April 18, 2019

Office of the Secretary
Federal Maritime Commission
800 North Capitol Street
Washington, DC 20573

Re: Agreement 201293: Comments of the World Shipping Council

Dear Secretary Dickon,

Please accept these comments of the World Shipping Council in response to the April 8, 2019, Federal Register notice describing Agreement Number 201293, the Georgia – South Carolina Marine Terminal Operator Cooperative Working Agreement.

The World Shipping Council represents the interests of the liner shipping industry, and many of its members call at the ports covered by the proposed agreement. Equally important, as discussed further below, the subject agreement is different in kind from any Marine Terminal Operator (MTO) agreement filed to date with the Commission. As such, how the Commission handles this agreement will have implications for future MTO agreements affecting operations in ports across the United States.

Many MTO agreements currently on file with the FMC allow for the parties to streamline and coordinate their operations in order to enhance efficiencies. When the authority in such agreements is properly matched to the operational purpose, these agreements, like ocean carrier operational agreements, can improve efficiency and provide benefits throughout the supply chain. Based on its plain language, the Georgia – South Carolina MTO agreement is fundamentally different from the operational MTO agreements currently effective under the Shipping Act.
A. The Agreement Authorizes Complete Alignment of Operational and Commercial Activity, and Would Replace Three Service Providers with a Single Provider.

The features of the Georgia-South Carolina Agreement that make it unique among filed MTO agreements and that raise serious concerns about anticompetitive effects include the following:

1. The agreement contemplates the merging of operations of the three parties at the covered ports into single new entity (“NEWCO”). Consistent with that consolidation of three competitors into one, the agreement states (subsections 4.4.a and c) that the parties through NEWCO may:

   a. “Establish rates, charges and competitive practices.”

   and

   c. “Negotiate and enter into agreements within the scope of NEWCO’s scope, with the Ports and/or any third parties concerning marine terminal facilities and/or services, and/or agreements to provide stevedoring and other related services. . . .”

   The agreement also authorizes “[j]oint contracting for the purchase, ownership, lease, or operation of equipment, facilities, and any services related thereto.” (Section 5.2.5)

   These agreement authorities, coupled with the express intent to combine operations and pricing into a single new company, would reduce the number of competitors at the affected ports from three to one. Such a level of concentration must be examined with great care under the 46 U.S.C. 41307(b) standard to determine whether “the agreement is likely, by a reduction in competition, to produce an unreasonable reduction in transportation service or an unreasonable increase in transportation cost. . . .”

   There are no features on the face of the agreement that would appear to mitigate the anticompetitive effects of moving from three competitors to a single competitor, which will impact both inter- and intra-port competition. Theoretically, this level of concentration might be justified by increased productivity and efficiencies in the loading, discharge and handling of containers, but there is nothing to indicate that such a result would occur here. In this regard, the agreement states without explanation or support in Section 4.3 that the anticipated consolidation of services will “provide more efficient and better quality service for users.” The FMC should require the parties to produce further details in support of this statement.

   In addition to the fact that the agreement would eliminate price competition, if ocean carriers calling at Charleston and Savannah must rely upon a single stevedore instead of the current three, the prospect of service disruptions caused by business failures, financial mismanagement, labor and corporate disputes, disputes with the GPA or the SCPA, etc. become
a serious risk. In the absence of viable stevedoring alternatives and options, the failure or disruption of a sole service provider would have a material adverse impact on carriers and shippers. The Ports of Jacksonville, Florida, and Wilmington, North Carolina, are not viable substitutes for Savannah and Charleston because of their limited depths, fewer cranes and limited rail and road connections.

It is also worth noting that the U.S. Congress recently amended the Shipping Act at the behest of marine terminal operators to provide that joint negotiations by ocean common carriers for “certain covered services,” which include core MTO services, must be consistent with the antitrust laws. Any analysis of joint procurement under the antitrust laws requires an examination of the relative bargaining power of the parties. In the converse situation presented here, where the proposed agreement would create not just a joint seller but a monopoly seller of stevedoring services in each port, the Commission must inquire whether the creation of such monopoly power through the use of a Shipping Act agreement is consistent with applicable law.

