Comments of the

World Shipping Council

Submitted to the

Federal Maritime Commission

In the matter of

Demurrage and Detention Billing Requirements

Docket Number:

FMC-2022-0066

December 13, 2022

The World Shipping Council (WSC) is a non-profit trade association that represents the liner shipping industry, which is comprised of operators of containerships and roll-on/roll-off (ro-ro) vessels (including vehicle carriers). Together, WSC's members operate approximately 90 percent of the world's liner vessel services including more than 5,000 ocean-going vessels of which approximately 1,500 vessels make more than 27,000 calls at ports in the United States each year.[1]

For the better part of the last five years, the Commission has consistently worked through its Fact Findings, policy guidance, and jurisprudence to make abundantly clear to the regulated industry that the "Incentive Principle," as set forth in its final Interpretive Rule on Demurrage and Detention,[2] is the touchstone of its detention and demurrage policy. The Incentive Principle states that in assessing the reasonableness of detention and demurrage practices, the Commission will first consider the extent to which those practices are serving their primary purpose of financially incentivizing cargo interests to remove their cargo from the terminal promptly and to return equipment in a timely manner. The Interpretive Rule also states that the concept of reasonableness is fact-specific, and therefore the application of the Incentive Principle will ''vary depending on the facts of a given case.''[3]

In the Ocean Shipping Reform Act of 2022 (OSRA 22) Congress directed the Commission to initiate a rulemaking that, "shall only seek to further clarify reasonable rules and practices related to . . . the final rule published on May 18, 2020, entitled 'Interpretive Rule on Demurrage and Detention Under the Shipping Act'."[4] Instead of following that instruction, the Commission proposes to abandon the Interpretive Rule's fact-specific analysis entirely and replaces it with absolute prohibitions on charging detention or demurrage to broad classes of entities. Just as egregious, this proposal abandons the Incentive Principle by failing to consider how billing certain parties other than shippers incentivizes freight fluidity through the supply chain.

WSC's discussion below shows how the Commission's proposed rule: (i) ignores express Congressional directives and prior Commission precedent, (ii) is based on a fundamental misunderstanding about the contractual rights and responsibilities of various parties along the supply chain, and (iii), if adopted, abandons the Incentive Principle and will disincentivize many parties in the supply chain from timely collecting goods from marine terminals and returning empty equipment for use by other customers. That in turn will only increase congestion in our nation's ports – threatening to worsen the very problem that properly applied detention and demurrage charges are designed to minimize.[5] Additionally, the discussion outlines how the Commission's proposed rules on billing timelines do not support the Incentive Principle, and fails

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[1] A full description of the Council and a list of its members are available at www.worldshipping.org.

[2] See Interpretive Rule on Demurrage and Detention Under the Shipping Act, 85 Fed. Reg. 29638 (May 18, 2020), see also 46 CFR § 545.5 (Interpretation of Shipping Act of 1984 - Unjust and unreasonable practices with respect to demurrage and detention) (2020).

[3] See Interpretive Rule on Demurrage and Detention Under the Shipping Act, 85 Fed. Reg. 29638, 29641 (May 18, 2020).

[4] See Public Law No: 117-146 (June 16, 2022), Section 7, paragraph (b)(2).

[5] As WSC and PMSA noted in their joint Petition for Review of the FMC's Environmental Assessment and Finding of No Significant Impact, increased port congestion results in increased air emissions and pollution.

to follow the statutory authority to develop rules that review the reasonableness of a carrier's actions under 46 U.S.C. 41102(c).

1. <u>The FMC's proposed rule ignores Congress' express authorization and violates the Administrative Procedure Act</u>.

a. <u>The structure of the proposed rule is inconsistent with Congress' direction to the Commission in the Ocean Shipping Reform Act of 2022 (OSRA 22)</u>.

As the Commission rightly points out, Congress directed it to *only clarify* reasonable rules and practices relating to detention and demurrage in OSRA 22, Section 7 paragraph (b). That paragraph reads:

> (b) RULEMAKING ON DEMURRAGE OR DETENTION.—
>
> (1) IN GENERAL.—Not later than 45 days after the date of enactment of this Act, the Federal Maritime Commission **shall initiate a rulemaking further defining prohibited practices by common carriers, marine terminal operators, shippers, and ocean transportation intermediaries under section 41102(c) of title 46, United States Code**, regarding the assessment of demurrage or detention charges. The Federal Maritime Commission shall issue a final rule defining such practices not later than 1 year after the date of enactment of this Act.
>
> (2) CONTENTS.—**The rule under paragraph (1) *shall only seek to further clarify* reasonable rules and practices related to the assessment of detention and demurrage charges** to address the issues identified in the final rule published on May 18, 2020, entitled ''Interpretive Rule on Demurrage and Detention Under the Shipping Act'' (or successor rule), including a determination of which parties may be appropriately billed for any demurrage, detention, or other similar per container charges. (emphasis added)

Through this subsection, Congress did not expand or change the Commission's authority to issue detention and demurrage regulations. Instead, it reminded the Commission of its existing authority under 41102(c), which states:

> A common carrier, marine terminal operator, or ocean transportation intermediary may not **fail to establish, observe, and enforce just and *reasonable regulations and practices*** relating to or connected with receiving, handling, storing, or delivering property. (emphasis added)

The authority found in 41102(c) allows the Commission to issue regulations that determine whether an action taken by a carrier, marine terminal operator (MTO), or ocean transportation intermediary (OTI) is ***reasonable***. Time and again, the Commission has recognized that reasonableness determinations must be analyzed through a case-by-case, fact-based approach. The Commission recognized this principle most recently in its Notice of

