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September 24, 2003

The Honorable Bryant L. Van Brakle
Secretary
Federal Maritime Commission
800 North Capitol Street
Room 1046
Washington, D.C. 20573

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FEDERAL MARITIME COMMISSION

RE: Comments of Ocean World Lines, Inc. in Response to Petition of United Parcel Service, Inc. For Exemption Pursuant to Section 16 of the Shipping Act of 1984P3-03

Dear Mr. Van Brakle:

Enclosed for filing please find an original and fifteen (15) copies of the above referenced Comments of Ocean World Lines, Inc.

Counsel for United Parcel Service has consented to service of these comments electronically and said comments have been so transmitted.

Sincerely yours,
TROUTMAN SANDERS, LLP



Leonard L. Fleisig

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Encl.

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ORIGINAL

BEFORE THE
FEDERAL MARITIME COMMISSION

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PETITION P3-03

FEDERAL MARITIME COMM

**PETITION OF UNITED PARCEL SERVICE, INC. FOR
EXEMPTION PURSUANT TO SECTION 16 OF THE SHIPPING
ACT OF 1984 TO PERMIT NEGOTIATION, ENTRY AND
PERFORMANCE OF SERVICE CONTRACTS**

COMMENTS OF OCEAN WORLD LINES, INC.

September 24, 2003

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Counsel for Ocean World Lines, Inc.

I. INTRODUCTORY STATEMENT

Ocean World Lines, Inc. (“OWL”) submits these comments in response to the *Petition of United Parcel Service, Inc. for Exemption Pursuant to Section 16 of the Shipping Act of 1984 to Permit Negotiation, Entry and Performance of Service Contracts* (“UPS Petition”).

OWL supports the purpose of the UPS Petition. The continuing prohibition on NVOCC/shipper contract rights represents the lingering, vestigial imposition of mid-20th century governmental over-regulation on an industry that has leapt into the high-technology world of the 21st-century at a speed that outpaces much of the rest of the industry. The contractual limitations imposed by Congress on the NVOCC segment of the ocean-transportation industry belie OSRA’s declared purpose to place a “greater reliance on the marketplace”.

As currently structured, the least competitive VOCC component of the industry enjoys the right to shield its pricing mechanisms while the more competitive NVOCC component continues to operate in the milieu of the early-20th century public tariff model created to ameliorate the unfettered power granted to VOCCs by the Shipping Act of 1916.¹ The competitive imbalance maintained by this structure can be addressed by the Commission either by an industry-wide exemption to the service contract prohibition or through an alternative revision to the Commission’s rules that would enable NVOCC’s to shield their underlying rates from review by VOCCs and other NVOCCs.²

OWL applauds UPS for the initiative it has shown in filing the Petition and the compelling arguments set forth on its behalf. The quality of its Petition is certainly a reflection of the quality of the logistics and transportation services provided by UPS. OWL has no

¹ A case of irony and inequity marching hand-in-hand.

² See *Petition of Ocean World Lines Inc for a Rulemaking to Amend and Expand the Definition and Scope of “Special Contracts ” to Include all Ocean Transportation Intermediaries (P7 - 03) (“0 WL Petition ”)*

reservation at all about the ability of UPS (or OWL for that matter) to perform fully under any service contract it enters into with its underlying shippers.

OWL supports the UPS Petition to the extent that the Commission uses it as a vehicle to create clear, objective industry-wide guidelines that would enable any qualified NVOCC to obtain a similar exemption contemporaneously. As is set out below, OWL does not believe the Commission should act on any single exemption request until industry-wide guidelines are promulgated and a timetable for filing exemption requests is promulgated by the Commission. OWL recognizes that an exemption request is an imperfect vehicle for the grant of industry-wide relief. OWL also recognizes that UPS has no reason to seek an exemption for anyone other than itself. Therefore, OWL's suggestion that the Commission should not act on a case-by-case basis should not be perceived as a criticism either of the substance or the purpose of the UPS Petition. OWL is grateful to UPS for taking the initiative and in so doing creating a framework for an industry-wide discussion.

