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BEFORE THE
FEDERAL MARITIME COMMISSION
WASHINGTON, D.C.

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DEPUTY SECRETARY
FEDERAL MARITIME COMMISSION

**PETITION OF
NATIONAL CUSTOMS BROKERS AND FORWARDERS
ASSOCIATION OF AMERICA, INC.
FOR A LIMITED EXEMPTION FROM CERTAIN TARIFF
REQUIREMENTS OF THE SHIPPING ACT OF 1984**

Petition No. ~~003~~ - P5-03

Pursuant to 46 C.F.R. §§ 502.67 and 502.69, the National Customs Brokers and Forwarders Association of America, Inc. ("NCBFAA") hereby respectfully petitions the Federal Maritime Commission ("FMC" or "Commission") for a limited exemption from the provisions of Sections 8 and 10 of the Shipping Act of 1984 (the "Act") which require Non-Vessel Operating Common Carriers ("NVOCCs") to establish, publish, maintain and enforce tariffs setting forth ocean freight rates. Alternatively, if the Commission believes it is without authority to exempt NVOCCs totally from the publication and enforcement provisions of the Act, the NCBFAA requests that the FMC issue a limited exemption from Section 8 of the Act and institute a rulemaking for the purpose of promulgating rules governing the establishment of "range rates".

As set forth more fully below, eliminating this costly and unnecessary regulatory burden on a significant segment of ocean transportation industry would be consistent with the policies underlying the Ocean Shipping Reform Act of 1998 ("OSRA"), recognize the fundamental changes in the marketplace that have occurred as a result of OSRA, and satisfy the criteria for the Commission's exercise of its exemption authority under Section 16 of the Act.

I. INTRODUCTION

The NCBFAA is a national trade association representing the interests of freight forwarders, NVOCCs and customs brokers in the ocean shipping industry. The NCBFAA's members are integrally linked to approximately 90% of the cargo that moves into and out of the United States via ocean transportation. Together with its 30 local affiliates, the NCBFAA

represents approximately 1000 licensed Ocean Transportation Intermediaries (“OTI’s”) in the United States and abroad. The large majority of the NCBFAA’s forwarder members also operate as NVOCCs. As a result, NCBFAA members are directly affected by the requirement that NVOCCs establish, publish and adhere to tariffs setting forth the rates that may be charged.

Tariff filing and enforcement obligations were originally imposed on vessel operating common carriers (“VOCCs”) as a counter balance to the antitrust immunity granted VOCCs, and specifically, to prevent carriers from exercising their market power to unjustly discriminate between shippers. Because NVOCCs were considered “common carriers” at the time tariff filing and enforcement was imposed in the foreign trades, tariff obligations appear to have been mechanically extended to NVOCCs with little analysis as to whether doing so was necessary or appropriate. In fact, it is highly debatable whether the rationale underlying imposition of tariff obligations on VOCCs support extension of those obligations to NVOCCs – who do not enjoy antitrust immunity and have no power to discriminate against shippers. Nonetheless, no one seriously disputes that the burden and cost of tariff publication and adherence has always been substantial – particularly for NVOCCs of modest size and resources, many of whom are small businesses under the Small Business Administration’s Standard Industrial Classification (“SIC”) system. The tariff system also imposes significant costs on the Commission, the shipping public and the economy at large. Whatever the perceived countervailing benefits associated with such tariff obligations were when tariff obligations were originally imposed on NVOCCs, however, those underpinnings for tariff obligations no longer exist today.

The deregulatory changes in Congressional policy begun in the 1984 Act and expanded in OSRA have transformed the ocean-shipping marketplace and rendered rate tariffs virtually superfluous. Shippers no longer rely on rate tariffs in determining how or when to ship, or in selecting a carrier or NVOCC. In today’s marketplace, freight rates are almost always separately negotiated with each shipper – regardless of the amount of goods or the number of containers at issue – and tailored to the specific movements, commodities and other circumstances involved. Rather than parsing through complicated and confusing on-line tariffs, shippers simply call a number of carriers or intermediaries to obtain rate quotes, and negotiate the commercial terms of carriage specific to their requirements. While NVOCCs do amend their tariffs to reflect the specific rates previously negotiated with each customer, the process of tariff maintenance is little

more than an afterthought – a technical, albeit costly and burdensome, regulatory requirement having no impact on either the movement it is intended to cover or subsequent movements. Indeed, tariff amendments are generally narrowly drawn to cover only the specific movements at issue, and are of little use to other shippers for other shipments.

