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October 20, 2005

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VIA E-MAIL

Mr. Bryant L. VanBrakle
Secretary
Federal Maritime Commission
800 N. Capitol Street, N.W.
Room 1046
Washington, D.C. 20036

Re: FMC Docket No. 05-06: Notice of Inquiry regarding Non-Vessel-Operating
Common Carrier Service Arrangements

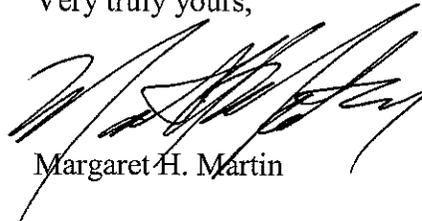
Dear Mr. VanBrakle:

We enclose Joint Comments in response to the Notice of Inquiry regarding Non-Vessel-Operating Common Carrier Service Arrangements. The Joint Comments are filed on behalf of the following:

Agriculture Ocean Transportation Coalition;
FedEx Trade Networks Transport & Brokerage, Inc.;
The National Industrial Transportation League;
North Atlantic Alliance Association, Inc.;
Transportation Intermediaries Association; and
United Parcel Service, Inc.

We ask that the Joint Comments be filed in Docket 05-06 and that you acknowledge receipt by return e-mail. Please do not hesitate to contact me with any questions.

Very truly yours,



Margaret H. Martin

Enclosure

**BEFORE THE
FEDERAL MARITIME COMMISSION
Washington, D.C**

Docket No. 05-06

**JOINT COMMENTS RESPONDING TO NOTICE OF INQUIRY:
NON-VESSEL-OPERATING COMMON CARRIER SERVICE ARRANGEMENTS**

Submitted By

**THE NATIONAL INDUSTRIAL
TRANSPORTATION LEAGUE
UNITED PARCEL SERVICE, INC.
FEDEX TRADE NETWORKS TRANSPORT
& BROKERAGE, INC.**

**TRANSPORTATION
INTERMEDIARIES ASSOCIATION
NORTH ATLANTIC ALLIANCE
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Dated: October 20, 2005

**JOINT COMMENTS RESPONDING TO NOTICE OF INQUIRY:
NON-VESSEL-OPERATING COMMON CARRIER SERVICE ARRANGEMENTS**

These Joint Comments respond to specific questions raised by the Federal Maritime Commission in its Notice of Inquiry (Docket No. 05-06) on permitting confidential service arrangements to be offered jointly by unaffiliated non-vessel-operating common carriers. The companies and organizations joining in these Comments are or are comprised of non-vessel-operating common carriers (NVOCCs) or their shipper customers.

Most of the companies and organizations represented here joined last fall to file Joint Comments supporting the Commission's final rule exempting NVOCCs from certain tariff requirements of the Shipping Act. We joined again in August to support adoption of the proposed amendment (Docket No. 05-05) to that rule that would allow NVOCCs when acting as shippers to enter into confidential service arrangements with other NVOCCs acting as carriers. Once more, we come together to express our support for allowing unaffiliated NVOCCs jointly to offer NVOCC Service Arrangements (NSAs) to shippers. In the course of responding to the questions posed, we offer our views that these jointly offered NSAs present the potential for flexible and efficient contracting vehicles that, in the context of legitimate joint undertakings that are fully subject to antitrust scrutiny, provide efficient, procompetitive approaches to moving cargo.

Much of the discussion surrounding the proposal of the initial NSA rule last year centered on the desirability of according to NVOCCs some of the flexibility and prospects for confidentiality that are allowed vessel owners when they enter into service contracts. Finding not only that it would not impede competition or be detrimental to commerce, but also that it would, in fact, enhance competition, the FMC adopted the rule. 69 Fed. Reg. 75,850 (Dec. 20, 2004). However, in defining the agreements authorized, the Commission excepted two types of

contracts: those involving NVOCCs acting as shippers and those involving multiple-NVOCCs acting as carriers. In a later amendment to the original NSA rule, FMC allowed NVOCCs to act as shipper parties to NSAs. 70 Fed. Reg. 56,577 (Sep. 28, 2005). For similar reasons, as discussed below, FMC should further amend the NSA rule, permitting NSAs that are jointly offered by NVOCCs acting as the carrier parties.

RESPONSES TO QUESTIONS

1. In what manner could two or more unaffiliated NVOCCs jointly offer NSAs? Would two or more NVOCCs use a single document to offer their services as carriers to other NVOCCs acting as shippers? Would two or more NVOCCs offer identical services or rates in separately-filed NSAs? Are there other possibilities?

It is important to note, at the outset, that unaffiliated NVOCCs already work together in various ways, including co-loading and agency relationships. However, it is our belief that permitting direct cooperation among NVOCCs via joint offering of NSAs is more efficient and potentially more transparent than the current arrangements.

