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BEFORE THE FEDERAL MARITIME COMMISSION

Docket No. 10 - 03

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**COMMENTS OF UPS REGARDING PROPOSED RULEMAKING ISSUED  
TO GRANT ECONOMIC RELIEF TO NVOCCs**

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June 4, 2010

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## **I. INTRODUCTION**

UPS Ocean Freight Services, Inc. (FMC License No. 016781N), UPS Europe SA and UPS SCS (Asia) Limited (collectively "UPS") offer the following comments in response to the Commission's proposed rulemaking pursuant to Section 16 of the Shipping Act of 1984 (the "Act") to permit Non-Vessel Operating Common Carriers ("NVOCCs") to utilize Negotiated Rate Agreements ("NRAs").

UPS is pleased that the Commission and staff have moved forward on this project and enthusiastically supports the proposed rule, but suggests certain changes that will promote greater competition and efficient service benefitting both shippers and NVOCCs, and avoid uncertainty and unwarranted administrative costs.

## **II. BACKGROUND – UPS INTEREST IN THE RULEMAKING**

The UPS NVOCCs are wholly-owned subsidiaries of United Parcel Service of America, Inc., a worldwide surface and air freight carrier and logistics and supply chain management service provider. Founded in 1907, UPS is the world's largest package delivery company and a provider of specialized transportation and logistics services, serving more than 200 countries and territories worldwide. UPS, with 2009 consolidated corporate revenues of \$45.3 billion, has 408,000 employees worldwide with 340,000 in the United States. UPS delivers 3.8 billion packages and documents annually, including 15.1 million daily global deliveries. On a daily basis, the UPS system picks up from 1.8 million customers and delivers to an average of 6.1 million U.S. and international addressees and consignees.

UPS operates from more than 1,800 facility locations worldwide. The company operates a fleet of 96,105 trucks and other vehicles, and more than 500 aircraft as the 9<sup>th</sup> largest airline worldwide. Principal UPS air freight hubs are in the U.S., Canada, Europe and South and East Asia. UPS capital expenditures average \$2 billion annually. UPS is a publicly-traded company and its shares are listed on the New York Stock Exchange.

UPS commenced NVOCC operations in 2001 upon acquisition of the Fritz companies. A UPS affiliate, UPS Supply Chain Solutions, Inc. (FMC License No. 00275F) is a licensed freight forwarder and also holds an FMCSA forwarder license. UPS handles hundreds of thousands of TEUs annually.

The UPS NVOCC customer base is large and diverse. UPS serves shippers ranging from large multinational industrial corporations moving hundreds of thousands of TEUs annually inbound and outbound, to small businesses exporting a few containers annually. In many instances, UPS customers look to the company for integrated logistics solutions in addition to ocean transportation.

### **III. COMMENTS ON THE PROPOSED RULE**

UPS's comments focus on six specific elements of the Commission's proposed rule, including (A) inclusion of unlicensed bonded NVOCCs, (B) exemption with respect to Shipping Act prohibitions in 46 U.S.C. §§41104(4) and (8); (C) clarification of the substantive terms that may be included in an NRA; (D) clarification of how rules tariff information may be provided to shippers; (E) clarification of the minimal requirements for a valid NRA, and (F) limitation of document retention requirements. UPS also

proposes a definition of "Affiliate" which should be added to clarify what class of entities will qualify. For ease of reference, UPS attaches to these comments a "redline" version of the proposed rule, showing UPS's proposed revisions.

**A. Inclusion of Unlicensed NVOCCs**

The UPS NVOCCs include one licensed NVOCC, UPS Ocean Freight Services, Inc., and two unlicensed NVOCCs, UPS Europe SA, and UPS SCS (Asia) Limited. Both unlicensed UPS NVOCCs have obtained organization numbers from the Commission, published ocean tariffs and provided the bonds required pursuant to the Commission's rules.

Unlicensed NVOCCs appear to be subject to the same Shipping Act provisions, regulatory jurisdiction and Commission scrutiny as licensed NVOCCs. For purposes of NRAs, UPS believes licensing is a distinction without a difference.

