

Commissioner Brennan Dissents from Majority Vote to Issue Final Rule Creating Non-Vessel-Operating Common Carrier Negotiated Rate Arrangements

On July 31, 2008, the National Customs Brokers and Forwarders Association of America, Inc. (NCBFAA) petitioned the Federal Maritime Commission (FMC) to exempt non-vessel-operating (NVO) common carriers from the statutory requirement to publish, and adhere to, tariff rates.¹ In response to the intermediaries' petition, the Commission initiated on its own motion² the exemption that the Commission is now considering.³

The Commission should disapprove the exemption for two reasons. First, under U.S. Supreme Court precedent, the Commission does not have the legal authority to interpret the Shipping Act of 1984 so as to undermine that statute's regulatory framework. Second, the proposed exemption does not satisfy the two-part standard for granting exemptions under section 16 of the Shipping Act.⁴ Exempting licensed NVOs from rate tariffs will neither promote competition nor benefit commerce. It will, in fact, be a setback on both fronts.

I. LIMITS ON AGENCY'S EXEMPTION AUTHORITY

A. Exemption Authority

The proposed rate-tariff exemption for licensed NVOs contravenes the principle that the United States Supreme Court established in Maislin Industries, U.S., Inc. v. Primary Steel, Inc., 497 U.S. 116 (1990) and applied again in MCI Telecommunications Corp. v. American Tel & Tel. Co., 512 U.S. 218 (1994). These two cases, while not dealing with an agency's "exemption" authority per se, make clear that federal agencies are not to interpret and apply the statutes they administer so as to undermine those statutes' very purpose and structure. The exemption under consideration today would do precisely that. Therefore it is an invalid use of the Commission's exemption authority.

B. Maislin and MCI

In Maislin, the Supreme Court set aside the Interstate Commerce Commission's ruling that a common carrier, by collecting the filed tariff rate from the shipper instead of the lower rate that the carrier and shipper had negotiated, had committed an "unreasonable practice."⁵ To validate the negotiated rate over the filed rate, the Court said, "permitted the very price

¹ Petition No. P1-08, Petition of the National Customs Brokers and Freight Forwarders Association of America, Inc. for Exemption from Mandatory Rate Tariff Publication ("Petition").

² On February 18th, 2010, the Commission majority voted in favor of Commissioner Dye's motion to initiate a rulemaking that would exempt licensed NVOCCs from the rate-tariff requirements of the Shipping Act. http://www.fmc.gov/economic_relief_granted_to_nvoccs_by_fmc_vote/?CategoryId=1&pg=5.

³ Docket No. 10-03, NVOCC Negotiated Rate Arrangements - Notice of Proposed Rulemaking, April 29, 2010 (Commissioner Joseph E. Brennan, dissenting).

⁴ "The Commission, upon application or on its own motion, may by order or rule exempt for the future any class of agreements between persons . . . or any specified activity of those persons from any requirement . . . if the Commission finds that the exemption will not result in substantial reduction in competition or be detrimental to commerce." 46 U.S.C. § 40103(a).

⁵ Maislin, 497 U.S. at 130.

discrimination that the Act by its terms seeks to prevent.”⁶ Maislin held that it was improper for the ICC to interpret its authority under the Interstate Commerce Act⁷ so as to undermine the “filed rate” doctrine⁸ and the statutory scheme as a whole.⁹

Similarly, in MCI, the Supreme Court held that the Federal Communications Commission (FCC) had misused its authority when it made tariff-filing optional for all “non-dominant,” long-distance carriers. It was improper for the FCC to modify a regulatory requirement with the effect of fundamentally revising the Communications Act of 1934.¹⁰ That modification by the FCC, the Court stated, had wrongly undermined the very concept of common carriage in the telecommunications field.¹¹ The Court noted that Congress had chosen tariff-filing as the means to prevent unreasonable and discriminatory charges.¹² In making tariff-filing optional, the FCC had wrongly frustrated the complaint process established by Congress as an enforcement mechanism.¹³ Vacating the agency’s action, the Court stated that the FCC was bound “not only by the ultimate purposes Congress has selected, but by the means it has deemed appropriate, and prescribed, for the pursuit of those purposes.”¹⁴

C. Tariff Framework of the Shipping Act

The import of Maislin and MCI is that federal agencies do not have the authority to take measures that “conflict directly with the core principles”¹⁵ of the statute being applied. This must be true even when an agency, such as the FMC, has exemption authority. After all, the ICC in Maislin did have the statutory authority to declare a practice to be “unreasonable.” Likewise, the FCC in MCI, did have the statutory authority to “modify” regulatory requirements. The Supreme Court ruled, however, that the ICC and the FCC had gone too far in their interpretation of those authorities. Similarly here, where the FMC does indeed have a limited authority to create statutory exemptions, the FMC would abuse that authority by “exempting” so as to undermine the very regulatory scheme that the agency is charged with administering.

