

**BEFORE THE  
FEDERAL MARITIME COMMISSION**

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SECRETARY  
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  
A LIMITED EXEMPTION FROM CERTAIN  
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  
ALLOCEAN TRANSPORTATION  
INTERMEDIARIES

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

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**REPLY COMMENTS OF  
THE NATIONAL INDUSTRIAL TRANSPORTATION LEAGUE**

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January 16, 2004

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**REPLY COMMENTS OF  
THE NATIONAL INDUSTRIAL TRANSPORTATION LEAGUE**

The National Industrial Transportation League (“League”) submits these Reply Comments in response to the orders of the Federal Maritime Commission (“FMC”), served on November 13, 2003 in each of the above-referenced dockets, in which the agency re-opened the period for filing comments and invited interested parties to file comments replying to the petitions for relief or to other comments made by other parties.

**I. INTRODUCTION**

On October 10, 2003, the League filed comments with the FMC (“Initial Comments”) in response to the petitions filed by four NVOCCs and the National Customs Brokers and Forwarders Association of America (“NCBFAA”), each of which seeks to eliminate rate transparency and obtain greater pricing flexibility for NVOCCs either individually or for the industry at large. In its Initial Comments, the League strongly supported the common principle being advanced by the petitioners that NVOCCs should have the right to engage in confidential, individually negotiated contractual arrangements with their customers, and that the FMC should provide that right through the exercise of its exemption authority under Section 16 of the Shipping Act of 1984, as amended by the Ocean Shipping Reform Act of 1998 (“OSRA”).<sup>1</sup> However, because the issues raised by the petitions are of major importance and because their resolution could have wide-ranging impacts on the primary stakeholders in the maritime industry, the League did not endorse any particular petition or favor the granting of relief on a case-by-case basis. Instead, the League advocated the initiation of a rulemaking proceeding for

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<sup>1</sup> Although NCBFAA supports a broad contracting exemption for NVOCCs (*see* the Statement of Common Principles, filed in Joint Additional Comments of the League, NCBFAA and the Transportation Intermediaries Association, filed on January 12, 2004), it has specifically requested an exemption from the tariff publication requirements applicable to NVOCCs.

the purpose of determining how the agency's exemption authority should be applied in order to broadly grant NVOCCs the ability to offer confidential rates via service contracts to their customers.

The League's position has not changed. Indeed, the League strongly believes that the FMC should follow a two-step process in resolving the issues raised by the petitions.

First, the FMC should issue a decision resolving in the affirmative the threshold legal question as to whether it has the power to authorize NVOCCs to engage in service contracts with their customers, based on the broadened exemption standards included in Section 16 of the Shipping Act, as amended by OSRA. As explained in the League's Initial Comments and in these Reply Comments *infra*, the agency does have the legal authority to directly grant exemption relief to permit contracting between NVOCCs and their customers. Moreover, because an expansion of contracting rights for NVOCCs would satisfy the current exemption standards, meet the pro-competitive and more market-driven policies of OSRA, and lead to substantial benefits for NVOCCs and their customers, the FMC should exercise its exemption authority to provide NVOCCs with greater pricing flexibility.

Even if the agency were to decide that the specific wording of the statute limits its authority to grant a direct exemption permitting NVOCC service contracts, the League believes that an alternative legal solution is available that would reach the same result; namely, the FMC could grant an exemption to NVOCCs from the tariff publication requirements on *the condition* that NVOCCs enter into written agreements that satisfy the existing requirements for VOCC service contracts entered into by vessel-owning common carriers ("VOCCs"). This indirect solution would allow the agency to grant the relief desired by NVOCCs and their customers and would address any technical legal concerns over the issuance of an exemption.

Second, once the FMC determines that it has the legal authority to exercise its exemption powers to provide NVOCCs with the ability to have confidential rates, it should then initiate a rulemaking proceeding to obtain further input from the industry as to how relief to NVOCCs should be structured, including examining whether existing NVOCC financial responsibility requirements are sufficient to qualify for the exemption or whether other standards should be developed. Indeed, following its review and analysis of the record in this proceeding, the League now believes that in granting relief to NVOCCs to allow for confidential rates with their customers, the FMC should only endeavor to develop new or increased standards of financial responsibility for NVOCCs if the agency believes it is obligated to do so to address statements by the Congress about contracting rights for NVOCCs when OSRA was enacted.

**II. THE FMC SHOULD BE GUIDED BY THE STATEMENT OF COMMON PRINCIPLES FILED BY THE LEAGUE, NCBFAA AND TIA**

Recognizing that the issues presented by the petitions have industry-wide significance, the League undertook to engage in discussions with other organizations involved in these proceedings to determine if common ground existed and to develop principles that could assist the agency in its deliberations. Specifically, the League met with the NCBFAA and the Transportation Intermediaries Association (“TIA”), two prominent organizations representing the interests of transportation intermediaries, and the three groups developed and adopted a Statement of Common Principles Concerning A Section 16 Exemption for NVOCCs, which was filed with the FMC on January 12, 2004, and is attached as Exhibit 1

There are seven principles included in the joint statement which address the key legal and policy questions that are before the agency. Although the three groups ascribing to the principles are filing separate reply comments explaining their position, the League, NCBFAA and TIA fully endorse the concepts set forth in the Statement. Together, these organizations represent a

very substantial segment of ocean transportation intermediaries, including NVOCCs, and the users of ocean transportation services. It is the hope of these organizations that the common principles agreed upon will help to guide the agency as it decides the important and complex issues presented by the petitions.

With regard to the critical legal question concerning the scope of the agency's exemption authority, the League, NCBFAA and TIA all believe that the agency has the power to grant relief to NVOCCs that would allow for the confidentiality of rates, and that it should exercise that authority to promote competition and reduce regulatory burdens for NVOCCs. Statement, Principles 1 and 2. The groups also agree that permitting NVOCCS to offer confidential contracts would satisfy the exemption standards which were intentionally liberalized under OSRA. Statement, Principles 2 and 3.

As a policy matter, these three national trade associations believe that the dramatic shift from common to contract carriage that occurred so quickly under OSRA, in order to allow for more flexible and customized shipping arrangements, should now be extended to NVOCCs and their customers, in order for even greater competition, efficiencies and other benefits to be realized in the maritime industry. Statement, Principle 5. Moreover, the groups all concur that requiring NVOCCs and their customers to rely on published tariffs, which are costly and of limited value, no longer makes sense, given the substantial changes that have occurred to the shipping industry under OSRA, including the fact that NVOCCs have become increasingly sophisticated and play a vital role in shaping international shipping arrangements involving the United States. Statement, Principles 6 and 7.

