

Tariffs: What They Are, What They Aren't, and How to Maintain Them

A presentation to the

Annual Conference of the

**Alaska Association of Harbormasters
and Port Administrators**

Homer, Alaska

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Agenda

- **Tariffs: What They Are, What They're Not**
- **How to Maintain Your Tariff**
- ***Findings from Case Study***
- **Q&A**

Disclaimer

- I am not an attorney, nor do I have any special knowledge about the legal issues surrounding tariffs. Consult your attorney if you have specific legal questions regarding tariffs.
- The legal and regulatory information presented here is based on my experience with doing rate-related work, hearing attorney discussions of related issues, and my limited readings of regulatory and legal documents.
- Thoughts on tariff maintenance are based on experience with rate studies, life cycle cost analysis, and financial sustainability.

Tariffs: What They Are, What They're Not

Rate Issues

■ Our approach:

- Understand the regulatory framework and key issues
- Do the analysis
- Develop rate recommendations

Tariffs: What They Are, What They're Not

■ Regulatory Framework

- Tonnage Clause of the U.S. Constitution
- Shipping-related acts
 - ◆ Shipping Act of 1984
 - ◆ Ocean Shipping Reform Act of 1998
- Federal Maritime Commission

Tonnage Clause (U.S. Constitution)

- **“No State shall, without the Consent of Congress, lay any Duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.”**

Tonnage Clause Implications

■ Rulings over the years have found:

- No fees are allowed for simply allowing vessels to access or use a port.
- Fees are allowed under state authority to cover the provision of services (e.g., wharfage, dockage, upland storage, etc.).
- States' police powers allow for fees to be charged for use of navigable waters within the state's geographical boundaries.
- There must be a relationship between fees levied and benefits received.

Shipping-Related Acts

■ Shipping Act of 1984

- “(1) to establish a nondiscriminatory regulatory process for the common carriage of goods by water in the foreign commerce of the United States with a minimum of government intervention and regulatory costs
- “(2) to provide an efficient and economic transportation system in the ocean commerce of the United States that is, insofar as possible, in harmony with, and responsive to, international shipping practices
- “(3) to encourage the development of an economically sound and efficient United States-flag liner fleet capable of meeting national security needs”