What is that regulatory scheme? The Shipping Act of 1984, as modified by the Ocean Shipping Reform Act of 1998 (OSRA), contemplates that all common carriers will publish and adhere to applicable tariffs. Tariffs are one of the means that Congress chose “to establish a nondiscriminatory regulatory process for the common carriage of goods.”¹⁶ That policy choice, whether wise or not, is clear from the legislative history of the Shipping Act of

⁶ Id.

⁷ 49 U.S.C. § 10701(a) (1982 ed.) (providing that “[a] rate . . . , classification, rule, or practice related to transportation or service . . . must be reasonable.”)

⁸ Maislin, 497 U.S. at 130.

⁹ Id. at 131.

¹⁰ MCI, 512 U.S. at 231.

¹¹ Id. at 229.

¹² Id. at 230.

¹³ Id. at 231.

¹⁴ Id. at 231, n.4.

¹⁵ Maislin, 497 U.S. at 133.

¹⁶ 46 U.S.C. § 40101(1).

1984 and its amendments. The FMC is not free to throw aside that policy choice in the guise of an exemption.¹⁷

OSRA was, to be sure, a deregulating measure. Most notably, it allowed members of an ocean-carrier agreement to enter into confidential service contracts with one or more shippers independently of the carrier agreement. But Maislin limits how much significance an agency can place on a “deregulating” amendment to the governing statute. The Court rejected the agency’s argument that deregulatory aspects of the Motor Carrier Act of 1980 justified a looser interpretation of the “filed-rate” doctrine.¹⁸ The Court presumed that Congress, having passed limited deregulatory measures, must have chosen not to disturb the statutory sections that remained.¹⁹ Similarly, the Supreme Court in MCI ruled that the agency was bound by the Communications Act as a whole, a statute that “for better or worse, . . . establishes a rate-regulation, filed-tariff system for common-carrier communications.”²⁰

OSRA, in any event, was not a “big bang” deregulation.²¹ The reform is better understood as an attempt to balance common carriage, enhanced competition, and antitrust immunity. In striking that balance, Congress explicitly retained the device known as the public tariff, which is to be adhered to (when applicable) and enforced by either an agency investigation or a private complaint at the FMC. As was the case in Maislin and MCI, the Federal Maritime Commission must work within the basic regulatory framework given to it. While there is room to adopt new policies in response to developments in the industry, an agency “does not have the power to adopt a policy that directly conflicts with its governing statute.”²² If there is an inherent tension between the common-carriage nature of tariffs and the deregulatory nature of confidential service contracts, the FMC cannot simply “exempt” one source of that tension out of existence. The NVO rate-tariff exemption, however, would do just that; it would essentially scrap the common-carriage framework that OSRA explicitly left intact.

Far from being antiquated,²³ tariffs are consistent with a 25-year trend of Congress repeatedly determining to regulate NVOs. In 1984, Congress required NVO common carriers to file tariffs for the first time. Then, in 1990, Congress imposed a new bond requirement on NVOs. Further, in 1998, Congress required NVOs to secure a license from the FMC and retained tariff requirements for all carriers. In formulating the bill that became

¹⁷ See, MCI, 512 U.S. at 234 (stating that it was improper for the FCC to apply its modification authority so as to effectively introduce “a whole new regime of regulation (or of free-market competition), which may well be a better regime but is not the one that Congress established”).

¹⁸ Maislin, 497 U.S. at 133, 134.

¹⁹ Id. at 135 (stating that “generalized congressional exhortations to ‘increase competition’ cannot provide the ICC authority to alter the well-established statutory filed rate requirements); “While this plainly reflects an intent to deregulate, it reflects an intent to deregulate *within the framework of the existing statutory scheme*. Perhaps deregulation cannot efficiently be accomplished within that framework, but that is Congress’ choice and not the Commission’s or ours.” Id. at 138, Scalia, J., concurring) (emphasis in original).

²⁰ MCI, 512 U.S. at 234.

²¹ Ted Prince, “Five-Year Report on OSRA,” The Journal of Commerce, May 3-9, 2004, at 11.

²² Maislin, 497 U.S. at 135.

²³ Petition at 3 (calling the publication of rate tariffs by NVOs “an expensive anachronistic exercise serving no apparent purpose”).

OSRA,²⁴ Congress took into account the views of all interested parties, including those of NVO carriers that were seeking at that time to eliminate tariff requirements.²⁵ The reported bill was an attempt “to compromise the positions and interests of those who support complete deregulation of ocean shipping and those who support the status quo.”²⁶

In light of this legislative history, the Federal Maritime Commission cannot claim today that the rate-tariff exemption is a “specific regulatory provision or practice not yet addressed by Congress.”²⁷ On the contrary, the proposed exemption would plainly substitute the Commission’s judgment for that of Congress. Congress addressed the NVO tariff issue with OSRA in 1998, after four years of consultations with industry, debate, negotiations, and hearings. At the end of that full process, OSRA left the FMC’s tariff system intact, which dates to 1961,²⁸ as a “well-established statutory requirement.”²⁹ The Senate Report on OSRA could not be clearer on this, as indicated by the following excerpts:

“[The reported bill . . . will] maintain current tariff enforcement and common carriage principles with regard to tariff shipments.”³⁰

“Common carriage requirements are intended to protect shipper interests and to encourage nondiscriminatory shipping practices.”³¹

