Acting Chairman Michael A. Khouri Summary Testimony
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Committee on Transportation and Infrastructure
Sub-Committee on Coast Guard and Marine Transportation
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Chairman Hunter, Ranking Member Garamendi, and Members of the Subcommittee – good morning and thank you for the opportunity to testify today about the Federal Maritime Commission's ("Commission" or "FMC") programs. I am grateful to be able to share with you how the Commission works to safeguard competition in ocean transportation for the benefit of the American consumer.

First, I want to acknowledge my fellow Commissioners here today – Commissioners Dye, Doyle, and Maffei. I want to recognize former Chairman and - for the moment – our colleague Commissioner Mario Cordero, who is leaving the Commission on May 14 to become the Executive Director for the Port of Long Beach, CA. We wish him fair winds and following seas in his new position with the port.

I would like to take this opportunity to address a number of matters about the Shipping Act of 1984 ("Shipping Act" or "Act") and the Commission of current interest to the Subcommittee.

The FMC is a competition agency charged with an important role in antitrust enforcement.

First, the Commission has ample authority to address the competitive issues facing the international liner industry. We have been forward leaning in our use of that authority as we have reviewed new carrier agreements as they formed the new generation of alliances. We have also been careful to consider the concerns of parties affected by these agreements, and the views of our sister competition agencies as well.

The FMC is an independent agency of specialized expertise that administers an antitrust regulatory regime tailored to the special factors affecting the international ocean liner trade. The Shipping Act of 1984, and the Federal Maritime Commission that administers the Act, are related to, but separate from Department of Justice (DOJ) and the Federal Trade Commission (FTC) and the competition and antitrust statutes they administer. Since 1916, Congress has recognized that the international ocean liner industry, which transports a large percentage of the international exports and imports so essential to this Nation's economy, requires special consideration because of the industry's critical role in our international commerce, its international dimension, and the competing and potentially conflicting regulatory regimes and interests of our international trading partners.

Because of conditions and factors affecting the international ocean liner trade, Congress determined in 1916 to allow certain types of international ocean carrier collaboration not permitted under other antitrust statutes to ensure certain national objectives would be met, including the availability of shipping and stability of the infrastructure upon which the transport of a great proportion of our international commerce depends. The antitrust laws, including the

Shipping Act of 1984, are designed to protect competition, not individual competitors. Collaborative joint venture agreements among competitor ocean carriers, *as long as they are not anticompetitive*, are recognized as beneficial, finding efficiencies and reducing cost that ultimately benefits U.S. exporters and saves the U.S consumer money.

Congress entrusted competition oversight and antitrust enforcement for this industry to a specialized agency with particular expertise in this legal area, close familiarity with the ocean liner industry, and sensitivity to the interests of U.S. stakeholders and international trading partners. The FMC reviews and monitors international ocean liner carrier joint collaborations or agreements under the Shipping Act to ensure that procompetitive efficiencies and cost savings are obtained for the benefit of U.S. consumers and anticompetitive effects are prevented or properly mitigated.

As Congress noted in the Joint Explanatory Statement of the Committee of Conference – House Report No. 98-600, during consideration of the Shipping Act of 1984, "[a]s new and evolving forms of cooperative conduct develop, the conferees believe that the Commission, rather than the antitrust agencies or the courts in the first instance, is in the best position to assess an agreement's benefits and detriments in light of the objectives of this Act." Given the explosive growth in international commerce over the past three decades and the importance of this international trade to the U.S. economy, what was true in 1984 is even more valid today.

The Shipping Act's competition standard and its "Prohibited Acts" sections provide the Commission with strong tools to protect competition in the international ocean liner industry.

