

Appeared in FD  
6/17/91

FEDERAL MARITIME COMMISSION

46 CFR PART 586

[DOCKET NO. 91-24]

ACTIONS TO ADJUST OR MEET CONDITIONS UNFAVORABLE  
TO SHIPPING IN THE UNITED STATES/KOREA TRADE

AGENCY: Federal Maritime Commission.

ACTION: Notice of Proposed Rulemaking.

SUMMARY: The Federal Maritime Commission, in response to apparent unfavorable conditions in the foreign oceanborne trade between the United States and Korea, proposes the imposition of fees on Korean-flag vessels calling at United States ports. Korean law and regulations preclude U.S. carriers operating in the U.S./Korea trade from engaging in trucking activities and directly contracting for rail services in Korea. The effect of the rule will be to adjust or meet unfavorable conditions created by those laws and regulations by imposing countervailing burdens on the Korean-flag carriers.

DATES: Comments due on or before August 2, 1991.

ADDRESS: Send comments to:

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SUPPLEMENTARY INFORMATION:

BACKGROUND

Section 19(1)(b) of the Merchant Marine Act, 1920, 46 U.S.C. app. 876(1)(b) ("Section 19"), authorizes and directs the Federal Maritime Commission ("Commission" or "FMC") to

make rules and regulations affecting shipping in the foreign trade not in conflict with law in order to adjust or meet general or special conditions unfavorable to shipping in the foreign trade, whether in any particular trade or upon any particular route or in commerce generally, including intermodal movements, terminal operations, cargo solicitations, forwarding and agency services, non-vessel-operating common carrier operations, and other activities and services integral to transportation systems, and which arise out of or result from foreign laws, rules, or regulations or from competitive methods or practices employed by owners, operators, agents, or masters of vessels of a foreign country . . . .<sup>1</sup>

The rules and regulations the Commission is authorized to make include limitation of sailings, suspension of carriers' tariffs or rights to use conference tariffs, suspension of carriers' rights to operate under FMC-filed terminal and other agreements, fees of up to \$1,000,000 per voyage, or any other action deemed necessary and appropriate to adjust or meet the unfavorable condition. 46 U.S.C. app. 876(9).<sup>2</sup>

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<sup>1</sup> The references to intermodal services and other transportation system activities and services were added by Public Law 101-595, section 103 of the Federal Maritime Commission's Authorization Act of 1990, November 16, 1990 ("1990 Section 19 Amendments"). The effect of these amendments was to codify the Commission's prior interpretations of Section 19. H.R. Rep. No. 101-420, 101st Cong., 2nd Sess. 8 (1990); S. Rep. No. 101-420, 101st Cong., 2nd Sess. 7 (1990).

<sup>2</sup> Paragraph 9 was also added by the 1990 Section 19 Amendments.

The Commission has been closely monitoring the commercial and inter-governmental negotiations over the concerns of U.S.-flag carriers in the oceanborne trade ("Trade") between the United States and the Republic of Korea ("ROK" and "Korea"), including U.S.-ROK discussions held in June 1990 and January 1991. The Commission has also inquired directly of U.S. and Korean carriers in the Trade, via the reporting mechanisms of section 10002(d) of the Foreign Shipping Practices Act of 1988, 46 U.S.C. app. 1710a ("FSPA"), and section 15 of the Shipping Act of 1984, 46 U.S.C. app. 1714 ("1984 Act") as to ROK restrictions on U.S. carrier operations in the Trade. Section 15 Orders were issued regarding Korean restrictions on April 14, 1987; Notices requesting supplemental information were issued on March 28, 1988, and August 23, 1988; and information demand orders pursuant to the FSPA and the 1984 Act were issued on November 29, 1990 ("November 1990 Orders").<sup>3</sup>

#### DISCUSSION

The Commission has concluded, on the basis of information reported and comments received,<sup>4</sup> that despite the commercial and

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<sup>3</sup> The November 1990 Orders were issued to Hanjin Shipping Company, Ltd. ("Hanjin"), Hyundai Merchant Marine Co., Ltd. ("Hyundai"), American President Lines, Ltd. ("APL"), and Sea-Land Service, Inc. ("Sea-Land").

