Comments of the

World Shipping Council

Submitted to the

Federal Maritime Commission

In the matter of

Definition of Unreasonable Refusal to Deal or Negotiate with Respect to Vessel Space Accommodations Provided by an Ocean Common Carrier

Docket No. 22-24

October 21, 2022

1. Identity and Interest of the World Shipping Council (WSC).

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]

WSC's container liner members are the parties that will be regulated under the proposed rule. WSC files these comments in the spirit of assisting the Commission in creating a final rule that is consistent with the Shipping Act, provides predictable guidance to all parties, and recognizes the operational and commercial realities of the container liner shipping industry.

2. Background and Executive Summary.

Section 7 of the Ocean Shipping Reform Act of 2022[2] (OSRA 22), requires the Federal Maritime Commission (FMC or Commission) to define when a carrier has unreasonably refused to negotiate or deal with respect to vessel space accommodations. See 46 U.S.C. § 41104(a)(10). To meet this Congressional direction the FMC issued a Notice of Proposed Rulemaking (NPRM), FMC Docket No. 22-24. In its NPRM, the Commission states that the term "unreasonable" must be determined on a case-by-case basis, reviewing the circumstances presented at the time of the claim. To help define what scope of actions will be reviewed, the Commission has proposed a factor test to guide their Administrative Law Judges (ALJ).

WSC agrees with the Commission that allegations of "unreasonable refusal to deal or negotiate" be dealt with on a case-by-case basis and that using a suite of non-exclusive factors is both appropriate and consistent with its past precedent. This is the approach that the Commission has consistently used when adjudicating cases brought under 46 U.S.C. § 41104(a) and its predecessors. It is important to remember in this regard that OSRA 22 did not create the "unreasonable refusal to deal" prohibition. Instead, OSRA 22 merely added language to the section by expressly naming vessel space accommodations as a factual situation to which the prohibition applies. Thus, adherence to past Commission precedent is required absent a reasoned explanation why its prior policies and standards are being changed.

Although WSC agrees with the Commission's general approach, there are four specific points on which WSC urges the Commission to amend its proposal before publishing a final rule:

i. Delete proposed subsection 542.1(b)(2)(i). This subsection lists the first factor in the test for unreasonableness as: "Whether the ocean common carrier follows a documented export strategy that enables the efficient movement of export cargo." Listing adherence to a written "export strategy" as the first factor in a reasonableness test creates a *de facto*

[1] A full description of the Council and a list of its members are available at www.worldshipping.org.
[2] Public Law 116-146.

requirement that carriers create such a document, and the Commission has no authority to impose such a requirement. Not only does the Commission not have the authority to require the development and production of such a document, the Commission has also failed to explain how an export strategy document would have any relevance to or evidentiary value in evaluating the reasonableness of subsequent action or inaction by an ocean carrier as it pertains to any individual decision on whether to deal or negotiate with respect to vessel space accommodations.

ii. Delete the statement in the preamble that: "A common carrier granting customers special treatment to one party because that party is a regular customer is likewise likely to be viewed as unreasonable." 87 FR 57677. This statement is contrary to law as it is categorically at odds with the confidential service contracting provisions added by the Ocean Shipping Reform Act of 1998 (OSRA 1998),[3] which were left undisturbed by OSRA 22. This misstatement (citing to a marine terminal case from 1968[4]) ignores the most consequential change made by OSRA 1998 and, if not removed, will taint the entire rulemaking.

iii. Expand proposed subsection 542.1(b)(2)(ii) to include enumerated legitimate business factors, in the same way that the Commission has enumerated "transportation factors" in 542.1(b)(1), to correspond to the use of those factors in subsection 542.1(b)(2)(iii).[5] This would be consistent with the Commission's prior precedent finding actions to be reasonable that are connected to either legitimate business decisions or legitimate "transportation factors." Failure to include legitimate business factors risks those factors receiving little to no weight in the adjudication of claims. This further leaves both regulated and protected entities with little insight into the Commission's thinking as to what overall factors will be considered in evaluating "good-faith negotiations" and whether "business decisions … were subsequently applied in a fair and consistent manner."[6]

iv. Revise proposed subsection 542.1(d) by adding or clarifying the following – 1) add to the text of the regulation that the burden of production shifts to the carrier but that the burden of persuasion remains with the complainant; and 2) either eliminate the text regarding submittal of evidence through a certified statement by a "compliance officer" or set forth what other methods carriers may use to provide rebuttal evidence. The language of the proposed rule sets forth a very specific means by which a carrier may make that rebuttal – certification – which could be read to suggest that certification is the

[3] Public Law 105-258.
[4] *Chr. Salvesen & Co., Ltd. v. West Michigan Dock & Market Corp.*, 12 F.M.C. 135, 146 (1968).
[5] "Whether the ocean common carrier engaged in good-faith negotiations, and made business decisions that were subsequently applied in a fair and consistent manner." 87 FR 57679.
[6] *Id*.

only way that a carrier may produce rebuttal evidence. WSC does not understand this to be the Commission's intent, and therefore seeks clarifying language to either specify additional means of submitting rebuttal evidence or removal of the certification example.

