WRITTEN TESTIMONY OF
MATTHEW LEECH
PRESIDENT & CHIEF EXECUTIVE OFFICER
PORTS AMERICA

BEFORE THE
COMMITTEE ON TRANSPORTATION AND INFRASTRUCTURE
SUBCOMMITTEE ON COAST GUARD AND MARITIME TRANSPORTATION
U.S. HOUSE OF REPRESENTATIVES

HEARING ON
"Maritime Transportation Supply Chain Issues"

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Good morning, Chairman Webster, Ranking Member Carbajal, and members of the Subcommittee. My name is Matt Leech, and I serve as President and Chief Executive Officer of Ports America. Thank you for the invitation to be here today. I appreciate the opportunity to discuss the status of the maritime supply chain and the implementation of S.3580, Ocean Shipping Reform Act of 2022 ("OSRA"), enacted into law last year.

Ports America is the largest marine terminal operator and stevedore in the United States. The company has been operating for over 100 years, is one of the largest U.S. maritime employers with approximately 945 full-time employees and hires more than 12,000 union workers on a daily basis to operate our terminals. Currently, Ports America manages operations in thirty-three ports and seventy locations. In 2022, Ports America handled over 19.25 million twenty-foot equivalent units, 1.6 million vehicles, 8.27 million tons of general cargo, and 4.4 million cruise passengers. In the industry, our marine terminals and cargo handling operations are commonly known by the acronym "MTOs." At the corporate level, Ports America maintains its focus on key areas, including terminal concessions, joint venture partnerships, infrastructure funding, public-private partnerships, labor management, and relationships with the world's leading shipping lines. Above all is Ports America's commitment to a culture of safety. The health and safety of our dedicated workforce is our single highest priority.

I am also here today on behalf of the National Association of Waterfront Employers ("NAWE"), of which Ports America is a proud member. NAWE is a non-profit trade association whose member companies are privately-owned stevedores, MTOs, and other U.S. waterfront employers. NAWE's member companies engage in business at all major U.S. ports on the Atlantic and Pacific Coasts, the Gulf of Mexico, the Great Lakes, and Puerto Rico. In that manner, NAWE, as the voice of MTOs in Washington, DC, ensures that there are open lines of

communication between Congress, regulatory agencies, and the gateways to our Nation's international commerce.

Importance of Marine Terminal Operators

As the American public has come to understand more acutely in recent years, MTOs are the critical lynchpin of our maritime transportation industry. MTOs employ hundreds of thousands of American waterfront workers, privately fund the purchase of cargo handling equipment at U.S. ports, and most importantly, serve as the critical link moving cargo between the sea and the land.

MTOs are the bridge between ocean transportation and inland land transportation. All U.S. imports and export cargo using international ocean transportation—which is [the vast majority] of all commercial cargo—rely on MTOs to perform a combination of essential and critical links in the supply chain. MTOs transition cargo from very different modes of transportation (ships, trucks, and rail cars), and MTOs manage the orderly, safe, and secure collection and distribution of cargo from a vast array of different parties. It is the work of MTOs that connects the products of American workers to the global economy and, in turn, ensures that global commerce constantly flows in support of our Nation's economy.

The national economy increasingly demands just-in-time delivery and associated reductions in container turn time throughout the maritime supply chain. Accordingly, MTOs must be adaptive and forward-thinking, looking to leverage new technologies and advanced infrastructure to ensure that the operators' skilled workforce can meet stakeholder needs in a safe operating environment that seeks to mitigate the risk of injury. However, while MTOs can create efficiencies through infrastructure and equipment investment, the waterfront land upon which MTOs operate (some of the most expensive real estate in the country) remains finite.

Supply chain challenges from 2020 through late 2022 demonstrate this basic supply and demand problem. Unprecedented consumer demand following the COVID-19 pandemic and limited capacity in other parts of the supply chain led directly to a scarcity of capacity at marine terminal property. Two main factors drove MTO congestion: (1) an extraordinary *increase* in container volumes and (2) an unprecedented *decrease* in container throughput—the period of time a container stays on a terminal. Marine terminals are a zero-sum game – each container sitting on a terminal is occupying space that is needed for another container coming off of (or going on to) the next ship. The analogy of an MTO as a bridge between transposition modes is very apt. The capacity of a bridge is a function both of how many cars it can hold at any one time, i.e., how many lanes *and* the speed that those cars can safely and efficiently move over the bridge from one side to the other. Marine terminal throughput works just the same. Increased demand (for a bridge, traffic on labor day weekend, for a terminal, a peak season before Christmas) is enough to stress capacity. Still, anything that slows down throughput can have catastrophic effects (for a bridge, think of how road construction on one lane at the other side can back up traffic for miles on a busy day, and for a terminal, any number of backups outside of a terminal and beyond an MTO's control can do the same—shortage of truckers, availability of chassis, rail congestion, not enough warehouses to unload containers, and, sometimes, even bridge traffic.). Terminals, like bridges, are also very expensive, have finite capacity, and are difficult to expand without major infrastructure development.

