

Magdalene Grant

From: Secretary
Sent: Tuesday, September 30, 2008 2:20 PM
To: Karen Gregory; Magdalene Grant
Subject: FW: Petition P1-08 - National Customs Brokers and Forwarders Association of America, Inc. - Exemption from Rate Tariff Filing
Attachments: Petition P1-08 Response Cover Letter.doc; Petition P1-08 - Comments of Distribution-Publications, Inc. (DPI).doc

From: James E. Devine [mailto:jdevine@dpiusa.com]
Sent: Friday, September 26, 2008 10:52 AM
To: Secretary
Subject: FW: Petition P1-08 - National Customs Brokers and Forwarders Association of America, Inc. - Exemption from Rate Tariff Filing

Hello Karen,

Please accept the attached soft copies attached which correct several typos. Thanks!

Cheers!

J.Devine/DPI

Email: jdevine@dpiusa.com

tel/fax/web: 1-510-273-8933 / 1-510-273-8959 / www.dpiusa.com

From: James E. Devine
Sent: Thursday, September 25, 2008 5:12 PM
To: 'secretary@fmc.gov'
Subject: Petition P1-08 – National Customs Brokers and Forwarders Association of America, Inc. – Exemption from Rate Tariff Filing

September 25, 2008

Via Email: secretary@fmc.gov and FEDEX (tel: 202-523-5725)

Ms. Karen V. Gregory

Assistant Secretary

Federal Maritime Commission

800 North Capitol Street, N.W.

Washington, D.C. 20573-0001

Re: Petition P1-08 – National Customs Brokers and Forwarders Association of America, Inc. – Exemption from Rate Tariff Filing

Dear Ms. Gregory,

Enclosed are original and 15 copies of comments on the above referenced petition. A copy has also been sent to Petitioner's Counsel, Edward D. Greenberg, Esq.

Please see any issuances to me via email at jdevine@dpiusa.com

Sincerely,

James E. Devine

Distribution-Publications, Inc. (DPI)

180 Grand Ave., Ste 430

Oakland, CA 94612-3715 USA

tel/fax/web/email: 1-510-273-8933 / 1-510-273-8959 / www.dpiusa.com / jdevine@dpiusa.com

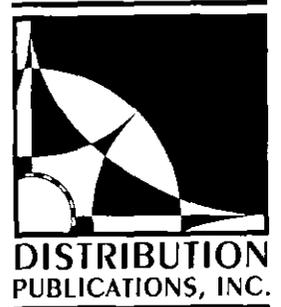
cc: Galand, Kharasch, Greenberg, Fellman & Swirsky, P.C.

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Via Email: secretary@fmc.gov and FEDEX (tel: 202-523-5725)

Ms. Karen V. Gregory
Assistant Secretary
Federal Maritime Commission
800 North Capitol Street, N.W.
Washington, D.C. 20573-0001

ORIGINAL



Re: Petition P1-08 – National Customs Brokers and Forwarders Association of America, Inc. –
Exemption from Rate Tariff Filing

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Enclosed are original and 15 copies of comments on the above referenced petition. A copy has also been sent to Petitioner's Counsel, Edward D. Greenberg, Esq.

Please send any issuances to me via email at jdevine@dpiusa.com

Sincerely,

James E. Devine
President
Distribution Publications, Inc.

cc: Galand, Kharasch, Greenberg, Fellman & Swirsky, P.C.

180 GRAND AVE., S.430
OAKLAND, CA 94612
TEL: 510-273-8933
FAX: 510-273-8959
INTERNET: dpiusa.com

INTRODUCTION

I am President of Distribution Publications, Inc. (DPI), a corporation based in Oakland, California, where I have worked since 1993. I have been a certified Federal Maritime Commission practitioner since 1995. Prior to joining DPI here in California, I worked for the Journal of Commerce, Seatrain Lines and Barber Steamship Agency in New York.