<sup>4</sup> The Commission received reports from Hanjin, Hyundai, APL and Sea-Land, as well as comments from the Council of European and Japanese National Shipowners' Associations ("CENSA") and An-Mar International. The latter were in response to a Commission Notice published in the Federal Register on December 5, 1990.

governmental efforts expended, assurances made, and time elapsed, it appears that restrictive practices continue to impede the Trade such that Commission action can no longer be postponed. The Commission has determined that rules to meet these conditions are therefore appropriate. Specifically, the Commission finds that by operation of Korean laws and regulations, U.S. carriers appear to be precluded from operating trucking activities in Korea and from directly contracting for rail services in Korea as part of intermodal movements in the Trade. To this end, the Commission is proposing herein ("Proposed Rule") that certain Korean-flag carriers pay a fee of \$100,000 per voyage, upon delivering cargo to or receiving cargo at U.S. ports.

#### Trucking

The information available to the Commission indicates that trucking rights of U.S. carriers continue to be impeded by the ROK through its Ministry of Transport ("MOT") and Ministry of Finance ("MOF"). It is the Commission's understanding that an MOT license to engage in trucking operations in Korea is not obtainable because of MOF guidelines, which list freight trucking among business categories in which foreign investment is prohibited.

The Korean-carrier responses to the November 1990 Orders confirm not only the existence of this restriction but also the fact that the MOT is empowered but has as yet failed to take action to resolve the matter. Hanjin explained that "trucking operations by U.S.-flag carriers have been restricted in Korea on grounds that the Korean trucking industry is in a weak condition." Hanjin

Report at 2.<sup>5</sup> Hanjin asserted there has been "gradual progress toward the opening of trucking operations in Korea," and that the ROK "intends to permit foreign carriers, including U.S. carriers, to participate in shuttle trucking between on-dock terminal and off-dock CY or rail ramp in the Port of Pusan . . . ." Hanjin Report at 2. Hyundai stated that the MOT "has taken this matter under consideration" and that the ROK "has been trying to solve this problem" since the June 1990 maritime consultations. Hyundai Report at 4. Hyundai describes MOT's recent decision "in principle" to issue licenses to U.S. carriers for shuttle services as "the initial stage of MOT's measures in connection with its effort to resolve this matter." Hyundai Report at 5.<sup>6</sup>

Thus, it is uncontroverted that U.S. carriers in Korea are intentionally precluded by operation of Korean law and regulations from engaging in trucking operations -- activities in which Korean carriers can and do engage in the United States. ROK actions to resolve this matter appear at this point to be limited to vague indications of future progress (the Agreed Minutes refer at 2 to the ROK's "intention to open trucking in Korea on a gradual basis") and assurances that shuttle services will be permitted within 1991.

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<sup>5</sup> This is consistent with the Agreed Minutes of the June 25 and 26, 1990, U.S.-ROK maritime consultations, which state: "The Korean side explained that in view of the weak and uncompetitive domestic trucking business, it is very difficult to allow foreign competition in the immediate future."

<sup>6</sup> A related issue raised by CENSA concerns the alleged Korean prohibition on imports of foreign made chassis, forcing steamship companies to purchase Korean chassis which are already in short supply. CENSA Comment at 2.

The latter concession, even if it materializes, would not appear to address the main concern, which is the right of U.S. carriers "to pick up and deliver containers at the premises of Korean shippers and consignees" as part of their intermodal operation in the Trade. Sea-Land Report at 2.

The Commission concludes that these circumstances suggest the existence of unfavorable conditions in the Trade generally and on intermodal movements in particular, within the meaning of Section 19. The Commission recognizes that there may be justifiable, minor impositions or inconveniences imposed on foreign business operations in any given country due to legitimate national or local concerns and customs. The effect of the ROK restrictions on U.S. carrier trucking activities, however, is a total ban on an integral aspect of intermodal transportation which the Commission cannot dismiss as a mere way of "doing business."

