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BEFORE THE  
FEDERAL MARITIME COMMISSION

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Docket No. 10-03

Comments on NVOCC Negotiated Rate Arrangements

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Written Comments Submitted by

OCEAN WORLD LINES, INC.

Alan E. Baer, Jr.  
President and C.E.O.  
1983 Marcus Avenue, Suite 100  
Lake Success, New York 11042

Telephone: 516-616-2400  
Facsimile: 516-616-2424

Ashley W. Craig  
Robert L. Hart  
Seung-Hyun Ryu  
VENABLE LLP  
Counsel

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**I. Comments on NVOCC Negotiated Rate Arrangements**

**A. *Introduction***

Ocean World Lines, Inc. ("OWL") hereby submit these Comments to the Federal Maritime Commission ("FMC" or "Commission") in response to the publication of the Commission's proposed rule in Docket No. 10-03 ("Proposed Rule"),

OWL commends the Commission for proposing a rule that will promote competition by reducing unnecessary regulatory costs and burdens for non-vessel-operating common carriers ("NVOCC") while enhancing their potential to offer competitive and flexible ocean rates to shippers. OWL believes that the Commission's proposed rule is a necessary and appropriate administrative action that reflects the modern economic and ocean transportation environment in which NVOCCs and shippers operate.

For the reasons set forth below, OWL respectfully submits that the FMC should adopt the proposed rule as written without delay.

**II. Support for Proposed Rule on Tariff Exemption**

**A. *The Proposed Exemption Is Within the Scope of the Commission's Statutory Authority and Reflects Congressional Intent***

As a general matter, the Commission has the statutory authority to promulgate rules and regulations implementing the Shipping Act, as amended by the Ocean Shipping Reform Act of 1998 ("OSRA"). Rulemaking authority is a cornerstone of the effective functioning of all federal administrative agencies. Because of this authority, federal agencies are recipients of a form of legislative power, as Congress has determined that certain aspects of public policy are best comprehended and effectively implemented by

agencies with oversight expertise.<sup>1</sup> The Commission (and its predecessor agencies) has a long-standing role, beginning in 1916, in overseeing the ocean shipping industry via implementation of regulations and policy decisions affecting those it regulates.

Through the Shipping Act of 1984, Congress explicitly has granted broad rulemaking authority to the Commission to prescribe rules and regulations as necessary to carry out this Act. The Commission's general regulations also confirm that its regulatory authority is derived in part from the Shipping Act: "[t]he Commission regulates common carriers by water and other persons involved in the oceanborne foreign commerce of the United States under provisions of the Shipping Act of 1984, 46 U.S.C. 40101–41309 . . . and other applicable statutes."<sup>2</sup> The federal courts routinely have recognized and upheld the broad rulemaking authority of the FMC and consistently have upheld regulations issued by the agency relating to various ocean-shipping activities.<sup>3</sup>

OSRA is "designed to encourage and facilitate commercial relationships tailored to meet the needs of the parties" and "contemplates a diverse, dynamic world of ocean

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<sup>1</sup> Alfred C. Aman, Jr. & William T. Mayton, *ADMINISTRATIVE LAW* 40-41, 79-81 (West Group 1998).

<sup>2</sup> 46 C.F.R. § 501.2(a).

<sup>3</sup> *See, e.g., United States v. American Union Transp., Inc.*, 327 U.S. 437 (1946); *National Customs Brokers & Forwarders Ass'n of Am., Inc. v. United States*, 883 F.2d 93 (D.C. Cir. 1989); *Trans-Pacific Conference of Japan/Korea v. Fed. Mar. Comm'n*, 650 F.2d 1235 (D.C. Cir. 1980); *Outward Continental N. Pac. Freight Conference v. Fed. Mar. Comm'n*, 385 F.2d 981 (D.C. Cir. 1967); *Pacific Coast European Conference v. Fed. Mar. Comm'n*, 376 F.2d 785 (D.C. Cir. 1967); *New York Foreign Freight Forwarders & Brokers Ass'n v. Fed. Mar. Comm'n*, 337 F.2d 289 (2d Cir. 1964).

