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December 19, 2003

**By Hand Delivery**

Mr. Bryant L. Vanbrakle  
Secretary  
Federal Maritime Commission  
Office of The Secretary  
800 North Capitol Street, NW  
Washington, DC 20573-0001

Re: **Comments to National Customs Brokers and Forwarders Association of America, Inc. FMC Petition No. P5-03, and Suggested Language for Rulemaking Relating to Implementation of Alternative Proposal by the NCBFAA for "Range Rates"**

Dear Mr. Vanbrakle:

We attach hereto an original and fifteen (15) copies containing comments filed by the NVOCC-Government Affairs Conference and the New York/New Jersey Foreign Freight Forwarders and Brokers Association, regarding the above captioned petition. We submit these comments in support of National Customs Brokers and Forwarders Association of America, Inc., FMC Petition No. P5-03.

We thank you for your assistance on this matter. If you require any further clarification or information, please call Carlos Rodriguez at 202.973.2999.

Very truly yours,

**RODRIGUEZ O'DONNELL**  
**FUERST GONZALEZ & WILLIAMS**

By:

  
Carlos Rodriguez, Esq.

**Bryant L. Vanbrakle**  
**Secretary**  
**December 19, 2003**  
**Page 2 of 2**

Enclosures: As stated

cc: Mi- Edward D. Greenberg, Esq. - **Galland** Kharasch  
cc: Mr. David K. Monroe, Esq. - **Galland** Kharasch  
cc: Mr. J. Michael Cavanaugh, Esq. – **Holland & Knight**  
cc: Mr. Leonard L. Fleisig, Esq. – **Troutman Sanders, LLP**  
cc: Mr. Edwards J. Shepard, Esq. – **Thompson Coburn, LLP**  
cc: Mr. Carlos Rodriguez, Esq. – **Rodriguez O'Donnell**

cc 020/030

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**BEFORE THE  
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FEDERAL MARITIME COMMISSION

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**Comments to the National Customs Brokers and Forwarders Association of  
America, Inc. Petition (P5-03)  
And  
Suggested Language for Rulemaking Relating to Implementation of  
Alternative Proposal by the NCBFAA for "Range Rates"**

These comments and suggestions which follow are being submitted jointly by the NVOCC-Government Affairs Conference ("NVOCC-GAC") and the New York/New Jersey Foreign Freight Forwarders and Brokers Association, hereinafter jointly referred to as ("the Associations").

The NVOCC-GAC consists of NVOCC members that provide complete ocean and inter-modal transportation services to importers and exporters on a global basis. The membership consists of medium and large-sized NVOCCs that operate globally. The cumulative cargo, which is carried by members of the NVOCC-GAC, comprises a substantial portion of the NVOCC cargo handled in the export/import commerce of the United States. The NVOCC-GAC was formed to monitor and comment on U.S. legislation, regulations, and other matters of concern to NVOCC-GAC members, and the NVOCC community. Members of the NVOCC-GAC provide both full container and consolidation ("groupage") NVOCC services globally.

The New York/New Jersey Foreign Freight Forwarders and Brokers Association is an association of approximately one hundred sixty (160) ocean freight forwarders, NVOCCs, customhouse brokers, serving the New York-New Jersey port area for the last eighty years. The Association is an affiliated member of the National Customs Brokers

and Forwarders Association of American, Inc. (“NCBFAA”). The Association’s members service thousands of exporters and importers that are engaged in international transportation in the foreign commerce of the United States.

**A. Introduction.** The National Customs Brokers and Forwarders Association of America, Inc. (“NCBFAA”), pursuant to 46 C.F.R. §§ 502.67 and 502.69, petitioned the Federal Maritime Commission (“FMC” or “Commission”) on or about August 3, 2003, for an exemption, to those NVOCCs who opt to be exempt, from the provisions of Sections 8 and 10 of the Shipping Act of 1984 (the “Act”) which require Non-Vessel Operating Common Carriers (“NVOCCs”), among others, to establish, publish, maintain and enforce tariffs setting forth ocean freight rates. Alternatively, the NCBFAA requested that if the Commission believed that it did not have authority to exempt NVOCCs totally from the publication of freight rates and enforcement provisions of the Act, the NCBFAA requested that the FMC issue a limited exemption from Section 8 of the Act and institute a rulemaking for the purpose of promulgating rules governing the establishment of “range rates”. (See NCBFAA’s Petition P5-03).

