative and burdensome. The Commission will be in possession of the filed agreement and can read for itself what authority, if any, the agreement contains beyond that set forth in Part 4 of the Information Form. Thus, this section of the Information Form serves no legitimate regulatory purpose and is unnecessary.

#### C. Other Changes To The Proposed Monitoring Report Form

As an initial matter, the Carriers wish to note that they support the elimination of monitoring report requirements for most of what are now known as Class C agreements. These agreements have little or no competitive impact and elimination of reporting requirements for them should enable both the Commission and carriers to dedicate their limited resources to more important matters.

Having said this, the Carriers believe that Part 3 of Section I of the monitoring report form should be deleted. This portion of the monitoring report would require agreements to report on any planned change in vessel capacity within 15 days after a change has been agreed upon and, in any event, prior to implementation. Such a requirement obviously does not fit within a form which is required to be filed on a

quarterly basis. We also note that the major alliances and larger carriers make public announcements when they determine to withdraw vessels on a seasonal basis and reports of those public announcements are read by the Commission staff.

Further, the Commission should not require such advance notice of changes in capacity. Since many agreements will already be required to provide the Commission with vessel capacity data in their quarterly monitoring reports, requiring them to submit advance notice is duplicative and unnecessary. Moreover, such advance notice appears to serve no legitimate regulatory purpose. In order for carriers acting in concert to reduce capacity, they would need authority in a filed agreement (e.g., authority to operate a number of vessels within a specified range). Where such authority exists, the reduction is lawful and advance notice of same is unnecessary. If the reduction is not lawful, reporting it does not make it so. This requirement should be eliminated.

## V.

### **Agreement Minute Filing Requirements**

The supplemental information indicates that the Commission has concerns that necessitate the expansion of its minute filing program. While the Carriers do not necessarily share such concerns, **they** understand the need for the Commission to receive meaningful minutes of agreement meetings in a timely fashion. Having said this, the Carriers believe that the proposed expansion of the minute **filing** requirements, combined with a shortening of the time to file minutes, will create an unduly burdensome and unworkable regime for both the industry and the Commission

A. Content of Agreement Minutes

The proposed regulations would increase the number of agreements required to file minutes and the number of minutes those agreements are required to file. The number of agreements required to file minutes would be expanded by revising section 535.704(a) to base this requirement on agreement authority, rather than agreement type. The number of minutes agreements are required to file would be increased by changing the definition of “meeting” to eliminate “authority to take final action” as a precondition to the minute filing requirement and to include discussions among as little as two agreement parties within the meaning of the term “meeting.”

If the proposed regulations are adopted, the expansion of the number of agreements required to file minutes and the number of minutes they are required to file would impose significant burdens on the Commission and the industry. In particular, the proposed regulations appear to be overly broad as applied to operational agreements such as vessel-sharing agreements.

Under the proposed regulations, minutes of “meetings” of a vessel sharing agreement with rate discussion authority would have to be filed with the FMC. However, the scope of the required minutes would extend well beyond the rate discussions that would trigger the filing requirement. In a major vessel sharing agreement, 15 minutes of a 3-hour meeting may relate to rates, while the remainder of the meeting covers a myriad of issues relating to port calls, scheduling, and other operational issues. The discussion of operational issues would not have to be minuted if the agreement did not contain the rate authority. Nevertheless, under the rules as proposed, minutes would have to be filed with respect to discussion of any “business

of the agreement,” including routine matters such as the scheduling of vessels, terminal and stevedoring arrangements, and other day-to-day matters that the Carriers submit are of little or no interest to the Commission.\* The sheer volume of minutes relating to everyday operational issues required to be filed under the proposed regulations would overwhelm both carriers and the Commission staff.

In order to avoid the burden described above while enabling the Commission to receive minutes relating to matters which are of greatest concern to it, the Carriers suggest that proposed section 535.704(d) be revised to add a new subparagraph (3), which would read as follows:

- (3) To the extent a space charter, sailing or capacity rationalization agreement contains one or more types of the authority set forth in §535.704(a), the minutes of meetings of the agreement need only reflect discussions held and agreements reached pursuant to such authority, and need not reflect discussion of or agreement upon routine operational matters such as those identified in §§535.408(b)(2), (b)(3), (b)(4) and (b)(5).

