

FEDERAL MARITIME COMMISSION

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PETITION NO. P2-90

PETITION OF EVERGREEN MARINE CORPORATION  
FOR DECLARATORY ORDER

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ORDER REJECTING PETITION  
FOR DECLARATORY ORDER

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Evergreen Marine Corporation ("Evergreen") has filed a Petition for Declaratory Order ("Petition"), pursuant to Rule 68 of the Commission's Rules of Practice and Procedure,<sup>1</sup> to resolve an alleged controversy between it and Global International Transport ("GIT"). The issue raised in the Petition is whether Evergreen must enter into a service contract with GIT similar to one originally entered into with E. I. Du Pont de Nemours and Company ("Du Pont") for 3200 TEUs of primarily chemical products ("Service Contract ET-2513"),<sup>2</sup> when its investigation is said to reveal that

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<sup>1</sup> Rule 68, 46 C.F.R. § 502.68, provides in part:

§ 502.68 Declaratory orders and fee.

(a)(1) The Commission may, in its discretion, issue a declaratory order to terminate a controversy or to remove uncertainty.

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(a)(3)(b) . . . The procedures of this section shall be invoked solely for the purpose of obtaining declaratory rulings which will allow persons to act without peril upon their own view . . . .

<sup>2</sup> Section 8(c) of the Shipping Act of 1984 ("1984 Act"), 46 U.S.C. app. § 1707(c), states that the essential terms of a service contract must be made available "to all shippers similarly  
(continued...)

GIT: (1) is neither an importer nor exporter of cargo; (2) does not have a tariff on file with the Commission, yet intends to operate as an NVOCC;<sup>3</sup> (3) is a new company with no history of cargo movements; (4) cannot furnish financial data; (5) uses a business phone number which is answered by someone working for another company; (6) is a subsidiary of a licensed freight forwarder; and (7) is not listed in Dun & Bradstreet.

Although Evergreen contends that these facts represent the extreme of what might be considered a similarly situated shipper, it nonetheless expresses concern that it could face severe penalties if its decision is second-guessed. In this connection, Evergreen refers to the administrative law judge's Initial Decision in FMC Docket No. 88-15, California Shipping Line, Inc. v. Yangming Marine Transport Corp., 25 S.R.R. 400 (1989), wherein another carrier, Yangming Marine Transport Corp. ("Yangming"), was found to have violated the 1984 Act by failing to grant a request to access a contract.

Evergreen thus seeks a declaration that:

1. GIT is not a similarly situated shipper; and

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<sup>2</sup>(...continued)  
situated." The Commission's service contract rules set forth procedures governing requests to access the essential terms of a service contract. 46 C.F.R. § 581.6(b).

<sup>3</sup> Section 3(17) of the 1984 Act, 46 U.S.C. app. § 1702(17), defines a "non-vessel-operating common carrier" ("NVOCC") as "a common carrier that does not operate the vessels by which the ocean transportation is provided, and is a shipper in its relationship with an ocean common carrier." Section 8(a) of the 1984 Act, 46 U.S.C. app. § 1707(a), requires common carriers to file their tariffs with the Commission.

2. an NVOCC which does not have a tariff on file when it seeks to access a service contract cannot gain access to that contract.

In addition, Evergreen seeks guidelines from the Commission to assist in determining what is a similarly situated shipper.

Evergreen contends that a declaratory order is necessary because, as a result of the Initial Decision in Docket No. 88-15, carriers will be continually beset by requests to access service contracts from entities that would not normally consider themselves similarly situated. Evergreen believes that its Petition offers the Commission the opportunity to define the term "similarly situated" by, at the very least, exclusion. As for the issue of whether an untariffed NVOCC can access a service contract, Evergreen claims that it is being placed in an untenable position: if it denies the request, it can be accused of discrimination; and if it grants the request it may face subsequent prosecution for conspiring with an untariffed NVOCC.

Evergreen urges the Commission to reassess its decision in Docket No. 86-6, Service Contracts, 24 S.R.R. 277 (1987), not to define the term "similarly situated." It further contends that the Commission's prior recognition that it has the responsibility to prevent abuses in service contracting likewise supports a responsibility to determine whether parties are in fact qualified to access those very contracts.