For all the reasons set forth in the NCBFAA’s Petition, and those further set or reiterated herein, the Associations, hereby endorse said Petition to exempt NVOCCs totally from the publication and enforcement provisions of the Act, and in the alternative the Associations provide specific proposed rulemaking to implement “range rates” as petitioned by the NCBFAA. The NCBFAA’s Petition did not provide any specific guidance in defining or implementing “range rates” in the context of the Commission’s current regulations and invited the Commission to establish these by rulemaking. These

comments, among other things, are intended to assist the Commission in the event that it decides that this rulemaking is a viable approach to some of the concerns expressed by the NCBFAA, a plethora of individual companies, and other industry groups that submitted comments to the NCBFAA's and other Petitioners. (See Comments to Petitions P3-03; P5-03; P7-03; P8-03; and P9-03).

**B. Industry and Governmental Support for Change.** During the initial comment period, which ended on or about October 10, 2003, the Commission provided to the public the opportunity to submit comments on the NCBFAA Petition, as well as to Exemption Petitions submitted by United Parcel Service, Inc. (P3-03), BaxGlobal (P8-03), Ocean World Line (P7-03), and C.H.Robinson, Inc. (P9-03), relating to confidential service contracting for NVOCCs. Ocean transportation industry companies and associations of those companies, as well as shipper and shipper groups, federal agencies such as the Department of Justice, and a significantly large number of Members of Congress submitted comments to the Commission. Many, if not most, were in favor of providing exemptions to all the Petitioners, or some expressed some support for only a portion(s) of some of the Petitions. Interestingly, most commentators expressed support for changes that would either result in freedom of contract for the shipping community, or at the very least, even those that opposed the UPS type petitions, expressed an open mind that the tariff system could be modified. Most of the major stakeholders---i.e., ocean carriers, NVOCCs, and shippers---noted that some change(s) in the directions indicated by the Petitions were warranted in the areas of confidential service contracting, or at the very least they would consider some modifications to the present tariff system.

**(1) The National Industrial League** (the League”), founded in 1907, is one of the oldest and largest national associations representing companies engaged in the transportation of goods in both domestic and international commerce. The League supports the general thrust of the relief requested by each of these petitions, namely, to permit confidential, individually negotiated arrangements between NVOCCs and their customers. While the League’s comments were not being filed in support of any particular petition, their focus was to permit their shipper/carrier/intermediary base the freedom to confidentially contract with transportation vendors, including NVOCCs. Impliedly, this is support for the exempting of tariff publishing that the NCBFM is calling for, since implicitly, transportation transactions that are structured by confidential contracts would not be subject to published tariff requirements. The League does believe that the petitions have raised an issue of industry-wide importance and that the FMC should exercise its exemption authority to permit NVOCCs to offer service contracts to their customers. The Associations agree with this position, as well as with its corollary, that when NVOCCs opt to enter confidential arrangements with shippers, the tariff publishing requirements would not apply to those transactions. To the extent that the Commission decides that implementation of “range rates” achieves some of the desired tariff reform, especially in conjunction with some of the other remedies which are being sought by the UPS type petitioners, then the Associations support that approach.

**(2) The Department of Justice** supported the common intent of all the petitions. They stated, “[w]hen regulatory barriers that confront one class of actual or potential rivals are removed, competition is enhanced. The Department believes that exempting all NVOCCs from all tariff-publication requirements would produce the

greatest competitive benefits.” They also concluded that the NCBFAA’s approach of exempting NVOCCs from the current tariff-publication requirements, that would result in allowing them to enter into confidential service contracts, “would create important benefits for NVOCCs, their customers, and ultimately American consumers, by fostering competition, lowering costs, and improving service in U.S. liner trades.” The Associations agree with these conclusions, and agree with the DOJ’s rationale in endorsing the NCBFAA’s petition to exempt NVOCCs from publishing freight rates in tariffs altogether, or in the alternative to provide a “range rates” approach, as will be described with further specificity herein.

**(3) Over two hundred Members of Congress** provided comments in support of confidential service contracts for NVOCCs and their customers. Significantly, and typical of these comments were those from Congressman Wayne Gilchrest who submitted a letter (Attachment A) in support of an exemption petition submitted by UPS (Petition No. P3-03). Significantly, Congressman Gilchrest was Chairman of the House Transportation and Infrastructure Subcommittee on Coast Guard and Maritime Transportation at the time Congress was considering OSRA. Congressman Gilchrest stated:

“ . . . [i]n order to protect shippers and to guarantee liability coverage, Congress determined NVOCCs should operate under a published tariff system when dealing with their customers. Now five years after enactment of OSRA, it is clear the US ocean shipping industry has changed dramatically. . . . The current regulatory scheme, however, puts NVOCCs at a distinct disadvantage and should be revised.”