There are myriad possibilities for joint offering of NSAs, and there are a variety of purposes for which NVOCCs might want to offer NSAs jointly. Two NVOCCs may want to expand their reach into previously unserved geographic markets through a contractual joint venture. An NVOCC with a predominantly Pacific clientele may want to engage in a limited joint venture with a predominantly Atlantic NVOCC to service a particular customer. Multiple NVOCCs may want to pool their capacity to offer more frequent sailing times. Certain niche NVOCCs may want to join together to offer more comprehensive services to a certain sector. There are certainly other strategic business interests and market expansion opportunities that will only become apparent once the jointly offered NSA becomes a feasible alternative. The most important interest that will be served, however, is the shipper's desire for a seamless, well-integrated, door-to-door logistics product.

With that customer demand in mind, the efficiencies and procompetitive effects that will be achieved by joint confidential contracting authority become more apparent. In particular, it is important to examine ocean shipping as a component of the larger transportation picture; for multimodal service to work at its best, each segment of transportation must flow seamlessly into the next. Many of the original petitioners promoting confidential contracting authority discussed the importance to shippers of door-to-door – versus port-to-port – integrated logistics management and, consequently, the importance of confidential contracting authority to NVOCCs. As one original petition noted,

With [confidential contracting] authority, UPS would be able to satisfy growing shipper demand to offer a **single confidential agreement** covering all aspects of UPS's global transportation and supply chain management services. In a single comprehensive contract, UPS could provide unique, customized service packages to each shipper, charging rates appropriate to the specific needs and traffic flow of the shipper.

See FMC Petition No. P3-03, Petition of United Parcel Service, Inc. for Exemption Pursuant to Section 16 of the Shipping Act of 1984 to Permit Negotiation, Entry and Performance of Service Contracts at 7 (emphasis added). Other NVOCCs similarly supported having confidential contracting authority for similar reasons.

In many of the factual scenarios above, seamless, integrated, door-to-door service necessarily entails the cooperation of more than one NVOCC. For example, a manufacturer may want to execute a single confidential contract for all inbound shipments to both the east and the west coasts, one that encompasses, among other things, ground, ocean, and air transportation. Clearly, a Pacific-oriented NVOCC could under current regulatory parameters co-load or otherwise cooperate with an Atlantic-oriented counterpart to accomplish that particular manufacturer's desired movement. However, it may be much more efficient for the two NVOCCs – and, most important, more efficient and more cost-effective for the shipper – if the

two NVOCCs could enter into a cooperation agreement with one another, and then offer, together, an NSA to the shipper as part of a package of services also jointly offered to the shipper.

Without the ability to offer a joint NSA to shippers as an integral part of a more comprehensive integrated logistics product, NVOCC carriers without an affiliated global infrastructure cannot as easily satisfy shipper demands with a “single confidential agreement covering all aspects of . . . global transportation and supply chain management services.” To reiterate, NVOCCs currently can and do cooperate via other, more unwieldy legal mechanisms, to accomplish the same goal; however, the shippers’ goals would be more efficiently met if NVOCCs were permitted to directly and jointly offer confidential contracts to their customers.

NVOCCs participating in a joint NSA would probably file a single document with FMC, rather than file separate NSAs with identical terms. However, there could be other circumstances where NVOCCs could file separate NSAs, each cross-referencing the other; for example, two NVOCCs could jointly offer end-to-end services, with different service features, possibly but not necessarily with a common minimum quantity commitment (MQC), and with different rates and surcharges on each trade segment.

2. How would rates and defined service levels for such jointly offered NSAs be determined?

Rates and service levels would be determined in the course of the negotiation of the arrangement between the two (or more) NVOCCs and the customer(s). Ultimately, rates would be determined by market forces. Further, NVOCCs are most likely to collaborate precisely where there is a shipper demand for the collaboration; therefore, any rates and service features offered would generally be in response to that shipper demand.

3. Would unaffiliated NVOCCs jointly offering NSAs keep the terms of such NSAs confidential from non-participating NVOCCs? From other shippers (including NVOCCs)?

The primary purpose of requesting joint NSA authority is to keep certain rate/volume/service tradeoffs confidential from competitors. Generally, to promote competition, those terms not required to be published as part of the Essential Terms should be kept confidential upon the agreement of the parties.

4. How would such an exemption meet the statutory requirements of section 16 of the Shipping Act of 1984?

Section 16 of the Shipping Act states that the Commission may make an exemption from a requirement of the Shipping Act if the Commission finds that the exemption will not (1) “result in substantial reduction in competition” or (2) “be detrimental to commerce.”

The original petitions promoting confidential contracting authority for NVOCCs noted the ways in which that authority would meet the Section 16 criteria. FMC further described the contours of each criterion in its various responses to the petitions and comments submitted in the NVOCC proceedings. These arguments, the ways in which these arguments continue to be applicable in the jointly offered NSA context, and the reasons why NSAs in the multiple-NVOCC context are mere continuations of the analysis already accepted by the FMC are discussed below. This section also includes a brief discussion of antitrust law, to address the Commission’s stated concerns about multiple NVOCCs working together as carriers.