shipping.”<sup>4</sup> Accordingly, Congress included in the OSRA a number of additional features and flexibilities intended to substantially reduce regulatory costs and burdens, enhance competition, and allow parties to enter into market-driven relationship. In this regard, OSRA was an important step in the evolution of regulating ocean shipping industry, which responds to changing commercial circumstances and reflects the congressional view that a competitive and efficient ocean transportation system is fostered by reducing unnecessary regulatory burdens and placing greater reliance on the ocean shipping marketplace.<sup>5</sup> Accordingly, one of the Commission’s objectives, as expected by Congress, has been to find additional solutions to reduce or eliminate unnecessary regulatory burdens and costs that limit market flexibility and competition without promoting the Commission’s regulatory interest or needs.<sup>6</sup>

Moreover, with Section 16 of the Shipping Act of 1984, 46 U.S.C. § 40103(a), which provides the Commission with the authority to exempt activities from the requirements of the Act, Congress deliberately provided the statutory basis for the Commission to regulate the industry in a flexible and effective manner in order to promote a healthy and competitive ocean shipping landscape. Senator Trent Lott, an

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<sup>4</sup> See, e.g., John Moran, Commissioner, Fed. Mar. Comm’n, Address at the Coalition of New England Companies for Trade: The Role of the Federal Maritime Commission in the 21<sup>st</sup> Century (April 9, 1999); John Moran, Commissioner, Fed. Mar. Comm’n, Address at the Transportation Intermediaries Association Government Affairs Conference (June 9, 2000).

<sup>5</sup> 106 CONG. REC. S3248 (May 2, 2000) (Statement of Sen. Lott).

<sup>6</sup> See, e.g., John Moran, Commissioner, Fed. Mar. Comm’n, Address at the Coalition of New England Companies for Trade: The Role of the Federal Maritime Commission in the 21<sup>st</sup> Century (April 9, 1999); John Moran, Commissioner, Fed. Mar. Comm’n, Address at the Transportation Intermediaries Association Government Affairs Conference (June 9, 2000).

architect of the OSRA, has remarked that “Where agency oversight once focused on using rigid systems of tariff and contract filing to scrutinize individual transactions, the ‘big picture’ of ensuring the existence of competitive liner service by a healthy ocean carrier industry to facilitate fair and open maritime commerce among our ocean trading partners will become the oversight priority.”<sup>7</sup>

Section 16 grants the Commission the authority to provide exemptions from certain requirements of the Act if doing so would not result in a substantial reduction in competition or be detrimental to commerce. As discussed in detail in Part B, the proposed exemption will not result in a substantial reduction in competition or be detrimental to commerce. Removing unnecessary regulatory burdens, such as the tariff-filing requirement, applicable to qualified NVOCCs is consistent with congressional intent to direct the Commission to respond effectively to the commercial needs and realities of the dynamic shipping and logistics industry.<sup>8</sup>

Finally, the proposed exemption is aligned with the policy decisions and practices of other federal agencies. In their comments to the Commission, the Department of Transportation and the Department of Justice supported the exemption of NVOCCs from tariff filing requirements, pointing out that it would “produce the greatest competitive benefits.”

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<sup>7</sup> 106 CONG. REC. S3248 (May 2, 2000) (Statement of Sen. Lott).

<sup>8</sup> *See, e.g.*, John Moran, Commissioner, Fed. Mar. Comm’n, Address at the Coalition of New England Companies for Trade: The Role of the Federal Maritime Commission in the 21<sup>st</sup> Century (April 9, 1999); John Moran, Commissioner, Fed. Mar. Comm’n, Address at the Transportation Intermediaries Association Government Affairs Conference (June 9, 2000).

B. *The Proposed Rule Will Promote Competition, Growth, and Efficiency in the Industry*

The proposed rules will promote the “deregulatory” and “pro-competitive” goals of OSRA.<sup>9</sup> Section 532.1 sets forth the purpose for the exemption and its conditions, and is consistent with the purpose and language of the Shipping Act. Based on its experience as an NVOCC for over thirty years, OWL believes that the proposed rule will not result in substantial reduction in competition or be detrimental to commerce; rather, it will significantly enhance both. The proposed rule allows qualified NVOCCs to respond more efficiently to changing shippers’ demands and promotes the growth of the U.S. economy, as well as U.S. exports in particular, by placing a greater reliance on the marketplace and allowing NVOCCs to compete fairly with their foreign counterparts. In addition, the proposed rule will produce competitive benefits to the shippers, by allowing NVOCCs to invest their limited resources in programs that benefit the shipping public. Furthermore, the proposed rule is aligned with the current commercial reality that shippers rarely, if ever, review or rely on public tariff rates to determine ocean transportation pricing. As such, the tariff publication process adds unnecessary costs to NVOCCs and thus increases shipping rates. Comments submitted to the Commission by various shippers and NVOCCs in response to the initial petition by the National Customs Brokers and Forwarders Association of America, Inc. (“NCBFAA”) reflect this business reality.