Now five years after enactment of OSRA, it is clear the U.S. ocean shipping industry has changed dramatically and that the changes which are the subject of the aforementioned Petitions should be considered and implemented, including changes to

the current tariff requirements. The Associations agree with the congressional view that the current regulatory tariff scheme puts NVOCCs at a distinct and unnecessary disadvantage and should be revised. The Associations submit that the Commission consider the NCBFM Petition to exempt NVOCCs from publishing freight rates, or in the alternative to implement rules which would allow for “range rates”, as will be further discussed herein.

(4) The ocean carriers made their views known mainly through the comments of the **World Shipping Council (“WSC”)**. While understandably, the WSC expressed opposition to the various Petitions for Exemptions which would allow NVOCCs to enter confidential service contracts with shippers, it is important to underscore their comments to the NCBFM Petition with regard to “range rates”. The WSC states that “[w]hile the Council believes that there would be a number of significant questions about how the Commission would construct such a range rate rulemaking, we would not object to the Commission undertaking such an initiative as a way to consider the issue and its appropriateness as a mechanism to reduce the alleged burdens and costs of tariff publication and penalties for minor tariff infractions about which NVOCCs complain.” APL, following to some degree the WSC lead, while stating a very rigorous objection to the Exemption Petitions, including the NCBFM Petition, does conclude by stating, “[w]ithout in any way endorsing the approach, we note that the NCBFAA has identified one possible such alternative, namely some form of range rates.” While APL obviously does not endorse anything, it is still open that this might be a possible alternative to the current tariff environment.

So at the very least there appears to be some sense, by NVOCCs, shippers, and even by the VOCCs, that there may be something to gain by everyone by modifying the tariff requirements, even if just by the establishment of “range rates”. While the Associations believe that tariff publication should be eliminated completely, at the option of individual NVOCCs, except as to rules and surcharges as the NCBFAA has suggested, if the Commission does not endorse this route for concern that it lacks authority, the “range rates” approach is at least a promising first thread to start pulling to bring about much needed reform to the tariff regulatory regime currently in place.

**C. The Fact Record Supporting Change.** As set forth more fully below, eliminating or modifying the tariff regulations which are a costly and unnecessary regulatory burden on a significant segment of the ocean transportation industry would be consistent with the policies underlying the Ocean Shipping Reform Act of 1998 (“OSRA”). It would also recognize the fundamental changes in the marketplace that have occurred as a result of OSRA and other commercial realities. Lastly, the tariff changes recommended by the NCBFM, and to be expanded herein in further detail, would satisfy the criteria for the Commission’s exercise of its exemption authority under Section 16 of the Act. We will provide a brief review of the factual basis relied upon by the Petitioners, including the NCBFM, and provide further factual support to be attached hereto by the Associations, and some of their members.

It is as good a place as any to note Congressman Wayne T. Gilchrest’s comments quoted above as a springboard to discuss industry changes that warrant consideration in the context of a Section 16 (of the Act) Commission review of industry activities. Congressman Gilchrist states: “. . . [n]ow five years after enactment of OSRA, it is clear

the US ocean shipping industry has changed dramatically.” (See Attachment A). What are these pertinent changes, which have occurred since the time Congress was considering OSRA, to which the former Committee Chairman, and other commentators, including other Members of Congress, are referring?

**(1) The Tariff Context in Ocean Shipping.** The most glaring of all “disconnects” between commercial reality and superfluous governmental regulatory infrastructure in the business world is that of the role played by ocean transportation tariffs in the liner shipping context, especially in the environment of the NVOCC. The NCBFM, as the Department of Justice has pointed out, relied on *An American Shipper* magazine survey, *American Shipper*, “NVOs Weighty Dilemma: Tariff Filing”, *December, 2001*, of members of the NCBFM (many of which are NVOCCs) to clearly conclude the following:

- a) Shipper customers rarely, if ever, consult NVOCC tariffs---i.e., posting of tariffs were “Not At All Useful” to customers.
- b) **3-5%** or more of the NVOCCs administrative costs were devoted to tariff publishing and other ocean regulatory compliance activities.
- c) Hits on NVOCC tariff web pages were extremely rare.

It is clear, as the Department of Justice has correctly concluded, that “[w]hen even the purported beneficiaries of tariff-publication requirements find little value in them, the cost of requiring publication of those tariffs clearly exceeds any competitive or commercial benefits.”

