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OFFICE OF THE SECRETARY  
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**PETITION OF THE NATIONAL CUSTOMS BROKERS AND FORWARDERS  
ASSOCIATION OF AMERICA, INC.  
FOR EXEMPTION FROM  
MANDATORY RATE TARIFF PUBLICATION**

Pursuant to 46 C.F.R. §§ 502.67 and 502.69, the National Customs Brokers and Forwarders Association of America, Inc. ("NCBFAA") respectfully petitions the Federal Maritime Commission ("FMC" or "Commission") for a limited exemption from the provisions of the Shipping Act of 1984 (the "Act") requiring Non-Vessel Operating Common Carriers ("NVOCCs") and Vessel Operating Common Carriers ("VOCCs") to publish all ocean freight rates in freight tariffs. As set forth more fully below and in the accompanying Verified Statements, eliminating this costly and unnecessary regulatory burden would be beneficial to the NVOCC and shipper industries, be consistent with the policies underlying the Ocean Shipping Reform Act of 1998 ("OSRA"), recognize the fundamental changes in the marketplace that have occurred as a result of OSRA, and satisfy the criteria for the Commission's exercise of its exemption authority under former Section 16 of the Act (now 49 U.S.C. §40103).

**I. INTRODUCTION**

The NCBFAA is the national trade association representing the interests of freight forwarders, NVOCCs and customs brokers in the ocean shipping industry. NCBFAA's members are integrally linked to approximately 90% of the cargo that moves into and out of the United States via ocean transportation. The large majority of NCBFAA's forwarder members also operate as NVOCCs. As a result, NCBFAA members are directly affected by the requirement

that NVOCCs publish in tariffs all rates that are charged shippers regardless of whether those rates have been individually negotiated.

The deregulatory changes in Congressional policy initiated in the 1984 Act and expanded in OSRA have transformed the ocean shipping marketplace and rendered many rate tariffs virtually superfluous. Shippers no longer review or otherwise rely on rate tariffs in determining how or when to ship or in selecting a carrier or intermediary. In today's marketplace, NVOCC freight rates are almost always separately negotiated with each shipper – regardless of the number of containers at issue – and tailored to the specific movements, commodities and other circumstances involved. Rather than parsing through complicated and confusing on-line tariffs, shippers contact intermediaries to obtain rate quotes and service commitments and then negotiate the commercial terms of carriage specific to their requirements.

NVOCCs are currently required by existing regulation to constantly amend their tariffs to reflect the specific rates previously negotiated with each customer. Yet, the process of rate tariff maintenance is now often an afterthought – a technical, albeit costly and burdensome, requirement having no impact on either the movement it is intended to cover or subsequent movements. Indeed, tariff amendments are generally narrowly drawn to cover only specific movements with a specific shipper, and have no relevance to other shippers for other shipments of similar commodities moving in the same trade lane. In view of the differing surcharges applied by the vessel operators, it is difficult in today's environment for NVOCCs to find takers for a single “one size fits all” tariff from shippers. To the contrary, since the rates offered by the vessel operators (the NVOCC “buy rates”) differ dramatically, the NVOCC's rate offers to

shippers (the “sell rates”) will of necessity vary frequently even for the same commodity moving the same trade lane.<sup>1</sup>

Thus, as a result of Congressional policy initiatives in the 1984 Act and OSRA to reduce regulatory costs and to place greater reliance on the marketplace in ocean transportation, the ocean shipping industry has moved from a highly regulated tariff-based, common carriage regime to a market-based, individualized contract system. The regulatory scheme requiring the publication of rate tariffs by NVOCCs has thus become an expensive anachronistic exercise serving no apparent purpose. On the other hand, it has burdened NVOCCs with substantial and unnecessary costs and made them subject to potentially enormous penalties for tariff-based violations involving no consumer injury or market distorting behavior.

The particular difficulty confronting the NVOCC industry with respect to the rate tariff publication requirement becomes readily apparent when viewed in the context of the market for obtaining space on the vessel operators. It is now a well known fact that there is a significant shortage of containers and vessel space in both the inbound and export trade of the United States. Regardless of the causes for this situation, NVOCCs attempting to obtain space for their customers are required to negotiate rates and bookings often weeks in advance, in a marketplace where carrier rates and surcharges are changing daily and lower rated cargo is difficult to move. When space is booked four or more weeks out, the carrier will often change its rate to the NVOCC even after a booking commitment has been obtained.<sup>2</sup>

As NVOCCs are necessarily dealing with all, or at least many, of the vessel operators in the various trades, the adjustment of rates and surcharges that are applicable to the NVOCC market takes place multiple times each day. Given the interrelationship of costs and rates,

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<sup>1</sup> See attached Verified Statements of Anthony Kozlowski, at 2; Juerg Bandle, at 2.

<sup>2</sup> Statement of David Powell, at 2.

NVOCC pricing of services to their customers will of necessity change on virtually an hourly, if not minute to minute, basis.<sup>3</sup> Consequently, one of the rationales originally underlying the need or purpose of NVOCC tariffs - - namely, that they provide advance notice to the public of a carrier's rate schedules and ensure equal treatment to all shippers - - no longer exists.<sup>4</sup>

Similarly, the evolution of the shipping industry from a common carriage to a contract carriage environment has been broadly recognized and well documented. In 2003, the NCBFAA filed a petition, in Docket P 5-03, seeking a Limited Exemption From Certain Tariff Requirements of the Shipping Act of 1984. At the same time, related petitions seeking recognition of this shift to a system of negotiated contract carriage in the NVOCC industry were filed by United Parcel Service, Inc. ("UPS") in Docket P 3-03; Ocean World Lines, Inc. ("OWL") in Docket P 7-03; BAX Global, Inc. ("BAX") in Docket P 8-03; C. H. Robinson Worldwide, Inc. ("CH Robinson") in Docket P 9-03; Danzas Corporation d/b/a Danmar Lines Ltd., Danzas AEI Ocean Services and DHL Danzas Air and Ocean ("DHL") in Docket P1-04; BDP International, Inc. ("BDP") in Docket P 2-04; and FEDEX Trade Networks Transport & Brokerage, Inc. ("FEDEX") in Docket P 4-04. These petitions approached the issue - - namely, the need for relief from strict common carriage regulation of the NVOCC industry - - from three different, albeit related, perspectives.

The NCBFAA requested then, as it does now, that the Commission utilize the authority given it in Section 16 of the Act (now 49 U.S.C. § 40103) to exempt NVOCCs from the requirements to establish, maintain and publish rate tariffs. UPS, BAX, CH Robinson, DHL and

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<sup>3</sup> The rate volatility in the ocean shipping industry is not limited to periods where, as at present, space is tight. In times of excess capacity, the vessel operators are similarly active in implementing rate changes in order to attract additional traffic and maximize their own utilization.

<sup>4</sup> To the contrary, the NVOCC rate publication process almost always takes place after the shipper has agreed to a specific rate based upon factors that are unique to it and the desired trade lane. Rate tariffs are not used by shippers as a means of ascertaining rates or selecting NVOCCs. *See* Statements of Paulette Kolba, at 3; Lee Connor, at 1; John Abisch, at 1; Edward Piza, at 1; Cas Pouderoyen, at 1.

FEDEX requested that NVOCCs be given the authority to enter into written contracts, akin to VOCC service contracts, with their customers. And, OWL requested that forwarders be able to enter into special contracts with their customers. Supporting statements were received from a large number of NVOCCs; the National Industrial Transportation League (“NITL”); the Transportation Intermediaries Association (“TIA”); a number of shippers’ associations, as well as the American Institute for Shippers’ Associations, Inc.; and the U.S. Department of Transportation (“DOT”) and the U.S. Department of Justice (“DOJ”).

Acting in response to these petitions, the Commission initiated a rulemaking proceeding, in Docket No. 4-12, *Non-Vessel-Operating Common Carrier Service Arrangements*, on October 28, 2004. On December 15, 2004 the Commission issued a final rule authorizing NVOCCs to enter into formal written contracts with their customers called NVOCC Service Arrangements (“NSAs”) subject to the conditions (1) that these NSAs be filed with the agency, and (2) that their essential terms be published in tariff form. In granting this form of relief, the Commission concluded that criteria needed for issuance of an exemption under Section 16 had been met by the petitioners; i.e., that giving NVOCCs the ability to enter into contracts with their customers would not result in a substantial reduction in competition or be detrimental to commerce. However, because of its concern that the broader tariff exemption sought by the NCBFAA - - which was supported by most commenting parties, including in particular DOT and DOJ - - might adversely “impact competition between large NVOCCs and VOCCs...by continuing to impose costs on one while relieving costs for the other” (December 15, 2004 Decision at 11), the Commission granted only the NSA option proposed by several of the NVOCC petitioners and declined to take action on the NCBFAA’s petition.

In the intervening years, several things have become clear. First, there is a fundamental difference between the way NVOCCs deal with their customers as compared to how business between vessel operators and their customers is conducted. Unlike the situation with vessel operators (who typically enter into annual, volume rate contracts with their customers), NVOCCs often work with their customers in a spot market environment and in all events must react to the constantly changing rate and service offerings of the vessel operators. And, even assuming that reducing NVOCC costs by eliminating anachronistic rate tariff publication somehow did disadvantage vessel operators (which is *not* the case), these expenses fall far more heavily on NVOCCs than on the steamship lines.

Unlike the vessel operators who deal only with their relatively limited customer bases, most of whom will be FCL shippers, NVOCCs sell to the entire universe of shippers, most of whom are LCL shippers, and procure the ocean transportation required from all of the carriers. In doing so, they must take into account the enormous number of rates, rate changes and surcharges that each of the carriers establish on a daily, if not a more frequent, basis. In one two week period, one NVOCC noted that vessel operators servicing its trade lanes published over 250 changes in rates and surcharges.<sup>5</sup> Moreover, NVOCCs are often responding to shippers' Request for Proposals ("RFQs") or respond to repetitive requests for rate quotes and could be required just to avoid running into tariff compliance issues, to publish numerous rate tariff amendments for traffic that does not ultimately move.<sup>6</sup>

Hence, the difficulty of publishing and maintaining the "sell" rates in tariff form, when NVOCCs must factor in both the substantially larger number of customers and suppliers, is an enormously greater burden than that borne by the carriers by several orders of magnitude. As

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<sup>5</sup> See Meunier Statement, at 1.

<sup>6</sup> See Kolba Statement, at 2; Powell Statement, at 3-4.

Mr. Powell explains, a vessel operator might maintain 10,000 distinct tariff rates and amortize that cost over 1 million shipments. On the other hand, a typical NVOCC may have to publish 100,000 rates and pay for that cost over 10,000 shipments. (Powell Statement, at 3-4.)

NVOCC business with their customers is not typically handled in a formal contract setting, where the parties establish long term, volume and service driven commitments in exchange for a relatively stable set of rates. To the contrary, rates are negotiated daily or even hourly and traffic moves based upon the results of those negotiations. Shippers do not review tariffs to determine which NVOCC to use, but instead rely almost exclusively upon the agreement reached with the NVOCC it selects; indeed, it is often the case that the traffic will move before the NVOCC has an opportunity to memorialize the negotiated rate in tariff form.<sup>7</sup> Although there is clearly an avenue available for shippers to enter into formal contracts with NVOCCs, that procedure is followed relatively rarely. Statistics compiled by the Commission's Bureau of Trade Analysis and its Office of OTI Licensing vividly the difference in the NVOCC and VOCC markets. In the 3 ½ years since the NSA option has been in effect, there have only been a total of 1,860 NSAs filed with the Commission, together with 2,186 amendments thereto (as of April 30, 2008). As there were 4,049 licensed and registered NVOCCs, this works out to an average of less than one NSA per year for each NVOCC. Interestingly, although a total of 600 NVOCCs have registered to file NSAs with the Commission, only 106 NVOCCs have actually entered into and filed any such agreements; that is still an average of only 11 NSAs per NVOCC over this period.

