FEDERAL MARITIME COMMISSION

46 CFR PARTS 515, 560 and 572

[DOCKET NO. 91-20]

RIN 3072-AB17

EXEMPTION OF CERTAIN MARINE TERMINAL ARRANGEMENTS

AGENCY: Federal Maritime Commission.

ACTION: Final Rule

SUMMARY: The Federal Maritime Commission amends 46 CFR Parts 515, 560 and 572 to exempt certain marine terminal services agreements between common carriers by water and marine terminal operators from the agreement filing requirements of the Shipping Act, 1916, the Shipping Act of 1984 and the Commission's implementing regulations thereunder, and to discontinue the Commission's tariff filing requirements for such matters. This action codifies Commission policy that has been in effect for the last 5 1/2 years.

EFFECTIVE DATE:

The amendments to 46 CFR Parts 515, 560 and 572 shall become effective 30 days after publication in the Federal Register.

FOR FURTHER INFORMATION CONTACT:

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SUPPLEMENTARY INFORMATION:

The Federal Maritime Commission ("Commission") initiated this proceeding by publishing a Notice of Proposed Rulemaking in the Federal Register on May 15, 1991 (56 FR 22384) ("NPR"). The NPR solicited comment on a Proposed Rule ("Proposed Rule") to discontinue existing filing requirements for certain terminal services arrangements between marine terminal operators ("MTOs") and ocean common carriers.

The Proposed Rule would (1) establish an exemption from the agreement filing requirements of section 15 of the Shipping Act, 1916, 46 U.S.C. app. 814 ("1916 Act") and section 5 of the Shipping Act of 1984, 46 U.S.C. app. 1704 ("1984 Act")(collectively, "Shipping Acts") for terminal services agreements; (2) discontinue the Commission's terminal tariff filing requirements under 46 CFR Part 515 for the marine terminal services provided under such arrangements; (3) withhold 1984 Act antitrust immunity for exempted arrangements as a condition of the exemption; and (4) exclude from the exemption all rates, charges, rules and regulations affecting terminal services or related facilities determined through marine terminal conference agreements.[1] Comments were also invited on an

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[1] The Proposed Rule was modeled after the Waiver of Penalties ("Waiver") that has been in effect since June 25, 1986. See Notice of Waiver of Penalties (51 FR 23154, June 25, 1986); Supplemental Notice of Waiver of Penalties (51 FR 36755, October 15, 1986); Second Supplemental Notice of Waiver of Penalties (52 FR 18744, May 19, 1987). The Waiver provides that the Commission will not assess penalties against those that fail to file agreements or tariffs setting forth rates and charges for terminal services performed for common carriers by water.

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Alternative Proposal which would add a further condition to the exemption requiring that the actual minimum/maximum range of rates and charges for the services/facilities provided by the involved MTO be listed in the MTO's tariff.

COMMENTS

Comments were received from public port interests, private-sector MTO/stevedore interests, common carriers which also operate marine terminals, foreign shipowners' interests, an association of ship owners, agents and stevedores, and the U.S. Department of Justice ("DOJ").[2] Replies to the Comments were received from public port interests, private-sector MTOs/stevedore interests, a common carrier which also operates marine terminals, and DOJ.[3] The Comments and Replies are summarized in the Appendix, which will not

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[1](...continued)
The Waiver was in response to widespread industry uncertainty over the Commission's filing requirements for industry practices of combining terminal services and stevedoring services under a single transaction. For a background of the Waiver and subsequent Commission-related initiatives, please refer to pages 2 through 8 of the NPR.

[2]Comments were filed by the American Association of Port Authorities ("AAPA"); the California Association of Port Authorities; the Foreign Shipowners Association of the Pacific Coast; the Master Contracting Stevedore Association of the Pacific Coast, Inc. ("MCSAPC"); the National Association of Stevedores ("NAS"); the Gulf Seaports Marine Terminal Conference ("GSMTC"); the Northwest Marine Terminal Association; Stevedoring Services of America; the West Gulf Maritime Association; the Massachusetts Port Authority; the Port Authority of New York and New Jersey ("PANYNJ"); the Port of Seattle; the Port of Tacoma; the Tampa Port Authority ("Tampa"); American President Lines, Ltd. and Eagle Marine Services, Ltd. ("APL/Eagle"); Sea-Land Service, Inc.; Guam Port Authority ("Guam"); Jacksonville Port Authority; and DOJ.

[3]Replies to Comments were filed by NAS, AAPA, MCSAPC, GSMTC, PANYNJ, Tampa, APL/Eagle, Guam, and DOJ.

appear in the Code of Federal Regulations.

In general, ports favor either a variation of the Proposed Rule (with an additional requirement that copies of exempted arrangements be provided to the public upon request), or retaining current filing requirements. However, many urge clarification of the definitions that will be used under the Proposed Rule's exemption. Private-sector MTO/stevedores tend to favor the Proposed Rule. Carriers either urge the Commission to retain current requirements, or generally support the Proposed Rule. DOJ supports the Proposed Rule, but urges that it be expanded to encompass all MTO agreements, and that antitrust immunity be withdrawn from all MTO arrangements.