#### Rail Access

The U.S. carriers advised that they continue to be precluded from contracting directly with the Korean National Railroads Administration ("KNRA"). Only rail forwarders are permitted direct contracting authority with the KNRA. There are conflicting reports as to whether this restriction applies to Korean as well as U.S. carriers. Hanjin and Hyundai, in their responses to the November 1990 Orders, asserted that the restrictions apply to all shipping companies, including Korean. Hanjin Report at 3; Hyundai Report at 5. Other reports indicated that Korean carriers are eligible

to contract directly with the Korean railroads. Sea-Land Report at 5; APL Report at 3-4; CENSA Comment at 2.<sup>7</sup>

In any event, it is uncontroverted that U.S. carriers are forced by operation of Korean law to engage the services of Korean middlemen to gain access to rail transportation. There is no apparent comparable restriction on Korean carriers operating in the United States. Sea-Land estimates that its inability to contract directly with KNRA costs it approximately \$220,000 annually. Sea-Land Report at 5. It is further understood that as a result of the January 1991 U.S.-Korea consultations, the KNRA has agreed to permit foreign carriers to directly contract for rail services.<sup>8</sup> Both Hanjin and Hyundai in their responses to the November 1990 Orders indicated that easing of restrictions in rail access will be tied to the trucking issue.<sup>9</sup>

The Commission's optimism over this most recent concession is tempered somewhat by its recollection of the Agreed Minutes of the May 1987 U.S.-Korea shipping discussions. Those Minutes contain

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<sup>7</sup> It may be that Korean carrier contacts with the KNRA are facilitated because of carrier affiliations with the authorized forwarders. The Commission would particularly invite comment on this issue in comments to the Proposed Rule.

<sup>8</sup> This would appear to support the contention that current ROK restrictions on rail contracting are tied, directly or indirectly, to nationality.

<sup>9</sup> Hanjin stated that direct rail contracts will be permitted of "foreign carriers who are licensed to operate trucks in Korea." Hanjin Report at 3. Hyundai reported that the ROK "is now developing plans to enable American carriers to negotiate and contract directly with KNRA," and that "this will be coordinated with further liberalization in the trucking area." Hyundai Report at 6, emphasis in original.

Korean assurances that U.S. carriers would be permitted "at the earliest possible date in 1988" to operate branch offices in Korea which would control services then provided by Korean agents -- services which specifically included "direct negotiation with railroads." Thus, while the Commission would like to rely on these most recent commitments by the ROK, we are dissuaded from doing so in light of the as yet unrealized previous assurances.

#### Other issues

While the rule proposed herein is premised on the existence of ROK laws and practices restricting trucking and rail activities, the Commission continues to be concerned about other Korean impediments to commerce in the Trade. U.S. carriers are precluded from owning and operating container terminals at the Port of Pusan. Prior commercial negotiations concerning phased development at Pusan had led U.S. carriers to believe that future terminal ownership there was a possibility. Sea-Land Report at 7. The Korean carriers have since indicated that the ROK has determined to keep Pusan a "public sector" operation and that private terminal ownership -- for both U.S. and Korean carriers -- will be pursued in plans for the Port of Kwangyang.

This turn of events was confirmed in the January 1991 discussions and in Korea Maritime and Port Administration ("KMPA") Administrator Kong Hyuk, Ahn's December 1990 letter to FMC Chairman Christopher L. Koch. Mr. Ahn indicated that the Kwangyang project



has been given renewed priority by the ROK.<sup>10</sup> U.S. carriers, however, have deemed Kwangyang inadequate to their needs because of insufficient rail and highway facilities and the long-term nature of the project. APL Report at 4; Sea-Land Report at 7. U.S. carriers are also barred from owning terminal equipment in Korea, a matter which the KMPA indicates will be resolved when the terminal ownership and trucking issues are resolved.

Despite its decision not to impose sanctions at this time with respect to these issues, the Commission remains concerned with the lack of action on these matters. The Commission is hopeful that progress will result from easing of rail and trucking restrictions, as well as from further efforts by the ROK to address its port congestion problems. To this end, the Commission will continue to monitor developments pertaining to container terminal and terminal equipment operation and ownership.

The Commission also wishes to acknowledge the progress that has been achieved in other areas. Discriminatory port charges have apparently been eliminated.<sup>11</sup> Branch offices for U.S. carriers have

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<sup>10</sup> Mr. Ahn's letter states that "adverse public opinion," a shortage of berth capacity, and the likelihood of Korean, U.S., and other carriers seeking terminal ownership, all "force us to conclude that Pusan Port must be run by public sector to optimize its efficiency. However, in the case of Kwangyang terminal, which is to take some of the increasing container freight traffic currently concentrated at Pusan Port, the possibilities for private investment and privately-leased terminal operations are under scrutiny."