I have used ocean and intermodal freight tariffs almost every day of my working life for nearly thirty years; first, as a documentation clerk, later, in pricing and sales for an ocean carrier. During my time with the Journal of Commerce (1981-1993), I helped it develop an on-line database of all tariffs on file with the Commission and market this service to shippers and carriers. The JOC's Transax/Rates division was a leading FMC tariff publisher during this time. Most of my 15 years at DPI has focused on helping NVOCCs publish tariffs and write shipping contracts that meet their commercial needs and comply with FMC regulations.

DPI was established in 1975 as a publisher of ocean and motor carrier freight tariffs. Since 1984, we have focused on helping our clients understand and comply with the Shipping Act and FMC regulations. We have published tariffs for a wide range of ocean carriers, NVOCCs and marine terminal operators. Our late founder, Raymond D. Vinick, was a member of the Commission's Section 18 Study Advisory Committee on the Shipping Act of 1984. Our firm was an active participant in the process the Commission used to plan and implement the Automated Tariff Filing Information (ATFI) system (1991 -1994) and was a certified ATFI Batch Filer. In response to the Ocean Shipping Reform Act (OSRA) of 1998 and the Commission's regulations implementing OSRA, we developed proprietary database software and a website at www.dpiusa.com that we use to publish and maintain tariffs for our clients.

DPI currently publishes and maintains FMC tariffs for 895 NVOCCs, 38 VOCCs, 1 Conference, and 4 Marine Terminal Operators. As a consultant, DPI provides expert assistance with FMC tariffs, service contract regulations, and NVOCC service arrangements (NSAs). We also assist with the Commission's licensing and bonding requirements for Ocean Transportation Intermediaries (OTIs).

Thus, we have expertise in the subject matter of this petition and an interest in this proceeding.

PETITIONER'S REQUEST

On August 5, 2008 the National Customs Brokers and Forwarders Association of America (NCBFAA) filed a petition requesting a voluntary exemption for all licensed or registered Non-Vessel Operating Common Carriers (NVOCCs) from requirements of the Shipping Act of 1984 (SA 1984), as amended, to publish and adhere to rate tariffs. The NCBFAA seeks exemption from these requirements for rates that are individually negotiated with shipping customers. These rates would be “memorialized in writing” and would be available to the FMC for the purpose of conducting investigations. Petitioner requests the Commission approval on the grounds that tariff regulations are outdated and compliance with these regulations is costly and burdensome.

BACKGROUND

On October 15, 1998, after nearly four years of consideration by the US Congress, the Ocean Shipping Reform Act of 1998 (Senate Bill S.414, also known as "OSRA") was signed into law by President Clinton. OSRA amended the Shipping Act of 1984 and introduced important changes to ocean transportation regulations in the US, but it did not eliminate ocean tariffs. On the contrary, OSRA carefully amended the Shipping Act's tariff publication requirements in Section 3 (Definitions) and Section 8 (Tariffs). Furthermore, Section 10 (Prohibited Acts) and Section 13 (Penalties) of the Act specifically reference the tariff requirements.

Prior to the implementation of the OSRA regulations on May 1, 1999, all ocean common carriers regulated by the Commission, including NVOCCs, were required to transmit (file) their tariffs with the "ATFI" computer system using tariff formats which were exactly prescribed by FMC regulations. ATFI was operated from 1993 thru April 1999 by a federal contractor and was carefully monitored by the Commission. Prior to ATFI the Commission required carriers to submit paper tariffs to the Commission, which were maintained in hard copy and microfiche at considerable expense to the Commission.

Under the OSRA regulations, the Commission's tariff requirements became much more flexible, and far less costly to the Commission. All carriers, including NVOCCs, are required to publish accurate tariffs in automated tariff systems that are monitored by FMC Office of Tariffs. These systems must be open to the Commission and other federal agencies at no charge; however, carriers are not required to utilize specific systems hardware or software. Public access to tariffs via dial-up or internet connections is mandated, but carriers or agents operating such systems on behalf of carriers may assess a reasonable charge for access. These regulations do not impede carriers from developing and integrating tariff database systems and websites that meet their commercial requirements, provided these also satisfy the regulatory requirements.

