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U.S. DEPARTMENT OF JUSTICE
FEDERAL MARITIME COMMISSION

November 19, 2004

Hand Delivered

Bryant L. VanBrakle
Secretary
Federal Maritime Commission
800 North Capitol Street, N.W., Room 1046
Washington, D.C. 20573-0001

Re: Docket No. 04-12; Non-Vessel Operating
Common Carrier Service Arrangements

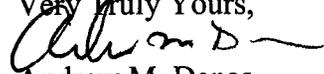
Dear Secretary VanBrakle:

This law firm represents the American Institute for Shippers' Associations, Inc. ("AISA"). Please find enclosed for filing one original and fifteen copies of AISA's Comments in the above-referenced proceeding.

Also enclosed is an additional copy of AISA's comments, which we request that you stamp for our files and return to us for our files

By separate e-mail this date we are forwarding to you an electronic version of AISA's comments in Word format.

Please contact the undersigned should you have any questions regarding the enclosed comments.

Very Truly Yours,

Andrew M. Danas

Enclosures

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

)) Non-Vessel-Operating Common Carrier) Service Arrangements)))	Docket No. 04-12
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**COMMENTS OF
 AMERICAN INSTITUTE FOR SHIPPERS' ASSOCIATIONS, INC.**

COMES NOW AMERICAN INSTITUTE FOR SHIPPERS' ASSOCIATIONS, INC., ("AISA"), by and through its undersigned counsel, and herein files its comments in the above-referenced proceeding.

INTRODUCTION AND SUMMARY

With one major exception, AISA supports the proposal to allow nvoccs to enter into Non-vessel operating common carrier Service Arrangements (NSAs). AISA believes that authorizing NSAs has the potential of increasing competition in ocean shipping. However, AISA opposes the proposed ban on shippers' associations that have nvocc members from entering into such agreements as set forth in proposed section 531.3(m) of the proposed regulations. As drafted, this proposed restriction is unlawful. It would also reduce competition.

As is further discussed below, for the first time the Commission is proposing to regulate the activities of shippers' associations and who can and cannot be members of an association. It is also seeking to regulate and impose competitive restrictions on with whom and how shippers' associations can contract.

The Commission's proposal is directly contrary to both the language and statutory history of the shippers' association provisions of the Shipping Act. It is also directly contrary to the Commission's own decisions which, over the past twenty years, have consistently stated that it lacks the statutory authority to impose restrictions on, or regulate shippers' associations. Finally, the

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proposal is directly contrary to the articulated purposes for which the Commission is proposing to restrict the right of shippers' associations to enter into NSAs.

AISA thus supports adoption of the proposed regulations if the proposed restriction on shippers' associations with nvoccs using NSAs is removed from the final regulation. Unless this restriction is removed, AISA respectfully suggests to the Commission that the proposed regulations are unlawful and the proposed exemption cannot, and should not, be granted.

ABOUT AISA

AISA was established in 1964. It is the trade association for shippers' associations. Based in Washington, D.C., AISA has actively represented the interests of shippers' associations in legislative and regulatory matters for the past 40 years. These matters have addressed issues in both domestic and international maritime transportation. AISA representatives have testified before the United States Congress and were actively involved with the drafting and enactment of both the United States Shipping Act of 1984 and the Ocean Shipping Reform Act of 1998. AISA has been involved in every major proceeding before the FMC interpreting those laws. AISA has also actively represented the interests of shippers' associations before international governments and governmental organizations involved with international shipping, for example, the Organization for Economic Co-Operation and Development (OECD) and the People's Republic of China.

ABOUT SHIPPERS' ASSOCIATIONS

Shippers' associations are membership-only buying cooperatives usually consisting of small to medium sized shippers. Shippers' associations are unregulated entities, consistent with their historic status as transportation entities servicing their members. This legal status is pursuant to Congressional mandates authorizing shippers' association operations in the international and domestic transportation markets. Under the Shipping Act, shippers' associations are legally defined as being shippers, thus enjoying all the rights and benefits of shippers under the Act.

Shippers' associations are active in all major international shipping trades. They operate both as full service and rate negotiator shippers' associations. Whether handling general commodity freight or specialized commodities, and regardless of the specific trade lanes, shippers' associations provide a very efficient mechanism for small to medium sized shippers to obtain access to volume discount rates and service contracts that would otherwise only be available to the largest shippers.