However, if the Commission elects not to extend NRAs to unlicensed entities generally, UPS suggests that the exemption at least be extended to those unlicensed NVOCCs that are affiliates (under common ownership and control) with licensed NVOCCs in good standing.

**B. Exemption Regarding Prohibitions in 46 U.S.C. §§41104(4) and (8)**

The Commission should extend the exemptions under the rule to Shipping Act prohibitions in 46 U.S.C. §§41104(4) and (8) (undue prejudice or advantage). NVOCCs will offer NRAs, and the various combinations of pricing and services that can be used under them, on a very informal, shipper-by-shipper basis. NRAs are intended to be highly-flexible and confidential rate offerings designed to react quickly to a very fluid marketplace. If shippers have the possibility of pursuing complaint proceedings before

the Commission alleging that an NVOCC has discriminated by offering one shipper an NRA and declining to offer an NRA to another, or with respect to terms offered in different NRAs, there exists the possibility for nuisance disputes, breach of confidentiality of NRA terms and other costly mischief. While arguably a complaining shipper would have the burden of proving that any preference or prejudice is "undue," the very notion of discrimination seems irrelevant where NRAs are concerned, because by nature the NVOCCs will be discriminating, shipper-by-shipper. UPS also notes that shippers will have the option of shipping at tariff rates or dealing with many other NVOCCs if any NVOCC declines to offer an NRA on terms acceptable to the shipper.

### **C. Scope and Substantive Terms Allowed in an NRA**

UPS is concerned that if the limits of contents of an NRA are not broadly and affirmatively defined in the rule, NVOCCs and shippers will be unable to optimize the economic benefits of the exemption.

The Commission should define with extreme clarity the role of the rules tariff. NVOCCs should have the flexibility to structure NRAs from the one extreme of merely containing base rates with all other economic terms left to the rules tariff, to inclusion in the NRA of all economic terms including surcharges, arbitraries, general rate increases and the like, in any given case where the parties mutually agree to do so. Shippers are principally concerned about what they must pay for the ocean transportation service, not whether the total is an all-inclusive rate (i.e., no surcharges) or a base rate plus surcharges. The shipper benefits if the NVOCC is willing to compete as to its surcharges by offering special NRA pricing. The distinction between base rate and surcharges is simply not a material one in the competitive pricing world.

The Commission should also clarify that an NVOCC may include in an NRA any and all economic terms affecting the carrier-shipper relationship, such as credit and payment terms, late payment interest, freight collect or prepay, and other commercial arrangements that may enable an NVOCC to compete most effectively. Additionally NRAs should allow the contracting parties to agree at arm's length on rate methodology, including minimum or maximum quantities, time/volume arrangements, penalties or incentives, methods for implementation of rate changes, including increases or decreases in surcharge changes, privately between themselves, with whatever degree of flexibility they may freely choose to adopt, with or without waiting periods to be effective, if they so agree. Special classes of premium or economy service, which may be different than any class offered in the NVOCC's tariff, will also benefit shippers, enabling them to bargain for exactly what service package best suits their business and only pay for what they need rather than being relegated only to "off the shelf" service arrangements. These flexibilities are critical for NVOCCs such as UPS that offer enhanced customer value by providing customized integrated logistics solutions.

A broad-scope NRA is also beneficial and efficient in that it will enable NVOCCs entering NRAs to have these agreements double as "service contracts" under the now likely to be adopted Rotterdam Rules (UN Convention on Contracts for International Carriage of Goods Wholly or Partly by Sea). Such "service contracts" under the Rotterdam Rules are intended to allow contracting carriers and shippers to agree on various things including arbitration, forum selection for disputes and variance of per-package liability limits. The United States has been at the forefront of diplomatic efforts to secure the broadest freedom of contracting under these rules. If NVOCCs and

shippers have to enter multiple contracts where a single agreement can cover all issues, there will be an inefficiency and administrative burden imposed in a field where the United States has fought hard to modernize and simplify dealings.

#### **D. Provision of Rules Tariff Information to Shippers**

There are several methods for providing access to rules tariff material without open free public access. The Commission should make it clear that NVOCCs may utilize any reasonable means that gets the information to the shipper without cost, including private electronic access, and that the NVOCC is not required to provide a "hardcopy" paper text. The regulation should also make it clear that the NVOCC does not need to provide universal free access to the tariff as long as it provides free access or a copy to each NRA shipper.

