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**BEFORE THE  
FEDERAL MARITIME COMMISSION**

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**OCEAN COMMON CARRIER AND  
MARINE TERMINAL OPERATOR  
AGREEMENTS SUBJECT TO  
THE SHIPPING ACT OF 1984**

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) **DOCKET NO. 03-15**  
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**Comments of Fesco Ocean Management Limited**

Fesco Ocean Management Limited (“FOML”) is an ocean common carrier, operating, *inter alia*, in the foreign commerce of the United States, submits the following comments with respect to the Notice of Proposed Rulemaking, 68 *Fed. Reg.* 67509 (December 2, 2003).

FOML provides vessels and participates in the Pacific Coast Oceania Vessel Sharing Agreement, FMC Agreement No. 011741 in the U.S. Pacific Coast /Australian-New Zealand trade and participates in rate and discussion agreements related to that trade. FOML also operates a direct vessel service from the United States Pacific Coast to ports in the Russian Far East. Finally, FOML is the Publishing Carrier and Destination Carrier in a non-exclusive transshipment agreement with P&O Nedlloyd from ports in the United States to ports in the Russian Far East and it has a similar arrangement with Westwood Shipping.

FOML’s comments are directed at the proposed changes to the exemption for non-exclusive transshipment agreements.

FOML believes that the proposed changes to the non-exclusive transshipment agreement regulation are based on an unsupportable premise, are ill-conceived, will result in eliminating transshipment agreements and will lead to potential reductions in services to shippers. Instead of achieving visibility of cargo movements, the proposed changes will do just the opposite. Instead of encouraging the movement of cargo to and from ports and places that do not, because of small cargo volumes and/or location, have direct ship services, or which have minimal direct services, the proposed regulations will discourage such movements.

**The Premise That the Transshipment Exemption Regulation Needs Clarification is Unsupported and Unsupportable.**

Under regulations issued pursuant to the Shipping Act, 1916, the Commission defined a “non-exclusive transshipment agreement” as follows:

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“A nonexclusive transshipment agreement for purposes of this Part is an agreement between a carrier **serv**ing a port of origin and a carrier serving a port of destination to establish a through route between such ports via an intermediate port at which the cargo is transferred which agreement does not prohibit either carrier from entering into similar agreements with other carriers.” (Emphasis added.) 46 CFR §524.2(a)

It is noteworthy that the provisions of the 1916 Act exemption did not contain the words “by direct vessel call” in describing transshipment agreements or in any way indicate the manner by which such service would be performed.

After the enactment of the Shipping Act of 1984, the Commission, in Docket 84-26, *Rules Governing Agreements by Ocean Common Carriers and Other Persons Subject to the Shipping Act of 1984*, 22 SRR 927 (1984) enacted Interim Regulations which also served **as** proposed rules for which comments were invited, that, inter *alia*, continued the exemption for non-exclusive transshipment agreements. The Commission made it clear that this was a continuation of the prior exemption, with certain modifications. The Commission stated:

“This section continues, in a modified form, the present exemption for non-exclusive transshipment agreements contained in 46 CFR §524. The modifications refine the description of the type of transshipment which is exempt. This will permit inclusion of matters in the agreement which are more fully representative of the usual actual arrangement of the parties for the conduct of commercial transshipment activities. The modifications permit inclusion in the arrangements of any specifics of equipment interchange, service rationalization and agency arrangements as may be necessary to complete the contemplated carriage. Additionally, these agreements will now be exempt from filing, but only if limited in scope to the provisions set forth. The exemption from filing eliminates the need to continue the requirements of a specified form of agreement.” 22 SRR at 932-38.

In the Interim Regulation adopted in 1984, the Commission in defining the term “transshipment agreement” inserted the words “by direct vessel call.” The Commission did not discuss the addition of these words in the Interim Rule and gave no specific notice that it was adding the words for any specific purpose or with any specific meaning or intention. In short, who added the words “by direct vessel call,” why they were added or what they were intended to mean, was not discussed or explained.

The Commission issued its Final Rules in Docket 84-26 on November 14, 1984, 22 SRR 1453. The Commission did not indicate that it received any comments about the Interim Rule on the exemption for non-exclusive transshipment agreements. The Commission very specifically noted that

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“Section 572.310 [redesignated §572.306] continues the exemption under the 19 16 Act for non-exclusive transshipment agreements pursuant to section 16 of the 1984 Act.” (Emphasis added.)