The individual members of a shippers' association would normally have insufficient volume, nor the time nor expertise, to negotiate competitive service contracts on their own. By joining and participating in a shippers' association, smaller shippers can obtain economically competitive ocean transportation rates that allow them to participate in international trade. This is usually accomplished by the shippers' association entering into service contracts which are then made available to the individual members of the association. Larger shippers may also

choose to join a shippers' association, as a method of consolidating their freight to obtain greater volume discounts, or as a means to supplement their own, individual, service contracts with ocean carriers.

*THE COMMISSION SHOULD NOT ADOPT THE
PROPOSED RESTRICTION ON SHIPPERS' ASSOCIATION USE OF NSAs*

AISA supports granting nvoccs the right to enter into confidential arrangements with their customers on the grounds that it would promote competitive options in ocean shipping and would enhance competition. However, as drafted, AISA opposes the Commission's proposed exemption, specifically proposed Section 531.3(m) which would limit the class of "NSA shippers" to:

a cargo owner, the person for whose account the ocean transportation is provided, the person to whom delivery is to be made, or a shippers' association. The term does not include NVOCCs or a shippers' association whose membership includes NVOCCs.

Many shippers' associations have nvoccc members. They do so because almost twenty years ago the Federal Maritime Commission held that nvoccs can join shippers' associations. Twenty years ago the Commission also held that it lacked the statutory authority to regulate the membership; formation; or operation of shippers' associations.

Now, for the first time in the twenty year history of the shippers' association provisions of the Shipping Act, the Commission is seeking to impose membership and contracting restrictions on shippers' associations. It is essentially proposing a rule that shippers' associations with certain categories of members - i.e., nvoccs - will not be legally treated as being shippers for purposes of

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entering into certain types of contractual arrangements. The proposed rule would give a competitive advantage to some shippers' associations as opposed to other shippers and shippers' associations. If adopted, the proposed rule would actually reduce competition.

The Commission's own decisions have held that it lacks the legal authority to promulgate the restrictive rule that it proposes. These decisions also totally rebut the policy concerns cited by the Commission for adopting the proposed rule.

The Commission's Own Decisions Hold that It Lacks the Statutory Authority to Adopt the Proposed Restriction

Ever since enactment of the Shipping Act of 1984 the Commission has consistently held that it lacks the statutory authority to regulate the membership; formation; and operation of shippers' associations. The Commission's decisions on this issue clearly hold that it lacks the authority to adopt the proposed restriction on shippers' associations set forth in proposed Section 531.3(m).

The earliest ruling by the Commission regarding its policy towards shippers' associations totally rebuts the Commission's adoption of its current proposal. In *Status of Shippers' Associations Under the Shipping Act of 1984*, 49 F.R. 21799 (May 23, 1984), the Commission held that shippers' associations would not be subject to direct, on-going affirmative regulation by the Commission. The Commission specifically stated that:

The Shipping Act of 1984 (the Act) (46 U.S.C. app. 1701 et seq.) recognizes shippers' associations as discrete entities in the transportation industry. Section 3(24) of the Act (46 U.S.C. app. 1702(24)), defines a shippers' association as "a

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group of shippers that consolidates or distributes freight on a nonprofit basis for the members of the group in order to secure carload, truckload, or other volume rates or service contracts." Shippers' associations are also mentioned in sections 8(c) 10((b) (13), and 15(b) of the Act (46 U.S.C. app. 1707(c), 1709(b)(13), and 1714(b)). None of these provisions, however, subject shippers' associations to direct, on-going affirmative regulation by the Federal Maritime Commission. The Commission, therefore, does not intend to issue any rules governing the formation and operation of such associations at this time.

The Conference Report which accompanies the Shipping Act of 1984 indicates that the legal issues arising from the formation of shippers' associations are matters falling within the jurisdiction of other federal agencies. See H.R. Rep. No. 600, 98th Cong., 2d Sess. 38 (1984). That Report also advises that cooperative activities of shippers in obtaining reduced rates would most likely not run afoul of the antitrust laws, especially if the group did not possess "threatening market power." Id. In any event, the Report further notes that Business Review Letters of the Department of Justice and Advisory Opinions of the Federal Trade Commission are available to provide shippers with advice on whether their contemplated concerted actions as shippers' associations comport with the antitrust laws; and that Title III of the Export Trading Company Act of 1982 (15 U.S.C. 4011 et seq.) allows groups of exporters to apply to the Secretary of Commerce for antitrust certification.