Compliance with the tariff requirements is not voluntary. Section 10(b)(2)(a) of the Shipping Act explicitly prohibits carriers from providing service in the liner trade that "*is not in accordance with the rates, charges, classifications, rules, and practices contained in a tariff published or a service contract entered into under section 8 of this Act unless excepted or exempted under section 8(a)(1) or 16 of this Act.*"

The Commission's automated tariff system regulations are set forth in 46 CFR Part 520. Per Section 1 (Scope and purpose), these requirements are intended to permit:

- 1) Shippers and other members of the public to obtain reliable and useful information concerning the rates and charges that will be assessed by common carriers and conferences for their transportation services;*
- (2) Carriers and conferences to meet their publication requirements pursuant to section 8 of the Act;*

(3) The Commission to ensure that carrier tariff publications are accurate and accessible and to protect the public from violations by carriers of section 10 of the Act; and

(4) The Commission to review and monitor the activities of controlled carriers pursuant to section 9 of the Act.

The Commission's tariff regulations define publication responsibilities and commonly used tariff terminology, and set forth general requirements for tariff contents, basic retrieval functionality and on-line access requirements. Tariffs must use English as the primary textual language, and may not include undefined abbreviations, symbols and codes. Tariff history must be maintained for five years. Requirements for accuracy, integrity and timeliness (effective dates) of tariffs are set forth in some detail. Each tariff must include a "*statement certifying that all information contained in the tariff is true and accurate and no unlawful alterations will be permitted.*"

With regard to tariff rate items (TRI), the regulations require carriers to provide the following details in their tariffs for each shipment moved pursuant to tariff rates. Rates for shipments moving under service contract or NVOCC service arrangements are not published in carrier tariffs.

f) Tariff rate items. A tariff rate item ("TRI") is the single freight rate in effect for the transportation of cargo under a specified set of transportation conditions. TRIs must contain the following:

- (1) brief commodity description;*
- (2) TRI number (optional);*
- (3) publication date;*
- (4) effective date;*
- (5) origin and destination locations or location groups;*
- (6) rate and rate basis; and*
- (7) service code.*

Cross-references to rate tariffs of other carriers are not permitted. Carriers may assess surcharges in addition to published rates, but these must be specifically provided for in their tariff rules. Furthermore, each tariff must provide the capability for a retriever to enter an access date, which will display rates in effect as of the access date. This capability must also "*align any rate adjustments and assessorial charges that were effective on the access date for rate calculations and designation of applicable surcharges.*"

The effective date requirement is a key aspect of Section 8 of the Shipping Act and the Commission's tariff regulation (46 CFR Part 520.8, Effective Dates). These provide a **30-day notice requirement** for increases to existing tariff rates and charges, and prohibit carriers from deleting or removing effective tariff items on less than 30 days notice. OSRA brought this requirement forward from the Shipping Act of 1984 without change. This 30-day notice requirement does not apply to service contracts and NVOCC service arrangements.

SUMMARY of the PETITION

The Petition claims “*Shippers no longer review or otherwise rely on rate tariffs in determining how or when to ship or in selecting a carrier or intermediary.*” Instead, shippers obtain rate quotes from carriers.

The Petition claims compliance with the Commission’s tariff regulations is challenging for NVOCCs because they often work with customers “*in a spot market environment*” and “*sell to the entire universe of shippers.*”

The Petition claims tariff costs for NVOCCs range from “*\$20,000 to \$240,000 per year*” and some NVOCCs have installed their own proprietary tariff publication systems “*which require expensive maintenance and dedicated manpower.*”

The Petition reviews the development of the NVOCC Service Arrangement (NSA) regulations, which the Commission approved in December 2004 in response to petitions of several NVOCCs. Under these regulations, NVOCCs are permitted to provide their shipper clients with individually negotiated contracts for ocean and intermodal transportation to/from the USA. The NSA regulations were amended by the Commission in October 2005 to redefine “NSA shipper,” and thereby allow NVOCCs to act as both carrier and shipper parties; in other words, NVOCC-to-NVOCC contracts. Relatively few NVOCCs have taken advantage of this option. The Petition provides some comments on why NSAs have not been more popular, but offers little analysis.