“Tariffs provide the shipping public with notice as to the price and service terms of tendered shipping services.”³²

The [statutory] requirement that common carrier tariffs be kept open to public inspection is retained.³³

“[OSRA] retains the strong common carriage requirements of the tariff system.”³⁴

The NCBFAA may believe that publishing rate tariffs “serves no valid public purpose,”³⁵ but Congress was clearly of a different view. The Commission does not need to justify this

²⁴ Prior to the OSRA of 1998, an Ocean Shipping Reform Act of 1995, H.R. 2149, would have abolished the FMC and eliminated the tariff filing system by the end of 1997. The Senate version of the bill, S. 1356, was never reported out of the Senate Committee on Commerce, Science, and Transportation.

²⁵ S. REP. NO. 61 at 4 (1997) (noting that the Senate Committee on Commerce, Science, and Transportation held two hearings and over 100 meetings with industry representatives and relevant federal agencies and spent over 300 hours in discussion with these representatives).

²⁶ Id.

²⁷ Id. at 23 (where the Senate Report states that “while Congress has been able to identify broad areas of ocean shipping commerce for which reduced regulation is clearly warranted, the FMC is more capable of examining through the administrative process specific regulatory provisions and practices *not yet addressed by Congress* to determine where they can be deregulated consistent with the policies of Congress.” (emphasis added).

²⁸ Report of the Advisory Commission on Conferences in Ocean Shipping, April 1992, at 107 (noting that, in 1961, “Congress amended the 1916 Act to provide the additional authority for the FMC to regulate rates and require tariff filing in the foreign liner trades.”)

²⁹ Maislin, 497 U.S. at 135.

³⁰ S.REP. NO. 61 at 5 (emphasis added).

³¹ Id. at 22.

³² Id. at 23 (emphasis added).

³³ Id. (emphasis added).

³⁴ S.REP. NO. 61 at 28.

policy choice by Congress. Not much imagination is needed, however, to perceive a public benefit to a pricing system that allows shippers to view common-carrier rates at a reasonable cost on the Internet, and that prevents all carriers from increasing those rates until 30 days after publication.³⁶ Congress believed that requiring Internet publication of tariff rates, with an “appropriate level of public access,” was “an innovative private sector approach.”³⁷

A joint letter filed with the Commission by two members of Congress, Congressmen Mike Doyle (D-PA) and Tim Murphy (R-PA), supports this understanding of the legislative history and Congress’s intent in 1998.³⁸ In reference to the sweeping change contemplated by the exemption, their letter states in part:

All aspects of the Shipping Act of 1984 were carefully reviewed by Congress in the 1990s. OSRA is the by-product of years of work on how best to fine-tune the Shipping Act. We believe that Congress was clear in that the exemption authority granted to the FMC was to be utilized only when there is a situation where congressional deliberations are silent – and that the exemption process would be used by the agency to advance regulatory reform that does not conflict with the underlying statutory basis. In the case of tariff publication, Congress carefully examined how best to introduce a more relaxed set of regulatory requirements, while preserving public disclosure of rate information (for both the shipping public and the regulators’ consideration). . . . We believe that the Federal Maritime Commission might be over-reaching in this rulemaking, where Congress has clearly articulated the framework in which the agency is to function and regulate an industry.³⁹

Congress provided for, among other things, a measure of consumer protection for shippers. That is achieved today by the requirement that a common carrier provide service according to the terms of the carrier’s tariff,⁴⁰ service contract,⁴¹ or NSA.⁴² This will change under the proposed exemption: exempted NVO carriers will not be subject to any specific requirement to provide service in accordance with their NRAs.⁴³ As a result, a shipper will be unable to file a complaint at the FMC on the basis that an exempted NVO carrier has failed to adhere to an NSA freight rate,⁴⁴ and the agency will be unable to investigate an

³⁵ Petition at 10.

³⁶ September 25, 2008 Comments of Distribution Publications, Inc. at 8 (stating: “Shippers rely on this 30-day notice period because shipments are often not ready to move immediately. The physical movement of goods for export, container loading, and documentation requirements can often require days or weeks. The 30-days notice period is an essential element of the Shipping Act for good reason”); Comments of Global Maritime Transportation Services, Inc. at 3.

³⁷ S.REP. NO. 61 at 23.

³⁸ No members of Congress filed comments in this proceeding in support of the exemption’s adoption.

³⁹ Letter of Mike Doyle, 14th District, Pennsylvania and Tim Murphy, 18th District, Pennsylvania, June 10, 2010.

⁴⁰ 46 U.S.C. § 41104(2).

⁴¹ Id.

⁴² 46 C.F.R. §531.6(d)(1).

⁴³ Under Proposed Section 532.2(e), 46 U.S.C. 41104(2)(A) will not apply to exempted NVOs.