To the extent shippers' associations become involved in activities which may be subject to the Shipping Act of 1984, it is the Commission's intention to address any matters and issues that arise therefrom on an ad hoc basis.

After issuing the above-quoted Notice, AISA filed a petition with the Commission seeking clarification as to whether the FMC would allow nvoccs to join shippers' associations as members or whether membership in shippers' associations would be limited to beneficial interest shippers. In its petition, AISA sought a ruling limiting membership in shippers' associations to beneficial cargo owners, on the grounds that then existing Interstate Commerce Commission

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policy had a similar policy.¹

In a ruling denying AISA's petition, the Commission again held that it lacked the statutory authority to regulate or impose restrictions on the membership of shippers' associations. This decision - based on the language of the Shipping Act and its legislative history - explicitly held that the Commission does not have the authority to limit who is or who is not a shipper under the Shipping Act for purposes of membership in a shippers' association:

The AISA petition requests the Commission to interpret the word "shipper" for purposes of the term "shippers' association" to mean only the owner or beneficial owner of the goods shipped. For the reasons stated below, the Commission is denying the Petition.

First and foremost, the applicable statutory provisions do not permit the interpretation urged by AISA. Section 3(24) defines "shippers' association" as "a group of shippers that consolidates or distributes freight on a nonprofit basis for the members of the group in order to secure carload, truckload, or other volume rates or service contracts." Section 3(23) defines "shipper" as not only the "owner" of cargo but also the "person for whose account the ocean transportation of cargo is provided or the person to whom delivery is made." The statute clearly recognizes, therefore, that someone other than the owner of the cargo can be considered a shipper for purposes of the 1984 Act. To the extent, therefore, that there are entities which are not beneficial owners of cargo but instead are "persons for whose account the ocean transportation of cargo is provided", they qualify as "shippers" under the Act. And as shippers, they would further qualify as participants in shippers' associations unless some restriction appeared elsewhere in the Act. None does; so that as a straightforward exercise in statutory interpretation, Petitioner's request is not supported.

Under the circumstances, there would appear to be no reason to resort to the legislative history of the Act to seek further clarification. However, even if one were to consult that history, it lends no support to AISA's restrictive interpretation of the word "shipper". Indeed, the limited legislative history on

¹ As with the former ICC, that policy is now defunct.

shipper's associations appears to indicate the contrary. The concept of some sort of shippers' group acting as a countervailing balance to the power of conferences was an early part of various bills introduced to reform the Shipping Act, 1916 (46 U.S.C. app. 801, et seq.). However, the use of the term "shippers' association" was a late development which only occurred as the result of meetings between the House and Senate conferees on S. 47. In discussing this provision, the Conference Report states that:

. . . The conferees agree to the addition of a new definition (24), "shippers' association" The definition was included for the sole purpose of identifying this shippers' group. A shippers' association would continue to be subject to laws other than the Shipping Act of 1984. If a group meets the definition, it can negotiate rates on behalf of its members. Section 10(b)(13) prohibits any common carrier from refusing to negotiate with such an association.

H.R. Rep. No. 660, 98th Cong., 2d Sess. 27-28, (184) (emphasis supplied). This discussion clearly indicates, therefore, that so long as a shippers' group meets the statutory definition, it can operate as a shippers' association. The Conference Report suggests no other restrictions on membership.

This conclusion is further supported by other aspects of the relevant legislative history. The Senate version of the Shipping Act which went to conference contained an entity called a "shippers' council." It was defined as "an association of shippers of their agents, other than ocean freight forwarders and non-vessel-operating common carriers" (S. 47, section 3(25)) (emphasis supplied). The Senate bill also recognized joint ventures of small shippers, which were specifically limited to shippers who ship no more than 35, 40 foot containers a month (S. 47, section 8(a)(9)(B)). The final compromise, which resulted in the addition of "shippers' associations" in lieu of "shippers' councils" and "shipper joint ventures," omitted these earlier restrictions. The failure to expressly restrict in any way the membership in shippers' associations (other than in the definition), where it had done so with predecessor shipper organizations, further suggests that Congress had no intention of limiting membership in such associations beyond the requirements set forth in its definition.

