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BEFORE THE
FEDERAL MARITIME COMMISSION
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_____)
Notice of Proposed Rulemaking:)
NVOCC Negotiated Rate Arrangements)
_____)

Docket No. 10-03

Comments of
the U.S. Department of Justice

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COMMENTS

The United States Department of Justice (“Department”) files these comments in support of the Federal Maritime Commission’s (“FMC” or “Commission”) proposed rulemaking to provide licensed non-vessel-operating common carriers (“NVOCCs”) relief from certain tariff rate publication requirements of the Shipping Act of 1984 (the “Act”).

A. Background

On July 31, 2008, the National Customs Brokers and Forwarders Association of America, Inc. (“NCBFAA”) initiated this proceeding by filing a petition requesting that the Commission exercise its authority under 46 U.S.C. § 40103 to issue an exemption for NVOCCs from certain provisions of the Act that require NVOCCs to publish rate tariffs for ocean transportation in those instances where they have individually negotiated rates with their shipping customers and memorialized those rates in writing.¹

The Department submitted comments in support of the NCBFAA’s petition, noting that the Department has long supported exempting NVOCCs from all tariff publishing requirements to produce the greatest competitive benefits.²

¹ See FMC Petition No. P1-08, Petition of the National Customs Brokers and Forwarders Association of America, Inc. For Exemption from Mandatory Rate Tariff Publication.

² FMC Petition No. P1-08, Comments of the U.S. Department of Justice (Feb. 5, 2010) (“DOJ Comments in P1-08”). See also, FMC Petition No. P3-3, Comments of the U.S. Department of Justice on Petition of the United Parcel Service for an Exemption Pursuant to Section 16 of the Shipping Act of 1984 to Permit Negotiation, Entry and Performance of Service Contracts (Oct. 10, 2003); Comments of the U.S. Department of Justice, FMC Docket No. 4-12 (Dec. 3, 2004); Comments of the U.S. Department of Justice, FMC Docket No. 05-06 (Oct. 20, 2005).

B. The FMC's Notice of Proposed Rulemaking

In response to the NCBFAA's petition, the Commission recently issued a Notice of Proposed Rulemaking in which it proposes to exempt licensed NVOCCs from the costs and burdens of tariff rate publication.³ The proposed rule would establish an instrument called a negotiated rate arrangement ("NRA"), defined as a written arrangement between a shipper and an eligible NVOCC to provide specific transportation service from origin to destination for a stated cargo quantity.⁴ An NVOCC entering into an NRA would be exempt from tariff rate publication requirements if it met conditions proposed by the Commission, including certain notice, access and record-keeping requirements.⁵

If implemented, this rule would be the latest in a series of rule changes issued by the FMC in which it has used its exemption authority under § 16 of the 1984 Shipping Act, later broadened by the Ocean Shipping Reform Act ("OSRA"),⁶ to relieve NVOCCs from certain tariff publication requirements. Most notably, the Commission has exempted from full tariff publishing requirements certain formal written contracts between NVOCCs and shippers ("NVOCC Service Arrangements" or "NSAs").⁷ The current proposal seeks to broaden the filing exemption to cover those instances where an NVOCC has individually negotiated rates with its

³ FMC Docket No. 10-03, NVOCC Negotiated Rate Arrangements, Notice of Proposed Rulemaking (April 29, 2010) ("Notice").

⁴ Notice at 15.

⁵ See Notice at 16 (describing required conditions).

⁶ 46 App. U.S.C. § 1715 (1998).

⁷ An NSA is essentially a contract between an NVOCC and a shipper in which the shipper makes a commitment to provide a certain minimum quantity or portion of its cargo or freight revenue over a fixed time period, and the NVOCC commits to a certain rate or rate schedule and a defined service level. See 46 C.F.R. § 531.3(p) (2005).

shipping customers and memorialized those rates in writing. In other words, while the NSA rule exempts formal contracts from tariff publication requirements, the proposed rule, by recognizing NRAs, also would exempt short-term “spot market” rate agreements between NVOCCs and shippers, by far the most common transaction for NVOCCs.

C. The Department Supports the Notice of Proposed Rulemaking

The Commission’s exemption authority under 46 U.S.C. § 40103(a) allows the Commission to exercise that authority if the exemption “will not result in a substantial reduction in competition or be detrimental to commerce.” The proposed elimination of the NVOCC tariff publication requirements clearly meets that standard and is an appropriate exercise of the Commission’s authority.

As the Department stated in DOJ Comments in Petition P1-08, tariff publication imposes significant costs and burdens on NVOCCs that greatly exceed any benefits.⁸ The current tariff filing requirements hamper an NVOCC’s ability to respond quickly in the marketplace. The proposed exemption will allow NVOCCs to be more flexible in a dynamic contractual environment, thereby allowing them to be more responsive to their shippers’ needs. It would likely promote competition and commerce by eliminating substantial regulatory costs to NVOCCs, a savings that could be passed on to their shipper customers in the form of lower shipping rates. As the Commission noted, NVOCCs will continue to be subject to all applicable antitrust laws.⁹

⁸ See DOJ Comments in P1-08 at 2-5.

⁹ See Notice at 17.

CONCLUSION

In conclusion, the Department supports the Commission's proposed rulemaking to further exempt NVOCCs from tariff publishing requirements.

Respectfully submitted,


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