⁴⁴ Moreover, under the standard of Cargo One, Inc. v. COSCO Container Lines Company, Inc., 288 S.R.R. 1635 (2000), it is unclear whether an allegation of an “unreasonable practice” under 46 U.S.C. § 41102(c) could be the basis of a shipper complaint or a Commission investigation, where no more is alleged than a mere failure to follow the terms of an NSA. Cargo One held, in relation to service contracts, that “as a general matter,

exempted NVO on that basis. This change in the law robs shippers of a consumer protection that Congress established as part of a regulatory framework that blends elements of common carriage and contract carriage.

II. SECTION 16 STANDARD: EFFECT ON COMPETITION AND COMMERCE

Section 16 of the Shipping Act of 1984 gives the Commission the authority to grant an exemption from the statute or the agency's regulations if the Commission finds that the exemption will not result in a substantial reduction in competition or be detrimental to commerce.⁴⁵ The proposed exemption does not meet these conditions of section 16. There is good reason to believe that the exemption will substantially reduce competition and be detrimental to commerce.

A. Reduction in Competition

1. Harder for Shippers to Compare Rates

By eliminating guaranteed online public access to tariff rates, the proposed exemption will likely hinder a shipper's ability to determine which NVO common carrier offers the best value. This hindrance, in turn, stands to substantially reduce competition among NVO carriers. For this reason if no other, the Commission should reject the tariff exemption as falling short of the section 16 "competition" standard.

Under current law, all common carriers must keep open to the public an automated tariff system showing all rates and charges.⁴⁶ Common carriers, while permitted to charge shippers a reasonable fee to view a tariff rate, must make their published tariff rates available electronically through remote access to any person without time, quantity, or other limitation.⁴⁷ Congress desired such a system in order to "provide the shipping public with notice as to the price and service terms of tendered shipping services."⁴⁸

Under the proposed exemption, however, there will no longer be any required "public notice" of NVO carrier rates. The so-called "relief"⁴⁹ will foreclose shippers from comparing the online freight rates of exempted NVOs. In this way, the exemption will hinder, not promote, a key element of competition: the ability of a purchaser to know and evaluate an offer based on price, in short to "comparison shop." When NVO common

allegations essentially comprising contract law claims should be dismissed unless the party alleging the violation successfully rebuts the presumption that the claim is no more than a simple breach of contract claim." *Cargo One* at 1645.

⁴⁵ 46 U.S.C. § 40103(a).

⁴⁶ 46 U.S.C. § 40501(a).

⁴⁷ 46 U.S.C. § 40501(c).

⁴⁸ S. Rep. No. 105-61, at 23 (1997). "Congress had the foresight to recognize that the emerging technologies of the mid-and-late 1990s were then well-suited to meet [the] objective . . . [of making tariffs] widely available to interested parties (e.g., regulators, shippers, other carriers)." Comments of the Descartes Systems Group, Inc., June 11, 2010, at 3-4.

⁴⁹ "Economic Relief Granted to NVOCC's by FMC Vote," FMC news release, Feb. 18, 2010.

carriers need not post their rates, the most important piece of information to the customer – the price – will become harder and more expensive to access. Far from promoting competition among NVOs, the FMC’s scrapping of NVO rate-tariffs deprives shippers of a pro-competitive means of evaluating NVO freight rates and choosing the best value.

Competition among carriers will be reduced when shippers can view the online tariff rates of some carriers (VOCCs and unlicensed NVOs) but not those of other carriers (the “exempted” NVOs). This is common sense and would be true whether the product is an ocean container, gasoline, or medication. The buyer’s ability to compare rates represents the heart of competition. Today, under the existing tariff system, the tariffs rates of all carriers are transparent.

It stands to reason that the smaller shippers would be the ones most likely harmed by the resulting reduction in competition. These are the small businesses, occasional shippers, or shippers of household goods who have limited resources to survey freight rates by telephone or to negotiate them. The exemption would block their ability to access the rates of all NVOs on the Internet as Congress intended. By making the selection of the best NVO freight-rate harder, the FMC will not foster competition but retard it.

The NCBFAA petitioners would justify this change upon the theory that “tariffs are rarely, if ever, reviewed or consulted by shippers to determine ocean shipping rates.”⁵⁰ Record evidence directly contradicts this claim. For example:

- Distribution Publications, Inc. notes that tariffs at its website “have been used thousands of times to verify tariff rates in order to assist in settling disputes” and that the company is “regularly requested by shippers, carriers, forwarders, and interested parties to assist them in verifying tariff rates.”⁵¹
- Global Maritime Transportation Services, Inc. reports that a review of recorded “hits” to the NVOCC section of its website between July 1, 2007 and June 30, 2008 indicate a total of 133,358 hits to the lobby screen after login. That represents an average of 11,113 hits per month for that time period.⁵² In the three-months between June 1, 2008 and August 22, 2008, Global’s website received 28,199 hits. The average number of hits was 466 per day. The company fairly concludes on the basis of these thousands of hits that “people are indeed accessing this information on an ongoing basis.”⁵³
- The Descartes Systems Group, Inc. reports that, in 2009, its fee-based, public tariff system was viewed by the public for over 7,000 hours.⁵⁴

⁵⁰ Petition at 9, note 11 (stating that “shippers virtually never visit NVO websites or otherwise review NVO tariffs”). Petition at 18 (stating that “shippers no longer review or otherwise rely on rate tariffs in determining how or when to ship or in selecting a carrier or intermediary.” Id. at 2.