The principal concerns expressed by the Comments and Replies involve: (A) the proposed exemption's application to rates determined through MTO conference agreements; (B) the viability of the Alternative Proposal; (C) the Commission's authority to remove antitrust immunity for the exempted activity; (D) the disclosure/availability of exempted arrangements; and (E) the need for contemporary definitions of marine terminal services and facilities before adoption of a final rule.

DISCUSSION

The Commission has considered all of the Comments and Replies received in this proceeding and has determined to adopt the Proposed Rule, with certain changes which are discussed below (and certain other technical and editorial changes to enhance its clarity), as the Final Rule in this matter. Any Comments not

expressly discussed have either been incorporated without discussion, have been found to be mooted by the changes incorporated into the Final Rule, or have been found to be irrelevant, without merit or beyond the scope of the proceeding.

A. The Exemption's Application to Rates Determined Through MTO Conference Agreements

The Proposed Rule's filing exemption did not cover rates, charges, rules and regulations affecting terminal services or related facilities determined through marine terminal conference agreements as defined in 46 CFR §§ 560.307(b) and 572.307(b). The NPR solicited comment on whether the exemption should be narrowed to exclude rates, charges, rules and regulations determined through marine terminal discussion and interconference agreements, or alternatively, whether all collectively-determined matters should be exempted.

Commenters' views vary on this issue and their suggestions range from: (1) exempting all collectively-determined matters; to (2) exempting all collectively-determined matters conditioned on the public availability of the exempted arrangements; to (3) exempting all collectively-determined matters if the involved conference agreements provide for the right of independent action.

The Commission believes that excluding matters determined through discussion or interconference agreements from the exemption could diminish industry access to the exemption without serving any offsetting regulatory purpose. Also, as noted by NAS and others, there are practical problems with such limitations. In practice, it may be difficult in some cases to distinguish which rates and

rules have actually been "determined through" an MTO discussion or interconference agreement, much less determine if the discussion of such matters -- as opposed to fixing rates in a context where adherence is enforced -- may disqualify certain MTO rates or rules from the filing exemption.

On the other hand, structuring an exemption with no limitations on MTO conference agreements would immunize from the antitrust laws unsupervised activity violative of those laws.[4] Because marine terminal conferences involve the fixing of and adherence to concertedly-determined courses of action, the Commission believes that their rates, charges, rules and regulations should not be encompassed by any filing exemption. The concerted, binding rate-fixing activity of the nature occurring in a marine terminal conference should be reflected in publicly available tariffs as a possible deterrent to the abuse of the immunized authority. Therefore, the Commission has determined to adopt the approach set forth in the Proposed Rule, thereby excluding from the exemption any rates, charges, rules and regulations determined through marine terminal conference agreements. However, the Commission does not see a need to structure an exemption in a manner excluding matters discussed by marine terminal discussion and interconference agreements, given

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[4]The Proposed Rule's exemption would remove Shipping Act antitrust immunity for certain unfiled MTO/carrier terminal services agreements, as defined in the Proposed Rule. The Proposed Rule does not affect the antitrust immunity of the agreements that provide for the establishment of a marine terminal conference.

the non-binding nature of their authority.[5]

B. The Alternative Proposal

The NPR also invited comments on an Alternative Proposal. The Alternative Proposal would have added a further condition to the exemption, which would have required MTO tariffs to list the actual minimum/maximum range of rates and charges for the services/facilities provided by the involved MTO. While several commenters believe such an approach warrants further consideration, the majority of Comments and Replies oppose it. The Commission has determined not to condition the exemption of marine terminal services arrangements in the manner contemplated in the Alternative Proposal but rather has decided to adopt the Proposed Rule as a Final Rule.

C. Antitrust Immunity

The Proposed Rule was limited by several conditions prompted by the criteria governing the Commission's exemption authority under section 35 of the 1916 Act, 46 U.S.C. app. 833a, and section 16 of the 1984 Act, 46 U.S.C. app. 1715[6]. One of these conditions

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[5]The comments of such associations opposing the Proposed Rule's limitation on the exemption with regard to conferences may have confused their status with that of a conference agreement. In this regard, it is noted that groups such as the California Association of Port Authorities, the Northwest Marine Terminal Association and the Gulf Seaports Marine Terminal Conference do not literally meet the definition of "marine terminal conference agreement" under 46 CFR 572.307(b) because they do not enforce adherence to uniform marine terminal tariff matter, nor do they publish any common tariffs in which all members participate.

[6]The Shipping Acts' exemption standards require the Commission to find that an exemption will not substantially impair effective regulation by the Commission, be unjustly discriminatory, result

(continued...)

was to withhold 1984 Act antitrust immunity from exempted arrangements.[7] The NPR stated that, absent any compelling arguments to the contrary, the removal of antitrust immunity appeared to be appropriate because the exempted activity occurs exclusively within the United States and the legislative history of the 1984 Act indicates that a removal of antitrust immunity is among the conditions the Commission may impose on a section 16 exemption.[8] Some commenters support this approach; indeed, DOJ urges the Commission to go beyond the scope of this proceeding and to discontinue antitrust immunity for all transactions involving this sector of the industry.