A. Criterion 1: Substantial Reduction in Competition

The petitioners and the commenters who initially requested confidential contracting authority made various arguments demonstrating why this authority would not result in a substantial reduction in competition. As might be expected, many of the petitions repeated similar points. To summarize those arguments, confidential contracting authority would:

- ⇒ Result in increased competition between NVOCCs and VOCCs because NVOCCs could compete more openly and fairly with VOCCs, who already had confidential contracting authority, on a level playing field.
- ⇒ Promote competition among shippers because shippers could negotiate private deals and prevent disclosure of transportation costs to their competitors.
- ⇒ Provide better pricing opportunities for shippers because
 - NVOCCs, with cargo volume commitments from shippers, would be able to negotiate more favorable rates with VOCCs, resulting in more competitive pricing and more advantageous service packages for shippers of all sizes.
 - NVOCCs could provide specialized service features with tailored pricing, including all-inclusive service, to shippers – a feature that shippers want and that, under a tariff system, is nearly impossible to provide.
- ⇒ Help NVOCCs meet shipper demands because
 - shippers have, without fail, consistently affirmed the benefits of confidential service contracts to them and commerce in general.
 - shippers want integrated transportation packages, covering all of their logistics needs, at rates tailored to their individualized requirements.

The Commission generally agreed with these reasons advanced by the petitioners. In further analyzing the “substantial reduction in competition” criterion, the Commission looked to three contexts: competition among NVOCCs, competition between NVOCCs and VOCCs, and competition among shippers. For the purposes of the jointly offered NSA, competition among NVOCCs is the most relevant analysis, although the other two contexts are addressed below.

The Commission’s concern about competition among NVOCCs was the genesis of the limitation placed on multiple-NVOCC-as-carrier NSAs. As was stated in the NOPR,

The proposed regulation specifically does not permit two or more NVOCCs to offer NSAs in concert, as there is reason for concern that doing so may cause substantial reduction in competition due to the inability of either the Department of Justice under the antitrust laws or the Commission under the Shipping Act to oversee such concerted behavior.

69 Fed. Reg. 63,981, 63,987 (Nov. 3, 2004). The Commission went on to discuss the reasons why it believed that both FMC and DOJ oversight of joint NSA activity would be limited. First,

FMC noted the status of the *Tucor*¹ and *Gosselin*² cases and the possible judicial interpretation that antitrust immunity would apply to NSAs executed under a Section 16 exemption, thereby removing any joint NVOCC arrangement from the oversight of the Department of Justice. Second, FMC stated its belief that Section 10(c) of the Shipping Act may not apply to NVOCCs, which would remove any joint NVOCC arrangement from FMC's enforcement oversight. The Commission concluded that "Therefore, allowing two or more unrelated NVOCCs to offer NSAs in concert could present significant impediments to competition, as NVOCCs would be permitted to collude without the oversight of the Commission or the Department of Justice." *Id.* at 63,986.

In the NSA Final Rule, the Commission further described its analytical position vis-à-vis multiple-NVOCC NSAs. The Commission stated that "by agreeing to jointly offer an NSA to a shipper, [NVOCCs] would collectively fix a price for their services, *i.e.*, a horizontal price-fixing agreement," 69 Fed. Reg. 75,850, 75,852 (Dec. 29, 2004), and that joint NVOCC NSAs "may include activities considered *per se* anticompetitive under the Sherman Act," *id.* at 75,852. Further, in discussing the possible limitations of its own Section 10(c) enforcement authority in the NVOCC area, FMC stated

There is nothing in the text of the Shipping Act to prevent the concurrent jurisdiction of the Commission under section 10(c) of the Shipping Act and the agencies responsible for enforcement of the general antitrust laws over NSAs. However, if NSA activities are judged immune from the antitrust laws under section 7(a)(2) of the Shipping Act, there appears to be no prohibition in section 10(c) specifically applicable to NSAs to address price-fixing or market division, activities which are almost universally accepted as the most egregious types of anticompetitive behavior. Therefore, even if the Commission were to find that the provisions of section 10(c) applied generally to NVOCC collective activity, because a

¹ *United States v. Tucor*, 189 F.3d 834 (9th Cir. 1999).

² *United States v. Gosselin World Wide Moving, N.V.*, 411 F.3d. 502 (4th Cir. 2005).

court might find NVOCCs immune from the antitrust statutes, there may be no regulation of such patently anticompetitive arrangements if they are undertaken through an NSA.

69 Fed. Reg. 75,850, 75,851-52 (Dec. 29, 2004).

Therefore, as is evidenced by FMC's prior statements in the various NSA proceedings, the Commission was very concerned about whether any agency would have the authority to investigate and prosecute an antitrust violation embodied in an NSA: DOJ could potentially be precluded from doing so by the inadvertent attachment of antitrust immunity under Section 7 of the Shipping Act, and the FMC Bureau of Enforcement could potentially be precluded from doing so by limitations inherent in Section 10(c) of the Shipping Act. Perhaps more important to the current context, however, is the question whether the collaboration of multiple NVOCCs in offering NSAs would result in a *per se* antitrust violation. On both of these issues, but most particularly on the second, we respectfully disagree with certain assumptions made in the record of the prior NSA proceedings.