**III. THE FMC HAS THE POWER TO GRANT AN EXEMPTION PERMITTING NVOCCS TO ENGAGE IN CONFIDENTIAL CONTRACTS WITH THEIR CUSTOMERS**

The threshold question presented by the petitions that must be addressed first by the FMC is whether it has the authority to grant an exemption that permits NVOCCs to enter into confidential service contracts with their customers. In its Initial Comments, the League explained that the agency does possess the legal authority under the liberalized exemption standards of Section 16 to broadly grant an exemption that would expand contracting rights for NVOCCs. Section 16 of the Act specifically states:

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* [46 U.S.C. App. Ch. 36] or any *specified activity* of those persons from any requirement of this Act if it finds that the exemption will not result in substantial reduction in competition or be detrimental to commerce. The Commission may attach conditions to any exemption

46 U.S.C. App. § 1715. NVOCCs are clearly “persons” subject to the chapter since they are defined in the Act and are required to adhere to certain licensing, bonding, and other requirements. 46 U.S.C. App. §§ 1701(17)(B) and 1718. Service contracts are a “class of agreement” or a “specified activity” covered by the Act. 46 U.S.C. §§ 1701(19) and 1707(c). Furthermore, NVOCCs are seeking an exemption from the current requirement set forth in Section 8 of OSRA (46 U.S.C. App. § 1707(c)) that allows only ocean carriers to enter into contracts with shippers. Thus, the FMC’s statutory authority under Section 16 is sufficiently broad to allow for the granting of an exemption that permits NVOCCs to enter into service contracts with shippers

**A. The FMC's Exemption Authority Is Not Limited By the Statute or Its Legislative History**

In its response to the petitions, carrier interests have claimed wrongly that the FMC cannot grant NVOCCs an exemption from the provisions in the Act that limit contracting rights with shippers only to ocean carriers. It is their view that the petitions have failed to identify “any requirement” in the Act from which NVOCCs would be exempted. World Shipping Council (“WSC”) Comments at 5-6. The League strongly disagrees. At the heart of the petitions is *the requirement* in OSRA that authorizes ocean carriers and shippers to enter into service contracts. 46 U.S.C. App. § 1707(c). Whether the provision is categorized as a “requirement” permitting VOCCs to offer contracts or a limitation on the ability of NVOCCs to offer such contracts to shippers is not relevant under the statute.

Moreover, the carriers' position is not supported by the words of the statute or OSRA's legislative history. The words of the statute both in terms of the FMC's exemption powers and the rights conferred upon ocean carriers and shippers to enter into service contracts are clear and straightforward. However, there is no express limitation or prohibition anywhere in the statute on the authority of the agency to use its exemption authority to permit NVOCCs to engage in service contracting with shippers. In creating OSRA, Congress decided not to place any restrictions on the kinds of activities that can be the subject of exemptions granted by the FMC, even though it has expressly restricted the exemption authority of other administrative agencies involved with transportation when finding it appropriate to do so. A clear example of such a restriction is included in the Interstate Commerce Act with respect to the otherwise broad exemption powers of the Surface Transportation Board (“STB”). See 49 U.S.C. § 10502(e) and (g) (Congress expressly limited the exemption authority of the STB and its predecessor, the Interstate Commerce Commission, with respect to rail carrier liability and employee protections.)

See also, 16 U.S.C. § 823(a) and §§ 2705 and 2708 (FERC power to exempt restricted to specific circumstances).

The legislative history of OSRA also does not support WSC's position.\* No statements can be found in OSRA's legislative history that Congress intended to restrict the FMC's exemption powers to prevent NVOCCs from engaging in confidential contracts with their customers always and forever. This position wrongly requires the agency to view OSRA as a static statute that cannot be administered to meet the changing needs of the maritime industry. Indeed, OSRA was intended to do the opposite; the more market-oriented policies of OSRA were the driving force behind Congress' decision to liberalize the FMC's exemption authority and provide the agency with greater latitude to prevent OSRA from becoming obsolete.

The FMC's exemption authority was deliberately changed in OSRA to require the agency to apply only two factors that emphasize competitive and commercial considerations, and Congress specifically eliminated two other more "regulatory" factors. In broadening the FMC's exemption powers, Congress decided that "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."<sup>3</sup> Thus, Congress clearly envisioned that the FMC, in its role as the expert agency involved with ocean shipping, would undertake to apply the law consistent with OSRA's pro-competitive and

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<sup>2</sup> In fact, because the provisions in OSRA are sufficiently clear on their face, the FMC need not consult OSRA's legislative history in resolving the issues presented by the petitions. *United States v. Granderson*, 511 U.S. 39, 74 (n.7) (1994); *City of Rome v. United States*, 446 U.S. 156, 199 (1980) ("it is elementary that where the language of a statute is clear and unambiguous, there is no occasion to look at its legislative history"); *Pipefitters Local Union No. 562 v. United States*, 407 U.S. 385, 446 (1972) ("If the language of a statute is clear and unambiguous there is no occasion to resort to legislative history. Nor can such history, however illuminating it may seem, be relied upon to contradict, or dilute, or add unspecified conditions to statutory language which is perfectly clear.").

<sup>3</sup> S. Rep. No. 105-61 at 30.

more market-based policies. As discussed below, granting an exemption that permits contracting by NVOCCs would promote the objectives of OSRA and expand upon its resounding success.

WSC also asserts that the defeat of the Gorton Amendment<sup>4</sup> (WSC Comments at 6), which specifically addressed the matter of whether NVOCCs could enter into confidential service contracts with their customers, prohibits the FMC from granting an exemption that would authorize such contracting activities. Although Congress decided, *under the circumstances that existed* in 1998, that NVOCCs should not have the same rights as ocean carriers with respect to contracting, it did not forbid the FMC from revisiting this issue in the future based upon *changed circumstances*. It has been nearly six years since the debate and vote on the Gorton Amendment. As the League, the petitioners, and a number of other commenters have pointed out to the Commission, the shipping industry and, in particular, the NVOCC industry, has changed substantially since OSRA was passed, and these changes warrant a new look at the matter of contracting rights for NVOCCs. When Congress decided to deny NVOCCs the right to contract with their customers it considered NVOCCs to be pure resellers of vessel space that did not “invest” in international shipping:

There is one group, Transportation Intermediaries, that has concerns about S. 414. *These companies do not operate the vessels on which the cargo is carried, but resell their space to shippers.* One of the purposes of the Shipping Act is to promote investment in international shipping. This bill attempts to give people reason to invest in shipping by allowing the company that operates the vessel on which the goods are transported to have a more confidential contract with shippers than those that do not operate the vessel.