In other words, as a result of Congressional policy initiatives in the 1984 Act and OSRA to reduce regulatory costs and to place greater reliance on the marketplace in ocean transportation, the ocean shipping industry has moved from a highly regulated tariff-based common carriage regime to a market-based contract system. The vast majority of cargo carried by VOCCs is now handled pursuant to service contracts completely removed from the realm of the tariff system. Indeed, NVOCCs are the only competitive segment of the ocean shipping industry still obligated to adhere to rate tariffs.’ The regulatory scheme requiring the establishment, maintenance and adherence to rate tariffs by NVOCCs no longer has any practical relevance to real world commercial transactions. Instead, it has become an expensive, anachronistic exercise serving little purpose other than to hinder the ability of NVOCCs to compete fully and fairly in the marketplace and to make NVOCCs subject to potentially enormous penalties for tariff-based violations involving no consumer injury or market distorting behavior.

The NCBFAA respectfully suggests that the time has come for the Commission to exercise its authority under Section 16 of the Act to exempt NVOCCs from the provisions of the 1984 Act imposing rate tariff obligations on NVOCCs. The NCBFAA strongly believes that the requested exemption meets the criteria set forth in Section 16 of the Act. In fact, removing the mandatory application of the outdated rate tariff system would eliminate a significant and unnecessary regulatory burden, place NVOCCs on an equal competitive footing with other carriers, and result in an increase in overall public welfare.

¹ Coincidentally, United Parcel Service, Inc. (“UPS”) recently filed a petition on behalf of its NVOCC service, which also pointed out how the ocean shipping industry has evolved since OSRA and that shippers would substantially benefit if NVOCC’s were permitted to enter into ocean service contracts. UPS accordingly requested the Commission to use its authority under Section 16 of the Act to grant an exception that would permit its NVOCC service to utilize confidential service contracts. See Docket No. P3-03, *Petition of United Parcel Service, Inc for Exemption Pursuant to Section 16 of the Shipping Act to Permit Negotiation, Entry and Performance of Service Contracts*. (Petition filed July 25, 2003.)

II. DESCRIPTION OF THE EXEMPTION REQUESTED

The NCBFAA requests that NVOCCs be exempted from all provisions of the 1984 Act requiring NVOCCs to establish, maintain, publish and/or adhere to rate tariffs for ocean transportation. In particular, the NCBFAA asks that NVOCCs be exempted from Sections 8(a), (b), (d) and (e), and Sections 10((b)(1), (2), (4), (7), (8) of the 1984 Act.’ However, under NCBFAA’s proposal, those NVOCCs that prefer not to utilize this exemption would still be able to establish and maintain rate tariffs; such rate publication would then be fully subject to the relevant provisions of the Act.

Alternatively, if the Commission believes that it is without authority to issue an exemption of this nature, the NCBFAA requests that NVOCCs be exempted from that portion of Section 8 (a)(1)(D) which requires that such OTIs “state separately each terminal or other charge, privilege, or facility under the control of the carrier.. .,” that the Commission initiate a rulemaking proceeding looking toward the modification of the regulations set forth in 49 C.F.R. Part 520, and that regulations be promulgated to permit NVOCC’s to establish and maintain “range rates” in lieu of specific rates covering their rates and charges.³

III. NVOCC RATE TARIFF OBLIGATIONS HAVE BECOME A REGULATORY ANACHRONISM IMPOSING SIGNIFICANT AND UNNECESSARY COSTS ON THE INDUSTRY WHILE PROVIDING NO COUNTERVAILING PUBLIC BENEFITS

A. The Ocean Shipping Industry Has Undergone A Dramatic Change As A Result of The 1984 Act And OSRA.

1. The Origins Of Rate Tariff Obligations For NVOCCs.

The tariff publication and adherence obligations now applicable to NVOCCs had their genesis in the Shipping Act of 1916, at a time long before NVOCCs existed or were recognized

² In addition, NCBFAA asks for a partial exemption from and modification of the applicability of the provisions of Section 10(b)(1) of the 1984 Act to the extent these provisions apply to tariffs.