Under this approach, the Commission would receive minutes of any discussions held pursuant to the authority which triggered the minute filing requirements, thereby enabling it to monitor activities with the greatest potential competitive impact. By providing that operational agreements are not required to file minutes of “ah business” of the agreement, the Commission would relieve the parties to such agreements of the burden of filing minutes of the many routine operational decisions reached pursuant to such agreements, and would relieve the Commission **staff** of the burden of wading

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<sup>8</sup> See proposed section 535.408(b).

through voluminous minutes that do not relate to the exercise of the authority which triggered the minute tiling requirement in the first place.<sup>9</sup>

Similarly, the requirement in proposed section 535.704(c)(4) to submit documents in connection with meetings should be limited to documents relating to the subject matter for which minutes would be filed, as limited in the manner discussed above. If “all” documents relating to the business of operational agreements were required to be filed, the Commission would be inundated with operational documents that would not further its regulatory activities and that would create huge burdens on both the Commission and the parties.

In addition to the foregoing concerns, the Carriers object to the proposed elimination of the portion of current section 535.706(b) that states minutes need not disclose the identity of parties that participate in discussions. Interestingly, this change is not discussed in the NPR and no reasons are set forth as to the regulatory purpose for such change. In the proposed regulations, this clear statement has been replaced with a vague requirement that minutes reflect the “extent” of discussions. NPR at p. 67545. Any requirement that minutes reflect individual statements or positions at a meeting is objectionable both in terms of the burden involved in preparing such minutes **and** the chilling effect such a requirement could have on discussion of issues within an agreement. (It also has implications with respect to the provision of documents, as discussed below.)

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<sup>9</sup> This suggestion assumes that “vessel operating cost data” would be deleted from section 535.704(a).

If minutes must identify the participants in a discussion and the views expressed by those participants, carriers will be reluctant to make proposals and state their positions clearly. FMC regulations have never required transcripts of meetings and such a requirement should not be adopted now, particularly where the NPR does not explicitly identify the proposed change or the reasons for it.

In light of the foregoing, the Carriers suggest that proposed section 535.704(c)(3) be revised to read as follows:

(3) A description of discussions detailed enough so that a non-participant reading the minutes could reasonably gain a clear understanding of the nature of the discussions and, where applicable, any decisions reached. Such description need not disclose the identity of the parties that participated in the discussion or the votes taken.

B. Submission Of Documents

The proposed regulations would require minutes tiled with the Commission to include copies of:

Any report, circular, notice, statistical compilation, analytical study, survey or other work distributed, discussed, or exchanged at the meeting, whether presented by oral, written, electronic, or other means.

NPR at p. 67545. While the requirement that certain documents be filed with minutes is not objectionable in principle, the proposed regulation would implement this requirement in a manner so expansive that it will require disclosure of individual positions and proposals. Accordingly, the Carriers oppose the proposal as drafted.

Moreover, the proposal apparently would require the submission of virtually any document distributed or discussed at a meeting. Thus, if a member line or an agreement secretariat circulates a memorandum proposing or discussing a new surcharge to cover security-related costs and that memorandum is discussed at the

meeting, the document reflecting the position on the surcharge (which may or may not bear any relation to whatever agreement may ultimately be reached) would be disclosed to the Commission. Since subjects are often (but not always) docketed for discussion in response to a memorandum from a carrier or the secretariat, requiring production of such memoranda would have a significant chilling effect on the submission of proposals or the expression of views on proposals that have already been made.

The Carriers suggest that the proposed requirement to provide documents be revised and clarified so that the Commission receives relevant documents while the anonymity of specific proposals is preserved. This could be done by revising proposed section 535.704(c)(4) to read along the following lines:

Any report, statistical compilation, analytical study, or other similar work in written or electronic format which is distributed, exchanged or discussed at the meeting. Memoranda or proposals prepared by one or more member lines or the agreement secretariat (other than reports, statistical compilations, analytical studies or similar works) need not be provided if the minutes reflect discussion of the subject of the memorandum or proposal.

The foregoing would ensure that the Commission receives studies, reports, analyses and other similar works that are likely to have the greatest impact on the decisions of the agreement and to be of most use to the Commission. These would include such things as market share and liftings statistics, analyses of economic conditions and/or competition in the trade, and the like. At the same time, it would preserve anonymity by enabling agreements to reflect proposals made and discussions related thereto in the minutes without attribution to a particular party, rather than by providing copies of such proposals to the Commission.

C. The Time For Filing Minutes

The Commission has proposed that the time for tiling minutes be reduced from 30 to 15 days. The Carriers oppose this proposal.

As an initial matter, the Commission has not offered any compelling reason why agreements should be required to file their minutes in a shorter time than is presently required.