3. OSRA 22 provides no Authority to the Commission to require Carriers to create an Export Strategy.

Proposed subsection 542.1(b)(2)(i) states the first factor of the FMC's proposed "unreasonableness" test as: "Whether the ocean common carrier follows a documented export strategy that enables the efficient movement of export cargo." 87 FR 57678. Four things immediately stand out with respect to this proposed factor:

i. First, there is no authority in the Shipping Act, as amended, that authorizes the Commission to require the creation of such a commercial and operational document (for exports or imports).

ii. Second, it creates a *de facto* requirement that carriers create and maintain a "documented export strategy." The WSC infers this requirement by the language of the preceding subsection of the regulation, which states that the Commission "will consider the following factors" including the export strategy. As such, the carrier bears the risk of an ALJ or the Commission interpreting the absence of an export strategy as a *per se* indication of unreasonableness.

iii. Third, the fact that the Commission has proposed the creation of an "export strategy" but does not propose a corresponding "import strategy" contradicts the Commission's own statement that, "[t]he common carrier prohibitions in 46 U.S.C. § 41104 do not distinguish between U.S. exports or imports. If adopted, this proposed rule would apply to both." 87 FR 57674.

iv. Fourth, there is no coherent explanation of how this newly required export strategy is relevant to, or would be used to evaluate individual cases of alleged unreasonable refusals to deal or negotiate.

For all these reasons, which we discuss in further detail below, proposed subsection 542.1(b)(2)(i) must be stricken.

a. Requiring carriers to create an "Export Strategy" in order for their behavior to be deemed reasonable is beyond the Commission's statutory authority.

The Commission's only explanation of why it has included a "documented export strategy" factor (thereby creating a *de facto* requirement) in the proposed rule appears at 87 FR 57675:

> Through its recently revised VOCC audit program, Commission staff reviewed a number of well-documented operating procedures and policies specifically related to export cargo. Ocean common carriers operating in the U.S. trade should have a documented export strategy that enables the efficient movement of export cargo.

This is a classic *non sequitur*; the second statement does not follow from the first. The Commission's review of operating "procedures and polices" relating to exports is a wholly insufficient basis on which to predicate a *de facto* requirement that all carriers have a so-called export strategy.

In the absence of any legal authority to require an export strategy, the Commission goes hunting through the statute in a misguided effort to tether its novel requirement to some authority. The Commission first argues that OSRA 22 imbues it with sufficient authority, stating:

> "This [requirement of an export strategy] comports with OSRA 2022 generally, and specifically with the purpose in Section 41104(4) to "promote the growth and development of United States exports."[7]

The Commission then quotes OSRA 22's amendment of the Shipping Act's purpose statement, 46 U.S.C. § 40101, which states that *one purpose* of the Act is to:

> "promote the growth and development of United States exports through a competitive and efficient system for the carriage of goods by water in the foreign commerce of the United States, and by placing a greater reliance on the marketplace."

And, in a further effort to justify its impermissible emphasis on export cargo regulation, the Commission cites summary language from S. 3580, to argue that provisions of OSRA were passed because of:

> "the challenges expressed by U.S. exporters trying to obtain vessel space to ship their products."[8]

But, as hard as the Commission hunts for authority, it gathers none, and resorts to making flawed arguments, buttressed with cherry-picked legislative statements, in a failed attempt to weave together authority that is simply not present in the statute. This is because none exists.