II. IF THE COMMISSION AGREES TO EXAMINE THE ISSUE OF NVOCC SERVICE CONTRACT RIGHTS IT MUST DO SO ON AN INDUSTRY-WIDE BASIS

A. THE GROWTH AND EVOLUTION OF THE LOGISTICS INDUSTRY WARRANTS REVIEW OF THE SERVICE CONTRACT ISSUE

OWL agrees with UPS's description of the evolution in the logistics industry since 1984. Significant elements of what was once known as the freight forwarding industry have evolved and grown beyond recognition. The logistics industry, of which both forwarders and NVOCCs play a critical role, is now an essential, value-added, technology driven, profession that views ocean transportation as but one piece of a very large, complicated process,

The provision of logistics services to shippers is no longer simply a matter of overseeing the loading of cargo onboard a vessel and preparing export declarations and bills of lading.

Rather, it involves the combination of a set of complex processes designed to move multiple cargoes from source-points around the globe in a manner designed to enable manufacturers or wholesale/retail operations to receive and process goods for assembly, manufacture, distribution or sale in the fastest possible time while maintaining as little inventory as possible. The value added to and the costs driven out of the supply chain by the provision of logistics services can be immense.

The compression of a manufacturer's supply chain by only a day or two can save millions of dollars of expense in inventory, storage, handling, and carrying costs annually. Similarly, the compression of the supply chain for a large retailer can result in the reduction of the time between transfer of tile to goods and their ultimate sale. This can result in improved credit ratings which in turn can save these stores millions annually in the cost of money. Logistics is not just about cutting \$10 off a rate anymore. Logistics providers, such as UPS, OWL and other full service logistics providers have the expertise to drive costs out of the supply chain. Traditional VOCCs, by themselves, do not have similar expertise. As UPS notes this is exactly what is driving VOCC expansion into the logistics marketplace. It seems inevitable that large fully-integrated logistics providers, by virtue of its supply chain expertise could eventually exercise commercial dominance over VOCCs in a manner reminiscent of the VOCCs' commercial domination of freight forwarders and NVOCCs.

OWL suspects that this trend serves as the commercial rationale underpinning the continuing VOCC opposition to NVOCC contract rights. Traditionally, ocean freight rates have been viewed as the most significant component of the landed cost of merchandise moving via water in international trade. However, the provision of seamless logistics services along the supply chain, by expanding value/cost analysis and methodologies beyond simple transport

factors has reduced the relative importance of ocean freight rates. In effect, opposition to NVOCC contract rights may very well be a rear guard action designed to delay the inevitable diminution of their traditional dominance.

Because of the value and critical nature of these logistics services, logistics providers and their clients invariably reduce their relationships to contracts or other written memoranda. These contracts typically set rates and other guidelines to cover the commercial relationship between the parties, including but not limited to software and technology support, intellectual property rights, confidentiality of information, marking, labeling, bar coding, inventory and warehouse management, origination and destination distribution, and air, truck, and rail rates. Glaring by their omission is reference to the ocean rates governing these complex moves.

It is this glaring omission that UPS seeks to rectify by its Petition. OWL reaffirms its support for the UPS Petition to the extent that it helps propel the Commission to take steps to provide industry-wide guidelines that will facilitate the provision of contract rights to NVOCCs. OWL opposes the UPS Petition but only to the extent that it focuses on the grant of the relief sought to a single entity.

B. A SINGLE-ENTITY EXEMPTION IS AN INAPPROPRIATE MECHANISM FOR RESOLUTION OF AN ISSUE OF INDUSTRY-WIDE CONCERN

OWL supports the extension of contract rights to UPS or to any other NVOCC. Nevertheless, a single-entity exemption for one NVOCC, even one as deserving as UPS (or OWL for that matter) is an inappropriate mechanism for the resolution of an issue of immediate concern to every NVOCC operating in the foreign waterborne commerce of the United States.

NVOCCs operate in a highly competitive and fragmented market. The very nature of the competition between NVOCCs and between VOCCS and NVOCCs requires that the Commission should only proceed on this issue on an industry-wide basis.

The grant of an individual exemption on a case-by-case basis, rather than pursuant to the issuance of industry-wide guidelines setting forth specific standards which would form the basis of any exemption would result in the submission of hundreds of petitions for single-entity exemptions from NVOCCs seeking similar relief. Further, Commission determinations on an *ad hoc* basis could overwhelm the Commission's resources and lead to inconsistent and/or conflicting results.

The grant of a single-entity exemption would have a significant deleterious and materially adverse impact on competition in the marketplace. UPS asserts that the grant of its exemption request would have no material adverse effect on competition. This assertion is based, in part, on UPS' claim that its size, transportation related asset-base and third-party logistic service offerings are unique. Granting an exemption to a 'unique' entity could not have an adverse impact on competition because no one is similarly situated to UPS.