⁵¹ Comments of James E. Devine, Jr., President, Distribution Publications, Inc., January 21, 2010 at 5 (emphasis added).

⁵² Comments of Global Maritime Transportation Services, Sept. 25, 2008, at 7 (emphasis added).

⁵³ Id. 7 (emphasis added).

⁵⁴ Comments of the Descartes Systems Group, Inc. at 5 (emphasis added).

Such numbers make the NCBFAA's argument that the public does not use, and has no interest in using, public tariffs both "a stunning assertion" and "wholly untrue."⁵⁵ It appears that, on the contrary, a significant amount of cargo, belonging to numerous shippers, continues to move today under tariff rates, despite the fact that confidential service contracts have been in use for 11 years and confidential NSAs for six years. As the Commission majority concedes,⁵⁶ a significant number of shippers and NVOs do not want, or need, to devote the time and expense required for individually negotiated contracts. Given the documented evidence of extensive use of online NVO rate-tariffs, I cannot concur in a finding that "shippers, for the most part, do not presently use published NVOCC tariffs for price information."⁵⁷

2. Unfair Advantage of "Exempt" NVOs over VOCCs and Registered NVOs

To a large extent, NVOs and VOCCs today compete for the same cargo.⁵⁸ As carriers selling basically the same product (container space) in the same geographic market, it is fair that both types of carriers face the same, or similar, regulatory environment. That is the case under current law, by which both VO carriers and all NVO carriers can offer their customers confidential contracts.

The exemption, however, would change this equality of treatment by relieving uniquely the licensed NVO of all rate-tariff requirements. Vessel-operators and unlicensed NVOs will continue to be required to maintain their rate-tariffs and to publish them on the Internet for the public. Perhaps this change will indeed help licensed NVOs to take business away from VOCCs and unlicensed NVOs and thereby, in a perverse sense, "increase competition."⁵⁹ But the FMC should not give one type of carrier an unfair advantage over other carriers and then claim that "competition" has been increased. Unfortunately, that is what the proposed exemption would do.

The experience with NSAs also calls into question the two main reasons that the Commission majority gives for its assertion that the exemption will increase competition. If the ability of NVO carriers to "opt out of the tariff rate publishing requirements" via NSAs has not led to any appreciably greater competition among NVOs in the last six years, why

⁵⁵ Comments of Global Maritime Transportation Services, Inc., Sept. 25, 2008, at 6.

⁵⁶ Final Rule, Docket No. 10-03, Non-Vessel-Operating Common Carrier Negotiated Rate Arrangements ("Final Rule"), at 9 (noting "lack of usage of NSAs by NVOCCs") and at 13 (finding that a majority of shippers do not consult NVOCC published tariffs).

⁵⁷ Final Rule at 9.

⁵⁸ Comments of Florida Shipowners Group, Inc., Sept. 30, 2008, at 2-3 (stating that "there is a vast overlap in the customer bases of NVOCCs and VOCCs" and arguing that "eliminating tariff publication requirements for one class of competitor while leaving it in place for the other class will affect the competitive balance between them"); *see also*, "Brokers, Forwarders, and NVOs," *American Shipper*, January 2001, at 22 (noting that, of the 350,000 container orders per week handled by the shipping portal INTTRA, NVOs accounted for fully 34% of the full containerload shipments); "NVOs Tackle Full Containers," *American Shipper*, March 2000, at 60.

⁵⁹ "Freeing NVOs 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." *Petition* at 23.

does the Commission believe that “NRAs” will lead to a different result?⁶⁰ Similarly, with regard to competition between NVO and vessel-operating carriers, the Commission majority overlooks that NVOs have, in fact, been able to offer confidential contracts (NSAs) equivalent to the service contracts of VOs since 2005.⁶¹ Therefore, there is no basis for the majority’s assertion that the new instrument called an “NRA” will reduce the “statutory competitive advantage.”⁶²

Because the proposed exemption would apply to licensed NVO carriers only, it will be harder for vessel-operating carriers, as well as for the registered-but-unlicensed NVOs, to compete against licensed NVOs, who alone will enjoy the privilege of the exemption. This is likely to substantially reduce competition between NVO and VO carriers within the meaning of the section 16 exemption standard.

B. Detriment to Commerce

1. Applicable Rate Uncertain

The proposed exemption fails to satisfy the “detrimental to commerce” component of the § 16 standard for an exemption from the Shipping Act of 1984. Under Proposed Section 532.5, there is a “memorialization” requirement for rate information. A rate, therefore, will exist in writing. There is reason to doubt, however, that such writings will be sufficiently dated, accessible, and clear to serve as a proxy for a published tariff when disputes arise. It appears that the Commission and private litigants will need to request such rate information from the “exempted” NVO carrier and will be unable to obtain the information independently, as is the case today when tariffs are used. Under such circumstances, there is a strong likelihood of “detriment to commerce” arising from disputes and disruptions over ongoing uncertainty as to the rate to be charged for specific shipments.