144 **CONG. REC.** H7016 (daily ed. August 4, 1998) (statement of Rep. Clement). There is no dispute that transportation intermediaries participating in the increasingly complex global shipping transactions are today much more than the simple resellers of space that were the

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<sup>4</sup> 144 **CONG. REC.** 3311 (daily ed. April 21, 1998).

subject of the Congressional debates over OSRA. For the most part, NVOCCs can no longer be accurately portrayed as mom and pop firms that operate with only a desk and a telephone book. Moreover, although third party logistics providers (“3PLs”)/NVOCCs do not own ships, they do make substantial investments in information systems and technology and contribute significantly to the overall health of the industry by spurring efficiencies and innovation.

**B. The FMC Must Take Into Account Changed Circumstances Brought About by OSRA**

In determining whether to exercise its discretion to grant a contracting exemption to NVOCCs, the FMC must evaluate the exemption in the context of the maritime industry as it exists today. The cornerstone of OSRA’s reforms was to provide shippers and ocean carriers the right to enter into confidential contracts. These reforms were embraced quickly by the industry and have led to sweeping changes in the U.S. trades. The speed at which the industry shifted from common carriage to contract carriage and began realizing the benefits of confidential, individually negotiated contracts was astonishing, surprising even the Commission.’ In its Report on the Impact of OSRA, the FMC found that shippers and ocean carriers favor confidential contracts because they allow for “greater flexibility to structure contracts as needed.

” and for “the ability to discuss and address commercially sensitive issues more freely. .” FMC OSRA Report at 18, 22. The agency also concluded that “[c]arriers and shippers are more focused on achieving their individual rate and business objectives through contract negotiations.” *Id.* at 44. It is beyond dispute that OSRA has been a huge success because of confidential contracts. The FMC is now being asked to simply extend the benefits of contracting even further to NVOCCs and their customers.

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*The Impact of the Ocean Shipping Reform Act of 1998*, September 2001, at 44 (“FMC OSRA Report”). Just three years after the passage of OSRA, the FMC observed a 200% increase in the number of service contracts filed since May 1999 and a substantial increase in the volume of cargo transported under service contracts. FMC OSRA Report at 17–18, 20.

It is no coincidence that all of the petitioners are telling the agency that they need greater pricing flexibility to satisfy their customers. The League, which has numerous members who are users of NVOCC services, agrees wholeheartedly. The shipper members of the League—large, medium, and small—are increasingly relying upon intermediaries, including 3PLs that are also NVOCCs, to arrange ocean transport services, perform warehousing, forwarding, shipment tracing and tracking, and provide other related services. For the most part, these 3PLs and many other NVOCCs are much larger, more sophisticated and more profitable companies than those involved in the industry when OSRA was passed. Thus, to the extent that Congress had concerns regarding the financial stability of NVOCCs and their ability to stand behind their contractual commitments, those concerns have largely been mitigated through the vast changes that have occurred in the NVOCC industry. Companies such as UPS, C.H. Robinson, FedEx and other leaders of innovation in the transportation industry cannot realistically be viewed as a financial risk and should not be denied the right to contract with their customers. However, it is very important for the Commission to understand that the League believes that the NVOCC industry as a whole has become much more sophisticated and that *all* NVOCCs should have the right to offer more flexible and customized arrangements to their customers via confidential contracts.

Shippers today enter into confidential contracts with NVOCCs operating in the foreign trades and would like to have that same opportunity in the United States. Verified Statement of M. J. Barr, Procter & Gamble (“Barr V.S.”), at 2, attached as Exhibit 2. As shippers increasingly rely upon 3PLs and NVOCCs to arrange transportation, achieve cost savings, and/or obtain supply chain management and other services, they would, at times, like to include all of the services they purchase in a single confidential contract to maximize efficiencies and deny their competitors access to their ocean transportation rates. *Id.* This is not possible today in the

United States, even though such confidential arrangements frequently occur with NVOCCs operating overseas. Shippers' need for confidentiality has a significant impact on the providers with whom they choose to do business. As Mr. Barr from Procter & Gamble states, "P&G would consider expanding its use of 3PLs/NVOCCs if they could offer confidential rate agreements." Exh. 2, Barr V.S., at 3.

Moreover, as William McCurdy, Logistics and Commerce Counsel for E.I. du Pont de Nemours and Company, Inc. ("DuPont"), states in his verified statement, attached as Exhibit 3, the requirement to ship under common carriage rates that are available to the public when using NVOCCs "is an aberration and a departure from DuPont's standard logistics processes, is costly, and unfairly exposes many of DuPont's logistics costs and best practices to its foreign-based competition." Exh. 3, McCurdy V.S., at 2. DuPont is one of the top five largest U.S. exporters and one of the 25 largest importers. Exh. 3, McCurdy V.S., at 1. Moreover, Mr. McCurdy has had world-wide responsibility for advising DuPont's transportation and logistics function for nearly 25 years. *Id.* Based on his vast knowledge and experience in transportation matters for DuPont, it is his strong belief that

"[r]emoval of the current tariff filing and confidentiality restrictions on NVOCCs would level the playing field between VOCCs and NVOCCs, thereby providing more competitive alternatives for United State exporters. This would, in turn, encourage the development of more value adding and productive processes by NVOCCs and their customers, increase the value and competitiveness of U.S. exports, help reduce the current trade deficit, and provide added help to the U.S. economy.

Exh. 3, McCurdy VS., at 3

As explained by the League in its Initial Comments, there have been other changes to the maritime industry since OSRA that should be considered by the FMC in evaluating whether to permit NVOCCs to offer service contracts to their customers, including the vertical integration of

VOCCs and their entry into the NVOCC market. A number of ocean carriers have established sister companies that perform logistics services and are licensed as NVOCCs, in order to meet the growing demands in the industry for such services. These companies compete head-to-head with other NVOCCs and with 3PLs who do not have affiliated companies that can offer confidential service contracts for the ocean component of the transportation services provided. The League believes that competition between ocean carriers and NVOCCs is healthy for the maritime industry, but all players should be competing on equal footing. As the Commission itself observed, NVOCCs have a “need to offer more service to customers in an effort to strengthen [their] competitive position under what is seen as a more difficult operating environment under OSRA.” FMC OSRA Report at 33. Further, as discussed above, many NVOCCs are offering greater services, but they are handicapped by their lack of authority to offer their services in confidential packages, as VOCCs do.