#### **E. Defining Minimal NRA Contracting Requirements**

UPS believes the definition of an NRA should allow flexibility for NVOCCs and shippers to use any means lawful under controlling law for contract formation, including a mere exchange of electronic mails containing offer and acceptance and stating the scope, time and price for liner transportation. Smaller NVOCCs and shippers will benefit from streamlined arrangements. As long as the exchange is written (including electronic communication), fulfills applicable legal requirements for an enforceable contract, and contains the minimal commodity, origin and destination, time and pricing terms, it should be acceptable. More formal requirements would impose costs on both NVOCC and shipper, pose barriers to smaller companies and discourage the broadest and most competitive offerings to shippers.

## **F. Document Retention Limits**

UPS is concerned that the several conflicting requirements in the Commission's draft rule create uncertainty and mandate expensive screening and retention of documents that are entirely irrelevant to performance of the parties' transactions, enforcement of contract rights, regulatory compliance or any other purpose of the rule. The requirements to retain "associated records" is too vague and the extension to all "written communications" serves no purpose. The Commission has successfully regulated tariff publication, service contracts and NVOCC Service Arrangements for many decades without such a requirement. (For example, the tariff integrity requirements in 46 C.F.R. § 520.10 only mandate retention of the actual data that appeared in tariffs, not associated documents or communications, obviously because such data is all that could ever be needed to audit tariff compliance.) The Commission should not impose a more formal recordkeeping requirement on what is intended to be a less formal contracting system to stimulate competition, innovation and efficiency. For avoidance of doubt, the Commission should also clarify that the requirements of 46 C.F.R. § 515.33 do not apply to NRAs.

The regulation should require only the retention of those specific documents constituting the contract between the NVOCC and shipper, which includes any document necessary to interpret and enforce the contract. For example, if the NVOCC enters an NRA by means of sending the shipper a proposed rate for moving commodity "X" moving from point "Y" to point "Z" during the following 12 months, and the shipper emails back saying "we accept," that is the legal contract and no other document is necessary to explain or enforce it. If those documents are available, they enable the

parties and the Commission and staff to determine what the agreement of the NVOCC and shipper was and whether the parties have complied with the regulation. These documents are all that could be needed or would be relevant in interpreting and enforcing an NRA in court or arbitration proceedings. Of course, if the NVOCC's offer or shipper's acceptance email referenced rate material or terms in other documents, or the agreement indicated that rates would be indexed by reference to some external algorithm or other resource, those items would by legal definition constitute part of the contract and would have to be preserved.

As the Commission and its counsel will be aware, under electronic data discovery rules, maintaining unneeded and excessive archives is both expensive and unwise. Seldom do we see service provider quotes of under \$1,000,000 when a company has to review and produce its electronic databases to comply with a litigation discovery request.

The time for document retention also should be shortened. To UPS's knowledge, regulatory situations have not commonly arisen where reversion to documents going back more than three years are required.

#### **IV. SUMMARY**

UPS again commends the Commission and staff for progressing this rulemaking. UPS looks forward to participating in the more competitive and innovative market for liner services that this rule will surely promote.

*[signatures on next page]*

Respectfully submitted,



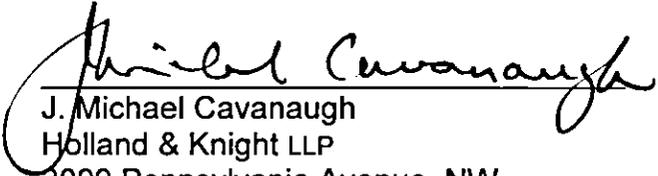
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June 4, 2010

Attachment: Mark-up of Commission's Draft Rule

# 9478330\_v3

# UPS Proposed Revisions to Draft Regulations on Negotiated Rate Agreements

(June 4, 2010)

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## §520.13 [Amended]

2. In 520.13, add a new section (e) to read as follows:

### §520.13 Exemptions and exceptions.

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(e) NVOCC Negotiated Rate Arrangements. A licensed NVOCC that satisfies the requirements of part 532 of this chapter is exempt from the requirement in this part that it include rates in a tariff open to public inspection in an automated tariff system.