Shipping-Related Acts

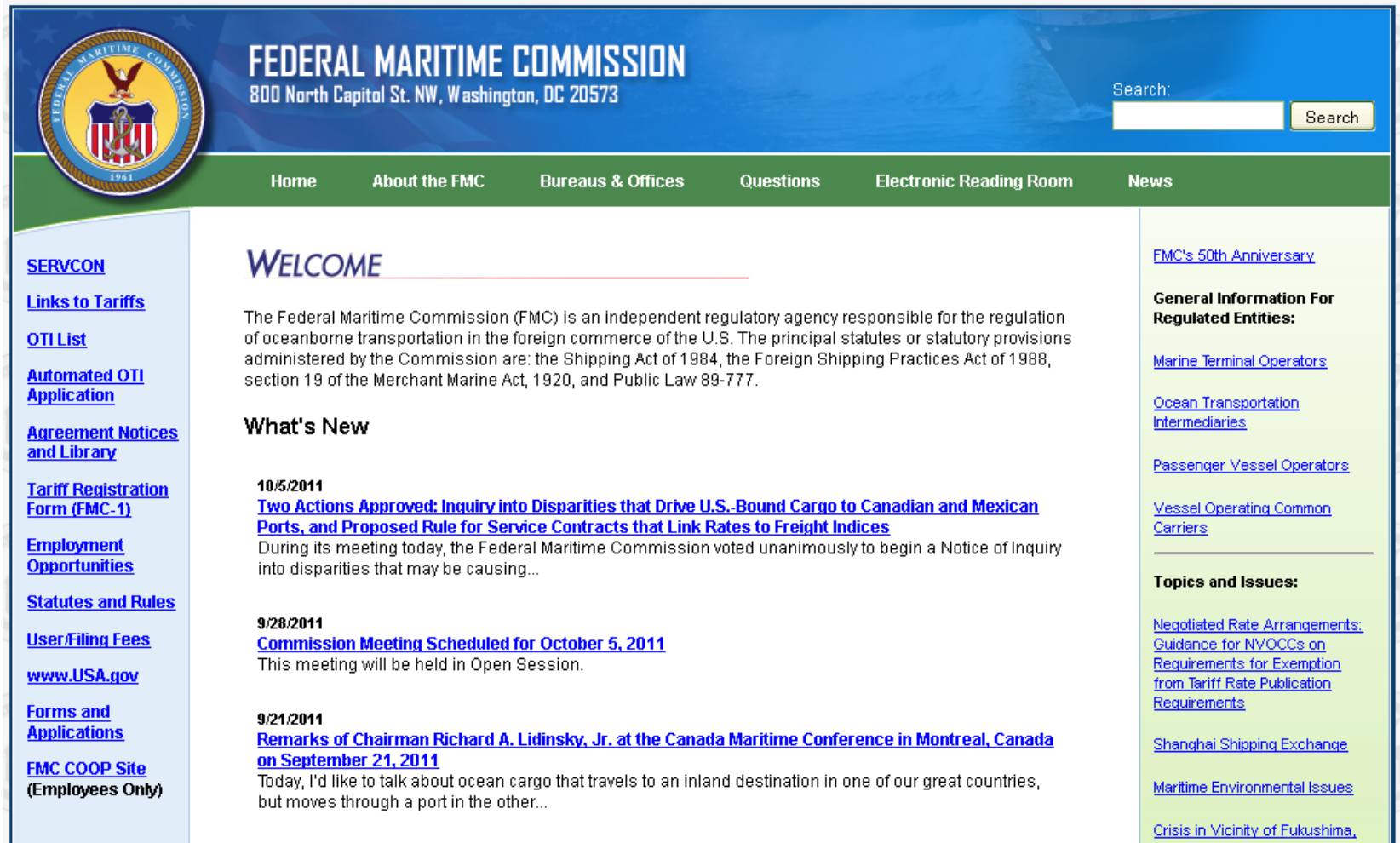
■ Ocean Shipping Reform Act of 1998

■ Added:

“(4) to promote the growth and development of United States exports through competitive and efficient ocean transportation and by placing a greater reliance on the marketplace.”

- The agency responsible for enforcement of administration of these acts is the **Federal Maritime Commission**.

FMC on the Web: *fmc.gov*



The screenshot shows the homepage of the Federal Maritime Commission (FMC) website. At the top left is the FMC seal, followed by the text "FEDERAL MARITIME COMMISSION" and "800 North Capitol St. NW, Washington, DC 20573". A search bar is located at the top right. Below the header is a green navigation bar with links for Home, About the FMC, Bureaus & Offices, Questions, Electronic Reading Room, and News. The main content area is divided into three columns. The left column contains a list of links: SERVCON, Links to Tariffs, OTI List, Automated OTI Application, Agreement Notices and Library, Tariff Registration Form (FMC-1), Employment Opportunities, Statutes and Rules, User/Filing Fees, www.USA.gov, Forms and Applications, and FMC COOP Site (Employees Only). The middle column features a "WELCOME" heading, a paragraph about the FMC's role, a "What's New" section with three news items dated 10/5/2011, 9/28/2011, and 9/21/2011, and a "What's New" heading. The right column contains a "FMC's 50th Anniversary" link, a "General Information For Regulated Entities:" section with links for Marine Terminal Operators, Ocean Transportation Intermediaries, Passenger Vessel Operators, and Vessel Operating Common Carriers, and a "Topics and Issues:" section with links for Negotiated Rate Arrangements, Shanghai Shipping Exchange, Maritime Environmental Issues, and Crisis in Vicinity of Fukushima.