**C. Other Federal Agencies Have Applied Their Exemption Authority Broadly To Promote Competition and Reduce Costly Regulation**

The League believes that the FMC may remove any doubt as to the scope of its exemption power by examining how other federal agencies have exercised similar statutory authority to promote competition and eliminate superfluous statutory regulation. For example, Congress gave exemption power to the Interstate Commerce Commission (“ICC”) in 1980, as part of the Staggers Rail Act.<sup>6</sup> Congress directed the agency to use its authority broadly, as a

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<sup>6</sup> See *Staggers Rail Act of 1980*, Pub.L. 96-448, 94 Stat. 1895; § 213 (1980). This statutory authority has been recodified at 49 U.S.C. § 10502 and is now administered by the Surface Transportation Board (“STB”), the successor agency to the ICC. In its current form, the provision states:

In a matter related to a rail carrier providing transportation subject to the jurisdiction of the Board under this part, the Board, to the maximum extent consistent with this part, shall exempt a person, class of persons, or a transaction or service whenever the Board finds that the application in whole or in part of a provision of this part – (1) is not necessary to carry out the transportation policy of section 10101 of this title; and (2) either – (A) the transaction or service is of

means to liberate transactions from cumbersome regulatory processes otherwise imposed by statute. See H.R. Rep. No. 96-1430, at 105 (1980), *reprinted in* 1980 U.S.C.C.A.N. 4110, 4137. The ICC seized this mandate to exempt both classes of transactions and individual transactions from regulation. For example, in *Improvement of TOFC/COFC Regulation*, 364 I.C.C. 73 1 (1981), *aff'd American Trucking Ass'ns v. I.C.C.*, 656 F.2d 1115 (5<sup>th</sup> Cir. 1981), the ICC exempted rail and truck service provided by rail carriers in connection with trailer-on-flatcar (“TOFC”) and container-on-flatcar (“COFC”) service from Title 49, Subchapter IV of the U.S. Code. In *Railroad Consolidation Procedures-Trackage Rights Exemption*, 1 I.C.C.2d 270 (1985), *aff'd, Illinois Commerce Comm'n v. ICC*, 8 19 F.2d 3 11 (D.C. Cir. 1987), the ICC created a class exemption for certain privately-negotiated trackage rights agreements, sparing such pro-competitive initiatives from agency oversight. And, in *Exemption of out of Service Rail Lines*, 2 I.C.C.2d 146 (1985), *aff'd Illinois Commerce Comm'n v. ICC*, 848 F.2d 1246 (D.C. Cir. 1988), the ICC established a class exemption to allow expedited abandonment of, and discontinuance of service or trackage rights over, uneconomic rail lines, removing a regulatory barrier to exit. See also *Class Exemption for the Acquisition and Operation of Rail Lines*, 1 I. C. C.2d 8 10 (1985) (exempting nearly all rail acquisitions from regulatory oversight and removing a regulatory barrier to entry).

More often than not, individual, pro-competitive rail build-outs are also handled through the exemption process. See STB Finance Docket 34210, *Sunflower Rail Company, LLC—Construction and Operation Exemption, Finney County KS*, (Served March 21, 2003); STB Finance Docket No. 34060, *Midwest Generation, LLC—Exemption from 49 USC. § 10901—For Construction in Will County, IL* (Served March 21, 2002); STB Finance Docket 34002,

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limited scope; or (B) the application in whole or in part of the provision is not needed to protect shippers from the abuse of market power.

*Alamo North Texas Railroad Corp.-Construction and Operation Exemption—Wise County, TX* (Served Sept. 3, 2002); STB Finance Docket No. 33782, *Entergy Arkansas and Entergy Rail-Construction & Operation Exemption-White Bluff to Pine Bluff, AR*, (Served May 4, 2000); ICC Finance Docket No. 32630, *Omaha Public Power District-Construction Exemption in Otoe County, NE* (Served May 2, 1995).

Aggressive use of exemption authority by a federal agency for pro-competitive purposes is not limited to the ICC (or its successor, the STB). The Federal Communications Commission (“FCC”) has used similar authority to deregulate, and to promote competition within the telecommunications industry. As part of the Telecommunications Act of 1996<sup>7</sup>, Congress gave the FCC “forbearance” authority to decline to apply statutory regulation of telecommunications:

Notwithstanding § 332(c)(1)(A) of this title, the Commission shall forbear from applying any regulation or any provision of this chapter to a telecommunications carrier or telecommunications service, or class of telecommunications carriers or telecommunications services, in any or some of its or their geographic markets, if the Commission determines that —

- (1) enforcement of such regulation or provision is not necessary to ensure that the charges, practices, classifications, or regulations by, for, or in connection with that telecommunications carrier or telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory;
- (2) enforcement of such regulation or provision is not necessary for the protection of consumers; and
- (3) forbearance from applying such provision or regulation is consistent with the public interest.

See 47 U.S.C. § 160(a). Acting under this authority, the FCC eliminated a six-decades-old tariff filing requirement, established by 47 U.S.C. § 203(a), as it applied to the services of interstate, domestic, and interexchange carriers. *Second Report and Order*, 11 F.C.C.R. 20730, 20742–47,

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<sup>7</sup> Pub. L. 104-104, 110 Stat. 56 (1996).

20750-53 (1996). Essentially, the FCC prohibited filing of tariffs, eliminated the “filed rate doctrine,” and paved the way for individual contracting between large and small telecommunications customers.

On appeal, a number of large long-distance telecommunications carriers argued, *inter alia*, that the FCC exceeded its power in obviating § 203(a). The D.C. Circuit, however, upheld the FCC’s use of its exemption authority, despite the fact that § 203(a) required the filing of tariffs. *MCI Worldcom, Inc., v. FCC*, 209 F.3d 760,764 (D.C. Cir. 2000) (“[I]f it forbears from applying § 203(a) the Commission’s staff is not obliged to accept filings.”).

The Federal Energy Regulatory Commission (the “FERC”) also possesses exemption authority-albeit more narrowly circumscribed. Under Section 30 of the Federal Power Act (16 U.S.C. § 823a) and Sections 405 and 408 of the Public Utility Regulatory Policies Act of 1978 (16 U.S.C. §§ 2705 and 2708), the FERC can exempt certain small hydroelectric projects from the licensing and other provisions of Part I of the Federal Power Act. Under 16 U.S.C. § 824a-3(e), the FERC is authorized to exempt certain small power production and cogeneration facilities from the Federal Power Act, the Public Utility Holding Company Act of 1935 (“PUHCA”), and some state laws and regulations, in appropriate circumstances. Under Section 32 of PUHCA (15 U.S.C. § 79z-5a), the FERC is authorized to exempt certain producers of electric power from the provisions of PUHCA.