FMC, Petition For An Amended Statement of Policy Regarding the Status of Shippers' Associations; Order Denying Petition, 50 Fed. Reg. 7225 (Feb. 21, 1985)(footnotes omitted).

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In denying AISA's 1984 petition the Commission specifically noted that nvoccs are shippers and are thus entitled to join shippers' associations. Since this decision, the Commission has consistently held that it will not regulate the membership; formation; or operation of shippers' associations.

Congress has also further endorsed that policy through enactment of the Ocean Shipping Reform Act of 1984, at which time it specifically included shippers' associations and nvoccs as being within the statutory definition of "shipper." *46 U.S.C. App. §1702(21)(D) and (E)*. At that time, Congress also had fourteen years of experience with shippers' associations under the Shipping Act of 1984. It was aware of the FMC's policy towards shippers' associations and the variety of types of shippers' associations that had formed and operated in the international trades since 1984. In enacting OSRA, Congress presumably reaffirmed the Commission's prior decisions that it would not regulate shippers' associations and that nvoccs can be members of shippers' associations.

The Commission's twenty-year history of holding that nvoccs can be members of shippers' associations and that the Commission will not restrict the operations of shippers' associations is binding precedent on this issue. These decisions are explicit rulings holding that the FMC lacks the statutory authority to adopt the proposed definition of "NSA shipper" now being proposed in Section 531.3(m). Simply put, the Commission lacks the statutory authority to say that some shippers' associations are shippers for some purposes but not for others under the

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Shipping Act. Adoption of the proposed rule will be unlawful.

The Proposed Restriction Is Contrary to the Statutory and Policy Purposes For Shippers' Associations and Would Reduce Competition

The Commission has stated that the reason for its proposed prohibition on allowing shippers' associations that have nvocc members from entering into NSAs with other nvoccs is to ensure that the nvoccs will not be granted an exemption from the antitrust laws when an nvocc enters into an NSA in a shipper capacity with another nvocc as the carrier. Neither the law nor the Commission's own stated policy supports prohibiting shippers' associations who happen to have nvocc members from entering into NSAs.

As previously discussed, the Commission has already held - almost twenty years ago - that it lacks the statutory authority to deny a shipper status to entities that fall within the statutory definition. The same is true with respect to the right of a shippers' association to enter into a contractual agreement. Nothing in the Shipping Act gives the FMC authority to dictate with whom and how shippers' associations are allowed to contract.

It is the shippers' association - not the nvocc member of the shippers' association - that is legally the shipper contract party with a carrier. The agreement that a shippers' association will enter into with an nvocc under a NSA will be an agreement between the shippers' association and the contracting nvocc carrier. It will not be a direct agreement between an nvocc and the nvocc member of the shippers' association.

While AISA recognizes the Commission's concerns with respect to nvocc to nvocc

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agreements under the decision in *United States v. Tucor*, 189 F.3d 834 (9th Cir. 1999), the reasoning of that decision is inapposite to agreements between nvoccs and shippers' associations. In its prior rulings regarding the status of shippers' associations and their members, the Commission has stated that it interpreted the clear legislative history of the Shipping Act as not conferring an antitrust immunity upon shippers' associations. Instead, shippers' associations seeking clarification of the application of the antitrust laws to their operations need to look to other sources, including Department of Justice business review letters and export trade certificates of reviews, among other legal mechanisms available to shippers' associations.

Since 1984 very clear antitrust guidelines have been developed for shippers' associations. These guidelines, and Department of Justice statements accompanying them, demonstrate that the formation and operation of shippers' associations very seldom raise potential anticompetitive concerns. First, the Department of Justice has indicated that shippers' associations seldom raise antitrust concerns unless they have more than thirty five percent (35%) of the market share between any given port pair or the cost of transportation is more than twenty percent (20%) of the final cost of the product.

