



BEFORE THE
FEDERAL MARITIME COMMISSION

Docket No. 10-03

Comments on NVOCC Negotiated Rate Arrangements

Written Comments Submitted by
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I. NVOCC Negotiated Rate Arrangements – General Comments

A. Introduction and Background on Descartes

The Descartes Systems Group Inc. ("Descartes") hereby submits the following comments to the Federal Maritime Commission ("FMC" or "Commission") in response to the publication of the agency's proposed rule in Docket No. 10-03.

By way of back ground, Descartes (TSX: DSG) (NASDAQ: DSGX), enables global organizations with logistics-intensive businesses to save money by improving the productivity and performance of their operations. Underlying Descartes' offerings is Descartes' Global Logistics Network (GLN), one of the world's most extensive multi-modal business application networks. As a federated software-as-a-service (SaaS) platform, Descartes' GLN combines with component-based 'nano' sized applications to provide messaging services between logistics trading partners, shipment management services to help manage third party carriers and private fleet management services for organizations of all sizes. Descartes' solutions and services deliver results by enabling organizations around the world to reduce administrative costs, billing cycles, fleet size, contract carrier costs, and mileage driven; improve pick-up and delivery reliability; and

optimize working capital through fleet visibility. Descartes' hosted, transactional and packaged solutions deliver repeatable, measurable results and fast time-to-value.

At the outset and as discussed in more detail below, Descartes cautions the Commission on advancing the proposed rule that would eliminate the statutorily-defined requirements for non-vessel-operating common carriers ("NVOCCs") to publish, adhere and enforce tariff rates for ocean transportation services in the U.S. foreign commerce. While some have noted that this proposed rule *may* enhance NVOCCs' services, Descartes believes that the Commission's proposed rule is beyond the current statutory authority granted by Congress to the agency and does not comport with the exemption authority permitted by law. Additionally, Descartes provides examples illustrating the ways that its customer base interacts with NVOCC tariffs – something that is imperative to the FMC's consideration of the proposed rule and has, in our opinion, been lacking throughout this debate and requires further consideration.

For the reasons set forth below, Descartes respectfully maintains that the FMC should not move forward with the proposed rule as published without considerable more examination of the issues and conclusive evidence supporting the proposal.

II. The Proposed Rule on NVOCC Tariff Exemption Exceeds the Congressional Mandate Granted to the FMC

A. The 1998 Amendments to the Shipping Act Must be taken into Consideration by the FMC

The Shipping Act of 1984, as amended by the Ocean Shipping Reform Act of 1998 (OSRA), was intended to create an environment in which NVOCCs (and VOCCs) are relieved of the longstanding statutory requirements to file tariff rates with the FMC. As we understand the issue, the congressional intent surrounding the OSRA amendments to tariff-filing requirements (embedded in the statute since the 1984 amendments) was to transition tariffs from a closed environment and instead make them widely available to interested parties (e.g., regulators, shippers, other carriers) via new

and developing technical means, such as the Internet. Congress had the foresight to recognize that the emerging technologies of the mid-and-late 1990s were then well-suited to meet this objective, as well as realizing that technology would continue to evolve and bring on-line additional cost-savings and efficiency-enhancing methods. Descartes believes that the tenth anniversary of OSRA's implementation (recognized in May 2009) demonstrates that the Commission's proper and effective implementation of the deregulatory changes to the Shipping Act are working well – including the very issue of tariff publication. It is our belief that such changes have resulted in costs savings to all sectors of the industry and shipping public, thus making it easier for interested parties (including shippers, intermediaries, regulators) to access NVOCCs' (and VOCCs') general tariff rates.

B. Practical Real World Observations

By way of Descartes' experience with the shipping industry, we offer the following observations on the issue of tariff publication.

1. NVOCC costs to publish have decreased since OSRA's implementation in 1999. Descartes' publishing fees per NVOCC have also decreased more than 50% from what the price point was at this point in 1998 (pre-OSRA amendments).
2. Some NVOCCs do not appear content with the cost savings they received by way of the OSRA amendments to the Shipping Act, as some continue to cite a perceived need to gain cost savings as a basis to no longer publish and adhere to electronically-available tariff rates.
3. Based on Descartes experience with tariff publication (dating back to the 1980s when its business was conducted by DXI, Inc. and helped to design and implement the Automated Tariff Filing and Information System (ATFI), we

maintain that the public does take advantage of the ability to view publically available rates.

4. In 2009, Descartes' public tariff system was viewed by the public for over 7,000 hours. It should be noted that this system can only be viewed if a shipper is willing to pay for access. Thus, the public was willing to pay money to access tariff information for 7,000 hours last year alone from Descartes' systems alone. It is a rational extension that other tariff publishers' systems were also utilized in a similar fashion with the same amount of time allocated for viewing by shippers (and others).

5. Many NVOCCs make tariffs available on their websites at no charge to the public. Descartes provides this private-labeled service to many NVOCCs. While Descartes does not track hours of usage on these systems, we are able to tell that tariffs are accessed significantly more than the paid sites we operate based on the number of licenses for access by concurrent users that our customers purchase.

