

**PREPARED REMARKS OF  
CONGRESSMAN ELIJAH E. CUMMINGS**

**Containerization and Intermodal Institute's FMC Seminar**

**August 13, 2008**

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I am honored to join you, Commissioner Creel, and everyone assembled here for the Containerization and Intermodal Institute's seminar to discuss the future of the Federal Maritime Commission.

As Chairman of the Subcommittee on Coast Guard and Maritime Transportation, I have convened the Subcommittee twice in the past year to examine the operations of the FMC.

On April 15<sup>th</sup>, the Subcommittee examined the Commission's proposed fiscal year 2009 budget and its management processes.

On June 19<sup>th</sup>, the Subcommittee continued examining the Commission's management and began an examination of the regulation of international shipping.

At the time of the April 15<sup>th</sup> hearing, there were four Commissioners on the FMC – and in the absence of a Chairman, all four Commissioners were exercising collective responsibility not only for the Commission's regulatory business but also for the Commission's administration.

At that time, Mr. Paul Anderson had been nominated by the President to serve as Chairman of the Commission, but his nomination had not been considered by the Senate.

Clearly, there will be challenges in any agency when the position of Chairman is vacant, but in the months preceding the April hearing, the FMC was rarely holding public meetings – and the testimony the four Commissioners presented at our hearing suggested that they had limited visibility over the administration of the Commission and that they were frankly not working together effectively to exercise their joint responsibilities.

Responses provided by FMC employees to an earlier Federal Human Capital Survey revealed that the employees had deep concerns about the administration of the Commission, including concerns about the effectiveness of the management exercised by senior leadership, fairness in the resolution of disputes and complaints, and the ability of the Commission to recruit qualified personnel.

An analysis produced by an outside management consultant suggested that there was a lack of trust at the Commission – and that it was hampered by a lack of effective communication and organizational planning.

Between the hearing on April 15<sup>th</sup> and the hearing held two months later on June 19<sup>th</sup>, Mr. Anderson resigned from the Commission and withdrew his nomination to be Chairman.

As a result, there are now three Commissioners at the FMC – and still no Chairman. The three current Commissioners continue to share collective responsibility for the Commission's regulatory and administrative functions.

The Commission has begun to hold regular public meetings, and the three current Commissioners reported at the June 19<sup>th</sup> hearing that they have established a working group to examine how to strengthen the administration of the Commission.

As everyone assembled here knows, if the Maritime Commission is not functioning effectively, it cannot respond appropriately to the many changes occurring in the maritime industry.

Our Subcommittee expects—and our nation’s maritime industry deserves—a Federal Maritime Commission that is both 100% focused on the nation’s regulatory business and 100% prepared to conduct that business.

For that reason, I have asked the Commission to provide a status report on the success of their reform efforts within 90 days from the June 19<sup>th</sup> hearing. We look forward to receiving that report by mid-September.

### **Ocean Shipping Reform Act**

Ladies and gentlemen, when I was offered the opportunity to chair the Subcommittee on Coast Guard and Maritime Transportation in January 2007, I must admit that this opportunity did not necessarily appear as attractive to me at the time as others appeared.

I thought to myself, I can’t swim.

And I get seasick.

But over the course of the past two years, I have had the opportunity to learn about the truly awesome responsibilities and awe-inspiring achievements of the nearly 42,000 men and women of our Coast Guard.

I have also learned how the shipping lanes that carry 95 percent of our nation’s imports by weight to our shores extend their reach through almost every facet of our economy.

And I have come to see what an opportunity this position is.

Now, I must admit that among all of the things I have learned, one of the situations that most surprised me is how so many aspects of the organization of carrier services are frankly contrary to the standards of competitiveness that are observed – in fact, required – in almost all other facets of commerce in the United States.

I was truly surprised that it was only the *Ocean Shipping Reform Act* of 1998 that allowed carriers to establish confidential service contracts without the approval of conferences and without disclosure of negotiated rates.

However, I have now come to understand the history behind these developments – and with that broader perspective, I have also come to see that we likely stand at another turning point of this continually developing saga.

The *Ocean Shipping Reform Act* introduced significant pro-market forces into U.S. shipping intended to expand competition and reduce the power of the conferences.

The current state of affairs – in which the FMC has indicated that somewhere between 90 and 95 percent of the cargo coming to the United States moves under contract – is testimony to the success of the Act in accomplishing its objectives.

However, though the Act was meant to shake up the way business was conducted, it was not meant to completely eliminate the old ways of business. As a result, elements of anti-trust immunity – even for rate setting – remain in place in the United States.