The Petition describes the exemption requested as voluntary, and relating only to rate tariffs, not rules tariffs. It requests “*negotiated NVOCC rates and any disputes relating thereto between the parties...be governed solely by contract law*” and exempt from Sections 8 (Tariffs) and 10 (Prohibited Acts) of the Shipping Act. It would require such negotiated rates to be “*memorialized in writing,*” but Petitioner does not believe the Commission should set any standards for rate quotation formats. Public access would not be provided, but the “*FMC would continue to have access...for the purpose of conducting any investigation that would be appropriate.*”

The Petition argues NVOCC tariff rate obligations have become a regulatory anachronism imposing significant and unnecessary costs on the industry while providing no countervailing public benefits. It claims NVOCC tariffs are not necessary for the Commission to enforce the Shipping Act, and that there are substantial costs associated with tariffs that have no practical use.

The Petition argues the requested exemption satisfies the criteria set forth in Section 16 of the 1984 Act because it would not result in a substantial reduction in competition and it would not be detrimental to commerce.

COMMENTS

1. Petitioners claim *“Shippers no longer review or otherwise rely on rate tariffs in determining how or when to ship”* is central to its argument. In my experience, shippers have NEVER reviewed tariffs, but ALWAYS rely on tariffs.

Tariffs have always been complex documents that are read and understood only by highly trained people that work with them on a daily basis. Tariffs are designed by carriers to define the services they provide and their applicable rates and charges. They are not marketing or sales documents. They are not easy to read or understand, and this is intentional. Carriers have rarely ever advertised or publicized their tariffs. Carriers would prefer not to provide public access to their tariffs. They do so only because the Commission requires it.

During my time with the Journal of Commerce (1981-1993), I helped it develop an on-line database of all tariffs on file with the Commission. This “RATES” database was designed to provide shippers with easy access to all paper tariffs on file with the Commission. This was an expensive undertaking and required software development, a central database, and tens of thousands of hours of data entry. In 1984 – 1985 over 200,000 tariff pages were entered into the database. Updates were entered on a daily basis by a large staff in New Jersey.

The business plan for this tariff service projected 3,000 shippers would access the service remotely for a few hours each day to review tariffs and find the best rates available. This never happened. The service was marketed to its target audience and was priced reasonably, but it failed to gain the popularity that was projected. Shippers found the tariffs confusing, difficult to understand, and impossible to compare. Access was rapid, but the information was incomprehensible to all but those few shippers who employed tariff experts.

The JoC’s “RATES” database was popular with Carriers, who found it of tremendous assistance in reviewing their own tariffs and their competitors’ tariffs. These users were tariff experts in carrier documentation, pricing, marketing, sales and customer service departments. The Commission also noted the potential of the service to eliminate the burden of maintaining and reviewing paper tariff records. Commission’s records for 1984 include Formal Comments submitted by The Journal of Commerce in response to FMC-REP-84-02 re: “Paperless FMC Electronic Filing Storage and Retrieval System for Tariffs” – these document this “RATES” database.

Several potential competitors monitored these developments and decided the business concept was good, but the database product was flawed because of its reliance on the textual tariff page. They argued tariff formats would have to be standardized, so a relational database could be used to retrieve tariff data and compare rate offerings of carriers. One competitor went to considerable expense to do this with a selected group of tariffs it believed would be popular. Costs for this venture far exceeded revenues because it too was not popular enough with shippers.

Another firm, DXI, Inc., took a different approach. It carefully defined tariff data elements and developed a relational database in cooperation with an American flag carrier, Crowley Maritime. This system became a tremendous asset to Crowley Maritime in its back-office documentation departments, and it helped the carrier automate key business processes that used tariff information.

