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December 9, 2003

To: Bryant L. VanBrakle, Secretary

From: Harold J. Creel, Jr.,  Commissioner

Subject: Petition No. **P5-03 - 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**

On December 2, 2003, I met with representatives of the National Customs Brokers and Forwarders Association of America ("NCBFAA") to discuss its petition to relieve non-vessel-operating common carriers ("NVOCCs") from certain requirements of the Shipping Act of 1984 relating to the publishing and enforcement of tariffs. In the alternative, NCBFAA requested that the Commission initiate a rulemaking proceeding to permit the use of "range rates". The NCBFAA was represented by: Edward D. Greenberg, Esq., counsel; J. H. Kent, Esq.; Juerg Bandle, Senior Vice President, Kuehne & Nagel, Inc.; Bill McNemey, Chief Executive Officer, Phoenix International; and Lisa R. Domingo, PIX Line Manager. Also present was my counsel, David R. Miles.

Mr. Greenberg stated that NCBFAA's petition was a response to the changes in the ocean transportation industry since enactment of the Ocean Shipping Reform Act ("OSRA"), particularly the fact that ocean carriers almost exclusively move their cargoes by contract carriage, i.e., service contracts. This allegedly leaves NVOCCs subject to an anachronistic common carriage system, including the publishing of rates in tariffs. In a recurring theme, he, and others, claimed that no one relies on NVOCC tariffs for rate information. Instead, rates are initially negotiated one-on-one with shippers and then later memorialized in a tariff. Mr. Greenberg also noted that OSRA had liberalized the Commission's exemption authority and argued that granting the exemption would be pro-competitive for the ocean transportation industry.

Mr. Bandle and Mr. McNemey contended that NVOCCs often bundle a package of services for a shipper, but that the ocean freight is the only part of the package that is published. They suggested that the only ones to benefit from a tariff publication requirement are the publishing companies. In this regard, Ms. Domingo averred that it costs her company approximately \$5.80 per shipment to comply with the tariff requirements, or three to five percent of their net profits. Mr. McNemey also suggested that tariff publication leaves NVOCCs at a greater risk of enforcement by the Commission's Bureau of Enforcement.

Mr. Greenberg did concede that the issue of service contracting was summarily dealt with by Congress in its consideration of OSRA. However, he claimed that Congress did not address

the specific exemption being sought by the NCBFAA , i.e., **from** tariff publihing. He further contended that the size of any particular NVOCC should be irrelevant to any exemption the Commission may grant, suggesting that nothing about the amount of assets makes an NVOCC more or less reliable. Although the NCBFAA supported the UPS and BAX approaches in its comments, he did not believe that they are better than NCBFAA's proposed approach.