Second, to prevent price fixing issues from arising, Department of Justice guidelines provide that shippers' associations should have management structures that prevent collusion between both association members as well as between members and the contracting carriers. To do so, Justice Department guidelines suggest that shippers' associations should (1) allow their members to use alternative transportation sources; (2) have an independent management; and (3)

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have confidential communications between the association and the members.

With respect to carrier - shippers' association negotiations, these guidelines specifically state that:

negotiations between the association and a carrier or conference must be conducted by an officer or employee of the association who is not also an employee of a member. These negotiations must be conducted on a confidential basis, and individual members cannot be permitted to participate directly in the negotiations.

See, The Antitrust Division's Approach to Shippers' Associations, Speech by Charles F. Rule, Deputy Assistant Attorney General, Antitrust Division, Department of Justice (1985), reproduced at <http://www.usdoj.gov/atr/public/speeches/2163.htm>.

Under these circumstances, it is difficult to see how the Commission can rationalize prohibiting shippers' associations with nvocc members from entering into NSAs with another nvocc. The Commission's own rulings; the legislative history to the shippers' associations provisions of the Shipping Act; and Department of Justice guidelines all state that shippers' associations are not exempt from the antitrust laws. Because it is the shippers' association - not the individual nvocc member - that will negotiate and enter into the NSA with another nvocc, sufficient safeguards will exist to address the possibility that nvocc shipper members of a shippers' association will collude with nvoccs offering NSAs as common carriers. In addition, there is no direct "agreement" between the NSA nvocc carrier and the nvocc shippers' association member participating in the NSA to be exempt under Section 7, since the nvocc shipper will merely be taking advantage of a contract that was separately negotiated for a larger group of shippers.

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To the extent that the Commission is concerned that granting a Section 16 exemption authorizing nvocc NSAs will grant an immunity from the antitrust laws, its focus solely on nvoccs and shippers' associations with nvocc members entering into NSAs is misplaced. While the *Tucor* decision involved nvoccs and Section 7(a)(4) of the Shipping Act, on its face Section 7(a)(2)(B) of the Shipping Act is not limited to common carriers but applies to:

any activity or agreement within the scope of this Act, whether permitted under or prohibited by this Act, undertaken or entered into with a reasonable basis to conclude that (A) it is pursuant to an agreement on file with the Commission and in effect when the activity took place, or (B) it is exempt under section 16 of this Act from any filing or publication requirement of this Act.

46 U.S.C. § 1706(a)(2). In a decision applying *Tucor*, the United States District Court for the Eastern District of Virginia has recently held that Section 7(a)(2) immunizes nvoccs from the antitrust laws in their handling certain Department of Defense cargo, because in 46 C.F.R. § 520.13(c) the Commission has exempted ocean transportation intermediaries from tariff publishing obligations for used military household goods. *United States of America v. Gosselin World Wide Moving N.V. and The Pasha Group*, 333 F.Supp. 2d 497 (Aug. 16, 2004).

Pursuant to the *Tucor* and *Gosselin* decisions, Section 7(a)(2)(B) can be interpreted as providing that any activity pursuant to an NSA may be immune from the antitrust laws, since NSAs will be exempt from the tariff publication requirements of the Shipping Act. Section 7(a)(2)(B) and the *Tucor* and *Gosselin* decisions go beyond nvocc-to-nvocc agreements. Instead, any activity pursuant to an NSA may be exempt from the antitrust laws, regardless of the identity of the contracting party. If Section 7(a)(2)(B) is subject to this interpretation, it does not matter

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whether the contracting party is itself another nvocc; a cargo owner; a shippers' association composed solely of cargo owners or a shippers' association whose membership also includes nvoccs. All parties engaged in the activity pursuant to an exempt NSA would arguably enjoy an immunity from the antitrust laws, not just nvoccs.