Moreover, the revised definition of the term “meeting” and the elimination of the final action requirement mean that more minutes than ever before will be **filed** with the Commission. This will place an additional burden on agreement secretariats (to the extent they are used) and on carrier personnel where agreement secretariats are not used. Where agreement secretariats are used, the fact that a discussion between as few as two agreement members may constitute a “meeting” for which minutes must be filed means that the burden on the parties involved in such “meetings” will still be increased. Even if the minute filing requirements are modified as suggested in these comments, there will still be a significantly increased burden with respect to the tiling of minutes.

Rather than requiring more work in less time, the Carriers recommend that the Commission retain the current 30-day requirement for tiling minutes. If the time agreements have to file minutes must be reduced, then the Carriers suggest that a period of 21 days would be more appropriate than 15 days.

In addition, in the event the Commission decides to shorten the amount of time agreements have to **file** minutes, it should stay implementation of that shorter period for 6 months after the regulation becomes effective to allow agreements to become

accustomed to the new minute filing requirements before the time they have to file minutes is shortened. Such an approach would also enable the Commission and its staff to obtain some experience with the volume of **filings** it will receive under these new requirements and to re-evaluate the shorter period should it appear necessary or desirable to do so based on experience during the period of the stay.

Finally, the Commission should clarify that the existing requirements will continue to apply to all meetings held prior to the effective date of the new regulations, and the new regulations will apply to those meetings held after the effective date of same.

## VI.

### **Transshipment Agreements**

The NPR proposes revising the definition of “transshipment agreement” to clarify that the publishing carrier must either operate its own vessel in the transshipment service or obtain space on the vessel of another common carrier pursuant to a filed and effective agreement covering the movement between the U.S. **and** the port of transshipment. The Carriers oppose this proposal and urge the Commission to retain the current definition of “transshipment agreement.’

As an initial matter, the Commission has offered no explanation of why this clarification is necessary. It has merely indicated that the shipping public “may” lack an understanding of how transportation is being provided under transshipment agreements. NPR at 67521. This is doubtful at best, given the notice that publishing carriers are required to place in their tariffs, the public availability of scheduling

information, and the fact that most cargo moves under service contracts, meaning the shipper has typically negotiated for and agreed upon the service it is receiving. Even if a shipper is unaware of the details of the transshipment arrangement used to move its cargo, the publishing carrier with whom the shipper has **contracted** remains responsible for the entire move under its through bill of lading. Given this, it is unclear why shippers need the further information that the Commission believes would be provided by its proposed clarification.

Even more troubling are two inconsistencies in the Commission proposal. Under the proposal, a carrier would be deemed to provide a “direct vessel call” at the transshipment port (and hence to qualify the arrangement as a transshipment agreement) if it uses space chartered under an agreement **filed** with the Commission to provide transportation between the U.S. port and the transshipment port. However, under the proposal, a space charter covering the movement between the foreign transshipment port and the foreign origin or destination would not be a “direct vessel call.” Thus, under the regulation, the term “direct vessel call” is given two different meanings! In the Carrier’s view, a carrier should also be deemed to provide a “direct vessel call” at the transshipment port if it uses space chartered from another carrier to provide transportation between the foreign port and the transshipment port. The rationale for this **anomaly** is apparently based on the grounds that such **foreign-to-foreign** agreements are not filed with the FMC. Thus, the proposed regulations would purport to dictate to carriers how they must structure their operations in trades

beyond the Commission's jurisdiction (i.e., between the foreign transshipment port and the foreign port) .<sup>10</sup>

It is also important to note that if the Commission adopts the proposal, that ocean common carriers required to use space charter agreements to/from the U.S. in lieu of transshipment agreements will no longer have to disclose their transshipment arrangements from a foreign port to another foreign port. Thus, at a time when national security needs may warrant some disclosure of what carriers are participating in the carriage of cargo to/from the United States, the Commission's proposal would actually result in less disclosure.

Moreover, the revision proposed by the Commission appears to conflict with other provisions of the Commission's own regulations. Under current section 535.308 (proposed **535.307**), an agreement between a parent company and its wholly owned subsidiary is exempt from filing. If the proposed revision to the definition of "transshipment agreement" is adopted, it is not clear whether such agreements that are part of transshipment arrangements would have to be filed.

In short, the proposed revision to the definition of "transshipment agreement" is a solution in search of a problem. It should not be adopted.

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<sup>10</sup> This apparent attempt to extend Commission jurisdiction is difficult to reconcile with the Commission's finding that persons not operating vessels to/from U.S. ports are beyond its jurisdiction. See *Ocean Common Carriers Subject to the Shipping Act of 1984*, 28 S.R.R. 1414, 1418 (FMC 2000).