DXI, Inc. was ultimately successful in licensing its RateMaster software system to all the leading ocean carriers serving the USA for their internal use. Nevertheless, like the JoC's "RATES" database service, this system never became the dominant source of tariff information for shippers, or anything remotely close to that. The tariff information provided by DXI, Inc. could never replace the efforts of carriers and forwarders who provide detailed and accurate rate information and/or service contract offers to their shipper clients directly, along with related service information.

In 1993, the Commission licensed the DXI "RateMaster" tariff database system and contracted with DXI to operate a central tariff database. After a thorough review and rule making process, the Commission issued tariff regulations that required all carriers to transmit tariff data to its Automated Tariff Filing Information (ATFI) system. This system eliminated the paper tariffs maintained by the Commission. It helped the FMC Office of Tariffs review tariffs much faster and more thoroughly during the time it was operated (1993 thru April 1999). It was accessible to the shipping public, but its chief users were the Commission staff and carriers, not shippers.

OSRA required the Commission to implement new tariff regulations that eliminated the ATFI tariff database as of May 1999. Under the OSRA regulations, carriers, including NVOCCs, are required to publish accurate tariffs in automated tariff systems that are accessible to the shipping public, and monitored by FMC Office of Tariffs. These regulations do not impede carriers from developing and integrating tariff database systems and websites that meet their commercial requirements. However, very few carriers have made user-friendly tariffs a feature of their marketing and sales efforts.

This is not going to change in the future. All carriers, including NVOCCs, will always resist the "commoditization" of their transportation services. They work hard to differentiate their services in the marketplace. They understand rates are of tremendous importance to shippers, but focusing on rates alone will not lead of profits. For these reasons, carriers will always resist the concept of a central database that allows all shippers to compare rates of all carriers. Carriers will always differentiate themselves, and their tariffs will reflect this. Thus, ocean freight tariffs will always be difficult for shippers to use. They are not marketing documents, never have been, and never will be.

2. While shippers have NEVER reviewed tariffs, they have ALWAYS relied on tariffs. Tariffs document carrier rates and charges completely and accurately and ensure these remain in effect for 30 days without increase. Shippers expect and rely on carriers to comply with the tariff requirement. Due to the Shipping Act and enforcement by the Commission, most carriers are careful to comply with tariff requirements. Shippers understand this and benefit from it.

Carrier rate quotations to shippers are not required to be published in FMC tariffs. Carriers are free to quote as they wish and these quotes can be subject to change without notice at any time. The Shipping Act and Commission regulations set no standards for carrier rate quotations. However, before a carrier receives a shipment at origin the rates and charges for the shipment must be published and effective in the carrier's tariff, or in a service contract or NSA filed with the Commission.

The tariff thus requires carriers to carefully document the actual rate and charges that will be invoiced to the shipper. Once the rate is filed in a tariff, it cannot be increased or removed from the tariff for 30 days. Shippers rely on this 30-day notice period because shipments are often not ready to move immediately. The physical movement of goods for export, container loading, and documentation requirements can often require days or weeks. Commercial considerations related to the sale of the goods can also delay shipments. The 30 days notice period is an essential element of the Shipping Act for good reason.

Carriers and shippers understand this. Many carrier rate quotes and proposals include the disclaimer "Subject to FMC tariff filing." For many carriers, the procedure whereby shippers "accept" their rate proposals triggers their rate filing. At that time, if there are any changes to the rate or surcharges the carrier advises the shipper. For other carriers, the receipt of the shipment at origin triggers the rate filing. At that time, the rates that will be invoiced for the shipment are carefully documented in a complete and accurate tariff filing that will remain in effect for 30 days, and will remain on accessible to the shipper and Commission.