The picture for vessel operators is substantially different. Since OSRA was enacted, almost 2 million service contracts and amendments have been filed. In 2006, vessel operators

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<sup>7</sup> Kozlowski Statement, at 2.

filed 47,739 service contracts and 255,505 amendments. Similarly, in 2007, vessel operators filed 43,699 original service contracts and 266,777 amendments for a total of 310,476 rate filings.<sup>8</sup> These statistics demonstrate that the vessel operators and NVOCCs are functioning in a different market. Unlike the situation with NVOCCs, the vessel operators primarily conduct business through the use of longer term, volume contracts in which it is anticipated that the rates and service terms are memorialized in formal service contracts.

Many NVOCCs utilize the services of tariff publishing companies to host their tariffs, and those expenses appear to vary with useage. Excluding administrative and other internal costs, the cost of publishing rate tariffs can range anywhere between \$20,000 to \$240,000 per year. Some NVOCCs have installed their own proprietary tariff publications systems, which require continuing expensive maintenance and dedicated manpower.<sup>9</sup> Even without quantifying the support and manpower dedicated to publishing information that no one will need or use, it is clear that this is a dead weight economic loss.

The substantial cost and burden of publishing rate tariffs continues to serve no purpose. The record was clear during the proceeding in Docket No. 4-12 that there is a very significant cost attributable to the burden of publishing and maintaining tariffs - - much of which falls on small and relatively small businesses - - in view of the dynamic nature of the ocean shipping marketplace, where rates are changing almost by the minute in the myriad of trade lanes for the virtually infinite types of traffic that is moved by NVOCCs. While NSAs do have a legitimate function in the shipper/NVOCC relationship, that role is limited for several reasons. Initially,

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<sup>8</sup> In 2007, NVOCCs filed a total of 762 original NSAs and 1,011 amendments, for a total of 1,773 filings. This equates to approximately 0.5 percent of the contract filings by vessel operators. (Source: FMC Bureau of Trade Analysis)

<sup>9</sup> Kolba Statement, at 3-4; Kozlowski Statement, at 1; Connor Statement, at 2; Abisch Statement, at 2; Pouderoyan Statement, at 2; Powell Statement, at 3; Bandle Statement, at 1.

shippers understand that confidentiality, which is generally recognized to be of substantial importance, is equally available in a non-NSA environment since rate tariffs are rarely, if ever, accessed. Many shippers either do not want to sign formal written contracts for NVOCC services at all for a variety of reasons or prefer to enter into comprehensive contracts relating to the complete, bundled package of logistics services that NVOCCs provide. Many shippers do not like the formality of NSAs or tariffs, with an often confusing array of cross referenced items, notes or incorporated tariff publications. And, of course, from the NVOCC perspective, the formal FMC filing and essential terms tariff publication requirements retain the burden and cost obligations that they are seeking to eliminate.<sup>10</sup>

The record is similarly clear that the purpose tariffs were intended to serve - - namely, as a price list providing equal rates to all similarly situated shippers tendering cargo in a common carriage industry - - is no longer applicable. OSRA fundamentally changed the shipping industry to a contract carriage environment and, whether intended or not, that is just as true for NVOCCs as it is for vessel operators. Shippers rely on individually negotiated rates and have no need or occasion to access an NVOCC's published tariff, and this explains why the large number of NVOCCs that filed statements in Docket No. 4-12 unanimously stated that no one had accessed their rate tariffs. Nor has that situation changed, as the attached Verified Statements demonstrate.<sup>11</sup>

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<sup>10</sup> Kozlowski Statement, at 2; Piza Statement, at 2; Pouderoyen Statement, at 2; Bandle Statement at 2-3.

<sup>11</sup> Each of the attached Statements categorically attest that their company's rate tariffs have never been accessed by a shipper. While one company reports that its rate tariff was accessed on one occasion, that appears to have resulted from a random check by an FMC official, to see if the tariff information was publicly available. (Abisch Statement, at 2.) And, although some NVOCCs do charge access fees, which theoretically could inhibit a party's desire to review a rate tariff, that notion is belied by the experience of one NVOCC that does not have an access fee; in that regard, Mr. Connors states: "We don't believe anyone would pay to access it since they don't access it for free!" (Connors Statement, at 2; *see also* Kolba Statement, at 4; Kozlowski Statement, at 1; Abisch Statement, at 2; Piza Statement, at 2; Pouderoyen Statement, at 2; Bandle Statement, at 1.)

This also explains why the National Industrial Traffic League (“NITL”), in conjunction with the NCBFAA and the Transportation Intermediaries Association (“TIA”), issued a statement of “common principles” in early 2004 stating, among other things:

The administrative costs incurred by NVOCCs to publish tariffs far exceed any consumer benefits, since very few NVOCC customers rely on published tariffs to obtain NVOCC pricing information.

(See Attachment 1.) As virtually every party in Docket No. 4-12 recognized, publishing rate tariffs serves no valid public purpose, other than slavish adherence to a regulatory requirement that no longer has any relationship to the industry being regulated. That remains true today.

In granting relief in Docket No. 4-12, the Commission recognized the need to provide regulatory relief to NVOCCs in view of the change to a contract carriage system resulting from the enactment of OSRA. The Commission’s approval of the use of NSAs was a positive step in reacting to those changes, but has not affected the vast majority of traffic handled by NVOCCs. Hence, further relief is both needed and appropriate.

The requested exemption meets the criteria set forth in Section 16 of the Act, would eliminate a significant and unnecessary regulatory burden and permit the industry to function in a far more efficient and less costly manner. The Commission should accordingly exercise its authority to exempt NVOCCs from the provisions of the 1984 Act imposing mandatory rate tariff publication.

## **II. DESCRIPTION OF THE EXEMPTION REQUESTED**

The NCBFAA requests that NVOCCs be exempted from the provisions of the 1984 Act requiring NVOCCs to publish and/or adhere to rate tariffs for ocean transportation in those instances where they have individually negotiated rates with their shipping customers and memorialized those rates in writing.

The NCBFAA's proposal would incorporate the following principles:

1. The exemption would be voluntary, rather than mandatory. In other words, shippers (or NVOCCs) that preferred to work through published rate tariffs (for example, in order to cover surcharges, GRIs, etc. or even for the purpose of establishing part or all of the base freight rates) would continue to do so. Any rates that are set forth in an NVOCC's tariffs would not be exempt, but would instead be applicable to all of the provisions of the Shipping Act.
2. The exemption would relate only to rate tariffs; rules tariffs would still be maintained by NVOCCs and still be subject to all of the provisions of the Shipping Act.
3. Negotiated NVOCC rates and any disputes relating thereto between the parties would be governed solely by contract law considerations. As such, these negotiated rates would be specifically exempted from former sections 8(a), (b), (d), (e) and (g); and 10(b)(2), (4), and (8) (now 46 U.S.C. §§40501(a) – (e) and (g); 40503; and 41104(2), (4) and (8)).
4. NVOCCs would continue to file NSAs with the FMC; similarly, the essential terms of NSAs would continue to be published.<sup>12</sup>
5. All negotiated rates would need to be memorialized in writing, so that there would be some written documentation in the event of a dispute. The NCBFAA does not believe, however, that it is necessary or appropriate for the Commission to dictate the particular form which should be used. The parties to such negotiated rate agreements are fully capable of appropriately memorializing the freight rates under which traffic moves and already do so, which helps explain the fact as to why there are so few rate disputes between shippers and the NVOCCs that serve them.
6. The FMC would continue to have access to the agreements or other written communications underlying these negotiated rates for the purpose of conducting any investigation that might be appropriate.
7. The exemption would not be construed to convey antitrust immunity on NVOCCS.
8. The exemption would only be applicable for licensed or registered NVOCCS; in other words, companies unlawfully providing NVOCC services would, in addition to acting in violation of the licensing/registration and/or bonding regulations, necessarily be violating the tariff provisions of the Act as well.

### **III. NVOCC RATE TARIFF OBLIGATIONS HAVE BECOME A REGULATORY ANACHRONISM IMPOSING SIGNIFICANT AND UNNECESSARY COSTS ON**

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<sup>12</sup> It is beyond the province of this petition to also urge that the need for NVOCCs to file NSAs or publish those essential terms tariffs be eliminated. The NCBFAA nonetheless continues to believe that this process serves no useful purpose with respect to NVOCC traffic and instead unnecessarily create expenses that hinder efficiency (*see* comments of NCBFAA in Docket Nos. P3-03 et al., filed October 10, 2003 at 17-18). The Commission might wish to consider initiating, on its own motion, a separate proceeding to determine whether an exemption should be issued for these as well.

## **THE INDUSTRY WHILE PROVIDING NO COUNTERVAILING PUBLIC BENEFITS**

### **A. The Ocean Shipping Industry Has Undergone Dramatic Change As A Result Of The 1984 Act And OSRA.**

#### **1. The Origins Of Rate Tariff Obligations For NVOCCs.**

The tariff publication obligations now applicable to NVOCCs had their genesis in the Shipping Act of 1916, at a time long before NVOCCs existed or were recognized as a class of common carrier. *See Shipping Act, 1916*, Pub. L. No. 260, 34 Stat. 728 (1916) (the “1916 Act”). In the following years, both through administrative actions taken by the predecessor agencies to the Commission and through legislation, the tariff publication and enforcement provisions were promulgated to ensure that the U.S. shipping industry was a common carriage system in which all similarly situated shippers were treated in exactly the same way. *See, e.g., Stallion Cargo, Inc. - - Possible Violations of the Shipping Act of 1984*, 29 S.R.R. 665, 676-77 (2001) (strict enforcement of tariff law and strong sanctions required to accomplish “the overriding statutory purpose of eliminating unjust discrimination between shippers”). The Shipping Act of 1984 continued the tariff filing and enforcement obligations initially imposed by the so-called Bonner Bill in 1961 (Pub. L. No. 87-346, § 4, 75 Stat. 762). Although the 1984 Act retained the tariff system, it also opened the door for partial deregulation of the ocean shipping industry by giving vessel operators the option of establishing individualized non-tariff rates through the mechanism of service contracts. *See former 46 U.S.C. App. § 1707(c)* (2003).

The 1984 Act provided for Commission oversight of service contracts, but maintained the semblance of a common carriage system by granting similarly situated shippers the right to demand “me too” service contracts. Regardless, the legitimization of service contracts marked the beginning of a change in Congressional policy toward promoting individualized based ratemaking, where carriers have greater flexibility to respond to changing market conditions and

shippers are afforded the opportunity to negotiate the rates and terms of service best suited to their commercial needs.

2. The Ocean Shipping Reform Act Of 1998.

The Ocean Shipping Reform Act of 1998 completed the shift in Congressional policy toward a market-based regulatory model emphasizing competition, efficiency and reliance on the marketplace in the ocean shipping industry, and away from a comprehensive regulatory scheme based on tariffs. Indeed, Congress specifically added, as its “Declaration of Policy”, that the purpose of the statute was to

to promote the growth and development of United States exports through competitive and efficient ocean transportation and *by placing a greater reliance on the marketplace.*

46 U.S.C. § 40101(4) (emphasis supplied).

While OSRA did not totally eliminate rate tariffs,<sup>13</sup> it substantially eliminated the old common carriage system in favor of privately negotiated contracts. For example, OSRA specifically approved the use of confidential contracts whose rates need not be disclosed to the public, eliminated the right of shippers to demand “me too” contracts, and removed the prohibition against unjust discrimination in service contracts.

Similarly, OSRA for all intents and purposes repealed reliance upon published rate tariffs as the basis of determining the applicable or legal rates for shippers. Former section 13 (f) of the Act now literally provides that rates privately negotiated between shippers and NVOCCs (or vessel operators) would supercede rates that are otherwise set forth in a tariff or service contract,

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<sup>13</sup> One significant change pertaining to tariffs was the elimination of any filing requirement. While each VOCC and NVOCC is currently required to publish their rate and rules tariffs in automated tariff systems, 46 U.S.C. § 40501, 46 C.F.R. § 520.3, there is no longer a single repository where one can view the rate offerings of the various carriers providing service in a given trade.

and that neither the Commission nor a court can order a shipper to pay any rate in excess of what it had negotiated.

The Commission or a court may not order a person to pay the difference between the amount billed and agreed upon in writing with a common carrier or its agent and the amount set forth in a tariff or service contract by that common carrier for the transportation service provided.