Proposed Rule Making for Unreasonable Refusal to Deal or Negotiate[6] – where the Commission acknowledged "that it is impossible to regulate for every possible scenario" and proposed a factors test that was "factually driven and determined on a case-by-case basis."[7]

Having determined that the Commission's existing Interpretive Rule meets this "reasonableness test", Congress, in Section 7 paragraph (b)(2) of OSRA 22, expressly directed that the Commission "shall only seek to further clarify reasonable rules and practices related to detention and demurrage charges to address issues identified in the Final Rule published on May 18, 2020 . . . including a determination of which parties may be appropriately billed." Congress therefore directed the Commission to preserve 46 CFR 545.5 and to use its existing authority under 46 U.S.C. § 41102(c) to clarify issues identified but not resolved in the 2020 Final Rule. Congress did not, however, direct or give the Commission the authority to abandon and wholesale replace the Interpretive Rule's case-by-case reasonableness determination approach with new bright-line determinations that entire classes of parties may never be billed for detention and demurrage. The result of the above plain-language reading would be a proposed rule that lists factors that will guide the Commission when it analyzes facts on a case-by-case basis to determine when a carrier's billing practices are reasonable or not. The Commission's failure to adhere to express Congressional direction in OSRA 22 renders the proposed rule contrary to law on its face.[8]

b. <u>The Commission's departure from the "Incentive Principle" in this rule without explanation is in violation of the Administrative Procedure Act</u>.

Even if the Commission were deemed to have adhered to Congress' direction in OSRA 22, the proposed rule still violates the Administrative Procedure Act (APA) because the Commission's replacement of the Interpretive Rule and the Incentive Principle with a series of bright-line rules represents a clear departure from its past precedent on detention and demurrage without any reasonable explanation. The Incentive Principle codified at 46 CFR 545.5 paragraph (c) is the touchstone of the Commission's detention and demurrage policy, which states that when determining whether a detention and demurrage charge is reasonable the Commission will first consider the "extent to which demurrage and detention are serving their intended primary purposes as financial incentives to promote freight fluidity." This approach was adopted based

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[6] WSC recognizes that the Unreasonable Refusal to Deal or Negotiate proposed regulation is being promulgated under 46 USC § 41104 and not 41102; however, the principle of issuing a reasonableness rule utilizing a factors-based test remains the same.

[7] See Definition of Unreasonable Refusal to Deal or Negotiate With Respect to Vessel Space Accommodations Provided by an Ocean Common Carrier, 87 Fed. Reg. 57676 (Sept. 21, 2022).

[8] See *Outdoor Amusement Business Association, Inc. v. Department of Homeland Security*, 983 F.3d 671, 688-689 (4th Cir. 2020) ("The Supreme Court has said that a regulation must be "reasonably related to the purposes of the enabling legislation.") (citing *Mourning v. Family Publ'ns Serv., Inc.*, 411 U.S. 356, 369 (1973) (noting the promulgating agency must "establish a nexus between the regulations and some delegation of the requisite legislative authority by Congress."); *Central Forwarding, Inc. v. I.C.C.*, 698 F.2d 1266, 1273 (5th Cir. 1983) ("[I]f Congress has granted only limited powers to the agency, and the regulation bears little kinship to the rulemaking authority expressed by statute, the validity of the regulation is suspect.").

on the FMC's long-standing principle that detention and demurrage charges are valuable tools to ensure the smooth operation of the U.S. international supply chain, a concept that is not in dispute. Moreover, the Interpretive Rule preamble repeatedly states that "instead of prescribing practices that ocean carriers and marine terminal operators must adopt or avoid,"[9] the application of the Incentive Principle was fact-specific and could vary depending on the circumstances.[10]

This approach was adopted based on the Commission's stated belief "the rule is not intended to, and cannot, solve every demurrage and detention problem or quell all disputes. Rather, it reflects the Commission's finding that all segments of the industry will benefit from advance notice of how the Commission will approach the "reasonableness" inquiry under section 41102(c)".[11] But through the creation of a number of bright-line rules, the Commission's NPRM essentially guts the Interpretive Rule and the Incentive Principle. Although "an agency is free to alter its past rulings and practices,"[12], it is required "to 'display awareness that it *is* changing position' and [may not] 'depart from a prior policy *sub silentio* or simply disregard rules that are still on the books.'"[13]

Such a reasoned explanation is particularly necessary here because the Commission's proposed bright-line regulations on which parties can be billed cannot logically coexist with its current policies under the Interpretive Rule, which employs a case-by-case analytical tool and the Incentive Principle to determine if a carrier, MTO, or OTI's detention and demurrage billing practices are reasonable.[14] The proposed rules and the Interpretive Rule cannot coexist because there are numerous instances when it is not only reasonable for carriers to take actions prohibited by this proposed regulation, but to do otherwise would disincentivize the fluid movement of freight through the supply chain. The predictable result is a proposal that is not only unworkable and unreasonable as a matter of policy, but *per se* arbitrary and capricious as a matter of law.[15]

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[9] See Interpretive Rule on Demurrage and Detention Under the Shipping Act, 85 Fed. Reg. 29638, 29639 (May 18, 2020).

[10] See *e.g., id.* at 29639 "Each section 41102(c) case would continue to be decided on its particular facts, and the rule would not foreclose parties from raising, or the Commission from considering, factors beyond those listed in the rule."; See also, *id.* at 29641 "The application of the 'incentive principle' the Commission reiterated, would 'vary depending on the facts of a given case.'"

[11] See *id*. at 29639.

[12] *Dillmon v. Nat'l Transp. Safety Bd.*, 588 F.3d 1085, 1090 (D.C. Cir. 2009) (quoting *Airmark Corp. v. FAA*, 758 F.2d 685, 691–92 (D.C. Cir. 1985)).