The tariff requirement thus forms the foundation on which rates are quoted to shippers. While there are no standards or requirements for rate quotation, when quotes result in cargo movement they must be documented with a tariff rate filing. The tariff rate filing must satisfy the standards and requirements of the Shipping Act and FMC regulations and must remain in effect for 30 days. These are fundamental aspects of the Shipping Act, which are relied upon by shippers. These benefit shippers every time a shipment moves under tariff rates.

3. The Petition claims compliance with the Commission's tariff regulations is challenging for NVOCCs because they often work with customers "in a spot market environment" and "sell to the entire universe of shippers."

An NVOCC who chooses to offer its client ocean transportation services from all US ports and points to worldwide ports and points is not required to publish a tariff naming rates and charges for all origins and destinations. The tariff rate filing requirement does not apply until the NVOCC receives a shipment at origin. On or before that date the NVOCC must publish the applicable rate for the shipment in question. This feature of the tariff regulations greatly limits the burden of tariff publication on the NVOCC.

Our experience here at DPI has shown us some NVOCCs do not understand this and publish rates needlessly for quotations that do not result in shipments. Some understand it, but insist on publishing rates anyway because they are unable to put procedures in place to publish only those rates that are required for actual cargo movements. That can be an expensive decision.

Either way, the NVOCC who offers worldwide NVOCC service is faced with the task of obtaining its "buy rates" from carriers or other NVOCCs. This can be challenging and time consuming. This is the nature of the NVOCC business. People who choose this business need to monitor their "buy rates" and "sell rates" very carefully in order to operate profitably. Failure to do this has caused many people to leave the business.

We suppose the "spot market environment" for NVOCC refers to the best rate available on any given day for all shipments to/from the USA. Petitioner is correct in saying one must take into account an enormous number of rates published by carriers in order to succeed in this market. That is the nature of the business for an NVOCC that does not limit itself to specific trade lanes, carriers or commodities. It is a challenging business.

4. The Petition claims tariff costs for NVOCCs range from “\$20,000 to \$240,000 per year” and some NVOCCs have installed their own proprietary tariff publication systems “which require expensive maintenance and dedicated manpower.”

We find these estimates high and wonder if they include costs NVOCCs would incur regardless of the Commission’s tariff requirement. Many of our clients have software systems for documentation and invoicing that include rate information. These systems would be required regardless of the Commission’s tariff requirement.

DPI currently publishes and maintains FMC tariffs for 895 NVOCCs licensed by or registered with the Commission. In our experience, annual tariff costs for NVOCCs range from \$400 to \$120,000. At the low end, these are simply tariff database maintenance charges for tariffs of NVOCCs whose rates have not changed because they are not active. At the high end, these are costs for NVOCCs who update their tariffs on a daily basis and move large volumes of cargo to/from the USA. We have many active NVOCC clients whose annual tariff costs are in the range of \$1,000 to \$10,000.

DPI does not license software systems to clients. We operate as a service bureau. Our clients submit rate filing requests to us via email or our website. Our highly trained staff reviews each request carefully for compliance with FMC regulations, and compares it with the tariff to determine if similar rates are already in effect. When a request is incomplete, duplicates or conflicts with other tariff matter, or would otherwise violate Commission regulations we revert quickly and explain what will be required to make it compliant, if possible. In this process, we help our clients understand and comply with the Commission regulations.

We update tariff data to our database, proofread the updates, and then make these data available for public access at our website: www.dpiusa.com Most requests are completed the same business day requested, and confirmed the following day via email. In addition to our web site, we provide our clients with tariff information other data formats, including MS-EXCEL and Adobe PDF. These are used by NVOCCs to help them in pricing, rate quotation, rating bills of lading, invoicing and other aspects of their business.

5. The Petition reviews the development of the NVOCC Service Arrangement (NSA) regulations, which the Commission approved in December 2004 in response to Petitions of several NVOCCs. Under these regulations, NVOCCs are permitted to provide their shipper clients with individually negotiated contracts for ocean and intermodal transportation to/from the USA. The NSA regulations were amended by the Commission in October 2005 to redefine "NSA shipper," and thereby allow NVOCCs to act as both carrier and shipper parties; in other words, NVOCC-to-NVOCC contracts.