In light of the foregoing, it is entirely appropriate for the FMC to exercise its authority under Section 16 to allow for the granting of an exemption that permits NVOCCs to enter into service contracts with shippers. The granting of such an exemption would be consistent with other agencies’ use of exemption authority to promote competition and to emphasize the market place over regulation.

**D. An Exemption Permitting Contracting By NVOCCs Satisfies The Broadened Exemption Criteria In Section 16**

The League, several of the petitioners, and other commenters have all demonstrated in their filings with the Commission that permitting NVOCCs to enter into confidential contracts with their customers would satisfy the Section 16 exemption criteria which was liberalized under OSRA.<sup>8</sup> Not even the ocean carriers who are opposed to the issuance of an exemption have argued in their opening comments that such an exemption would fail the exemption test—because they cannot.

The fact is that the exemption criteria were deliberately changed under OSRA to provide the FMC with greater latitude to administer the law by placing a greater emphasis on the maritime market place. Post-OSRA, there are only two market-based standards that must be satisfied in order for the Commission to grant an exemption under Section 16. Specifically, the exemption cannot be detrimental to commerce or substantially reduce competition. 46 U.S.C. App. § 17 15. The record is already clear that enabling NVOCCs to enter into confidential contracts with their customers would be pro-competitive.’ This authority would increase the service options available to shippers and would lead to more vigorous competition between NVOCCs and ocean carriers. *Id.*

It is without question that expanding contracting rights to NVOCCs and shippers would also facilitate commerce. The enormous benefits that have been achieved under OSRA based on confidential contracts, such as more flexible pricing and services, greater efficiencies, and more customized business arrangements, would only be enhanced if NVOCCs could also offer confidential contracts to their customers. Public tariffs simply do not provide logistics

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<sup>8</sup> NITL Initial Comments at 3–9; UPS Petition at 16–20; C.H. Robinson Petition at 14–18; Comments of the Department of Justice (“DOJ”) at 3.

<sup>9</sup> *See, e.g.*, NITL Initial Comments at 9; UPS Petition at 19–21; DOJ Comments at 3–4.

companies and other NVOCCs with sufficient flexibility to meet the increasingly global and complex transactions being demanded by their customers. As the economy has become more global, shippers too are facing increasing competition and they want and *need* confidentiality to protect sensitive business information. Exh. 2, Barr V.S. at 2-3. Although logistics companies and NVOCCs can and do offer competitive pricing and other desirable services to shippers, their inability to provide confidentiality is a significant shortcoming. ***Id.***; Exh. 3, McCurdy V.S. at 2-3. The Commission now has the opportunity to correct this limitation which will vastly enhance commerce in the U.S. trades.

A finding that the exemption criteria are satisfied is all that is required for the FMC to grant an exemption. There is no requirement for the Commission to find that NVOCCs are worse off under OSRA than they were before the law was passed. Thus, the positions of the WSC that “there is no evidence of harm under the current regulatory structure” and “there is no data offered by Petitioners showing that the regulatory structure embodied in the Shipping Act has impeded [ NVOCC] growth” are irrelevant. WSC Comments at 3.

It is difficult to imagine any significant harm that could result from allowing NVOCCs to have confidential contract with their customers. Furthermore, it is without question that the benefits to be derived from such contracting activities would vastly outweigh any harmful impact, assuming *arguendo* that there would be any. In truth, much more harm is being inflicted on the industry today by denying NVOCCs the freedom to contract because the current regulatory scheme prevents the industry from maximizing efficiencies and realizing other benefits.

**E. Granting the Exemption Would Align NVOCCs With Other Transportation Intermediaries Operating In Other Transportation Modes, All Of Whom Have the Right to Contract With Their Customers**

Granting an exemption to allow NVOCCs to contract with their customers would not be a novel concept. All other transportation intermediaries operating in other transport modes in the United States have the right to enter into confidential contracts with their customers. Indeed, for other transportation intermediaries operating in U.S. domestic and international commerce, including motor carrier freight brokers, domestic freight forwarders, 3PLs (other than for ocean services), intermodal marketing companies, and air freight forwarders, contracting is the primary means of conducting their transportation business. For these kinds of intermediaries, contracting is not a regulated activity. Rather, following deregulation of the motor, rail, and air carrier industries, it became the manner in which they operate in order to best meet their customers' and their own business requirements.

NVOCCs are the only remaining intermediary in the United States that must publicly disclose their rates. If the FMC were to issue an exemption permitting confidential contracts to be offered by NVOCCs, it would bring the ocean intermediary industry in line with other U.S. transportation intermediaries, all of whom today enjoy the right to freedom of contract.

**IV. ALTERNATIVELY, THE COMMISSION COULD GRANT NVOCCS AN EXEMPTION FROM TARIFF PUBLICATION SUBJECT TO CONDITIONS**

WSC has argued that the Commission cannot permit NVOCCs to enter into confidential contracts, because the wording of the statute requires the Commission to find a "requirement" from which it can exempt. WSC has argued that there is no such "requirement" in the statute, but simply an "affirmative privilege" to VOCCs that is not otherwise available to NVOCCs. See WSC comments at 6.

As noted *infra* at III.A, the League believes that WSC is mistaken in arguing that the statutory wording is simply an “affirmative privilege” and not a requirement. However, if the FMC has any doubt or concern about its authority to directly grant an exemption from the limitation in OSRA regarding the right of NVOCCs to offer confidential contracts, the League believes that another legal alternative is available that would lead the FMC to the same result. Specifically, the FMC could exempt NVOCCs from the tariff publication requirement in OSRA (see 46 U.S.C. App. § 1707(a)) *on the condition* that all such NVOCCs enter into a written agreement for the ocean transportation services provided. As part of the condition, the agreement entered into between the NVOCC and its customer would be required to satisfy all of the existing service contract requirements included *in OSRA* and the FMC’s regulations.

It is without question that tariff publication is a “requirement” in OSRA that could be the subject of a Section 16 exemption.” It is also clear that the Commission “may attach conditions to any exemption .” 46 U.S.C. App. § 1715. Although the League does not believe that the issuance of a tariff exemption on the condition of a written agreement is necessary, for the reasons stated above, it nevertheless offers this legal alternative should the Commission desire to allow contracting by NVOCCs and their customers but find that its authority is constrained by the specific wording of exemption provision in the statute.

