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FEDERAL MARITIME COMMISSION

46 CFR Parts 520, 532

Docket No. 10-03

RIN 3072-AC38

NVOCC Negotiated Rate Arrangements

COMMENTS OF RATEWAVE TARIFF SERVICES, INC.

Pursuant to the Federal Maritime Commission's Notice of Proposed Rulemaking in Docket No. 10-03 (NVOCC Negotiated Rate Arrangements) issued April 29, 2010, RateWave Tariff Services, Inc. does hereby respectfully submit the following comments on this issue.

RateWave Tariff Services, Inc. is a professional Tariff publishing and regulatory consulting company. Currently RateWave publishes, posts and maintains the Tariffs of active NVOCCs subject to FMC jurisdiction. Our clients range in size from some of largest NVOs involved in the U.S. foreign trades to some of the smallest. When the Commission formally announced its intention to provide NVOs with a mechanism to exempt them from the Commission's Tariff Publishing regulations, we knew there would be both great interest in this matter and an immediate need to provide our NVO clients with a clear explanation of what such a change in regulations would mean in NVO day to day operations. We expected many, if not most, of our smaller clients to be somewhat confused by exactly what these regulations contain. After reading the media headlines reporting on the Commission's meeting on February 18, 2010, several of our smaller NVOs even sent us instructions to cancel their Tariffs since "Tariff Filings were no longer required." That said, however, we were surprised at the extent of the confusion and perplexity there is among all our NVO clients, large and small. Many NVO managers and compliance officers took note of the news reports of the proposed exemption, but after reading the headlines and articles in various trade publications, we have found that few of them have had the time to truly digest and prepare a response to this proposal. Rather most of them have either called or emailed us asking RateWave to provide a detailed explanation as to "just what does this mean."

RateWave as a company has not taken any particular stance for or against the proposed exemption, rather our focus has been to provide our clients with a clear, accurate and lucid explanation of the exemption to help each NVO make an informed decision as to whether or not to utilize this new exemption, and more importantly, how to structure their sales and documentation activities to comply with them.

Therefore in light of the need for detailed guidance to the NVO community and as a direct result of the many questions our clients have asked us to raise, RateWave respectfully submits these comments requesting that the Commission both clarify some aspects of the proposed regulations as well as possibly make several amendments thereto.

The most common question that has been raised is why are foreign based NVOCCs excluded from this exemption? We at RateWave can well understand the FMC's reluctance to extend this exemption to foreign based NVOs. While many foreign based NVOs are operating divisions of large multi-national logistics corporations, who should be able to structure their business models to comply with the new regulations, there

are still a large number of foreign based NVOs who have little or no presence here in the United States, beyond a registered Agent for service of process and a cargo clearing agent. We spend an inordinate amount of time trying to explain to such NVOs exactly what they can and cannot do, how to quote and publish rates that comply with Commission regulations, the necessity to post Tariff increases on 30 days notice, how to publish and apply Surcharges, Bond Posting requirements, along with many other topics. A 3 or 4 week time frame to make a foreign based NVO's first filing is not unusual. Our Vice President Laurie Olson has even conducted seminars in FMC regulations in some of our client's overseas offices at the request of the client to help some of our clients learn how to comply with the unique Ocean Regulatory laws of the United States. We are sure that the Commission will receive numerous requests to extend this exemption to foreign based NVOs, simply as a matter of equity and to "level the playing field." Based on RateWave's experience, should the Commission decide to extend this exemption to foreign based NVOs, we would recommend the Commission consider adding to the proposed regulations a provision requiring that all foreign based NVO NRA records be maintained within the United States, either with the Licensed OTI Agent they utilize or with a FMC registered 3rd party. The Commission should further require that all Foreign based NVOs place a statement in their Rules Tariff as to exactly where those records will be maintained and what party is to be contacted to obtain copies of NRAs and associated records, much the same as the Commission requires for NVOCC Service Arrangement records. Finally RateWave believes the Commission should specify that all NRA records either be in English, or contain a certified English translation. More than a few times, RateWave has received filing instructions in a foreign language from overseas filers. Since we are required to either post all Tariff matter in English, or when posting the filings in a foreign language, we are required to also include an English translation, we find ourselves often requesting that overseas filing agents re-send all rate filing instructions in English. This process can take up to 2 or even 3 weeks before we receive the information in a usable form. By requiring that all NRAs and associated records be in English, or be maintained with an English translation, the FMC would not find itself in a position of waiting for an English translation when requesting NRA data, which if the delay was long, could result in an NVO's right to use the NRA Exemption being rescinded due to not providing records in a timely manner.

