BEFORE THE
FEDERAL MARITIME COMMISSION

PETITION OF UNITED PARCEL SERVICE, INC. FOR EXEMPTION PURSUANT TO SECTION 16 OF THE SHIPPING ACT OF 1984 TO PERMIT NEGOTIATION, ENTRY AND PERFORMANCE OF SERVICE CONTRACTS

FMC Petition No. P3-03

PETITION OF NATIONAL CUSTOMS BROKERS AND FORWARDERS ASSOCIATION OF AMERICA, INC. FOR TARIFF REQUIREMENTS OF THE SHIPPING ACT OF 1984

FMC Petition No. P5-03

PETITION OF OCEAN WORLD LINES, INC. FOR A RULEMAKING TO AMEND AND EXPAND THE DEFINITION AND SCOPE OF "SPECIAL CONTRACTS" TO INCLUDE ALL OCEAN TRANSPORTATION NTERMEDIARIES

FMC Petition No. P7-03

PETITION OF BAX GLOBAL INC. FOR RULEMAKING

FMC Petition No. P8-03

PETITION OF C.H. ROBINSON WORLDWIDE, INC. FOR EXEMPTION PURSUANT TO SECTION 16 OF THE SHIPPING ACT OF 1984 TO PERMIT NEGOTIATION, ENTRY AND PERFORMANCE OF CONFIDENTIAL SERVICE CONTRACTS

FMC Petition No. P9-03

COMMENTS OF YELLOW ROADWAY CORPORATION

David P. Street
Galland, Kharasch, Greenberg,
Fellman & Swirsky, P.C.
1054 Thirty-First Street, N.W.
Washington, D.C. 20007
(202) 342-5200

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1. Introduction

Yellow Roadway Corporation ("Yellow Roadway") is submitting these comments in response to the above-referenced Petitions. For the reasons stated below, Yellow Roadway supports the Petition filed by the National Customs Brokers and Forwarders Association of America, Inc. ("NCBFAA") requesting that the Commission exempt non-vessel-operating common carriers ("NVOCCs") from the requirement to file tariff rates.

Yellow Roadway is a $6 billion Fortune 500 company headquartered in Overland Park, Kansas recently formed through the acquisition of Roadway Corporation by Yellow Corporation. Yellow Roadway employs close to 50,000 dedicated transportation professionals and has over 500,000 current customers. The company owns and operates a significant amount of transportation assets including approximately 900 distribution terminals, 18,700 tractors and 71,350 trailers.

Yellow Roadway Corporation owns multiple subsidiaries, including but not limited to, Yellow Transportation, Meridian IQ, Roadway Express, New Penn Motor Express and including two NVOCCs, Globe.com Lines, Inc. (License No. 16596N) and Roadway Express, Inc. (License No. 9650NF). Combined, these companies provide seamless service to all 50 states, Canada, Mexico and Puerto Rico, including export and import services to over 100 countries worldwide.

Yellow Roadway's international ocean business handled in excess of 35,000 shipments totaling more than $40 million in 2003. Yellow Roadway is aggressively expanding its international ocean service by collectively leveraging the strengths of each of their recently combined companies. The ability to contract confidentially is a necessary part of the company's strategy to provide bundled services to its ever-growing number of global customers.

2. The Commission Should Exempt NVOCCs From Tariff Filing

Although Yellow Roadway supports the general thrust of all five petitions that the Commission should take action to allow NVOCCs to enter into confidential, individually negotiated contractual arrangements with their customers, it believes the NCBFAA's proposed exemption to eliminate tariff filing requirements for NVOCCs is the best way to accomplish this goal. This is because the NCBFAA directly and efficiently addresses the core regulatory hindrance to the growth of the U.S. NVOCC and logistics industry. Tariff rate filing is an archaic regulatory vestige that burdens competition, disadvantages U.S. NVOCC/logistics providers vis-a-vis their foreign competitors, serves no meaningful regulatory purpose and -- in the ocean transportation industry that exists today -- is contrary to the policies upon which the Shipping Act is based. As such, the tariff rate filing requirement for NVOCC's should simply be eliminated as the NCBFAA requests and not transformed into yet another unnecessary form of rate filing regulation as would be the case if any of the other four exemption petitions were granted.