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WELCOME

The Federal Maritime Commission (FMC) is an independent regulatory agency responsible for the regulation of oceanborne transportation in the foreign commerce of the U.S. The principal statutes or statutory provisions administered by the Commission are: the Shipping Act of 1984, the Foreign Shipping Practices Act of 1988, section 19 of the Merchant Marine Act, 1920, and Public Law 89-777.

What's New

10/5/2011
[Two Actions Approved: Inquiry into Disparities that Drive U.S.-Bound Cargo to Canadian and Mexican Ports, and Proposed Rule for Service Contracts that Link Rates to Freight Indices](#)
During its meeting today, the Federal Maritime Commission voted unanimously to begin a Notice of Inquiry into disparities that may be causing...

9/28/2011
[Commission Meeting Scheduled for October 5, 2011](#)
This meeting will be held in Open Session.

9/21/2011
[Remarks of Chairman Richard A. Lidinsky, Jr. at the Canada Maritime Conference in Montreal, Canada on September 21, 2011](#)
Today, I'd like to talk about ocean cargo that travels to an inland destination in one of our great countries, but moves through a port in the other...

FMC's 50th Anniversary

General Information For Regulated Entities:

- [Marine Terminal Operators](#)
- [Ocean Transportation Intermediaries](#)
- [Passenger Vessel Operators](#)
- [Vessel Operating Common Carriers](#)

Topics and Issues:

- [Negotiated Rate Arrangements: Guidance for NVOCCs on Requirements for Exemption from Tariff Rate Publication Requirements](#)
- [Shanghai Shipping Exchange](#)
- [Maritime Environmental Issues](#)
- [Crisis in Vicinity of Fukushima, Japan](#)

Federal Maritime Commission

- **“The Federal Maritime Commission (FMC) is an independent regulatory agency responsible for the regulation of oceanborne transportation in the foreign commerce of the U.S. The principal statutes or statutory provisions administered by the Commission are: the Shipping Act of 1984, the Foreign Shipping Practices Act of 1988, section 19 of the Merchant Marine Act, 1920, and Public Law 89-777.”**

Federal Maritime Commission Duties

- **Monitor activities of ocean common carriers, marine terminal operators, conferences, ports, and ocean transportation intermediaries (OTIs) who operate in the U.S. foreign commerce to ensure they maintain just and reasonable practices, and oversee the financial responsibility of passenger vessel operators.**
- **Maintain a trade monitoring and enforcement program designed to assist regulated entities in achieving compliance, and to detect and appropriately remedy malpractices and violations set forth in section 10 of the Shipping Act.**

Federal Maritime Commission Duties

- **Monitor the laws and practices of foreign governments which could have a discriminatory or otherwise adverse impact on shipping conditions in the U.S.**
- **Enforce special regulatory requirements applicable to ocean common carriers owned or controlled by foreign governments (controlled carriers).**
- **Process and review agreements and service contracts.**

Federal Maritime Commission Duties

- **Review common carriers' privately published tariff systems for accessibility and accuracy.**
- **Issue licenses to qualified ocean transportation intermediaries in the U.S. and ensure all maintain evidence of financial responsibility.**
- **Ensure passenger vessel operators demonstrate adequate financial responsibility for casualty and non-performance.**

FMC Compliance: What Matters Most for You

■ From the United States Government Manual:

- **Complaints:** The Commission reviews alleged or suspected violations of the shipping statutes and rules and regulations of the Commission and may take administrative action to institute formal proceedings, to refer matters to other governmental agencies, or to bring about voluntary agreement between the parties.
- **Rulemaking:** The Commission promulgates rules and regulations to interpret, enforce, and ensure compliance with shipping and related statutes by common carriers and other persons subject to the Commission's jurisdiction.

FMC Compliance: What Matters Most for You

- **From the United States Government Manual:**
 - **Investigation and Economic Analyses:** The Commission prescribes and administers programs to ensure compliance with the provisions of the shipping statutes.
 - These programs include...