49 U.S.C. § 41109(d). In enacting this provision, Congress understood that there was now a dynamic marketplace for ocean shipping rates, just as there was for air, truck and rail traffic, and that shippers no longer relied upon static price lists posted on tariffs in planning and carrying out their transportation needs.<sup>14</sup> Now, the negotiated rate - - not the tariff rate - - is the legal rate as between shippers and carriers, as long as that rate is memorialized in writing.

Not surprisingly, the deregulatory provisions and policies of OSRA led to sweeping changes in how the ocean shipping industry functions. Since the enactment of OSRA, vessel operators largely moved away from tariffs to conduct the vast majority of their business through confidential service contracts. And, of course, the Commission recognized this shift toward individual negotiated rates in the NVOCC industry several years ago when exercising its authority under former section 16 of the Act, now 49 U.S.C. § 40103, to issue the exemption in Docket No. 4-12. Indeed, to support its authority to utilize the exemption process in permitting NSAs, the Commission took note of the fact that Section 13(f) eliminated the need to scrupulously adhere to rate tariffs if the parties reached negotiated rate arrangements. The Notice of Proposed Rulemaking specifically observed:

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<sup>14</sup> And, by doing so, Congress took the opportunity to prevent a repeat of the “undercharge crisis” that had afflicted motor carrier transportation in the last decade.

. . . OSRA's elimination of the absolutist "filed rate doctrine" for more "market based principles" appears to define the Commission's new role as more market-based than the statutes at issue in *Maislin* and *MCI*.<sup>15</sup>

Both Congress and the Commission recognized, accordingly, that the mandatory publication of rigid, common carriage rate tariffs no longer was to be viewed as a necessary, let alone important or desirable, policy. Nonetheless, as the Commission apparently still had several concerns about the wisdom of granting the broader relief sought by the NCBFAA and numerous commenters in the consolidated Docket P 5-03 (including DOT and DOJ), it concluded at that time only to provide an exemption enabling NVOCCs to enter into NSAs. It is time to reconsider that position.

The statistics recited above vividly demonstrate that NSAs play a minor role in NVOCC traffic. Although shippers and vessel operators went from tariff-based common carriage to service contract carriage almost overnight, the NSA experience is quite different. This does not imply, however, that shippers and NVOCCs are satisfied with or functioning within the tariff-based common carriage system. To the contrary, the shipping industry is a *de facto* contract carriage system, where rates are individually negotiated by individual NVOCCs with individual shippers. There has not been a single rate discrimination challenge to a tariff-based rate in memory, nor has there been much, if any, rate litigation between shippers and NVOCCs. This is not surprising, since rate tariffs today simply memorialize the negotiated rates to which shippers and NVOCCs have already agreed.

This raises a very legitimate question. What purpose is served by requiring and enforcing tariff publication in situations where the shippers and NVOCCs have negotiated the applicable rates and memorialized those arrangements in writing? The need for NVOCCs to comply with

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<sup>15</sup> Docket No. 04-12, *Non-Vessel Operating Common Carrier Service Arrangements*, Notice of Proposed Rulemaking, served October 28, 2004, at 19-20.

the literal publication requirements of 46 U.S.C. § 40501 (formerly, section 8 of the Shipping Act) is enormously expensive, burdensome and time-consuming in the post-OSRA environment, where an NVOCC's rate offerings to their thousands of customers will vary daily or even hourly. As the Act provides for penalties of up to \$25,000 per day for each instance of non-compliance, NVOCCs failing to memorialize the myriad of rates that are quoted or negotiated each day in tariff form bear a substantial risk that the Commission or its Bureau of Enforcement may seek to impose penalties<sup>16</sup>, despite the facts that the negotiated rate is binding upon all other parties (due to section 41109(f)) and that virtually no one still uses or relies on published rate tariffs.<sup>17</sup>

**B. No Ascertainable Public Benefits Flow From The Imposition Of Rate Tariff Obligations On NVOCCs.**

1. NVOCC Tariffs Are Not Necessary To Prevent Unjust Discrimination Or For Commission Enforcement Of The Shipping Act.

A fundamental purpose of tariff filing and enforcement has been to prevent unjust discrimination by carriers able to exercise market power as a result of collective conduct immunized from antitrust scrutiny. But this issue is virtually irrelevant as to NVOCCs. As a practical matter, NVOCCs cannot engage in unjust discrimination because they have no market power, and instead operate in a highly competitive marketplace with low barriers to entry. In today's marketplace, an NVOCC must compete not only with other NVOCCs, shippers' associations and various other types of transportation intermediaries, but also the vessel

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<sup>16</sup> Notwithstanding this substantial risk to NVOCCs, the Commission does not appear to regard strict tariff enforcement as a high priority. On April 15, 2008, former Commissioner Anderson testified, before the House of Representatives Committee on Transportation and Infrastructure, Subcommittee on Coast Guard and Maritime Transportation, concerning, among other things, about the agency's current programs and initiatives. Although he provided the Committee with a general description of the agency's enforcement priorities, no mention was made of any desire or need to prosecute NVOCCs for failing strictly to comply with the tariff publication requirement of the statute. (This testimony can be located on the Commission's web page at [www.fmc.gov](http://www.fmc.gov).)

<sup>17</sup> As noted previously, the discussion here concerning eliminating the mandatory requirement of tariff rate publication relates only to those rates which are individually negotiated by NVOCCs and their shippers. NVOCCs would continue to publish individual rate tariffs in those instances where shippers might desire to continue to have rates memorialized in tariff form.

operators who provide the underlying ocean transportation. NVOCCs do not control the capacity or the terms of the underlying ocean transportation, vessel operators do. Perhaps more importantly, NVOCCs do not enjoy antitrust immunity, and thus cannot lawfully engage in collective action to discuss or fix prices, limit capacity, allocate territories or customers or otherwise exercise collective market power to the detriment of the shipping public.

There is considerable reason, moreover, to question the assumption that the prevention of unjust discrimination between shippers remains a relevant policy goal in the wake of OSRA. While one of the stated policy goals underlying the Shipping Act is “to establish a nondiscriminatory regulatory process,” that is limited to situations involving goods moving via “common carriage.” (46 U.S.C. § 40101(1).) Other policies go on to emphasize the need for “efficient and economical transportation” and to promote growth in exports “through competitive and efficient ocean transportation and by placing a greater reliance on the marketplace.” (46 U.S.C. §§ 40101(2) and (4).) OSRA was intended to make the ocean shipping industry more efficient and competitive by fostering individualized, negotiated rates between shippers and carriers in lieu of reliance upon the old common carriage tariff based system.

Under these circumstances, it would be ironic, to say the least, to conclude that NVOCCs – who have no power to engage in unjust discrimination – should still be required to publish and adhere to rate tariffs. The fact that the legalization of confidential contracts in OSRA actually *encourages* vessel operators to price discriminate between shippers demonstrates that the prevention of discrimination is no longer an “overriding purpose” of the Act. Similarly, the Commission’s use of the exemption authority in former Section 16 of the 1984 Act (now 46 U.S.C § 40103) to permit NVOCCs to enter into NSA’s with their customers further *encourages* the movement toward a system of contract carriage and price discrimination. Moreover, by

amending former Section 16 to remove the requirement that proposed exemptions to provisions of the Act not be unjustly discriminatory, Congress clearly signaled that the prevention of discrimination is no longer a policy goal.

The publication of tariffs by NVOCCs is also not necessary for Commission enforcement efforts. While it may be convenient for Commission enforcement personnel to have online access to NVOCC rate information, the enormous costs to the industry of publishing and maintaining tariffs far outweigh the limited utility this information has in Commission enforcement efforts. NVOCC rate information is just as easily available in any event through other means which do not require the NVOCC industry to maintain an elaborate online tariff system that nobody uses.

2. Tariffs Are Not Generally Used By Shippers To Develop Competitive Price Information.

Historically, one of the primary purposes of requiring carriers to establish and publish rate tariffs was to provide shippers with reliable information about available freight rates. That rationale is not applicable to NVOCC tariffs in today's marketplace. While NVOCCs do incur significant expense to update their tariffs on accessible internet websites, shippers virtually never visit those websites or otherwise review NVOCC tariffs.

The record in Docket No. P5-03 conclusively demonstrated that shippers rarely attempted to access the rate tariffs of NVOCCs.<sup>18</sup> The attached Verified Statements demonstrate that this significant fact has not changed. (*See* discussion, *supra* at 9, n. 11.)

There are a number of reasons why shippers do not use published NVOCC tariffs to obtain information about available freight rates. Most obviously, it is far easier – not to mention

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<sup>18</sup> No party in the various proceedings that were initiated to look into the issue of NVOCC tariffs and NSA's ever challenged this fact. Nor did the Commission itself ever suggest in its decision in Docket 4-12 that shippers relied upon published rate tariffs in making their transportation decision, indeed, that tariffs served any other useful purpose.

cheaper – to obtain applicable rates by calling, faxing or emailing the NVOCC and asking for a rate quote addressing the particular requirements of the shipment at issue. In the competitive marketplace in which NVOCCs operate, NVOCCs are far from reluctant to quote rates to potential customers and do so on an hourly basis.<sup>19</sup> Many NVOCCs disseminate their toll-free “800” telephone numbers to potential customers, distribute written marketing materials, calendars, coffee mugs and other advertising paraphernalia, and employ salesmen to solicit business through personal sales calls. Given the ready availability of information about current NVOCC rates and services, there is little reason for a shipper to review tariffs that typically demonstrate historic information. Shippers have far better uses for their time than combing through an NVOCC’s tariff for a rate applicable to the shipper’s requirements – particularly when obtaining competitive quotes from any number of NVOCCs requires nothing more than a few telephone calls or emails.

Perhaps more to the point, shippers generally have no interest in the “one size fits all” rates and services offered under a rigid tariff system. In today’s marketplace, shippers demand the flexibility to negotiate the individualized rates and services best suited to their commercial requirements. Moreover, because shippers have ready access to a number of competitive alternatives, they expect NVOCCs to be responsive to their individualized needs with respect to both rates and services. Consequently, shippers have no interest in perusing an NVOCC’s tariff and typically do not do so.

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<sup>19</sup> See Powell Statement, at 2-4, who explains both the rate quotation process and the fact that the administrative burden of compliance is far higher for NVOCCs than vessel operators.

C. **There Are Substantial Economic Costs Associated With Requiring NVOCC To Publish And Adhere To Rate Tariffs That Have No Practical Use.**

The costs associated with maintaining the tariff system for NVOCCs are substantial. The NVOCC industry spends millions of dollars a year complying with tariff obligations under the 1984 Act. In order to comply with the tariff obligations imposed by the 1984 Act, an NVOCC must either set up and maintain its own internet website or retain a tariff publishing company to do so on its behalf. Either avenue is very expensive.

In addition to the hardware, software and third party costs, an NVOCC must also invest considerable administrative and management resources to continually update its tariffs as new rates are quoted and old rates expire. For a large NVOCC, rate tariffs may be updated on an hourly basis and require personnel dedicated just to that task. Smaller NVOCCs may update their tariffs somewhat less frequently, but must nonetheless maintain trained staff or pay outside consultants to update their tariffs.

The NVOCC industry also faces significant costs associated with any potential noncompliance with the tariff publication requirements. Although the Commission has indicated that strict tariff compliance may not currently be an enforcement priority in connection with the Commission's recent enforcement efforts (see footnote 16, *supra*), it is simply a fact that significant penalties may nonetheless be assessed against NVOCCs for failure to scrupulously update rate tariffs in the event this does become an area of interest for the agency's Bureau of Enforcement ("BOE"). Consequently, even in those cases where the nonpublication of a rate tariff has not injured the shipping public - - *i.e.*, where the NVOCC and shipper have agreed on the rates and memorialized that agreement in writing - - the NVOCC remains at risk of having substantial penalties imposed. This increases the already high cost of tariff compliance by requiring the devotion of more resources to ensure that even technical tariff violations do not

occur. While the considerable costs of tariff compliance might be justified in a world in which tariff filing and compliance served some useful purpose, these costs constitute a flat dead weight loss to the NVOCC industry, shippers and the United States economy in today's marketplace.