Administrative case law is clear that the "preamble," "findings," or "purposes" section of a statute may not be relied upon in conferring or enlarging the authority or power of administrative agencies.[9] These provisions may be relied upon when examining the statute to resolve ambiguities in the operative sections of statutes but may not be pointed to for their own authoritative purposes. For further illustration, in 2014 the Congressional Research Service

[7] WSC assumes the FMC is referring to 46 U.S.C. § 40101(4) – Purposes and not § 41104 (4) which does not exist.
[8] 87 FR 57674.
[9] See, e.g. Yazoo Railroad Co. v. Thomas, 132 U.S. 174, 188 (1889) (stating that "the preamble is no part of the act, and cannot enlarge or confer powers, nor control the words of the act"); Ass'n of Am. Railroads v. Costle, 562 F.2d 1310, 1316 (D.C. Cir. 1977) ("A preamble no doubt contributes to a general understanding of a statute, but it is not an operative part of the statute and it does not enlarge or confer powers on administrative agencies or officers."); Rothe Dev., Inc. v. United States Dep't of Def., 836 F.3d 57, 65-66 (D.C. Cir. 2016) ("[Statutory] [f]indings, like a preamble, may contribute to a general understanding of a statute, but, unlike the provisions that confer and define agency powers, they are not an operative part of the statute.") (citations and quotations omitted).

issued a report on statutory interpretation that clearly states that "Preamble" sections of law cannot be used to give operative effect, and that "Findings" and "Purposes" sections may be helpful in resolving ambiguities to ensure that the statute and subsequent regulations align with congressional intent.[10] In this case, there are no ambiguous terms in either 46 U.S.C. § 41104(a)(10) or Section 7 of OSRA 22 that could be construed to authorize the FMC to require anything outside of defining the term "unreasonable" – and there is a total absence of any authorization for the Commission to create a *de facto* requirement to produce an export strategy by making it the definitive factor in its proposed reasonableness test.[11]

As with the Commission's impermissible reliance on preamble language, partial summary language from a predecessor bill — S.3580 — does not confer any authority on an administrative agency. It also contradicts the Commission's finding elsewhere in the proposed rule that these cited challenges were faced by both importers and exporters. *See* 87 FR 57675 ("In addition to the challenges faced by exporters, there have also been reports of restricted access to equipment and vessel capacity for U.S. importers, particularly in the Trans-Pacific market."). The emphasis on exports also contradicts the Commission's own statement that the plain language of 46 U.S.C. § 41104(a) does not differentiate between imports and exports. *See* 87 FR 57674 ("The common carrier prohibitions in 46 U.S.C. 41104 do not distinguish between U.S. exports or imports.").

The Commission's only other stated support for its export emphasis is its apparent reading of Section 9 of OSRA 22, where "Congress further highlighted issues related to U.S. exports and imports." *See* 87 FR 57675. As summarized in the proposed rule, Section 9 created a requirement for ocean carriers to provide information to the Commission relating to total import and export tonnage. The Commission does not explain how this requirement has any relevance to its export emphasis in the proposed rule and, if anything, contradicts such an emphasis as the provision creates a requirement for the Commission to publish both import and export data.[12] In the end, none of these provide the authority for the Commission to rewrite OSRA 22 as an "export-focus[ed]" statute.

Rather than advancing novel concepts and creating new requirements for a so-called export strategy, the Commission should do what Congress authorized it to do in Section 7 of OSRA 22 –

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[10] *See* "Statutory Interpretation: General Principles and Recent Trends," Congressional Research Service (Sept. 24, 2014) (available at: https://www.everycrsreport.com/files/20140924_97-589_3222be21f7f00c8569c461b506639be98c482e2c.pdf).

[11] The statute reads, "A common carrier, either alone or in conjunction with any other person, directly or indirectly, shall not— … (10) unreasonably refuse to deal or negotiate, including with respect to vessel space accommodations provided by an ocean common carrier." 46 USC § 41104(a)(10); "Not later than 30 days after the date of enactment of [OSRA 22], the [FMC] … shall initiate a rulemaking defining unreasonable refusal to deal or negotiate with respect to vessel space under section 41104(a)(10) of title 46, as amended by this section." Public Law 117-146 at Sec. 7(d).

[12] The remainder of the preamble to the NPRM includes a general discussion of trade imbalances, how those imbalances were affected by COVID, China's ban on solid waste imports, and other exogenous trade conditions that can affect the flow of cargo. The Commission never ties this discussion to its proposed regulatory response, and we do not speculate here on what those connections might be. It is for the Commission to provide those explanations, and it has not done so.

which is to define "unreasonableness" in the context of refusals to deal or negotiate with respect to vessel space accommodations. This is a relatively simple and limited Congressional direction. Instead, the Commission has sought, on the thinnest of statutory reeds, to turn that definitional exercise into a requirement that reaches deep into the commercial and business affairs of regulated entities. The development and production of an export strategy does not define unreasonable action; rather, this factor effectively mandates a company to take an action that is not otherwise required by law. Congress did not give the Commission the authority to take that step, and the Commission must therefore withdraw the "documented export strategy" factor from the proposed rule.[13]

To be clear, the lack of statutory authority to impose an "export strategy" requirement cannot be cured simply by adding a balancing "import strategy" requirement. The lack of authority to require the creation and production of commercial and operational plans extends to both import and export cargo. The Commission's foray into rewriting the Shipping Act as an export-focused statute is simply an additional, independent reason why subsection 542.1(b)(2)(i) must be removed.

b. The Commission has not explained how an export strategy document would have any relevance to or evidentiary value in evaluating the reasonableness of a refusal to deal or negotiate with respect to vessel space accommodations.