³ A range rate would consist of establishing two levels of rates for any particular service, which would be a maximum and the other to be a minimum rate. The participating NVOCC could then price its traffic for a given customer, based upon the appropriate market conditions and the agreement negotiated with its customer, anywhere within that range without having to separately establish a specific rate or charge for that service in its tariff. As the Commission has no responsibility to regulate the “reasonableness” of NVOCC rates, the establishment of range rates would not interfere with any meaningful regulatory objective. In all other respects, the tariff and compliance provisions of the Act and the Commission’s regulations would remain in force.

as a class of common carrier. See Shipping Act, 1916, Pub. L. No. 260, 34 Stat. 728 (1916) (the “1916 Act”). The 1916 Act conferred antitrust immunity on ocean common carriers, allowing them to combine into conferences having the power to fix prices, set terms of service and control capacity. *Id.* at § 15. Tariff filing and enforcement obligations were included in the 1916 Act as a means of monitoring and controlling potential abuses – most particularly, unjust discrimination between shippers – by carriers and conferences immunized from antitrust liability. *Id.* at § 18. See *also* Section 18 Report on the Shipping Act of 1984, Federal Maritime Comm’n (Sept. 1989) (“FMC Report”) at 491. This need to prevent unjust discrimination between shippers remains the fundamental justification for tariff publication and enforcement to this day. See, e.g., *Stallion Cargo, Inc. – Possible Violations of the Shipping Act of 1984*, 29 S.R.R. 665, 676-77 (2001) (strict enforcement of tariff law and strong sanctions required to accomplish “the overriding statutory purpose of eliminating unjust discrimination between shippers”).

The 1916 Act imposed tariff obligations only on carriers in the domestic trades; carriers in the foreign trades were not required to file or adhere to tariffs. See FMC Report at 492. As a practical matter, however, conferences setting rates in the foreign trades did file their rates as a means of enforcing rate discipline on their members. *Id.* at 492-93. Non-conference carriers did not file their rates, and were free to establish and change their rates at will. *Id.*

In 1935, the United States Shipping Board Bureau, a predecessor to the Commission, by administrative action, required both conference and non-conference carriers to file their export rates within 30 days after they became effective. Docket No. 128, *Investigation -- Section 19 of the Merchant Marine Act, 1920*, 1 U.S.S.B.B. 470 (1935). Similarly, in 1958, the Federal Maritime Board (“FMB”) administratively required all carriers to file export rates within 30 days after they became effective. General Order 83, 46 C.F.R. 235.1 (1958). Conferences were also generally obliged to agree to furnish their import rates to the FMB pursuant to provisions in their conference agreements. See FMC Report at 494. In 1960, the FMB issued an order requiring all carriers and conferences to file rates 30 days in advance of their effective date. See Revised General Order 83, 26 Fed. Reg. 643 1 (1961).

In 1961, Congress enacted the Bonner Bill, establishing for the first time a statutory requirement that all carriers and conferences in the foreign trades file their rates with the Commission. Pub. L. No. 87-346, § 4, 75 Stat. 762 (1961). The Bonner Bill did not separately define or even mention NVOCCs, and there appears to have been no Congressional consideration of whether tariff obligations should apply to transportation intermediaries. Nonetheless, the tariff filing and enforcement provisions of the Bonner Bill were automatically applied to NVOCCs, who the Commission had previously determined to be common carriers in other contexts.

2. The Shipping Act of 1984.

The Shipping Act of 1984 continued the tariff filing and enforcement obligations first imposed by the Bonner Bill, and expressly applied tariff obligations to NVOCCs. In particular, the 1984 Act defined an NVOCC to be a common carrier in relation to its shipper customers, and a shipper in relation to the VOCCs providing the underlying ocean transportation. 46 U.S.C. App. § 1702(17) (2003). Although the 1984 Act retained the tariff system, it also opened the door for partial deregulation of the ocean shipping industry by allowing VOCCs the option of establishing individualized non-tariff rates through the mechanism of service contracts. See 46 U.S.C. App. § 1707(c) (2003).

The 1984 Act provided for Commission oversight of service contracts, and also provided protection to shippers by mandating that the essential terms of service contracts be filed with the Commission, and granting similarly situated shippers the right to demand “me too” service contracts. Although NVOCCs were not granted the right to enter into service contracts in the 1984 Act, the recognition of service contracts marked the beginning of a change in Congressional policy towards a market-based ratemaking scheme, where carriers are given greater flexibility to respond to changing market conditions and shippers are afforded the opportunity to negotiate rates and terms of service best suited to their commercial needs.