1. Antitrust Enforcement Authority

First, we observe that the Commission has broad authority to address anticompetitive activities under Section 10. For example, under Section 10(c), the FMC may pursue enforcement action against common carriers (including NVOCCs) that take any concerted action resulting in an unreasonable refusal to deal. Furthermore, as was noted by the Commission in its NOPR and its Final Rule permitting NVOCCs to participate in NSAs as shippers, the Fourth Circuit's decision in *Gosselin* has largely ameliorated any concerns regarding antitrust immunity attaching to NVOCC activity via Section 7 of the Shipping Act – therefore leaving any anticompetitive activity by NVOCCs open to investigation and enforcement by the Department of Justice. 70 Fed. Reg. 45,626, 45,627 (Aug. 8, 2005); 70 Fed. Reg. 56,577, 56,579 (Sep. 28, 2005). The FMC's primary concern regarding multiple NVOCCs acting as carriers – the lack of oversight

that would occur if the NVOCCs received antitrust immunity via Section 7 of the Shipping Act – should no longer be a concern.

2. *Per Se* or “Rule of Reason” Antitrust Analysis

Second, joint NVOCC activities do not automatically constitute horizontal price-fixing or market division; nor are those activities *per se* anticompetitive.

In April 2000, the Federal Trade Commission and the Department of Justice issued Antitrust Guidelines for Collaborations among Competitors (“Guidelines”).³ In these Guidelines, the Agencies set out the general criteria that they will use to evaluate competitor agreements for anticompetitive effect and potential antitrust violation.

From its introductory paragraphs, the Guidelines recognize that collaboration between competitors often occurs and is, at times, highly desirable:

In order to compete in modern markets, competitors sometimes need to collaborate. Competitive forces are driving firms toward complex collaborations to achieve goals such as expanding into foreign markets, funding expensive innovation efforts, and lowering production and other costs. Such collaborations often are not only benign but procompetitive. . . . Nevertheless, a perception that antitrust laws are skeptical about agreements among actual or potential competitors may deter the development of procompetitive collaborations.

Guidelines at 1. The Guidelines go on to explain the difference between competitor collaborations that are challenged as *per se* illegal⁴ versus those collaborations analyzed under a rule of reason. “Agreements of a type that always or almost always tend to raise price or to reduce output are *per se* illegal . . . including agreements to fix prices or output, rig bids, or share or divide markets by allocating customers, suppliers, territories, or lines of commerce.” *Id.* at 3. However, not every agreement that includes a pricing element is an agreement to “fix prices.” As

³ The Guidelines are available at <http://www.ftc.gov/os/2000/04/ftcdojguidelines.pdf>.

⁴ Note that these *per se* violations may result in criminal penalties, not merely civil liability, under the Sherman Act, and may also subject the violator to private treble-damage lawsuits.

the Guidelines state, agreements examined under the rule of reason “include agreements of a type that otherwise might be considered per se illegal, provided they are reasonably related to, and reasonably necessary to achieve procompetitive benefit from, an efficiency-enhancing integration of economic activity.” *Id.* at 4. Even for agreements containing a pricing element, “the nature of the agreement and the absence of market power together may demonstrate the absence of anticompetitive harm.” *Id.*

There may be many elements of joint NVOCC operations that go beyond pricing: joint investment in technology to allow electronic management and transmission of operational data, joint marketing and advertising, joint business planning, joint purchasing, and shared risk. As is noted in the Guidelines, the antitrust laws have long allowed joint pricing arrangements that are ancillary to legitimate joint undertakings that are efficiency-enhancing or introduce new services or products that would otherwise be unavailable.

Ultimately, both the FTC and DOJ recognize that

consumers may benefit from competitor collaborations in a variety of ways. For example, a competitor collaboration may enable participants to offer goods or services that are cheaper, more valuable to consumers, or brought to market faster than would be possible absent the collaboration. A collaboration may allow its participants to better use existing assets, or may provide incentives for them to make output-enhancing investments that would not occur absent the collaboration. The potential efficiencies from competitor collaborations may be achieved through a variety of contractual arrangements including joint ventures, trade or professional associations, licensing arrangements, or strategic alliances.

Id. at 6.

At its core, antitrust analysis is a simple equation: procompetitive benefit minus anticompetitive harm equals overall competitive effect. *See* Guidelines at 3. The overall competitive effect – and whether that effect is positive or negative – is the key to the antitrust

analysis. For NVOCCs, we respectfully propose that, consistent with the Guidelines, FMC should focus not only on the potential anticompetitive harm, but also on the significant procompetitive benefits, including expansion of markets and better use of existing assets. Only the consideration of both will result in an accurate competitive assessment. The mere inclusion of a pricing element in an NSA would not render that agreement either horizontal price-fixing or a *per se* violation.