**IV. THE REQUESTED EXEMPTION SATISFIES THE CRITERIA SET FORTH IN SECTION 16 OF THE 1984 ACT**

In Section 16 of the 1984 Shipping Act, Congress authorized the Commission to issue exemptions to any requirement of the Act if four criteria were met:

The Commission, upon application or on its own motion, may by order or rule exempt for the future any class of agreements between persons subject to this chapter or any specified activity of those persons from any requirement of this chapter if it finds that the exemption will not *substantially impair effective regulation by the Commission, be unjustly discriminatory, result in a substantial reduction in competition, or be detrimental to commerce*. The Commission may attach conditions to any exemption and may, by order, revoke any exemption. No order or rule of exemption or revocation of exemption may be issued unless opportunity for hearing has been afforded interested persons and departments and agencies of the United States.

Shipping Act of 1984, Pub. L. No. 98-237, §16, 98 Stat. 67, 84 (1984) (emphasis added).

In OSRA, Congress broadened the Commission's authority to grant exemptions to the requirements of the 1984 Act by deleting two of the four criteria originally contained in the 1984 Act. In particular, Congress removed the requirements that an exemption (1) not substantially impair effective regulation by the Commission, and (2) not be unjustly discriminatory. By doing so, Congress obviously intended to facilitate the grant of exemptions under Section 16 and enable the Commission use its expertise to make additional regulatory changes, consistent with the needs of the evolving ocean shipping industry:

The policy underlying this change is that while Congress has been able to identify broad areas of ocean shipping commerce for which reduced regulation is clearly warranted, the FMC is more capable of examining through the administrative process specific regulatory provisions and

practices not yet addressed by Congress to determine whether they can be deregulated consistent with the policies of Congress.

Senate Report No. 61, 105th Cong., 1st Sess. at 30 (1997).

It has been suggested in the past that the Commission does not have the authority to exempt NVOCCs or other parties from those sections of the Act for which Congress has established specific affirmative requirements (such as publishing tariffs or filing agreements) or prohibitions (such as providing service that is not contained in a tariff or service contract). This contention falls of its own weight for a number of reasons.

The plain words of section 16 demonstrate clearly that Congress envisioned no such limitation on the agency's authority to use the exemption power in order to address anachronistic or otherwise inappropriate regulatory burdens on ocean shipping. To the contrary, the statute literally states that the Commission has complete latitude to exempt carriers from any provision of the Act or obligations arising thereunder.

The Commission ...may by order or rule exempt for the future ...*any specified activity* of those persons [subject to the Act]....

Former Section 16, now 46 U.S.C. § 40103 (emphasis supplied).

In enacting OSRA, Congress dispelled any doubts as to whether the exemption authority extended to the subject of tariffs. In amending the "Prohibited Acts" provisions of the Shipping Act, former section 10(b)(2)(A), now 46 U.S.C. §41104(2)(A), was amended to take into consideration that tariff rates might be exempted by Section 16.

No common carrier . . . may . . . provide service in the liner trade that is not in accordance with the rates . . . contained in a tariff published . . . under Section 8 of this Act *unless excepted or exempted under Section 8(a)(1) or 16 of this Act.*

(Emphasis supplied.) The statute thus literally contemplates that rate tariffs may be exempted from regulation. There is, accordingly, no legitimate support for a contention that Congress

somehow meant to give the Commission latitude to exempt “any specified activity” from the regulatory requirements of the Shipping Act *except* tariff publication.

The Commission has used its broad authority on numerous occasions to exempt parties from various affirmative obligations, the most recent of which of course are the exemptions that permit NVOCCs to enter into NSAs and for NVOCCs to enter into NSAs with other NVOCCs, 30 S.R.R. 763 (Sept. 23, 2005). In support of that action, the Commission cited *California Ex Rel. v. Federal Energy Regulatory Com'm*, 383 F. 3d 1006, (9<sup>th</sup> Cir. 2004), where the Ninth Circuit upheld challenges to FERC’s deregulation of filed tariffs in situations where the carriers negotiated rates with customers in a competitive market.<sup>20</sup> Similarly, the Commission has exempted agreements between affiliates of a common ocean common carrier parent from being subject to the prohibitions against concerted action in former Section 10(c) of the Act, now 46 U.S.C. 41105. (*See* 46 C.F.R. 535.307(c).)<sup>21</sup>

The Commission has the authority to exempt NVOCCs from the tariff publication provisions of the statute. Using that authority to issue the requested exemption is consistent with and furthers the statutory prerequisites and goals in former Section 16.

**A. The Requested Exemption Would Not Result In Substantial Reduction In Competition.**

An exemption relieving NVOCCs from the obligation to publish and adhere to rate tariffs would not result in a substantial reduction in competition. To the contrary, relieving NVOCCs from mandatory rate tariff publication in those instances where rates have been negotiated with

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<sup>20</sup> *See*, October 28, 2004 decision, at 20. The elimination of mandatory tariff rate publication is even more appropriate here than in *California v. FERC*, since the FMC - - unlike FERC - - has no jurisdiction over the reasonableness of tariff rates. Hence, publication of consensual, negotiated rates in tariff form serves no meaningful regulatory purpose.

<sup>21</sup>As noted above, the requested exemption would not relieve NVOCCs of all tariff publication obligations (since they would still be publishing both rules and any rate tariff items that were not memorialized in a written negotiated arrangement with shippers).

shippers would increase competition in the ocean transportation industry. Freeing NVOCCs from the administrative burden and cost of tariff publication, as well as the risks of substantial penalties for tariff violations involving no harm to the public, would increase, rather than reduce, the overall level of competition in the industry.

Indeed, the Commission properly raised the question of whether the NSA process itself might cause some reduction in competition, noting that large NVOCCs might be better able, than their smaller competitors, to afford the administrative and legal costs of “drafting, negotiating, filing and enforcing NSAs.” *See* October 28, 2004 Decision at 21-22. That concern was essentially mooted of course by the fact that relatively few NVOCCs or shippers have found the NSA process to be useful. Nonetheless, it is clear that lifting regulatory burdens in this respect would not adversely affect competition between NVOCCs, since it would be available to all companies regardless of size.

Nor would a grant of the requested exemption affect competition between NVOCCs and vessel operators. In determining to grant the exemption to enter into NSAs, the Commission properly recognized that the situations involving NVOCCs and vessel operators are “not analogous”. *Id.*, at 25. While both are treated as carriers under the Act, there are clear differences in their activities as well as in the way they are regulated. Vessel operators are both suppliers to and, in certain situations, competitors of NVOCCs. Former FMC Chairman Koch perhaps said it best when he observed:

Competition between NVOCC’s and vessel operators (VO’s), to the extent it exists, differs fundamentally from VO – VO competition. When vessel operators compete, someone wins and carries the cargo and someone loses and doesn’t. To the extent VO’s and NVO’s “compete,” the competition is for who issues a shipper a bill of lading and makes a little more money as a result. Even when the NVO wins in that exercise, the VO’s aren’t total losers because they will - - they must - - still carry the cargo on their ships.

Statement of Chairman Koch on NVOCC Tariff Filing, 26 S.R.R. 465 (August, 1992).

NVOCCs and vessel operators are different in many other ways as well. NVOCCs tend to serve the small and medium sized members of the shipping community who shop around for the best rates and service options that are available from the entire intermediary community at any given time, while the vessel operators primarily serve larger customers that sign volume service contracts with one or a few carriers. In the words of one NVOCC,

Unlike ocean carriers, which limit their service offerings to their well-defined vessel strings, and make use of tariff simplification tools such as port groups, separate inland tariffs, and General Rate Increases, NVOCCs offer a much broader range of services, over a much larger scale of transactions.

Powell Statement, at 4. NVOCCs deal with a far broader and more volatile market than are the vessel operators, as they necessarily are negotiating rates with both their suppliers and customers on a daily, if not hourly, basis. Even if any purpose was served by mandatory rate tariff publication (which is not the case), the burden of doing so falls far more directly on NVOCCs than on the vessel operators.

Another fundamental distinction between these two types of carriers is that NVOCCs are not permitted to act collectively, while the vessel operators still enjoy antitrust immunity to discuss rates with their competitors, establish rate and service guidelines and rationalize their capacity. Thus, a contention that an exemption of this nature would threaten the competitive balance between these entities misperceives the fundamental distinction between how they operate. Even though both are called "common carriers" under the Act and are subject to many - - but not all - - of the same statutory provisions, there is no basis to conclude that an exemption

from rate tariff publication for NVOCCs lessens competition with or is otherwise somehow unfair to vessel operators.<sup>22</sup>

At the same time, eliminating the need to police tariff publication would allow the Commission to direct its oversight and enforcement activities toward malpractices involving market-distorting behavior or otherwise reviewing suspect practices that do result in injury to the shipping public. Regulatory activity focused on maintaining an efficient and competitive marketplace, rather than preserving the outmoded tariff system, would in and of itself be beneficial to competition in ocean transportation.<sup>23</sup> Hence, the requested exemption is clearly consistent with the declaration of Congressional policy added by OSRA – “to promote the growth and development of United States exports through competitive and efficient ocean transportation and by placing a greater reliance on the marketplace.” 46 U.S.C. §40101(4).

The record before the Commission in Docket 4-12 made it quite clear that shippers do not rely on published rate tariffs for any purpose at all. Published rate tariffs are not used to determine which NVOCC to utilize; nor are they generally used to gather information on general market conditions. Nonetheless, the NCBFAA is not requesting that all rate tariff publication be eliminated. The Association instead requests only that those rates which are negotiated between NVOCCs and shippers and which are memorialized in writing need not be published in a formal rate tariff form. Accordingly, the requested relief would have no adverse effect upon shippers.

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<sup>22</sup> Moreover, if vessel operators believed that such relief would be useful to them, they may request similar treatment. That they have not yet done so is another indicator of the significant differences in their operations vis-à-vis NVOCCs.

<sup>23</sup> Although collusive activity would appear to be highly unlikely in the diverse and unconcentrated market in which NVOCCs and other intermediaries operate, eliminating mandatory tariff publication would have the additional benefit of removing a potential mechanism for price signaling in the ocean transportation industry.

**B. The Requested Exemption Would Not Be Detrimental To Commerce.**

Relieving NVOCCs from the burden of publishing negotiated rates in their tariffs would also not be detrimental to commerce. Eliminating the unnecessary and unproductive costs of tariff publication in these circumstances can only serve to increase economic efficiency in the ocean transportation industry, a vital segment of the United States economy. Because the costs of tariff publication and enforcement must ultimately be borne by the shipping public, reducing those costs would be beneficial to shippers. In addition, relieving NVOCCs of publication obligations would also have the salutary effect of making United States regulation of ocean transportation intermediaries more closely aligned with the practices of all of our major international trading partners. Similarly, eliminating NVOCC rate tariff obligations would be consistent with current regulatory treatment of other modes of transportation in the United States.

The requested exemption would not remove any protection available to shippers through the Act. No shipper or NVOCC would be required to rely on negotiated rates, as they could instead do business based upon published rate tariffs. To the extent they elect to utilize the negotiated rates, the statute already provides that those rates are final and binding. (*See* 46 U.S.C. §41109(d).)

The proposed exemption would not disturb or remove protections in the Act that prohibit false billings, classifications or other unfair or unjust efforts to obtain transportation at inappropriate rates. To the contrary, the exemption would apply only to rates established through bilateral negotiations, and the prohibitions against fraudulent practices in former Section 10(b)(1), now 46 U.S.C. §41104(1), would continue to exist.

Nor is there reason to be concerned that exempted negotiated rates are somehow problematic because they are not available to the “all comers”. As discussed above, OSRA dramatically changed the nature of ocean shipping by permitting privately negotiated rate

arrangements. There is no justification to pretending that the genie of individually negotiated rates can, or should, be put back into some bottle. Service contracts, NSA's and former section 13(f) already debunk the concept of "one size fits all" rate structures, as does the reality of the existing market place for NVOCC buy and sell rates. Issuing the exemption proposed here will not change how business between shippers and NVOCCs or between NVOCCs and vessel operators is done. But it will free NVOCCs from the substantial burdens and costs of anachronistic rate tariff publication.

In other words, the only regulatory change is that the "legal" rate in these circumstances would be the negotiated, rather than the tariff, rate.<sup>24</sup> While freeing NVOCCs from the burden of rate publications that no longer serve a useful public purpose, the limited nature of the proposed exemption would preserve the efficacy of those statutory provisions that protect against harm to the shipping public.