In addition to the lack of any statutory authority, the Commission never even attempts to explain any rational connection between a requirement for carriers to have an "export strategy" document and the statutory provision requiring the Commission to define when a carrier has unreasonably refused to negotiate or deal with respect to vessel space accommodations. The Commission provides sparse guidance, "by illustration only," on what it might consider to be an "effective export strategy." 87 FR 57675. But without more, it is impossible for either carriers or an ALJ to determine in the first instance whether any particular strategy would be considered reasonable in the Commission's eyes. Equally as important, the Commission has not explained how any of these illustrative general topics have any relevance at all to whether a carrier is reasonably negotiating with respect to vessel space accommodations, which is what Congress directed it to do. In other words, the Commission has told carriers they should have a

[13] *See, Outdoor Amusement Business Association, Inc. v. Department of Homeland Security*, 983 F.3d 671 688-689 ("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….Regardless, we cannot accept any suggestion that the regulation is valid because it is aimed at an evil perceived by Congress, for here the argument cuts both ways. Nothing in the legislative history suggests that Congress thought the Commission had the power to act directly on owner-operator compensation. If it be asked why, then, Congress did not itself attack the problem by specific legislation, the response is that the fact that Congress recognized a problem but chose not to act directly suggests that it would as likely disapprove as approve of the Commission's frontal attack on the problem.").

documented strategy yet provided virtually no substantive guidance on what that strategy should include, and then offered no coherent explanation as to how such a strategy would be useful as a benchmark in deciding cases based on 46 U.S.C. § 41104(a)(10).

We provide views below on why such a factor would in fact not be useful (and would lead to multiple practical problems in adjudications), but the point here is that the Commission itself must explain the regulatory choices it has made to withstand judicial review, and the Commission has utterly failed to do so. To withstand scrutiny under the Administrative Procedure Act ("APA"), 5 U.S.C. § 706, an agency is required to "articulate a satisfactory explanation for its action, including a rational connection between the facts found and the choice made."[14] The Commission has provided no such rational connection in the proposed rule as it relates to the export strategy document, making this aspect of its proposed rule arbitrary and capricious on its face.

4. Requiring an Export Strategy is Bad Public Policy.

a. An Export Strategy Will Not Show if a Carrier is Being Unreasonable.

In addition to the legal deficiencies discussed above, requiring an export strategy, or the application of that strategy to assess the reasonableness of a carrier's actions in each individual situation is not workable. The export business is volatile with rapidly changing factors that impact space availability on a daily basis. A business must be able to adapt in real time as factors change from port to port, commodity to commodity, and day to day. (The types of business decisions carriers consider regarding U.S. exports are discussed in greater detail in Section 6 of these comments.)

Business strategies create repeatable practices that consider myriad factors, some cyclical and long-term, while others are based on season, location, and equipment availability. But none would describe when to take or not take the business of an individual shipper. In other words, it is neither helpful nor necessary to create a requirement that carriers must develop and produce an "export strategy" against which the Commission would try to measure reasonable behavior.

As the FMC states in the preamble to the proposed rule:

> [R]easonableness is necessarily a case-by-case determination, and the Commission will continue to adhere to that principle. However, the Commission believes it is necessary to provide, and OSRA 2022 requires, criteria that it will use to assess whether a refusal to deal or negotiate with respect to vessel space accommodations is reasonable. These criteria will be considered for the reasonableness evaluation for any given case.[15]

[14] *See,* e.g., Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 42-43 (1983); City and Cty. of San Francisco v. Fed. Energy Reg. Comm'n, 24 F.4th 652, 658 (D.C. Cir. 2022); Mingo Logan Coal Co. v. EPA, 829 F.3d 710, 719 (D.C. Cir. 2016).
[15] *See* 87 FR 57676.