**V. THE FMC SHOULD INITIATE A RULEMAKING PROCEEDING TO DETERMINE HOW TO APPLY ITS EXEMPTION AUTHORITY**

Once the FMC decides that it has the authority to issue an exemption to provide NVOCCs with greater pricing flexibility and the ability to offer confidential rates, then the League believes that the Commission should initiate a rulemaking proceeding to determine how the exemption should be structured. The League does not favor the resolution of the various

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<sup>10</sup> Indeed, even WSC recognizes that tariff tiling is a “requirement” from which the agency may exempt a person or class of persons. See WSC Comments at 8.

petitions on an ad hoc, case-by-case basis, which would only encourage a flurry of additional petitions being tiled with the agency. Instead, because the petitions present issues of industry-wide importance, the better approach would be to consolidate the key issues involved in these proceedings into a single manageable docket.

#### **A. Service Contract Considerations**

Using the rulemaking process, the League believes that the FMC should evaluate whether NVOCCs should be required to satisfy standards of financial responsibility in order to qualify for the exemption. In this respect, the FMC could consider whether existing licensing and bonding requirements for NVOCCs are sufficient or whether other standards should be developed.

However, the League believes that the FMC should not unnecessarily impose additional costs and regulation on the NVOCC industry in permitting confidential contracting by NVOCCs. It should only impose additional standards of qualification to the extent it finds it needs to do so to address any concerns of Congress.” Furthermore, the League believes very strongly that the FMC should not develop new criteria for a class exemption that is so narrow or restrictive that only a few of the very largest NVOCCs would qualify for the exemption.

UPS suggested in its petition that the Commission should adopt an asset-based standard. However, there are other ways to measure financial responsibility should the FMC decide to require some showing of financial security.\* The League opposes a strictly asset-based standard because it arbitrarily would exclude many financially responsible NVOCCs from the exemption. There are many other NVOCCs who are financially secure and have substantial expertise in

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<sup>11</sup> At the time OSRA was enacted, statements by the Congress were made to the effect that NVOCCs should not have the same contracting rights as VOCCs because NVOCCs do not invest in the assets needed to actually perform the transportation services. *See* 144 CONG. REC. S3192, S3200 (daily ed. April 3, 1998) (statement by Sen. Breaux), 144 CONG. REC. S3305, S3307 (daily ed. April 21, 1998) (statement by Sen. Breaux).

<sup>12</sup> NVOCCs could demonstrate financial responsibility through a variety of means, such as assets, earnings or net income, a surety bond, or marine insurance. However, the League is not advocating specific standards or threshold amounts at this time that should be adopted.

ocean transportation, yet they do not own or operate transportation assets. The League does not believe that those NVOCCs should be excluded from the exemption. Therefore, the League would encourage the agency to apply its exemption authority in a manner that would permit a broad cross-section of NVOCCs to offer contracts to their customers.

Finally, the League believes that a condition for granting the exemption should be that service contracts between NVOCCs and shippers must be subject to all existing rules and requirements applicable to service contracts between VOCCs and shippers. The League does not believe that NVOCCs should be placed in a better position than ocean carriers but certainly should be allowed to compete with ocean carriers for shipper's cargo on a level playing field.

**B. Any Rulemaking Commenced By The Commission Could Also Include Issues Related To An Exemption From Tariff Publication**

Unlike the other petitioners who are seeking the right to gain expanded service contracting authority, the NCBFAA has requested an exemption for NVOCCs from the tariff publication requirements set forth in Section 8 of OSRA. The League agrees with NCBFAA that the tariff publication requirements are very costly and burdensome for the NVOCC industry. In their Joint Statement of Common Principles, the League, NCBFAA and TIA all agreed that “the administrative costs incurred by NVOCCs to publish tariffs far exceed any consumer benefits, since very few NVOCC customers rely on published tariffs to obtain NVOCC pricing information.” Exh. 1, Joint Additional Comments, Principle 6, at 1. In fact, the League conducted a survey of its Ocean Transportation Committee members in 2000, regarding the public benefits of tariff publication under OSRA. The results of the survey showed that “strict adherence to ocean tariffs services no useful purpose.” NITL Notice. September 22, 2000, at 2.

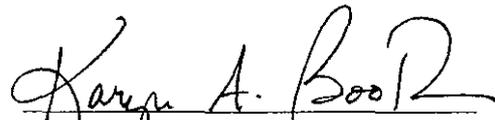
Furthermore, in its petition, the NCBFAA raised the issue of range tariffs as a possible alternative to the granting of a complete exemption from tariff publication. The League believes

that the issue of range tariffs could be examined in any rulemaking proceeding as another means of providing greater pricing flexibility but should not be adopted by the FMC in lieu of an exemption permitting NVOCC to have confidential contracts with their customers.

## **VI. CONCLUSION**

For the foregoing reasons, the FMC should (1) decide at the outset the threshold legal question concerning the scope of its exemption authority and, specifically, should rule that it does have the power to grant an exemption permitting NVOCCs to enter into confidential contracts with their customers; (2) decide to exercise its authority to grant such an exemption; and (3) initiate a rulemaking proceeding to determine the manner in which NVOCCs would qualify for the contracting exemption but should not develop standards that would result in the expanded contracting authority being provided to only a handful of the very largest NVOCCs.

Respectfully submitted,



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January 16, 2004

*Counsel for The National Industrial  
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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a copy of the foregoing Reply Comments was served via first-class U.S. mail on the 16<sup>th</sup> day of January, 2004, upon the following:

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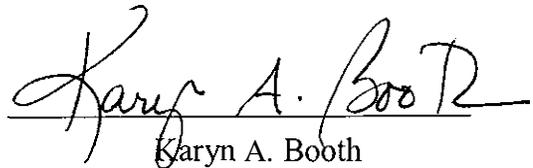
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**BEFORE THE  
FEDERAL MARITIME COMMISSION**

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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  
A LIMITED EXEMPTION FROM CERTAIN  
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  
INTERMEDIARIES

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

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**JOINT ADDITIONAL COMMENTS  
of  
THE NATIONAL INDUSTRIAL TRANSPORTATION LEAGUE  
NATIONAL CUSTOMS BROKERS AND FORWARDERS ASSOCIATION OF  
AMERICA  
TRANSPORTATION INTERMEDIARIES ASSOCIATION**

---

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*Counsel for The National Industrial  
Transportation League*

The National Industrial Transportation League, the National Customs Brokers and Forwarders Association of America and the Transportation Intermediaries Association (collectively, "Joint Commenters") submit these Joint Additional Comments in response to the order of the Commission in these various proceedings served November 13, 2003, in which the Commission determined to re-open the comment period for additional comments.