In the NVOCC context, two (or more) NVOCCs may determine that certain markets or certain customers would be better served if the two (or more) NVOCCs pooled their resources. These competitors could enter into a joint venture agreement or strategic alliance that includes joint information technology development and deployment, mutual marketing, asset sharing, risk sharing, or other mutually beneficial terms. As part of the joint venture or alliance, the two (or more) NVOCCs could, together, negotiate NSAs with various shipper customers. That jointly offered NSA would, of course, contain certain pricing elements. The rate provisions in the NSA, however, would reflect only a small portion of the rest of the efficiency-enhancing package that the cooperation brings to the negotiating table – for example, that package might include a more efficient integrated end-to-end, or door-to-door, logistics capability than either NVOCC could provide on its own. Although pricing would be a part of any jointly offered NSA, the totality of the underlying joint venture would present procompetitive benefits so significant that the overall competitive effect of the jointly offered NSA would be positive.

Another core concept in antitrust analysis is market power. In contrast to the VOCC marketplace, where few participants control broad swaths of market space, the NVOCC marketplace is both diffuse and fragmented, with over 3000 currently operating. Further, even

large NVOCCs generate annual volumes of approximately 300,000 TEUs⁵ – a very small percentage of the overall traffic.⁶ The high number of operating NVOCCs, particularly in combination with the low percentage of total trade volume handled by NVOCCs, demonstrates NVOCCs’ inability to exercise market power, regardless of any pricing element in the cooperation agreement.

In conclusion, it appears that the first Section 16 criterion would be met – allowing jointly offered NSAs would not result in a substantial reduction in competition. Indeed, allowing joint NSAs may enhance competition to an even greater degree than the currently permissible NSAs. Several commenters to the original NSA NOPR noted that the NSA exemption could harm competition between large NVOCCs and small NVOCCs, as the larger NVOCCs could more readily afford the administrative burdens associated with drafting, filing, and enforcing NSAs. 69 Fed. Reg. 63,981, 63,985 (Nov. 3, 2004). A jointly offered NSA would allow smaller NVOCCs to consolidate those administrative burdens, therefore providing more efficiencies to the marketplace. Further, the ability to offer a joint NSA may permit smaller NVOCCs to cooperate to offer supply chain management services on a geographic scale that was previously unattainable; as was noted in the record supporting the original NSA rule, shippers are demanding integrated logistics services from their carriers. Thus, allowing jointly offered NSAs would permit smaller NVOCCs to compete more fully under the NSA rule.

B. Criterion 2: Detrimental to Commerce

The various petitions proposing confidential contracting authority for NVOCCs also noted ways in which the authority would not be detrimental to commerce. Recognizing the

⁵ FMC Petition No. P3-03, Petition of United Parcel Service, Inc. for Exemption Pursuant to Section 16 of the Shipping Act of 1984 to Permit Negotiation, Entry and Performance of Service Contracts at 13.

⁶ For calendar year 2003, the total U.S. waterborne foreign trade was 21,289,000 TEUs. MARAD statistics, *available at* http://www.marad.dot.gov/MARAD_statistics/index.html.

confusion that might result from a possible conflation of the analyses under the Section 16 criteria, the Commission set forth, in its initial Notice of Proposed Rulemaking on the NSA issue, its view of the scope of the “detriment to commerce” criterion. The Commission stated:

‘detriment to commerce’ must mean ‘something harmful’ other than one of the other criteria of the exemption provision. . . . Interpreting the two criteria of section 16 identically would be contrary to the well-accepted canon of construction which requires that meaning be given to every provision of a statute; if ‘detriment to commerce’ had the same meaning as ‘no substantial reduction in competition,’ it would be mere surplusage.

69 Fed. Reg. 63,981, 63,987 (Nov. 3, 2004). In short, the FMC interpreted “detriment to commerce” to mean *harmful to the shipping public in ways not implicating competition*. *Id.* To ensure that the NSA rule would not result in a detriment to commerce, the FMC instituted certain conditions so that the “important shipper protections provided for in the Shipping Act [that] ensure against detriment to commerce” would also apply to carriage under an NSA. *Id.* Therefore, NVOCCs using NSAs must continue to publish tariffs. Under the FMC’s reasoning, removal of the tariff publication requirement could result in there being no “applicable rate,” thus undercutting the filed rate doctrine and other principles that are protective of shippers, and ultimately resulting in a harm to shippers/detriment to commerce. *Id.* The FMC additionally required that only NVOCCs meeting all applicable licensing and bonding requirements of the Shipping Act would be eligible to participate in NSAs. *Id.* at 63,988. In summary, the Commission stated:

Therefore, to ensure the exemption does not result in any detriment to commerce, the proposed rule requires NVOCCs to file their NSAs electronically with the Commission; to retain the original (in the same manner that service contracts offered by VOCCs are now filed) and prohibits noncompliant NVOCCs from offering NSAs. These conditions will enable the Commission to perform audits of these arrangements to ensure against malpractices by which *shippers may be harmed*.