Under the Shipping Act, cooperative or collaborative agreements between or among competitor international ocean liner carriers are filed with the Commission and reviewed under the Shipping Act's competition standard to prevent anticompetitive behavior in these agreements. This standard the Commission uses to review carrier agreements, 46 U.S.C. §41307(B)(1) -"Anticompetitive Agreements," commonly referred to as 6(g), is analogous to the standard employed by DOJ and the FTC to review mergers, acquisitions, and competitor collaborations. Under 6(g), an agreement filed with the Commission goes into effect *UNLESS* the Commission determines (and convinces a judge to agree) that the agreement *is likely, by a reduction in competition, to produce an unreasonable reduction in transportation service or an unreasonable increase in transportation cost. In the event of such determination, the Commission then must go to a Federal District Judge as discussed below.*

The Commission's process for agreement review under 6(g) is modeled on the Hart-Scott-Rodino Act of 1976 governing premerger clearance of proposed acquisitions and mergers. Congress adapted this process for the Commission as part of the Shipping Act of 1984. Prior to 1984, the Commission reviewed and *approved* agreements under a broad "public interest" standard. Because approval became a lengthy process sometimes stretching into years, Congress put a Hart-Scott-Rodino type framework in place for Commission review of carrier agreements under the Shipping Act to ensure that that potential efficiencies and cost-savings would not be lost by consumers because of delay in agreement effective dates. Agreements filed with the Commission go into effect automatically in 45 days *unless* the Commission determines (and a

judge agrees) that the agreement is anticompetitive under the 6(g) standard referred to above. Under certain circumstances, the Commission may ask for additional information necessary to make a determination under 6(g), extending for an additional 45 days after receiving that information the time before the agreement becomes effective. In order to prevent the agreement from going into effect, the Commission must bring a civil action in the United States District Court for the District of Columbia and successfully obtain an injunction to halt the operation of the agreement. The burden of proof is on the Commission.

If parties agree to undertake activities that are governed by the Shipping Act, but do not comply with the Commission's process of review, they risk not only Shipping Act sanctions, but also federal criminal sanctions prosecuted by DOJ under the Sherman Act.

Some claim that section 6(g) is ineffective because it presents too high a bar to a successful court challenge of an anticompetitive agreement by the Commission. On the contrary, the paucity of 6(g) cases and the historical absence of the Commission's need to challenge agreements in court is testament to the Commission's successful efforts to mitigate or eliminate potentially anticompetitive provisions in pending agreements through detailed discussions with filing parties during the review process. One need only look at the THE Alliance and the OCEAN Alliance to see recent examples of cases where the major carrier alliance agreements, as originally filed, requested authority to jointly negotiate for goods and services. Following Commission review, however, the agreements lacked these joint purchasing authorities when they went into effect. By its terms, the Shipping Act provides an opportunity for the public to express its concerns about filed agreements. The Commission takes these comments seriously, and uses them together with its own economic analysis under 6(g) during the review process to consider and address anticompetitive concerns.

In addition to the review of carrier agreements for potentially anticompetitive effects under 6(g), the Commission may use section 10, the "Prohibited Acts" provisions in the Shipping Act, to preserve competition. This section of the Act includes prohibitions on a number of business practices on concerted carrier conduct acting outside of approved authority (such as price fixing or market allocation), unreasonable practices, discrimination in price or accommodations, refusal to deal, retaliation, boycotts, predatory practices, and discrimination based on shipper affiliation., 46 U.S. Code § 41105(4), prohibits carriers from jointly negotiating with non-ocean carriers *if doing so would violate antitrust laws* (emphasis added).

These prohibited practices mirror remedies found in other competition statutes, such as the Robinson-Patman Act of 1936. The Commission, of course, may enforce section 10; but private litigants may bring actions under these Shipping Act provisions to protect their interests.

The international ocean liner industry is not "concentrated" under normal antitrust benchmarks.

By any benchmark used by the Commission, DOJ, and the FTC, the worldwide ocean liner marketplace is not concentrated. Concentration is assessed using the Herfindahl-Hirschman Index (HHI). Theoretically, the greater the degree of market concentration and the fewer competitors, the higher the HHI. In its merger guidelines, the DOJ's Antitrust Division regards

markets as not concentrated if the HHI is below 1,500. Under DOJ guidelines, mergers and other less problematical, forms of horizontal collaborations, that do not result in concentrated markets are unlikely to produce adverse competitive effects and, ordinarily, do not require further analysis.

