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BEFORE THE  
FEDERAL MARITIME COMMISSION

Docket No. 04-12

JOINT REPLY TO REQUEST FOR STAY SUBMITTED BY INTERNATIONAL  
SHIPPERS' ASSOCIATION AND  
AMERICAN INSTITUTE OF SHIPPER ASSOCIATIONS, INC.

Submitted By

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Dated: January 19, 2005

**JOINT REPLY TO REQUEST FOR STAY SUBMITTED BY INTERNATIONAL  
SHIPPERS' ASSOCIATION AND  
AMERICAN INSTITUTE OF SHIPPER ASSOCIATIONS, INC.**

The foregoing non-vessel operating common carriers ("NVOCCs") and national trade associations representing intermediaries and their shipper customers (collectively, the "Joint Commenters") hereby submit this Reply to the request for stay submitted by the International Shippers' Association ("ISA") as part of its Petition for Reconsideration and Stay filed January 7, 2005 ("ISA Petition") and to the request for stay submitted by the American Institute for Shippers' Associations, Inc. ("AISA") as part of its Petition for Reconsideration and Stay filed January 11, 2005 ("AISA Petition"; together the "Petitions").

The Petitions seek various revisions to Section 531.3(o) the Federal Maritime Commission's ("Commission's") Final Rule on Non-Vessel Operating Common Carrier Service Arrangements ("NSAs") adopted in Docket No. 04-12 ("Final Rule"), and a stay of the Rule, which is due to become effective January 19, 2005. The Joint Commenters will show that the Petitions do not satisfy the procedural requirements of the Commission's Rules of Practice and Procedure ("Procedural Rules") at 46 C.F.R. §502.261 and .262, and that Petitioners have not made any factual showing to support a delay in implementation of the Final Rule. There is no basis for a stay delaying implementation of the Final Rule.<sup>1</sup>

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<sup>1</sup> Both Petitions ask the Commission to reconsider and to stay its decision. As discussed in more detail in this Reply, the request for stay in both Petitions is cursory and without support. Under the agency's rules, responses to petitions for reconsideration are due 15 days after filing. Thus, replies to the ISA and AISA Petitions are not due until January 24<sup>th</sup> and 26<sup>th</sup> respectively, or after the January 19<sup>th</sup> effective date of the rule at issue.

This reply is directed solely at the request for stay and the procedural infirmities in both Petitions. These Joint Commenters specifically reserve their right to file a reply to the substance of the petitions for reconsideration on the due date provided under the Commission's rules for both Petitions.

## I. A Stay Is Not Warranted on the Record

Procedural Rule 261(a) provides in pertinent part that a petition will be "subject to summary rejection" unless it:

"(1) Specifies that there has been a change in material fact or in applicable law, which change has occurred after issuance of the decision or order;

"(2) Identifies a substantive error in material fact contained in the decision or order; or

"(3) Addresses a finding, conclusion or other matter upon which the party has not previously had the opportunity to comment or which was not addressed in the briefs or arguments of any party. Petitions which merely elaborate upon or repeat arguments made prior to the decision or order will not be received."

Both Petitions fall within the description of Part (a)(3), as they address matters which Petitioners had the opportunity to present when the Commission invited comments in Docket No. 04-12, and repeat arguments that were already made in Petitioners' comments in this Docket.<sup>2</sup> The Commission has always interpreted Procedural Rule 261 strictly, and will not entertain reargument of points that were made or could have been raised earlier in proceedings.<sup>3</sup> While Petitioners seek a waiver of the requirements of Procedural Rule 261, they present no basis for the Commission to conclude that reconsideration would prevent any "undue hardship or manifest injustice" which would satisfy the waiver requirements of Procedural Rule 10.<sup>4</sup>

In addition to the fact their petitions do not satisfy the requirements of Procedural Rules 10 or 261, Petitioners also have not demonstrated any actual or imminent injury that could justify

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<sup>2</sup> See Comments of International Shippers' Association filed November 16, 2004 ("ISA Comments"), and Comments of American Institute of Shippers' Associations, Inc. filed November 19, 2004 ("AISA Comments").

<sup>3</sup> See, e.g., Green Master International Freight Services, Ltd. – Possible Violations of Section 10(a)(1) and 10(b)(1) of the Shipping Act of 1984, Docket No. 01-10, Order, 2003 WL 21368690 (F.M.C.); Application of Orient Overseas Container Line (USA) Inc. for the Benefit of Chicago International, Special Docket No. 2373, Order Denying Petition for reconsideration, 1993 WL 330681 (F.M.C.); DSR Shipping Co., Inc., Petition for Declaratory Order, Docket No. 91-59, Order Denying Petition for Reconsideration, 1992 WL 231213 (F.M.C.); American President Lines, Ltd., Docket No. 87-19, Order Rejecting Petition, 1989 WL 360918 (F.M.C.).

<sup>4</sup> 46 C.F.R. §502.10. Petitioners do not present any reasons why a waiver should be granted. Allowing further reargument of their points is not necessary to prevent any prejudice or undue harm. Possible Unfiled Agreements Among A.P. Moeller-Maersk Line, P&O Nedlloyd Limited and Sea-Land Service, Inc., Docket No. 97-08, Order Denying Request to File Reply, 1998 WL 940830 (F.M.C.).

a stay.<sup>5</sup> Petitioners claim the restrictions imposed by the Commission in Section 531.3(o) of the Final Rule would place small NVOCCs and shippers' associations at a competitive disadvantage with respect to larger NVOCCs. However, Petitioners made no factual presentation to this effect on the record in Docket No. 04-12 by way of verified statements or reference to published information or other sources from which the Commission could have made factual findings. Petitioners merely make these contentions in their briefs without citing to any supporting sources.

