

Before The  
**FEDERAL MARITIME COMMISSION**

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FEDERAL MARITIME COMM

**DOCKET NO. 03-15**

**OCEAN COMMON CARRIER AND MARINE TERMINAL OPERATOR  
AGREEMENTS SUBJECT TO THE SHIPPING ACT OF 1984**

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**COMMENTS OF AMERICAN PRESIDENT LINES, LTD. AND APL CO. PTE., LTD.**

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American President Lines, Ltd. and APL Co. Pte., Ltd. (“APL”) participate in and endorse the Comments Of Ocean Common Carriers And Agreements (“Carrier Group” comments) that are concurrently being filed in this docket. APL submits the following supplemental comments to elaborate its positions on three aspects of the proposed rules -- (i) the changes to address concerns for “future commercial flexibility” for alliances and vessel sharing agreements (“VSAs”), (ii) the monitoring report requirements for alliances and VSAs, and (iii) the minuting requirements as they would apply to alliances and VSAs.

**I. The Complex Nature Of Alliances And The Need For Flexibility**

The operations of global alliances (and some other major VSAs) are extremely complex and fluid. Vessel deployments are not simply a function of market demand. They are directly impacted by, and in turn directly impact, operational factors concerning vessel availability and characteristics, terminal availability and capabilities, equipment availability and repositioning costs, rail connections, and feeder ship connections (to mention just a few factors). Moreover, the factors that must be taken into account extend beyond the U.S. trades. To take just one example, based on market conditions in the Asia-Europe trade, the parties to a global alliance may decide to substitute new, larger ships in one of their Asia-Europe strings. This in turn raises the issue of whether to use the replaced ships in the U.S. trades, either to start a new U.S. trade

string or to replace vessels in existing U.S. strings, thus triggering a large number of variables. For example, the larger ships in the Asia-Europe string will require increased port time to load/unload, which may reduce berth or crane availability at particular port(s) for a new or existing U.S. string and thereby increase its port time. That prospect may require the parties to consider dropping a U.S. string call at that port (or another port) to maintain schedule reliability, or to consolidate alliance parties' terminals at that port (or another port) to avoid or make up for the increased port time. The parties' ability to satisfactorily solve the terminal issues will depend on their ability to reach deals with port authorities and/or terminal operators. Their decision will also depend on how new port arrangements would affect rail and feeder ship connections, as well as terminal gate congestion and chassis availability at particular ports. It will also depend on the ripple effects on the operations of other alliance strings.

It is impossible to encapsulate in one paragraph the wide variety of factors that go into alliance decision making. The foregoing is merely suggestive, and is designed to illustrate two points.

First, it is critically important that alliances and other **VSAs** have flexibility to make operating decisions on a timely and efficient basis. Portions of the Commission's November 24, 2003 Notice of Proposed Rulemaking (**NOPR**) seem to suggest that Commission views "global alliances" with concern, i.e., as posing significant threats to competition due to the potential effects of "capacity rationalization" on rates." Although we do not take issue with the Commission's recognition of the effect of the capacity/demand relationship on rates (or with the **NOPR's** conclusion that the Commission should receive appropriate information concerning capacity levels and utilizations), we do think that it is very important not to lose sight of the great benefits to U.S. foreign commerce of alliances and other **VSAs**. In an asset-intensive industry with large fixed capital and operating costs, they are critical to carriers' abilities to achieve efficiencies and cost savings. By providing efficiencies and savings, alliances have in fact

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"See, e.g., **NOPR** at pp. 44-45, 59-60, 80-85, 86. In citing herein to pages of the **NOPR**, we refer to the document made available to the public on November 24, 2003.

resulted in greatly improved service levels and facilitated the large increases in capacity that have been necessary to keep pace with demand. In direct result, shippers have greatly benefited with respect to both service and rates. Competition has also benefited, not only **from** improved service and increased efficiencies, but also because a carrier in an alliance can compete more effectively with a much larger carrier created through a merger which can operate alone, unrestricted by the Shipping Act agreement regime.

Second, a major alliance is a work continuously in progress. In result, the “commercial agreement” between the parties, like the operational decisions themselves, may be complicated. Operations may commence on a relatively small scale with an understanding that larger scale operations will be considered later based on operating experience and **opportunities**.<sup>2/</sup> At the time operations commence, the “commercial document” may be a relatively simple memorandum of understanding and charter party (with a relatively short initial term to allow the parties to assess how the arrangements are working). Whether the cooperation starts small or is larger and more elaborate from the outset, as operations evolve the parties will make a very large number of operational decisions and commitments that are critical to their ability to achieve efficiencies and cost savings. The “agreements” as to those operational matters are **often** not formalized and merged into the original commercial document. **Often**, they take the form of **email** exchanges which the parties understand to augment the original document. Some of the operational agreements may be incorporated into an “implementing agreement” that is more detailed than the original document; but that codification may not occur until months **after** operations commence and may be amended only infrequently, or not at all, as operations evolve (so that it, too, is augmented by subsequent **email** exchanges). In addition, particular facets of cooperation may sometimes be set forth in a separate document; for example, a separate agreement might be signed concerning the provision of terminal services by one party to the