**VII.**

**Conclusion**

The Carriers believe that the Commission's proposed regulations address many of the concerns raised by carriers in the past, and generally support the proposals. They urge the Commission to address those few provisions that may be unclear or burdensome by revising the proposals in accordance with these comments.

Respectfully submitted,



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January 30, 2004

Attachment A

The following agreements and their ocean common carrier members, also listed, are participating in the foregoing comments<sup>11</sup>:

ABC Discussion Agreement

A.P. Moller-Maersk A/S  
Hamburg Sudamerikanische Dampfschiffahrts-Gesellschaft KG  
King Ocean Services Limited  
Seafreight Line, Ltd.

Australia/United States Containerline Association

Australia-New Zealand Direct Line, a division of CP Ships (UK) Limited  
Hamburg Sudamerikanische Dampfschiffahrts-Gesellschaft KG  
Lykes Lines Limited, LLC  
P&O Nedlloyd Limited

Australia/United States Discussion Agreement

A.P. Moller Maersk A/S  
Australia-New Zealand Direct Line, a division of CP Ships (UK) Limited  
FESCO Ocean Management Inc.  
Hamburg Sudamerikanische Dampfschiffahrts-Gesellschaft KG  
LauritzenCool AB  
Lykes Lines Limited, LLC  
P&O Nedlloyd Limited  
Seatrade Group N.V.

Caribbean Shipowners Association

Bernuth Lines, Ltd.  
CMA CGM S.A.  
Crowley Liner Services, Inc.  
Interline Connection, N.V.  
Seaboard Marine, Ltd.  
Seafreight Line, Ltd.  
Tecmarine Lines, Inc.  
Tropical Shipping & Construction Co., Ltd.

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<sup>11</sup> Some carriers may file individual comments in addition to their participation in these comments. To the extent these comments and individual participating carrier comments are in conflict, the individual comments shall be controlling for that carrier.

Central America Discussion Agreement

A.P. Moller-Maersk A/S  
APL Co. **PTE** Ltd.  
Crowley Liner Services, Inc.  
Dole Ocean Cargo Express  
King Ocean Services Limited  
Lykes Lines Limited, LLC  
Seaboard Marine, Ltd.

East Coast of South America Discussion Agreement

Alianca Navegacao e Logistica Ltda.  
APL Co. Pte. Ltd.  
A.P. Moller Maersk A/S  
CMA CGM S.A.  
Companhia Libra de Navegacao  
Compania Sud Americana de Vapores, S.A.  
Evergreen Marine Corporation (Taiwan) Limited  
Hamburg **Sudamerikanische** Dampfschiffahrts-Gesellschaft KG  
Lykes Lines Limited, LLC  
Mediterranean Shipping Co. S.A.  
Montemar Maritima S.A.  
P&O **Nedlloyd** B.V. and P&O **Nedlloyd** Limited

Eastern Mediterranean Discussion Agreement

A.P. Moller Maersk **Sealand**  
COSCO Container Lines Company Limited  
Farrell Lines, Inc.  
Hapag-Lloyd Container Linie **GmbH**  
Mediterranean Shipping Company S.A.  
P&O **Nedlloyd** Ltd.  
**Turkon** Container Transportation and Shipping, Inc.  
Zim Israel Navigation Co., Ltd.

Florida Bahamas Shipowners Association

Arawak Line Ltd.  
Bahamas Ro Ro Service (Freeport), Inc.  
Caicos Cargo Ltd. d/b/a Turks Island Shipping Line  
Crowley Liner Services, Inc.  
G&G Marine, Inc.  
Pioneer Shipping Ltd.  
Seaboard Marine, Ltd.  
Tropical Shipping and Construction Co., Ltd.

Grand Alliance Agreement II

Hapag-Lloyd Container Linie GmbH  
Nippon Yusen Kaisha  
P & O Nedlloyd Limited and P&O Nedlloyd B.V.  
Orient Overseas Container Line Inc., Orient Overseas Container Line Limited  
and Orient Overseas Container Line (Europe) Limited

Hispaniola Discussion Agreement

Crowley Liner Services, Inc.  
Frontier Liner Services, Inc.  
Seaboard Maine Ltd.  
Tropical Shipping and Construction Co., Ltd.

Israel Trade Conference

Farrell Lines, Inc.  
P&O Nedlloyd Limited  
Zim Israel Navigation Co., Ltd.