2. The agreement contemplates a level of information sharing that is not limited to what is necessary to achieve the objectives of the cooperation. For example, section 5.4 authorizes the collection and sharing of a very broad range of commercial information, including information regarding customers and commercial forecasts. In the context of a merger, this is perhaps to be expected, but here the parties propose to merge activities at two large ports in the same geographic range while presumably remaining competitors at the many other ports in which they operate. There is no indication of how the parties propose to segregate the sensitive commercial information that they propose to share with respect to the two covered ports from their operations in other ports. The possibility of “leakage” of such competitively sensitive information into the parties’ operations at other locations is reinforced by the provision at section 4.5(a) authorizing the parties to provide accounting, information technology and other services to NEWCO.

Even if the agreement parties were to overcome the jurisdictional and competitive problems discussed elsewhere in these comments, the agreement would have to be amended to better define and limit the scope of information exchanged among the parties.

B. It is Not Clear That the Filed Agreement is Within the Commission’s Jurisdiction.

In addition to the fact that the agreement describes activity (consolidation from three competitors to one) that on its face would be substantially anticompetitive, there are two threshold issues associated with the Commission’s jurisdiction that require evaluation.

First, the agreement contemplates that the operations of the parties to the agreement will be merged into a new entity (“NEWCO”). As described at section 4.1 of the agreement, “NEWCO will assume responsibility for providing those facilities and services currently provided in their
individual capacity in the ports, including marine terminal gate operations and vessel loading and unloading operations, and the operation of equipment and technology related thereto.”

In short, with respect to the services provided by the three parties to the agreement at the ports of Savannah and Charleston, the agreement appears to describe a full-function merger. Given that fact, WSC urges the Commission to evaluate whether this agreement falls within the jurisdiction of the Commission under 46 U.S.C. 40301(c) (no Commission jurisdiction over mergers) or pursuant to the analysis under that subsection employed by the Commission in 2017 in rejecting the Tripartite Agreement that was filed in anticipation of the creation of Ocean Network Express. See FMC Press Releases dated May 2 and May 5, 2017.

The second jurisdictional issue involves the nature of the services provided by each of the parties at each of the two covered ports. The Commission has held that an entity shall not be recognized as a marine terminal operator if it provides only stevedoring services separate from MTO services. See, e.g., Fact Finding Investigation No. 17, Rates, Charges and Services Provided at Marine Terminal Facilities, 55 Fed. Reg. 5626, 5630 (1990). The agreement stops short of asserting that all three parties are MTOs at both ports. The Agreement at Article 3 states that the parties “are marine terminal operators as defined in the Shipping Act of 1984. . . .” The agreement goes on to state that: “Each party operates public wharves, other marine terminal facilities, or a combination of the foregoing in connection with ocean common carriage.” Public information suggests that this may well be a true statement, but the statement is insufficient to assert, much less establish, that all three parties are MTOs at each of the two ports, which is the relevant inquiry.1 To the extent that any one of the three parties is not an MTO at either of the two covered ports, then the agreement is not a “marine terminal operator agreement” within the meaning of 46 U.S.C. 40301(b).

Because the agreement neither asserts nor demonstrates facts sufficient to allow the Commission to determine that the parties are in fact marine terminal operators with respect to the covered services and covered ports, WSC urges the Commission to undertake a factual inquiry into that question before deciding whether to challenge the agreement or to allow the agreement to go into effect. The need for such an inquiry is all the more necessary in this case because both ports are “operating” ports rather than “landlord” ports, meaning that the relevant port authorities in both instances are the primary MTOs. This fact underscores the need to understand the operational role of the parties to the agreement.

The agreement states that the parties will discuss the operation of marine terminal gates. However, today those functions are handled by independent companies—by Charleston Gate

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1 On this point of whether or not all parties are today MTOs at both covered ports, we note that the fact that NEWCO itself might qualify as an MTO once the operations of the parties are combined cannot bootstrap FMC jurisdiction over the agreement. The point of the agreement is to form NEWCO, and jurisdiction must be based on the pre-formation status of the parties.
LLC in Charleston and by Gateway Terminal LLC in Savannah. The Commission should determine whether these companies have agreed to transfer these functions to NEWCO.