Id. at 63,988 (emphasis added).

The Commission reiterated this approach when it promulgated the amendment allowing NVOCCs to participate as shipper parties to NSAs, stating

We find that the Final Rule will not be detrimental to commerce. . . . Neither the original rulemaking nor this Final Rule eliminates the requirement that common carriers publish tariffs and adhere to rates that are either published in tariffs or filed in NSAs. Principles of common carriage inherent in the Shipping Act are preserved by the continuing application of all of the prohibitions contained in section 10 of the Shipping Act, 46 U.S.C. app. 1709, e.g., against retaliation, deferred rebates, unreasonable refusals to deal, etc. Accordingly, the protections provided to the shipping public will be preserved and detriment to commerce will not occur.

70 Fed. Reg. 56,577, 56,579 (Sep. 28, 2005).

The Commission put into place the safeguards it considered necessary to protect against a detriment to commerce when it initially crafted the NSA rule. It found that the application of those safeguards when NVOCCs act as shipper parties to NSAs would be sufficient to protect against a detriment to commerce in that context. Those precise protective conditions would continue to apply, to the same extent, to any NSA offered jointly. Further, joint NSAs would be filed with the FMC, just as any other NSA must be filed. This filing would give the FMC the same ability to audit the arrangements and ensure against any unlawful practices by which shippers may be harmed. The tariff publication, bonding and licensing, and NSA filing requirements – and the Commission’s authority to enforce those requirements – would, therefore, protect the shipping public from suffering harm under the “detriment to commerce” criterion of Section 16, just as those same requirements fulfill that criterion for all other NSAs.

C. Section 16 Analysis: Conclusion

Allowing joint NSAs would cause neither a substantial reduction in competition nor a detriment to commerce. Competitor cooperation, even competitor cooperation that includes joint

pricing, is not *per se* illegal under the antitrust laws. Further, both the FMC's Bureau of Enforcement and the Department of Justice Antitrust Division would have the power to investigate and prosecute anticompetitive activity. There is no reason to expect that the same antitrust laws that allow and, in fact, encourage novelty, efficiency-enhancement, and competition in other industries while they prevent or punish anticompetitive behavior will be any less effective for joint NVOCC service arrangements in the ocean shipping market – allowing these joint NSAs would not result in a “substantial reduction in competition.” Finally, every safeguard that was put into place to protect against a detriment to commerce in the general NSA rule would continue to apply to any jointly offered NSA. In summary, every Section 16 concern that has been raised by the Commission has been either addressed by the courts or mitigated by safeguards instituted by FMC itself.

Would such an exemption cause a substantial reduction in:

A. Competition among NVOCCs;

Please see the discussion above at page 5 (answer 4A). There would be no substantial reduction in competition among NVOCCs.

B. Competition between NVOCCS and vessel-operating common carriers (VOCCs);

FMC also addressed competition between VOCCs and NVOCCs in its analysis of the original NSA rule, and concluded that NVOCCs must continue to publish tariffs so that the administrative burdens of VOCCs and NVOCCs remain similar, thus maintaining a level playing field. 69 Fed. Reg. 63,981, 63,986 (Nov. 3, 2004). Adding the ability for multiple NVOCCs to offer a joint NSA would not change the administrative filing requirements for each NVOCC – each would continue to publish tariffs. Therefore, the FMC's primary concern regarding VOCC-

NVOCC competition, as expressed during the previous NSA proceedings, would continue to be met.

There are some significant remaining differences between NVOCCs and VOCCs, however, that joint NSAs would ameliorate to a certain degree. VOCCs operate in this market space with the advantage of antitrust immunity; NVOCCs, even those operating jointly, neither receive nor want to receive antitrust immunity for their NSA operations. With that antitrust immunity, VOCCs are already able to offer joint confidential contracts to their customers, pursuant to Section 5 filed agreements. Allowing NVOCCs a similar joint contracting mechanism would further level the playing field and enhance competition between VOCCs and NVOCCs – although NVOCCs would still be subject to the antitrust laws, while VOCCs would not.

C. Competition among beneficial cargo owners; and other competition.

In its discussion of competition among shippers during the earlier NSA proceedings, FMC noted that the essential terms of NSAs should be published so that shippers could continue to gather information on the marketplace. 69 Fed. Reg. 63,981, 63,987 (Nov. 3, 2004). This publication of essential terms would continue for jointly offered NSAs, thus promoting competition among beneficial cargo owners (BCOs). Further, it is unlikely that such an exemption would affect any market other than the market for transoceanic shipment space; indeed, it is hard to imagine that a change in the ocean shipping market could affect the competition between Widget Co. A and Widget Co. B. Note, also, that the representatives of various shipper interests are participants in this proceeding and are eager to see this authority granted.

5. Would such an exemption cause detriment to commerce by any general or specific adverse economic impacts on the carriage of cargo in the U.S.-foreign trade or U.S. commerce generally?