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“This has nothing to do with starting the **45-day** waiting period while the parties negotiate the “real” agreement (see NOPR pp. **38, 39**). Rather, it has to do with the fact that the complexities of **further** cooperation may take months or years to **work** out **after** initial operations commence.

others at a particular port. Thus, we do not believe the NOPR is entirely realistic to the extent that it may suggest that the commercial agreement among alliance partners is relatively static once signed, or that the full commercial agreement is contained in a readily identifiable single document?’

In these circumstances, in order for alliances and VSAs to achieve their central purpose of producing efficiencies and cost savings that will benefit the trade and shippers, it is essential that the regulatory regime give the carrier parties flexibility to make operations-related decisions and commitments on a timely and efficient basis. As illustrated by the above examples of factors that need to be considered, such decisions are highly complex and must be made continuously as opportunities and conditions change over time. The parties (individually and jointly) must have the ability to react quickly to the many variables involved. Subjecting operational decisions under an alliance to the Shipping Act filing and waiting period requirements would delay them by more than seven weeks.” The shipping business moves much too quickly for that. Decisions and commitments must be made or opportunities will be lost, and with them the efficiencies that alliances are intended to produce. A way needs to be found to balance the need of alliance parties for decision-making flexibility with the Commission’s oversight responsibilities.

In fact, as discussed below, the NOPR identifies such a way -- a combination of specified exceptions to the filing requirement for operations-related matters and increased monitoring report obligations.

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“See NOPR p. 50, n.21.

“Assuming (very optimistically given the fact that many operational decisions are not now memorialized in a single document) that the parties could **draft** and file a Shipping Act agreement or amendment in a week, and that the **45-day** review period would apply. Even under expedited review, the minimum delay would approximate a month.

## II. The Proposed Filing Exceptions Aud Monitoring Report Requirements Applicable To Alliances And VSAs

1. **The section 535.408(b) exceptions.** The NOPR and the proposed rules explicitly recognize the need for alliances and VSAs to have operational flexibility. Among other things, the proposed rules provide exceptions in section 535.408(b) for matters that do not require further tiling under section 5 of the Act. APL strongly supports the Commission's recognition in these provisions of the need for flexibility. We also join in and support the Carrier Group's position that the section 535.408(b) exceptions, read in conjunction with section 535.402's provisions concerning the nature of agreements that must be filed, are appropriately interpreted as a codification of current practice as it has evolved and been clarified over the last several years.

Having said this, we recognize (as the NOPR states) that, at least historically, there has been some confusion as to the practices that are permitted under the current regulations. We also note that the proposed rules, including the section 535.408(b) exceptions, use shorthand terms to refer to a wide variety of operational activities, without attempting to fully define those activities. We believe this to be both necessary and appropriate, given the practical impossibility of attempting to comprehensively describe such activities in a regulation.

Our basic point, and the reason for the above discussion of the complexity of alliance operations and decisions, is this: While APL agrees with the Commission's decision in the NOPR that it is not productive to attempt to comprehensively define in the abstract terms such as those used in section 535.408(b), it will remain important for the Commission to ensure that the terms, as they are applied to the facts of particular agreements after the rules are adopted, are interpreted in a way that preserves the operational flexibility that is critically necessary for alliances and VSAs to achieve their intended benefits. For example, while everyone can agree in principle, as the NOPR proposes, that alliances should be allowed to vary the number and capacity of vessels within a "range" stated in the tiled agreement, the practical effect of that exception will depend to a significant degree on the size of the range that is deemed appropriate

for a particular agreement. Similarly, the practical effect of the filing exception for changes in port rotation may depend on the size of the port “range” included in a particular agreement’s geographic scope. It will also be necessary to interpret in the context of particular agreements other terms used in the section 535.408(b) exceptions, including, for example, “terminal, and related services,” “joint container marshaling facilities,” collection of “data and reports,” and “operational matters such as port rotations . . .” APL joins in the Carrier Group comments because we believe (as we think other carriers do) that these and other provisions of the proposed rules accommodate the need for flexibility and will be administered accordingly.

**2. Monitoring reports for alliances or VSA’s with “capacity rationalization” authority.** APL recognizes that an appropriate quid pro quo for the needed flexibility to address operational requirements is that the Commission be informed of decisions and actions under alliances that could impact the Commission’s regulatory responsibilities. The proposed rules would, in fact, greatly increase the reporting requirements applicable to **VSAs** with “capacity rationalization” authority, including by requiring detailed data on capacity and utilization for particular VSA parties.<sup>5/</sup> While we suggest below some specific refinements to those proposals, APL has no quarrel with what we perceive to be the basic decision underlying the NOPR -- i.e., that the Commission’s regulatory concerns relating to alliances and other **VSAs** should be addressed by reasonably increasing information reporting requirements rather than by reducing necessary operational flexibility. Our specific suggestions concerning the proposed reporting requirements are as follows.