3. The Ocean Shipping Reform Act of 1998.

The Ocean Shipping Reform Act of 1998 represents a fundamental shift in Congressional policy towards a market-based regulatory model emphasizing competition, efficiency and

reliance on the marketplace in the ocean shipping industry, and away from a comprehensive regulatory scheme based on tariffs. While OSRA left the tariff filing and enforcement mechanisms of the 1984 Act intact, it substantially deregulated the use of service contracts. For example, OSRA specifically approved the use of confidential contracts whose rates need not be disclosed to the public, eliminated the right of shippers to demand “me too” contracts, and thereby removed the prohibition against unjust discrimination in service contracts.

The deregulatory provisions and policies of OSRA have led to sweeping changes in the ocean shipping industry. Since the passage of OSRA, VOCCs have largely moved away from tariffs and now conduct the vast majority of their business through confidential service contracts. In fact, and as Congress foresaw, the whole structure of the ocean transportation industry has evolved from one of primarily common carriage to one of primarily contract carriage. VOCCs now routinely negotiate rates and enter into service contracts for a small number of containers. In the few short years since the enactment of OSRA, shippers large and small have become accustomed to dealing with transportation companies as commercial vendors rather than regulated quasi-utilities. In other words, a competitive commercial marketplace has developed in which shippers expect and demand the ability to negotiate individualized rates and services fitting their commercial needs.

Although NVOCCs do not have statutory authority to enter into service contracts, they have nonetheless felt the effects of the competitive marketplace spawned by OSRA. NVOCCs – like the VOCCS with which they compete – negotiate individualized rates and services with their customers. The only practical difference in the way VOCCS and NVOCCs conduct business is that NVOCCs remain shackled to an outmoded and inflexible tariff system while VOCCs can, and in large part have, opted out of the tariff system.

B. No Ascertainable Public Benefits Flow From The Imposition Of Rate Tariff Obligations On NVOCCs.

1. NVOCC Tariffs Are Not Necessary To Prevent Unjust Discrimination or for Commission Enforcement of The Shipping Act.

The fundamental purpose of tariff filing and enforcement has always been to prevent unjust discrimination by carriers able to exercise market power as a result of collective conduct

immunized from antitrust scrutiny. But tariff publication and enforcement is not needed to prevent unjust discrimination by NVOCCs. As a practical matter, NVOCCs cannot engage in unjust discrimination because they have no market power. NVOCCs operate in a highly competitive marketplace with low barriers to entry. In today's marketplace, an NVOCC must compete not only with other NVOCCs and ocean transportation intermediaries, but also the VOCCs who provide the underlying ocean transportation NVOCCs sell (and which often have formed their own NVOCC subsidiaries). Moreover, NVOCCs do not control the capacity or the terms of the underlying ocean transportation, VOCCs do. Perhaps more importantly, NVOCCs do not enjoy antitrust immunity, and thus cannot engage in collective action to fix prices, limit output, or otherwise exert collective market power to the detriment of the shipping public.

Indeed, there is considerable reason to question the assumption that the prevention of unjust discrimination between shippers remains the preeminent, or even an important, policy goal in the wake of OSRA. It is ironic, to say the least, that NVOCCs – who have no power to engage in unjust discrimination – are the only segment of the ocean transportation industry still required to publish and adhere to rate tariffs. In contrast, VOCCs – who do have the power to engage in unjust discrimination through immunized collective action – have been granted the ability to opt out of tariff obligations altogether through the use of service contracts. The fact that the legalization of confidential contracts in OSRA actually *encourages* VOCCs to price discriminate between shippers strongly suggests that the prevention of unjust discrimination should no longer be considered the “overriding purpose” of the 1984 Act.⁴

The mandatory publication of tariffs by NVOCCs is also not necessary for Commission enforcement efforts that are directed at preventing market distorting conduct. While it may be convenient for Commission enforcement personnel to have online access to NVOCC rate information, by any reasonable measure, the enormous costs to the industry of publishing and maintaining rate tariffs far outweigh the limited utility this information has in Commission enforcement efforts. This is especially true because NVOCC rate information is just as easily available through other means, which do not require the NVOCC industry to maintain an elaborate online tariff system that nobody uses. Moreover, as a practical matter, Commission

⁴ OSRA's amendment of Section 16 of the 1984 Act to remove the requirement that exemptions to the provisions of the Act not be unjustly discriminatory is further indication that the prevention of unjust discrimination is no longer the most important policy goal underlying the 1984 Act.

enforcement efforts ultimately rely upon the underlying commercial documents and not tariff information.