[13] *Id.* (quoting *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515, 129 S.Ct. 1800, 173 L.Ed.2d 738 (2009)); *see also* *Lone Mountain Processing, Inc. v. Sec'y of Labor*, 709 F.3d 1161, 1164 (D.C. Cir. 2013) ("[A]n agency changing its course must supply a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored." (quoting *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 852 (D.C. Cir. 1970).

[14] See *Encino Motorcars, LLC v. Navarro*, 579 U.S. 211, 222 (2016), "But the agency must at least display awareness that it is changing position and show that there are good reasons for the new policy. In explaining its changed position, an agency must also be cognizant that longstanding policies may have engendered serious reliance interests that must be taken into account." (internal quotations and citations omitted).

[15] See*, Mingo Logan Coal Company v. EPA,* 829 F.3d 710, 719 (2016), stating that if a "new policy rests upon factual findings that contradict those which underlay [an agency's] prior policy," the agency "must" provide "a more detailed justification" for its action (citing FCC v. Fox Television Stations, Inc., 556 U.S. 502 (2009)).

Examples of instances when it would be reasonable for ocean carriers to take actions prohibited by this proposed regulation, and consistent with the Incentive Principle, are set forth below.

2. <u>There are multiple examples of when it may be reasonable to bill a party not named as the Shipper on a contract for the carriage of goods to incentivize the efficient movement of cargo through the supply chain</u>.

The FMC's proposal in subsection 541.4 (Properly issued invoices) limits detention and demurrage invoices to only persons who have contracted (*i.e.,* shippers) with the billing party (*i.e.,* ocean carriers) for carriage or storage of goods. However, there are times when it is reasonable to bill a party other than a shipper – especially when failure to meet deadlines is not the shipper's fault.

The Commission's primary argument that certain parties should not be billed for detention and demurrage is that they are not a party to the contract that memorializes free time terms, and therefore they do not have direct knowledge of the terms that were negotiated. By boiling down responsible parties for detention and demurrage solely to parties who negotiated free time ignores the relationships and responsibilities other contractual instruments create between parties. It also restricts the meaning and scope of the contract of carriage in ways that are inconsistent with voluminous jurisprudence that ascribes rights and responsibilities to multiple parties named in a contract of carriage, including many who did not sign that contract but who nevertheless derive rights from it.

Typically, an international commercial transaction between a buyer and seller is done through a series of instruments that evidence the entirety of the contract, which includes the contract for carriage of the goods. But the contract of carriage is far from the only contract used in these settings.[16] The different instruments, which are also freely entered into by parties other than the buyer and seller, impose obligations on those different parties and ultimately support movement of cargo through the supply chain. These contracts often include interwoven terms, and each party enters into the contact for its own benefit. For example, a contract for the purchase or sale of goods typically states how the goods are to be shipped, which party is to arrange for transportation of the goods, and under what terms. Those terms often specify who is responsible for charges at origin and destination, including responsibility for detention and demurrage charges. Thus, it is simply untrue that the parties that sign the carriage contract are the only parties that have freely obligated themselves to the terms of that contract.

As such, the Commission must not take such a narrow approach to contract interpretation and limit responsibility only to those who have signed the contract for ocean transportation. Rather, the Commission must analyze the facts to determine if it is reasonable to bill a party based on its role in incurring the fee and whether the charge will incentivize efficiency within the supply chain. WSC discusses below several scenarios that illustrate why a "one-size-fits-all" prohibition on billing broad classes of entities is bad policy and would not only

[16] Thomas J. Schoenbaum, Admiralty and Maritime Law § 10-1 (4th ed. 2004) ("A contract for the carriage of goods is never concluded in isolation. It is always part of an intimately linked system of contracts. The carriage contract is usually ancillary to the commercial transaction.").

cause delay at our nation's ports but would also cause confusion among the multiple parties that make up the import and export supply chain.

a. *Consignees.* WSC agrees with the FMC that the consignee named on the bill of lading must be included as an entity that may receive a detention or demurrage invoice. Consignees, as the receivers of the cargo, are the party best positioned to arrange for timely pick up and return of containers. When an ocean carrier releases a container to a consignee, the ocean carrier entrusts the consignee with the equipment to further deliver the cargo to its final destination. With that entrustment comes an obligation to timely collect and return the container. Without the ability to bill the consignee for detention and demurrage charges, that obligation becomes illusory. It is important to be able to financially incentivize consignees to retrieve their cargo and return an ocean carrier's equipment within the allotted free time.

Consignees have long been seen by the courts as being bound to the terms of the contract for the carriage of goods for various reasons.[17] However, for each case tried in the courts, there is another that is distinguished from prior holdings. This is because the contractual relationship between the consignee and the other parties is complicated and hinges on multiple and variable facts. A "one-size-fits" all approach to consignee liability for detention and demurrage is unworkable because coverage by the terms of the contract is so fact specific.

Utilizing a simple example of an import shipment, a shipper often fulfills its contractual obligation to a U.S. customer (typically named as the consignee) once the cargo is delivered to the marine terminal. It is therefore likely unreasonable to hold the shipper accountable for fees incurred when the consignee, by its own fault, fails to collect or return the container on time, particularly when the shipper has fulfilled its obligations under the contract. The following example is illustrative:

> A shipper has fulfilled its contractual obligation to deliver cargo to the marine terminal. The consignee accepts delivery of the cargo and is now the party in the best position, possibly the only position, to arrange for collection of the cargo and return of the container. Under the proposed rule, if a consignee cannot be billed for detention and demurrage, the only party that potentially can be billed is the shipper. A shipper, which by the terms of the transaction with the buyer (consignee) has fulfilled its obligations and no longer has possession or control over the cargo, is unlikely to be incentivized by detention and demurrage to ensure the timely collection of the cargo or return of the equipment. (That shipper