**(2) The Changing Players.** Congressman Gilchrest’s statement: “. . . . [n]ow five years after enactment of OSRA, it is clear the US ocean shipping industry

has changed dramatically. . . .” resonates with most urgency when the commercial reality of today’s NVOCC/logistics industry is juxtaposed with the arcane regulatory shackles of public tariffs. In view of recent developments of NVOCCs/logistics companies offering myriad services that were either non-existent, or at most, at nascent stages during the OSRA period, it is important that the Commission take note of these. It is important that the Commission use its authority under Section 16, the exemption mechanism in the Act to provide a realistic regulatory environment. As Congressman Gilchrest and others noted, industry conditions have changed significantly in that the shipping arena now includes significant new players, new services, and conditions not previously considered by Congress in the OSRA discussions. These include the following:

a) The proliferation of NVOCC/3PL logistics companies with extensive capital investment in information technology, and corresponding skilled personnel, offering complex transportation/logistics solutions to shippers, which include NVOCC transportation services as components of these solutions. This is a development that is not “big company” unique, as a substantial number of small and mid-sized intermediaries have made significant investments in IT and personnel solutions to the increasingly demanding shipper public;

b) The proliferation of logistics companies that are subsidiaries of VOCCs. These companies offer services to their customers that cannot be provided solely through their affiliated VOCCs. Therefore, they will require similar relief as is herein being requested to service their customer base;

c) The continuing change in the OTI panorama by the growing trend of large full service multi-modal companies such as UPS, FEDEX, DHL, and others which are acquiring NVOCC components to their core business. These companies will also require freedom to contract with their customer base, as well as a modified tariff environment; and,

d) Lastly, and one of the most important of current developments, is that shippers of all sizes are demanding one-stop shopping, including confidential ocean components from transportation/logistics companies. Comments from the NIT League are significant, and should not be taken lightly when they state:

“ . . . These 3PL/NVOCC companies tend to offer a myriad of logistics services, including ocean transportation. Many shippers would like to have a single contract with such entities covering the broad scope of their supply chain. However, due to the inability of NVOCCs to contract with their customers, **efficiencies are lost or diminished because the 3PL must address the ocean transportation component separately and/or, at a minimum, the pricing for the ocean piece must be made known and available to the public.** Granting an exemption that would allow for comprehensive logistics services to be bundled in a single contract would increase efficiencies and facilitate commerce. . . .”  
(Emphasis supplied).

While these comments relate to the ability of shippers to enter confidential service contracts with NVOCCs, the same could be said as to the advantages to shippers to enter ocean transportation arrangements in a modified tariff environment. In the proposed tariff environment proposed herein, as will be subsequently discussed, the rate structures to which the parties have agreed would not be displayed publicly, or in the alternative, in the context of range rates, rates would not be disclosed with enough specificity or particularity as to concern shippers. Yet, the modified tariff approach would adequately

safeguard and make transparent the parameters of negotiation that would conform to regulatory concerns.

It is now truly a new and different environment from that which Congress considered during OSRA. The mechanism that Congress provided for just such changes in circumstances as described herein is the Exemption process of Section 16 of the Act, or as will be discussed below, for purposes of implementation, it is not necessary to resort to the exemption process.

**D. Exemption Authority for NVOCCs From Tariff Publishing of Freight Rates; or in the Alternative To Implement Rules for Range Rates.**

The NCBFM requested in its Petition that if the Commission believed that it did not have authority to exempt NVOCCs totally from the publication of freight rates and enforcement provisions of the Act, the NCBFM requested that the FMC issue a limited exemption from Section 8 of the Act by instituting a rulemaking for the purpose of promulgating rules governing the establishment of “range rates”. (See NCBFAA’s Petition P5-03).

The Associations submit that it may not even be necessary to couch a rulemaking procedure with regard to instituting “range rates” in the context of a statutory “limited” exemption. Pertinent sections of Article 8 provide as follows:

**“Sec. 1707. - Tariffs**

(a) In general

(1)

Except with regard to . . . each common carrier and conference shall keep open to public inspection in an automated tariff system, tariffs showing all **its rates, charges, classifications, rules, and practices . . .**  
(Emphasis supplied).

With regard to time-volume rates, the statute provides as follows and nothing else:

“(b) Time-volume rates.

Rates shown in tariffs filed under subsection (a) of this section may vary with the volume of cargo offered over a specified period of time.”