As explained in the Carrier Group comments, it is questionable whether any advance reporting of capacity changes is necessary. However, if some advance reporting of capacity changes is to be required, as provided in proposed section 535.703(c) and in Part 3 of Section I of the proposed monitoring report form, the requirement should exclude capacity increases and

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<sup>5/</sup>**The** Carrier Group comments suggest that the rules use the existing definition of “capacity management” but go on to propose a clarified definition of “capacity rationalization” if the Commission adopts the **NOPR’s** use of that term.

be limited to actions that reduce total VSA capacity in the inbound or outbound U.S. trades. The NOPR (p. 108) justifies advance reporting by stating that the Commission needs to evaluate potentially **harmful** reductions in capacity. However, there is no reason why increases in capacity cannot be reported on the normal quarterly basis.

Whether in advance reports or quarterly reports, there need to be both temporal and quantitative limitations on the capacity and service changes to be reported. For example, it would be unduly burdensome and serve no useful regulatory purpose to require reporting of temporary changes such as substitution of ships to allow periodic drydocking, dropping a port temporarily due to weather-related problems, mechanical problems with a vessel or crane, or similar temporary conditions that do not reflect a change in the **VSA's** normally planned deployment. Similarly, it would be burdensome and serve no **useful** purpose to require reporting of changes that have little or no impact, for example, substituting a vessel with capacity that is close to the capacity of the vessel being replaced, or deleting a port from one string's rotation while adding it to another string's rotation. We do not believe that the proposed rule, as **drafted**, is intended to cover such temporary or minor changes. If that belief is incorrect, the language should be revised to incorporate such limitations.

### **III. The Proposed Minuting Requirements**

The proposed rule would, for the first time, make alliances subject to the requirement to file minutes of "meetings." The proposed rule would have this effect because it provides that authority to discuss "vessel operating costs" is, in itself, sufficient to trigger the minute filing **requirement.**<sup>6/</sup> Almost by definition, the parties to alliances must discuss some types of vessel operating costs, because they are inherently relevant to making vessel deployment and related operational decisions designed to achieve efficiencies and cost savings. Under the proposed rule,

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<sup>6/</sup>**Section 535.704(a).** "Vessel operating costs" is defined for this purpose to include, among other things, fuel costs, maintenance and repair costs, and charter hire expenses. **Section 535.104(kk).**

therefore, alliances would be required to file detailed minutes of all “meetings” (broadly defined) “relating to the business of the agreement.” Section 535.704(b).

With respect, we do not see how such a proposal can be seriously entertained. The parties to alliances are constantly discussing alliance business. The proposed minuting requirement would literally be impossible for a major alliance to comply with and, if it could be complied with, the alliance parties and the Commission would be overwhelmed by useless paperwork.

APL supports the Carrier Group position that the subjects of agreement minutes should be limited to the matters that trigger the minute-filing requirement (for example, if an agreement has rate discussion authority, minutes would need to cover discussions of rates, but not discussions of matters that do not trigger minute filing). However, while adoption of that suggestion is very important, it would not significantly ameliorate the problems for alliances so long as the rule provides that minute-filing is independently triggered by authority to discuss vessel operating costs. Such discussions are inherent, and necessarily so, in alliances.

The question thus becomes whether there is a justification for the proposed provision that discussion of vessel operating costs independently triggers minute-filing. There is not. The concept appears to have originated in Docket No. 94-3 1, in which the Commission stated that vessel operating costs are so closely related to rate-setting that discussion of them should be deemed equivalent to discussion of rates and subject to the same regulatory requirements. 61 Fed. Reg. 11564, 11566 (March 21, 1996). Under that premise, if rate discussion authority triggers minute-filing (which is not in dispute), so too should authority to discuss vessel operating costs.

As elaborated in the Carrier Group comments, however, the premise is no longer valid (if it ever was). Vessel operating costs are not a direct determinant of carrier rates. To the extent that rates are based on marginal cost, vessel operating costs are largely irrelevant because they are largely fixed. To the extent that rates take account of a carrier’s total costs, vessel operating costs account for only a portion of total costs, which also include such major items as terminal

costs, container and chassis costs, information technology costs, other overhead costs, rail transportation costs, and capital costs. Moreover, large components of vessel operating costs (including bunker, charter-hire and insurance costs) can be estimated with significant accuracy **from** publicly available data. APL thus urges the Commission to adopt the Carrier Group position that authority to discuss vessel operating costs should be deleted as an independent trigger of the minute filing requirement, because it is based on a faulty predicate and because it would destroy alliance operational efficiency.

Respectfully submitted,



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