[17] See, e.g., *CSX Transp. Co. v. Novolog Bucks Cnty.*, 502 F.3d 247, 255 (3d Cir. 2007)(finding a consignee is a party to the transportation contract, defined as the bill of lading, and is subject to liability on freight charges); *S & H Hardware & Supply Co. v. Yellow Transp., Inc.*, 2004 WL 1551730 (E.D. Pa. July 8, 2004) aff'd, 432 F.3d 550 (3d Cir. 2005)(where the carrier's bill of lading contained a nine-month limitation to filing a claim); *Travelers Indem. Co. of Illinois v. Schneider Specialized Carriers, Inc.*, 2005 WL 351106 (S.D.N.Y. Feb. 10, 2005)(finding that bill of lading determines the rights of a consignee bound by the Carmack Amendment). *See also Frohlich Glass Co. v. Penn. Co.*, 138 Mich. 116 (1904)(finding consignor is agent of consignee in shipment of goods and consignee is bound by contract consignor enters into with carrier); *Taisheng Int'l Ltd. v. Eagle Mar. Servs., Inc.*, 2006 WL 846380 (S.D. Tex. Mar. 30, 2006)(stating that in a maritime context, consignee to a bill of lading may also be bound under agency principles to usual and customary transportation contract carrier entered into with consignor).

> is also likely to be many thousands of miles away.) Equally as important, in this case, a detention and demurrage invoice sent to the shipper would be subject to a potentially meritorious challenge under the existing Interpretive Rule found in 46 CFR 545.5 as being unreasonable.

Unless the consignee is financially responsible for timely pick up and return, the result will be cargo and equipment accumulating in the terminals, at distribution centers and in rail yards, or delay in making containers available to other shippers – all of which are completely contrary to the Incentive Principle. If the FMC creates a static rule that the consignee cannot be billed under any circumstance, then it is creating a situation where the terminal space and the container can be used as free storage. Accordingly, consignees must be included as a party that can be invoiced for demurrage and detention charges. Furthermore, it is not only reasonable to bill consignees under the Incentive Principle; it is also reasonable as a matter of contract, because the consignee as the receiver of the cargo is the ultimate beneficiary of the contract of carriage, a contract that was set in motion under the terms of the separate contract for the purchase and sale of the goods.

b. _Motor Carriers._ The first sentence of subsection 541.4 makes explicit that the "carriage or storage of goods" reference in 541.4(a) (defining properly billed parties by their relationship to the relevant contract) refers to "ocean transportation or storage." The Commission explains in the preamble that the effect of these provisions would be that "the proposed rule would prohibit billing parties from invoicing motor carriers or customs brokers."[18] The Commission's overly simplistic reasoning that motor carriers should be exempted in all cases from being invoiced detention and demurrage charges because they are not parties to ocean service contracts fails to acknowledge: (i) that there are other relevant and directly applicable contracts between ocean carriers and motor carriers, and (ii) that there are times when it is reasonable to invoice a motor carrier to "promote freight fluidity."[19] On the second point, consider this simple example:

> A motor carrier is dispatched to deliver a container to a consignee. The consignee unloads the cargo and returns the container to the motor carrier in a timely manner. The motor carrier then fails to deliver the empty container back to the carrier within the allotted time – for this scenario we assume that the motor carrier's failure is unreasonable under 46 CFR 545.5. If the FMC contends that the motor carrier cannot be billed, even though the delay in returning the container is the motor carrier's fault, then by the FMC's proposed regulation the only party that can be billed is the shipper – who is not at fault – and which might not be considered reasonably billed under 46 CFR 545.5.

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[18] See Demurrage and Detention Billing Requirements, 87 Fed. Reg. 62341, 62349 (Oct. 14, 2022) "Practically, the proposed rule would prohibit billing parties from invoicing motor carriers or customs brokers."

[19] See 46 CFR 545.5(c)(1) ("In assessing the reasonableness of demurrage and detention practices and regulations, the Commission will consider the extent to which demurrage and detention are serving their intended primary purposes as financial incentives to **promote freight fluidity**.") (emphasis added).

This scenario results in an absurd outcome under the proposed rule, and it is unreasonable that a motor carrier could not be billed under such circumstance. If the motor carrier cannot be financially incentivized to pick up or return equipment on time, the Commission's actions can only lead to inefficiency and cause delays in the supply chain. Unless the Commission is willing to make the shipper the absolute guarantor of performance for every non-ocean party in the supply chain, then it must amend its proposed rule to allow billing of parties that have an operational responsibility and ability to keep cargo moving. Otherwise, the Commission is effectively banning the collection of detention and demurrage, which it has no authority to do, and which would gridlock America's ports.

The Commission's contention that the motor carrier should not be responsible for detention and demurrage charges because is not a party to the carriage of goods contract ignores the fact that the motor carrier often signs other contracts with shippers, carriers, consignees, etc., that obligate the motor carrier to pay detention and demurrage charges if certain terms of the contract are not met.