The second most common question we are asked is exactly what does the Commission mean by a "Rate." The proposed definition of "rate" in 532.3(b) makes no mention of surcharges or additional charges. It is very common today for NVOs to publish their rates as subject to Bunker, Fuel, Security, AMS or AES along with other constantly changing charges. These are usually listed in the Rules of the NVO's Tariff to which all rates are subject unless otherwise exempted. It would appear from reading the proposed exemption rules and the Discussion in the Docket that the Commission believes that NRAs will be used to quote, and will contain, all-inclusive rates that are not subject to additional charges. The NVO personnel we have spoken with have all requested we ask the Commission to please insure the application of surcharges is specifically addressed in the final Rulemaking. What is of great concern to NVOs is that Vessel Operator charges which are not included in their Service Contracts have become extremely volatile and therefore hard to build into rate quotes of any duration longer than a week. As an example RateWave has even seen an NVO's Bunker Charge increase twice in a single month. If an NVO is limited to including only "rates" in an NRA that cannot be subject to surcharges as specified within the NRA itself, most NVOs will find themselves constantly re-negotiating existing NRAs, or having to create new NRAs, as one underlying Vessel Operator surcharge after another is increased. The same is true for General Rate Increases. During this past year the number of General Rate Increases imposed by the Vessel Operators have proliferated to the point where in some of the major trade lanes there is a General Rate Increase once a month. In most cases today our clients have told us that when they negotiate a level of rates with a Shipper, the quotation to the Shipper makes very clear that the rates therein are subject to variations in specified surcharges and subject to any General Rate Increase imposed during the period for which the quotation is effective. Most Shippers understand the necessity for this and with few exceptions expect to see such provisions in every rate quote. If NVOs are

going to be able to convert such quotations into NRAs instead of Tariff filings, NVOs must be able to make the NRAs subject to specified tariffed surcharges as well as tariffed General Rate Increases, by means of clear language within a formal NRA offer. And since any increases in tariffed surcharges or any general rate increase rule would still have to be filed on 30 days notice in the NVOs governing rules Tariff as required under the current Tariff Publishing regulations in 520, Shippers would be provided with the minimum notice currently required for such increases. This question may seem to be superfluous, but so many NVO clients have raised this concern with us that we feel we should request that the Commission specifically address the issue to either confirm or allay the NVO's fears.

A further question on this issue is whether the NRA itself may list specific surcharge amounts within the NRA in addition to the rate. Several NVOs have raised the question that since there are times when an NVO will agree to mitigate a specific surcharge amount for a customer, how can such an agreement be included in an NRA? This is almost always done at the request of a shipper who insists not only on a mitigated surcharge amount but also that the rate and the surcharge amount be listed separately on their invoices. Under the current Tariff rules this can easily be done within a web rate page, and occurs with some frequency. If the definition of a rate remains so restrictive as to bar this practice, some NVOCCs will be forced to use the Tariff publication method rather than an NRA whenever a Shipper insists on such a quotation structure.

Another major concern raised by some our NVO client personnel is that section 532.5(d) specifies that an NRA "may not be modified after the time the shipment is received by the carrier or its agent..." For some of our clients their current practice is to update a customer's quotation rather than re-create it (such updated quotations are then sent to RateWave so that we can amend the Tariff). For instance sometimes a customer will ask the NVO to add an additional trade lane to an existing quote that was not needed at the time the original quote was made. Under the currently proposed exemption rules the NVO and Shipper would have to agree to an entirely new NRA. If a new NRA has to be re-created every time anything in the original NRA changes, the number of NRAs will quickly grow to a number that will become more and more difficult to manage, particularly in view of the Commission's requirement to retain records for 5 years. RateWave would request that the Commission consider allowing NRAs to be amended as mutually agreed to by the parties to allow greater ease in tracking and storing NRA records. A related question some of our NVO clients have raised is, is it possible for an NVO to cancel an NRA given that an NRA cannot be modified? For instance if an NVO and Shipper agree to a specific rate level to be maintained for 3 months and due to unforeseen circumstances the costs the NVO must pay to obtain transportation service make the NRA rates no longer profitable for the service level agreed to, and the Shipper and NVO cannot agree on a new higher rate, would be NVO be free to cancel the existing NRA, or would they be required to honor the original NRA and provide service to the Shipper at the no longer profitable level? (An example would be if the NVO bases their quotation and NRA on the service of a specific vessel operator service and then during the NRA's effective period that vessel operator changes their service level forcing the NVO to utilize another more expensive vessel operator to provide the service the Shipper requires under the NRA.)

