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Cc: OS  
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Comm(5)

Before the  
**FEDERAL MARITIME COMMISSION**  
Washington, DC 20573

**FILED**

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**Petition P 3-18**  
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SEP 11 2018

Federal Maritime Commission  
Office of the Secretary

**PETITION OF THE WORLD SHIPPING COUNCIL FOR  
AN EXEMPTION FROM CERTAIN PROVISIONS OF THE SHIPPING  
ACT OF 1984, AS AMENDED, AND FOR A RULEMAKING  
PROCEEDING**

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Pursuant to Rule 92 of the Commission's Rules of Practice and Procedure, 46 C.F.R. § 502.92, the World Shipping Council ("WSC") hereby petitions the Federal Maritime Commission ("FMC" or "Commission") for an exemption from the service contract filing and essential terms publication requirements set forth at 46 U.S.C. §§40502(b) and (d), respectively (the service contract filing and essential terms publication requirements are hereinafter collectively referred to as the "filing requirements"). WSC further petitions the Commission for the initiation of a rulemaking proceeding to amend its service contract regulations set forth at 46 C.F.R. Part 530 in a manner consistent with the requested exemption.

**Interest of WSC and Its Members**

Each year, WSC's ocean common carrier members enter into thousands of service contracts with their customers and file these service contracts and amendments thereto with the FMC pursuant to 46 U.S.C. §40502(b). They also publish certain essential terms of these service

contracts as required by 46 U.S.C. §40502(d). The filing of service contracts and amendments, and the publication of essential terms, represent a substantial administrative and regulatory burden. Accordingly, the WSC members have a direct and substantial interest in the relief sought by this petition.

### **Relief Sought**

WSC seeks an exemption from the filing requirements of 46 U.S.C. §40502(b) and 46 U.S.C. §40502(d). It also seeks initiation of a rulemaking that would make conforming changes to the Commission's service contract regulations set forth at 46 C.F.R. Part 530.

### **Background**

Prior to 1984, the rates and charges that ocean common carriers ("VOCCs") charged their customers and the terms of service related to those rates and charges were required to be published in tariffs. Tariffs were the sole means available for VOCCs to offer and provide transportation services; there were no service contracts. The Shipping Act of 1984 introduced service contracts as an alternative means of lawfully rating and transporting cargo. Under the Shipping Act of 1984 as originally enacted, service contracts were required to be filed with the Commission, and all essential terms (including rates) were required to be made available to the public in tariff format. 46 U.S.C. App. §1707(c). Moreover, VOCCs were required to make those essential terms available to any other shippers that were similarly situated to the original service contract signatory (the so-called "me too" right). *Id.*

The Ocean Shipping Reform Act of 1998 ("OSRA") revised the Shipping Act to make the rates contained in service contracts confidential by eliminating the requirement that the rates be part of the publicly available essential terms, and also eliminated the right of shippers to "me too" service contracts. 46 U.S.C. §40502(d). Although Congress considered including language

in OSRA that would have permitted non-vessel-operating common carriers (“NVOCCs”) to enter into confidential contractual arrangements with their customers, this language was not part of the statute as enacted. *Congressional Record*, April 21, 1998, pp. S3306-S3221.

Since the enactment of OSRA, the Commission has granted various forms of regulatory relief to NVOCCs to allow them greater flexibility and confidentiality in dealing with their customers. More specifically, NVOCCs were granted an exemption which permits them to enter into NVOCC Service Arrangements (“NSAs”) with their customers, and were subsequently granted an exemption which permits them to enter into Negotiated Rate Agreements (“NRAs”) that are not filed with the Commission or published in tariffs. Of note, in granting the exemption which permits NVOCCs to enter into NSAs, the Commission indicated that NSAs were modeled on service contracts and were intended to provide NVOCCs with parity vis-à-vis VOCCs when it comes to offering contractual arrangements to customers. 69 Fed. Reg. 63984 (Nov. 3, 2004).

Most recently, in Docket No. 17-10, the Commission adopted regulations which relieve NVOCCs of the obligation to file NSAs and publish the essential terms of NSAs. WSC and its members now seek parity in the form of the same relief with respect to service contracts.

### **Argument in Support of Exemption**

The Commission has the authority to exempt for the future any specified activity of persons subject to the Shipping Act if the Commission finds that “the exemption will not result in substantial reduction in competition or be detrimental to commerce.” 46 U.S.C. §40103(a). Exempting service contracts (the functional equivalent of NSAs) from the filing requirements of the Shipping Act satisfies that standard.

### No Reduction in Competition

Exempting service contracts from the filing requirements of the Shipping Act will not result in a substantial reduction in competition. Service contracts filed with the Commission reflect commercial terms agreed upon by the parties to such contracts. The fact of whether or not those contracts are then filed with the Commission has no bearing whatsoever on the functioning of the competitive commercial marketplace.