## V. CONCLUSION

Former FMC Chairman Koch succinctly stated the case in favor of this exemption as far back as 1992. In addition to noting that NVOCCs ultimately cannot discriminate against VOCCs, Chairman Koch observed:

- (1) Requiring NVOCCs to file rate tariffs is inconsistent with the practices of the United States' major trading partners and contrary to the principles of the Shipping Act that the "regulatory system should 'insofar as possible' be 'in harmony with and responsive to international shipping practices'."
- (2) The Commission should be mindful of the President's instructions to remove unnecessary regulatory burdens.

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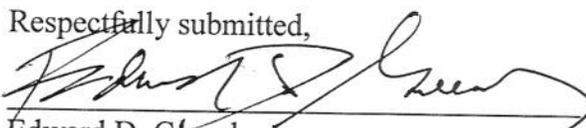
<sup>24</sup> Just as the Commission found NSAs to be the "applicable" or "legal" rate, (October 28, 2004 Decision, at 31), compliant negotiated rates would now fill that role. And, of course, in view of former Section 13(f), the negotiated rate is already the "legal" rate between shippers and NVOCCs.

- (3) NVOCCs lack market power to engage in any anticompetitive behavior, in part because they do not have anti-trust immunity. Indeed, rate tariff publication inhibits price competition.
- (4) Even with strict tariff enforcement, there is price discrimination in the NVOCC market “and the world has not spun off its axis.”
- (5) The Commission needs to be mindful of the nightmare of the undercharge crisis that afflicted shippers in the motor carrier industry, due to the fact that many carriers were negotiating rates with their customers without memorializing them in a tariff format.<sup>25</sup>

(Koch Statement, 26 S.R.R. at 466-468.) Those sentiments are more true today, following the enactment of OSRA, than they were 16 years ago.

For all of the foregoing reasons, NCBFAA requests that the Commission initiate a formal proceeding under Section 16 of the Shipping Act of 1984 to consider exempting NVOCCs from the specified tariff obligations discussed above. The NCBFAA also requests the opportunity to address any public comments filed in response to this petition in a subsequent submission.

Respectfully submitted,



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Attorney for

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<sup>25</sup> Congress ultimately eliminated this concern when it amended section 13(f) of the Act in order to essentially make the negotiated rate become the legal rate, thus precluding both any repetition of this problem as well as any need to require published tariffs in those instances when rates have been negotiated and properly memorialized in writing between the two parties.

THE NATIONAL CUSTOMS BROKERS AND  
FORWARDERS ASSOCIATION OF AMERICA,  
INC.

DATE: July 31, 2008

# ATTACHMENT 1

**STATEMENT OF COMMON PRINCIPLES  
CONCERNING A SECTION 16 EXEMPTION FOR NVOCCS**

**agreed to by**

**The National Industrial Transportation League  
National Customs Brokers and Forwarders Association of America  
Transportation Intermediaries Association**

1. The FMC has the authority under Section 16 of the 1984 Shipping Act, as amended by OSRA, to grant an exemption that would provide greater pricing flexibility and/or reduce regulatory burdens for NVOCCs.
2. The FMC's exemption authority was liberalized under OSRA to enable the agency to reduce unnecessary regulatory burdens and the FMC should exercise that authority unless the exemption would substantially reduce competition or be detrimental to commerce.
3. Granting exemptions that broadly permitted confidential contracting between NVOCCs and their customers and reduced tariff publication burdens would have a pro-competitive impact on the industry and would facilitate commerce.
4. The FMC should initiate a rulemaking proceeding to determine how to apply its exemption authority in order to broadly authorize confidential contracting between NVOCCs and their customers. The FMC should permit all qualified NVOCCs to have service contracting authority and should consider whether service contracts between NVOCCS and shippers should be subject to all of the existing rules and requirements applicable to VOCC service contracts.
5. Contracting is the preferred means of conducting ocean transportation services between VOCCs and shippers because it allows for more flexible and customized business arrangements. NVOCCs should have the same opportunity to offer contracts to their customers.
6. The administrative costs incurred by NVOCCs to publish tariffs far exceed any consumer benefits, since very few NVOCC customers rely on published tariffs to obtain NVOCC pricing information.
7. The shipping industry has changed dramatically since OSRA was adopted and has moved from a system of common carriage to contract carriage. In addition, NVOCCs—whether small, medium or large—have become far more sophisticated and have generally made the investments in infrastructure that are necessary to provide an efficient and economic intermodal transportational system. The changed dynamics of the NVOCC industry supports the FMC taking a fresh look at how it can increase competition and relieve regulatory burdens for NVOCCs.

## **SUPPORTING VERIFIED STATEMENTS**

1. John Abisch (Econocaribe Consolidators Inc.)
2. Juerg Bandle (Kuehne + Nagel Inc., agent for Blue Anchor Line, Division of Transpac Container System Ltd.)
3. Lee Connor (John S. Connor, Inc.)
4. Paulette Kolba (Panalpina, Inc.)
5. Anthony Kozlowski (American International Cargo Services, Inc.)
6. Edward M. Piza (Barthco Transportation Services, Inc.)
7. Cas Pouderoyen (DHL Global Forwarding)
8. David E. Powell (C.H. Powell Company)

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

**PETITION OF NATIONAL CUSTOMS BROKERS AND FORWARDERS  
ASSOCIATION OF AMERICA FOR EXEMPTION  
FROM MANDATORY RATE TARIFF PUBLICATION**

**VERIFIED SUPPORTING STATEMENT OF John Abisch**

I am John Absich, President of Econocaribe Consolidators Inc.

Econocaribe is OTI operating under FMC license number #16318N. We are headquartered in Miami and have 7 branch offices in the USA. Overseas we work with a network of agents.

As a member of the NCBFAA NVOCC Committee, I am familiar with issues relating to the requirements for mandatory publication of ocean rate tariffs and I support the Association's petition to exempt NVOCCs from having to memorialize rates that have been negotiated with shippers in rate tariffs.

Due to the competitive nature of the NVOCC market we must make rates adjustments on a daily basis. It is not uncommon for a client to call multiple NVOCC's for a specific shipment and due to their preference to work with Econocaribe they will call us back after they have received the three quotes to let us know the price they need from us in order to book this cargo with us. At this point we make a decision if we are prepared to offer the proposed rate and if yes we email the client our confirmation of the new rate and a booking to show this mutually agreed upon rate. Thus there is a clear understanding of what the charges will be prior to the acceptance of the cargo. This type of situation occurs on a daily basis thus we are updating our tariff on a daily basis.

Due to the frequent tariff filings Econocaribe created software to help us take this agreed upon rate into our operating system both to ensure the shipment is rated properly and our tariff remains updated. This was a complicated program to write and continues to be a time consuming task to keep this system. We incurred a substantial cost to write the software and have a regular cost to keep the software updated. In addition to the software design expense there is also the expense for a "tariff expert" to update the information. This is basically a full time task due to the constant challenge of keeping published rates updated to the velocity and frequency of the rate changes.

None of our clients access our rates via our publically accessible tariff. They all prefer to call for rate quotes or use our online booking to identify the rate. At that point they may book the cargo with the rate offered or may communicate, mainly via phone, about the rate and try to negotiate a better rate for that specific shipment. The only "hits" on our website during the past 5 years without exception have come from the FMC just doing a random check to ensure our tariff information was publically accessible. We know this to be true as we have login and password protect to this information. Of course the public has access to this information for a small fee, yet no one single client has used this mechanism to confirm our rates.

The NVOCC Service Arrangements have not provided any benefit to Econocaribe nor our clients. Neither party enjoys the benefit on this option which is ultimately is a more time consuming method to file rates.

I, John Abisch declare under penalty of perjury that the foregoing is true and correct. Further I certify that I am qualified and authorized to file this verified statement.

Executed on July 2, 2008.



John Abisch

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

**PETITION OF NATIONAL CUSTOMS BROKERS AND FORWARDERS  
ASSOCIATION OF AMERICA FOR EXEMPTION  
FROM MANDATORY RATE TARIFF PUBLICATION**

**VERIFIED SUPPORTING STATEMENT JUERG BANDLE**

I am Juerg Bandle, Senior Vice President of Kuehne + Nagel Inc., agent of Blue Anchor Line, Division of Transpac Container System Ltd., Hong Kong.

Blue Anchor Line, Division of Transpac Container System Ltd., Hong Kong, through its agent Kuehne + Nagel, is the world's largest NVOCC with an office network of more than 800 offices in 100 countries and more than 40 offices in the U.S.A. In 2007 Blue Anchor Line shipped 2.7 million TEU through its global network out of which more than 500,000 TEU in U.S. trade-lanes.

Kuehne + Nagel is a member of the NCBFAA, and I am very familiar with issues relating to the requirements for mandatory publication of ocean rate tariffs. As a matter of fact I have supported the NCBFAA and other associations' previous petitions to exempt NVOCCs from having to memorialize rates that have been negotiated with shippers in rate tariffs.

Our representatives are quoting hundreds of rates daily, not only in the U.S.A. but in all countries where ocean transportation services from or to the U.S.A are available. These rates do not only cover the actual ocean and/or intermodal transportation but do include many other services specifically required by the shippers, which are increasingly looking for integrated service offerings.

Having the global NVOCC community adhere to strictly defined rate publishing requirements in the US no longer serves any useful specific purpose.. It seems clear, after several separate proceedings before this Commission, that rate tariffs are rarely referred to or used by the shipper community. They certainly are not used by shippers. Not one single request was ever received from shippers interested in subscribing to a Blue Anchor Line tariff.

Reliably and accurately maintaining these tariffs is made even more difficult by the fact that no other country than the U.S.A. is asking for this data to be published. Even China, which once announced the introduction of a tariff filing or publishing requirement, has never actually implemented this system.

Considering expenses paid for manpower and tariff services, the total cost runs at approximately \$ 20,000 per month. This is a very high expense for a system which is not used by the shipping public.

Ocean carriers have traditionally and historically been tariff driven primarily with the intention of sharing this information with other carriers under the umbrella of global anti-trust immunity. NVOCCs never enjoyed this privilege and have therefore always been exposed to a more competitive pricing environment. Not only do NVOCCs not have anti-trust immunity but there are also a much larger number of intermediaries locally and globally active than there are ocean carriers, resulting in an extremely competitive and, therefore, shipper friendly transportation market.

The competitive environment, bonding and licensing requirements ensure that shippers can enjoy the best possible services at the best price. Rates, Fees and Service Descriptions are usually confirmed in writing with both the shipper and NVOCC having relevant documentation available in either soft or hardcopy format. In the event of disputes, these documents can be used by all parties involved, including the Commission, for arbitration purposes.

If the carriers are looking for a so-called "quid-pro-quo" in order to consent to NVOCC tariff relief, it is more than likely that our industry would have no objection if carriers are accorded the same relief. The objections to tariff exemption for ocean carriers will not come from shippers or NVOCCs but the regulatory agencies, which attempt to monitor the carriers' actions in relation to their anti-trust immunity. Carriers, on the other hand, are using their tariffs and the regulatory regime to their advantage by filing all sorts of surcharges and fees, not actually shown in their service contracts. All carrier-NVOCC service contracts refer to fees, charges and surcharges published in their tariffs. It is impossible to monitor the carriers' tariffs and charges.

Why do some ocean carriers still want NVOCCs to file tariffs? Numerous ocean carriers still believe that the tariff publishing regime ensures higher rate levels and revenue for them. There is also the fear that supporting the abolishment of the mandatory tariff filing requirements for NVOCCs will eventually lead to the removal of the anti-trust immunity.

NVOCCs work with multiple carriers operating in the same trade-lane. As a result of the diminished influence and prohibition (in Europe as of October 2008) of carrier conference systems, carriers are introducing their own types of surcharges as well as the amounts or percentages and validity. This creates the question of how can a NVOCC file these surcharges as the tariff filing system doesn't allow for memorializing different surcharges charged by different carriers in the same trade-lane? When quoting these surcharges to the customer, the NVOCC can specify the individual surcharges applied by each carrier which is not feasible in the current tariff environment.