<sup>11</sup> Mr. Sung-Soo Kim, Maritime Attache for the Embassy of the Republic of Korea, advised FMC Chairman Koch by fax message on April 3, 1991, that

(continued...)

been established, with resulting savings for one U.S. carrier reported at \$3 million annually in sales agency commissions. Sea-Land Report at 3. However, the range of branch office activities continues to be curtailed by ROK law, particularly with respect to rail and trucking.

In proposing remedies, the Commission is desirous that a resolution of the rail and trucking issues will be achieved in short order so that the need for sanctions will be obviated. The Commission wishes to emphasize, however, that it is wary of changes in Korean law or policy which on their face appear corrective but which have no practical effect because of other ROK laws, policies, rules or regulations. The Commission is seeking to achieve the elimination of restrictive practices in the Trade, not to encourage empty administrative or legislative actions which are negated by other overriding factors. For example, a determination that foreign-flag status will no longer bar a carrier from direct rail contracting authority will not be deemed to resolve the rail issue, if trucking authority remains a criterion for rail contracting authority and if foreign companies remain unable to engage in trucking operations. Similarly, the Commission will not consider the trucking and rail restrictions to have been lifted if the purported resolutions are tied to future action on other issues,

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<sup>11</sup>(...continued)

port service charge discounts extended to Korean carriers were eliminated as of April 1, 1991. Furthermore, equal treatment with regard to pilotage fee and pilot boat charge will be applied, effective on April 8, 1991.

such as container terminal ownership, so that actual liberalization remains illusory.

After giving consideration to all available countervailing sanctions, including limitations of sailings and suspension of carrier tariffs or terminal or other agreements to which the carriers are party, the Commission has determined to propose a primary remedy of a \$100,000 per voyage fee. However, the Commission specifically solicits comment on the feasibility of additional or alternative potential sanctions. In the event that the presently prescribed fees are not paid, the Proposed Rule does provide for the suspension of tariffs and denial of clearance from or access to U.S. ports.

In order to provide proper notice and a fair opportunity to respond to the proposed action, the Commission is giving all interested parties until August 2, 1991, to file comments concerning the proposed sanctions and any recent developments affecting conditions in the Trade. This should provide adequate time for the reporting of any concrete progress resulting from U.S.-ROK maritime consultations currently scheduled for the week of July 8, 1991. Factual submissions relating to conditions in the Trade, where relevant, should include evidence or statistics showing commercial loss and to the extent possible be supported by sworn documents and affidavits.

The responses to the Commission's November 1990 Order and comments filed by Hanjin, Hyundai, APL and Sea-Land, and the

responses to the simultaneous Federal Register Notice filed by CENSA and An-Mar International, are made part of the record herein.

**List of Subjects in 46 CFR Part 586**

**Cargo vessels; Exports; Foreign relations; Imports; Maritime carriers; Penalties; Rates and fares; Tariffs.**

Therefore, pursuant to section 19(1)(b) of the Merchant Marine Act, 1920, 46 U.S.C. app. 876(1)(b), as amended, Reorganization Plan No. 7 of 1961, 75 Stat. 840, and 46 CFR Part 585, it is proposed to amend Part 586 of Title 46 of the Code of Federal Regulations as follows:

1. The authority citation is amended to read as follows:

AUTHORITY: 46 C.F.R. app. 876(1)(b); 46 U.S.C. app. 876(5) through (12); 46 U.S.C. app. 1710a; 46 CFR Part 585; Reorganization Plan No. 7 of 1961, 26 FR 7315 (August 12, 1961).

2. A new section is added reading as follows:

**§ 586.5 Conditions unfavorable to shipping in the United States/  
Korea trade ("Trade")**

(a) **Conditions Unfavorable to Shipping in the Trade.** (1) The Federal Maritime Commission ("Commission") has determined that the Government of the Republic of Korea ("ROK" or "Korea") has created conditions unfavorable to shipping in the foreign trade of the United States by enacting, implementing and enforcing laws and regulations which unreasonably preclude U.S.-flag carriers from engaging in trucking operations in Korea and from directly contracting for rail service in Korea incidental to intermodal commerce in the Trade.