To truly review the facts on a case-by-case basis, the ALJ will need to look at the circumstances surrounding the actions in question at the time the action took place. In contrast, a long-term static document will not provide insight into why a particular shipper was denied the ability to negotiate or deal for vessel space at any given moment. Indeed, the Commission appears to concede this point when discussing the proposed "certification" as a mechanism by which an ocean carrier can justify its actions as reasonable when rebutting a *prima facie* case of a complainant or the Bureau of Enforcement, Investigations, and Compliance (BEIC). In that section, the Commission states, "any justification must be directly relevant and specific to the case at hand. Information or data that supports generalized propositions is not helpful in determinations of reasonableness for a specific case." 87 FR 57677. An export strategy document, by definition, can only stand for "generalized propositions," any aspect of which will have different applications in different situations. Therefore, by the Commission's own acknowledgement, such a general "procedures and processes" document could not be relied upon to evaluate a carrier's actions under a specific set of facts. This internal inconsistency in the Commission's own proposed rule further demonstrates why the requirement to have a documented export strategy is arbitrary and capricious.

The other relevant point here is that export trades cannot be considered in isolation from import trades. The Commission acknowledges as much in the proposed rule when it states carriers "make operational decisions regarding the import and export goods they carry based on both economic and engineering considerations." 87 FR 57675. Carriers use the same containers, ships, and marine terminals to handle both import and export containers, and vessels operate on continuous loops, not distinct import and export legs disconnected from one another. Additionally, the proposed regulatory language does not address in any way the basic reality that imbalanced trades (as reflected on in the preamble) require the repositioning of equipment, which adds an additional dimension to planning and operating vessel networks. It defies the reality of ocean transportation to ignore these complexities and to treat the export and import legs of a trade as unrelated.

b. Reviewing a Confidential Business Strategy to Determine Reasonableness has Little or No Precedential Value and Creates the Possibility of Uneven Application of the Law for Shippers and Carriers.

If the FMC requires the creation and production of an export strategy, these documents would be confidential business information. Unless the Commission wishes for its regulations to be a vector for sharing competitively sensitive information about carrier market strategies, discovery would have to be conducted under a protective order. After review and adjudication, the ALJ would have to release an opinion that is either sealed or that simply states that the plan was either sufficient or insufficient, or showed or did not show evidence of misconduct. In any event, the ALJ could not disclose what within the strategy led them to the conclusion. As such, opinions in these cases would have little or no precedential value to inform the public when a particular action within an export strategy, or an action taken when compared to the strategy, is not acceptable.

Additionally, the complainant and the respondent will not know if their case was decided in accordance with past decisions. This will create a fundamental fairness issue for all parties and destroy the guidance and deterrence functions of agency adjudication.

5. The Commission Makes Erroneous Statements in the Preamble that are not Consistent with the Law.

The Commission makes good use of case law to develop its understanding of the term unreasonable, particularly when it says it "has a history of recognizing that it is appropriate to defer to a party's reasonable business decisions and not to substitute its business judgement for that of an entity conducting negotiations."[16] The FMC cites *Ceres Marine Terminals* v. *Maryland Port Administration*, which includes the statement that: "[t]he Shipping Act permits, and indeed encourages, parties to enter into agreements tailored to their individual needs."[17]

The authority for the proposition that shippers and carriers should generally be free to structure their relationships as they see fit comes directly from the Congress. In OSRA 1998, Congress established the confidential nature of service contracts, thus removing the "me-too" mechanism from the Shipping Act of 1984, which allowed similarly situated shippers to demand the same contract terms as others previously negotiated. The law is clear that Congress explicitly abolished the "me-too" right in OSRA 1998, and the Report of the Committee on Commerce, Science, and Transportation (R. 105-61, July 31, 1997) explained the policy behind the change, stating "that common carriers be afforded the maximum flexibility to differentiate their service contract terms and conditions with respect to individual shippers and ocean transportation intermediaries in this more competitive environment." This freedom to give preferential treatment to one shipper over another was echoed in *Global Link Logistics, Inc. v. Hapag-Lloyd AG* when the Commission said,

> [T]he [Shipping] Act does not prohibit common carriers from charging different rates to similarly situated shippers for transportation service pursuant to service contracts. Using the words of section 41104(3), when entering into service contracts, as a matter of law it is not unfair or unjustly discriminatory in section 41104(3) for a common carrier to charge different shippers different rates for the same transportation services.[18]

Thus, it is simply contrary to law when the FMC states in the preamble that, "[a] common carrier granting customers special treatment to one party over another because that party is a regular customer is likewise likely to be viewed as unreasonable."[19] Because OSRA 22 did not amend or in any way limit the Shipping Act's authorization to enter into confidential contracts, there is no legal basis for the preamble statement quoted above. The same principles of freedom to contract continue to apply to § 41104(a)(10) as amended, and the Commission must make