From the perspective of both the Commission and NVO shippers, there is obviously a need to know the rate a carrier is charging and whether it is subject to unknown charges. Publicly accessible tariffs meet this need. The proposed exemption, in contrast, creates the potential for rate ambiguity and confusion. Let us suppose that an exempted NVO fails to keep or produce an original NRA and, on that basis, is found by the Commission to have violated the requirement to adhere to tariff rates.⁶³ In such cases, there will be neither a valid NRA rate nor a tariff rate that could be applied for any shipment at issue. An administrative law judge of the FMC would presumably have to make an equitable determination as to the applicable freight rate. In this way, the exemption will cause uncertainty as to the applicable rate. It is an ambiguity that will likely result in inefficiency and detriment to ocean commerce.

⁶⁰ Final Rule at 7.

⁶¹ The Commission’s rule exempting non-vessel-operating common carriers from the Shipping Act’s tariff publication requirements, conditioned upon the filing of confidential service arrangements (NSAs), went into effect on January 19, 2005.

⁶² Final Rule at 8.

⁶³ Proposed 46 C.F.R. § 532.7(c), citing 46 U.S.C. §§ 41104(1), 41104(2).

It was upon this very analysis that the Commission previously rejected a request to exempt NVO carriers from all tariff publication requirements.⁶⁴ In 2004, the Commission determined that a full exemption for NVOs is still detrimental to commerce today. Specifically, the Commission stated in its notice of proposed rulemaking for NSAs:

Doing away with the requirements that common carriers publish tariffs and adhere to rates that are either published in those public tariffs available to all comers, or adhere to rates filed in their service contracts or NSAs, would likely undercut [the principle that there must always be an applicable or legal rate] . . . and thereby cause detriment to commerce.⁶⁵

Were the FMC now to eliminate NVO rate-tariffs across the board, the agency would contradict its own legal rationale for creating NSAs in 2004.⁶⁶ Today, only six years since the introduction of NSAs, the Commission has been given no new evidence or argument that would justify an assessment different than that made by the Commission in response to the nearly identical petition filed by the NCBFAA in 2003. Doing away with the requirement to publish, and adhere to, tariff rates is still be detrimental to commerce today, as it was deemed by the Commission to be in 2004.

Under today's Shipping Act, a shipper can confirm the applicable freight-rate via the Internet. A shipper can also contact the FMC's area representatives or other staff for assistance to verify the applicable rate of a published tariff. The Office of Consumer Affairs and Dispute Resolution Services (CADRS), the area representatives of the FMC, and the Bureau of Enforcement (BOE) have found tariffs particularly useful in resolving commercial disputes between NVOs and their shipper customers. This "dispute resolution" function of tariffs has been attested to by commenters.⁶⁷ Far from serving no valid public purpose, tariffs are something that can be easily accessed and reviewed in the event of a dispute between a carrier and shipper or any related party.

It is well-known that some carriers attempt to extract high, extraneous charges from shippers using the release of the shipper's cargo as leverage.⁶⁸ Shipper complaints relating to such "hostage goods" situations can be expected to increase under the proposed exemption,

⁶⁴ Petition P5-03 and other petitioners.

⁶⁵ FMC Notice of Proposed Rulemaking, Non-Vessel-Operating Common Carrier Service Arrangements, Oct. 28, 2004, at 31.

⁶⁶ In Docket No. 04-12, the Commission conditioned its NVO tariff exemption upon the creation and filing of NVO service arrangements (NSAs). With the "detriment to commerce" standard in mind, the Commission created NSAs as an alternative to the NCBFAA's request for a complete NVO exemption from tariff publication.

⁶⁷ Comments of James E. Devine, President of Distribution Publications, Inc., Jan. 21, 2010, at 5 (stating that "the tariffs maintained at our website have been used thousands of times to verify tariff rates in order to assist in settling disputes. We are regularly requested by shippers, carriers, forwarders, and interested parties to assist them in verifying tariff rates."); Comments of Stan Levy Consulting, LLC, Petition P1-08, Jan. 18, 2010, at 5 (stating that shippers, legal counsel, NVOs, vessel operators, and the FMC use tariffs to verify the applicable rate).

⁶⁸ Household Goods and Personal Property Shipping Practices Considered by FMC, FMC news release, Dec. 9, 2010; U.S. Government Accountability Office, Consumer Protection: Some Improvements in Federal Oversight of Household Goods Moving Industry Since 2001, but More Action Needed to Better Protect Individual Consumers, GAO-07-586 (May 2007).

which makes the applicable rate less certain and leaves the form of memorialization to the discretion of the NVO carrier.⁶⁹ As explained above, no tariff, NRA, NSA, or other applicable rate may be available as a reference point in those disputes. A published rate tariff, in contrast, provides an undisputable reference point to which both the shipper and the common carrier can turn in resolving a dispute. Online tariff rates would thus seem to be a far more solid basis for determining the applicable rate than paper or electronic copies of an “arrangement” that the shipper or carrier might put forth as the controlling instrument.