On the other hand, the Commission’s exemption authority in pertinent parts allows it to:

“ . . . exempt for the future. . . **any specified activity** of those **persons** (subject to this chapter ) from **any requirement** of this chapter if it finds that the exemption will not result in substantial reduction in competition or be detrimental to commerce. The Commission may attach conditions to any exemption . . . .”

46 U.S.C. app. §1715.

The Associations conclude that it is clear from language of the statute that if the Commission was to “exempt” NVOCCs altogether from the “activity” of publishing freight rates in tariffs, it would require an exemption procedure as noted above. It is clear that NVOCCs are “persons” as noted in the statute and that publishing of freight rates would clearly be a “specified activity”. However, the Associations believe that if the Commission proceeds to the “alternative” requested by the NCBFM---i.e., of implementing “range rates”---that this can be accomplished pursuant to the Commission’s rulemaking powers, without having to rely on the exemption statute. As noted above, common carriers must keep open for public inspection in an automated tariff system, tariffs showing all its “rates”. This term would include time volume rates since they are statutorily defined, but also conceivably “range rates”, since clearly these are on their face included within the term “rates”. They are a type of rate structure that is included in the “rates” contemplated in Section 8. The Commission clearly has the authority pursuant to Section 17 (46 App. U.S.C. 1716 (2002)) to prescribe rules and

regulations as necessary to carry out the mandates of the Act. On its face it does not appear that the Commission would require to pursue the exemption procedures to implement “range rates”. However, in the unlikely event that the Commission deemed it necessary to pursue implementation through the exemption route, **that** also would be a viable process to accomplish tariff reform.

**E. The “Range Rates” Model.**

While the NCBFAA Petition does not provide specific rulemaking language, it does provide the following starting point in defining a “range rate”:

“A range rate would consist of establishing two levels of rates for any particular service, which would be a maximum and the other to be a minimum rate. The participating NVOCC could then price its traffic for a given customer, based upon the appropriate market conditions and the agreement negotiated with its customers, anywhere within that range without having to separately establish a specific rate or charge for that service in its tariff. As the Commission has no responsibility to regulate the ‘reasonableness’ of NVOCC rates, the establishment of range rates would not interfere with any meaningful regulatory objective. In all other respects, the tariff and compliance provisions of the Act and the Commission’s regulations would remain in force.” NCBFM Petition. .

It is the view of the Associations that any new regulations with regard to modifying tariff regulations must at least meet the following objectives:

**1. Commercial and Regulatory Objectives of Range Rate Regulations.**

In order for the “range rate” restructuring of regulations to be effective, it is the opinion of the Associations that the new regulations must:

- a) Provide shippers greater freedom in structuring non-public commercial relationships with NVOCCs as to both pricing and services, as is clearly

the mandate from shippers and shipper groups as has been documented by the NIT League and others;

- b) Result in the elimination or substantial lessening of the expense burden of tariff publishing, especially in view of the fact, which has been repeatedly demonstrated, that there is no commercial or other benefit to public tariffs, as clearly indicated by the Department of Justice and other commentators;
- c) Result in elimination or substantial lessening of regulatory exposure to technical violations and sanctions generally associated with tariff publishing; and
- d) Contain elements that the Commission would find acceptable in allowing it to perform its congressional mandate in the new industry environment as described by an overwhelming number of commentators, including large numbers of Members of Congress.

**2) Suggested Modifications to Tariff Regulations to Accomplish Range Rates**

The Associations suggest that implementation of the following practices would meet the commercial and regulatory requirements as note above (also note that the specific regulation additions and deletions required to achieve the tariff modifications noted below are attached hereto as Attachment B):

- a) Maintain, as currently done, a “Rules and Ancillary Surcharge” tariff with charges and terms which would apply unless otherwise stated in a tariff provision(s), or time volume rate provision(s).

- b) At the option of common carriers (NVOCCs and VOCCs), these would publish and maintain minimum/maximum rates/charges (“range rates and charges”) to/from specific port pairs or ranges of ports, or points; these, at the option of the common carrier, may be expressed by specific commodity; by General Department Store Merchandise “GDSM” definitions or by such other designations currently in use in service contracts by the industry; by container size; and with specific commodities excluded or included; or in any other method which makes it clear what commodities or group of commodities, or size of containers are allowed to be shipped pursuant to these rates, or excluded from these rates, and between what ports or points, and at what rates and charges, including all inclusive rates and charges, within the indicated price ranges. These rates and charges may include or exclude particular surcharges as would be indicated in the range rate line item.
- c) At the option of common carriers (NVOCCs and VOCCs), common carriers would also publish range rates and charges in time volume rate structures and enrollments as discussed in more detail below. These are identified below by the term ”TVRs”.
- d) Minimum rates and charges combined, would not be less than 50% of the maximum rates, and charges expressed in the tariff; if rates, and applicable charges exceed the maximum rate(s) and charges expressed in the tariff, then a separate tariff line item would be published; if rates and applicable charges offered to a shipper are less than the minimum rates and charges,

then those rates and charges must be published as separate tariff line items.