3. Add part 532 to read as follows:

## PART 532 - NVOCC Negotiated Rate Arrangements

### Subpart A - General Provisions

Sec. 532.1 Purpose

Sec. 532.2 Scope and Applicability Sec.

532.3 Definitions

### Subpart B - Procedures Related to NVOCC Negotiated Rate Arrangements

Sec. 532.4 Duties of the NVOCC

Sec. 532.5 Requirements for NVOCC Negotiated Rate Arrangements

Sec. 532.6 Notices

### Subpart C - Recordkeeping Requirements

Sec. 532.7 Recordkeeping and audit

Sec. 532.91 OMB control number assigned pursuant to the Paperwork Reduction Act

AUTHORITY: 46 U.S.C. 40103

### Subpart A - General Provisions

#### § 532.1 -Purpose

The purpose of this Part, pursuant to the Commission's statutory authority, is to exempt licensed and bonded or registered and bonded non-vessel-operating common carriers (NVOCCs) from the tariff rate publication and adherence requirements of the Shipping Act of 1984, as enumerated herein.

### § 532.2 - Scope and Applicability

This Part exempts NVOCCs duly licensed pursuant to 46 CFR ~~515.3~~, 515.3 holding adequate proof of financial responsibility pursuant to 46 CFR 515.21(a)(2) and unlicensed NVOCCs that publish a tariff pursuant to 46 CFR 520.3 holding proof of financial responsibility under 46 CFR 515.21(a)(3); and meeting the requirements of 46 CFR 532.4 through 532.7; from the following requirements and prohibitions of the Shipping Act and the Commission's regulations:

- (a) the requirement in 46 U.S.C. 40501 (a)-(c) that the NVOCC include its rates in a tariff open to public inspection in an automated tariff system;
- (b) 46 U.S.C. 40501(d);
- (c) 46 U.S.C. 40501(e)
- (d) 46 U.S.C. 40503;
- (e) the prohibition in 46 U.S.C. 41104(2)(A); and
- (f) the prohibition in 46 U.S.C. 41104(4);
- (g) the prohibition in 46 U.S.C. 41104(8);
- (h) (f)-the Commission's corresponding regulation at 46 CFR 520.3(a) that the NVOCC include its rates in a tariff open for public inspection in an automated tariff system; and
- (i) (g)-the Commission's corresponding regulations at 46 CFR 520.4(a)(4), 520.4(f), 520.6(e), 520.7(c), (d), 520.8(a), 520.12, and 520.14. Any NVOCC failing to maintain its bond or license as set forth above, or who has withdrawn, cancelled, terminated or had its tariff suspended by the Commission, shall not be eligible to invoke this exemption.

### §532.3 - Definitions

When used in this part,

- (a) "Affiliate" means two or more entities which are under common ownership or control by reason of being parent and subsidiary or entities associated with, under common control with, or otherwise related to each other through

common stock ownership or common directors or officers.

(b) "NVOCC Negotiated Rate Arrangement" means a written and binding arrangement Arrangement, other than a bill of lading or sea waybill, between a shipper one or more shippers and one or more eligible NVOCC NVOCCs to provide specific transportation service for a stated cargo quantity moving in one or more shipments, from origin to destination, on and after receipt of the cargo by the carrier or its agent (or the originating carrier in the case of through transportation).

(bc) "Rate" means a price stated for providing a specified level of transportation service for a stated cargo quantity, from origin to destination, on and after a stated date or within a defined time frame.

(ed) "Rules tariff" means the portion of a tariff, as defined by 46 CFR 520.2, containing the terms and conditions governing the charges, classifications, rules, regulations and practices of an NVOCC, and may include surcharges, but does not include a commodity rate.

#### Subpart B - Procedures Related to NVOCC Negotiated Rate Arrangements

##### §532.4-Duties of the NVOCC

Before entering into an NRA under this Part, the NVOCC must either:

- (a) ~~for each~~ prior to entering such NRA, provide the prospective shipper all the applicable terms as set forth in its rules tariff at such time, by electronic access free of charge or by providing a printed copy; or
- (b) provide electronic access to its rules tariffs to the public free of charge.