Significantly, as with the Interim Rule, there was not a single reference to the addition of the words “by direct vessel call” in the description of non-exclusive transshipment agreement. Moreover, since adoption of this regulation the words “**by** direct vessel call” have not been discussed in any Commission decision or rulemaking, including the rulemaking in Docket 99- 10 *Ocean Common Carrier Subject to the Shipping Act of 1984s*, 28 S.R.R. 1414 (FMC 2000) (“*Ocean Common Carriers*”)

The **first** inkling to the public that the Commission had some specific intention in adding the words “by direct vessel call” is in the discussion in this rulemaking proceeding when the Commission states:

“The Commission has traditionally viewed transshipment agreements as agreements under which two ocean common carriers that both operate vessels provide a through service between the United States and a foreign port.” (Emphasis added.) 68 *Fed. Reg.* 67520-21.

The FMC cites absolutely no factual or legal basis for this so-called “traditional view” of transshipment agreements that both parties “operate vessels. In fact, the current regulation doesn’t say anything about either party operating vessels, it merely says “by direct vessel call” not “by direct vessel call of vessels operated by the parties.” In sum, the Commission’s premise that the regulation is not consistent with current carrier practices and that the regulation requires clarification is just not supportable factually or legally and would be contrary to the Commission’s ruling in *Ocean Common Carriers* which makes it clear that an ocean common carrier may provide service without operating its own vessels as long as it has at least one vessel in one trade that operates to a U.S. port.

### The Rulemaking in Docket 99- 10 is Fully Consistent with the Existing Transshipment Exemption Regulation and Current Carrier Practices

Perhaps the most important result of the action in *Ocean Common Carriers* was the Commission’s clear statement that “[I]f a common carrier is an ocean common carrier in one U.S. trade, it can act as ocean common carrier in all U.S. trades.” (Emphasis added.) 28 SRR at 1418. The clear meaning of this decision is that an ocean common carrier who operates vessels in one U.S. trade in which it operates a vessel that calls at a U.S. port, may act as an ocean common carrier in U.S. trades where it does not operate its own vessels. This ruling clearly was in recognition of the fact that ocean common carriers acquired space on vessels by a variety of ways including alliance agreements, vessel sharing agreements, space charters and transshipment agreements. Certainly, the Commission did not in its ruling in Docket 99- 10 state that an *ocean common* carrier could not use a transshipment agreement as part of its ocean common carrier service to or from the United States.

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### How Transshipment Agreements Work

In every transshipment agreement there are two ocean common **carrier**<sup>1</sup> parties (Carrier A and Carrier B) who may operate in either of the following combinations:

Scenario 1:

Carrier A: Publishing Carrier and Origin Carrier  
Carrier B: Connecting Carrier and Destination Carrier

Scenario 2:

Carrier A: Publishing Carrier and Destination Carrier  
Carrier B: Connecting Carrier and Origin Carrier

It is noteworthy that at no time has the transshipment agreement exemption regulation required the Carrier who is the Publishing Carrier to be the Origin Carrier nor does it require the Connecting Carrier to be the Destination Carrier.<sup>2</sup> Either scenario is possible under the regulations. It also does not matter under the regulations whether the transshipment agreement is in the export trade of the U.S. or the import trade of the U.S.

Under Scenario 1, Carrier A is the Publishing Carrier and the Origin Carrier. Under this scenario, Carrier A is the carrier issuing a through bill of lading to the shipper and publishing the tariff rate or entering into a service contract with the shipper. Carrier A is also responsible for the carriage of the container from the port or point of origin to the transshipment port. Carrier B is the Connecting Carrier and Destination Carrier that carries the cargo from the transshipment port to the destination port.

Under Scenario 2, Carrier A is the Publishing Carrier and the Destination Carrier. Carrier A is the carrier issuing a through bill of lading to the shipper and publishing the tariff rate or entering into a service contract with the shipper. Carrier A is also responsible for the carriage of the container from the transshipment port to the destination port. Carrier B is the Connecting Carrier and the Origin Carrier. It is responsible for carrying the cargo from the origin port to the transshipment port.

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<sup>1</sup> It must be firmly understood that both carriers are “ocean common carriers” as defined under the Shipping Act of 1984 and the Commission’s **rulemaking** in Docket **99-10**.

<sup>2</sup> As will be discussed below, the Commission’s proposed rule would appear to require the Publishing Carrier to be the Origin Carrier in the export trade and it would appear to require the Publishing Carrier to be the Destination Carrier in the import trade.