Evergreen argues that if Congress intended all shippers to be entitled to the essential terms of a service contract, it would not have used the term "similarly situated," which calls for a

distinction between shippers. In this regard, Evergreen references the Opening Brief of the Commission's Bureau of Hearing Counsel in Docket No. 88-15. Evergreen notes that Hearing Counsel proposed a competitive relationship test in evaluating requests to access a contract - i.e., that the accessor must be in a competitive relationship with the original shipper. Evergreen contends that, under this test, there is no competitive relationship between Du Pont and GIT.

Evergreen notes that Hearing Counsel also proposed that the capability of performance be considered, both financially and operationally. Evergreen does not believe that tariff case law should be controlling in this area and notes that discrimination under service contracts is inherent to the system.

#### DISCUSSION

Evergreen is seeking a declaration that (1) GIT is not a similarly situated shipper entitled to access Service Contract E.T.-2513, and (2) an NVOCC that does not have a tariff on file when it seeks to access a service contract is not similarly situated. In addition, Evergreen is requesting that the Commission issue general guidelines as to the meaning of the term "similarly situated." For the following reasons, we are rejecting Evergreen's Petition.

We note initially that the Commission has previously rejected a similar petition filed by Yangming. In that petition, Yangming ostensibly sought a declaration that it could use credit or

financial information to determine whether a person was a similarly situated shipper for purposes of section 8(c) of the 1984 Act. The basis of the Commission's rejection of this request was that pending Docket No. 88-15 was the more appropriate forum to resolve the issues raised in the petition. The Commission also noted that Docket No. 88-15 raised additional issues that would have a bearing on the ultimate issue of whether a particular shipper was similarly situated.

Although the instant Petition is presented in terms of a different factual situation, it too seeks a general standard by which to judge requests to access service contracts. As we concluded in the Yangming petition, the best forum for arriving at such a standard is Docket No. 88-15.

Docket No. 88-15 is now before the Commission on Exceptions and Replies to Exceptions. Oral argument in the matter has been heard. The issue of what is meant by the term "similarly situated shipper" is of paramount importance in Docket No. 88-15. That proceeding therefore is the most proximate vehicle to promulgate general guidelines in this area.

There does not appear to be any particular urgency with regard to the instant Petition. The service contract at issue was entered into on March 13, 1989, and Evergreen has continued to refuse GIT's requests.<sup>4</sup> Moreover, as mentioned by the Commission in its order

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<sup>4</sup> The primary purpose of Rule 68 is to allow persons "to act without peril upon their own view . . . ." 46 C.F.R. § 502.68(a) (3)(b). Evergreen has already acted upon GIT's request. Evergreen declined the request on May 22, 1989 when counsel for Evergreen  
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rejecting the earlier Yangming petition, the declaratory order process is not necessarily that expeditious. The Commission's decision in Docket No. 88-15 should issue well before a declaratory order could be rendered in this matter.

The only issue raised by the Petition that may not be subject to resolution in Docket No. 88-15 is the question of whether an NVOCC that does not have a tariff on file at the time it seeks to access a service contract can qualify as a similarly situated shipper.<sup>5</sup> However, this issue falls within the general scope of Docket No. 89-20, Definition of Shipper and Availability of Mixed Commodity Rates, presently pending before the Commission. Docket No. 89-20 will come before the Commission for decision in the near future.

Given the scope and pendency of Docket Nos. 88-15 and 89-20, the Commission is rejecting Evergreen's Petition. This rejection, however, is without prejudice to refiling later should Evergreen

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<sup>4</sup>(...continued)

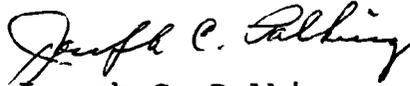
wrote to counsel for GIT (Exhibit J) informing him that ". . . your client does not qualify as a similarly situated shipper in regard to the referenced matter." In explaining its reasons for denying the request, Evergreen stated ". . . this is an extremely large contract and your client has demonstrated neither the financial nor the operational capacity to perform the contract." Moreover, when GIT changed counsel, Evergreen again informed them that ". . . the service contract cannot be offered to G.I.T. because it in no way qualifies as a similarly situated shipper." (Exhibit L). Evergreen has thus already acted on its own view.

<sup>5</sup> Although GIT concedes that it did not have a tariff on file when it sought to access the instant contract, it states that it will file a tariff before it begins operations under any contract it receives.

require additional guidance appropriate to the declaratory order process subsequent to our decisions in those dockets.

THEREFORE, IT IS ORDERED, That the Petition for Declaratory Order of Evergreen Marine Corporation is rejected, without prejudice.

By the Commission.

  
Joseph C. Polking  
Secretary