[16] *See* 87 FR 57677.
[17] *Ceres Marine Terminals* v. *Maryland Port Administration,* 29 S.R.R. 356, 369 (F.M.C. 2001).
[18] *Global Link Logistics, Inc. v. Hapag-Lloyd AG*, 2014 WL 5316345, at *22 (April 17, 2014) (FMC Init. Dec.).
[19] 87 FR 57677.

clear in any final rule that this is the case. Otherwise, the rule will be tainted by a fundamental error of law that undermines the entire rule. The APA requires that a court "hold unlawful and set aside agency action" that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[20]

After stating that the Commission would find it unreasonable for carriers to grant some regular customers special treatment over others, the Commission then appears to acknowledge that carriers can in fact establish "criteria for granting preferential terms to parties who are able to meet those specified terms," but that they have a "duty under the Shipping Act to apply such criteria in a consistent and fair manner without differentiating based on illegitimate transportation factors."[21] The Commission thus waivers back and forth on whether carriers have the flexibility to differentiate their service contract terms and conditions with respect to individual shippers. As stated above, the law is clear that carriers do have that flexibility, and the proposed rule must therefore make this clear as well.

The Commission similarly contradicts itself in the proposed rule when it states, "commercial convenience alone is not a reasonable basis for a common carrier's refusal to deal or negotiate."[22] The Commission does not say what "commercial convenience" means, yet the Commission later states "[a]n ocean carrier may be viewed as having acted reasonably in exercising its business discretion to proceed with a certain arrangement over another by taking into account such factors as profitability and compatibility with its business development strategy."[23] There is no way to reconcile these two statements, and the Commission has provided no reasonable explanation on how to do so.

The Commission also states that a carrier may not refuse to deal with a potential client based on the "status of the shipper."[24] Again, the Commission does not say what this means, and we have no way of knowing.[25] The Commission must therefore either explicitly withdraw the comment in the final rule or re-notice the proposed rule with an explanation of what it means by this statement and how it is designed to affect the operation of the proposed rule.

6. The Commission Should Expand Factor (ii) to Include Legitimate Business Factors.

The FMC's second proposed factor reads, "(ii) [w]hether the ocean common carrier engaged in good-faith negotiations, and made business decisions that were subsequently applied in a fair and consistent manner." WSC recommends that the FMC expound on this factor the same as it did for transportation factors. As this section has been provided for comment in this notice, there

[20] 5 U.S.C. § 706(2).
[21] 87 FR 57677.
[22] *Id.*
[23] *Id.*
[24] *Id.*
[25] The *Matson and Sea-Land* cases cited by the Commission herein both pre-date 1998, and neither shed any additional light on what the Commission means by "status of shipper."

would be no need for a supplemental notice of proposed rulemaking – allowing the FMC to stay on track within its 6-month deadline.

The Commission correctly states in the proposed rule that it has "previously found reasonable those decisions that are connected to a legitimate business decision or motivated by legitimate transportation factors." 87 FR 57676. It also rightly states that it:

> has a history of recognizing that it is appropriate to defer to a party's reasonable business decisions and not to substitute its business judgement for that of an entity conducting negotiations. However, this precedent does not eliminate the Commission's responsibility to evaluate whether a party's decision-making practices resulted in a violation of the Shipping Act. The Commission continues to acknowledge that its role is not to ensure that all interested parties get the same deal or make a certain profit. Rather, the Commission's role is to ensure that parties are not precluded from obtaining preferential treatment due to unreasonable or unjustly discriminatory reasons.[26]

Thus, consistent with its past practice, we encourage the FMC to develop "legitimate business factors" in this rule to guide ALJs when making determinations regarding the reasonableness of a carrier's actions. This furthers the FMC's stated objective of this rulemaking, namely that:

> [R]easonableness is necessarily a case-by-case determination, and the Commission will continue to adhere to that principle. However, the Commission believes it is necessary to provide, and OSRA 2022 requires, criteria that it will use to assess whether a refusal to deal or negotiate with respect to vessel space accommodation is reasonable. These criteria will be considered for the reasonableness evaluation for any given case.[27]

If, for whatever reason, the Commission is opposed to expanding its factors (ii) to include legitimate business factors, 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." *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009).

WSC recommends that legitimate business factors include, but not be limited to, the following:

- *Suggested Factor* – **Fulfillment of contractual obligations**.