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### FOML's Non-Exclusive Transshipment Agreements with P&O Nedlloyd and with Westwood

In 2001, FOML entered into a non-exclusive transshipment agreement with P&O **Nedlloyd** in which FOML is the Publishing Carrier that holds itself out to provide service from points and ports in the United States to ports in the Russian Far East under a published FOML tariff. The FOML tariff has a rule that, in accordance with FMC regulations, specifically notes that P&O **Nedlloyd** is providing transshipment service. In this case, P&O **Nedlloyd** is the Origin Carrier and Connecting Carrier carrying FOML containers, for example, from Seattle to **Busan**. FOML is, as noted, the Publishing Carrier and the Destination Carrier and is responsible for the carriage from **Busan** to Russia.

In this example, **P&O Nedlloyd** provides FOML space from P&O Nedlloyd's space allocation under the Grand Alliance. The Grand Alliance vessels serve Seattle and **Busan** "by direct vessel call." FOML, for its part, takes the cargo "by direct vessel call" from **Busan** to ports in the Russian Far East. FOML has a space charter agreement with its parent company, Far Eastern Shipping Company ("FESCO") which is not an ocean common carrier subject to FMC jurisdiction. FESCO, in turn has a vessel sharing arrangement between **Busan** and ports in the Russian Far East with Hyundai Merchant Marine. Thus, FOML's service from the transshipment port, **Busan**, to the Destination Ports in Russia will be on space chartered to FOML by FESCO on either FESCO or **Hyundai** vessels.

The FOML – P&O **Nedlloyd** non-exclusive transshipment arrangement is visible to the Commission and the shipping public. FOML's tariff, as required by the **FMC's** regulation, contains a provision describing the fact that transshipment occurs via P&O Nedlloyd.

The FOML –**Westwood** Non-Exclusive Transshipment Agreement is structured the same way as the FOML – P&O **Nedlloyd** arrangement.

### The Proposed Rule is Unworkable, Inconsistent with Other Regulations and Will Not Achieve its Stated Purpose

The Commission proposal revision in the definition of "transshipment agreement" in §535.104(jj) would directly affect FOML's non-exclusive transshipment agreements. The Commission's proposal would insert in the current definition, found at §535.104(ii), the following new language:

"and the publishing carrier performs the transportation on one leg of the through transportation on its own vessel or on a vessel on which it has rights to space under a filed and effective agreement."

There are several aspects of this change that are of concern. First, the Commission is departing from its decision in Docket 99-10 where the Commission said "[I]f a common carrier is an ocean common carrier in one U.S. trade, it **can act** as ocean common carrier in all U.S. trades." (Emphasis added.) 28 SRR at 1418. By the proposed rule, the Commission is clearly saying that in transshipment services you are only an ocean common carrier in the leg

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between the transshipment port and the foreign origin port or foreign destination port if you operate your own vessel. This is the case because a space charter agreement between a foreign transshipment port and a foreign port of origin or foreign port of destination would not be an agreement that could be filed with the FMC because it would be a foreign to foreign agreement.

It seems somewhat strange, to say the least, that the Commission would take the view that one might be able to operate from U.S. ports as an ocean common carrier without operating one's own vessels but that an ocean common carrier cannot operate between a transshipment port and a foreign port unless it **operates** its own vessel.

Second, the Commission, in a departure from the past, will for the **first** time require the Publishing Carrier, when it does not "perform the transportation on one leg of the through transportation on its own vessel" to specifically be the Origin Carrier in the export trade of the United States or to specifically be the Destination Carrier when operating in the import trade of the United States. That this is the result is clear because the phrase "rights to space under a filed and effective agreement" can only mean an agreement between ocean common carriers subject to the Shipping Act, which can only mean the carriage between a port in the United States and the foreign transshipment port.

Third, the Commission is saying that the term "by direct vessel call" may be satisfied by a Publishing Carrier through a space charter agreement filed and effective under the Shipping Act of 1984. This means that the Commission is permitting a party to a transshipment agreement to utilize chartered space between the U.S. and the transshipment port but would, at the same time, prevent the use of chartered space by an ocean common carrier between the transshipment port and the foreign origin or destination port. The result is that the phrase "served by direct vessel call of both such carriers" has two directly opposite meanings in this proposed regulation, depending on whether the transshipment is in the export trade or the import trade and whether the Publishing Carrier is the Origin Carrier or the Destination Carrier.

If the Publishing Carrier is the Destination Carrier in the export trade then it must under this definition provide transportation on its own vessel from the transshipment port to the destination port. If the Publishing Carrier is the Origin Carrier in the export trade then it can provide its portion of transportation from the origin port to the transshipment port either on its own vessel or under a filed and effective space charter agreement in which it can use the vessel of another ocean common carrier.