The facts do not support the theory that Petitioners assert regarding the existence of competitive injury. Their theory is that larger NVOCCs can enter confidential agreements to purchase underlying ocean transportation from VOCCs at non-tariff rates, but small NVOCCs and shippers' associations with NVOCC members cannot do this, and thus the restrictions of Section 531.3(o) would block them from access to such lower rates which theoretically might be available through NSAs with the large NVOCCs.<sup>6</sup> However, the record in Docket No. 04-12 does not indicate that smaller NVOCCs or shippers' associations with NVOCC members cannot obtain service contracts from VOCCs.<sup>7</sup> To the contrary, ISA itself indicated in its comments in Docket No. 04-12 that it has periodically entered service contracts with VOCCs. ISA further

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<sup>5</sup> While Procedural Rule 261 determinations are based solely upon whether the petitioner has raised questions of changed circumstances as opposed to mere reargument, the Joint Commenters note, by way of analogy, that the traditional civil court procedural test for grant of a stay (in the form of a preliminary injunction) requires a "clear showing" by the movant that it would suffer irreparable harm or injury in the absence of such relief, as well as demonstrating likelihood for success on the merits, absence of injury to non-moving parties, and that a stay is in the public interest. See, e.g., Cobell v. Norton, 391 F.3d 251, 258 (D.C. Cir., 2004).

<sup>6</sup> ISA Petition, at 6-7.

<sup>7</sup> ISA asserts, without citation to any materials on the record, that the "record before the Commission in the form of comments shows, and the Commission with its administrative expertise may take official notice of the fact that smaller NVOCCs do not have the cargo volumes necessary to enter service contracts with vessel operators and must turn their shipments over to larger NVOCCs for consolidation and movement under the carrier NVOCCs' service contracts with VOCCs." ISA Petition, at 5. The Joint Commenters are not aware of any factual material on the record in Docket No. 04-12 in the form of verified statements or otherwise to support this assertion. Moreover, the Final Rule adopted by the Commission does not preclude smaller NVOCCs from continuing to consolidate cargo and to ship with larger NVOCCs, as they do now under existing FMC regulations at 46 C.F.R. 520.11 (setting forth procedures for both carrier to carrier and shipper to carrier coloadung between NVOCCs).

alleges that its only direct competitor, the Overseas Shipping Association, also moves its shipments under VOCC service contracts. ISA Comments, at 3.

The Commission's own studies of service contracting further confirm that this practice is not the exclusive province of big shippers and large NVOCCs. The Commission's survey in support of its 2001 report on the impact of the Ocean Shipping Reform Act indicated there is actually a trend toward smaller volume commitments, and that 60 percent of all service contracts had minimum volume commitments of 100 TEUs or less, and such minimums ranged as low as one TEU.<sup>8</sup> The Commission noted in this 2001 study that "[n]o shippers complained of inability to obtain [service] contracts."<sup>9</sup>

Given that the only information in the factual record suggests that smaller NVOCCs and shippers' associations, including ISA itself, can and do enter service contracts directly with VOCCs, Petitioners clearly cannot show any serious, much less irreparable, injury of the sort that might justify extraordinary relief in the form of a stay of the Final Rule. Moreover, there is no evidence on the record that access to NSAs is necessary to protect Petitioners from any loss of current market share or other competitive injury. It appears from ISA's comments that its chief competitor is a similarly-situated shippers' association.

Because Petitioners have not demonstrated any actual or impending injury on the record, and because Petitioners' arguments fall within the category of reargument which Section 261(a)(3) of the Procedural Rules states will be summarily rejected, a stay should be denied.

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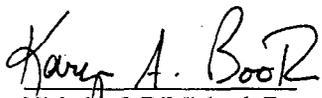
<sup>8</sup> The Impact of the Ocean Shipping Reform Act of 1998, Federal Maritime Commission, September 2001, at 18.

<sup>9</sup> The Commission went on to note that "However, some shippers' associations noted that since OSRA, [VOCCs] have tried more aggressively to solicit independently their individual members." *Id.* at 19.

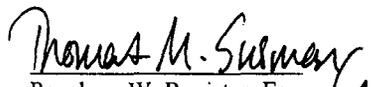
## II. Conclusion

For the foregoing reasons, the Joint Commenters urge the Commission to deny the request for stay of the Final Rule.

Respectfully submitted,

  
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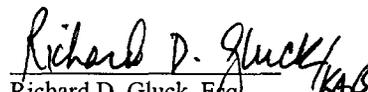
  
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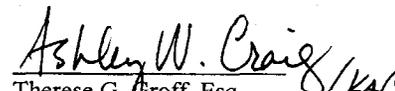
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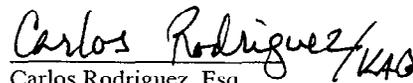
  
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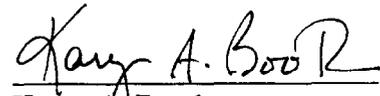
Dated: January 19, 2005

**CERTIFICATE OF SERVICE**

I hereby certify that I have on this 19<sup>th</sup> day of January, 2005, served a copy of the foregoing Reply via first-class mail, postage pre-paid on all parties of record, including:

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