FMC Compliance: What Matters Most for You

- **the collection of information relating to field investigation of activities and practices of ocean common carriers, terminal operators, agreements among ocean common carriers and/or marine terminal operators, ocean transportation intermediaries, passenger vessel operators, and other persons subject to the shipping statutes;**

FMC Compliance: What Matters Most for You

- **and rate analyses, studies, and economic reviews of current and prospective trade conditions, including the extent and nature of competition in various trade areas.**

FMC Tariff Links



FMC Organizational Form - Reports - Mozilla Firefox

File Edit View History Bookmarks Tools Help

← → fmc.gov https://www2.fmc.gov/FMC1Users/scripts/ExtReportsTOC.asp ☆ ↻ Google

FEDERAL MARITIME COMMISSION

- Information accepted for filing as of: 10/6/2011 8:08:16 PM
 - [FMC1 VOCC](#)
 - [FMC1 OTI/NVOCC](#)
 - [FMC1 Conference](#)
 - [FMC1 Marine Terminal Operator](#)
- The following entities' tariffs at the locations indicated below are not active for one or more reasons: (e.g., tariff cancellation, surrendered/suspended/revoked OTI license, conference suspension/termination).

FMC1 VOCC	2YR VOCC History	5YR VOCC History	ALL VOCC History
FMC1 OTI/NVOCC	2YR OTI History	5YR OTI History	ALL OTI History
FMC1 Conference	2YR Conf. History	5YR Conf. History	ALL Conf. History
FMC1 Marine Terminal Operator	2YR MTO History	5YR MTO History	ALL MTO History

Marine Terminal Operator Tariffs



Marine Terminal Operators

Organization No.	Legal Name	Trade Name	Location of Tariff(s)
001820	Alabama State Docks an Agency of the State of Alabama	Alabama State Docks Department, Alabama State Docks, ASDD, ASD	www.asdd.com
001821	Albany Port District Commission	Port of Albany	www.portofalbany.com
012273	American Stevedoring, Inc.		www.newytc.com
018595	APM Terminals Pacific Ltd.	APM Terminals	www.apmterminals-na.com
019071	APS East Coast, Inc.	AMPORTS	WWW.SUMNERTARIFF.COM
012824	ARMCO, INC.	GREENS PORT TERMINAL	www.bgulf.org
012982	ARROWPAC INTERNATIONAL, INC.		www.ratewave.com
001872	Baltimore Marine Terminal Association	BMTA	http://www.mpa.state.md.us
002018	BOARD OF COMMISSIONERS OF THE PORT OF NEW ORLEANS	PORT OF NEW ORLEANS	www.portno.com
012215	Board of Trustees of the Galveston Wharves	Port of Galveston	www.portofgalveston.com
002072	BOSWELL OIL COMPANY, THE	RIVER TRANSPORTATION CO.	http://rates.descartes.com
012117	Brazos River Harbor Navigation District	Port Freeport	HTTP://www.portfreeport.com/tariff005_toc.asp
012891	BRIDGEPORT PORT AUTHORITY, THE		WWW.SUMNERTARIFF.COM
011993	BROWNSVILLE NAVIGATION DISTRICT	PORT OF BROWNSVILLE	www.bgulf.org
018144	C.W. INT'L USA LTD.		WWW.PARAMOUNTTARIFF.COM
012451	CALHOUN COUNTY NAVIGATION DISTRICT	PORT OF PORT LAVACA/POINT COMFORT	WWW.TXGULF.ORG
018210	Canaveral Marine Terminal LLC		plee@mfreezer.com
011216	CANAVERAL PORT AUTHORITY		www.portcanaveral.com
018243	Carolina Marine Terminal, Inc.		www.dmstradeservices.com
021289	CENAC OFFSHORE, L.L.C.		www.sumnertariff.com
015679	CHARLESTON HEAVY LIFT, LLC	CHARLESTON HEAVY LIFT, LLC	http://rates.descartes.com
001877	CITY OF BETHEL	PORT OF BETHEL, AK, BETHEL MUNICIPAL DOCKS	www.bgulf.org
001877	CITY OF BETHEL	PORT OF BETHEL, AK, BETHEL MUNICIPAL DOCKS	www.cityofbethel.org
001881	City of Los Angeles	Port of Los Angeles	www.portoflosangeles.org
011807	City of Portland, Maine		www.ci.portland.me.us/waterfront.htm
002102	City of St. Mary's, Alaska	Port of St. Mary's, Alaska	http://home.gci.net/~citykm