- e) No new, initial rate, including range rate(s) and charges, as defined herein, that result(s) in an increased cost to the shipper would become effective earlier than 30 calendar days after publication. The Commission, for good cause, would allow such a new, initial rate, including range rate(s) to become effective in less than 30 calendar days. A change in an existing rate, charge, including range rate(s) and charge(s) that result in a decreased cost to the shipper would become effective upon publication.
- f) (TVRs). Ranges of rates and charges published in tariffs would vary with the volume of cargo offered over a specified period of time.
- g) (TVRs). All ranges of rates and charges for specific volumes, or ranges of volumes, applicable for specific time periods, classifications rules and practices concerning time/volume rates applicable to time/volume transactions would be set forth in the common carriers' tariff.
- h) (TVRs). Tariffs, in addition to containing the range of rates and charges, and volume commitments, would identify the shipment records that would be maintained to support the rates and charges accepted by the shipper and the common carriers.
- i) (TVRs). Shippers would accept TVRs by executing enrollment forms, indicating the rates and charges accepted by the shipper and the common carriers within the rate and volume ranges indicated in the tariff for time volume rates.

- j) (TVRs). Shippers and common carriers would amend or terminate, by mutual written agreement as an amendment to the enrollment form, the rates, charges, and volumes contained in the enrollment form at anytime prior to the termination of the TVR, provided that the amended rates and charges are not amended to an amount lower or higher than the minimum/maximum rates and charges indicated in the TVR in the tariff.
- k) (TVRs). Enrollment forms would provide for rerating of cargo, or other remedies, in the event shipper fails to meet the requirements of the time/volume agreement.
- l) (TVRs). Enrollment forms would be kept confidential by the common carriers and shippers for a period of five years, except that the Commission could request copies of same, and these would be promptly provided by the common carriers.

Please see as Attachment B, the Associations' suggested additions and deletions to existing regulations to achieve the changes noted above.

Under this proposal, NVOCCs could establish range rates that would be applicable on any single or multiple shipments without any regard to volume commitments. However, the NVOCCs would also have the option of their customers enrolling in time volume arrangements by executing enrollment forms specifying the terms and conditions applicable to the customer's shipments. The NVO and its customers would be allowed to terminate or amend the rates, charges and volumes at any time prior to the expiration of the time/volume rate enrollment, provided the amended rates and

charges would not exceed or be less than the minimum/maximum rates and charges for the time/volume rate structure contained in the tariff for time volume shipments.

The enrollment form may provide for rerating of cargo or other remedies if the NVOCCs' customers fail to fulfill the requirements of the time/volume arrangement specified in the enrollment form. Enrollment forms would remain confidential for a period of five (5) years. However, these confidentiality restrictions would not apply to requests by the Commission or its staff. The NVOs would promptly provide the Commission with any enrollment form the Commission may request. This system of time volume rates, meets the present statutory requirement in that the time volume rates shown in tariffs "may vary with the volume of cargo offered over a specified period of time." See Article 8, Section 1707 (b) of the Act. The specific rates which would apply to a specific customer from the range of rates contained in the applicable time volume section would vary with the volume to which the shipper commits.

This approach meets the statutory requirements, and the objectives noted above on all levels. The TVR, enrollment process is one that is already currently in use. The only new element is that the rate and charges structures would **be** expressed in range rates, but the enrollments would provide the Commission with all pertinent shipping information for regulatory purposes. This approach has the benefit of providing flexibility to shippers; lessening the publishing expense; lessening exposure to technical violations of the Act; and, as the NCBFAA has noted in its Petition, it would "not interfere with any meaningful regulatory objective." As the NCBFAA further noted, "[i]n all other respects, the tariff and compliance provisions of the Act and the Commission's regulations would remain in force."

## **F. Conclusion.**

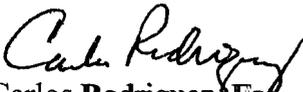
In view of the current industry developments as described in detail by an impressive number of Members of Congress, shipper groups which represent the vast majority of U.S. importers and exporters, all groups representing transportation intermediaries, and a pertinent governmental agency, the Department of Justice, the Associations join in their support of changing the regulatory environment in which NVOCCs and their customers operate. The Associations request that all of the current Petitions be given serious consideration in that all have one common thread: the recognition that greater flexibility in contracting between the vendors of transportation services, and shippers, the consumers of transportation, results, as the DOJ has stated, “in competition, lowering costs, and improving service in U.S. liner trades.”