Similarly, if the Publishing Carrier is the Origin Carrier in the import trade then it must provide transportation from the origin port to the transshipment port in its own vessel. But if the Publishing Carrier in the import trade is the Destination Carrier then it may use its own vessel or space on a vessel of another carrier obtained through a filed and effective space charter agreement.

There does not appear to be any factual or logical or legal or policy basis for the Commission's proposal that the phrase "by direct vessel call" to mean use of

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chattered space on the U.S. leg but not use of chartered space on the non-U.S. leg of a transshipment move.

If the proposed regulation becomes effective the **FOML's** non-exclusive transshipment agreements would have to be terminated because the Publishing Carrier, FOML, does not operate its own vessel and it is not the Origin Carrier.

As a result, these transshipment services would have to be discontinued. It is possible, subject to the provisions of the existing vessel sharing agreements, that FOML and P&O **Nedlloyd** could enter into a space charter agreement. For example, FOML could conceivably charter space from P&O **Nedlloyd** under a tiled and effective agreement that would cover carriage to **Busan**. But if FOML **used** chartered space, it would no longer need a transshipment agreement because it would be both the Origin and the Connecting Carrier, assuming it continued to use space chartered from FESCO from **Busan** to Russian Far East ports.

This leads to the point that if the purpose of the rule change is to create greater "transparency," (we would suggest that the better word would be "visibility") then it will hardly be achieved by the proposed regulation. If the transshipment carrier does not operate its own vessel on the non-U.S. leg of the transshipment, but does operate its own vessel or uses space obtained through a filed or effective agreement, not only will there be no connecting carrier agreement, the FMC will have less information than it currently has about how the cargo loaded by such carrier moves from the U.S. to its ultimate foreign destination with transshipment along the through route.

The fact is that under the current approach to transshipment the Commission gets greater visibility than it has when there is no transshipment agreement. Under the current approach, the Publishing Carrier is required to tariff its transshipment arrangement. Under the proposed regulation, there would be no transshipment agreement because once a *bona fide* ocean common carrier moves cargo from the United States, the Commission is totally without information as to how that shipment gets to its ultimate destination. Similarly, when cargo arrives in the United States the Commission has no visibility of prior feeder services that might be involved from ports and points not served directly by vessels calling the U.S.

If "visibility" is the issue, then the Commission should understand that it has greater visibility under the current regulations as compared to its proposed regulation. We note that in a time where there are heightened concerns about security, an action that results ultimately in the Commission being provided with less visibility does not appear to represent sound policy.<sup>3</sup>

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<sup>3</sup> We also note that if visibility is a serious concern of the Commission, it ought to think about how little it knows about how cargo is moved from between the U.S. and foreign countries by **NVOCCs**. The Commission has absolutely no knowledge about whose vessels **carry** the shipments, whether there are **transshipments** and where.

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Conclusion

We have shown that the premises for the proposed change in regulation, *i.e.*, the Commission's assertion that the words "by direct vessel call" had a "traditional" meaning and that use of space charters inhibited FMC visibility of transshipment activities, are both without legal or factual support.

We have further shown that the proposed rule has significant internal inconsistencies including the fact that it would effectively define the phrase "by direct vessel call" in two different ways, depending on which leg of transshipment is involved, that requiring an ocean common carrier to operate its own vessel in the non-U.S. leg of transshipment service while allowing the use of space charters in the U.S.-leg is inconsistent with the spirit and intent of the Commission's decision in Docket 99- 10.

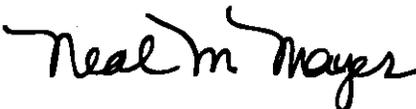
We have also shown that under the rule the Commission would impose a more *rigorous* standard on "ocean common carriage" for shipments between a foreign transshipment port and a foreign origin/destination than it imposes on ocean common carriers calling at U.S. ports because the Commission's proposal would require an ocean common carrier to operate its own vessel between the foreign transshipment port and the foreign origin/destination and allow it to use a filed and effective space charter between the U.S. and the transshipment port.

We have shown that the proposal would adversely impact on FOML's non-exclusive transshipment agreements where FOML is the Publishing Carrier. In the FOML – P&O **Nedlloyd** arrangement, FOML is able to offer service to ports in the Russian Far East which do not have sufficient cargo volumes to permit regular round voyage service to/from the United States. (FOML does serve these destinations directly when it is able to charter a vessel one way from the Pacific Northwest to the Russian Far East.) If this transshipment service is prohibited, then the shippers lose the service and have fewer choices to move their cargo and less competition.

Based on the foregoing, FOML believes it is clear that the proposed change in the definition of transshipment agreement should not be adopted.

Respectfully submitted,

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