Further, to the extent that the Commission determines that NEWCO will conduct some MTO activities, if such activities constitute only a small amount of NEWCO’s business with stevedoring constituting the bulk of its activities, then the Commission should confirm that antitrust immunity does not apply to the stevedoring portion.

C. The Commission should Confirm whether the Ports are also Participating in the Proposed Cooperative Working Arrangement and whether there are Agreements that have not been Filed which should also be Filed.

It would seem unlikely that the parties to the agreement would have filed without prior consultation with the South Carolina Ports Authority and the Georgia Ports Authority. To the extent that the ports and the parties have discussed questions such as how NEWCO would be operated, how the gates would be handled, or discussed long term license agreements, those agreements should be disclosed and the ports, as MTOs, should join the agreement. To the extent that the ports and the parties are taking the view that such arrangements are exempt from filing, they should be required to explain why. Further, the Commission should inquire whether the ports will permit new entrants access to equipment, permits or licenses in order to compete with the NEWCO for its services.2

D. Status of Current Carrier Contracts and other Filed Agreements.

The Commission should also inquire as to how the establishment of NEWCO will affect current contractual arrangements that the parties have with carriers. For example, if those agreements include confidentiality clauses, how will the parties be able to discuss rates for NEWCO services without violating those confidentiality provisions? Further, will the parties adhere to those contracts or seek to abrogate such contracts when NEWCO becomes effective?

Additionally, the Commission should inquire whether and to what extent the agreement will affect other existing discussion agreements involving marine terminal operators in the South Atlantic. For example, it is not clear whether the East Coast Gateway Terminal Agreement in effect between the Georgia Ports Authority and the Virginia Port Authority that allows for

2 We note that currently barriers to entry to operate as stevedores in both ports are relatively low. For persons wishing to operate as stevedores at the container terminals in Charleston and Savannah, the application and insurance requirements are set forth in the GPA and SCPA schedules and requirements are modest (for example, see http://www.scspa.com/wp-content/uploads/8-charleston-tariff.pdf). The FMC should confirm that this openness to competition will remain.
discussion and the exchange of information on commercial opportunities would be complementary to this agreement in such a way as to further lessen competition between marine terminal operators in the U.S. southeast.

E. The Agreement Raises a Substantial Threat of Reduced Competition, Threshold Shipping Act Jurisdictional Questions, and Multiple Factual Questions about its Scope of Information Sharing and Effects on Competition and Operations in Other Ports.

To summarize:

1. With respect to the covered services at the covered ports, the agreement would authorize a reduction from three service providers to a monopoly single provider, eliminating all intra-port and inter-port competition for such services. Any higher costs will fall primarily upon carriers calling at the ports, and to some extent those higher costs may be passed on to beneficial cargo owners and the shipper public. Such a reduction in the number of competitors raises an obvious question of whether the agreement violates 46 U.S.C. 41307(b). WSC urges the Commission to undertake a full competitive evaluation under that standard and to take appropriate action as indicated by that review.

2. The agreement appears to describe a de facto merger with respect to the activities of the parties at the two covered ports, both of which ports are in the southeast U.S. port range. If the Commission is to exercise jurisdiction over such an agreement, it will need to provide a clear explanation of the basis for such jurisdiction.

3. The agreement does not assert or provide adequate facts to demonstrate that all parties are MTOs with respect to both covered ports. Ascertaining current MTO status of the parties will require further factual investigation by the Commission.

4. The FMC should be mindful that the parties currently operate in other U.S. ports, including Jacksonville. If the Commission finds that it has jurisdiction and it allows the agreement to become effective, it should require changes to the agreement to prevent the parties and NEWCO from using the agreement as a platform to engage in joint discussions concerning services, operations and facilities in other ports.

5. We note that the agreement is silent as to the admission of new members. The Commission should ask whether new members will be allowed admission to the agreement and, if so, under what terms.
The World Shipping Council appreciates the opportunity to provide these comments, and urges the Commission to conduct a full jurisdictional and competitive analysis of Agreement No. 201293 and to take such actions as are appropriate based on that analysis.

Respectfully submitted,

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