The Petition notes relatively few NVOCCs have taken advantage of NSA option, and our experience agrees with this observation. The Petition provides some comments on why NSAs have not been more popular, but offers little analysis.

We are not attorneys here at DPI and we cannot give legal advice on transportation contracts, but in our capacity as tariff publishers and FMC Practitioners, we offer our assistance in preparing NSAs that provide for a wide variety of creative pricing options and comply with the Commission's regulations. We handle the filing of NSAs with the Commission for clients and the publication of the essential terms documents of NSAs. We have encouraged all our clients to consider NSAs. About 30 of our clients have filed NSAs with the Commission. Three of our clients have adopted NSAs as a key part of their business plans; they are moving a substantial volume of shipments under these contracts. We expect more to do so in the future.

These comments are not the proper forum for speculating on why more NVOCCs have not adopted NSAs or when this will happen. However, we support the Commission's decision to provide NVOCCs with the opportunity to provide their shipper clients with individually negotiated contracts for ocean and intermodal transportation.

6. The Petition describes the exemption requested as voluntary, and relating only to rate tariffs, not rules tariffs. It requests that “negotiated NVOCC rates and any disputes relating thereto between the parties...be governed solely by contract law” and exempt from Sections 8 (Tariffs) and 10 (Prohibited Acts) of the Shipping Act. It would require such negotiated rates to be “memorialized in writing,” but Petitioner does not believe the Commission should set any standards for rate quotation formats. Public access would not be provided, but the “FMC would continue to have access...for the purpose of conducting any investigation that would be appropriate.”

The Shipping Act and current tariff regulations set valuable standards for the publication of tariff rate items (TRIs), the integrity of tariffs, and access by the Commission and the shipping public. The Petition would replace these with the option for NVOCCs to utilize rate quotations that would not need to conform to any standard, and need not be written in English. The issues of completeness, accuracy or integrity of these quotations are not addressed in the Petition. These quotations could be amended by the NVOCC at anytime; the 30-day notice provisions of the Shipping Act and FMC regulations would not apply. The Commission would have access to these quotations only upon request. Shippers would have access rule tariffs published by NVOCCs, but not to rate tariffs.

By exempting these rate quotations from the requirements of Section 10 (b) (2) and 10(b)(4) (Prohibited Acts) the Commission would authorize NVOCCs to:

- (2) provide service in the liner trade that
 - (A) is not in accordance with the rates, charges, classifications, rules, and practices contained in a tariff published or a service contract entered into under section 8 of this Act unless excepted or exempted under section 8(a)(1) or 16 of this Act; or
 - (B) is under a tariff or service contract which has been suspended or prohibited by the Commission under section 9 of this Act or the Foreign Shipping Practices Act of 1988 (46 U.S.C. App. 1710a);

Furthermore, by exempting these rate quotations from the requirements of Section 10(b)(4) (Prohibited Acts) the Commission would authorize NVOCCs:

- (4) for service pursuant to a tariff, engage in any unfair or unjustly discriminatory practice in the matter of_
 - (A) rates or charges;
 - (B) cargo classifications;
 - (C) cargo space accommodations or other facilities, due regard being had for the proper loading of the vessel and the available tonnage;
 - (D) the loading and landing of freight; or
 - (E) the adjustment and settlement of claims;

Finally, by exempting these rate quotations from the requirements of Section 10(8) (Prohibited Acts) the Commission would authorize NVOCCs to provide transportation services to shippers which would “give any undue or unreasonable preference or advantage or impose any undue or unreasonable prejudice or disadvantage.”

7. The Petition argues NVOCC tariff rate obligations have become a regulatory anachronism imposing significant and unnecessary costs on the industry while providing “no countervailing public benefits.” It claims NVOCC tariffs are not necessary for the Commission to enforce the Shipping Act, and that there are substantial costs associated with tariffs that have no practical use.