Please see the discussion above at page 12 (answer 4B); there would be no detriment to commerce and no adverse economic impacts in any market.

6. What might be the benefits or harm to beneficial cargo owners of jointly-offered NSAs?

Generally, beneficial cargo owners would benefit from joint NSAs because they would have more service options. In some instances, they may choose to ship their goods under a single NVOCC's NSA; in other circumstances, they may choose to ship their goods under a jointly offered NSA. Joint NSAs provide the potential for NVOCCs to join together to offer shippers a wider range of transportation and logistics services, across one or more trade lanes, in a single efficient package. In order to maximize efficiencies and reduce administrative costs, shippers of all sizes are increasingly utilizing carriers who can provide fully integrated door-to-door transportation services that can be bundled into a sole contract, rather than contracting with multiple carriers in separate documents which, in turn, requires management of multiple contractual relationships. It is entirely plausible that NVOCCs who concentrate their services in different trade lanes or markets or who specialize in different aspects of intermodal point-to-point logistics services may be able to jointly provide shippers a more cost-effective and efficient transportation package of services than could be offered individually (e.g. one NVOCC who specializes in reefer shipments and has access to particular equipment may join with another NVOCC who has access to more cost-effective ocean and/or trucking rates to offer their customers attractive rates and services under a sole NSA). Further, instead of spreading cargo volumes among multiple NVOCCs (or VOCCs) who offer particular services under individual contracts, in some cases, a shipper may prefer to maximize the volume shipped under a single

NSA that includes service offerings from more than one NVOCC. Accordingly, joint NSAs will generally be offered in direct response to shipper demands for better rates and service features.

Moreover, given the growing trend of VOCC consolidations, permitting NVOCCs to join in NSAs to offer expanded services to shippers could provide a competitive and potentially more cost-effective alternative to the services offered by VOCCs, particularly for small and medium sized shippers who rely more heavily on NVOCC services. As was stated earlier, in contrast to the VOCC marketplace, the NVOCC marketplace is both diffuse and fragmented, presenting numerous opportunities for the shipper to negotiate.

There are no obvious or inherent harms. However, as previously noted, if NVOCCs joining in an NSA attempted to engage in unlawful activities, both FMC and DOJ could take appropriate enforcement or prosecutorial action to address such unlawful conduct. Also, if market conditions in the future result in an inadequate number of NVOCC suppliers of ocean transportation services or if joint NSAs create problems or concerns which presently are not anticipated, then the FMC could take action to revoke any exemption authorizing joint NSA activities by NVOCCs.

Finally, this measure is supported by representatives of shipper and BCO interests, indicating that the benefit to shippers and beneficial cargo owners outweighs any potential for harm. If any BCO does not like the terms offered in a joint NSA, that BCO can negotiate for better terms or quite easily turn to an alternative carrier.

7. Do any issues with regard to NVOCC financial responsibility arise stemming from jointly-offered NSAs? For example, should a joint bond or higher individual bond be required for NVOCCs that jointly offer NSAs? If so, how should the amount be determined?

Because each NVOCC that is a party to a multiple NSA would have already met the applicable individual licensing requirements for NVOCCs that are set forth in the FMC

regulations, including the individual financial responsibility requirements, no further financial responsibility measures would be necessary. Some NVOCCs currently handle hundreds of thousands of containerloads of cargo under a single \$75,000 bond. However, if the shipper decides that additional security or insurance is needed, this is a matter that could be negotiated into the terms of the NSA.

8. Would there likely be any specific benefits or harm to small NVOCCs if jointly offered NSAs were permitted?

As noted above at page 12, smaller NVOCCs would benefit from the increased flexibility and the expansion of competition into currently less-competitive markets that would result from the offering of multiple-NVOCC NSAs. Further, the ability to offer a joint NSA may allow smaller NVOCCs to engage more readily in door-to-door integrated logistics management for their shipper customers, a product for which there is high customer demand.

9. If jointly offered NSAs are allowed, should there be limits on the number (or combined market share) of the NVOCCs participating in a single joint NSA? If so, how should the relevant market be defined? Should the Commission or the parties determine the market share? Should NVOCCs be required to obtain Department of Justice business review letters prior to offering jointly offered NSAs?

Parties to jointly offered NSAs do not have the protection of antitrust immunity. Therefore, any agreement raising antitrust concerns – including total market share of the participating NVOCCs (to which the number of NVOCCs participating is irrelevant) – would be subject to prosecution under the antitrust laws. Because the only concerns raised by this question are concerns that are addressed via antitrust enforcement, there is no need to determine in advance the types of arrangement that might violate the antitrust laws. The Department of Justice has provided guidelines for joint ventures that can be used by the NVOCCs or by the FMC to determine whether any particular proposed arrangement is likely to be lawful or not.

Prudent NVOCCs who are concerned that their contemplated arrangements might violate antitrust laws may, for business reasons and on their own initiative, request business review letters from the Department of Justice. However, it is not productive or necessary to require such a request for every proposed multiple NVOCC arrangement.