Now, others are taking the next steps down the road toward deregulation – and it remains to be seen what the ripple effect of their steps will be.

## **European Union's Elimination of the Block Exemption**

Since 1987, the European Union has provided a block exemption for shipping conferences from those provisions of the European Community Treaty that prohibit agreements deemed to restrict competition.

Several years ago, the European Union conducted an assessment to determine whether the anti-trust immunity it granted to conferences fulfilled the objectives that such grants of exemption are required by the Community Treaty to accomplish.

These specific objectives – which are spelled out in the Treaty – include improving efficiency in the production or distribution of goods or promoting technical or economic progress.

These objectives also require that when benefits are created through the grant of an exemption from anti-trust restrictions, consumers are to receive a fair share of these benefits.

In its “Official Journal of the European Union,” from September 28, 2006, the Council of the European Union explains why it has concluded that the grant of exemption to the carrier services no longer fulfills the objectives required by the EU of such grants.

Thus, the Council wrote that the original exemption provided to conferences was based on the assumption that “conferences bring stability, ensuring exporters reliable services which cannot be achieved by less restrictive means.”

In deciding to lift the exemption, the Council wrote, “a thorough review of the industry carried out by the Commission has demonstrated that liner shipping is not unique as its

cost structure does not differ substantially from that of other industries. There is therefore no evidence that the industry needs to be protected from competition.”

The Council continued, “There is also no evidence that the conference system leads to more stable freight rates or more reliable shipping services than would be the case in a fully competitive market.” The Council then concluded that “no clearly positive effectives” benefiting consumers are being produced.

Based on these considerations, the European Council has decided that beginning in October 2008, “all EU and non-EU carriers which currently take part in conferences operating on trades to and from the EU will have to end their conference activities, in particular price-fixing and capacity regulation, on those trades.”

These findings by the EU are very significant – and they deserve serious consideration.

At our Subcommittee hearing on June 19<sup>th</sup>, we heard a variety of opinions regarding both the assessments that led the EU to lift the exemption previously granted to carriers as well as what the impact of this change would be on carrier service and rates between the EU and the U.S.

Some argued it is “premature” for the U.S. to take specific action toward eliminating anti-trust immunity for carriers while others argued it is essentially overdue. Another witness argued that anti-trust immunity remains essential for marine terminal operators.

Again, due to the success of the *Ocean Shipping Reform Act*, the Federal Maritime Commission has indicated that price fixing agreements constitute only a tiny percentage of the agreements now filed with the Commission.

In her testimony submitted to the Subcommittee's June 19<sup>th</sup> hearing, Commissioner Rebecca Dye wrote that the Commission estimated that only 6 of the 234 carrier agreements currently filed with the Commission "will need to be restructured or eliminated to ensure carrier compliance with EU guidelines."

Nonetheless, despite the significant pro-market forces that were introduced in the United States in 1998, as I said, these forces were not intended to and did not change all "business as usual."

Thus, at our hearing, some involved in maritime transportation – and particularly shippers – argued that while conferences may not engage in explicit rate setting collusion as they once did, they nonetheless continue to discuss rate-related matters.

These critics further argued that the conferences have methods of sending "signals" regarding rate floors and that they collude to create a variety of surcharges applied even under confidential service agreements.

Indeed, the European Council noted that "liner conferences are no longer able to enforce the conference tariff although they still manage to set charges and surcharges which are a part of the price of transport."

Of course, no one really knows exactly what the impact of the EU's action is going to be. The FMC indicated at our hearing that they will study this issue – and I eagerly anticipate the results of that study.

Some have claimed that the U.S. and EU systems can co-exist side-by-side without affecting either side – but I am curious to see if that is really possible.

In particular, if, as the EU anticipates, elimination of the anti-trust immunity for ocean common carriers introduces more competition that lowers rates, wouldn't the carriers

potentially seek a market in which to make up lost profits – and wouldn't they likely seek them in a market that still extends anti-trust immunity in tariff setting?

Importantly, I note that at this time, the European Council has eliminated the block exemption only for activities pertaining to rate setting. Anti-trust immunity will continue to be granted by the EU for other types of agreements among carriers relating to service provision.

The EU has indicated that they will be reviewing whether these types of agreements should also continue to enjoy exemptions from the Union's prohibitions on anti-competitive agreements.

In fact, then, the European Union is creating a sort of "mixed" regulatory system – and over the next few years, we will have the opportunity to observe how it functions.