For example, before an ocean carrier will release its equipment to a motor carrier to use in delivering the cargo, the ocean carrier must be satisfied that the motor carrier will honor certain minimum obligations to protect the carrier's business and equipment – e.g., holding a certain level of insurance, a level of maintenance on the vehicle, and a promise to pay detention and demurrage on the container. When a motor carrier signs such a contract, it creates a new firsthand contractual obligation with the ocean carrier to fulfill the prescribed terms. Though the contractual relationships between the motor carrier and the ocean carrier may take different forms, they are born of market forces and business negotiations from which each party derives benefit. The FMC should not seek to prohibit ocean carriers and motor carriers from being able to form contracts containing mutually agreeable terms, such as an agreement to pay detention and demurrage charges, particularly when the motor carrier is responsible for the delay. Below are several instances when motor carriers enter into contracts with different parties and through these contracts agree to detention and demurrage charges.

i. **The Uniform Intermodal Interchange and Facilities Access Agreement (UIIA):** Prior to the implementation of the UIIA, ocean carriers had their own interchange agreements with individual motor carriers that resulted in much negotiation and administration. Many parties wanted a uniform method of obtaining access to facilities, the use of intermodal equipment, and a forum to negotiate and update a more balanced interchange agreement, which today is done through the UIIA's Intermodal Interchange Executive Committee. The Intermodal Association of North America (IANA) is the body that oversees the content and administration of the UIIA. Of relevance to this proposal, the UIIA ensures motor carriers are responsible for ocean carriers' equipment and contractually obligates them to pay demurrage and detention charges.[20] This is a highly used contract between the motor carrier and the ocean carrier that is entered into with

[20] See, Uniform Intermodal Interchange and Facilities Access Agreement at Section 6.a, "Interchange of Equipment is on a compensation basis. Provider may permit some period of uncompensated use and thereafter impose Per Diem, Container Use, Chassis Use/Rental and/or Storage/Ocean Demurrage charges, as set forth in its Addendum.", *id.* at Section 6.b, "Motor Carrier shall be responsible for Per Diem, Container Use, Chassis Use/Rental and/or Storage/Ocean Demurrage charges set forth in the Addenda."

full knowledge of the terms regarding payment of detention and demurrage charges. Is it the FMC's intention for its proposal to displace the only standard interchange agreement, used by more than 14,000 motor carriers, and all major ocean and rail carriers, that governs 95 percent of all North American intermodal equipment exchanges?

ii. **Merchant Haulage:** In merchant haulage contracts, cargo is delivered by the ocean carrier to a marine terminal or container yard, and a shipper or consignee will typically contract with a motor carrier to pick up and deliver its cargo. Under this type of contract, ocean carriers do not control which motor carrier a shipper/consignee hires, and as discussed above, the container will only be released pursuant to a separate contract between the carrier and the motor carrier – an example of which might be a UIIA contract. In this case, the motor carrier, though it did not negotiate for free time or return dates, acts as an agent of the shipper/consignee and is authorized by it to pick up and return the container at the port of discharge on its behalf.[21] It has a contract in place with the shipper/consignee to deliver the cargo, and as such is well positioned to ensure its shipper/consignee client is providing it with accurate information about free time requirements. Additionally, the ocean carriers are not privy to detention and demurrage negotiations found within the motor carrier's contract with the shipper or consignee. Anecdotally, WSC was informed of contractual relationships between a consignee and a motor carrier where the motor carrier specifically assumes responsibility for detention and demurrage charges away from the consignee under certain circumstances. If the ocean carrier cannot invoice a motor carrier in these cases, the FMC risks voiding contractual terms bargained for through those negotiations.

iii. **Carrier Haulage:** A carrier haulage contract exists when an ocean carrier contracts with a shipper to deliver cargo to the customer's place of business, and the ocean carrier has a separate contractual arrangement directly with a motor carrier to make that inland delivery. In this case, the motor carrier acts as a subcontractor to the ocean carrier. Such arrangements are negotiated directly with a motor carrier, may be long-term in nature, and often include detention and demurrage provisions. Here again, the Commission's proposal would seem to eliminate any liability for the nonperformance by a motor carrier for terms that it negotiated. For example:

> An ocean carrier signs a contract with a motor carrier to fulfill the land delivery portion of an ocean transport contract under which the ocean carrier has agreed to arrange for the inland transportation. The motor carrier in this case is a subcontractor of the ocean carrier. Part of the negotiation process of the contract with the motor carrier is the motor carrier's promise to pay detention and demurrage charges on the container should it fail to meet delivery or return deadlines. Under the proposed rule, the motor carrier is no longer obligated to

[21] Courts have held that a non-signatory third party can be bound by the terms of a bill of lading between a carrier and a shipper/consignee by virtue of having an agency relationship with one of the named parties to the bill of lading. *See, e.g., In re M/V Rickmers Genoa Litig.*, 622 F.Supp. 2d 56, 74 (S.D.N.Y. March 31, 2009); *APL Co. Pte. Ltd. v. UK Aerosols Ltd*., 452 F.Supp.2d 939 (N.D. Cal. July 7, 2006); *Laufer Group Int'l v. Tamarack Indus., LLC*, 599 F. Supp. 2d 528, 531 (S.D.N.Y. Feb. 24, 2009).

pay those charges, even though it agreed to do so as part of the mutually agreed upon terms of the contract.

Is it the FMC's intention to remove the ability to invoice a motor carrier for detention and demurrage fees incurred by a motor carrier's non-performance of a contract the motor carrier mutually agreed to with an ocean carrier for the transport of goods? If so, to pass muster under the APA, the Commission must provide a reasoned explanation for why it is taking this extraordinary step, the source of its statutory authority, and the proposal's potential impact on the fluidity of the supply chain. The NPRM addresses none of these core issues.

c. *Notify Parties.* Ocean bills of lading typically have a space to designate a "notify party." This party may play different roles depending on the shipment in question. For example, the notify party may be the actual buyer of the goods, a forwarding agent, or a customs broker. [22] In some cases, there are containerized commodities that are traded while in transit. The ability to negotiate the price or transfer title of such commodities while the cargo is in transit is made possible by using "To Order" Bills of Lading. When goods are sold while in transit – which may happen several times – the consignee's customer to whom it has sold the goods is then listed as the notify party. The consignee's customer to whom the carrier is instructed to deliver the goods is not an original party to the contract of carriage, but that party accepts that contract when it claims the cargo, making it reasonable in this circumstance for the ocean carrier to look to the consignee's customer for payment before releasing the cargo.[23] Thus, in cases where the notify party is the new owner of the cargo and consents by some manner to be bound by the terms of the contract where the free time terms have been negotiated,[24] it is reasonable to bill that party for detention or demurrage because they are best positioned to arrange for the timely pick-up and return of the container.