Exempting the service contracts from the requirement to file them with the Commission will not reduce competition between VOCCs or between VOCCs and NVOCCs, who will continue to compete with one another in the market as they currently do. Similarly, relieving VOCCs of the obligation to publish essential terms will not reduce competition, since those essential terms which are made public do not include the most competitively relevant terms, i.e., the contract rates.

Granting the relief sought by this petition will not reduce competition between VOCCs and NVOCCs. To the contrary, granting VOCCs relief similar to that which has been granted to NVOCCs would place the two on more equal footing and enable VOCCs to compete more effectively with NVOCCs by relieving VOCCs of the same regulatory and administrative burdens that NVOCCs have been permitted to shed and establishing parity between them. In addition, providing service contract filing relief is necessary in order to give full effect to the NVOCC NSA and NRA regulatory relief that the Commission recently granted in Docket No. 17-10. This is the case because ocean transportation offered by NVOCCs is physically provided by VOCCs – virtually all of it governed by service contracts between the NVOCC and the VOCC. If VOCCs must file their contracts before they can provide transportation to NVOCCs under those service contracts, then NVOCCs cannot in turn provide service to their customers or

make use of the expedited contract acceptance and effective date provisions now applicable to NSAs and NRAs until the underlying VOCC service contract is filed. Granting the relief requested by this petition would eliminate that regulatory inconsistency and thereby avoid unintended regulatory and commercial disputes.

Finally, granting this petition would not reduce competition between shippers, since they will continue to negotiate contracts with the VOCC(s) of their choice on a confidential basis. The fact that such contracts are not filed and that certain essential terms are not published will in no way impact competition among shippers.

#### No Detriment to Commerce

Exempting service contracts from the filing requirements of the Act will not be detrimental to commerce. In granting an exemption in a similar context, the FMC held that an exemption would not be detrimental where no shipper alleged that the exemption would result in economic harm and where the exemption would reduce operating costs and increase competition. 76 Fed. Reg. 11353 (March 2, 2011). The same is true of the exemption sought by this petition.

No economic harm would result to shippers if this petition is granted. In this regard few, if any, other countries require the filing of contractual arrangements between VOCCs and shippers. There is no indication that the lack of a filing or essential terms publication requirement is detrimental to shippers or to the commerce of those countries. Furthermore, the Shipping Act already exempts service contracts covering a number of commodities from the service contract filing and essential terms publication requirements. 46 U.S.C. §40502(b)(2). There is no indication that this exemption has been detrimental to commerce insofar as these exempt commodities are concerned. Indeed, the purpose of exempting these commodities from the service contract filing and essential terms publication requirements was to promote

competition in the transportation of these commodities and hence to benefit commerce. See, H.R. 600, 98<sup>th</sup> Cong., 2d. Sess., p. 38 (February 23, 1984).

The Commission has also had more than a year of experience with the rules adopted in Docket No. 16-05. Those regulations, which became effective on May 5, 2017, permitted carriers and NVOCCs to file amendments to service contracts and NSAs up to 30 days after cargo moved under the subject amendment. WSC is unaware of any problems arising from the delayed filing of amendments, which strongly suggests that filing is not critical to competition, commerce, or regulatory oversight.

All available evidence indicates that granting this petition would enhance competition and commerce. Accordingly, this petition satisfies the statutory criteria and should be granted.

#### Granting the Requested Relief Would Remove a Substantial Regulatory Burden

In addition to enhancing competition and commerce, granting this petition would relieve the VOCC industry of a substantial administrative and regulatory burden. In issuing the final rule in Docket No. 17-10, the Commission found that relieving NVOCCs of the obligation to file NSAs and publish NSA essential terms would reduce the burden of compliance with these requirements by 162 hours, or approximately \$10,728.37. Docket No. 17-10, p. 18 (July 19, 2018). According to the Commission's 56<sup>th</sup> Annual Report for FY 2017, there were 969 new NSAs and 1,778 NSA amendments filed during FY 2017. According to that same report, during the same period VOCCs filed 47,110 new service contracts and 766,329 service contract amendments. 56<sup>th</sup> Annual Report, p. 19. In other words, there were approximately 48 times more service contracts filed than NSAs, and approximately 431 times as many service contract amendments as NSA amendments filed with the Commission. Thus, the savings that would be realized by VOCCs and their customers being relieved of the requirement to file service

contracts and publish essential terms would be an order of magnitude larger than the savings realized by NVOCCs and their customers.

These savings are particularly important in light of the Commission's determination that retaining the filing and essential terms publication requirements for NSAs provides little or no regulatory benefit. Docket No. 17-10, pp. 10 and 17 (July 19, 2018). The same is true with respect to service contracts. To the extent the Commission requires access to service contracts in order to carry out its regulatory oversight functions, granting this petition would not alter the obligation of VOCCs to maintain service contracts and associated records, or the Commission's ability to require production of those records. See 46 C.F.R. §530.15. In the context of NSAs, similar requirements have been found to ensure adequate regulatory oversight. Docket No. 17-10, p. 17 (July 19, 2018). Again, the same is true with respect to service contracts.