2. Tariffs Are Not Used BY Shippers To Develop Competitive Price Information.

Historically, one of the primary purposes of requiring carriers to establish and publish rate tariffs was to provide shippers with reliable information about available freight rates. That rationale, however, is simply not applicable to NVOCC tariffs in today's marketplace. The simple fact of the matter is that, although NVOCCs incur significant expense to update their tariffs on accessible Internet websites, shippers virtually never visit those **websites** or otherwise review NVOCC tariffs.

Although the electronic maintenance of tariffs is less burdensome than filing at the agency, NVOCCs that maintain their tariffs on Internet **websites** uniformly report that "hits" on their tariff web pages are extremely rare. The same is true for NVOCCs that contract with tariff publishing agents. Moreover, NCBFAA members rarely, if ever, receive inquiries from their customers about their tariffs by telephone or otherwise. In fact, in a survey of NCBFAA members conducted in October 2001 by the *American Shipper* magazine, 92% of the respondents indicated that the posting of tariffs on the Internet was "Not At All Useful" to their customers.

There are a number of reasons why shippers do not use published NVOCC tariffs to obtain information about available freight rates. The most obvious reason is that it far easier – not to mention cheaper – to obtain an NVOCC's applicable rates by calling, faxing or emailing the NVOCC and asking for a rate quote addressing the particular requirements of the shipment at **issue**.⁵ In the competitive marketplace in which NVOCCs operate, NVOCCs are far from reluctant to quote rates to potential customers and do so on a daily basis. Indeed, NVOCCs invest considerable resources in marketing their rates and services to potential shippers. For example, most NVOCCs disseminate their toll-free "800" telephone numbers to potential customers, distribute written marketing materials, calendars, coffee mugs and other advertising paraphernalia, and employ salesmen to solicit business through personal sales calls. Given the

⁵ Most NVOCCs use the services of a tariff-publishing agent that handles the updating of NVOCC tariffs and provides Internet access to shippers. Shippers generally must subscribe to, and pay a fee for, access to online tariffs hosted by tariff publishing agents.

ready availability of information about NVOCC rates and services, there is no reason for a shipper to review tariffs. Indeed, shippers have far better uses for their time than combing through an NVOCC's tariff for a rate applicable to the shipper's requirements – particularly when obtaining competitive quotes from any number of NVOCCs and VOCCs requires nothing more than a few telephone calls.

In any event, perusing the typical NVOCC tariff would not be very helpful to a shipper seeking to select a carrier or obtain a rate for a shipment from a particular origin to a particular destination during a particular time frame and requiring specific ancillary services. NVOCCs provide a broad range of value-added services to shippers in addition to ocean transportation, including performing or arranging for packing, consolidation, inland transportation, insurance, export documentation, facilitation of letters of credit transactions, customs clearance, storage, and delivery. To the extent that any of these additional services are required by the shipper for a particular shipment, the cost of those specific services will be included in the NVOCC's tariff rate for that shipment. As a result, the vast majority of the rates in an NVOCC's tariff that are actually used to move cargo are negotiated rates specific to the requirements of a particular shipper and its shipment or series of shipments, and not are generally applicable to other shippers and other shipments.⁶

Perhaps more to the point, shippers generally have no interest in the “one size fits all” rates and services offered under a rigid tariff system. In today's marketplace, shippers demand the flexibility to negotiate the individualized rates and services best suited to their commercial requirements. Indeed, that was the overarching basis, which led shippers to seek enactment of OSRA. Moreover, because shippers almost always have ready access to a number of competitive alternatives, they expect NVOCCs to be responsive to their individualized needs with respect to both rates and services. Consequently, shippers have no interest in perusing an NVOCC's tariff and typically do not do so.

