



**U.S. Department of
Transportation**
Office of the Secretary
of Transportation

General Counsel

1200 New Jersey Avenue, S.E.
Washington, D.C. 20590

June 4, 2010

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

Re: NVOCC Negotiated Rate Arrangements
Docket No. 10-03

Dear Ms. Gregory:

Pursuant to the Commission's Notice of Proposed Rulemaking issued April 29, 2010, I have enclosed herewith the original and fifteen copies of the Comments of the United States Department of Transportation for filing in the above-referenced proceeding. As directed, I am also emailing to you an electronic copy of the same document. Please contact me if you have any questions.

Respectfully,

PAUL SAMUEL SMITH
Senior Trial Attorney

(202) 366-9280

Enclosures

CC: OS
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Comm(4)
ETA
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Before the
Federal Maritime Commission
Washington, D.C.

NVOCC Negotiated Rate Arrangements)
_____)

Docket No. 10-03

Comments of the
United States Department of Transportation

Introduction

In this proceeding the Federal Maritime Commission (“FMC” or “Commission”) has proposed to grant non-vessel-operating common carriers (“NVOCCs”) an exemption from statutory provisions that now require them to file and maintain public rate tariffs. Notice of Proposed Rulemaking, issued April 29, 2010 (“NPRM”).¹ As it has for almost twenty years, the United States Department of Transportation (“DOT” or “Department”) strongly supports such an exemption. Tariff regimes are costly, without purpose, and hinder competition. There is no reason why, alone among all transportation providers and intermediaries, NVOCCs should remain subject to tariff obligations. The FMC should finalize its proposed exemption.

Discussion

The NPRM has its origin in a petition filed in 2008 by the National Customs Brokers and Forwarders Association of America, Inc. seeking an exemption from provisions of the Shipping Act of 1984 that impose on NVOCCs the obligation to publish and adhere to tariffs. Petition P1-

¹/ NVOCCs do not own or operate the vessels that actually transport cargo but serve as aggregators of freight on behalf of their shipper customers in order to secure lower rates from those who do own or operate such vessels, vessel-operating common carriers (“VOCCs”). As their names suggest, both NVOCCs and VOCCs are common carriers at law. 46 U.S.C. §§ 40102 (16), (17).

08 (“Petition”). The exemption would apply when NVOCCs and their shipping customers reach private agreements on ocean transportation rates (“negotiated rate agreements” in regulatory parlance). NPRM at 2-3. After considering the comments of DOT, the U.S. Department of Justice, and other parties, the Commission has proposed to grant the exemption.²

Properly so. Exemptions may be granted when they “will not result in a substantial reduction in competition or be detrimental to commerce.” 46 U.S.C. § 40103(a). Commenters of every stripe, from federal agencies to transportation intermediaries to VOCCs, overwhelmingly recited the now familiar litany of reasons why the exemption at issue meets this standard: that shippers do not use tariffs to ascertain rates, that tariff preparation and publication impose unnecessary costs on NVOCCs, and that these burdens impede the ability of NVOCCs to compete. *Id.* at 6-9, 11-12. By contrast, the opposition comprises two tariff publishing agents and two consultants whose professed concerns about the loss of FMC regulatory protections ignore the fact that the exemption would become effective only for those who voluntarily forego them by agreeing to the rates for their own transportation arrangements. *Id.* at 9-10, 12-13. It is telling that the shipper community, on whose behalf such protections have primarily been maintained, unanimously supported the exemption. *Id.* at 6-9, 12.³

The FMC has also proposed to attach conditions to the exemption that embrace principles contained in the Petition and endorsed by NVOCCs, shippers, and other freight intermediaries: rules tariffs would continue to be maintained and be freely accessible; negotiated rate agreements

²/ DOT’s Comments (filed September 26, 2008) outline the history of this agency’s efforts to eliminate costly and unnecessary tariff burdens on NVOCCs since 1992. We will not repeat yet again the legal and policy grounds for granting this Petition contained in that pleading, but simply incorporate it by reference.

³/ The only other noteworthy comments claimed that VOCCs would remain subject to tariff obligations and thus be disadvantaged if the exemption were granted. *Id.* at 10. But VOCCs have been free since 1998 to enter into confidential service contracts without having to publish commercially sensitive terms, and thus it seems that grant of this exemption would rather remove an advantage now held by VOCCs. Nonetheless, the Department supports any exemption necessary to put NVOCCs and VOCCs on equal competitive footing.

would be voluntary, reduced to writing, and available to the FMC; disputes under these agreements would be resolved pursuant to contract law; and no antitrust immunity would apply to the actions of those making use of the exemption. *Id.* at 3-4, 16. DOT believes that retaining rules tariffs and making negotiated rate agreements available to the Commission will prove unnecessary, but accepts them as reasonable measures during a transition in which the FMC and industry move away from an archaic regulatory construct that no longer binds any other transportation mode or participant. *See* DOT 2008 Comments at 7.

Finally, the Commission has asked for comment on related issues, among them whether the exemption should reach beyond tariff obligations to statutory provisions that prohibit common carriers from (1) unfair or unjustly discriminatory practices in service pursuant to a tariff, and (2) undue or unreasonable preference, advantage, disadvantage, or prejudice for tariff service. *Id.* at 17. The Department supports such an extension. Just as there is no continuing justification for mandatory tariffs because commercial parties can decide for themselves the terms of their own transportation arrangements without the need for regulatory oversight, there can be no basis that those decisions could be considered unlawful under tariffs and subject to enforcement action.

Conclusion

No only does the Petition satisfy the statutory standard for grant of an exemption, but adopting the proposed exemption will positively enhance competition and facilitate commerce. There is no basis in law or policy for continuing in place tariff obligations that constrain no other transportation industry participants. The Department again urges the Commission to adopt the proposed exemption.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Rivkin', with a stylized, wavy line extending to the right.

ROBERT S. RIVKIN
General Counsel

June 4, 2010