Similarly, exempting service contracts from filing would not impair any Commission monitoring functions. As an initial matter, the extent to which filed service contracts can be used to monitor trade conditions is unclear, given the number of rates in each contract, the difficulty of determining which of these rates are actually moving cargo, and the frequency with which service contracts are amended. Moreover, the Commission's regulations impose quarterly monitoring report requirements on various types of carrier agreements, and authorize the Commission to impose alternative requirements where it deems it necessary to do so. See 46 C.F.R. §535.702. The Commission has imposed such alternative requirements on a number of agreements. The standard and alternative monitoring report requirements provide the Commission with much more concise and usable information about trade conditions than it could glean from the many thousands of constantly changing service contracts that are presently on file with the agency. Granting this petition will not affect the Commission's monitoring programs,

and it will continue to receive the quarterly monitoring reports presently required. Hence, the relief sought herein would not impair effective Commission execution of its regulatory responsibilities.

Granting the relief sought by this petition would also not be injurious to other stakeholders. More specifically, this petition would not impact the duty of certain VOCCs under 46 U.S.C. §40502(e) to disclose certain service contract terms to requesting labor organizations.

The final point that we offer in support of eliminating the service contract filing and essential terms publication requirements – and arguably the most compelling – is that those requirements are vestiges of a much more rigid system of economic regulation that no longer exists. Beginning with the Shipping Act of 1984 and continuing with the Ocean Shipping Reform Act, Congress has moved regulation of the liner shipping industry from a highly structured tariff-based common carriage system to a market-based, confidential contract-based structure. Along with those legislative changes, the industry itself has evolved into a highly competitive global marketplace in which rates and terms are set by supply and demand and negotiations among commercial parties. Service contract filing and essential terms publication no longer serve a purpose in that marketplace, and the Commission should remove those outdated requirements.

#### **Petition for Rulemaking**

In the event the petition for an exemption is granted, it will be necessary to amend the Commission's service contract regulations to conform them to the exemption, similar to what was done in revising the NSA/NRA regulations. The following revisions to the Commission's service contract regulations would be consistent with the requested exemption:

1. 530.1 – This provision would be revised to read: “The purpose of this part is to facilitate the use of service contracts.”

2. 530.3 – The following definitions would be deleted:

- (c) authorized person
- (k) file or filing
- (s) statement of essential terms

In addition, in the definition of “effective date” (subsection (i)), delete everything after the first sentence.

3. 530.4 – The words “filed with the Commission” would be changed to “provided to the Commission pursuant to 530.15”.

4. 530.5 – This provision would be deleted in its entirety.

5. 530.6 – In subsection (a), in the first sentence, replace “on the signature page of” with the word “in.” This will provide flexibility in the execution and structure of contracts.

6. Subpart B – The title of this Subpart would be changed to “Requirements.”

7. 530.8 – Subsection (a) would be deleted and the remaining provisions re-lettered accordingly.

In current subsection (b), the words “filed with the Commission” would be deleted. In subsection (b)(9)(ii), the second sentence would be deleted. In subsection(c)(2) delete “and the Commission”. In existing subsection (d), the reference to filing would be deleted, as would subsection (d)(4). Subsection (e) would be deleted in its entirety.

8. 530.9 – This provision would be deleted in its entirety.

9. 530.10 – This section would be deleted except for the language in current subsection (b), which provides that: “Service contracts may be amended by mutual agreement of the parties to the contract.” That statement correctly reflects commercial practice and current contract law

applicable across the broader economy. The subsection header would be amended to read: “Amendments”.

10. Subpart C would be deleted in its entirety.
11. 530.13 – This provision would be deleted in its entirety.
12. 530.14 – Subsection (a) would be deleted, and subsequent subsections would be re-lettered accordingly. In what is now 530.14(b), “filing parties” would be changed to “contracting parties.” Current subsection (b)(3) would be deleted in its entirety.
13. 530.15 – In the first sentence of subsection (a), replace “signed” with “effective” to reflect alternative means of contract acceptance/execution.
14. 530.91 – Appendix A and Exhibit 1 to Part 530 would be deleted.

### **Conclusion**

When the Commission created NSAs, it based them on service contracts and treated them in a manner similar to service contracts for purposes of filing, essential terms publication, and legal prohibitions. The similarity between service contracts and NSAs was reinforced in Docket No. 16-05, where the Commission revised the deadline for the filing of amendments to both types of arrangements, thereby reinforcing the parallel nature of the two types of instruments. In Docket No. 17-10, the Commission exempted NSAs from filing and essential terms publication requirements. As demonstrated above, exempting service contracts from these same requirements is consistent with the legal standard in 46 U.S.C. § 40103(a). Accordingly, the Commission should reestablish parity between the contractual arrangements offered by VOCCs

and NVOCCs, and exempt service contracts from the filing and essential terms publication requirements of the Shipping Act.

Respectfully submitted,



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September 11, 2018