Yellow Roadway is in full agreement with the Petitioners and Commenters who have argued that tariff filing is a competitive burden on NVOCCs. It is costly and requires management resources that could better be used elsewhere. Moreover, the cost represents a significant portion of the narrow profit margins on which NVOCCs operate. Yellow Roadway also confirms the experience of other NVOCCs that its customers do not use tariffs for pricing information or rate comparisons. As is well-stated in the NCBFAA Petition, NVOCC rates are individually negotiated with customers and memorialized only after the negotiation to comply with regulatory requirements. Yellow Roadway's experience is that its customers "rate shop" among NVOCCs and vessel operators and choose the best combination of cost and service options for each given shipment or series of shipments. NVOCC customers are already relying on the marketplace to ensure they obtain the best prices and services for their shipments.

Tariff filing is a regulatory anachronism that does not exist for companies in the other transportation modes. Yellow Roadway's historic business, of course, is domestic

motor carriage, where it is authorized to enter into private, confidential and unregulated transportation contracts with its customers. 49 U.S.C. § 14101(b)(l). Yellow Roadway does the same thing as an air freight forwarder. Indeed, Yellow Roadway's customers frequently demand that their particularized transportation and logistics requirements be addressed in negotiated contracts.

Equipment operating air and rail carriers, and rail and motor intermediaries are also not subject to tariff filing obligations. And, of course, since 1998, the vessel operators have been authorized to enter into confidential, individually negotiated contract arrangements with their customers that completely eliminate rate transparency. Thus, even apart from the costs and administrative difficulties tariff rate filing imposes on NVOCCs, this situation begs the question of why mandatory tariff rate filing requirements continue to exist only for NVOCCs among all types of air, land and ocean transportation providers?

Yellow Roadway also agrees with other Commenters that the tariff rate filing requirements discriminate against U.S. NVOCCs vis-a-vis their foreign competitors. *See, Comments of Menlo Worldwide Forwarding, inc.,* at 4, 7. Yellow Roadway's own experience in the international market is a good illustration of this point. Yellow Roadway has a long and distinguished history in the domestic United States transportation industry and has, over the years, developed strong domestic 'transportation operations and a loyal customer base. Yellow Roadway is building on its domestic strengths to become a major international logistics service provider. In doing this, Yellow Roadway's initial efforts are naturally focused on U.S. trade lanes. Many of its competitors, however, have -- and are -- building their international business in trade lanes that are unregulated and in which they are able to focus completely on developing operations and services without being distracted by costly and outmoded regulatory requirements. In the fiercely competitive international market for ocean services, even minor administrative burdens and minimals have a significant input on a carrier's operating margin. The United States, having seen the demise of the U.S. flag carrier fleet, should not be putting unnecessary regulatory obstacles in the way of

developing a strong and competitive U.S. logistics industry in which NVOCC operations are an important component.

3. Eliminating Tariff Filing Is In Accord With the Policy of Congress

Eliminating NVOCC tariff rate filing requirements would also further the Congressional policy and guidance to the Commission expressed in the Ocean Shipping Reform Act of 1998 ("OSRA") and its legislative history. Congress increased the Commission's exemption authority in OSRA "to facilitate the exemptions of classes of agreements . . . or any specified activities . . from any requirements of the 1984 Act." Senate Report No. 105-61, 105th Cong., 1st Sess. 30 (1997). The Senate Report went on to state that:

> 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 where they can be deregulated consistent with the policies of Congress.

Id. This is clearly not only a mandate -- it is a directive -- for the FMC to affirmatively look for areas to deregulate.

The vessel-operating carriers have argued that, if Congress has addressed an activity regulated in the Shipping Act, Congress' conclusion on that subject cannot be re-examined by the Commission'. This is a logical fallacy. Congress has clearly spoken to all activities regulated in the Shipping Act by passing the Act in the first place.

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1 The APL companies, have argued that the FMC has no legal authority to grant the NCBFAA's Petition because "the FMC's exemption authority cannot be used to make a fundamental change in the nature of the Congressionally established regime governing ocean shipping." *Comments of American President Lines, Ltd. and APL Co. Pte., Ltd.,* at 24. But nowhere in the Shipping Act's declaration of policy in Section 2 is there any statement that tariff filing is an essential, necessary or integral part of the statutory scheme. Moreover, there is nothing in the exemption authority in Section 16 of the Shipping Act that excepts tariff requirements from the Commission's power to exempt. In fact, the Commission exemption power is plenary; it may exempt "any class of agreements between persons subject to th[e] Act or any specified activity of those persons from any requirement of th[e] Act" if it makes the necessary findings (underlining added). Moreover, Section 10(b)(2)(A) of the Shipping Act explicitly contemplates exemptions under Section 16 from tariff filing requirements.

If the Commission cannot reexamine the statute from time to time in light of changing conditions, the exemption authority would be of no effect and meaningless.