  - *Reasoning:* When a shipper and a carrier enter into a service contract, the shipper is agreeing to tender a certain amount of cargo over a given period and the carrier is agreeing to make cargo space available in return. A carrier must be able to ensure it has enough cargo space consistent with these commitments, or risk breaching its contracts. Notably, the shippers' implementation of a contract is

[26] 87 FR 57677.
[27] 87 FR 57676.

also a critical factor to a carrier's allocation of space, e.g., where a shipper does not ship any cargo at the beginning of the contract period, but then seeks to ship its minimum quantity commitment (MQC) within a very short time period.

- *Suggested Factor* – **Good faith negotiations with a shipper that do not result in a contract.**

  - *Reasoning* - Good faith negotiations with a shipper that do not result in formation of a contract can arise for many reasons to include, but not limited to, an inability to agree on contract terms or an inability to agree to a contracting platform.

    Notably, the Commission appears to have oversimplified the contracting process in the proposed rule and thereby overlooked the various manners/methods by which parties may reach an agreement (or otherwise fail to reach an agreement). Service contracts can take many forms with various terms such as annual contracts with minimum quantity commitments, month-to-month contracts, or shipment-by-shipment contracts. In all cases, these contracts include two-way commitments between the ocean carrier and its customer as well as consequences for breaching those commitments.

    There are also many commercial negotiations that take place in which the parties may not come to an agreement due to these terms, and such situations should not be deemed to be an unreasonable refusal to deal.[28] Consistent with the FMC's past precedent of deferring to a party's reasonable business decisions and not substituting its business judgement for that of an entity conducting negotiations, carriers need the flexibility to determine whether and how to grant space and on which terms to its customers based on a number of commercial factors like commodities, trade lanes, and compatible business strategies.

    Additionally, carriers may offer contracts through different platforms for negotiation purposes (*e.g.*, online service offerings). Similar to failure to reach agreements on terms, the proposed rule should acknowledge that failure to offer one type of contract vehicle over another should not be considered a refusal to deal or negotiate.

- *Suggested Factor* – **A contracting party that has a poor safety or financial record**.

[28] As just one example, if a carrier's customer is unwilling to accept a fee or consideration for a "no show," when the carrier is willing to pay a fee for a cargo roll, then the shipper should not be able to claim that a carrier unwilling to grant space under these circumstances was acting unreasonably.

- *Reasoning* - Specific issues related to safety or business practices for particular customers, such as: a past history of misdeclaration of goods, poor payment history, poor financial standing, or "no-show" bookings or broken contracts.[29]

- *Suggested Factor* – **Balance between the needs of import and export customers.**

  - *Reasoning* - As the FMC points out in the preamble – the statute does not discriminate between importers and exporters. The regulation will need to account for legitimate business practices that take into consideration importer needs as well.[30]

- *Suggested Factor* – **Decisions to cease, delay, or skip service to a port or carriage of a product**.

  - *Reasoning* – the factors must take into account operational issues including service suspensions, or service rotations/scope of destination changes where port calls may be omitted to keep a vessel on schedule or loading considerations which prohibit the ability to take on certain cargo, e.g., where depending on the freight already on board, available space to all destinations may be limited, or capacity, draft, or time restrictions may limit loadings.

7. In its Definitions Section, the Commission Should define and add "Business Decisions."

WSC recommends adding the term *business decisions* to the definitions section of 542(b), using the following regulatory language, and incorporating the above discussion in the final rule:

> *Business decisions* are the genuine business considerations underlying an ocean common carrier's refusal to negotiate or deal for laden import or export cargo, which can include, without limitation, fulfillment of contractual obligations, good faith negotiations that do not result in a contract, a poor safety record, poor financial standing, history of misdeclaration of cargo, balancing between the needs of import and export customers, and decisions to cease, delay, or skip service to a port or carriage of a product.

8. The Commission must Revise its Burden Shifting Regime and Clarify Carriers' Means of Rebutting Evidence beyond the Certification Example.

In Section 542.1(d), the Commission proposes the following burden-shifting mechanism:

[29] Inclusion of "no show bookings" or broken contract factors is supported by language in the preamble of the proposed rule noting that "common carriers stated they have seen delays in the movement of export cargo due to a lack of mutual commitment between shippers and common carriers leading to cancellations of vessel space accommodation by either party, sometimes up to the day of sailing." 87 FR 57675.
[30] *See* 87 FR 57675.