FMC and Marine Terminal Operators

■ Do MTOs have to publish a schedule?

- MTOs are not required to make their schedule(s) of rates, regulations and practices (formerly called "MTO tariffs") available to the public.
- A MTO that elects to make their schedules available to the public must make them available in electronic form.
- Should an MTO maintain parallel terminal schedules in paper form for entities in the shipping industry who are unable to access electronic terminal schedules, the electronic version will govern in the event of a conflict with the parallel paper form of terminal schedules since the electronic format is the required method of publication.

FMC and Marine Terminal Operators

- **46 CFR § 525 implements the *Shipping Act of 1984*, as amended by the *Ocean Shipping Reform Act of 1998* and the *Coast Guard Authorization Act of 1998*.**
- **All marine terminal operators who are subject to FMC jurisdiction must submit an electronic form (FMC-1) prior to beginning operations.**

46 CFR § 525.2(a)

- ***Marine terminal operator schedules.*** A marine terminal operator, at its discretion, may make available to the public, subject to section 10(d) of the Act, a schedule of its rates, regulations, and practices.
 - (2) *Enforcement of terminal schedules.* Any schedule that is made available to the public by the marine terminal operator shall be enforceable by an appropriate court as an implied contract between the marine terminal operator and the party receiving the services rendered by the marine terminal operator, without proof that such party has actual knowledge of the provisions of the applicable terminal schedule.
 - (3) *Contracts for terminal services.* If the marine terminal operator has an actual contract with a party covering the services rendered by the marine terminal operator to that party, an existing terminal schedule covering those same services shall not be enforceable as an implied contract.