Additionally in view of the fact that an NRA cannot be altered several other concerns have been raised by some of our NVO Clients. Is the "cargo quantity" provision in the proposed regulations restricted to a single shipment? Or can the "cargo quantity" be a range, for instance a minimum of 20 and a maximum of 30 shipments? If the cargo quantity can be expressed as to require multiple shipments, what happens if the shipper does not meet the minimum cargo quantity before the expiration date of the NRA? Does the Carrier have to re-rate any shipment that has moved at the otherwise applicable Tariff rate (that of course would assume there is a Tariff Rate)? Is the NVO responsible for collecting any sort of penalty, or can an NVO even put a penalty into its rules Tariff? If the answer to such a question is yes, then what is the difference between an NRA and an NSA? Finally, what happens if the stated cargo quantity is exceeded? Can an

existing NRA cover such excess shipments or is a new NRA required? Or indeed is a new NRA required for each and every shipment tendered to the NVO by a Shipper? We realize that such questions may seem trivial or so obvious that the Commission does not need to address them, but these are genuine concerns that have been raised by even our larger NVO customers.

Also there are a number of questions that have been asked by several of our NVO clients that seem to reflect the uncertainty over just what "in writing" or "memorialized in writing" actually means. They have asked that we specifically raise these questions with the Commission. The first question is will the Commission prescribe an exact form an NRA must adhere to, or, at the very least specify the minimum elements each NRA must contain. We appreciate that the Commission has requested that commenters address exactly this question. RateWave would like to recommend for the Commission's consideration that the following elements be included in every NRA regardless of whether the actual format is a written document, a spread sheet or an email.

1. A unique NRA number.

2. The Commodities covered by the rates in the NRA, this can be as broad as Cargo, N.O.S or something as specific as Sandals.

3. The Origins and Destinations covered by the NRA as well as any via Ports required for inland movements (via ports for inland movements are currently required for rates published in Tariffs).

4. The quantity of cargo that either must be or can be tendered for transportation.

5. Type of service to be provided at Origin and Destination: for instance Door service, Container Freight Station Service or Rail Ramp service. Additionally the NRA would specify any transit services applicable such as all-motor inland service, mini-landbridge service or would contain a reference to a transportation service defined in a Tariff rule such as premium, standard or economy.

6. The Basis for the rates in the quotation.

7. The rate or rates.

8. An effective date.

9. An expiration date if any.

10. Any special services that are included in the services provided to the Shipper under the NRA such as Customs clearance, ISF or 10+2 filings, or Consolidation services.

11. And if the Commission decides to allow this, the Surcharges that will or will not apply to the rates named in the NRA, their amounts if different than the ones found in the Tariff rules and whether or not the NRA will be subject to any tariffed General Rate Increases.

In particular RateWave believes that requiring a unique NRA number that must be placed both within the NRA and on all shipping documents could provide a basis on how to define the "safe-harbor" provisions that the Commission is seeking. Placing a unique NRA number on the shipping documents would provide ample evidence to both the NVO and the Shipper that a shipment is to move on an agreed, effective NRA and not the NVO's Tariff rates. Further if either the Shipper or the NVO find that the NRA number has been

omitted, a corrected document can be always be issued. This would also help to prevent any question as to what rate should be applied in the event an NRA rate and a Tariff Rate cover the same shipment.

Also in the matter of what happens in the event there is an NRA and a Tariff rate covering the same shipment, there is unanimous agreement that if an NRA exists between the Shipper and an NVO then in all cases the rate within such an NRA must be enforced without any reference to a Tariff rate, even if the Tariff rate is lower. And conversely if an NRA has not been agreed to between a Shipper and the NVO then in all instances a Tariff rate is to apply without regard to any existing NRA that could cover the same shipment. In the event there is neither a Tariff rate nor formal NRA to apply to a shipment, all NVOs agree that the NVO must bear the responsibility for any Commission action resulting from the NVO's non-compliance with the Commission's tariff regulations. And specifically that Shippers moving cargo in the absence of a Tariff Rate should not be allowed to "shop" through an NVO's effective NRAs looking for the most advantageous rate to apply.