> The burden to establish a violation of this part is with the complainant (or the BEIC). Once a complainant sets forth a *prima facie* case of a violation, the burden shifts to the ocean common carrier to justify that its actions were reasonable. This justification may take the form of a certification by an appropriate representative of the ocean carrier to attest that the decision and supporting evidence is correct and complete. An appropriate representative can include the ocean common carrier's compliance officer.

First, WSC requests that the Commission clarify the burden-shifting mechanisms provided in the proposed regulation, as this is unclear in both the preamble and the proposed regulation. Based on both APA and Commission precedent, the burden of persuasion must not shift away from the complainant (or BEIC), but the burden of production may move between the litigating parties.[31] WSC requests that the preamble and the final rule clearly articulate that in the event the complainant or the BEIC sets forth a *prima facie* case of a violation, the burden of production may shift to an ocean carrier to rebut that case by producing evidence of why its actions were reasonable. Further, the text of the rule should clarify that while an ocean carrier may in some circumstances bear the burden of producing evidence justifying its conduct, the complainant (or BEIC) in all cases carries the ultimate burden of persuasion that the respondent ocean carrier acted unreasonably. The language of the preamble states this but it must be incorporated into the rule.[32]

Second, WSC seeks that the FMC remove mention of the "compliance officer" from the regulation or at a minimum clarify that other methods of submitting rebuttal evidence are permissible. As proposed, the sole method for submitting rebuttal evidence is, "certification by an appropriate representative."[33] This certification mechanism appears to be a new requirement that does not have a basis under existing Commission precedent. WSC is concerned that emphasizing the proposed certification as the means by which a carrier can justify its actions could give the public and the ALJ the incorrect perception that certification is *the only* or preferred means by which an ocean carrier may rebut a complainant's *prima facie* case of unreasonable refusal to deal or negotiate. Further, the Commission does not attempt to explain how such a certification would have any additional probative value beyond the evidence a carrier would otherwise produce to support the reasonableness of its actions. In other words, the certification would likely reference specific documents and other evidence that, by themselves, would seek to demonstrate reasonableness. Finally, the Commission states it is considering whether to make any such certification by a U.S. based compliance officer mandatory. Here again, to the extent a carrier opted to use such a certification, the Commission does not explain

[31] *See Cablevision Sys. Corp. v. F.C.C.*, 649 F.3d 695, 716 (D.C. Cir. 2011); *Lisa Anne Cornell and G. Ware Cornell, Jr. v. Princess Cruise Lines, Ltd. (Corp); Carnival PLC; and Carnival Corp.*, 2013 WL 9808684 (F.M.C. July 23, 2013).
[32] *See Garvey v. Nat'l Transp. Safety Bd.,* 190 F.3d 571, 579–80 (D.C.Cir.1999); *Maher Terminals v. PANYNJ*, 2014 FMC LEXIS at *42 (Dec. 2014).
[33] 87 FR 57679.

why that certification must be made by such a compliance officer, as opposed to any other authorized representative of the company with specific knowledge of the underlying facts.

The Commission should thus (i) clarify that the proposed certification is one, but not the only, permissible way for an ocean carrier to demonstrate reasonableness, (ii) clarify that carriers opting not to demonstrate reasonableness via a certification will not be prejudiced for selecting alternative permissible means, (iii) explain how it believes such a certification would have additional probative value in a dispute, and (iv) explain its reasoning for why it is considering making certification by a U.S.-based compliance officer mandatory.

WSC provides the following suggested regulatory language changes to 542.1(d):

> A complainant (or the BEIC) may seek to establish a violation of 46 U.S.C. § 41104(a)(10) by producing sufficient evidence to establish a *prima facie* case of a violation. If a complaint (or the BEIC) establishes a *prima facie case* of a violation, the burden of production shifts to the ocean common carrier to rebut the complainant's evidence and justify that its actions were reasonable. Once the ocean common carrier has fulfilled its burden of production, the burden of persuasion rests with the complainant (or BEIC) to prove its case.

9. Conclusion.

WSC appreciates the opportunity to comment on the Commission's proposed rule to define unreasonable refusal to deal or negotiate with respect to container liner vessel space accommodations. The container liner shipping industry is in the business of moving cargo, be it import or export. Carriers are not in the business of refusing cargo service to an individual shipper unless it is for a legitimate transportation or business purpose, and even then, only when that shipper has presented a circumstance in which the carrier feels a business transaction cannot reasonably be undertaken. Against this backdrop, WSC urges the Commission to craft a reasonableness test that incorporates the aforementioned safety, operational and business factors to guide its ALJs in determining when a carrier has unreasonably refused to negotiate or deal with respect to vessel space accommodations.

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