In particular the Associations request that the Commission provide, as the NCBFAA has requested, for an exemption, to those who desired to be exempt, from the provisions of Sections 8 and 10 of the Act which require NVOCCs, among others, to establish, publish, maintain and enforce tariffs setting forth ocean freight rates. Alternatively, if the Commission does not believe that it has authority to exempt NVOCCs totally from the publication of freight rates and enforcement provisions of the Act, the Associations join the NCBFAA in requesting that the FMC issue a limited exemption from Section 8 of the Act, if the Commission decides that one is indeed required, and institute a rulemaking for the purpose of promulgating rules.

The Associations respectfully request, if the Commission does opt for the alternative rulemaking requested by the NCBFAA with regard to “range rates”, that the

Commission then favorably consider the rulemaking suggestions contained herein for the reasons provided in these comments.

Respectfully submitted,

  
Carlos **Rodriguez**, Esq.

**RODRIGUEZ O'DONNELL ROSS**  
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**COUNSELFOR :**

NVOCC-Government Affairs Conference

New York/New Jersey Foreign Freight  
Forwarders and Brokers Association,

Dated at Washington, D.C., December 19, 2003.

# **ATTACHMENT – A**

**COMMENTS BY:**  
**CONGRESSMAN, WAYNE T. GILCHREST**  
**1<sup>st</sup> District, Maryland**  
**(COMMITTEE ON TRANSPORTATION AND INFRASTRUCTURE)**

WAYNE T. GILCHREST  
1st District, Maryland

COMMITTEE ON TRANSPORTATION  
AND INFRASTRUCTURE  
COAST GUARD AND  
MARITIME TRANSPORTATION  
WATER RESOURCES  
COMMITTEE ON SCIENCE



Congress of the United States  
House of Representatives

ORIGINAL

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COMMITTEE ON RESOURCES 022  
CHAIRMAN, FISHERIES CONSERVATION,  
WILDLIFE AND OCEANS 0  
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AND PUBLIC LANDS 30  
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CHAIRMAN, CHESAPEAKE BAY  
WATERSHED TASK FORCE 30  
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September 15, 2003

Brant L. VanBrakle  
Secretary, Federal Maritime Commission  
800 North Capitol Street, NW  
Washington, DC 20573

Dear Commissioners:

I am writing to urge your favorable consideration of the petition United Parcel Service (UPS) has filed for an exemption from the prohibition on Non-Vessel Operating Common Carriers (NVOCCs) from entering into confidential contracts with their customers.

During consideration of the Ocean Shipping Reform Act of 1998 (OSRA), at which time I chaired the House Transportation and Infrastructure Subcommittee on Coast Guard and Maritime Transportation, Congress reviewed the role of NVOCCs within the ocean shipping industry. Based on the nature of the industry at the time, we determined NVOCCs should be regulated differently than vessel operators. NVOCCs were then mostly small enterprises that neither owned ocean vessels nor the cargo being shipped. In order to protect shippers and to guarantee liability coverage, Congress determined NVOCCs should operate under a published tariff system when dealing with their customers.

Now five years after enactment of OSRA, it is clear the US ocean shipping industry has changed dramatically. The unprecedented consolidation among ocean carriers and resulting loss of major US flagged carriers have led the remaining carriers to create vertically integrated logistics companies that now compete with NVOCCs. The current regulatory scheme, however, puts NVOCCs at a distinct disadvantage and should be revised.

In addition, it is important to note the operational characteristics of UPS that set it apart from other NVOCCs and the concerns about them that led to the different regulatory scheme in OSRA. UPS is no small enterprise, but perhaps the most sophisticated, integrated, intermodal transportation network in the world, which includes air, rail, and surface and NVOCC transportation. It is deemed a "carrier" in the surface and air freight industries. Also, the company makes significant annual capital investments to its asset-based transportation infrastructure.

Under OSRA Congress granted FMC broad exemption authority to deal with anticipated changes in the shipping industry. The UPS petition presents FMC the opportunity to acknowledge these

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Federal Maritime Commission  
September 15, 2003  
Page 2

changes and promote fair competition that will ultimately benefit the industry and shipping consumers worldwide. I am confident you will give the merits of the UPS petition your every consideration and render an appropriate decision. Thank you.