⁶ A rate negotiated by a shipper and an NVOCCs is typically published, as a reduction from the NVOCC's “cargo N.O.S.” rate, is effective for a limited period of time, and is narrowly defined to describe the shipment or shipments for which it is intended.

C. There Are Substantial Social Costs Associated with Requiring NVOCCs to Publish and Adhere to Rate Tariffs That Have No Practical Use.

The social costs associated with maintaining the tariff system for NVOCCs are substantial. The NVOCC industry spends millions of dollars a year complying with tariff obligations under the 1984 Act. For example, in order to publish tariff obligations imposed by the 1984 Act, an NVOCC must either set up and maintain its own **internet website** or retain a tariff publishing company to do so on its behalf. The cost of engaging a tariff publication agent is considerable. However, the cost to an NVOCC of establishing and maintaining its own **tariff website** is generally even more expensive.

An NVOCC must pay substantial sums for computer hardware and specialized software, continuing **internet** activity and computer/network expertise, just to have an operational **tariff website**. In addition, an NVOCC must also invest considerable administrative and management resources to continually update its tariffs as new rates are quoted and old rates expire. For a large NVOCC, rate tariffs will need to be updated on a daily basis and require personnel dedicated to that task. Smaller NVOCCs may have to update their tariffs less frequently, but must nonetheless maintain trained staff or pay outside consultants to update their tariffs.

Given the large number of small shipments handled by NVOCCs, and the constantly changing rates available in the competitive ocean transportation marketplace, the investment of administrative resources in updating rate tariffs is considerable. For example, in the *American Shipper* survey of NCBFAA members conducted in October 2001, 39% of the respondents indicated that 5% or more of administrative resources were spent complying with regulatory obligations under the 1984 Act, such as tariff publishing and compliance. In the same survey, an additional 27% of the respondents estimated that 3%-4% of their administrative resources were spent on such matters. If freed of these costs, the NVOCCs would be more efficient and would likely, in view of the extremely competitive nature of this industry, pass these cost savings along to their shippers in the form of lower rates.

In addition to the direct costs of tariff compliance, the NVOCC industry also faces significant costs in connection with the Commission's recent enforcement efforts. The Commission's Bureau of Enforcement ("BOE") considers the enforcement of rate tariff compliance to be a high priority, and aggressively pursues enforcement actions for tariff

violations such as rebating, misdescription of a commodity or its weight or measurement, equipment substitution, and improper rating of cargo. Because VOCCs can, and largely have, opted out of tariff-based carriage since the passage of OSRA, the brunt of the BOE's enforcement efforts is now directed at NVOCCs – the only class of carrier still required to publish and adhere to tariffs.

The costs and risks to the NVOCC industry associated with BOE's enforcement program have dramatically increased in recent years for several reasons. BOE has significantly raised the stakes in enforcement proceedings by taking aggressive litigating positions in connection with all tariff violations – seemingly with little consideration given to the nature or seriousness of the violations, the harm to the public, or the ability of a respondent to pay the assessed penalties. In fact, BOE takes the position in enforcement actions that every tariff violation constitutes a knowing and willful offense deserving of the severest of sanctions. In pursuing this policy, BOE has sought and obtained numerous draconian penalties often far beyond the ability of the respondent to pay. For example, BOE is currently seeking a penalty assessment exceeding \$4,000,000 against Sea-Land Service, Inc. for tariff violations by a VOCC that occurred before OSRA.⁷ See, also, *Hudson Shipping (Hong Kong) Ltd. d/b/a/ Hudson Express Lines – Possible Violation of Section 10 (a)(1) of the Shipping Act of 1984*, Docket No. 02-06 (Initial decision served July 10, 2003) (\$7,900,000 penalty); *Green Master International Freight Services*, Docket No. 01-10 (Feb. 28, 2003) (\$1,530,000 penalty); *Transglobal Forwarding Co., Ltd. – Possible Violations of Sections 10(a)(1) of the Shipping Act of 1984*, 29 S.R.R. 814 (2002) (\$1,440,000 penalty); *Refrigerated Container Carrier Pty., Ltd. – Possible Violations of 1984 Act*, 28 S.R.R. 799 (1999) (\$1,240,000 penalty); *Stallion Cargo, Inc. – Possible Violations of the Shipping Act of 1984*, 29 S.R.R. 665 (2001) (\$1,340,000 penalty).