But there is a big difference between bridges and marine terminals that is part of the reason for my testimony today. No one would think it is okay use a bridge for long term parking. Indeed, if cars parked on a bridge in rush hour, everyone would expect—demand even—that the bridge operator has the ability and the tools to get parked cars moving. Yet, containers are often improperly "parked" at marine terminals for excessive periods of time, which was a particularly acute problem during the pandemic, but "warehousing" containers at marine terminals is an ongoing problem. Worse, the critical tools that MTOs have available to move containers off terminals are at risk. Well-meaning efforts to regulate excessive and unreasonable charging practices in certain areas of the supply chain, perhaps inadvertently or as an unintended consequence, are threatening essential tools used by MTOs to charge for use of services and to promote movement of cargo—namely assessment and collection of "terminal demurrage."

Accordingly, it is imperative that MTOs have the flexibility to use all available tools – including the assessment of terminal demurrage – to ensure the expedient retrieval of containers from a terminal property and to avoid a repeat of the congestion issues of recent years.

Status of the Maritime Transportation Supply Chain

It is well known that the exceptional levels of consumer demand that began in 2020 have receded, and the overall flow of cargo has returned to relatively normal levels, with accordant reductions in ocean transportation freight rates. For example, Freight Waves reported that unlike in January 2022, when over 100 container ships were stuck waiting off the Ports of Los Angeles and Long Beach, in January 2023, no ships were waiting offshore to enter San Pedro Bay. Moreover, this turnaround is not unique to the Pacific Coast. Major Atlantic and Gulf Coast ports have experienced similar reductions in vessel queues despite increased port calls. Overall, marine exchange data indicates that vessel queues and container dwell times at North American ports and marine terminals have essentially returned to pre-COVID norms.

The current status of the maritime supply chain now must be one of reflection, focused on the implementation of important lessons of recent years to mitigate the risk of future congestion issues. When examining how MTOs were able to address these historic cargo volumes and throughput pressures, it becomes clear that the availability of two tools was critical.

First, the assessment and collection of terminal demurrage and long dwell fees was decisive in ensuring that containers were removed from a terminal yard in a timely manner. While marine terminals are not warehouses, part of moving containers through a marine terminal requires short-term storage between the time a container is discharged from a ship until it is loaded on a truck or rail car (and the reverse). That period of time, which is referred to as "free time," is the intended period of time to move cargo off the terminal without additional changes. But when containers remain on the terminal after free time, terminal demurrage is charged.

Simply put, terminal demurrage is part "rent" or a "storage fee" for the use of the space and extended care and custody of the container and cargo on a terminal after free time. It is also an incentive for cargo interests to remove cargo in a timely fashion to avoid using the terminal as a warehouse. In many situations, even with demurrage and dwell fees, MTOs are not compensated for the negative impact of overstaying containers, and some cargo interests persist in abusing

marine terminals as de facto warehouse storage because other options are less convenient or more expensive.

As noted above, terminal space is finite; therefore, it is critical both to the health of the American supply chain and the basic business principles of MTOs that containers be retrieved as quickly as possible. Managing the time a container is on terminal—"dwell time" as it is known—is critical to managing throughput and ultimately maintaining capacity. Think of cars at an airport. Cars at arrivals and departures are not charged for quick and usually well-monitored periods, and some airports have short-term pickup lots that may offer a first hour free. But virtually all major airports manage the efficiency and availability of short- and long-term parking through the application of rates and charges. As with marine terminals, there are both cost differences and incentive differences at play in service charges. Close-in parking buildings tend to cost more than more distant open lots, and close-in, short-term parking tends to have higher charges than more distant open lots to incentivize efficient use of time and space.