(2) Under Korean law, entities desiring to engage in trucking operations in Korea must obtain a license, but said license is not issued to foreign companies because foreign investment in freight trucking is prohibited. After considerable commercial and inter-governmental negotiation, ROK movement on this issue has been limited to a recent announcement that foreign carrier participation in shuttle trucking between terminal and container yard or rail ramp will soon be permitted. There has been no ROK concession as to the essential need of U.S. carriers to engage in trucking operations to and from inland origin and destination points. Korean carriers face no similar restrictions in their intermodal operations in the United States. In addition, this lack of trucking authority has been cited by the ROK as justification for barring U.S. carriers the right to contract directly with railroads for rail access and to own terminal operating equipment.

(3) ROK law also prevents U.S. carriers from contracting directly with the Korean National Railroads Administration. U.S. carriers are forced to contract with railroads through the intermediary services of licensed forwarders, at considerable expense to the U.S. carriers. Recent Korean assurances that these restrictions will be lifted have not as yet been carried out. No such restrictions on Korean carriers exist in their operations in the United States.

(b) Korean-flag carriers - assessment of fees. (1) Generally, voyage means an inbound or outbound movement between a foreign country and the United States by a vessel engaged in the United

States trade. Each inbound or outbound movement constitutes a separate voyage. For purposes of this section, the transportation of cargo by water aboard a vessel or vessels, inbound or outbound between ports in Korea and ports in the United States, including transshipment points, under one or more bills of lading issued by or on behalf of the Korean-flag carriers named in paragraph (b) (2) of this section, whether on board vessels owned or operated by the named carriers or in space chartered by the named carriers or in space chartered by the named carriers on vessels owned or operated by others, or carried for the account of the named carriers pursuant to agreements on file with the Federal Maritime Commission, under any of the tariffs enumerated in paragraph (b) (4) of this section, shall be deemed to constitute a voyage.

(2) For each voyage completed after the effective date of this section, the following carriers shall pay to the Federal Maritime Commission a fee in the amount of \$100,000: Hanjin Shipping Co., Ltd. and Hyundai Merchant Marine Co., Ltd. The fee for each voyage shall be paid by certified or cashiers check made payable to the Federal Maritime Commission within 7 calendar days of the completion of the voyage for which it is assessed.

(3) Each Korean-flag carrier named in paragraph (b) (2) of this section shall file with the Secretary of the Federal Maritime Commission a report setting forth the date of each voyage completed, amount of cargo carried, and amount of fees assessed pursuant to paragraph (b) (2) of this section during the preceding calendar quarter. Each such report shall include a certification

that all applicable fees assessed pursuant to paragraph (b)(2) of this section have been paid, and shall be executed by the Chief Executive Officer under oath. Such reports shall be filed within 15 days of the end of each calendar quarter.

(4) If any Korean-flag carrier shall fail to pay any fee assessed by paragraph (b)(2) of this section within the prescribed time for payment, or fail to file any quarterly report required by paragraph (b)(3) of this section within the prescribed period for filing, the tariffs identified below, as applicable to such carrier, shall be suspended effective 30 calendar days after the expiration of the calendar quarter in which such fees or report were due:

(i) Hanjin Shipping Company, Ltd.

FMC No. 13 - Canada/U.S.A. Freight Tariff No. 13, Applicable  
Between Ports in Canada and U.S. Pacific Coast Ports

FMC No. 15 - Freight Tariff FMC No. 15, Applicable Between Ports  
in Japan and Ports and Points in the United States

FMC No. 16 - Local and Intermodal Freight Tariff FMC No. 16,  
Applicable Between Ports/Points in the Far East and Ports and  
Points in the United States

FMC No. 17 - Equipment Interchange Tariff Naming Terms and  
Conditions Governing Use of Carrier Equipment

FMC No. 18 - Westbound Local and Intermodal Freight Tariff FMC No.  
18, Applicable Between Ports and Points in the United States  
and Ports and Points in the Far East

(ii) Hyundai Merchant Marine Co., Ltd.