Section 532.2 exempts licensed NVOCCs from certain requirements of the Shipping Act and related regulations, including tariff filing requirements, adherence to a published tariff rate requirement, and the thirty-day notice requirement. The proposed

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<sup>9</sup> *Id.*

exemption ensures that these NVOCCs will retain the flexibility to respond to shippers' demands and changing market conditions without unnecessary delays and regulatory costs.

The Commission's proposed use of the Shipping Act's Section 16 exemption authority will provide immediate benefits to both the shipping industry and the public. It can — and should — be used to provide NVOCCs with necessary flexibility in setting tariff rates and competing with their counterparts, while such action ensures adherence to legislative history and preserves the current regulatory scheme instituted by Congress. Granting these exemptions to qualified NVOCCs is consistent with congressional goals in enacting the ORSA and the Commission's past use of its Section 16 authority, and it is prudent agency rulemaking.

C. *Response to Select Comments Submitted in Response to the NCBFAA Petition*

One commenter argued that it was more appropriate for Congress to revise the Act. However, Congress clearly intended for the Commission to exercise its Section 16 exemption authority to regulate the shipping industry while preserving the overall regulatory scheme created by Congress. Moreover, it is appropriate and proper that the Commission uses its Section 16 exemption authority to promulgate regulations responding to matters Congress did not deliberate or at times even foresee. Importantly, it was noted in the Report issued by the Senate Commerce Committee on the OSRA that:

While Congress has been able to identify broad areas of ocean shipping commerce for which reduced regulation is clearly warranted, the FMC is more capable of examining through the administrative process specific regulatory provisions and practices not yet addressed by Congress to determine where they can be deregulated consistent with the policies of Congress.<sup>10</sup>

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<sup>10</sup> See S. Rep. No. 105-61 at 30, 105th Cong. (1st Sess. 1997).

Exempting well-qualified NVOCCs<sup>11</sup> from overly burdensome regulatory requirements is undoubtedly a case for Commission action in its regulatory role and comports with the requirements as set forth under the Shipping Act and the OSRA by Congress.

A few vessel ocean common carriers (“VOCCs”) have commented that eliminating tariff publication requirements for NVOCCs (while leaving them in place for VOCCs) will affect the competitive balance between these two classes of carriers. However, this argument fails to recognize the crucial fact that ocean carriers’ filing of their service contracts with the Commission is tied to the Commission’s oversight of the carriers’ long-standing<sup>12</sup> antitrust immunity, as provided currently provided by 46 U.S.C. § 40307.

Another commenter argued that the proposed exemption would be detrimental to commerce because elimination of the 30-day notice requirement for tariff rates would produce rate quotations that would be valid for short periods of time. However, the Commission has found previously that an exemption allowing a controlled carrier to reduce its rates by giving one day of notice, rather than 30 days, would actually increase competition because it created greater flexibility in negotiating rates for time-sensitive shipments and would give shippers more service options by allowing the carriers to compete more effectively.<sup>13</sup> The proposed exemption is consistent with the Commission’s previous decisions.

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<sup>11</sup> Under the Proposed Rule Section 532.2, the exemption is limited to NVOCCs that are licensed pursuant to 46 C.F.R. Part 515. Further, this Section provides that any NVOCC who fails to maintain its bond or license or has had its tariff suspended or cancelled by the Commission is ineligible to avail itself of the exemption.

<sup>12</sup> Antitrust immunity for ocean carriers was first granted by Congress in the Shipping Act, 1916.

<sup>13</sup> *Petition of China Ocean Shipping (Group) Co.*, 28 S.R.R. 144, 149 (1998).

D. *The Proposed Rule, as Written, Provides Clear Responsibilities for NVOCCs and Appropriate Protection to Shippers*

OWL supports proposed Sections 532.4 (Duties), 532.5 (Requirements for NVOCC Negotiated Rate Arrangement), 532.6 (Notices) and 532.7 (Recordkeeping and Audit), as these sections provide regulatory frameworks for NVOCCs to follow. OWL supports the FMC's decision to (i) provide all terms of an NRA; (ii) impose requirements on timing, contents, and documentation of NRA; (iii) require an NVOCC invoking an exemption to provide the notice pursuant to this Section 532.6, and (iv) require NVOCCs to maintain original NRAs and all associated records for five years, subject to the FMC's inspection and reproduction requests consistent with the FMC's regulation.