One of the primary purposes advanced by BOE for its aggressive enforcement policy and pursuit of draconian penalties and settlements – especially in cases where injury to the shipping public appears to be nonexistent – is to deter future tariff violations and require the strictest adherence to tariff publication and compliance. But the practical result of BOE's enforcement policy is to significantly increase the already high cost of tariff compliance by requiring the

⁷ In this proceeding, *SeaLand* argues, *inter alia*, that the conduct for which it was so heavily penalized would be entirely permissible today if undertaken by means of a service contract.

devotion of even more resources to ensure that even technical tariff violations do not occur. While the considerable costs of tariff compliance might be justified in a world in which tariff filing and compliance served some useful social purpose, these costs constitute an enormous dead weight loss to the NVOCC industry, shippers and the United States economy in today's marketplace.

In its Strategic Plan for 2003, the Commission specifically noted that the primary objective of its enforcement policies should be to prevent market-distorting behavior by the members of the ocean shipping industry

The purpose of the 1984 Act, as amended by OSRA, and other U.S. laws and regulations governing international ocean transportation is to establish and maintain a competitive, nondiscriminatory regulatory process that ensures an efficient, market-driven transportation system in the ocean commerce of the U.S. and encourages an economically sound environment for the U.S. shipping industry and public.

The Commission naturally discussed this objective in the context of fostering voluntary compliance with the provisions of the Shipping Act of 1984 and the existing regulatory obligations. Issuing the requested exemption would substantially advance this goal. Indeed, US based NVOCCs would benefit substantially by being able to compete on a world-wide level playing field, where unnecessary costs and anachronistic regulatory formalities that have little or no bearing on the functioning of the market-based ocean transportation industry would be substantially reduced. Shippers would benefit by being able to deal with NVOCCS on a far more efficient, competitive basis than is presently possible. And, of course, the Commission's resources would then be better conserved in order to address and correct significant issues that do work to the detriment of shippers and the members of this industry.

IV. THE REQUESTED EXEMPTION SATISFIES THE CRITERIA SET FORTH IN SECTION 16 OF THE 1984 ACT

In Section 16 of the 1984 Shipping Act, Congress authorized the Commission to grant exemptions to the requirements of the Act if four criteria were met:

The Commission, upon application or on its own motion, may by order or rule exempt for the future any class of agreements between persons subject to this chapter or any specified activity of those persons from any requirement of this

chapter if it finds that the exemption will not *substantially impair effective regulation by the Commission, be unjustly discriminatory, result in a substantial reduction in competition, or be detrimental to commerce*. The Commission may attach conditions to any exemption and may, by order, revoke any exemption. No order or rule of exemption or revocation of exemption may be issued unless opportunity for hearing has been afforded interested persons and departments and agencies of the United States.

Shipping Act of 1984, Pub. L. No. 98-237, § 16, 98 Stat. 67, 84 (1984) (emphasis added). In OSRA, however, Congress broadened the Commission's authority to grant exemptions to the requirements of the 1984 Act by deleting two of the four criteria originally contained in the 1984 Act. In particular, Congress removed the requirement that an exemption (1) not substantially impair effective regulation by the Commission, and (2) not be unjustly discriminatory. By doing so, Congress intended to facilitate the grant of exemptions under Section 16 and to enable the Commission to make appropriate regulatory changes, consistent with Congressional policy, beyond the changes Congress itself made in OSRA:

The policy underlying this change is that while Congress has been able to identify broad areas of ocean shipping commerce for which reduced regulation is clearly warranted, the FMC is more capable of examining through the administrative process specific regulatory provisions and practices not yet addressed by Congress to determine whether they can be deregulated consistent with the policies of Congress.

Senate Report No. 61, 105th Cong., 1st Sess. at 30 (1997) (current version at 46 U.S.C. App. 1715 (2003)). Exempting NVOCCs from the tariff publication and adherence provisions of the 1984 Act would satisfy the statutory criteria set forth in Section 16 of the 1984 Act, as amended by OSRA.