Moreover, the Senate Report itself demonstrates Congress' bias in favor of deregulation. In discussing the goals of OSRA, the Committee noted:

> . the Committee bill attempted to balance the need to deregulate the industry with the need to provide the oversight of industry practices, given the immunity from the antitrust laws.

Id. at 5. In other words, the basic thrust of OSRA was to achieve deregulation of the shipping industry, tempered by the need to provide effective controls on the antitrust immunity granted to the vessel operating carriers. Thus, Congress' clear directive in passing OSRA was that the Commission is to be deregulation-minded while taking care to preserve the regulatory supervision necessary to counterbalance the anticompetitive and market distorting effects of the antitrust immunity. NVOCCs, of course, have no antitrust immunity.

In OSRA, Congress has already determined that rate transparency for vessel operators is not an important protection against the risk to competition arising from the antitrust immunity. If private, confidential contracts between vessel operating carriers and their customers further Congress' interest in deregulating the ocean shipping industry,* how could there possibly be an argument that allowing NVOCCs without antitrust immunity to enter into private, confidential contracts with their customers would not also be desirable and in accord with the deregulatory policy mandated by Congress?

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[2] Congress, of course, also eliminated the prohibitions against unjust discrimination, undue performance and unreasonable advantages for shippers in private, confidential service contracts between carriers and their customers, The fact that private contracts between NVOCCs and their customers would also not be subject to these provisions cannot, therefore, be considered harmful. Moreover, the Commission would still have plenary powers under the NVOCC licensing regulations to investigate and punish unfair NVOCC practices.

4. Eliminating Tariff Filing is in Accord With the Purposes of the Shipping Act

Deregulating NVOCC rate filing would also be consistent with the stated purposes underlying the Shipping Act itself. This may be seen by briefly comparing the impact of a tariff filing exemption with those stated purposes. The first such purpose is:

> to establish a non-discriminatory 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.

46 App. U.S.C. §1701(1). The elimination of tariff rate filing requirements for NVOCCs would fulfill this purpose in three ways. It would eliminate the regulatory discrimination that presently exists between U.S. NVOCCs vis-a-vis their foreign competitors; it would eliminate a source of government intervention in the maritime transportation services market; and it would eliminate the regulatory cost of tariff filing.

The second stated purpose of the Shipping Act is:

> . . . 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.

46 App. U.S.C. §1701(2). Eliminating NVOCC tariff rate filing would increase efficiencies and economies in the transportation system and U.S. ocean commerce by eliminating the meaningless regulatory burdens that tariff filing imposes. It would also bring U.S. practices into accord with international standards. As pointed out by the NCBFAA and other Commenters, no other country in the world requires NVOCCs to file tariff rates.[3]

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[3] The possible exception to this statement in the case of the People's Republic of China, which has included rate filing requirements in its recent Maritime Regulations. The PRC is not presently enforcing its tariff filing requirements for NVOCCs.

The third stated purpose of the Shipping Act is to preserve a healthy United States -- flag liner fleet. This purpose is not relevant to NVOCCs. The fourth stated purpose of the Shipping Act is:

> 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 App. U.S.C. §1701(4). Eliminating NVOCC tariff rate filing would clearly be putting greater reliance on the marketplace for transportation services. It would also promote the export of U.S. NVOCC services by eliminating regulatory burdens and enabling U.S. NVOCCs to compete more vigorously with their foreign counterparts in the international market.

5. Summary

In sum, the clear Congressional mandate in OSRA is that the FMC should use its enhanced exemption power to deregulate, to the fullest possible extent, the ocean shipping industry while maintaining necessary regulatory protections against misuse of the vessel operators' antitrust immunity. In wielding its exemption authority, the FMC is not to be bound by facts or situations as they existed in the past; it is to look at the ocean transportation marketplace as it currently exists. Clearly, there have been major changes in the ocean transportation marketplace since the passage of OSRA as have been amply discussed in the Petitions and Comments previously submitted. These changes have already resulted in an industry that looks far different than the one confronted by Congress in 1998. In view of these changes, the clear Congressional directive to deregulate the ocean shipping industry, and the stated purposes underlying the Shipping Act, Yellow Roadway urges the Commission to grant the Petition of the

NCBFAA and eliminate all requirements that NVOCCs file and maintain rates in their tariffs.

Respectfully submitted,

David P. Street
Galland, Kharasch, Greenberg,
Fellman & Swirsky, P.C.
1054 Thirty-First Street, N.W.
Washington, D.C. 20007
(202) 342-5200

Attorneys for Yellow Roadway Corporation

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