The NSA concept has not taken root with NVOCCs and particularly not with shippers. While shippers are fully aware and know the Carrier Service Contract, there is virtually no market awareness with the respect to the NSA. Many shippers expect their NVOCCs

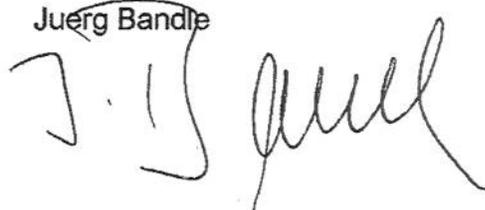
to act as their carrier, forwarder and overall logistics provider. Order and freight management services are often bundled together with the actual ocean or intermodal transportation. Shippers therefore insist on having their own Service Agreements or similar documents negotiated with their providers, and are reluctant to separate out just the ocean transportation piece that could form the basis for an NSA.

In conclusion and consideration of above we would like to restate that the time has come for the tariff system to be modified in favor of the "memorialized rate" concept as proposed by the NCBFAA.

I, Juerg Bandle, declare under penalty of perjury that the foregoing is true and correct. Further I certify that I am qualified and authorized to file this verified statement.

Executed on May 27<sup>th</sup>, 2008.

Juerg Bandle

A handwritten signature in black ink, appearing to read "J. Bandle", written over the printed name "Juerg Bandle".

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

**PETITION OF NATIONAL CUSTOMS BROKERS AND FORWARDERS  
ASSOCIATION OF AMERICA FOR EXEMPTION**

**FROM MANDATORY RATE TARIFF PUBLICATION**

**VERIFIED SUPPORTING STATEMENT OF LEE CONNOR**

I am Lee Connor, President of John S. Connor, Inc. We conduct business as a freight forwarder, customs broker and NVOCC under OTI License No. 496. We have offices located at our headquarters in Baltimore and also Norfolk, Washington, D.C., and Louisville, Kentucky.

Complying with government regulations it has always been a top priority for our company since its inception in 1917. This includes the publishing of ocean rate tariffs for our NVOCC operation. We are quite familiar with the issues related to tariff filing and submit this in support of the NCBFAA petition to exempt NVOCC's from the requirement to publish tariffs in those situations where we have negotiated rates with our customers and appropriately memorialized those rates in a written form where both we and the customer know precisely what the applicable rate is..

We operate in an extremely competitive environment. Not only do we compete with other NVO's but we also often compete with the carriers who have enjoyed the benefits of deregulation in this area for some time. Our NVO operation is supported by a sales staff that solicits business from shippers directly. Many of the carriers we compete with are also our vendors in the sense that we book our shipments directly with them. Our business includes some FCL as well as LCL freight. We are subject to an environment where rates are frequently changing and we are constantly seeking new ways to obtain transportation services with carriers as well as other neutral NVOs. Not only do the base buy rates with these providers fluctuate often but, especially in this environment of the volatile fuel market, the surcharges (bunker, currency adjustment, etc.) are a constant moving target. Some of these rates are subject to change even where there are service contracts in place. Pricing is often the number one factor in a decision maker's choice of NVO or carrier.

We work extremely hard on a regular basis to satisfy our customers needs and meet their service requirements in a cost effective fashion. Because the market is so volatile and dynamic it is a constant battle. Often long-term clients are shopping their rates on a regular basis during the year or at least annually. Given this strong fluctuation it is essential that we memorialize our pricing with clients on a regular basis. It is our practice to submit price quotations by e-mail to ensure there is no misunderstanding on either our part or by our customers. We have invested in a specific software program to assist us with pricing and established an independent pricing department to negotiate rates with both carriers and customers. Our pricing to shippers is established with arms length negotiations and confirmed in writing.

The requirement to file tariffs has always been an onerous burden. Many years ago we determined that we would do this ourselves and have established procedures and software to control this. Our initial investment was approximately \$5000 and our yearly maintenance is about \$1200. We concluded this was the best way for us to go but there are also soft costs involved with our own IT staff to refine and maintain the system, as well as the internet interface. This does not include the internal processes that all our staff must comply with when quoting and booking cargo to insure that rates are published timely. This cost over the years is almost incalculable.

In the volatile market in which we operate it has become only more burdensome with the frequencies of changes and the demands of the shipping public. Because the environment is so volatile we are re-quoting constantly. This also requires us to renegotiate with carriers even when service contracts are in place to take advantage of bullet rate opportunities. The time frame requirements for filing tariff rates become extremely difficult to comply with based on the constant changes in the market. We are in the constant state of negotiation it seems. We have hundreds of rate quotes out in the market at any given time. These quotes may be accepted and cargo has to move on short notice. Add the constant changing surcharges to this environment, and the 30 day notice requirement becomes impractical and /or impossible. The whole tariff filing requirement is costly and time consuming.

This volatility and negotiation process is also why shippers insist on receiving quotes in writing. To avoid any disagreements or confusion about what the rate their cargo maybe moving under the rates are always confirmed in writing. In fact we know of no cases where shippers have actually reviewed the publicly available tariffs over the past at least ten year if not more. It simply is not a function that is utilized in the market to our knowledge. In short, the burden of making tariff filings for each and every customer and even shipment by shipment at times, is a very costly and cumbersome proposition. It adds immensely to our work and costs while providing no benefit to the shipping public.

We have considered adding a charge to access our tariff but have concluded this is not worth the further investment. We don't believe anyone would pay to access it since they don't access it for free!

In conclusion, the tariff publication requirement for NVOs is costly, burdensome and serves no useful purpose in our view. Obviously, to the extent that we can avoid these types of unnecessary costs, we are better able to provide the most efficient, competitive rates and service to our customers. We respectfully urge the Commission to do away with this archaic rule and allow responsible U.S. NVOCCs to conduct business in a similar fashion to our counterparts around the world.

I, Lee Connor, declare under penalty of perjury that the foregoing is true and correct. Further I certify that I am qualified and authorized to file this verified statement.

Executed on July 23, 2008.



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

**PETITION OF NATIONAL CUSTOMS BROKERS AND FORWARDERS  
ASSOCIATION OF AMERICA FOR EXEMPTION  
FROM MANDATORY RATE TARIFF PUBLICATION**

**VERIFIED SUPPORTING STATEMENT OF PANALPINA, INC.**

I am Paulette Kolba, VP Export Services and Compliance, Panalpina, Inc. (US Resident Agent for Pantainer Ltd. dba Pantainer Express Lines) and I have full responsibility for overseeing compliance to 46 CFR 500.

Pantainer (FMC Org# 008092) has a global network in 137 countries, with multiple offices in most countries. Panalpina, Inc., as US Resident Agent (FMC# 375F) has 40 licensed U.S. offices.

As an active participant of the NCBFAA NVOCC Committee, I am very familiar with issues relating to the requirements for mandatory publication of ocean rate tariffs and am supporting the Association's petition to exempt NVOCCs from having to memorialize rates that have been negotiated with shippers in rate tariffs.

Ocean transportation is market driven in global trades, including the U.S. trade. As an NVOCC (Non-Vessel Operating Common Carrier) our core business is to provide ocean transportation services on both an FCL and LCL basis, utilizing the services of many VOCCs. The normal process is that, based on the volume of business that we control, we negotiate the best possible rates with the individual ocean carriers, and sign

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All quotations are subject to confirmation and contracts contingent upon strikes, delay in delivery and other causes beyond our control. No insurance coverage is effected except upon express instructions given in writing by the customer. Rates subject to change without notice. All shipments handled as per Terms and Conditions of Service which are available upon request. FMC No. 375

service contracts to document those rates. As a customer of the VOCC, we fully expect that the rates that we pay may be higher or lower than that of other NVOCCs and Beneficial Cargo Owners, and that rates will be based on our volume commitments and other areas of mutual benefit.

Market conditions change frequently and we therefore have regular occasion to renegotiate rates or to request additional rates to be added to those contracts as market conditions change, and therefore VOCCs continuously add 'bullet' rates to the service contracts. Many times, those bullet rates are written into the VOCC Service Contract in such a way that they would apply only to a specific book of business.

In turn, we offer ocean transportation services either at origin or destination to our customers. The rate we charge is negotiated with the customer. At the end of the day, this is purely a negotiation based on our cost (service contract rates), services required, and other areas of mutual interest, such as the volume of cargo that a customer has. As market conditions change our customers will approach us to renegotiate driving us to renegotiate with our service providers, the VOCCs.

The transportation arrangements for a large percentage of business in all trades is typically controlled by the purchaser of the product. In other words, for U.S. Imports, much of the rate negotiation is done in the US. For U.S. Exports, the rate negotiations are primarily handled by Pantainer offices at the overseas destination. Therefore we have a global sales force armed with our cost, their knowledge of the marketplace, and their negotiation skills to negotiate a fair price for both parties. The rules surrounding ocean rates in the US Trade is a 'foreign' concept to staff in other countries, who must, therefore be educated on these regulations and the limitations that the regulations put on this market driven process. We address this challenge by offering FMC awareness and rate filing training globally, at great expense.

For large accounts, the rate negotiations are many times part of an RFQ (Request for Quotation) process in which we know that the customer will compare the rates and services proposed by many NVOCCs and VOCCs and then award business in various tradelanes to one or more providers. The agreed to rates are documented as part of the proposal process in which the shipper accepts our proposal or rate quote through an email or other writing or is memorialized in an more formal contract. For smaller to medium accounts, the rates are generally proposed by written quotation (email) and then accepted by the customer. Either way, rates are documented in writing. The RFQ process occurs over several weeks, but the quotation process can happen within hours of cargo being tendered to us for shipment. As a Forwarder, Customs Broker and NVOCC, we offer a wide range of logistics services. It is important to note that our customers are rarely interested solely in the ocean freight rates – they are interested in the bottom line for all services they require.

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Accordingly, it is clear that establishing sell rates to our customers is market driven and based on many factors that are unique to each customer and tradelane, an important component of which is the buy rates Pantainer is able to negotiate in the VOCC marketplace, where rates and surcharges are changing daily, if not hourly.

Pantainer is committed to complying with all U.S. Government regulations, including 46 CFR 500. We respect the Commission's mission in ensuring that NVOCCs are properly licensed and have the proper financial backing. Maintaining that level of professionalism is critical to our credibility in the marketplace.

We are therefore committed to complying fully to the tariff publication provisions of these regulations. These requirements, however, are an unnecessary administrative and financial burden which only add to the cost of our overhead and therefore to the rates for transportation services that we provide to our customers. Nowhere in the explanation of the rate negotiation processes above do we mention customers referring to our public tariffs to find out what we charge. This is not now, nor has it ever been, part of the rate negotiation / quotation process. The entire tariff rate publication process takes place after the negotiation, but before cargo moves to ensure compliance. This, in and of itself, can be a challenge to achieve, especially with regard to volatile surcharges. For surcharges, it is virtually impossible to meet the tariff publication requirements short of checking every VOCC tariff every day to see if they have changed. Tariff rate publication has accordingly become, since OSRA, an internal function performed solely to meet the requirements of the regulation and is unrelated to our relationship with our customers. In fact, very few customers are even aware of these regulations.

I will go so far as to say that sometimes the regulation gets in the way of our mutual agreements with the customer. Our sales staff and the customer may agree to a perfectly acceptable rate, yet we are unable to file it because we already have an established rate for that commodity in the same trade lane. So even if the customer was happy and we were happy, we are forced to charge something different solely because a rate was published in the tariff based on negotiations with a different customer.

In order to comply to the public tariff requirements, Pantainer contracts the services of an established Tariff Publishing firm to publish our sell rates in accordance with the regulations. We also have active internal training and auditing functions that are solely related to our activities related to compliance to this regulation.

Our costs:

**Tariff Publisher: \$10,000 - \$15,000 PER MONTH!** And this does not include our internal administrative costs associated with publishing, auditing and training personnel to handle tariff publication.

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Average Number of Commodity Rate Filings: 1500+ per month

Number of staff actively filing tariff rates: 192 user ids (1 per location) with between 2 and 75 users at each location.

Time dedicated to filing or retrieving rates at operations level: 1-2 hours per week per individual.

In the years since OSRA that Pantainer has maintained the required tariffs, no customer or potential customer has ever accessed or even requested access to our tariff for pricing.