The Commission appears to be unwittingly creating, via the exemption, an overly complicated and bureaucratic new contract system. That outcome alone could be considered detrimental to commerce. With the adoption of the exemption, licensed NVO carriers will be able to offer three types of contracts: the traditional tariff, the non-vessel-operating common carrier service arrangement (the NSA) from 2005, and now the non-vessel-operating common carrier negotiated rate arrangement (the NRA). All three will bring differing legal requirements and liabilities. In my view, the complexity of this alphabet soup of contract options for NVOs is not outweighed by any known benefit to the industry as a whole.

2. Cost and Administrative Burden

The Commission majority sees the proposed exemption as lifting an unnecessary administrative burden.⁷⁰ The contrary may in fact be true. Removing freight rates from an accessible Internet format could demand more paperwork and increase administrative costs for exempted NVOs.⁷¹ Exempted NVOs will have to hold the original NRA and all associated records, including written communications, for five years from the completion date of performance of the NRA by the NVO.⁷² Furthermore, an exempted NVOCC will have to enter into a new NRA for each specific cargo shipment.⁷³ These increases in the record-keeping and administrative burden on NVOs threaten to be “detrimental to commerce” under section 16. In addition, whereas today NVOs can charge a reasonable fee for tariff access, the proposed exemption will require exempted NVOs to provide electronic access to rules tariffs to the public free of charge.⁷⁴ Even if NRAs end up not adding to the administrative costs of exempted NVOs, it is very much in dispute whether NRAs will represent a significant cost savings for exempted NVOs.⁷⁵ Exempted NVOs will still be

⁶⁹ Final Rule at 25 (noting that both e-mails and telephone facsimiles may be acceptable forms of NRA memorialization).

⁷⁰ Final Rule at 13.

⁷¹ Comments of Laurie Zack-Olsen, June 9, 2010, at 4 (vice president of tariff operations for RateWave Tariff Services, Inc. commenting that “NVOs will have more work preparing and memorializing an NRA for each and every shipment covered on its bills of lading, thereby creating additional costs and work”).

⁷² Proposed Section 532.7(a).

⁷³ Final Rule at 28.

⁷⁴ Proposed Section 532.4.

⁷⁵ Final Rule at 6; Comments of Stan Levy Consulting, LLC, Docket No. 10-03, June 8, 2010 at 6 (stating that “in my 18 years as a tariff publisher with over 400 NVOCC clients, it is rare for a NVOCC, except the large ones, to have tariff costs exceeding \$5,000 per year. \$500 - \$1,000 per year is more likely, not the \$20,000 to \$240,000 claimed by the NCBFAA.”); Comments of James E. Devine, President of Distribution Publications, Inc., Petition P1-08, Jan. 21, 2010, at 4 (stating, in relation to the NCBFAA’s tariff-cost estimate of a range

required to publish, free of any charge for access, a rules tariff with virtually all details relating to NRA shipments. A “rules tariff” is defined as a tariff containing the terms and conditions governing the charges, classifications, rules, regulations, and practices of an NVOCC, but does not include the rate.⁷⁶ With such continued posting of information online, one must wonder how much of an administrative cost the exempted NVOs are really going to “save” by not having to enter just one more term relating to shipments, the rate, on their tariff websites.

Indeed, the proposed exemption itself concedes that the cost of publishing tariff rates is not “substantial.”⁷⁷ The supplementary information of the final rule states:

Other commenters argued that foreign unlicensed NVOCCs will be disadvantaged due to higher administrative costs, because they will continue to be required to publish rates. The Commission acknowledges there are administrative costs associated with publishing tariffs, but notes that even those licensed NVOCCs who take advantage of NRAs will be required to publish a rules tariff *The Commission is not convinced, however, that any difference in administrative costs between licensed NVOCCs entering into NRAs and foreign unlicensed NVOCCs publishing tariff rates would be of such a magnitude that it would substantially impact competition between them.*⁷⁸

III. ALTERNATE APPROACHES

The issues that appear to be of greatest concern to the industry, based on the NCBFAA petition, supporting statements, and responses appear to be: the cost to NVOs of tariff publication; the public accessibility and user-friendliness of tariffs; and problems associated with the use of non-vessel-operating common carrier service arrangements (NSAs). It seems to me that, instead of eliminating rate tariffs for licensed NVOs, the Commission should instead review its tariff requirements and propose any revisions that are needed to make tariffs as accessible and as useful as possible.

I disagree with the Commission majority that a review of the FMC’s tariff regulations is not necessary at this time. Under the Shipping Act of 1984, the Commission is supposed to ensure that tariffs are accessible to the public and that the fee charged for that access is reasonable.⁷⁹ The Commission has known of substantial, ongoing problems with tariff access since at least 2000, when the Commission issued two circular letters on this subject to all common carriers, carrier conferences, and tariff publishers.⁸⁰ To my knowledge, the

between \$20,000 to \$240,000, “we find these estimates high[,] and we also wonder if they include costs for software systems which NVOCCs would incur regardless of the Commission’s tariff requirement.”).

⁷⁶ Proposed Section 523.3(c).

⁷⁷ Proposed Final Rule, supplementary information, at 26.

⁷⁸ *Id.* (emphasis added).