Following the last ocean common carrier merger, the HHI for the container shipping industry in the international U.S. trades today is 752, far down into the "safe harbor" area as recognized by DOJ, FTC, and our industry specialists at the FMC.

While still not "concentrated" under traditional antitrust standards and with overall market share of the largest oceangoing carriers diffused, the international ocean liner industry has recently experienced consolidation because of long-term structural issues in the industry and poor financial returns. Thirty-one different ocean common carriers carrying at least 12,000 containers a year serve the U.S. trades. The number of major carriers serving the U.S. trade will decrease from 20 in 2015 to 13 by 2018 with various company mergers and the bankruptcy of one major carrier.

As the industry consolidation continued over the last two years, the number of major alliances serving the U.S. trades decreased from four to three. A reassuring data trend shows us that the individual ocean carriers within each alliance continue to independently and vigorously compete on pricing. Further, individual ocean carriers within the alliances continue to add and withdraw vessels from trades both inside and outside the alliances in which they participate, demonstrating that competition remains in both vessel capacity decisions and pricing decisions within the alliances.

The reduced number and increased size of these major alliances (2M, THE Alliance, and OCEAN Alliance), however, have raised new issues and concerns for the FMC and changed the way in which the Commission approaches these joint ventures. Broader authorities and language for small or limited slot sharing agreements or in a world with seven or eight alliances with much smaller market shares presented fewer and less complex competitive issues. As noted below, provisions that might have been acceptable in earlier agreements for smaller and more limited joint ventures have become increasingly problematic as the number of alliances serving the U.S. trades has shrunk to four, and now three.

The FMC rigorously reviews carrier agreements before they go into effect, and continuously monitors joint activities for anticompetitive effects.

With the increased size and market share of carrier alliances over the last four years, the FMC has increasingly insisted on narrower authorities, more specific language, and enhanced monitoring requirements. For some time now with respect to these larger alliances, the FMC has required more "clear and definite" authority language for alliance agreements that was only recently "suggested" by DOJ in September 2016. Monitoring for these large alliances, requiring more details and more timely filing of monitor reports has increased.

Each agreement or alliance is reviewed and evaluated by the Commission on a trade-by-trade basis and using the appropriate relevant product market and geographic market. A large

trade-lane with many participants and with many potential entrants ("contestability") may not be concentrated under HHI, but a small trade-lane with limited current participants may appear to be concentrated. As an example, a trade lane, such as some Mediterranean trade lanes may appear concentrated, but when viewed from the basis of the number and scope of potential entrants, then that trade may not be considered as a competitive problem. That is why it is important to have an agency with broad knowledge and expertise in this industry.

The FMC reviews whether ocean liners are competing on price, and if so, each dollar saved by an ocean carrier in a competitive marketplace is more likely to be passed along to the ultimate consumer than a dollar saved by a service provider in a non-competitive industry. Much of the FMC's monitoring and oversight involves the conditions in each trade lane, so that the Commission can determine whether efficiencies can be gained, and whether they are substantially being passed along to downstream consumers.

Because alliances are ongoing cooperative agreements rather than mergers, the Commission is charged by Congress with ongoing and continuous monitoring after the initial review and following the effective date of the agreements. The Commission checks for anticompetitive behavior that would violate the Shipping Act. The Commission may challenge an agreement at any time after the effective date. Because of this ongoing monitoring role, expertise is important, and the Commission is the expert agency on the ocean liner industry, dedicated to understanding the nuances of this important and unusual industry. Our expert analysts, economists, and attorneys maintain a careful watch on industry trends, being vigilant for any indications of anticompetitive behavior by the participants operating within the filed agreements.

Joint ventures of ocean carriers, or alliances can and do benefit U.S. interests.

