

# Memorandum

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FEDERAL MARITIME COMMISSION

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**TO** : Bryant L. VanBrakle, Secretary

**DATE:** December 5, 2003

**FROM** : Steven Najarian, Counsel to Commissioner Joseph E. Brennan

**SUBJECT** : Summary of Oral Presentation of December 2, 2003 regarding P3-03, Petition of United Parcel Service

By an order of November 13, 2003, the Commission determined to permit interested persons to make oral presentations to individual commissioners in the proceeding P3-03, 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.

The order required that a summary or transcript of any oral presentation be included in the record and submitted to the Secretary of the Commission within five days of the presentation.

On December 2, 2003, Commissioner Brennan met at 800 North Capitol Street, NW at 9:30 AM with the following persons regarding P3-03:

- J. Michael Cavanaugh, Holland & Knight, LLP
- Michael G. Gargaro, Vice President, Global Ocean Freight Services, United Parcel Service
- Thomas F. Jensen, Public Affairs Manager, United Parcel Service
- Kathy Luhn, Senior Advisor, Trans Systems Advisors

The presentation had been scheduled at the request of Kathy Luhn.

The presenters made the following points:

UPS employs approximately 1000 persons in Maine and 360,000 persons worldwide. The employees of UPS are well-paid and receive good employment benefits. UPS was founded in Seattle, Washington in 1907. Atlanta, Georgia has been the base of UPS for the last 13 years. The average salary for a UPS driver is \$24 per hour. The average salary for a UPS package handler is \$9 per hour. In the United States, UPS has 50% of the ground market, 20% of the air market, and less than 1% of the ocean market. UPS lifted approximately 300,000 TEUs last year. Maersk Sealand lifted 8 million TEUs last year. UPS considered operating a vessel in order to gain the status of a vessel-operating common carrier, but UPS determined that such a move was

not worth the effort. Small-package delivery is the core business of UPS. UPS owns 250 airplanes and leases 100 airplanes. UPS is a huge operation. The main air hub is in Louisville, Kentucky. International shipment and supply-chain are two growth areas for UPS.

UPS Logistics was developed 10 years ago. In the high-tech sector, companies do not want to be in the warehouse business and therefore turn to UPS. UPS acquired Fritz Companies in San Francisco, an enterprise with global scope. UPS Supply Chain Solutions was formed. This division addresses all aspects of a customer's supply chain. The ocean-freight portion of the transport must be in a public tariff, but customers wish to use confidential, tailored contracts. APL and other ocean common carriers also have OTI operations. This means that they can do the whole package. UPS filed its petition to address this advantage of the ocean common carriers. UPS was not a NVO at the time of OSRA's passage. UPS offers service to any direct importer and not only to large companies such as Sears. A predictable, reliable delivery service is important today. The shipping business is cyclical. Ocean common carriers tend to undermine their position in the market. The OCCs increase capacity but also try to supply a little less capacity than the market demands in order to allow for rate increases.

After the filing of UPS's petition with the FMC, comments were filed. UPS was pleased that the FMC extended the comment period in this proceeding. That allowed UPS to respond to the other filings. The purpose of UPS's oral presentation to Commissioner Brennan is to rebut some of the claims made in the comments filed in response to the UPS petition. UPS also plans to file additional written material with the FMC. Many shippers, or manufacturers, are shutting down their logistics departments and are outsourcing their transportation logistics. These shippers cannot keep track of Customs requirements on their own. They need logistics help. It is more cost-effective for these companies to outsource. Service contracts became the norm during just one contracting season. That was a change brought about by OSRA faster than expected.

At the time of OSRA's passage, some large OCCs were U.S. companies, and large NVOs were European companies. This fact partly accounted for Congress's decision not to extend antitrust immunity to NVOs. Now the situation has reversed. The NVOs are U.S. companies, and the OCCs are foreign companies. UPS's transportation assets are greater than Maersk Sealand's. There is sufficient authority under section 16 of the Shipping Act for the FMC to grant UPS's petition for an exemption. The defeat of Sen. Slade Gorton's amendment is not controlling. The standard of section 16 is whether the requested exemption would substantially reduce competition or be detrimental to commerce, and UPS has met that standard. Under customary principles of statutory construction, legislative history is to be consulted only when the statute is unclear. That is not the case here. It cannot be said that UPS's exemption would hurt competition. Vessel operators such as APL and Maersk Sealand oppose the UPS exemption precisely because it would make the industry more, not less, competitive. UPS does not oppose the other NVO petitions. UPS might face a legal challenge if it operated one vessel in order to qualify as a vessel-operating common carrier worldwide.

Commissioner Brennan stated that the Commission remains open-minded as to the issues raised

in the UPS petition and has come to no conclusion on the matter.