Another example is when a bank issues a letter of credit on the cargo, the bank has a legal right to withhold release of the goods until certain contractual obligations are met. In these cases, the issuing bank may be listed as the notify party, and decisions made by that bank take precedence over the consignee. It is important to ensure the ability to invoice the bank listed as the notify party for detention and demurrage charges, because the bank is often the best positioned party to facilitate movement of the cargo.

d. *Customs Brokers.* The Commission's proposal to prohibit customs brokers from being invoiced for detention and demurrage is predicated upon the same rationale it uses for motor carriers, and therefore it suffers from the same flaws. Many beneficial cargo owners rely upon

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[22] See, e.g., *G.I.C. Servs, L.L.C. v. Freightplus U.S.A., Inc.*, 866 F.3d 649, 657 (5th Cir. 2017) ("In the modern shipping industry, the shipment of goods by vessel from the United States often involves a chain of multiple entities, each with defined roles.").

[23] See, 49 U.S.C. § 80110(a)(1) (carrier required to deliver goods to holder of a negotiable bill for the goods only when the consignee or holder offers in good faith to satisfy the lien of the carrier on the goods).

[24] See e.g., *Ingram Barge Co., LLC v. Zen-Noh Grain Corp.*, 3 F. 4th 275, 279 (6th Cir. 2001) ("And a third-party beneficiary can show consent by: (1) filing suit; (2) its course of conduct; or (3) accepting through its agent."); *OOCL (USA) Inc. v. Transco Shipping Corp.*, 2015 WL 9460565 (S.D.N.Y. Dec. 23, 2015) (determining consignee liable for unpaid detention and demurrage as it "accepted the bills of lading and became a party to each when it signed, endorsed, and presented them to [the carrier]."

customs brokers to handle clearances and notify customers, and in some cases list their customs brokers as the notify party. If delay in a customs clearance process is attributable to a customs broker failing in its duties, resulting in demurrage fees, it is important to be able to hold customs brokers accountable by allowing the ability to invoice them for any demurrage fees caused by their nonperformance.

WSC has laid out examples of when it might be reasonable to issue a detention and demurrage invoice to a party other than the shipper to incentivize freight fluidity within the supply chain. However, we do not contend that it is always reasonable to bill any party in every circumstance. Rather, our point is that determining when a party can be appropriately billed is dependent on the facts of the particular case.

WSC therefore recommends the FMC abandon its proposal to create bright-line regulations that prevent billing certain parties for detention and demurrage in all cases. As the examples above illustrate, there are situations when these additional non-shipper parties are responsible for causing delays in the movement of cargo, and it is therefore reasonable and appropriate to invoice them for detention and demurrage charges. Such parties are often recognized by the law as being parties to or beneficiaries of the contract of carriage, thus bringing them within the rationale (although not the language) of the Commission's proposed subsection 541.4. The Commission should amend its proposed regulatory language in subsection 541.4 to conform to the approach under 46 CFR 545.5, which provides that case-by-case facts are to be analyzed to determine when it is reasonable to bill a party. This will meet Congress' OSRA 22 direction to clarify the reasonableness standard under 46 USC § 41102(c) and adhere to the Incentive Principle found in 46 CFR 545.5.

3. <u>Billing Practices</u>.

a. <u>The Commission Has Not Adequately Explained How the Section 541.7 30-Day Timeframe to Issue Demurrage or Detention Invoices is the Only Reasonable Approach</u>.

As discussed above, 46 U.S.C. § 41102(c) and OSRA 22 § 7 require that the FMC develop a rule grounded in reasonableness taking into account the "Incentive Principle" found in 46 CFR 545.5.[25] The Commission's authority under 46 USC § 41102(c) is to ensure a carrier has "establish[ed], observe[s], and enforce[s] just and reasonable" regulations for detention and demurrage charges.[26] In the NPRM, the FMC is proposing specific timeframes to issue detention and demurrage invoices. In its preceding ANPRM, the Commission specifically requested comments on whether it should require billing parties to issue detention and demurrage invoices within 60 days of the occurrence of the charges, noting that this practice would align with the UIIA.[27]

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[25] WSC understands that the FMC's general authority to issue regulations is found at 46 U.S.C § 46105, but that authority must be linked to an operational authority to have effect – such as §§ 41102 or 41104.

[26] The FMC cannot rely on statutory authority granted under 41104(a)(15) to issue this part of the proposed regulation as that statute only allows the FMC to require certain information to be provided on an invoice; it does not give authority to dictate action beyond providing that information.

[27] See Demurrage and Detention Billing Requirements, 87 Fed. Reg. 62341, 62352, n. 131, 132.

The Commission has ignored a significant number of comments detailing why any timeframe should be set by commercial negotiations, or via contractual terms, to include the UIIA's 60 days. Instead the Commission has proposed a 30-day timeframe. The Commission attempts to justify its proposed 30-day timeframe by saying, "it appears that billing parties are capable of issuing demurrage or detention invoices, on average, within 30 days, applying this timeframe does not appear to be unreasonable"[28] and "the more time that passes between when the charges stop accruing and when the billed party receives an invoice, it is more difficult for the billed party to verify the charge because it is less likely that they have the necessary information or documentation to confirm a charge."[29] However, neither of these statements explain why 30 days is the only reasonable timeframe.