"Alliances" are no more than joint ventures of ocean liner companies. They are not mergers. They take various forms ranging from simple space or slot-sharing arrangements to very complex operational arrangements sharing vessel service strings, terminal space, and certain back office functions. It is important to remember that carrier alliances under the Shipping Act are not permanent mergers like those reviewed by DOJ, but much more dynamic arrangements that preserve price and service competition between and among the participants. Alliance structures can and do shift and rearrange participants on a regular basis with changes in the industry. These joint ventures provide ocean carriers with flexibility and they may facilitate the survival of independent companies, preserving competition and averting further industry concentration. The interests of the American shipping public and the American consumer will not be well served if carrier consolidations result in only a handful of mega-carriers transporting the Nation's cargo. Most importantly, alliances can be very beneficial for U.S. shippers, resulting in efficiencies and cost-savings that are passed on to our exporters and importers.

In the Joint Explanatory Statement of the Committee of Conference for the Shipping Act of 1984, Congress recognized the important potential benefits of carrier agreements properly reviewed and monitored by the FMC:

> Joint ventures and other cooperative agreements can enable carriers to raise necessary capital, attain economies of scale, and rationalize their services. Pooling arrangements can also offer significant benefits in reducing excess capacity and promoting efficiency. [292]

While the Shipping Act is an antitrust statute tailored to the international liner trade, the ability of competitors to collaborate is not unique to the Shipping Act. Competition laws, including the Shipping Act as well as those administered by DOJ and FTC, recognize that competitor collaborations that do not raise antitrust concerns because of "market power" can be procompetitive and beneficial. Competitors are permitted lawfully to collaborate under the Sherman Act and the Clayton Act, as well. The Federal Trade Commission and Department of Justice *Antitrust Guidelines for Collaborations Among Competitors* issued in 2000 notes, "that,[i]n order to compete in modern markets, competitors sometimes need to collaborate. Competitive forces are driving firms toward complex collaborations to achieve goals such as expand in to foreign markets, funding expensive innovation efforts, and lowering production and other costs." As long as anticompetitive effects remain within certain bounds, "[s]uch collaborations are not only benign, but *procompetitive*."

The Shipping Act permits carrier agreements to jointly purchase goods and services under certain circumstances.

As a general rule, subject to the competition standard of section 6(g) and the prohibited acts in section 10, the Shipping Act permits joint ventures among ocean carriers which can create efficiencies and cost savings that are passed on to exporters, importers, and ultimately benefit the U.S. consumer. This is not an issue of foreign carriers versus U.S. suppliers of goods and services. Whether under the Shipping Act administered by the Commission or other antitrust laws administered by the DOJ and FTC, the question is, as long as there are no anticompetitive effects, *what creates cost savings and efficiencies that will be passed along to the U.S. consumer.*

No distinction is made in the statute or the accompanying conference report between operational joint ventures or purchasing joint ventures. The Commission applies the Shipping Act's 6(g) competition standard to requests for joint purchasing authority just as it does for agreements seeking joint operational authority. Whether for joint purchasing or joint operational authority, the larger the market share of the participants to an agreement, the more concern the Commission will have about "market power" and potentially anticompetitive effects. Whether the Commission or any other antitrust enforcement agency will allow this joint purchasing authority to remain in an agreement depends on the specific facts of the agreement and an analysis of the potentially anticompetitive effects in each relevant geographic and product market.

This authority for ocean carrier agreement participants to jointly negotiate for goods and services is not new or an expansion of the Shipping Act or FMC jurisdiction into new areas. The Shipping Act and Commission regulations have long allowed joint authority in carrier agreements to extend to the purchase of goods and services from domestic suppliers, especially in the area of terminals and stevedoring services. In the last two or three years, however, the Commission has seen a growth in the number of filed carrier agreements requesting the authority

to jointly negotiate for goods or services: bunker supplies, terminal space, and tug-assist services. Ocean carriers are increasingly recognizing what other business know and that antitrust laws acknowledge: that joint purchasing arrangements consistent with competition laws frequently allow participants to obtain volume discounts and reduce transaction costs. Economic and market history shows, these savings ultimately do benefit U.S. consumers in the form of lower prices.