Nor are tariffs used to resolve disputes. It is in our best interest, as a service provider, to resolve any rate dispute based on our written quotations or other written rate documentation that are part of the normal process. We certainly wouldn't want a customer to feel the need to contact a US Government Agency to resolve a rate dispute. Our tariff publisher access fees range from a per minute fee with a minimum fee of \$50.00 per month up to a monthly flat fee of \$500.00 for 13 hours access where the subscriber could access all tariffs that are managed by that publisher. Is the cost too high? We don't know because no one has ever asked to access the Pantainer tariff.

We realize and appreciate the ruling allowing NVOCCs to issue NSAs (NVOCC Service Arrangements) to our customers. NSAs, however, have proven to have limited value, especially to the small and medium sized companies who do not want to get involved in signing a legal contract. They are perfectly happy with the written quotation and rarely understand the need for the NSA. The main benefit of NSAs that we see is in being able to customize rates and services to the unique conditions of some customers. That is possible without going to a lot of trouble to devise more individualized rate tariffs, so that we can charge different rates for the same commodity in the same trade lane to different customers. Confidentiality (rates not being available in the public tariff) is not a concern because no one accesses the public tariffs. The bottom line is that the NSA is issued primarily to comply to the regulation and to avoid the per commodity tariff filing process. It is established after rates have already been negotiated, agreed to and documented elsewhere. There is still filing cost associated with the NSA – that is for filing and maintaining the essential terms. The time needed to establish the NSA, including legal review, is many times much greater than that for filing tariff rates. NSA's do allow some flexibility, but their value is limited.

In closing, we concur that it is of the utmost importance to establish agreed to rates in writing, whether those rates are for NVOCC services or any other Forwarding, Customs Brokerage or Logistics services that Panalpina in all of its capacities provide. This is already the accepted practice in the market driven rate negotiation and rate quoting process. This written document is sufficient to reconcile any rate disputes. The rate publication process offers no benefit or protection to the shipping public and we support

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PANALPINA, INC.



the NCBFAA petition to exempt NVOCCs from this unnecessary burden, allowing us to use our personnel and financial resources to better serve our customers.

Respectfully,

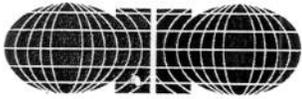
I, Paulette Kolba declare under penalty of perjury that the foregoing is true and correct. Further I certify that I am qualified and authorized to file this verified statement.

Executed on July 25, 2008

  
VP Export Services and Compliance

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# American International Cargo Service Inc.

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828-651-9722 Fax

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BEFORE THE  
FEDERAL MARITIME COMMISSION  
WASHINGTON, D.C.

PETITION OF NATIONAL CUSTOMS BROKERS AND FORWARDERS  
ASSOCIATION OF AMERICA FOR EXEMPTION  
FROM MANDATORY RATE TARIFF PUBLICATION

VERIFIED SUPPORTING STATEMENT OF ANTHONY KOZLOWSKI

I am Anthony Kozlowski and I am the Chief Executive Officer of American International Cargo Service, Inc.

We are a USA based OTI/NVOCC (License No. 13862N) with 3 offices in the United States, 1 office in Hong Kong, and 9 offices in Mainland China.

We currently have an employee that is a member of the NCBFAA NVOCC Committee and we are very familiar with issues relating to the requirements for mandatory publication of ocean rate tariffs and we are supporting the Association's petition to exempt NVOCCs from having to memorialize rates that have been negotiated with shippers in rate tariffs.

Since 1992 when we went to an electronic format for our tariff filings, we have not had even one single hit to our tariff site. To us, this is a clear indication that our tariff is not utilized by the shipping public for pricing. Since January 2000, we have spent \$130,000.00 to file our rates in a tariff that has never been accessed by the general public. The system of filing rates in tariffs is antiquated and does not reflect the realities of the market that exists today.

- 1. Traffic moves exclusively on rates that are negotiated, often if not usually, on a shipment by shipment basis*
- 2. Even if have a service contract with steamship line, many rates are negotiated on a spot market basis so that the traffic moves under bullet rates; as a result, NVOCC costs vary frequently and so the rates we offer will also vary frequently even for the same commodity moving in the same trade lane*

Consolidators

N.V.O.C.C./O.T.I.

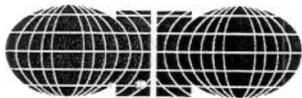
Custom Brokers

Freight Forwarders

Worldwide Logistics

Domestic Logistics

Total Logistics Solutions



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201- 941- 3632 - Fax

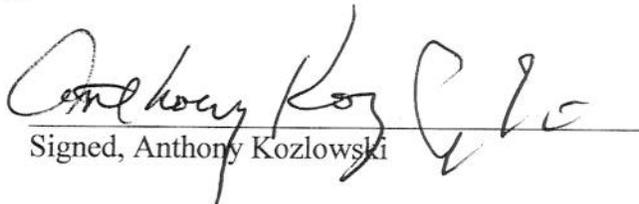
3. *Because the traffic usually moves almost immediately after the rates are negotiated, it is often difficult to ensure that the rates are memorialized in tariff form before the traffic moves.*
4. *Shippers are satisfied to rely on the rates quoted via email, so they are not confused about the rate; nor have there been any disagreements about what the rate is.*
5. *In view of the large number of shippers serviced and the large number of carriers used, the publication process is a very cumbersome and expensive proposition*

Further, NVOCC Service Arrangements have not provided any relief from the burden of tariff filing.

1. The benefit of confidentiality is not important, since no one accesses our rate tariffs anyway
2. NSAs still have to be written documents that have to be filed with the agency and the essential terms still have to be published in the tariff, so there is no cost savings
3. Many shippers don't want to sign NSA's. They feel that they are too formal and unnecessary
4. NSAs too cumbersome except for large volume contracts with shippers; even there, many large shippers still prefer to avoid formal contracts

I, Anthony Kozlowski declare under penalty of perjury that the foregoing is true and correct. Further I certify that I am qualified and authorized to file this verified statement.

Executed on July 25, 2008.

  
Signed, Anthony Kozlowski

Consolidators  
N.V.O.C.C./O.T.I.  
Custom Brokers  
Freight Forwarders  
Worldwide Logistics  
Domestic Logistics  
Total Logistics Solutions

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

**PETITION OF THE NATIONAL CUSTOMS BROKERS AND FORWARDERS  
ASSOCIATION OF AMERICA FOR EXEMPTION  
FROM MANDATORY RATE TARIFF PUBLICATION**

**VERIFIED SUPPORT STATEMENT OF EDWARD M. PIZA**

I am Edward M. Piza, Senior Vice President of the Ocean Product at Barthco Transportation Services, Incorporated (BTSI).

BTSI currently operates as a non-vessel operating common carrier (NVOCC) engaged in both import and export ocean transactions within the commerce of the United States. We currently transact this business at 15 offices throughout the United States and utilize an extensive network of agency offices throughout the world.

As a member of the NCBFAA's NVOCC Committee, I am very familiar with the issues of mandatory tariff filing of all ocean rates and I support the NCBFAA's petition to exempt NVOCC's from having to memorialize rates negotiated with customers in formal ocean tariffs.

In the normal course of business, we approach prospective customers and begin a sales process that includes exchange of information on business particulars (cargo origins, destinations, commodity descriptions, etc.), multiple rate negotiations, and final rate agreements. To facilitate the process we current maintain numerous service contracts with VOCC's who will provide us with "buy" rates that our "sell" rates will be based on.

In the course of the sales process we repeatedly approach the contracted VOCC's for "buy" rates based on that specific customer's requirements, apply our profit margin, and present those "sell" rates to the prospective customer. The process is often lengthy and typically will include numerous negotiations and re-negotiations of the "sell" rates. Once we have reached a final agreement with the customer we present them with a final rate sheet, notify the VOCC so that they can add the "buy" rates to our service contract, and file the accepted rates in our ocean tariff. We further recapitulate the rates to the customer, in a formal Standard Operating Procedure document which we present to the customer that not only contains specific operational details but restates the agreed upon rates.

Given the complexity of most customers' business it is often necessary to amend existing service contracts, sign new service contracts, utilize multiple VOCC's based on capacity concerns or unique region rate factors, and duplicate the negotiation process numerous times. Given the volatility of certain season charges, fluctuations in domestic transportation expenses, and changes in the cost of fuel we frequently must repeat this process throughout the year to remain competitive. Considering this rate volatility all of our existing contracts contain clauses and or variable surcharges that change frequently and may typically be based on reduced general tariff levels. Even in cases where we accept the surcharge the final quantum is most often open to negotiation. In today's marketplace the variability of surcharges and

the surcharge amounts have become as much a part of the negotiable structure of rates as the basic ocean freight charges.

In order to comply with the existing tariff filing requirements we have operational processes in place to ensure that all rate and surcharge change is provided to our customers, negotiated, and properly filed prior to receipt of cargo. In order to do so the written rate quotation that is given to our customer is converted to a filing form and sent to our tariff filing agency, Global Maritime/EZ Tariff, via e-mail attachment. The actual filing and communication with Global Maritime is handled by one person who spends approximately 13 man/hours per week on the process.

With these frequent rate additions and amendments the process of updating the rates into our ocean Tariff is extensive, time consuming, and expensive. From June 1, 2007 through May 31, 2008 BTSI filed or amended a total of 9,734 individual tariff line items at a cost of \$25,544. The total cost of tariff compliance including the individual filing fees, cost of hosting the tariff in a publically accessible web-site, and the labor costs for the same period was \$38,364.

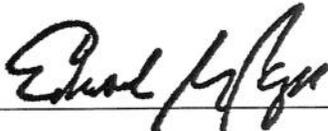
We had hoped, as a result of the Commission's decision to allow for NVO Service Agreements (NSA's), that the burden would be reduced. Given the necessity to file the terms and conditions as well as the essential terms and our customers' resistance to sign them it has not achieved the expected result. At this time we only maintain one NSA in our tariff. The vast majority of customers are unwilling to sign an NSA, primarily because it seems excessive to them in light of the fact that the industry as a whole has not adopted use of the NSA, instead preferring to maintain rates as we have.

Ironically, the process we have put in place to ensure the rates are filed is driven by the written rate quotations given to our customers. By virtue of the fact that we file rates using a document already given to our customers it is clearly illustrated that the written rate quotation is much more a part of our customers' rate process than access to our tariff. Further, Global Maritime reports that since we began using them as our filer over four years ago there has never been an outside hit on our tariff.

Considering the method by which we negotiate rates with our customers, the minimal use of our tariff that our client base has shown, the substantial cost maintaining the tariff represents, and the limited rate disputes we have experienced with our customers I maintain that the tariff filing process is an unnecessary and expensive part of our business. I therefore support the NCBFAA's petition for exemption from the filing requirements.

I, Edward M. Piza, declare under penalty of perjury that the foregoing is true and correct. Further I certify that I am qualified and authorized to file this verified statement.

Executed on June 12, 2008



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

**PETITION OF NATIONAL CUSTOMS BROKERS AND FORWARDERS  
ASSOCIATION OF AMERICA FOR EXEMPTION  
FROM MANDATORY RATE TARIFF PUBLICATION**

**VERIFIED SUPPORTING STATEMENT OF Cas Pouderoyen**

I am the Senior Vice President of Ocean Freight North America for DHL Global Forwarding.

DHL Global Forwarding, operating under FMC license number 000315NF, is part of the DHL network, operating 37 ocean freight offices in the USA, and many more overseas.

DHL Global Forwarding is an active member of the NCBFAA, and we are very familiar with the mandatory rate filing requirements and our obligation to have our ocean freight rate tariffs published. We are in support of the NCBFAA petition to exempt NVOCCs from having to memorialize rates that have been negotiated with shippers in rate tariffs.

As one of the largest global NVOCCs operating in the USA, DHL Global Forwarding has an extensive client base, with nearly every client having negotiated an individual set of ocean freight rates. Our Sales organization is tasked to negotiate ocean freight rates with our clients. While the sales colleagues have access to our current tariffs and use these tariff rates as a starting point for negotiations, the vast majority of the rate agreements are a result of a tailored proposal, which takes into consideration the specific distribution network of our clients, and most rates are developed on a "door" basis, covering thousands of locations within the USA.