These Joint Commenters are submitting the following Statement of Common Principles which they believe should guide the Commission in adjudicating these proceedings:

**STATEMENT OF COMMON PRINCIPLES  
CONCERNING A SECTION 16 EXEMPTION FOR NVOCCs**

**agreed to by**

**The National Industrial Transportation League  
National Customs Brokers and Forwarders Association of America  
Transportation Intermediaries Association**

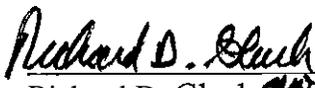
1. The FMC has the authority under Section 16 of the 1984 Shipping Act, as amended by OSRA, to grant an exemption that would provide greater pricing flexibility and/or reduce regulatory burdens for non-vessel operating common carriers ("NVOCCs").
2. The FMC's exemption authority was liberalized under OSRA to enable the agency to reduce unnecessary regulatory burdens, and the FMC should exercise that authority unless the exemption would substantially reduce competition or be detrimental to commerce.
3. Granting exemptions that broadly permitted confidential contracting between NVOCCs and their customers and reduced tariff publication burdens would have a pro-competitive impact on the industry and would facilitate commerce.
4. The FMC should initiate a rulemaking proceeding to determine how to apply its exemption authority in order to broadly authorize confidential contracting between NVOCCs and their customers. The FMC should permit all qualified NVOCCs to have service contracting authority and should consider whether service contracts between NVOCCs and shippers should be subject to all of the existing rules and requirements applicable to vessel-operating common carriers ("VOCCs") service contracts.
5. Contracting is the preferred means of conducting ocean transportation services between VOCCs and shippers because it allows for more flexible and customized business arrangements. NVOCCs should have the same opportunity to offer contracts to their customers.

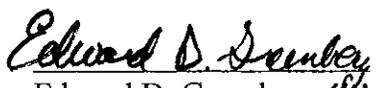
6. The administrative costs incurred by NVOCCs to publish tariffs far exceed any consumer benefits, since very few NVOCC customers rely on published tariffs to obtain NVOCC pricing information.

7. The shipping industry has changed dramatically since OSRA was adopted and has moved from a system of common carriage to contract carriage. In addition, NVOCCs—whether small, medium or large—have become far more sophisticated and have generally made the investments in infrastructure that are necessary to provide an efficient and economic intermodal transportation system. The changed dynamics of the NVOCC industry supports the FMC taking a fresh look at how it can increase competition and relieve regulatory burdens for NVOCCs.

In addition to the submission of these Common Principles, these Joint Commenters will also be separately submitting Additional Comments in response to the Commission’s November 13 orders, in which they will discuss at greater length the above principles and also submit views or arguments in reply to the petitions or in reply to comments already received.

Respectfully submitted,

  
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*Counsel for The National  
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Dated: January 12, 2004

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a copy of the foregoing Joint Additional Comments was served via first-class U.S. mail on the 12<sup>th</sup> day of January 2004, upon the following:

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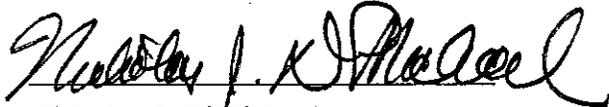
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Nicholas J. DiMichael

**VERIFIED STATEMENT OF MICHAEL J. BARR**

My name is Michael J. Barr. I am Assistant Director Global Physical Distribution for The Procter & Gamble Distributing Company, 8500 Governors Hill Drive, Cincinnati, Ohio 45249. The Procter & Gamble Distributing Company is a wholly-owned subsidiary of The Procter & Gamble Company (“P&G”), a leading manufacturer of consumer products that are distributed world-wide. P&G has more than 98,000 employees in nearly 80 countries. P&G markets approximately 300 consumer products to more than 5 billion customers in 140 countries.

I have worked at P&G for twenty-six years, and have spent twenty of those years in the area of international logistics. My current job responsibilities can be broken down into two primary categories: (1) global sourcing for international transportation services; and (2) North America export and import. Under the first category, I manage P&G’s global purchases of international ocean and air transportation services. P&G ships approximately 160,000 TEUs annually around the world and uses a bidding process to select its primary service providers. Under the second category, I manage P&G’s exports from North America of finished products, raw materials, equipment and machinery. On the import side, I am responsible for managing P&G’s team that handles customs compliance issues.

I have also been active in transportation policy issues through my involvement on behalf of P&G in the National Industrial Transportation League. Currently, I serve on the NITL Board of Directors and the League’s Executive Committee, and I hold the title of First Vice Chairman. I also am a member of the NITL’s Ocean Transportation Committee.

P&G purchases ocean transportation services from both vessel owning common carriers (“VOCCs”) and non-vessel-operating common carriers (“NVOCCs”). P&G also utilizes the services of third party logistics companies who perform warehousing, freight forwarding,

customs brokerage and ocean transportation services. P&G purchases the majority of its full container load (“FCL”) traffic on a global basis from VOCCs and this traffic moves under confidential service contracts. NVOCCs are used by P&G primarily for less-than-container load (“LCL”) shipments, although we do employ NVOCCs for approximately 5% of our global FCL shipments. My responsibilities include the global purchasing of NVOCC ocean freight services, including shipments involving the United States. Unfortunately, the rates for these U.S. services are required to be included in tariffs that are publicly available. When I purchase NVOCC services for shipments moving to or from the United States, I never consult the NVOCCs tariff to determine the price. Rather, I negotiate a price with the NVOCC for the needed services, which I understand are ultimately published by the NVOCC in its tariff.

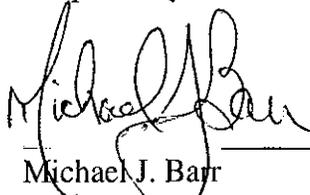
By contrast, when P&G buys NVOCC services in the foreign-to-foreign trades P&G negotiates confidential service contracts with foreign NVOCCs. These contracts are structured in substantially the same manner as P&G’s service contracts with ocean carriers and account for approximately 5% of our total freight movements, as mentioned previously.

P&G would like to have the ability to enter into confidential contracts with NVOCCs operating in the U.S. trades. P&G does not believe the rates it negotiates with NVOCCs in the U.S. trades should be subject to public inspection, while the rates it negotiates with ocean carriers and foreign NVOCCs can remain confidential. P&G uses the services of logistics companies that provide NVOCC services and would, at times, prefer to be able to bundle the various services it purchases, such as warehousing, freight forwarding, transportation, and customs brokerage, into a single confidential package. This would help P&G maximize efficiencies in its supply chain and prevent our competitors from having access to the ocean transportation component of our LCL, and FCL, traffic.

