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PETITION NO. P4-04

**PETITION OF FEDEX TRADE NETWORKS TRANSPORT & BROKERAGE, INC.
FOR EXEMPTION FROM TARIFF PUBLISHING REQUIREMENTS**

**COMMENTS OF AMERICAN PRESIDENT LINES, LTD. AND APL CO. PTE., LTD.
IN REPLY TO THE PETITION**

American President Lines, Ltd. and APL Co. Pte., Ltd. ("APL") hereby reply to the March 12, 2004 petition of FedEx Trade Networks Transport & Brokerage, Inc. ("FTNT&B"). FTNT&B says (pp. 1-2) that it strongly supports the petition for rulemaking filed by BAX Global in Docket No. P8-03, and that its exemption petition constitutes a backup plan so that FTNT&B will be in the queue in case the Commission decides to act on individual exemption petitions, as proposed by United Parcel Service.

APL opposes FTNT&B's petition for the reasons set forth in APL's 10/10/03 Comments and 1/16/04 Further Comments in Docket Nos. P3-03, P5-03, P7-03, P8-03 and P-9-03, which are incorporated herein by reference. In addition, three aspects of FTNT&B's petition warrant separate comment.

1. Procedurally, FTNT&B is out of bounds in using its petition as an excuse to reply to APL's comments in the above-identified dockets (see FTNT&B petition pp. 4-5). FTNT&B took full advantage of the opportunities to participate in those dockets, by filing opening comments on 10/10/03 and reply comments on 1/16/04, and by meeting with individual Commissioners on 1/8/04. If FTNT&B considered it prudent to file an exemption petition as a backup to its primary position in support of a rulemaking, that was its prerogative (although one may wonder why it waited so long). But it was not FTNT&B's prerogative to use its backup

petition as the vehicle to reply to the consultant study that was included in APL's 1/16/04 comments in the prior dockets, as it did at pp. 4-5 of the petition. That portion of the petition is entirely gratuitous and transparently violates the Commission's rule against replies to replies, and must be ignored.'

Further, in noticing FTNT&B's petition, the Commission admonished: "Commenters shall not use this as an opportunity to submit further comments or replies to Petition Nos. P3-03, P5-03, P7-03, P8-03, P9-03, P1-04 and P2-04 or any replies thereto. The comment period in these petitions is closed and the Commission's rules at 46 C.F.R. §502.74 prohibit replies to replies." 3/17/04 Notice (emphasis added). This makes clear that comments on FTNT&B's petition cannot be used as an excuse to reply to APL's comments in the prior dockets.

We are glad that FTNT&B has implicitly recognized the importance of the issues addressed in APL's 1/16/04 consultant study. However, those issues had been clearly raised in APL's first round (10/10/03) comments in the prior dockets. FTNT&B and other NVOs had an opportunity -- which they universally declined -- to comment on those issues in their second round (1/16/04) comments. If the Commission initiates further proceedings to consider such issues, as APL and the World Shipping Council have requested, all parties will have opportunities to address the data and analysis in APL's study, and APL will have opportunities to elaborate. We would welcome such a debate. However, the Commission should not tolerate replies to the study in the guise of comments on a single NVO's six-page backup petition.

2. In these circumstances, we will not undertake to respond to the substance of FTNT&B's groundless criticisms of APL's consultant study. We do, however, believe it appropriate to respond to FTNT&B's attempt to impugn APL's motives by alleging (p. 5) that the study was submitted for the purpose of delay rather than to enhance reasoned agency decisionmaking. To support this allegation, FTNT&B criticizes the study for raising the issue of "mega-NVO" market power without providing the data necessary to evaluate that issue.

'See, e.g., 46 C.F.R. § 502.74(a)(1); 10/9/03 Order in Docket No. P8-03 Denying BAX Request to File a Reply to Comments.

However, APL's study (pp. 9-11) did, in fact, identify publicly available volume and revenue data clearly suggesting that the **mega-NVOs** have great market power. At the same time, the study explicitly recognized (p. 9) that the available data is "only indicative at this point" and stated that "it will be important to get better information on NVOCC volumes in U.S. trade." We thus acknowledged that we do not have the full data necessary for a reasoned analysis of **mega-NVO** market power or its implications for important U.S. maritime policies if the **NVO** proposals were adopted. But our point was: Neither does the Commission. By asking the Commission to obtain and evaluate such data before it acts on proposals that could fundamentally alter the structure of the liner shipping industry, APL is advocating informed decisionmaking, not delay.

3. Unlike the other **NVOs** whose petitions for rulemaking **FTNT&B** supports, **FTNT&B** requests (pp. 2, 6) that it be granted a "temporary exemption" from tariff requirements while a rulemaking is pending. However, the Shipping Act does not mention, much less authorize, temporary exemptions pending Commission consideration of the underlying issues in a different proceeding. We are aware of no instance, and **FTNT&B** has cited none, in which the Commission has granted an exemption on a temporary basis while it considers whether an equivalent exemption should be granted on a "permanent" basis. Rather, Section 16 on its face requires that any exemption can be granted only after the Commission makes specified findings (and affords an adequate hearing).

FTNT&B's petition merely repeats, in summary fashion, the by-now-familiar mantra in support of the **NVO** proposals for long-term relief, without presenting any evidence or argument addressed to the shorter-term implications of a temporary exemption. Further, **FTNT&B** has provided only minimal information on its operations, and no information on how its operations relate to those of FedEx corporate affiliates involved in the "logistics" business, including FedEx Supply Chain Services, Inc. (an affiliated **NVO** whose operations were subject to the show cause proceeding in Docket No. 03-14). Thus, even if a temporary exemption were available in principle (which it is not), and even if the Commission had statutory authority to exempt an

NVO from tariff requirements (which it does not), FTNT&B's filing does not allow the Commission to make any findings concerning the effects of the requested temporary exemption.

More basically, the issues that would be raised in the rulemaking FTNT&B advocates -- including the issues identified in APL's filings in the prior dockets -- go to the heart of competition in the liner shipping industry, and as such could not sensibly be resolved on an interim basis. It would be completely unrealistic, and a recipe for chaos, to "temporarily" change the basic ground rules governing liner shipping pending completion of a proceeding to address the ground rules on a long-term basis. Moreover, if the Commission were to initiate a rulemaking proceeding such as FTNT&B supports, the issues would necessarily range beyond NVO service contract authority as such. For example, if NVOs were to take the position in such a rulemaking that NVOs and VOCCs should be placed on equal footing and that the competition between them should be governed purely by market forces, it would seem logical for VOCCs to raise the issue of whether, in such a system, VOCCs should be relieved of the current Shipping Act provisions arguably requiring them to do business with NVOs, consistent with the general rule governing American markets that a provider of goods or services is free to choose to sell its product to consumers exclusively on a retail basis (rather than through middlemen). This simply illustrates the scope and complexity of the issues that would be on the table, and why they cannot rationally be decided on a "temporary" basis.

Respectfully submitted,



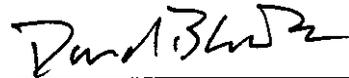
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April 2, 2004

CERTIFICATE OF SERVICE

I certify that I have this date served copies of the foregoing Comments of American President Lines, Ltd. and APL Co. Pte, Ltd. in Reply to the Petition via first class mail, postage prepaid, to:

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