MTOs similarly use terminal demurrage to manage the on terminal dwell time of containers. After free time there is a cost recovery element to terminal demurrage and an incentive element (often reflected in the use of tiers or rate increases over time) to incentivize shorter stays and more prompt removal.

Terminal demurrage, therefore, ensures that marine terminals are the bridge that is needed for the supply chain to function properly, not a very expensive and under-compensated warehouse that risks supply chain congestion. If additional warehouse space is needed, the industry should invest in warehouse capacity, not unduly burden MTOs and risk untenable supply chain congestion.

Second, MTOs were able to work together to create operational efficiencies and – as necessary and when appropriate and feasible – extend gate hours to expedite the flow of cargo through U.S. ports. This coordination was only possible through the ability to coordinate facilitated by the limited antitrust immunity afforded to MTO agreements filed with the Federal Maritime Commission ("FMC") under the Shipping Act. Without this immunity, competitor MTOs operating on the same public port property would be unable to coordinate efforts and share data, which would have made it virtually impossible to address the supply chain capacity issues of recent years.

OSRA Implementation

OSRA directed the FMC to undertake a number of administrative and regulatory actions to implement the Commission's new authorities. I applaud the efforts of the Commissioners and their staff in taking rapid action through repeated public engagement. In some cases, the FMC has gotten it right, such as increasing investigation of improper charges and practices, following Congress' directive to implement OSRA's requirements for ocean carrier demurrage and detention invoices, and diligently implementing the new charge complaint process. In other cases, however, the FMC appears to be getting it wrong, notably in the issuance of its October 2022 Notice of Proposed Rulemaking ("NPRM") regarding demurrage and detention requirements mandated by Section 7(b) of OSRA. We offer two examples.

(1) Proposed Rules Would Penalize MTOs, threaten MTO Ability to Charge Their Own Terminal Demurrage, and are Inconsistent with how the Supply Chain Really Works

First, the FMC's October 2022 NPRM, unfortunately, chose to ignore the express directive from Congress in Section 7(b) of OSRA to initiate a very specific rulemaking: clarifying reasonable rules and practices identified in the FMC's May 18, 2020, "incentive rule," but it was not an invitation to re-write the common carrier provisions enacted by Section 7(a) of OSRA to apply wholesale to MTOs. Aside from not following the express directive, the FMC should not be engaging in proposed regulation that would do by regulation what Congress chose not to do by legislation. Indeed, instead of further clarifying issues not resolved in the inventive principle rulemaking, the NPRM broadly and inexplicably sweeps MTOs into such requirements, notwithstanding the impossibility of complying with the proposed regulations. Specifically, the NPRM proposed rules would require MTOs to have a "direct contractual relationship" with cargo owners in order to bill them for terminal demurrage. This is not only inconsistent with longstanding relationships in the supply chain but quite frankly astonishing that the FMC would suggest a rule that a terminal not be able to charge for services it actually performs and which are the essential tool that MTOs have to facilitate cargo movement. MTOs are also in the best position to efficiently assess and collect demurrage-type charges because the amount due is generally only known at the time a container is removed from a terminal, which MTOs directly facilitate and manage. If anything, MTOs should be the only party to charge terminal demurrage, not the other way around.

The FMC's proposed rules on MTOs are inconsistent with OSRA 2022, target the wrong part of the supply chain, and would almost certainly not only do more harm than good but would very likely have the direct opposite effect than Congress intended. Accordingly, not only would the Commission's proposed changes be impossible without senselessly prohibiting MTOs from charging for their owner services, but they would also slow the flow of cargo, undermining the recent successful efforts to mitigate supply chain congestion.

We hope the FMC takes this issue into consideration.

(2) Demurrage and the Incentive Principle

In addition to the FMC's rulemaking efforts, I am concerned about some of the related policy directions of the Commission. For example, in a recent informal adjudication decision taken up by the FMC, a majority of the Commissioners determined that the imposition of equipment detention (essentially a fee charged by ocean carriers for the use of their equipment beyond "free time") on a holiday weekend when the equipment return location was normally closed was at odds with the "incentive principle" and therefore unreasonable under the Shipping Act. The "incentive principle" – a creation of the FMC's own regulatory efforts – considers as a factor in the reasonableness analysis the degree to which detention and demurrage charges act as "financial incentives to promote freight fluidity ."As noted in Commissioner Bentzel's dissent, the "incentive principle" does not replace the statutory test under Shipping Act, i.e., whether or not the charge is "reasonable."