The second question in this matter is what exactly constitutes an associated record? Obviously emails and cover letters should be considered as an associated record, but what else could qualify? Most NVOs who have raised this question are concerned that they will not be saving all the relevant documents the Commission would expect to see, which because of their absence, could result, at a later date, in placing the NVO in jeopardy of losing the NRA exemption for non-compliance. They have requested that the Commission provide a list of possible documents that would be considered associated records. Such a list, which no one expects to be all inclusive, would provide NVOs with greater guidance when structuring their record retention procedures.

Third, one NVO client has asked us specifically to request that the Commission clarify when exactly does the 5 year period for retaining NRAs and associated documents begin. Does it begin when an NRA is first proposed to the Shipper? Does it start on the day of the first shipment made under the NRA? Or most likely the day the last shipment is made under the NRA? For larger NVOs this can have a significant impact on the volume of records they must plan to store, sort and maintain.

Another question we have been asked is can an NVO retain NRA records in an electronic format? While the Commission has long recognized that records can be stored electronically, several of our NVO clients would greatly appreciate a specific reference to electronically stored records in the regulations. Additionally the Commission may even consider requiring that any NVO storing records electronically must provide the Commission's staff unfettered access to such records in the same manner that the NVO is required to provide access to an NVO's Tariff.

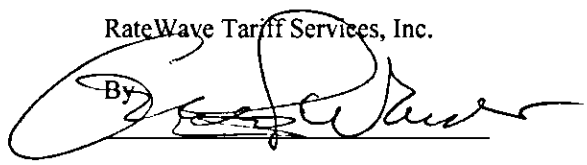
Finally, there are two points RateWave would like to recommend for the Commission's consideration. First since the NRA is a binding agreement between the NVO and the Shipper, should there be a requirement that a formal acceptance by the Shipper be obtained before the movement of any cargo begins under the NRA? While this may seem obvious, we have a number of NVO clients who allow their pricing staff to prepare and present rate quotations upon a request from any Shipper. It is not unheard of for a Shipper to receive a quotation, decide to use it, and then without informing the NVO begin booking cargo under the quotation. The same problem such action presents under the current Tariff rate filing regulations, could also apply to the new NRA regulations. The NVOs who have raised this question fear that unless the regulations require a formal acceptance by the Shipper, compliance personnel will find it difficult to capture all the NRA records for retention as NVO pricing staff personnel fail to follow up with each Shipper offered an NRA.

On the question of exemptions, every NVO manager or compliance officer we have spoken with believes that the Commission MUST provide an exemption from the Acts Sections 10(b)(4) and 10(b)(8) – USC Sections 41104(4) & 41104(8) – since by their very nature NRAs will often result in discriminatory rates being

assessed to similarly situated shippers. Without such an exemption some NVOs believe they would not be able to legally enter into NRAs with different shippers at different rates for the transportation of the same commodity. For example, an NVO may enter into an NRA with one shipper for a rate of $2000 for a 40ft container of shoes from Shanghai to Los Angeles and then enter into another NRA with a second Shipper for a rate of $2200 for a 40ft container of shoes also from Shanghai to Los Angeles. If an NVO must be mindful to make sure that all similarly situated shippers of the same commodity from and to the same origins and destinations, moving via the same service must all receive the same rate, any advantages that the granting of the NRA exemption will confer will be completely negated or at least severely reduced.

In conclusion, while we realize that many of the suggestions RateWave is making may seem minor or even too obvious to address, we respectfully request the Commission consider addressing all these issues. From our years of experience with NVO personnel in NVOs of any size we can safely assert that many NVOs simply do not feel comfortable reading their own interpretation into any Commission regulation. Too often in the past NVOs have found that actions and Tariff Rules and Provisions they thought were both legal and acceptable have turned out to be illegal and unacceptable. Our NVO clients are hopeful that the Commission will thoughtfully consider expanding both the regulations themselves and it comments on the regulations to address these issues so as to provide clear guidance to each NVO on what the Commission expects when an NVO utilizes this new exemption.

RateWave Tariff Services, Inc.

By 

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