10. What would be the likely impact, if any, of joint NSAs on individual rates offered by the participating NVOCCs in the same trade? In other trades?

There is no reason to believe that increased competition in this market will not lead to the same result that has occurred across the economy when competition increases: higher output and lower prices.

11. Should the contract details which must be made publicly available (“essential terms”) be more extensive for jointly offered NSAs than for other NSAs? For example, should the Commission require that the identities of each of the NVOCC carrier parties to the jointly offered NSA be made public?

There is no need for the identities of each of the NVOCC carrier parties to the jointly offered NSA to be made public and no other item that appears to be a necessary addition to the essential terms. The essential terms of any NSA – jointly offered or not – should remain constant; this ensures that the playing field among NVOCCs, and between NVOCCs and VOCCs, remains level. If any problem arises that requires the public disclosure of the identities of the parties, as would happen in any litigation or public proceeding, then the Commission has access to those identities because the NSA has been filed with the Commission.

12. Are there any additional procedures (e.g. registration, reporting, monitoring, measuring) that should be considered to ensure that each jointly-offered NSA does not result in a substantial reduction in competition or detriment to commerce?

There is no need for the FMC to take pre-emptive steps in an attempt to ensure procompetitiveness. In fact, the existence of further procedural burdens on jointly offered NSAs would chill the competitive benefit that those NSAs would otherwise bring – the additional procedures themselves could be considered anticompetitive.

13. Should the Commission require some type of notification to the VOCC carrying the cargo moving under a jointly offered NSA? If so, describe what form such notification should take and when it should be required.

There appears to be no need for requiring notification.

14. How would bills of lading be issued for cargo moving under a joint NSA?

The issuance of bills of lading for cargo moving under a joint NSA would depend on the structure of the NSA. One can imagine, for example, a contractual joint venture where bills of lading for all outbound shipments are issued by one NVOCC and all bills of lading for inbound shipments are issued by the other NVOCC. One can also imagine a situation where the parties agree that each NVOCC will issue the bills of lading for all of the customers it brings in. The question of which party issues the bill of lading will ultimately be determined by the pragmatic, logistical, and business considerations that are negotiated between the participating NVOCCs and their customer(s). Indeed, this may depend on the terms of the trade financing being used by the shipper and consignee, or on letter of credit terms. The use of a negotiated NSA would give the shipper, working with the participating NVOCCs, the flexibility to shape the transportation documentation to the needs of its underlying commercial transaction.

15. Please describe any other matters that may be relevant to the Commission's consideration of this issue.

The FMC's concerns about allowing jointly offered NSAs seem to stem from a perceived threat of anticompetitive behavior, violative of the antitrust laws, that NVOCCs would undertake upon being granted the requested authority. The Joint Commenters do not believe that NSAs involving multiple NVOCCs are inherently anticompetitive. More to the point, we have full confidence in the capacity of the antitrust laws – which have effectively policed anticompetitive conduct in the marketplace for over a century – along with continued Commission oversight, to ensure that NVOCC cooperation does not have anticompetitive effects. Indeed, other

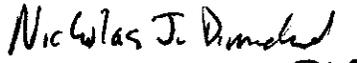
transportation intermediaries, such as truck brokers and domestic freight forwarders, are already granted some form of joint contracting authority under the Interstate Commerce Act. Provision of similar authority to NVOCCs would not only promote competition within the ocean shipping industry; it would also promote parity between various transportation sectors.

The FMC will continue to have oversight and enforcement authority over any NSA, including jointly offered NSAs. Additionally, antitrust strictures will apply against joint NVOCC activities if they are anticompetitive – and any violative agreements will be on file with the FMC, an instant repository of essential information for any enforcement action. Therefore, granting NVOCCs the ability to enter into service arrangements would provide a playing field that is still tilted toward vessel owners, who may enter into joint agreements that are immunized from antitrust challenge.

NVOCCs have no greater propensity than airlines or trucking firms – or automobile or beverage companies, for that matter – to commit antitrust violations. That is not to say that such violations do not occur; *Tucor* and *Gosselin* stand testament to the contrary. It is only to say that both the Bureau of Enforcement of the Federal Maritime Commission and the Antitrust Division of the U.S. Department of Justice, as well as private litigants, will be willing and able to step in to prevent or rectify such violations.

In summary, jointly offered NSAs would increase the efficiency of the NVOCC marketplace and enhance competition – ultimately resulting in more options and lower prices for shippers and beneficial cargo owners. We urge the FMC to consider adapting the NSA rule to accommodate jointly offered NSAs.

Respectfully submitted,


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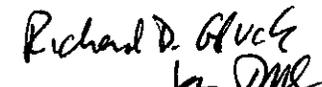
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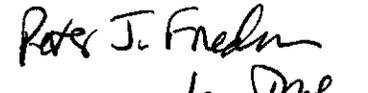

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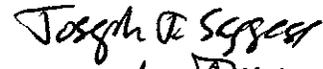
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