E. *The Exemption Should Be Limited to Licensed NVOCCs*

Finally, OWL agrees with the Commission that the exemption should be limited to the NVOCCs licensed by the Commission, in order to ensure that the ocean transportation industry and the shipping public are properly protected against incompetent or unqualified NVOCCs. Section 19 of the Shipping Act, as amended by OSRA, conditions the issuance of a license upon the Commission's determination that an NVOCC is qualified by experience and character to act as an ocean transportation intermediary.<sup>14</sup> The Commission's licensing and financial responsibility requirements under 46 CFR Part 510 thus provide that NVOCCs should (1) possess a minimum three years of experience in ocean transportation intermediary activities as well as the necessary character to render ocean transportation intermediary services, and (2) obtain

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<sup>14</sup> 46 U.S.C. § 40901(a).

and file with the Commission a valid bond, proof of insurance, or other surety.<sup>15</sup> The fair and thorough administrative process of determining the qualification of NVOCCs has helped the Commission to regulate the ocean transportation industry properly. Moreover, this is not merely a sound regulatory principle; it is also a statutory mandate for the Commission imposed under the Shipping Act and OSRA.

As noted, the Commission's proposal, as published, differentiates between a "licensed" OTI and a "registered" OTI. It is OWL's understanding that most licensed OTIs are U.S.-based companies (as the governing statute requires that all U.S.-based entities engaged in regulated ocean transportation activities be licensed by the FMC); foreign-based NVOCCs are only required to register with the FMC (as well as publish a tariff and maintain the required surety amounts). Hence, the proposed exemption would, practically speaking, apply largely to U.S.-based and licensed NVOCCs. OWL does not believe that this demarcation between licensed and registered NVOCCs should be revised when the final rule is published later this year. OWL maintains that the licensing process by which the FMC conducts a charter and fitness examination of all would-be NVOCCs stands in stark contract to the mere registration of foreign-based NVOCCs.

Hence, by undergoing the licensing process, the FMC has a fuller understanding of the regulated NVOCC – from corporate ownership and structure to individual company officers and board members. None of this information is available to the FMC for foreign-based and registered NVOCCs. Importantly, FMC rules do not prohibit a foreign-based NVOCC from obtaining a license from the agency; in fact, during the OSRA rulemaking process, the FMC focused on this issue, noting that the licensing

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<sup>15</sup> 46 C.F.R. § 515.11(a).

option is available to foreign-based NVOCCs. OWL believes that the proposed tariff exemption is a worthy factor for foreign-based NVOCCs to consider when they forgo obtaining a license from the Commission.

In short, we do not support extending the tariff publishing exemption to those NVOCCs that are merely registered with the FMC.

The Commission's proposed rule is also reinforced by its prior rulings. The Commission has correctly noted the "remedial purposes" of the Shipping Act, emphasizing that Congress intended to address "complaints concerning NVOCC practices" by protecting the shipping public from "unqualified" or "unscrupulous" service providers.<sup>16</sup> Limiting the exemption to licensed NVOCCs, as proposed by the Commission, promotes the "spirit and basic policy" behind Section 19 of the Shipping Act.<sup>17</sup>

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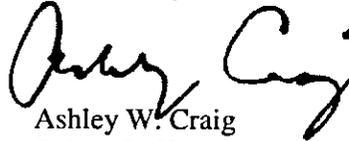
<sup>16</sup> *In re Lawfulness of Unlicensed Persons Acting as Agents for Licensed Ocean Transportation Intermediaries*, No. 06-08, 31 S.R.R. 185 (2008) (citing H.R. REP. No. 101-785 (1990); 136 CONG. REC. E2211 (1990); S. REP. No. 105-61, at 31-32 (1997)), *rev'd on other grounds, Landstar Exp. America v. Fed. Mar. Comm'n*, 569 F. 3d 493 (D.C. Cir. 2009).

<sup>17</sup> *Id.* (internal quotation marks omitted).

**III. Conclusion**

The Commission has the authority to exempt NVOCCs meeting certain criteria from certain requirements of the Shipping Act. The proposed rule will promote the congressional goals of enhancing competition and the growth of U.S. ocean transportation industry by removing unnecessary regulatory burdens on NVOCCs.

Respectfully Submitted,



Ashley W. Craig  
Robert L. Hart  
Seung-Hyun Ryu

VENABLE LLP  
Counsel to  
Ocean World Lines, Inc.