A. The Requested Exemption Would Not Result In Substantial Reduction In Competition.

An exemption relieving NVOCCs from the obligation to publish and adhere to rate tariffs would not result in a substantial reduction in competition. To the contrary, relieving NVOCCs from their tariff obligations would increase competition in the ocean transportation industry. Freeing NVOCCs from the administrative burden and cost of tariff publication, as well as the risks of draconian penalties for tariff violations involving no harm to the public, would put NVOCCs on an equal competitive footing with other intermediaries and VOCCs, thus increasing the overall level of competition in the industry. At the same time, relieving NVOCCs of their

tariff obligations would allow the Commission to direct its oversight and enforcement activities toward **malpractices** involving market-distorting behavior or injury to the shipping public. Regulatory activity focused on maintaining a competitive marketplace, rather than preserving the outmoded tariff system, would in and of itself be beneficial to competition in ocean transportation.* In addition, the requested exemption is clearly consistent with the declaration of Congressional policy added by OSRA – “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.” 46 U.S.C. App. § 1701(4) (2003).

B. The Requested Exemption Would Not Be Detrimental To Commerce.

Releasing NVOCCs from their rate tariff obligations under the 1984 Act would also not be detrimental to commerce. Eliminating the unnecessary and unproductive costs of tariff publication and enforcement, can only serve to increase economic efficiency in the ocean transportation industry, a vital segment of the United States economy. Because the costs of tariff publication and enforcement must ultimately be borne by the shipping public, eliminating those costs would be beneficial to shippers. In addition, relieving NVOCCs of mandatory compliance with the existing tariff system would also have the salutary effect of making United States regulation of OTI’s closely aligned with the practices of most of our major international trading partners.’ Similarly, eliminating NVOCC mandatory tariff adherence would be consistent with current regulatory treatment of other modes of transportation in the United States, would recognize and facilitate the dynamic ocean-shipping marketplace that exists today and eliminate unnecessary, costly and burdensome regulation that no longer serves any purpose.

⁸ Although collusive activity would appear to be highly unlikely in the diverse and unconcentrated market in which NVOCCs and other intermediaries operate, eliminating mandatory tariff publication would have the additional benefit of removing a potential mechanism for price signaling in the ocean transportation industry.

⁹ Indeed it is likely that the recent movement of the People’s Republic of China to require the filing of ocean carrier and NVOCC rate tariffs, pursuant to their Regulations on International Maritime Transportation (see Article 20) is directly attributable to that government’s desire to emulate the U.S. regulatory system. To the extent the FMC removes regulatory barriers to the provision of efficient maritime services, the People’s Republic of China government can reasonably be expected to act in a comparable manner.

V. PUBLIC SUPPORT

The NCBFAA requests that the Commission publish a notice concerning this tiling on its **website** and in the Federal Register and give interested parties an opportunity to submit their comments. The NCBFAA expects that both the shipper and NVOCC communities will provide substantial public support for this proposal. While various members of the industry may prefer different approaches to resolving the tariff problem,” the anticipated comments from these parties will provide ample support for the proposed exemption.

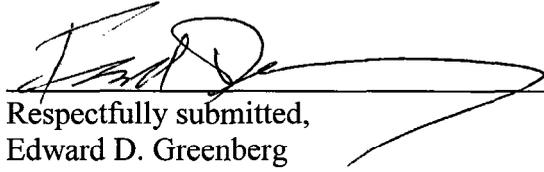
Finally, the NCBFAA requests that it be permitted to respond to comments that may be submitted and that commenting parties be directed to send a copy of their submissions to the undersigned counsel for the NCBFAA.

VI. CONCLUSION

For all of the foregoing reasons, the NCBFAA respectfully requests that the Commission initiate a formal proceeding under Section 16 of the Shipping Act of 1984 to consider exempting NVOCCs from tariff obligations pursuant to Sections 8 and 10 of the 1984 Act. Alternatively, although this would not be the optimum solution to the problems discussed above, the NCBFAA requests that the Commission consider the more limited exemption and rulemaking that looks toward the establishment of range rates. Taking either of these steps would: eliminate costly, burdensome and inefficient regulatory provisions; facilitate and enhance competition; substantially benefit the ocean shipping industry; and bring this nation’s regulatory practices more in line with those of its major trading partners.

¹⁰ For example, the UPS exemption petition suggests that the ability to enter into service contracts is one method for addressing the lack of **flexibility inherent** in the tariff system.

NCBFAA also respectfully requests the opportunity to address any public comments filed in response to this petition in a subsequent submission.



Respectfully submitted,
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DATE: August 8, 2003