Sincerely,

  
Wayne T. Gilchrest  
Member of Congress

# **ATTACHMENT – B**

**SUGGESTED ADDITIONS AND DELETIONS TO  
CURRENT REGULATIONS TO ACHIEVE RATES**

## ATTACHMENT B

### SUGGESGTED ADDITIONS AND DELETIONS TO CURRENT REGULATIONS TO ACHIEVE RANGE RATES

**ADDITIONS: BOLDED AND UNDERLINED**

**DELETITIONS: CROSSED THROUGH**

Amend 46 CFR 520.2 Definitions by adding:

**Range Rates means a price stated in a tariff for providing a specified level of transportation service for a stated cargo quantity, from origin to destination, on and after a stated effective date or within a definite time frame, which prices are to be stated in terms of minimum and maximum rates and charges. Minimum rates and charges shall not be less than 50% of the maximum rates and charges. Range rates may include or exclude surcharges, and may define applicable cargo in generic terms defining which commodities shall be included or excluded from the range rates.**

Amend 46 CFR 520.2 Definitions by revising the definition of *Rate*, to read as follows:

*Rate* means a price, **including a range rate**, stated in a tariff for providing a specified level of transportation service, from origin to destination, on and after a stated effective date or within a defined time frame.

**Amend 46 CFR 520.12 Time/Volume rates to read as follows:**

(a) *General*. Common carriers or conferences may publish in their tariffs rates, which are conditioned upon the receipt of a specified aggregate volume of cargo, aggregate freight revenue, **or aggregate freight and charges revenue**, over a specified period of time.

(b) *Publication requirements*. (1) All rates, charges, classifications rules and practices concerning time/volume rates must be set forth in the carrier's or conference's tariff

(2) The tariff shall identify:

(i) the shipment records that will be maintained to support the rate; and

(ii) the method to be used by shippers giving notice of their intention to use a time/volume rate prior to tendering any shipments under the time/volume arrangement.

~~(c) *Accepted rates.* Once a time/volume rate is accepted by one shipper, it shall remain in effect for the time specified, without amendment. If no shipper gives notice within 30 days of publication, the time/volume rate may be canceled.~~

~~(d) (c) *Records.* Shipper notices and~~ **Enrollment forms, identifying the commitment by a shipper to ship pursuant to a time volume arrangement, specifying the terms and conditions, including the specific rates and charges applicable to the specific customer's shipments, and other shipment** records supporting a time/volume rate shall be maintained by the offering carrier or conference for at least 5 years after a shipper's use of a time/volume rate has ended. **Any enrollment forms and other shipment records the Commission may request shall be promptly provided to the Commission.**

(d) **Carriers and shippers may terminate or amend the rates, charges and volumes at any time prior to the expiration of the time/volume enrollment, provided amended rates and charges shall not total less than the minimum rates and charges applicable for the time volume range rate, nor shall the amended rates and charges total more than the applicable maximum range rates.**

(e) **The enrollment form may provide for rerating of cargo or other remedies if the common carrier's customer fails to fulfill the requirements of the time/volume arrangement specified in the enrollment form.**

~~(e) *Liquidated damages.* Time/volume rates may not impose or attempt to impose liquidated damages on any shipper that moves cargo under the rate. Carriers and agreements shall rerate cargo moved at the applicable tariff rate, if a shipper fails to meet the requirements of the time/volume offer.~~

**(f) Carriers may publish and maintain a “Rules and Ancillary Surcharge” or similar tariff with rates and terms which will apply except as otherwise stated in a tariff provision or a time volume rate provision.**

**CERTIFICATE OF SERVICE**

I hereby certify that I have this 19<sup>th</sup> day of December, 2003, served a copy of foregoing Comments by the NVOCC-Government Affairs Conference, Inc., and the New York/New Jersey Foreign Freight Forwarders and Brokers Association upon the parties, named herein, by causing an original and **fifteen** copies thereof to be hand delivered to the following:

Mr. Bryant L. VanBrakle  
Secretary  
Federal Maritime Commission  
800 North Capitol Street, N.W.  
Room No. 1046  
Washington, D.C. 20573

Mr. J. Michael Cavanaugh, Esq.  
Petition **P3-03**  
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Mr. Edward D. Greenberg, Esq.  
Mr. David K. Monroe, Esq.  
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Petition P9-03

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A handwritten signature in black ink, appearing to read "E. Edwards", written over a horizontal line.

Mr. Eddie L. Edwards

**RODRIGUEZ O'DONNELL ROSS**

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