46 CFR § 525.3(a)(2)

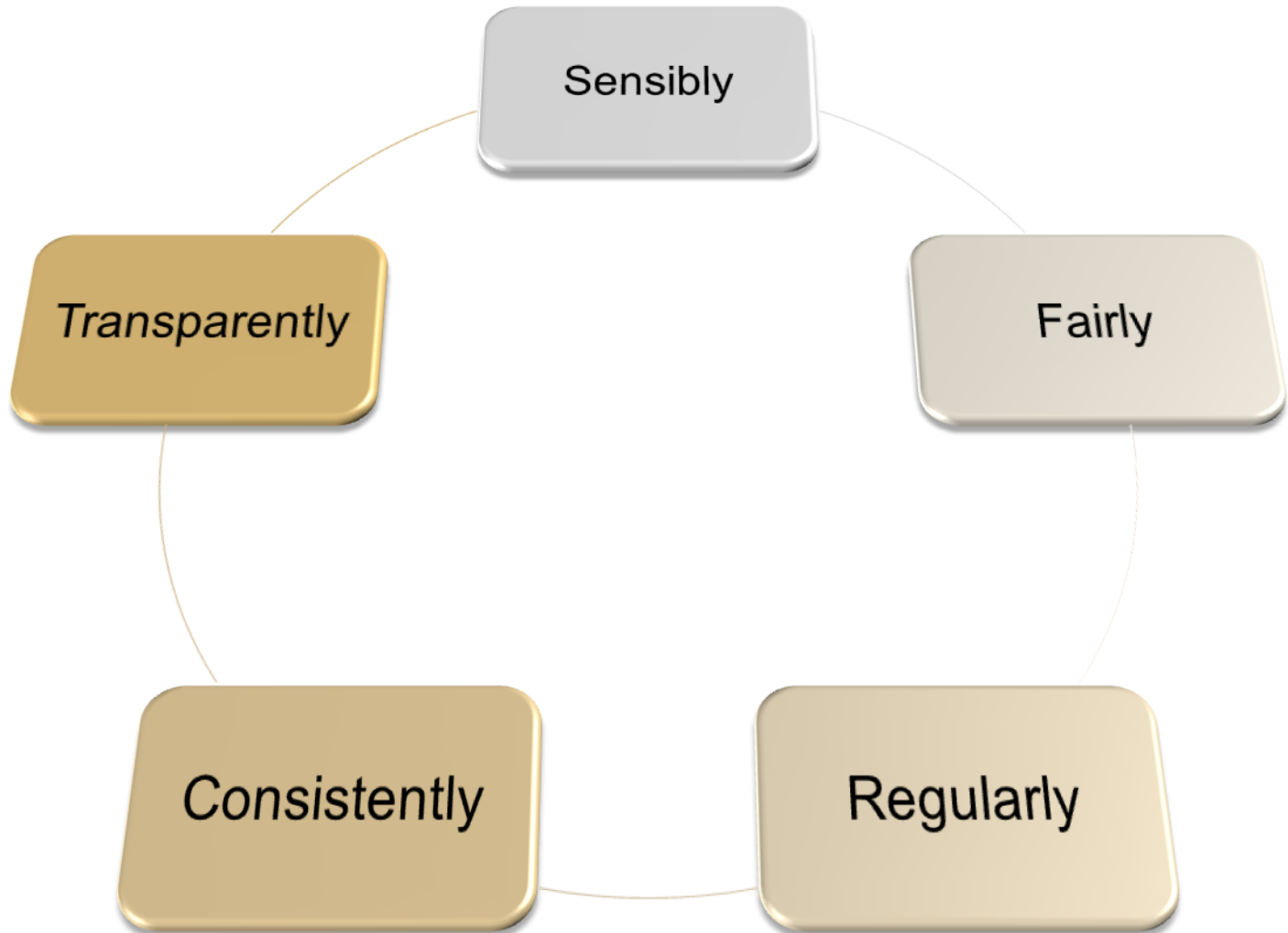
- **(2) *Availability to the public.*** Any terminal schedule that is made available to the public shall be available during normal business hours and in electronic form. The public may be assessed a reasonable nondiscriminatory charge for access to the terminal schedules; no charge will be assessed against the Commission.

Some Questions

- **What is a Tariff?**
- **How do the governing rules apply to municipal ports and harbors?**
- **Some of our fees are in the Tariff and some are not. How are we doing so far?**
- **Are we ever audited for compliance? Should I be worried about the black helicopters?**
- **What about care and maintenance of a Tariff?**

How to Maintain Your Tariff

How to Maintain Your Tariff: My View



How to Maintain Your Tariff: Sensibly and Fairly

- **Tariffs and fees must comply with federal laws.**
- **Rates and fees must be related to benefits provided to users.**
- **Rates and fees should reflect actual costs.**

How to Maintain Your Tariff: Regularly

- **Changes in facilities, services, users, and other factors should be addressed regularly to avoid loopholes and other confusion.**
- **Rates should be adjusted regularly in order to reflect cost conditions.**

How to Maintain Your Tariff: Consistently

- **Determination of rates and fees set forth in the tariff should be done in a consistent manner over time.**
- **Allocations of costs should be handled on a consistent basis; the allocations can change over time, but the process for finding those allocations should remain constant.**
- **It's a good idea (especially if it's required) that all changes be reviewed and approved by the local governing body (city council or assembly).**

How to Maintain Your Tariff: Transparently

- **Allocations should be explained clearly.**
- **Costs should be explained clearly, including how long-term plans fit in.**
- **Stakeholders should be involved in the process, if only to get feedback on future projects (what's needed and what's not wanted) and to keep them informed.**

The Mechanics of Setting Rates

- **In recent years, we've advocated more and more for life-cycle-based costs:**
 - What is the total cost of our facilities, including annual operations and maintenance costs, as well as longer-term major repair and replacement costs?
 - How much do we need to charge to cover those costs?

