



Office of the Secretary
Washington, DC 20250

January 4, 2023

HON. DANIEL B. MAFFEI
Chairman
Federal Maritime Commission

HON. REBECCA F. DYE
Commissioner
Federal Maritime Commission

HON. LOUIS E. SOLA
Commissioner
Federal Maritime Commission

HON. CARL W. BENTZEL
Commissioner
Federal Maritime Commission

HON. MAX VEKICH
Commissioner
Federal Maritime Commission

RE: FMC Notice of Proposed Rulemaking, Docket No. 22–24, Definition of Unreasonable Refusal To Deal or Negotiate With Respect to Vessel Space Accommodations Provided by an Ocean Common Carrier

Dear Chairman Maffei and Commissioners Bentzel, Dye, Sola, and Vekich:

The U.S. Department of Agriculture (USDA) writes to commend the Federal Maritime Commission (Commission or FMC) for its actions in implementing the Ocean Shipping Reform Act of 2022 (OSRA). Of particular note is FMC’s proposed rulemaking to define an unreasonable refusal to negotiate or deal with respect to vessel space accommodations. USDA believes this rulemaking is one step toward righting an unfair situation: Over the past 2 years, agricultural (and other) exporters have endured ocean carriers’ systematic neglect of exports in favor of higher value import cargo. USDA believes the proposal could be improved with a few key changes: (1) broaden the definition of an unreasonable refusal to negotiate or deal; (2) significantly narrow the guidance on reasonable refusals; (3) and encourage specific actions by carriers to guard against unreasonable refusals.

The Commission rightly recognizes OSRA’s high priority on U.S. exports. The law’s explicit purpose is to “promote the growth and development of U.S. exports through a competitive and efficient system for the carriage of goods by water in the foreign commerce of the United States.” In addition, we appreciate the Commission’s recognition that “[t]he primary objective of the shipping laws administered by the FMC is to protect the shipping industry’s customers, not members of the industry.”

Over the past 2 years, a host of challenges have prevented agricultural shippers from reliably shipping sold product to buyers worldwide. Shippers have continually contended with broken export contracts, canceled bookings, inadequate receiving windows, and shortages of empty containers and other equipment. These issues reduced prices paid to producers, compromised bottom lines for agricultural companies, and damaged U.S. agriculture’s standing with global

customers. After repeatedly alerting USDA, shipper and producer groups raised these concerns again in the comments submitted for the Commission's proposed rulemaking.

USDA encourages the Commission to revise and strengthen its proposal along three dimensions:

- **Broaden the definition of an unreasonable refusal to negotiate or deal.** USDA agrees with the Commission's understanding that an unreasonable refusal to negotiate or deal can be simply defined as the failure to make good faith efforts to work with the shipper. Like many commenters, USDA contends that several types of carrier actions show a lack of good faith effort to work with the shipper and, therefore, constitute an unreasonable refusal to deal. All too commonplace in recent years, such actions include "effective refusals," such as no-notice cancellations and perpetually rolled bookings. For instance, a carrier's decision to cancel a booking or roll it to a future date raises questions about whether the carrier initially engaged in good faith discussions and negotiations—especially when such disruptions happen frequently. USDA believes the Commission's rulemaking should explicitly detail what constitutes an unreasonable refusal to deal. A more useful definition would name actions, such as cancellations without sufficient notice, perpetual re-bookings, failure to provide necessary equipment (e.g., containers and chassis), and other "effective refusals." All these actions—which repeatedly appear in shippers' comments—show a lack of good faith effort by carriers.
- **Narrow the proposal's guidance on reasonableness.** USDA believes the circumstances are rare in which the Commission should consider it reasonable for a common carrier to fail to make good faith efforts to find a mutually beneficial arrangement that works for both parties. The Commission should excuse only a few exceptional circumstances. USDA understands various factors may get in the way of an ultimate deal between the shipper and carrier, but common carriers should be required to do everything they can to work with the shipper before refusing to deal. In the proposed rule, the broadness of the language around reasonableness leaves USDA wondering whether *any* refusals to negotiate or deal would be considered unreasonable. The inclusion of broad concepts such as "profitability" and "compatibility with its business development strategy" are particularly concerning, and the existence of legitimate transportation factors alone should not immunize a practice, especially in the face of a pattern of problematic practices. USDA urges the Commission to narrow its language on reasonableness, clarify that the existence of multiple factors will not absolve problematic practices, and focus more on illuminating actions it would consider to be unreasonable, such as by specifying as unreasonable the types of "effective refusals" discussed above and expanding on what would be considered "illegitimate transportation factors."
- **Encourage specific actions by carriers to guard against engaging in an unreasonable refusal.** USDA understands the Commission's intention to take a case-by-case approach to defining unreasonableness, but we underscore the importance, therefore, of the Commission's proposal to require the proponent make only a prima facie case of unreasonableness to trigger review. USDA appreciates the rule's preamble statement that "situations where an ocean common carrier categorically excludes U.S. exports from its backhaul trips" have a "rebuttable presumption of unreasonableness," and we encourage the Commission to make it clear and explicit in the rule. In addition, USDA supports requirements on carriers to document and ensure the reasonableness of their practices, including requirements to maintain and comply with documented export strategies, written

policies and procedures relating to negotiations and dealings, and certifications by U.S.-based compliance officers affirming and documenting the reasonableness of specific decisions. With respect to each of these approaches, USDA encourages clearer, more affirmative duties for carriers, greater specificity with respect to the requirements they need to meet, and that the non-confidential portions of these documents be made available for shippers and the public to review. Documentation and transparency will assist carriers in ensuring compliance by their personnel and will also aid the Commission in meaningfully enforcing the requirements of the statute.

USDA acknowledges the Commission's important, complex role to ensure competitive and efficient ocean transportation service for our Nation's shippers. Looking beyond the proposed rule on a refusal to negotiate or deal, USDA encourages the Commission to continue working toward enhancing information, providing fair rules, and promoting competition in the industry. The Commission needs to consider the effects of market power gained through carrier consolidation and alliances in recent years. USDA also encourages FMC to continue to work with ports, ocean carriers, and railroads to facilitate a more efficient and reliable export transportation system.

Thank you for considering the points raised in this letter. USDA may offer additional perspective on FMC's proposed rulemaking as the proceeding progresses and stands ready to work with you to advance any of the specific recommendations set forth in this letter.

Sincerely,

THOMAS J. VILSACK
Secretary