Even if the services UPS provides were unique it would not mitigate the fact that UPS competes for the same target shipper market as OWL and many other large NVOCCs. UPS asserts in its Petition that its primary shipper customers move between 300-400 TEUs per year. This is exactly the type of volume shipper that OWL, and many other NVOCCs, maintain on their client base or actively solicit cargo from. UPS cannot distance itself from the fact that it competes with many other logistics providers and NVOCCs for small to large volume shippers simply by self-reference to its own uniqueness. OWL admires both UPS' size and the efficiency of its service offerings. Nevertheless, those service offerings do not render UPS unique as much

as they render UPS representative of the trend toward the provision of fully-integrated logistics solutions by an advanced, technology driven industry.

OWL supports the idea of an industry wide exemption but cannot support the idea of a unitary exemption for one NVOCC. OWL is certain that UPS would qualify under any guidelines promulgated by the Commission.

If the Commission is favorably disposed to the idea of exemptions generally, it should and must do so on an industry-wide basis subsequent to the issuance of proposed guidelines followed by the opportunity for comment from the industry and other interested parties. Such a proceeding would provide clear, objective guidelines so that any NVOCC desirous of obtaining an exemption would be able to determine if they qualify for the right to an exemption. It would also serve to avoid providing any one party with an exemption months before any other party might be able to seek and obtain one.

C. THE GRANT OF SERVICE CONTRACTS RIGHTS, IF ANY, SHOULD NOT BE BASED ON THE SIZE OF THE NVOCC'S INVESTMENT IN TRANSPORTATION INFRASTRUCTURE ASSETS

UPS pays particular attention to the size of its capital investment in transportation and transportation-related infrastructure. As part of the Pacer International, Inc. ("Pacer") group of companies OWL too is backed by the sizable transportation infrastructure and capabilities of a large, publicly held group of companies.³ OWL does not believe, however, that size alone provides an adequate or appropriate guidepost in determining what entity may or may not qualify for an exemption.

LIPS' emphasis on size and capital investment in transportation infrastructure seems driven by the need to rebut the arguments put forward by the VOCC lobby and swallowed whole by Congress during OSRA's journey to enactment. The legislative history of OSRA focused on

³ An overview of the size and breadth of Pacer's operations may be found at the OWL Petition, pps 2-3.

NVOCCs' lack of capital investment in vessels as one reason for declining to extend service contract rights to NVOCCs.

The idea that one must own or operate before being allowed the right to contract for transportation service is a product of a bygone age. Quite frankly, OWL has a far greater comfort level about the performance and execution of the contractual obligations of UPS, FedEx, DHL-Danzas, or Schenkers than it does with most VOCCs. At most, operational or ownership interest in vessels may be a factor in how parties negotiate with each other on rates and services. It should not be a prerequisite. The ownership of vessels and the ability to provide space to shippers is a competitive, 'earned' advantage that NVOCCs, absent slot charter or guaranteed space service contracts, do not enjoy. However, that natural competitive advantage should be sufficient to provide VOCCs with a natural bargaining advantage which would survive even an industry-wide exemption. Simply put, OWL does not believe that this argument can withstand rational scrutiny.⁴

Nevertheless, this legislative history exists, and OWL finds no fault with UPS for detailing its investment in non-ocean transportation related infrastructure. However, if this were to be the only factor utilized by the Commission, it could have serious unintended consequences. As noted by UPS, there is a significant consolidation process taking place within the logistics industry. As the need for global supply chain services grows there is a natural trend in the industry towards growth and consolidation. Logistics providers have acquired freight forwarders and NVOCCs to supplement their menu of supply chain services. The UPS absorption of the Fritz Group is a case in point. So too is the purchase of OWL and RF International by Pacer, and the purchase of everyone else (or so it seems) by Deutsche Post.

⁴ The VOCC lobby cannot be faulted for advancing this argument before Congress. The failure here lies with the inability of those who lobbied on behalf of NVOCCs to rebut successfully the notion that one must own a vessel before one is entitled to enter into contracts for ocean transportation services.

This trend is proceeding at its own pace as dictated by the needs of the marketplace. If, however, the Commission were to act on this exemption by reference solely to the size of the NVOCC's capital base or the capital base of its affiliates, that trend would be accelerated by dint of regulatory fiat rather than by conditions in the marketplace. In other words, the Commission will have interposed itself unintentionally on commercial forces in the marketplace. That should not be the role of the Commission.