New Caribbean Service Rate Agreement

CMA CGM  
Compania Sud Americana de Vapores, S.A.  
Hamburg Sudamerikanische Dampfschiffahrts-Gesellschaft KG  
Hapag-Lloyd container Linie GmbH  
P&O Nedlloyd Limited/P&O Nedlloyd B.V.

New Zealand/United States Inter-Carrier and Conference Discussion Agreement

New Zealand/United States Container Lines Association Conference  
A.P. Moller-Maersk A/S  
Australia-New Zealand Direct Line, a division of CP Ships (UK) Limited  
Hamburg-Sudamerikanische Dampfschiffahrts-Gesellschaft KG  
Fesco Ocean Management Ltd.  
Lauritzencool AB  
Lykes Lines Limited, LLC  
P&O Nedlloyd Limited

New Zealand/United States Container Lines Association Conference

Australia-New Zealand Direct Line, a division of CP Ships (UK) Limited  
Hamburg-Sudamerikanische Dampfschiffahrts-Gesellschaft KG  
Lykes Lines Limited, LLC  
P&O Nedlloyd Limited

Trans-Atlantic Conference Agreement

A. P. Moller-Maersk Line A/S  
Atlantic Container Line AB  
Hapag-Lloyd Container Linie **GmbH**  
Mediterranean Shipping Company S.A.  
Nippon Yusen Kaisha  
Orient Overseas Container Line Limited  
P&O **Nedlloyd** Limited

Transpacific Stabilization Agreement

American President Lines, Ltd. and APL Co. **PTE** Ltd.  
A.P. Moller-Maersk A/S  
CMA CGM S.A.  
Cosco Container Lines Ltd.  
Evergreen Marine Corp. (Taiwan) Ltd.  
Hanjin Shipping Co., Ltd.  
Hapag-Lloyd Container Linie **GmbH**  
Hyundai Merchant Marine Co., Ltd.  
Kawasaki Kisen Kaisha, Ltd.  
Mitsui O.S.K. Lines, Ltd.  
Nippon Yusen Kaisha  
Orient Overseas Container Line  
P&O **Nedlloyd** Limited  
P&O **Nedlloyd** B.V.  
**Yangming** Marine Transport Corp.

United States/Australasia Discussion Agreement

A.P. Moller-Maersk A/S  
Australia-New Zealand Direct Line, a division of CP Ships (UK) Limited  
CMA CGM  
Compagnie Maritime **Marfret** S.A.  
Contship Containerlines, a division of CP Ships (UK) Limited  
**Fesco** Ocean Management Limited  
Hamburg Sudamerikanische Dampfschiffahrts-Gesellschaft KG  
Lykes Lines Limited, LLC  
P&O **Nedlloyd** Limited  
**Wallenius** Wilhelmsen Lines AS

United States/South Europe Conference

A. P. Moller-Maersk **Sealand**  
Hapag-Lloyd Container Linie **GmbH**  
P&O **Nedlloyd** Limited

Venezuelan Discussion Agreement

A.P. Moller Maersk A/S  
Hamburg **Sudamerikanische** Dampfschiffahrts-Gesellschaft KG  
King Ocean Service de Venezuela  
Seaboard Marine Ltd.  
**SeaFreight** Line

West Coast of South America Discussion Agreement

A.P. Moller-Maersk A/S  
APL Co. PTE Ltd.  
CMA CGM S.A.  
Compania Chilena De **Navigacion** Interoceania, S.A.  
Compania Sud Americana de Vapores, S.A.  
Hamburg Sudameriksnische Dampfschiffahrtsgesellschaft KG  
Mediterranean Shipping Company, S.A.  
P&O **Nedlloyd** B.V.  
Seaboard Marine Ltd.  
South Pacific Shipping Company, Ltd.  
Trinity Shipping Line, S.A.

Westbound Transpacific Stabilization Agreement

American President Lines, Ltd. and APL Co. **PTE** Ltd.  
China Shipping Container Lines Co., Ltd.  
COSCO Container Lines Company Limited  
Evergreen Marine Corp. (Taiwan) Ltd.  
Hanjin Shipping Co., Ltd.  
Hapag Lloyd Container Linie **GmbH**  
**Hyundai** Merchant Marine Co., Ltd.  
Kawasaki Kisen Kaisha, Ltd.  
Mitsui O.S.K. Lines, Ltd.  
Nippon Yusen Kaisha  
Orient Overseas Container Line Limited  
P&O **Nedlloyd** Limited  
P&O **Nedlloyd** B.V.  
**Yangming** Marine Transport Corp.