We respectfully disagree with this claim. We believe tariff costs are not unreasonable, and tariffs do provide valuable benefits. Thanks to the tariff publication requirement, shippers can rely on filed tariff rates to be accurate, complete, and in effect for 30 days. This exerts a tremendous influence on the ocean transportation marketplace in the US trades. Rate quotations that result in actual cargo movement are conditioned on the expectation that rates will be published in tariffs that satisfy FMC regulations.

In the event of a dispute between a carrier and shipper or any related party the tariff can be easily accessed and reviewed. The tariffs maintained at our website at www.dpiusa.com have been used thousands of times to verify tariff rates in order to assist in settling disputes. We are regularly requested by shippers, carriers, forwarders and interested parties to assist them in verifying tariff rates.

The Commission’s access to published tariffs is essential in order for it to monitor the activities of NVOCCs and to help protect the public from violations by carriers of section 10 of the Act. Tariffs provide the transparency required for the Commission to fulfill its mission to administer policies and regulations that foster a fair, efficient and secure maritime transportation system. Tariffs enable the Commission facilitate compliance with U.S. shipping statutes through oversight and outreach, and assist in resolving disputes. These are important public benefits.

We also believe that the services we provide our NVOCC clients during the tariff rate publish process benefit the shipping public. In our communications with our NVOCC clients regarding their rate publications we are constantly advising them on FMC compliance issues. In this process, we help our clients understand and comply with the Commission regulations and the shipping public benefits from this.

8. The Petition argues the requested exemption satisfies the criteria set forth in Section 16 of the 1984 Act because it would not result in a substantial reduction in competition and it would not be detrimental to commerce.

We respectfully disagree with this claim. First, we believe granting this exemption would impair the Commission's effective regulation by limiting its access to NVOCC rate information. Second, we believe this exemption would be detrimental to commerce on two key grounds. Elimination of the 30-day notice requirement for tariff rates would result in rate quotations that would be valid for extremely short periods of time - a few days or even a few hours. This would result in tremendous increase in disputes between shippers and NVOCCs over the applicable rates and charges for shipments. Settling these disputes without the benefit of tariff rates published according to standards set by the Commission would make these disputes more difficult to settle, especially for shippers. This would have a disruptive effect on commerce that would be significant. Additionally, this exemption would limit the Commission's ability to protect the shipping public from incompetent, inexperienced, and potentially unscrupulous NVOCC operators.

Petitioner notes the exemption would only be applicable for licensed or registered NVOCCs, however, it fails to note more than 1,000 of the 4,000 NVOCCs currently serving the USA trades are based outside the USA and are not subject to the Commission's licensing requirements for Ocean Transportation Intermediaries (OTIs). The Commission has very limited information at its disposal on these NVOCCs – just simple registration details and a surety bond, and access to its tariff. The Commission does not have the details of the ownership, officers, or related entities of these NVOCCs, and it does not investigate them under the OTI licensing procedures to determine if they have the good character to operate as OTIs.

Many of these overseas-based NVOCCs are fine companies that provide a high level of service and comply with all the Commission's regulations, but some are not, and new NVOCCs register with the Commission every day. There is a considerable amount of change in the industry. Eliminating the Commission's access to tariffs of unscrupulous unlicensed NVOCCs by allowing them to use rate quotations hidden from public view would be detrimental to commerce.

CONCLUSION

We submit granting this exemption would impair the Commission's effective regulation by limiting its access to NVOCC rate information. Granting this exemption would be detrimental to commerce because it would restrict access to rate information relied upon by the shipping public and because it would eliminate the 30-day notice requirement for tariff rates. This would result in an increase in disputes between shippers and NVOCCs over applicable rates and charges for shipments. Additionally, this exemption would limit the Commission's ability to protect the shipping public from potentially unscrupulous NVOCC operators.

Respectfully submitted,

James E. Devine
President
Distribution Publications, Inc.