D. THE MOST IMPORTANT FACTOR IN DETERMINING WHETHER AN NVOCC SHOULD BE ENTITLED TO AN EXEMPTION IS THE ABILITY OF THE NVOCC TO SECURE SPACE ON BOARD VESSELS

It is OWL's view that the most critical factor in setting guidelines for an industry-wide exemption should be the ability of an NVOCC to secure guaranteed space from VOCCs.⁵ Recent experience with peak season shortages in the eastbound Pacific trades provides evidence that the ability to procure guaranteed space is critically important to NVOCCs and underlying shippers when and if VOCCs start shipping at close to their vessel capacity.

OWL suggests that if the Commission believes that the ability to secure guaranteed space is an important factor in any possible exemption, then guidelines should be drawn to provide exemptions to any NVOCC, large or small, willing to obtain space (and pay any premium and take the risks inherent in securing guaranteed slots) from VOCCs. Such guaranteed space could be secured from VOCCs by use of VOCC/NVOCC slot charters through which the NVOCC would be contractually obligated to use a pre-set number of slot whether it loads cargo or not.⁶

⁵ OWL still believes that this should be a factor in negotiating the terms of a contract and not a prerequisite. Nevertheless, OWL is aware that the Commission must act within the confines of the law and legislative history provided to it.

⁶ OWL would be interested to know if any VOCCs operating in the Atlantic or Pacific trades solely by virtue of slot charters enter into service contracts that cumulatively commit them to carry more TEUs than they have slot chartered.

Alternatively, or additionally, NVOCCs could, as UPS and others have already done, obtain space guarantees in their service contracts. In either case, the Commission could provide an exemption on a slot-per-slot basis⁷

Basing an exemption upon the procurement of guaranteed space by virtue of slot charters or service contracts would have the following advantages:

It would not disadvantage small to medium size OTIs who do not own or are affiliated with large asset-based logistics providers;

It would, rather, be available to any NVOCC willing to make the financial commitment and take the commercial risk inherent in securing secured space, whether 10 TEUs per vessel or 100;⁸

It would alleviate concern that NVOCCs could not fulfill their obligations under the terms of its underlying service contracts with its shipper customers;

It would compel VOCCs that compete with NVOCCs for cargo to negotiate up from their own sell rate rather than down from the NVOCC's sell rate; and in so doing

It would serve the purpose of the 1984 Act and OSRA by placing a greater reliance on the marketplace.

III. CONCLUSIONS

OWL supports service contract rights for NVOCCs and supports the right of UPS to enter into such contracts. OWL only opposes the UPS Petition to the extent it seeks unitary relief. OWL respectfully requests that if the Commission believes it has the statutory authority to

⁷ OWL suggests that if an NVOCC slot charters or secures guaranteed space for 1,000 TEUs per year it would be entitled to enter into its own NVOCC service contracts totaling 1,000 TEUs.

⁸ The Commission should keep in mind that VOCC to VOCC slot charters that facilitate a carrier's entrance into a new trade lane do not necessarily involve large volumes of equipment. When Hyundai first entered the North Atlantic trade in 1995 (via agreement with MSC), it announced that it would carry between 100-300 TEUs per year eastbound and westbound collectively – or approximately 3 TEUs per voyage. See *Hyundai Aims to Join Transatlantic Trade*, Journal of Commerce, September 7, 1995, p. 1a

exempt NVOCCS from the prohibition on service contracts it should grant those exemptions after announcing specific industry-wide standards. Applications for exemptions should be accepted on a designated date so that NVOCCs may submit their own requests for exemption at the same time.

Nevertheless, OWL is not convinced that the Commission will grant an exemption request in the face of the statutory language and legislative history behind both the service contract prohibition and the tariff filing requirement. See *OWL* Petition at 15- 16. This fact standing alone does not relieve the Commission of its statutory obligation to promote the growth and development of United States exports through competitive and efficient ocean transportation and by placing a greater reliance on the marketplace. If the Commission takes that obligation seriously, and OWL has no doubts that it does, it must explore alternative means by which it can address the critical issues raised by the UPS Petition and its progeny.

Respectfully submitted



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Of Counsel to:
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Alan Baer, President

CERTIFICATE OF SERVICE

I hereby certify that on September 24, 2003 a copy of the foregoing **COMMENTS OF OCEAN WORLD LINES, INC.** was served by electronic mail upon:

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and that an original and fifteen (15) copies were served by messenger upon:

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