The Commission review of the competitive impact of an agreement is based on the specific facts of the requested authority. Such review would be very similar if not identical to the review by the Department of Justice for joint purchasing arrangements. If anything, the Commission's review of joint purchasing arrangements is more focused than its antitrust sister agencies. While the DOJ might permit joint purchasing after a survey of a marketplace, the FMC not only surveys the general marketplace, but also looks at each individual agreement to assess the relevant product and geographic market at the time of the proposed procurement. While the Commission's standard and analysis for joint purchasing collaborations by competitors is similar to the Department of Justice and Federal Trade Commission, the Commission does not use a "safe harbor" formula employed by these agencies. Employing its industry expertise, the Commission analyzes each agreement on a case-by-case basis, requiring that contracts entered into pursuant to any agreement negotiating authority be brought back to the Commission for further review based on the specific facts.

As noted above, the three large alliance agreements (2M, THE Alliance and the OCEAN Alliance) *DO NOT* include authority to jointly negotiate for goods and services. The only recent example of joint authority to purchase goods and services is found in a relatively small joint venture of Roll-on/Roll-off (Ro-Ro) vessels serving the U.S. trades. The WWL/EUKOR/ARC/Glovis Cooperative Working Agreement includes the authority for the agreement participants to jointly *negotiate* for tug-assist services at United States ports. The relevant product market under the competition analysis is tug-assist services for all commercial vessel calls at a port, including not only Ro-Ro, but all vessels - container, bulk, breakbulk, cruise, and tanker). The parties to this agreement control only 2.7% of the total global container ship and Ro-Ro ship fleets. As a general legal and judicial matter, the Commission simply did not have a plausible legal basis under 6(g) to seek an injunction in court to exclude this negotiating authority from this agreement.

Because a contract for tug-assist services at a particular port could have anticompetitive effects depending on the specific facts, the FMC only permitted this general negotiating authority to remain in the agreement on the condition that any proposed contract resulting from this joint negotiating authority must then be brought back to the Commission for review as to any anticompetitive effects under the 6(g) standard on a port by port and case-by-case basis. The competitive effects or acceptability under competition laws in a large port, such as New York/New Jersey, may be very different than that in a smaller port, such as Brunswick, GA, or Port Hueneme, CA. To date, this negotiating authority has not been used by this Ro-Ro joint venture.

Preventing such a joint purchasing venture that has passed regulatory scrutiny from obtaining cost savings or efficiencies may allow suppliers to charge higher rates than might otherwise be obtained, increasing the cost of overall ocean transportation that is ultimately

passed on to U.S. consumers and exporters in the form of higher prices and to U.S. exporters in the form of higher transportation changes. The ultimate harm would be to U.S. consumers, who would pay marginally higher prices for goods shipped internationally, and U.S. exporters who may lose sales in the international marketplace.

Application of the antitrust laws to joint ocean carrier agreements with certain domestic businesses, including common carriers by water not subject to the Shipping Act

It is important to note that ocean carrier agreements filed with the Commission do not exempt then from application of the general antitrust laws (Sherman Act and Clayton Act) whenever the joint carrier group is dealing with certain domestic businesses, including tug-assist operators. Congress expressly considered these types of agreements and explicitly excluded these arrangements from the types of agreement that are not subject to general antitrust laws. Because they are cooperative working agreements with two or more ocean common carriers, these carrier joint purchasing agreements must be filed with the FMC for review, but the agreements nevertheless do not receive immunity from the antitrust laws. This conclusion is reinforced by two statutory provisions:

- 46 U.S. Code § 40307 - Exemption from antitrust laws

  (b) Exceptions.—This part *does not extend antitrust immunity* to—

  (1) an agreement with or among air carriers, rail carriers, motor carriers, or common carriers by water not subject to this part relating to transportation within the United States;