In fact, there is ample evidence to show that 60 days is a much more reasonable time frame. The UIIA sets the default billing period at 60 days and has been used by the industry for over 25 years. The UIIA is the product of multiple ocean, rail, and motor carriers working together to negotiate terms they all felt were reasonable. This 60-day timeframe is not only a negotiated term, but it is continuously monitored by the IANA, which is a body created for the purpose of ensuring these terms are reasonable for all parties involved. Notably, in the Interpretive Rule, the Commission specifically addressed detention and demurrage billing timeframes, concluding that it "does not believe it is appropriate in this interpretive rule to prescribe timeframes, let alone specific ones," while at the same time referencing the UIIA's 60-day timeframe.[30] The FMC must therefore explain why it suddenly finds a 30-day time period more reasonable, against the use of a 60-day timeframe that has been in use for more than two and a half decades.

As with all other aspects of this rulemaking, it is critical to keep in mind that the Commission's statutory authority is to prevent unreasonable practices, not to dictate a single practice that is the only approach that will be deemed reasonable at the expense of other reasonable practices. If the Commission decides that there must be some outer limit on the timing of the issuance of bills and the presentation and resolution of disputes, then the Commission must at a minimum explain why other practices, such as the longstanding UIIA practice of 60-days, is unreasonable.

b. Sections of 541.7 and 541.8's Timeframe for Disputing Charges and Resolving Disputes are Incongruent and Unreasonably Discriminate between Billing Parties and Billed Parties.

The proposed regulations found in Sections 541.7(a) and 541.8(a) are incongruent and discriminatory and must be amended to correct those flaws. Section 541.7(a) would require a

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[28] See Demurrage and Detention Billing Requirements, 87 Fed. Reg. 62341, 62354

[29] See *id.*

[30] See Interpretive Rule on Demurrage and Detention Under the Shipping Act, 85 Fed. Reg. 29638, 29662, n. 388 "The Commission notes, however, that the standard UIIA agreement requires equipment providers to invoice motor carriers for ''Per Diem, Container Use, Chassis Use/Rental and/or Storage Ocean Demurrage charges within sixty (60) days from the date on which the Equipment was returned.'' citing to Uniform Intermodal Interchange and Facilities Access Agreement at § E.6(c) (quotations omitted).

billing party to issue an invoice to a billed party within 30 days[31] of the last day detention and demurrage charges were incurred. If the billing party fails to issue an invoice within this timeline, then the billed party does not have to pay the charges. In the NPRM the Commission states, "[w]ithout such a provision, there would be no consequence for not meeting the 30-day timeframe."[32] Section 541.8(a), in turn, provides a corresponding requirement that a billed party seeking fee mitigation, refund, or a waiver must submit the request within 30 days of receiving the invoice. However, Section 541.8(a) does not contain a corresponding clause that imposes a consequence if a billed party does not submit such request for mitigation, waiver, or refund within 30 days of receiving the invoice. The Commission provides no explanation or discussion as to why the billed party faces no consequence for failing to meet its deadlines, but the billing party forfeits its contractual rights if it misses a deadline.[33]

To make these sections congruent, the Commission must amend Section 541.8(a) to add language similar to Section 541.7(a) to state that if a billed party fails to submit its request for fee mitigation, refund, or waiver within the 30-day deadline, then its claim is waived. Failing to amend Section 541.8(a) would impose requirements on billing parties that are not equally imposed on billed parties, resulting in a violation of fundamental fairness, equal protection, and due process. Additionally, it would likely be considered arbitrary by a court taking into account the Commission's reasoning for imposing the penalty on the billing party.

Proposed Section 541.8(b) must also be amended to add a provision to address the situation where a billing party receives a request for fee mitigation, refund, or waiver, and while working in good faith to resolve the request, is not able to gather sufficient information to complete its investigation and respond to the request within the 30-day deadline. For such cases, the Commission should include a provision that allows the billing party to work directly with the billed party to agree on an expanded timeframe to resolve the dispute.

In addition, Section 541.7(b) states that if a billing party incorrectly invoices a billed party, it must invoice the correct party within 30 days of the incorrect party disputing the bill. Section 541.7(b) also creates a hard-stop that states that the correct party must be invoiced within 60 days after the charges were last incurred. However, if a billing party issues an invoice on the 30th day, as allowed by Section 541.7(a), and the billed party does not dispute the invoice until the

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[31] Please note, based on the argument in section 3.a. of these comments WSC does not agree that the time frame should be 30-days, rather we are using the timeline in the existing proposed regulation to illustrate the point of this section.

[32] Demurrage and Detention Billing Requirements, 87 Fed. Reg. 62341, 62354 (Oct. 14, 2022).

[33] See <u>*Bracco Diagnostics, Inc. v. Shalala*</u>, 963 F. Supp. 20, 27–28 (D.D.C. April 21, 1997) ("Our court of appeals has repeatedly held that "an agency must treat similar cases in a similar manner unless it can provide a legitimate reason for failing to do so.") (citing *Independent Petroleum Association of America v. Babbitt,* 92 F.3d 1248, 1258 (D.C.Cir.1996) (citing *National Association of Broadcasters v. FCC,* 740 F.2d 1190, 1201 (D.C.Cir.1984)); *see also Transactive Corp. v. United States,* 91 F.3d 232, 237 (D.C.Cir.1996); *Doubleday Broadcasting Co. v. FCC,* 655 F.2d 417, 423 (D.C.Cir.1981) ("Government is at its most arbitrary when it treats similarly situated people differently.") (citing *Etelson v. Office of Personnel Management,* 684 F.2d 918, 926 (D.C.Cir.1982)); *Allergan. Inc. v. Shalala,* 6 Food and Drug Rep. 389, 391, No. 94–1223 (D.D.C. Nov. 10, 1994) ("If an agency treats similarly situated parties differently, its action is arbitrary and capricious in violation of the APA.").

