

**BEFORE THE  
FEDERAL MARITIME COMMISSION**

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**PETITION NO. P5-04**

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**PETITION OF AMERICAN PRESIDENT LINES, LTD., AND APL CO. PTE. LTD., FOR  
A FULL EXEMPTION FROM THE FIRST SENTENCE OF SECTION 9(C) OF THE  
SHIPPING ACT OF 1984, AS AMENDED**

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**COMMENTS OF THE NATIONAL CUSTOMS BROKERS  
AND FORWARDERS ASSOCIATION OF AMERICA, INC.**

American President Lines, Ltd. and APL Co. PTE. Ltd. ("APL") recently filed a petition with the Commission seeking an exemption from the first sentence of Section 9(c) of the Shipping Act of 1984. In a Notice served September 23, 2004, the Commission invited interested persons to submit their views on the issues raised. In accordance with the Notice, the National Customs Brokers and Forwarders Association of America, Inc. ("NCBFAA") is filing its comments.

APL seeks an exemption from the requirements of Section 9(c), which requires so-called "controlled carriers" (a status which APL may attain in the near future) to delay the effectiveness of tariff rate reductions by 30 days. While supporting APL's petition, the NCBFAA believes that the Commission should be made aware of several inconsistencies between APL's position in this proceeding as compared to what it has stated either directly or as a member of the World Shipping Council ("WSC"), in FMC Docket No. P5-03 with regard to the Association's petition seeking exemption from rate tariff publication.

The NCBFAA notes, first, that APL has not provided any evidence to support its contention that the requested exemption is both appropriate and necessary. APL relies instead on comments filed by U.S. governmental agencies and various shipper organizations that were submitted in the similar exemption proceedings initiated by Chinese carriers last year.<sup>1</sup> While NCBFAA believes that the relief sought is appropriate, it cannot help but note that APL and the WSC criticized the Association's petition for the alleged failure to supply evidence in support of the exemption petition.<sup>2</sup> This allegation, of course, was inaccurate, as the record in P5-03 (and the other NVOCC exemption proceedings) is replete with supporting, detailed statements from NVOCC's, shippers, government agencies, and members of Congress that tariff rate publication is pointless, cumbersome and unnecessarily costly. Nonetheless, and although the NCBFAA agrees that APL should be granted such relief, by relying solely on comments filed in other dockets APL failed to provide evidentiary support for its request.

Second, APL argued, in Docket P5-03, that Section 16 of the Act did not authorize the Commission to exempt parties from statutory requirements only recently addressed by Congress in the Ocean Shipping Reform Act. (APL Comments in Reply to the Petitions, filed October 10, 2003 in Docket Nos. P5-03, *et al.*, at 23-26; Further Comments of APL in Reply to the Petitions, in the same dockets, filed January 16, 2004, at 31-32.) The NCBFAA has explained at length, in

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<sup>1</sup>Docket No. P3-99, *Petition of China Ocean Shipping (Group) Company*, 30 SRR 187 (F.M.C., April 1, 2004); Docket No. P4-03, *Petition of China Shipping Container Lines, Ltd.*, 30 SRR 193 (F.M.C., April 1, 2004); Docket No. P6-03, *Petition of Sinotrans Container Lines Co., Ltd.*, 30 SRR 197 (F.M.C., April 1, 2004).

<sup>2</sup> In the Comments of World Shipping Council filed October 10, 2003 in Docket Nos. P3-03, P5-03, P7-03, P8-03 and P9-03, at 11-12, the WSC stated:

. . . [T]he Commission has properly interpreted Section 16 as requiring a solid factual record as a mandatory prerequisite to the granting of any exemption.

Docket No. P5-03, why APL's contention on this issue was wrong, and that Congress gave the Commission complete discretion to use its expertise to exempt regulated parties from any requirement of the Act. If the Commission has the authority to exempt controlled carriers from Section 9(c) of the Act -- which provision was clearly specifically addressed by Congress during the enactment of OSRA<sup>3</sup> -- it also has the authority to grant relief concerning the rate tariff publication requirement in Section 8. In other words, APL's view of the reach of Section 16 is clearly self-serving, being dependent upon the identity of the party seeking the Commission's exercise of that authority. Regardless, the Commission clearly has the authority to grant the requested exemption.

Finally, the NCBFAA supports APL's petition because it is pro-competitive and not detrimental to commerce, which are of course the criteria that a petitioner must satisfy under Section 16. In support of its petition, APL cites the Commission's decision in the *China Shipping* case, which held that the ability to "reduce [their] rates effective immediately without reference to competitors' rates would seem to result in an instantaneous increase in competition among carriers." APL Petition at 4. Similarly, APL cites the *China Shipping* case for the proposition:

Allowing [the carriers] to compete more effectively for time-sensitive cargo, shippers will be given more service options in a more competitive carrier market.

At 4-5.

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<sup>3</sup>For example, the Senate Committee report states that Congress amended section 9 "to increase the FMC's authority to prevent and address unjust or unreasonable actions by controlled carriers." The Committee specifically noted that Congress was "concerned about the aggressive growth of certain controlled carriers, and would hope that the new authority under section 9 will allow the FMC . . . to move forward aggressively" to ensure that controlled carriers were not improperly competing with non-controlled carriers. Senate Report No. 61, 105<sup>th</sup> Cong., 1<sup>st</sup> Sess. At 26-27 (July 31, 1977).

If these conclusions are valid for vessel operating common carriers (“VOCC’s”), they are equally valid for NVOCC’s seeking to be rid of cumbersome, anachronistic and costly tariff publication requirements.<sup>4</sup> Consequently, while APL, COSCO and China Shipping joined in comments filed by the WSC that opposed the exemption sought by the NCBFAA, each has sought to be exempted from requirements of the Act that inhibit their ability to provide efficient service to the shipping public. Again, the Commission should note the self-serving and inconsistent positions those VOCC’s have taken on the importance of competition and efficiencies when considering the exemption petition submitted by the NCBFAA.

It is clearly in the Commission’s power to exempt parties from the provisions of the Shipping Act when it concludes that the exercise of that authority will result in increased competition and not be detrimental to commerce. By explaining why it should be exempted from the first sentence of Section 9(c) of the Act, APL has vividly explained why the Commission should also grant the relief sought by the NCBFAA in Docket No. P5-03.

Respectfully submitted,



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<sup>4</sup>It is also worth noting China Ocean Shipping Company (“COSCO”) and China Shipping Container Lines, as well as APL, are members of the WSC.

**CERTIFICATE OF SERVICE**

I hereby certify that I have this 1<sup>st</sup> day of October, 2004, served a copy of the foregoing Comments Of The National Customs Brokers And Forwarders Association Of America, on the following persons listed below via first-class mail, postage pre-paid:

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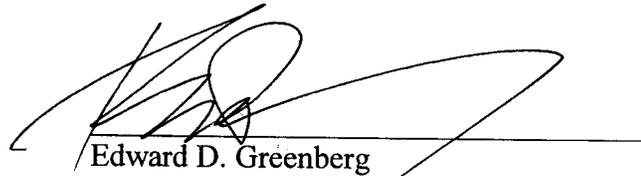
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