Descartes maintains that this type of activity is what Congress intended when it authored and passed the OSRA amendments: easy, open access to rate information directly from an NVOCC's website.

Because of the various methods that NVOCCs employ to comply with the Shipping Act's tariff publication, adherence and enforcement requirements, it is difficult for shippers to compare rates. As one can see from the arguments being made before the Commission on this proposed rule, many NVOCCs do not want to make rates publically available. Given this position, further investigation should be done to understand whether or not measures are being taken to frustrate the intent of the existing rule and make it difficult to gain access to current NVOCC rates. NVOCCs can

do this by making tariffs complicated and difficult to locate, as well as expensive to utilize. The net result is that shippers give up trying to utilize and access NVOCC tariffs. It is ironic then that the NVOCCs use the argument that, because many shippers do not use publically available rates, NVOCCs should be exempt from making rates available at all. In the end, this is circular logic, in our opinion: rates are difficult to locate and expensive to view, therefore shippers decide to cease searching for tariffs. In the end, however, this is not a basis for utilizing the FMC's exemption authority for this particular issue – to do so would undermine the very tariff publication and adherence requirements written into the OSRA amendments.

It is also important to recognize the status of NVOCCs today in terms of logistics and supply chain performance. In 2010, NVOCCs control a much larger portion of the freight than they did at the time of OSRA's implementation in 1999. As a result, NVOCCs have become one of the main sales channels for the VOCCs. We note that VOCCs have anti-trust immunity and that, as a result, their rates need to be monitored. Given this, there is a strong argument that NVOCCs' rates should continue to be monitored, if for no other reason than to insure that the VOCCs are not indirectly extending their antitrust immunity beyond what was originally contemplated, in a way that takes advantage of the public.

III. Recommendations

Descartes believes that more examination of the tariff publication issue is warranted to properly determine how much shippers currently use rates, and in cases where shippers do not utilize NVOCC tariff rates, why that is so. The Commission would be prudent in examining why shippers do not utilize tariff rates – do they find them difficult to locate and expensive to retrieve, for example. On a related note, the FMC should consider whether terminating the obligation to publish rates for NVOCCs is the answer to shipper non-utilization of public rates or, in the alternate, would the public be

better off if the Commission mandated that NVOCCs make their rates easier to find, cheaper to view and more consistent across the NVOCC community, so that shippers could compare “apples-to-apples.”

Descartes believes the impact of the proposed rule change on small shippers needs to be further investigated. Small- and mid-sized shippers’ thoughts on this matter need to be solicited and their comments need to be taken into consideration. It seems counter-intuitive to us that a small shipper would want NVOCC rates to be hidden. The FMC is charged, in part, with helping to ensure that competitive practices are happening for the benefit of the small shipper to protect the public. Larger shippers (and the NVOCCs) are well represented at the table when discussing such issues. This segment of the shipping industry and public has the most to gain from the proposed rule and can therefore afford to be well represented in this matter – however, we have not seen similar representation from small shippers.

IV. Competition Concerns Need to Considered

The proposed rule also has the potential to affect certain competition matters, as it relates to both VOCC and NVOCC operations. In particular, over the past decade (in earnest since the adoption of the OSRA amendments), NVOCCs have developed into a more structured sales force for certain vessel operators – a channel in many trade lanes for the VOCCs in dealing with all types of shippers. Thus, in many respects, the NVOCC has become an extension of the VOCC. It is well understood that ocean common carriers enjoy antitrust immunity from U.S. competition laws and regulations and that the FMC is to safeguard against abuse by the carriers of their antitrust immunity. The filing of service contracts with the FMC and disclosure of carrier tariffs are part of the countervailing scheme that Congress put in place to ensure that carrier antitrust immunity is properly utilized.

The FMC should consider the possible anti-competitive consequences that relieving NVOCCs from disclosing their tariff rates may have on shippers, in the sense that the NVOCC has become an extension of the VOCC's pricing structure. This point is not theoretical; we point to the on-going examination into the alleged anti-competitive conduct of direct and indirect air carriers in the air freight sector. Along with the United States, most of our trading partners have initiated investigations (some resulting in multi-million dollar fines and even prison terms for individuals), due to the alleged anti-competitive schemes that air carriers implemented. Indirect air carriers (equivalent to an NVOCC in the ocean sector) are subject to examination by the government authorities as allegedly furthering the anti-competitive conduct tied to the direct carriers' price-fixing strategies. The FMC would be prudent to consider what has transpired in the past several years in the alleged air cargo price-fixing environment.

V. **Conclusion**In sum, more investigation needs to be done by the FMC to determine the extent that NVOCCs have become a sales channel for the VOCC, as well as how NVOCCs have evolved into a transportation solution in their own right in the past decade. In addition, further investigation needs to be done in to how the level of historic and current use and availability of published tariffs by interested parties, to understand the impact on those parties and the competition landscape in general. Accordingly, for the reasoning set forth above, Descartes calls on the FMC to withhold further action on the proposed rule until there is a fuller understanding and appreciation of what the fundamental changes to the Shipping Act and OSRA requirements would have on the industry and public.

Respectfully Submitted,

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