30th day of receiving the invoice (or longer since there currently is no consequence for failure to meet this deadline), as allowed by Section 541.8(a), then all 60 days have elapsed (if not more depending on the time it takes for an invoice to reach the billed party), leaving no time to bill the correct party. The consequence is that the correct party will not have to pay the invoice. Not only is this inconsistent with the Incentive Principle under 46 CFR 545.5, but it appears to give billed parties an incentive to wait until the last minute to dispute an invoice they feel has been improperly charged to them. WSC recommends that the 60-day deadline in Section 541.7(b) be removed in its entirety to remedy this issue.

Finally, the Commission must revise Section 541.8(b) to clarify the applicable timeframe for a billing party to "resolve" a request for fee mitigation, refund, or waiver. The proposed regulation does not define this term, and the Commission's discussion of the matter in the preamble includes multiple, differing commentary as to whether billing parties must both (i) decide whether mitigation, refund, or waiver is appropriate based on the facts and supporting evidence submitted by the billed party and also (ii) remit the refund, if applicable, within the same timeframe.[34] If the Commission does intend for the proposed regulation to require both of these actions within 30 days, this is impractical and again illustrates why an extended timeframe such as 60 days is more appropriate. WSC understands the Commission's interest in billed parties being provided with some certainty that they will receive a timely response to their fee mitigation, refund, or waiver requests, but requiring billing parties to complete both the evaluation of a billed party's claims and any supporting evidence in a thorough manner and also remit payment within 30 days would effectively limit the time for review and evaluation of a dispute to well short of 30 days. This is simply not enough time to evaluate documentation, pose and receive answers to any follow-up questions, and render a properly considered answer to a dispute. Quick answers are good; accurate answers are better. Moreover, the Commission has not sufficiently explained how a far more practical 60-day timeframe would not meet its objective. Therefore, this section must be amended in the final rule.

4. <u>Conclusion</u>.

The Commission proposes a rule that utterly disregards Congress' direction in OSRA 22 to perform a relatively simple task: "only seek to further clarify" reasonable rules and practices related to the assessment of demurrage and detention charges under the FMC's existing Interpretative Rule. By ignoring this clear Congressional direction and exceeding the authority granted by Congress, the Commission's proposal to prohibit entire classes of entities from being invoiced for demurrage and detention is a *per se* violation of the Administrative Procedure Act.

The Commission then compounds its legal error with bad policy, because its proposal would jettison five years of work the Commission has diligently spent developing its Interpretative Rule, with the Incentive Principle as its touchstone. Stunningly, the Commission's

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[34] See Demurrage and Detention Billing Requirements, 87 Fed. Reg. 62341, 62355 - "Resolution of a request also includes billing parties to mitigate, refund, or waive a charge, if appropriate, within the 30-day timeframe," and "The proposed deadline would provide billed parties with certainty that it will **receive a response** to its fee mitigation, refund, or waiver request within a specific timeframe." (emphasis added).

proposal is devoid of any discussion of its Incentive Principle – a cornerstone which has been relied upon throughout the pandemic-caused supply chain congestion as a critical tool to incentivize the movement of cargo. Failing to explain a major change in policy is also a violation of the APA, but equally to the point, the Commission is proposing an entirely new billing framework that will upend decades of established industry practice, including numerous contracts and associated rights and responsibilities that parties currently enter into to move the nation's freight while ensuring cargo fluidity.

Congress was clear in instructing the Commission to use this rulemaking to provide further clarification on how to reasonably use the tools of detention and demurrage to incentivize cargo velocity. The current proposal would do precisely the opposite: it would ban many reasonable applications of demurrage and detention and therefore risk increasing congestion in our nation's ports. Given that we are only now clearing the congestion that snarled our ports and inland supply chains during the pandemic, it is hard to imagine a Commission initiative that is worse aligned with Congress' objectives in passing OSRA 22.

In order to align with Congress' clear instructions and to avoid fatal administrative law violations, the Commission must abandon its proposed approach of prohibiting detention and demurrage invoicing to whole classes of entities. Instead, the Commission must recognize the functional and contractual responsibilities that multiple parties have for keeping our nation's ocean cargo moving. The World Shipping Council welcomes properly constructed regulations that encourage cargo fluidity and that treat all parties fairly. The proposed rule does neither, and it must be fundamentally restructured to be consistent with the Commission's Interpretive Rule.

Switching from broad policy to practical details in the proposed rule, the Commission must amend its proposed billing timelines and framework. Here again, in complex commercial environments, allowing parties to negotiate important contractual terms is superior to imposing arbitrary deadlines. If the Commission is going to codify set deadlines, then it must fully explain why it is choosing these deadlines. The Commission has done nothing more than to simply tally how many votes are in favor of a certain deadline, but counting is not analysis. The timing rules must be fair and workable to all parties, and they must be aimed at accuracy as well as speed. The Commission must amend its proposal to ensure that both billed and billing parties face the same consequences if they fail to meet their respective responsibilities when issuing or disputing invoices. Where parties are working in good faith to resolve a dispute, the rules must include a provision that enables the parties to negotiate an expansion of the deadline for resolution. The Commission must also remove the 60-day deadline in Section 541.7(b) to remedy the situation where an incorrect party is initially billed. Finally, the Commission must revise Section 541.8(b) to clarify the applicable timeframe for a billing party to "resolve" a request for fee mitigation, refund, or waiver so that the calculation of the time to issue a refund is separate from the period allowed for deciding whether a refund is appropriate.

WSC looks forward to continuing to work with the Commission towards a rule that implements OSRA consistent with Congressional intent and sound policy to ensure a workable and fluid international ocean transportation system for U.S. businesses and consumers.

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