We operate in an extremely dynamic environment, with supply and demand ratio's varying each week, equipment surpluses and deficits changing daily, the overall trade patterns adjusting regularly based on multiple factors, such as currency values, global trade agreements, regional economical strengths and weaknesses, etc. As such we deal with numerous and very frequent changes in rates from our underlying ocean carriers. For example, in nearly every trade the Bunker Adjustment Factors are changing on a monthly basis. More and more carriers are now operating their own BAF

formulas, and no longer rely on the earlier conference BAF tariffs. With contracts in place with 18 ocean carriers and most of them having their own BAF formulas, it has become a complicated challenge to maintain the rate filings. The majority of the freight rates are now negotiated and adjusted on a quarterly basis. The result is that we are required to file new rates nearly continuously, which has become a huge administrative burden as well as a considerable operating expense. In addition we are communicating and negotiating these rate adjustments with our clients in a very time intensive manner, and have another administrative challenge to keep our clients apprised of these rate adjustments, which is usually done via letter or e-mail.

At DHL Global Forwarding we employ Ratewave Tariff Services, Inc. to file our ocean freight rates. The standard process is for each local office to advise Ratewave Tariff Services of the impending rate adjustments or new rates, and they in turn will post the rates with the FMC. The filing expense has increased considerably over the past year, in light of the more frequent rate adjustments, and is fast becoming an impediment to our ability to operate. We spend nearly \$200,000 per annum on our rate filing services now, in addition to the many hours it takes to follow this cumbersome process, estimated at over 15,000 hrs throughout our global organization. Ironically Ratewave advises us that there has been no attempt by any entity to search our filed rates over the past two years. Our clients have no interest to verify if the moving rates are filed as they are quite content to have the quoted rates applied to their shipments, and never even inquire if we have filed their rates in our published tariffs. We have never experienced a discrepancy between quoted and filed rates, whereby our shipper would raise this as an issue.

We should also make note that DHL Global Forwarding does not receive any requests for NVOCC Service Agreements from our client base. During the Shipping Reform Act of 1999 this feature was lauded as meeting a need in the market place, but it has proven otherwise. In general our clients prefer to operate without a formal contract (NSA), as they see limited benefit in them. They prefer to make shipping arrangements with NVOCCs without such agreements, and prefer to avoid unnecessary MQCs, deadfreight clauses, etc. In addition these shippers are also aware that their terms and conditions are confidential for the most part, as no one appears to make the effort to search for the terms in the filed rates, which equates to finding a needle in the proverbial haystack anyway.

I, Cas Pouderoyen, declare under penalty of perjury that the foregoing is true and correct. Further I certify that I am qualified and authorized to file this verified statement.

Executed on June 24, 2008.

Cas Pouderoyen



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

**PETITION OF NATIONAL CUSTOMS BROKERS AND FORWARDERS  
ASSOCIATION OF AMERICA FOR EXEMPTION  
FROM MANDATORY RATE TARIFF PUBLICATION**

**VERIFIED SUPPORTING STATEMENT OF DAVID E. POWELL**

I am David E. Powell, Vice President of C. H. Powell Company, responsible for its NVOCC division. C. H. Powell Company is an Ocean Transportation Intermediary licensed as both an Ocean Freight Forwarder, and a Non-Vessel-Operating Common Carrier, under license number 000176NF. C.H. Powell Company operates 17 offices at major USA ports. C. H. Powell Company has an ownership interest in affiliated companies in China and the Netherlands. C.H. Powell Company has more than 50 dedicated agents throughout the world. C. H. Powell Company transacts approximately 13,000 NVOCC shipments per year.

C. H. Powell Company is a member of the NCBFAA NVOCC Committee, and is very familiar with issues relating to the requirements of mandatory publication of ocean rate tariffs. C. H. Powell Company is supporting the Association's petition to exempt NVOCCs from having to memorialize rates that have been negotiated with shippers in rate tariffs.

The solicitation of ocean transportation services and related pricing has changed drastically in recent years. Forces of change include the technological advances in communications and data sharing, the globalization of trade, and the significant operational restructuring by vessel-operating carriers in order to remain economically viable. The internet and the ubiquitous spreadsheet have encouraged the shipping public to demand freight pricing in formats and media of its choosing. The controlling shippers and the providing vendors are no longer proximate to each other, or to the origins and destinations of their shipments. The scope of trade lanes encountered by a typical shipper is exponentially greater than in previous decades, each trade lane having distinct service and pricing protocols. At the same time that the shippers' demands for flexibility, simplicity, and immediacy increase, and at the same time that the complexity of service pricing compounds, the resources available to control freight pricing at its ultimate source, the vessel-operating carriers, are diminishing. NVOCCs have actually used the confluence of these forces to fashion a legitimate and valuable position for themselves in the transportation logistics supply chain. However, NVOCCs are held back, and placed at regulatory risk, by the requirement to maintain tariffs and to apply all pricing by means of such an antiquated mechanism.

NVOCCs like C. H. Powell Company generate their revenue through a tightly controlled spread between the buy rates obtained from the ocean carriers, and the sell rates offered to the shippers. The range of the profit margin is narrow, typically between 5% and 20% of the cost price. While the NVOCC's sell rate, by rule, is controlled by its tariff filing, in reality the commercial market dictates the sell rate. C. H. Powell Company negotiates and establishes virtually all of its freight pricing with its customers based on commercial considerations, and then files the customized rate in its tariff, purely for compliance purposes. Because of the narrow profit margin, C.H. Powell Company must also accurately identify and control its freight cost from the carrier, when establishing its sell rates. Freight cost management has become increasingly difficult, which in turn impacts C. H. Powell's ability to define and file its sell rates.

Ocean carriers, in an effort to gain leverage in the market, have embraced the worst features of both the historic general tariff, and the more recent confidential service contract. Ocean carriers have moved away from any fixed price commitment in service contracts. All service contracts are subject to unilaterally imposed General Rate Increases. General Rate Increases are imposed on arbitrary schedules, separate for each trade lane, and based mostly upon the balance between supply and demand. General Rate Increases are not well announced by carriers. Even when they are announced, the carriers tend to advance file a large, commercially unviable rate, to satisfy the advanced filing requirements, and then they back off on the amount of increase at the last minute, and file a reduced level. This practice alone makes it virtually impossible for an NVOCC like C.H. Powell Company to fiscally manage its revenue, adequately inform its customers of price changes, and fulfill its own rate filing obligations.

An increasing percentage of ocean carriers' overall freight charge comes in the area of tariff-based surcharges. Because the base rates obtained by NVOCCs are controlled in a service contract, but the applicable surcharges are managed in separate, and numerous, underlying tariffs, C. H. Powell Company finds it quite difficult to calculate a "bottom line cost" on any particular shipment, on which to base its own sell rate and tariff filing. As soon as we succeed, through intense commercial pressure, to force the carrier to identify and fix the levels of any surcharge in a service contract, the pricing departments of the ocean carriers, distinct from the sales contacts with whom we interact, create and file a new surcharge, serving the same purpose, as a deliberate way to circumvent our efforts at price control. Further, because NVOCCs offer shippers an a-la-carte approach to freight carriage, providing multiple routing options via various underlying carriers, and because each underlying carrier structures and adjusts its surcharges in a unique way, it is impossible for NVOCCs to embrace a synchronized, pass-through pricing strategy. NVOCCs, like C. H. Powell Company, must resort to "all-inclusive" pricing, which the shipping public finds quite valuable.



# C.H. Powell Company

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In addition to the difficulty NVOCCs encounter calculating their "bottom line cost" in order to set and file their sell rates, the timing constraints required by the current rules are often logistically impossible to honor. Fifty percent of C. H. Powell Company's NVOCC shipments are imports, where the cargo delivery into the control of the NVOCC happens overseas, in foreign countries, and in different time zones. The shipment definitions necessary for C. H. Powell Company to determine its bottom line cost and suitable sell rate for filing, or whether a suitable sell rate has already been filed, often only become available in the USA regulatory environment after the required deadline for filing has passed. Even for USA originating exports, C. H. Powell Company increasingly services full container shippers, on a multi-modal, door-to-door basis, where actual receipt of the cargo is subcontracted, often to the underlying ocean carriers, and C. H. Powell Company has no direct control over, or specific awareness of, the exact time at which it has taken control of the cargo. With the current strong USA export market, bookings are being made four weeks or more in advance of loading. Given the carrier pricing strategies referenced above, pricing components may change 2 or 3 times in the intervening period, meaning the NVOCC cannot fully control its rate filing process at time of booking, and is basically powerless to control it afterward.

Assuming an NVOCC could otherwise solve the "bottom line cost" calculation problems, and know upfront what its cost factors are, what its required margins are, and what the market will bear, the only way it can overcome the timing issues of the current rules is by advance filing rates for all theoretically offered services. The economic costs of such an approach are prohibitive. While the advent of the internet has reduced the direct cost of maintaining a tariff and publishing rates compared to the previous hard copy requirements, the overall economic burden is still substantial.

For C. H. Powell Company's 13,000 shipments, I estimate that there are 300 customers involved, and a shipment repetition rate of 70% ( meaning 70% of all shipments are identical by tariff definition to prior shipments). If C. H. Powell Company were able to magically solve its "bottom line cost" issues already identified, it would be able to file only 3900 rates per year, for which I am estimating a direct cost of \$ 5.00 each and an indirect cost of \$ 10.00 each, for a total annual cost of \$ 58,500.00. Because of the rule constraints and the timing issues, for better compliance, C.H. Powell Company would need to maintain and file rates for all theoretical shipment possibilities in advance of acceptance. Assuming a very simplistic tariff structure, limited to 4 shipping units (20/40/40HC/LCL), 3 general commodity classifications, 20 USA ports/points, and 50 overseas ports/points, the unique rates to be filed multiply to 12,000, for an estimated annual cost of \$ 180,000.00. With no allowance for any surcharge maintenance, and assuming a very modest rate of change in underlying costs of once monthly, the theoretical rate filings required to capture all possible pricing for C. H. Powell Company's 13,000 shipments balloons to 144,000 distinct rate filings, at an estimated cost of \$ 2,160,000. Unlike ocean carriers, which limit their service offerings to their well-defined



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vessel strings, and make use of tariff simplification tools such as port groups, separate inland tariffs, and General Rate Increases, NVOCCs offer a much broader range of services, over a much smaller scale of transactions, resulting in an exponentially greater per transaction cost for publishing. A typical ocean carrier may maintain 10,000 distinct rates, and be able to pay for the maintenance over 1,000,000 shipments. A typical NVOCC may have to maintain 100,000 distinct rates, and must pay for it over 10,000 shipments. The economic impact of price control would be much more affordable for NVOCCs like C. H. Powell Company if they could manage their customer pricing on a flexible, per-client basis. As customers are currently requesting their pricing in such a format anyway, elimination of the separate tariff filing would eliminate virtually all incremental cost for compliance. For C.H. Powell Company, the range of potential price memorialization would reduce to between 3600 pricing transactions (one price sheet for each client, updated monthly) and 13,000 (a specific quote for each shipment).

Much more significant to C. H. Powell Company than the direct and indirect cost of tariff maintenance, is the potential regulatory risk associated with tariff filing. In the example outlined above, a significant outlay of expense and effort can improve tariff filing compliance, by filing 144,000 conceivable rates for 13,000 actual shipments. Such an approach, in my view, will improve the percentage of compliance, but it will still fall well short of 100%. Every single NVOCC, including C. H. Powell Company, is under significant regulatory risk, for every single one of its shipments. Even the most motivated and commercially immune NVOCC cannot approach full compliance with the rate filing rules currently in place.

Ironically, the regulatory intent of tariff filing, that shippers can identify and calculate their bottom line freight cost for any given shipment, at the point the freight is tendered, is neither deliverable by NVOCCs in an economically viable way, nor provided to NVOCCs, in their role as shippers, by the ocean carriers. Neither is it valued or used by the NVOCC's shippers. In the past 5 years, I am not aware of a single instance in which a shipper has directly accessed or otherwise used C. H. Powell Company's tariff.

I, David E. Powell, declare under penalty of perjury that the foregoing is true and correct. Further, I certify that I am qualified and authorized to file this verified statement.

Executed on June 10, 2008.