Against this background, as we consider what form the FMC might best take to fulfill our nation's regulatory objectives, we might also wonder whether the European Union will need an FMC and what form it might take?

I emphasize that the European Union approaches this issue from a regulatory background and history very different from the U.S. experience.

We have had a national entity involved in some aspect of shipping oversight since 1916 – and since 1961, we have required agreements concluded by the conferences to be filed with the Federal Maritime Commission.

The European Union has no equivalent to a Federal Maritime Commission as we know it – and it may be that, particularly if they retain a sort of dual regulatory environment in

which some collusive agreements remain permissible, they may need an entity like the Commission.

It may also be that the development of a regulatory environment that mixes restrictions on different types of contracts could lead to additional “mixing” in regulatory actions.

For example, some have argued that deregulation may work well on trade routes with excess capacity but may not be as effective on routes with very limited capacity. Perhaps deregulation may proceed at different speeds on routes with different levels of competitiveness?

That said, one thing is certain – and that is that the continued evolution of these issues will certainly factor into the work of the FMC in the coming years. These issues will also affect Congress’ consideration of the FMC’s role in regulating international carriers.

### **FMC’s Regulation of Marine Terminal Operators**

Importantly, as we consider the FMC’s future role, we must keep in mind that the Commission regulates not only carrier services but also other actors in the maritime industry, such as marine terminal operators – and this is another busy area of work for the FMC.

On August 4, I convened a field hearing of the Subcommittee in Los Angeles to examine the infrastructure and emission control initiatives planned by the Ports of Los Angeles and Long Beach.

These ports – which together constitute the largest port complex in the United States – are confronting twin and inter-related challenges.

They need to grow their infrastructure to accommodate increasing cargo flows while also reducing their polluting emissions both to ensure the health of surrounding communities

and to comply with the environmental regulations that govern infrastructure developments.

The ports are looking to reduce emissions from all sources – but it is perhaps their Clean Trucks programs that have received the most attention both from the port community as well as from the FMC.

Under their Clean Trucks plans, both ports will assess a container fee to pay for the replacement of essentially the entire fleet of trucks serving the ports.

Both ports will allow only licensed motor carriers that enter into concession agreements with the ports to provide drayage services at the ports.

However, the Port of Los Angeles will phase in a requirement over time that will allow only individuals who are employees of the licensed motor carrier concessionaires to serve that port.

By contrast, the Port of Long Beach will allow licensed motor carrier concessionaires to dispatch individuals who are either employees of the carrier or owner-operators.

As you know, Title 46 requires all agreements between or among terminal operators to be filed with the FMC – and the Title forbids certain conduct by marine terminal operators.

For example, section 41106 states that marine terminal operators may not “give any undue or unreasonable preference or advantage or impose any undue or unreasonable prejudice or disadvantage with respect to any person” and may not “unreasonably refuse to deal or negotiate.”

On June 13, 2008, the FMC announced that it had concluded its review of the initial agreements filed by the Ports of Los Angeles and Long Beach with it.

The FMC instructed the ports to file additional information – including “all substantive aspects of the Clean Trucks Programs” so that a determination of the programs’ impacts on costs and service levels could be made.

The actions being taken by the Ports of Los Angeles and Long Beach are aggressive – and they are being taken in an attempt to deal with urgent, critical challenges.

Ports across the nation are watching the outcome of the initiatives created by Los Angeles and Long Beach to assess whether and how they can best use immunity from anti-trust activity to take joint action to address common problems.

The FMC is obviously central to these developments – because while grants of anti-trust immunity may eventually empower ports and terminal operators to take innovative steps to solve inter-related challenges, any such actions need to be taken within the parameters required under federal law. This will ensure equal treatment of all commercial actors.

### **Closing**

The Federal Maritime Commission has evolved over time in response to changing trends in shipping as well as changing laws and regulatory priorities.

Given the significant trends in the maritime industry that I have just discussed, I think it is time for us to again reassess how the FMC's functions and authorities align with our nation's regulatory priorities.

The Subcommittee will be continuing its examination of the FMC – particularly as we begin the 111<sup>th</sup> Congress. I know each person here has a unique insight and perspective on this matter – and I invite you to share them with the Subcommittee as we consider these issues.

Thank you for the opportunity to join you today. While my schedule unfortunately does not permit me to stay longer, I look forward to hearing the conclusions reached by the important discussions that will occur here and I thank each of you for your dedication to the success of the FMC and of our nation's vital maritime industry and commerce.

Thank you.###