⁷⁹ 46 U.S.C. § 40501(c).

⁸⁰ The first letter, noting the FMC’s concern that “some tariff systems appear to limit the public’s ability to access rates,” offered specific guidance in four problem areas: instructions, commodity index/search features, search date capability/historic records, downloading/software problems, and fees. FMC Circular Letter No. 00-01, April 6, 2000. The second letter noted the agency’s identification of tariff systems requiring fees that

Commission has received no indication that these tariff-access problems were resolved through the voluntary compliance envisioned by the circular letters of 2000. Rather, having performed comprehensive reviews of carrier tariffs in 1999, 2002, and 2005, the FMC has consistently identified excessive tariff-access fees as a factor limiting the public's ability to access electronic tariffs.

As part of its review, the Commission might also consider developing free software by which carriers could publish their tariffs. The idea of “range rates” (the minimum/maximum rates in a tariff) could also be taken up as a possible way of reducing the publication requirements on carriers. There are no doubt other ideas that might emerge from a comprehensive staff review of the FMC’s tariff system.⁸¹ They stand to offer more potential benefit to commerce, competition, and consumer protection, it seems to me, than scrapping today’s system of online rate tariffs.

IV. CONCLUSION

Congress made the current tariff system fully applicable to both VO and NVO carriers. That policy choice binds the Commission. The holdings of Maislin and MCI make clear that the Commission lacks the legal authority to “re-legislate” on that broad issue. That fact that some NVO carriers do not like to use tariffs is an insufficient basis for the Commission to undo a key aspect of OSRA. The statutory revision of 1998 was an attempt at a regulatory framework that balances aspects of contract carriage and common carriage. Congress obviously saw a valid public purpose in that scheme, and it is the Commission’s job to carry it out. Today’s online tariff system is not antiquated. If anything, Congress showed commendable foresight in embracing, in 1998, the role the Internet would play in ocean transportation.⁸²

More concretely, the Commission must also deny the request because the section 16 standard has not been met: the exemption would substantially reduce competition. It will be harder for shippers to compare the rates of NVOs, and licensed NVO carriers will have an unfair advantage over other common carriers (both vessel-operating and NVO) that cannot make use of exemption. The exemption will also be detrimental to commerce. The

“appear to be in apparent contravention of OSRA’s provisions permitting assessment of a ‘reasonable’ access charge.” FMC Circular Letter No. 00-02, Oct. 6, 2000.

⁸¹ Comments of Global Maritime Transportation Services, Inc., Petition P1-08, at 9 (stating that “an instruction from the FMC that rates need only get filed once a booking has been secured but prior to receipt of the cargo could go a long way in reducing the filings versus shipment ratio.”).

⁸² See, generally, “Shippers’ IT,” American Shipper, January 2011, at 20 (noting a 693% increase in online bookings in the previous five years at the web portal Cargo Smart); Steve Block, “Traversing Transportation Techno-Babble: FMC Takes on the Web,” Marine Digest and Transportation News, June 1, 2000 (stating that “E-Commerce has invaded ocean carriage” and that “electronic tariff-filing requirements imposed by . . . OSRA [have made] the Internet a fundamental element of our industry”); Ann Saccomano, “Tension,” Journal of Commerce, July 7-13, 2003 at 10 (noting that the Internet portals of ocean common carriers “are helping carriers accomplish an overriding goal, which is to wean shippers off of the phone and fax when conducting business with carriers”); Helen Atkinson, “Chicken and Egg,” Journal of Commerce, August 5-11, 2002, at 20 (noting that “shippers are warming to the use of carriers’ online services”).

exemption stands to create uncertainty as to rates and to increase, not decrease, the cost and administrative burden faced by exempt NVOs.

At a minimum, the Commission should be very cautious when taking up an idea that, in one form or another, has already been examined and rejected three times: by Congress in 1998 and by the FMC in 1991 and 2004. Eliminating tariffs across the board for NVOCCs would contradict the Commission's legal rationale in providing for NVOCC service arrangements in 2004. I have not been made aware of any new factual or legal argument that would justify the Commission's reversing its decision of six years ago in this matter. Virtually the same arguments that lost before have been put forward again in this proceeding. They remain unpersuasive.

The tariff exemption would tilt the scale in the favor of the licensed NVO carrier. Naturally the NVO carriers would like to keep their rates secret and to be able to negotiate an increase in rates immediately with every potential shipper, without being bound by the 30-day, "no rate increase" requirement of the tariff system. But no one has explained how doing away with NVO tariffs would benefit shippers.⁸³ The proposed exemption represents a step backward in relation to two functions of the FMC as a regulatory agency: the promotion of competition and the protection of consumers. It has the appearance of being nothing more than a gift from the FMC to licensed NVOs.

⁸³ Comments of Stan Levy Consulting, LLC, Docket No. 10-03, June 8, 2010, at 6 ("I doubt that the \$13.00 saved on one tariff filing is going to be passed onto the shipper. It will pass to the NVOCC at the expense of the same importer or exporter who will no longer benefit from his shipment being covered by all the protections of the laws passed by Congress.").