- FMC No. 1 - Freight Tariff FMC No. 1, Applicable Between Ports in the Far East and United States, Hawaii and Puerto Rico
- FMC No. 2 - Freight Tariff FMC No. 2, Applicable Between Ports in Australia and South Pacific Islands and Pacific Coast Ports of the United States, Canada and Hawaii
- FMC No. 12 - Southbound Intermodal Freight Tariff No. 12, Applicable Between U.S. Atlantic and Gulf Rail Terminals and Australia, New Zealand and South Pacific Islands
- FMC No. 14 - Service Contract Tariff No. 14, Naming Essential Terms and Services as Provided in Service Contracts on File with the Federal Maritime Commission
- FMC No. 18 - Eastbound Local/OCP and Intermodal Rules Tariff No. 18, Applicable Between Ports and Points in Korea, Taiwan, Hong Kong, Thailand, Singapore, Malaysia, Philippines and Indonesia and Ports and Points in the United States
- FMC No. 19 - Eastbound Local/OCP/and Intermodal Freight Tariff No. 19, Applicable Between Ports and Points in Korea and Ports and Points in the United States
- FMC No. 20 - Eastbound Local/OCP/and Intermodal Freight Tariff No. 20, Applicable Between Ports and Points in Taiwan, Hong Kong and Ports and Points in the United States
- FMC No. 21 - Eastbound Local/OCP/and Intermodal Freight Tariff No. 21, Applicable Between Ports and Points in Thailand, Singapore, Malaysia, Philippines and Indonesia and Ports and Points in the United States



FMC No. 22 - Eastbound Rules Tariff FMC No. 22, Applicable Between Ports and Points in Japan and Ports and Points in the United States

FMC No. 23 - Eastbound Tariff FMC No. 23, Applicable Between Ports and Points in Japan and Ports and Points in the United States

FMC No. 30 - Ocean and Intermodal Freight Tariff No. 30, Applicable Between Ports and Points in the United States and Ports and Points in the Far East

(iii) Any other tariff which may be filed by or on behalf of the carriers listed in paragraph (b) of this section.

(iv) In the event of suspension of tariffs pursuant to this paragraph, any affected conference or rate agreement tariffs shall be amended to reflect said suspensions. Operation by any carrier under suspended, cancelled or rejected tariffs shall subject said carrier to all applicable remedies and penalties provided by law.

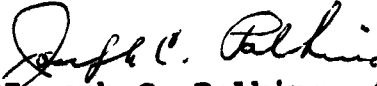
(c) Source of fees. Any fees assessed by paragraph (b) (2) of this section against Korean-flag carriers operating pursuant to any agreement filed with the Federal Maritime Commission providing for revenue pooling, joint service, space-chartering or other joint operations shall be paid by such Korean-flag carriers without affecting the revenue shares or amount of revenue earned by other carriers operating pursuant to such agreements.

(d) Refusal of Clearance by the Collector of Customs. If a named Korean-flag carrier shall fail to pay any fee assessed by paragraph (b) (2) of this section, or fail to file any quarterly report required by paragraph (b) (3) of this section within the

prescribed period for filing, the Secretary of the Commission shall request the Chief, Carrier Rulings Branch of the U.S. Customs Service to direct the collectors of customs at the affected U.S. port or ports, to refuse the clearance required by section 4197 of the Revised Statutes (46 U.S.C. app. 91) to any vessel owned or operated by such Korean-flag carrier.

(e) Denial of Entry to or Detention at United States Ports by the Secretary of Transportation. If a named Korean-flag carrier shall fail to pay any fee assessed by paragraph (b)(2) of this section, or fail to file any quarterly report required by paragraph (b)(3) of this section within the prescribed period for filing, the Secretary of the Commission shall request the Secretary, U.S. Department of Transportation, to direct the Coast Guard to: (1) deny entry for purpose of oceanborne trade, of a vessel of a country that is named in paragraph (a) of this section, to any port or place in the United States or the navigable waters of the United States; or (2) detain that vessel at the port or place in the United States from which it is about to depart for another port or place in the United States.

By the Commission.

  
Joseph C. Polking  
Secretary