Obtaining confidential rates is extremely important to P&G. P&G undertakes to keep its rates confidential from its competitors to the maximum extent possible and also restricts the disclosure of rate information during contract negotiations with ocean carriers. P&G would consider expanding its use of 3PLs/NVOCCs if they could offer confidential rate agreements.

Accordingly, P&G supports the comments of the NITL that have been filed with the FMC on this issue and believes that the FMC should grant an exemption that would permit NVOCCs to offer confidential service contracts to their customers

Respectfully submitted,

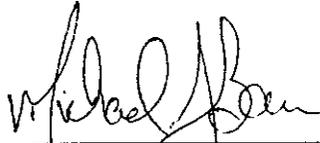
A handwritten signature in black ink, appearing to read "Michael J. Barr". The signature is written in a cursive style with a horizontal line underneath it.

Michael J. Barr  
Assistant Director Global Physical Distribution  
For The Procter & Gamble Distributing Company

**VERIFICATION**

In accordance with the Federal Maritime Commission's regulations at 46 C.F.R.

§ 502.112(c)(2), I hereby verify under penalty of perjury that the foregoing is true and correct.

A handwritten signature in black ink, appearing to read "Michael J. Barr". The signature is written in a cursive style with a horizontal line underneath it.

Michael J. Barr  
Assistant Director Global **Physical** Distribution  
For The Procter & Gamble Distributing Company

VERIFIED STATEMENT OF WILLIAM A. MCCURDY, JR

I am William A. McCurdy, Jr., Logistics and Commerce Counsel for E. I. du Pont de Nemours and Company, Inc. (hereinafter DuPont). The principal office of my employer is located 1007 Market Street, Wilmington, Delaware 19898. My mailing address is DuPont Legal, Barley Mill Plaza 25/2364, P.O. Box 80025, Wilmington, Delaware 19880-0025.

I have been employed by DuPont for twenty-seven years and have had worldwide responsibility for advising DuPont's Transportation and Distribution function since the early 1980's. I have been an active member, officer and committee chairman for many logistics focused trade associations and legislative coalitions, including the National Industrial Transportation League (NITL), the Dangerous Goods Advisory Council (DGAC – formally HMAC), the Agriculture Ocean Transportation Coalition (AGOTC), the Distribution Committee of the American Chemistry Council (ACC – formally CMA), the Association of Transportation Law, Logistics and Policy (ATCLP), the Transportation Lawyers Association (TLA) and several others. I am also an active member of and a two time Track Leader for the Council of Logistics Management (CLM) dealing with Logistics and the Law. On behalf of DuPont, I actively participated in many of the industry efforts which contributed to the passage of the Shipping Act of 1984 and the Ocean Shipping Reform Act of 1998 (OSRA). Finally, I am and have been the principal draftsman and legal negotiator of DuPont's numerous global marine service contracts since 1984.

DuPont is and has been for the last ten years one of the five largest exporters of containerized cargo from the United States. DuPont is also one of the twenty-five largest importers of containerized cargos into the United States. The vast majority of this cargo is transported under confidential marine service contracts with numerous vessel-owning common

carriers (VOCCs). However, DuPont also has substantial amounts of cargo, including project cargo, which is consolidated and/or transported through the use of non-vessel-operating common carriers (NVOCCs), other transportation intermediaries, and third-party logistics concerns. Although DuPont utilizes confidential contracts for on-shore consolidation and related logistics functions performed by the transportation intermediaries, the actual ocean transportation involving the United States is performed – by law – under common carriage tariffs. This process is an aberration and a departure from DuPont's standard logistics processes, is costly, and unfairly exposes many of DuPont's logistics costs and best practices to its foreign-based competition.

DuPont firmly believes that the current practice of requiring NVOCCs and other marine intermediaries serving the U.S. trades to refrain from entering into confidential service contracts with their customers is counterproductive and hinders the competitive position of United States manufacturing and agricultural interests. NVOCCs and their customers are not permitted by current regulation to negotiate and agree upon customized marine contracts that permit and encourage each of them to develop and profit from their own ingenuity. Supply chain customization, which I believe has been the prime facilitator in the reduction of transportation and logistics costs as a percentage of the United States Gross National Product (GNP), cannot be used in ocean transportation to the degree it is domestically because of the limitation on the freedom to contract.

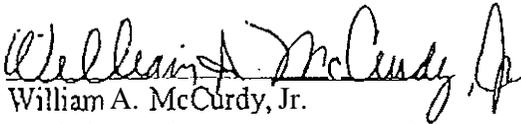
I believe that the current common carriage tariff system that is imposed upon NVOCCs operating in the U.S. trades reduces the competitive position of such NVOCCs and their customers in the same manner that VOCCs and their customers were disadvantaged prior to the passage of OSRA. Foreign producers of competitive agricultural products and manufactured

goods, under the current regulatory regime, are able to access hard data regarding the transportation and distribution costs of domestic producers of the same or similar products and goods. Domestic exporters are not provided access to similar data for their foreign-based competition. This disparity provides the foreign-based producer with a significant competitive advantage in the market place, helps reduce United States exports, increases the trade deficits and has a direct adverse impact on the United States economy.

Removal of the current tariff filing and confidentiality restrictions on NVOCCs would level the playing field between VOCCs and NVOCCs, thereby providing more competitive alternatives for United State exporters. This would, in turn, encourage the development of more value adding and productive processes by NVOCCs and their customers, increase the value and competitiveness of U.S. exports, help reduce the current trade deficit, and provide added help to the U.S. economy.

DuPont supports the NITL comments and urges the FMC to issue an exemption that would permit NVOCCs to enter into confidential, customized marine service contracts in the same manner and subject to the same rules as the VOCCs.

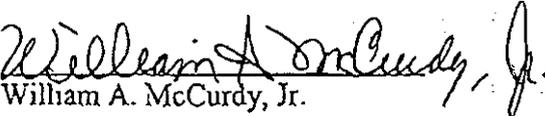
Respectfully submitted,



William A. McCurdy, Jr.  
Logistics and Commerce Counsel  
For E. I. du Pont de Nemours and Company, Inc

VERIFICATION

In accordance with the Federal Maritime Commission's regulations at 46 C.F.R. §  
502.112(c)(2), I hereby verify under penalty of perjury that the foregoing is true and correct.

  
William A. McCurdy, Jr.  
Logistics and Commerce Counsel  
For E. I. du Pont de Nemours and Company, Inc.