The Mechanics of Setting Rates

- **...rather than simply looking at fund balances:**
 - How much do we need to charge to ensure we maintain a positive fund balance?
- **This second approach makes good fiscal sense, but it's only part of the picture.**
 - Focusing solely on fund balances prevents you from looking at the bigger picture of life cycle costs.

Case Study

Case Study: What Can We Learn From It?

■ Rates need to be justified.

- Operations, maintenance, and replacement costs are legitimate.
- Users need to receive benefit from the facilities and service they are supporting.
 - ◆ *E.g.*, one Gulf of Mexico port has a surcharge for vessels over 500' for a future widening and deepening project
- Treat indirect and shared costs carefully.

Case Study: What Can We Learn From It?

- **Rates need to be handled in their appropriate places.**
 - Wharfage rates are not supposed to include “subsidies” for other activities that have their own rates.
 - ◆ *E.g.*, wharfage can’t be used to offset losses in upland storage, use of a crane, or some other service that has its own charge.
 - Each rate (or group of related rates) must cover costs without subsidy from other, unrelated rates.

Case Study:

■ Be careful about how costs are represented:

- **Real costs:** In base year dollars (like 2011 dollars). If a facility will cost \$10 million today, it will cost \$10 million 10 years from now *in today's dollars*. The model will provide a rate that you increase each year based on inflation.
- **Nominal costs:** In the dollars of the year in which the cost is incurred. The facility will cost \$10 million today or \$15 million 10 years from now. The model will provide a rate based on the “window” of time you use.

Case Study: What Can We Learn From It?

■ Size matters

- The life cycle cost analysis gave rates close to the port's current rates.
- When we've done similar analyses for Alaskan ports, we've often seen rates 2–3 times the current rates (or higher). The size of the operation—and more importantly the utilization rate—matters a great deal.
- This is nothing new to Alaskans, but it validates the life cycle cost approach and its results.

References

- **Code of Federal Regulations, Part 525—Marine Terminal Operator Schedules**
<http://www.gpo.gov/fdsys/pkg/CFR-2010-title46-vol9/pdf/CFR-2010-title46-vol9-sec525-1.pdf>
- **Federal Maritime Commission website**
<http://www.fmc.gov/>
- **FMC Links to Tariffs**
<https://www2.fmc.gov/FMC1Users/scripts/ExtReportsTOC.asp>

References

- **Constitution of the United States**

<http://www.archives.gov/exhibits/charters/constitution.html>

- **FindLaw.com analysis of Tonnage Clause**

<http://caselaw.lp.findlaw.com/data/constitution/article01/58.html>

- **Shipping Act of 1984**

http://www.fmc.gov/about/shipping_act_of_1984.aspx

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- **Ocean Shipping Reform Act of 1998**
<http://www.gpo.gov/fdsys/pkg/PLAW-105publ258/pdf/PLAW-105publ258.pdf>
- **Coast Guard Authorization Act of 1998**
<http://www.gpo.gov/fdsys/pkg/PLAW-105publ383/pdf/PLAW-105publ383.pdf>
- **The Impact of the Ocean Shipping Reform Act of 1998**
http://www.fmc.gov/assets/1/Page/OSRA_Study.pdf

References

- **United States Government Manual / Section on FMC**
<http://www.gpo.gov/fdsys/pkg/GOVMAN-2011-10-05/xml/GOVMAN-2011-10-05-144.xml>

Questions/Comments?



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