If activities under NSAs are, in fact, exempt from the antitrust laws by virtue of Section 7(a)(2)(B) and the *Tucor* and *Gosselin* decisions, it is arbitrary and capricious of the Commission to allow such agreements between nvoccs and shippers, and nvoccs and shippers' associations with cargo owners, but not nvoccs and shippers' associations that also have nvocc members. Beneficial cargo owners can just as easily engage in price fixing conspiracies with nvoccs offering NSA as other nvos. Either all entities defined as shippers under the Shipping Act should be allowed to enter into NSAs, or none. To distinguish between shippers' associations with nvocc members and those without engages in a form of discrimination based on shippers' association status and class of membership that the very language of the Shipping Act prohibits. *See, e.g., 46 U.S.C. App. § 1709.*

The obvious answer to the Commission's concerns regarding its concern about antitrust immunity arising from the use of NSAs is to point out that the Section 7(a)(2)(B) immunity will not apply, because in authorizing the exemption from tariff publishing the Commission has also created a new filing requirement for NSAs. Since NSAs will not be exempt from a filing requirement that the Commission has created by regulation under the Act, the immunity in Section 7(a)(2)(B) will not apply. Thus, there is no statutory or policy basis to support the

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prohibition suggested by the Commission in proposed Section 531.3(m).

Adopting the Proposed Restriction on Shippers' Association Use of NSAs Will be Arbitrary and Capricious. It Would Reduce - Not Enhance - Competition

Finally, as a matter of policy the Commission's actions in adopting the proposed restriction in section 531.3(m) would be arbitrary and capricious. The proposed rulemaking states that:

In order to ensure that there is no substantial reduction in competition among NVOCCs, the exemption must be available to all NVOCCs compliant with section 19 of the Shipping Act and with the conditions of the exemption....without regard to size or capitalization.

However, unless smaller nvoccs can join shippers' associations which sign NSAs, it is difficult to see how they will be able to offer and use such NSAs themselves. Indeed, by prohibiting shippers' associations with nvoccc members from entering into NSAs, the Commission is, in effect, saying that only large nvoccs can offer NSAs and that only shippers who choose not to participate in shippers' associations that have nvoccc members can take advantage of NSAs.

The proposed prohibition would thus result in a substantial reduction in competition, because its net effect would be to allow only large shippers and large nvoccs to contract with one another. Smaller shippers who need to join shippers' associations in order to obtain volume discount rates and contracts would find that the association would be unable to offer access to NSAs if the association also had nvoccc members. Shippers' associations that need nvoccc members to obtain economies of scale would be unable to shop for competitive alternatives to

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ocean carrier service contracts.

Twenty years ago the Commission specifically ruled that such a result is contrary to the intent of Congress in authorizing shippers' associations. In rejecting the proposal to limit the definition of "shipper" for shippers' association purposes, the Commission held:

Finally, limiting the definition of "shipper" in the manner suggested by AISA does not appear consistent with the overall objectives of the shippers' association provisions in the 1984 Act. These provisions were intended to allow small shippers to take better advantage of the 1984 Act by permitting them to aggregate their cargoes to obtain volume rates and service contracts. It should not matter whether small shippers are able to gain these advantages by individually consolidation their cargoes or by using others who aggregate cargoes of other shippers. The expansion of membership in shippers' associations to other than the owners of cargoes should enable small shippers to compete more effectively. This may in fact be the only option available to many of them.

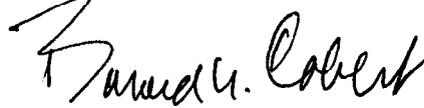
FMC, *Petition For An Amended Statement of Policy Regarding the Status of Shippers' Associations; Order Denying Petition*, 50 Fed. Reg. 7225 (Feb. 21, 1985).

Shippers' associations have always been considered methods to increase competition and ensure that small to medium sized shippers have the ability to effectively compete with larger shippers. The Commission is now proposing a new form of contractual arrangement in the international shipping industry. At the same time it is saying that certain shippers' associations can not enter into or take advantage of such contracts based on the nvocc status of some of their members. With all due respect to the Commission, its proposed restriction on shippers' association use of NSAs is contrary to the law and the very policy of increased competition that it seeks to promote. It is not lawful. *Interstate Commerce Commission v. Delaware, L & WR Co.*, 220 U.S. 235 (1911). It should be reconsidered and removed.

CONCLUSION

Wherefore, American Institute for Shippers' Associations, Inc., respectfully supports the Commission's proposed regulations, provided that the final regulations contain no restrictions on the right of shippers' associations to enter into Nonvessel-operating common carrier Service Arrangements. To the extent that the final regulations contain such restrictions, AISA opposes them and respectfully suggests that they will be contrary to law.

Respectfully submitted,



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Dated: November 19, 2004