- 46 U.S. Code § 41105 - Concerted action

  A conference or group of two or more common carriers may not—

  (4) negotiate with a non-ocean carrier or group of non-ocean carriers (such as truck, rail, or air operators) on any matter relating to rates or services provided to ocean common carriers within the United States by those non-ocean carriers, unless the negotiations and any resulting agreements *are not in violation of the antitrust laws* and are consistent with the purposes of this part, except that this paragraph does not prohibit the setting and publishing of a joint through rate by a conference, joint venture, or association of ocean common carriers;

As tugs are generally considered common carriers by water not subject to the Shipping Act, that an agreement is filed does not, in the end, exempt ocean liner carriers from the broader antitrust laws. Further, a non-ocean carrier that does not wish to negotiate with an ocean carrier need not do so, and may have a private party remedy against the ocean liner if the non-ocean carrier wishes to pursue it.

Other Commission Regulatory Issues

A further mission of the Federal Maritime Commission is to facilitate an open and free market for ocean shipping services by bringing transparency to market forces and protecting against anticompetitive behaviors. We are working to be a more efficient organization by making a concerted effort to reduce regulatory burdens on our constituents as well as aggressively looking for ways to make compliance with Commission requirements easier and more cost effective for shippers, carriers, and ocean transportation intermediaries. Toward those goals, a final rule amending requirements for Service Contracts and NVOCC Service Arrangements (NSAs) will become effective this Friday, May 5, 2017. Changes made via this action will ease regulatory burdens and reduce the costs of compliance with the agency's regulations. More specifically, the Commission instituted four key reforms with its action: 1) allowing for the filing of sequential service contract amendments with the FMC within 30 days of the effective date of an agreement between shipper and carrier; 2) allowing for up to 30 days for filing NVOCC Service Arrangement Agreements with the FMC after their effective date; 3) allowing additional time to correct technical data transmission errors from 48 hours to 30 days; 4) extending the period in which one can file a service contract correction request from 45 days to 180 days; and 5) multiple changes to a service contract or an NSA can be combined into a single amendment filed once every 30 days, provided each change clearly reflects the effective date of every term or rate being amended . This final rule was developed with extensive input from interested industry stakeholders.

An important way in which the Federal Maritime Commission meets its mission of protecting the shipping public and American consumers from financial harm is by knowing who qualified and actual service providers are. In terms of Non-Vessel Operating Common Carriers (NVOCCs) and freight forwarders, what are called "Ocean Transportation Intermediaries" (OTIs), the Commission achieves that goal by licensing these entities. Given advances in information technology, the Commission determined that there existed an opportunity to improve the quality and accuracy of information it has on file concerning OTIs while doing so in a manner that was not only easy to comply with, but of minimal burden. Several years ago, the Commission reviewed a survey of OTIs and discovered that over 25% had moved to new addresses without informing the FMC, that the person whose qualifications were reviewed as the basis of granting the license ("Qualified Individual") was no longer an employee of the company, and several other such filing discrepancies. A simple matter of not having the correct address of an OTI on file hampers the ability to have proper service in a legal matter and bringing our records up to date was an important goal. Earlier this spring, the first batch of OTI license holders were required to go to www.FMC.Gov to update information about their businesses. This completely online and no fee process takes approximately five minutes to complete. In total, 4,823 licensed OTIs will need to complete the license update process in the coming months. Licensed entities will need to update their information once every 36 months, a far less burdensome requirement than the annual updates all states require for all registered corporations, LLCs, and partnerships.

Conclusion

To close, we have the authority to effectively regulate the ocean liner carrier industry. We are the front line in terms of the significant changes roiling the industry. We listen and respond to public comments on matters pending before the Commission. We have responded with positive and proactive measures. We will continue to faithfully administer the Shipping Act.

Thank you for your attention and I will be pleased to answer any questions you may have.