I am extremely concerned about what this recent decision could mean for the imposition of terminal demurrage. Not because the decision applies to marine terminal demurrage, as it does not. And not that it should be applied to marine terminal demurrage, as it should not. But my concern is that in the absence of clear legislation or a normal rulemaking process—like the process Section 7(b) of OSRA mandated that FMC undertake, the decision has created a significant amount of uncertainty among various industry segments, and thus the potential for rash operational changes that are both unnecessary as a matter of law and regulation and detrimental to the interests of MTOs.

Notably, in this recent case, the shippers had advanced notice that the marine terminal (the designated return location) would be closed on the holiday weekend. Nonetheless, they chose to continue to hold the ocean carrier's equipment.

Despite this clear notice and the fact that the shipper's agent had every opportunity to return the equipment before the holiday weekend, the Commission deemed the detention charges unreasonable. Some in the industry believe that this logic could be extended to terminal demurrage, even though terminal demurrage is qualitatively different from equipment detention (e.g., the charge for the use of space), and the analysis under the incentive rule should consider both the actual differences in the charges as well as the different incentivizing facts at issue. Despite this, the uncertainty is already affecting stakeholders, and the results, if continued to their (il)logical conclusion, would be illogical and potentially devastating.

The costs borne by the MTO in storing a container at the terminal that has improperly exceeded its free time remain constant, whether or not the terminal is open. To repeat, a marine terminal is not intended to be used as a warehouse. The business model of a marine terminal depends on a constant flow of cargo through the terminal. Accordingly, the MTO must be compensated for a party failing to remove a container. This is quite different from the "lost opportunity" costs of already unused equipment at issue in equipment detention.

Moreover, it is clear that the imposition of weekend and holiday terminal demurrage promotes freight fluidity, consistent with the incentive principle. If free time has expired, cargo is incentivized to remove a container before the weekend or holiday to avoid paying for such additional storage costs. In addition, the availability of free storage on the weekend is likely to disincentivize the flow of cargo, when the alternative is relocating cargo to an offsite facility where fees would be incurred. The aggregate result, therefore, would be an increase in supply chain congestion at U.S. ports. Because the potential implications of the FMC's recent decision fly in the face of the incentive principle, we urge this Subcommittee to encourage the FMC to avoid extending its scope to terminal demurrage.

MTO Investments in Cargo Handling Equipment

Notwithstanding the success of reducing supply chain congestion through the use of terminal demurrage and filed MTO agreements, new challenges are emerging. For example, Congress passed the Inflation Reduction Act ("IRA") last August, which appropriates $3 billion for maritime decarbonization. The government's investment is intended to help MTOs switch to zero- or near-zero emissions equipment to decarbonize port operations and improve air quality in

port communities. NAWE and its members are extremely grateful to Congress for its leadership in passing the IRA and supporting MTO investment in next-generation cargo handling equipment. However, although MTOs and other stakeholders want cleaner, safer, and healthier ports, the IRA's timelines for getting new equipment are challenging for several reasons, including:

1. The much higher cost of electric equipment;
2. Lost value in replacing existing equipment before the end of its useful life;
3. The need for expensive electric infrastructure; and
4. The lack of U.S.-manufactured zero- or near-zero emissions cargo handling equipment.

NAWE and its members continue to investigate the anticipated costs and timelines of switching from existing cargo handling equipment to zero- or near-zero emissions equipment. However, given the above-listed challenges, we anticipate that the aggregate costs to bring U.S. ports into compliance with the IRA's decarbonization goals will be in the tens (and possibly hundreds) of billions of dollars and will far exceed the IRA's timelines, even if U.S. manufacturing of next-generation cargo handling equipment can be rapidly expanded.

Given these challenges, Ports America and NAWE will continue to engage with Congress to find flexibility in the IRA to account for the realistic costs, timelines, and U.S. equipment availability to achieve the Act's policy goals. While the IRA is outside this Subcommittee's jurisdiction, we appreciate the members' support for our efforts. We will keep you apprised of these implementation challenges as they directly impact the U.S. maritime supply chain.

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In closing, I want to thank you all for inviting me to share updates and concerns on these critical issues that impact our industry. I am truly grateful for your support of American marine terminal operators in ensuring resilient maritime supply chain and safe working environment for our waterfront workforce. I am happy to respond to any questions you may have.

Sincerely,

Matthew Leech
Ports America
President & CEO