##### §532.5-Requirements for NVOCC Negotiated Rate Arrangements

(a) In order to qualify for the exemptions to the general rate publication requirement as set forth in section 532.2, an NRA must:

(a)-(i) be in writing (which may be in electronic form, including electronic mail or other format, print or other media);

(b)-(ii) be agreed to by both shipper and NVOCC prior to the date on which the cargo is received by the common carrier or its agent (including originating carriers in the case of through transportation);

(c)(iii) clearly specify the rate and to which shipment or shipments such rate will apply; and

(d)(iv) may not be modified after the time the shipment is received by the carrier or its agent (including originating carriers in the case of through transportation) only by written amendment which satisfies the foregoing requirements.

(b) An NRA may:

(i) provide that rates, including all-inclusive rates or base rates plus surcharges, specified in the NRA will supersede any rate, all-inclusive rate or base rate plus surcharges that would be available for the same traffic under the NVOCC's rate tariff;

(ii) provide all-inclusive rates, rates which will be combined with surcharges or other costs set forth in the NVOCC's rules tariff(s), or rates which will be combined with surcharges or other costs set forth in or incorporated by reference into the NRA from indices or other clearly-defined sources other than the NVOCC's rules tariff;

(iii) provide that rates or applicable surcharges and costs, including surcharges and costs published in the NVOCC's rules tariff, may be increased, decreased or modified at any time in a manner agreed by the parties and set forth clearly in the NRA, with or without any prior notice or publication in the NVOCC's rules tariff;

(iv) provide for time/volume rates, minimum quantity commitments and/or maximum volumes overall or for any portion of the service or term of the contract, and liquidated damages, re-rating or other agreed remedies for non-performance;

(v) provide for special service terms and conditions;

(vi) include any and all other lawful contract terms and conditions, including payment or credit terms, allocations or limitations of liability or risk, claims procedures, choice of law or forum for resolution of disputes, arbitration or other matters pertinent to the performance of the NRA or any contract of carriage; and/or

(vii) extend the availability of the NRA rates and terms to any affiliate of the shipper listed in the NRA.

(c) Evidence of the agreement of each party to an NRA may be provided by original signatures, facsimiles of signatures, electronic copies of signatures, corporate stamps or seals, digital signatures or any other means customarily used in the ocean transportation industry to signify binding agreement.

(d) Parties may correct rates or adjust accounts, including refunds or additional assessments on prior transactions, in the event of any inadvertent error or mutual mistake, without amending an NRA or requesting special permission from the Commission.

#### §532.6-Notices

(a) An NVOCC wishing to invoke an exemption pursuant to this part must indicate that intention to the Commission and to the public by one or more of the following:

(1) A prominent notice on its rules tariff stating that the NVOCC will offer NRAs to some or all shippers; or

(2) By so indicating on its Form FMC-1 on file with the Commission.

(b) An NVOCC that has published a notice as required in subpart (a) may thereafter, in its discretion, offer or enter an NRA with any shipper or shippers, and may continue to provide service to other shippers under its applicable rate tariff.

Subpart C — Recordkeeping

#### §532.7 - Recordkeeping and Audit

(a) An NVOCC invoking an exemption pursuant to this part must maintain original NRAs and all associated records including written communications for 5 documents constituting each NRA and each amendment thereto, including all electronic or printed documents constituting any portion of the NRA and necessary for its interpretation and enforcement, for 3 years in a format easily produced to Commission.

(b) NRAs and all associated records and written communications are subject to inspection and reproduction requests under section 515.31(g) of this chapter. An NVOCC shall produce the requested NRAs and associated records, including written communications, promptly in response to a Commission request. Section 515.33 of this chapter shall not apply to NRAs.

(c) Failure to keep or timely produce original NRAs and associated records and written communications will disqualify an NVOCC from the operation of the exemption provided pursuant to this part, regardless of whether it has been invoked by notice as set forth above, and may result in a Commission finding of a violation of 46 U.S.C. 41104(1), 41104(2)(A), 41104(4), 41104(8) or other acts prohibited by the Shipping Act.

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