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[6](...continued)
in a substantial reduction in competition (1984 Act only), or be detrimental to commerce. Both Shipping Acts authorize the Commission to attach conditions to any exemption.

[7]Unlike the 1984 Act, the 1916 Act does not explicitly confer antitrust immunity to exempted activity. Section 7 (a)(1) of the 1984 Act, 46 U.S.C. app. 1706, in pertinent part provides:

> The antitrust laws do not apply to --
>
> > (1) any agreement that . . . is exempt under section 16 of this Act from any requirement of this Act.

[8]We refer to an explanatory statement published in the Congressional Record at the request of the leadership of the House Judiciary and Merchant Marine and Fisheries committees to record "important changes" made as a result of certain compromises made by the two committees (Cong. Rec. H 8124 and 8125, October 6, 1983). The explanatory statement recites that the compromise resulted in new wording which "closely tracks that of section 35 of the Shipping Act of 1916", adding, "[t]he change permits the Commission to impose conditions upon such an exemption, including the partial or total removal of antitrust immunity for agreements or conduct that might be exempted from filing requirements."

The House version of section 16 representing the House committees' compromise was accepted by the Senate without change (H. Rept. 98-600, p. 42).

However, several commenters challenge the Commission's authority to remove the antitrust immunity for exempted agreements. They generally assert that the "plain language" of section 7(a)(1) of the 1984 Act confers antitrust immunity on agreements that are filed with the Commission or are exempt under section 16 of the 1984 Act, and, accordingly, that any removal of antitrust immunity for the exempted agreements should occur only through direct Congressional action. Moreover, Tampa states that it would not appear that Congress intended to confer authority on the Commission to remove antitrust immunity provided for under the Act, when such immunity is being reviewed by the Advisory Commission created under section 18 of the Act.[9]

The Commission is not persuaded that its exercise of its exemption authority under section 16 of the 1984 Act is necessarily limited by the language of section 7(a). Section 7(a) itself does not by its express terms limit the Commission's authority to condition exemptions.[10] And, the 1984 Act's legislative history specifically provides that the "conditions" available to the

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[9]Section 18 of the 1984 Act, 46 U.S.C. app. 1717, provides for a study of the effects of the 1984 Act and establishes the Advisory Commission on Conferences in Ocean Shipping to make recommendations to the President and to the Congress concerning conferences in ocean shipping. The topics listed for study under section 18 include the need for antitrust immunity for ports and marine terminals.

[10]It is noted that section 7(c) anticipates the Commission's removal of antitrust immunity under section 7(a). Section 7(c) provides, in part, that any determination by the Commission that results in the removal of the immunity to the antitrust laws set forth in section 7(a) shall not remove or alter the antitrust immunity for the period before the determination.

Commission under section 16 of the 1984 Act could include withdrawal of antitrust immunity.[11]

After consideration of the views expressed on this issue, the Commission has determined to proceed with the approach under the Proposed Rule, whereby 1984 Act antitrust immunity will be removed with respect to agreements which are not filed with the Commission pursuant to the Final Rule's exemption. The Comments filed on this issue have not convinced the Commission that it can effectively ensure that such exempted agreements, when not filed for Commission review, comply with Shipping Act standards and warrant immunity from the antitrust laws. Thus, while Shipping Act antitrust immunity will not be available to agreements that are not filed with the Commission pursuant to the Final Rule herein, for the reasons discussed below, such immunity will remain available to exempt agreements which are filed with the Commission voluntarily.

The NPR solicited comments on whether those desiring 1984 Act antitrust immunity for activity otherwise eligible for the proposed filing exemption should be afforded the option to file their agreements voluntarily under the waiting period exemption currently set forth at 46 CFR § 572.307, and, thus, obtain such immunity. The majority of commenters support the "voluntary" filing proposal. However, DOJ urges the Commission to reject this approach on the basis that it is within the Commission's discretion to do so and such rejection would be consistent with the public interest in preserving competition in the MTO industry.

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[11]See footnote 8, supra.

"Voluntary", or "optional" filing of exempted agreements is presently permitted under 46 CFR § 572.301(b). This approach has been codified since the Commission's promulgation of its agreement rules under the 1984 Act, and was carried forward from the 1916 Act rules.[12] The Commission is not persuaded that it should now alter this policy. While DOJ urges the Commission to follow the Interstate Commerce Commission's ("ICC") lead with regard to TOFC/COFC deregulation, we believe that there are relevant differences. In particular, the ICC was addressing collective rate setting, not the provision of transportation-related services. Moreover, as recently as 1984, Congress enacted legislation explicitly reaffirming antitrust immunity for MTO agreements. The Commission does not believe it should impair access to the process created by Congress by those willing to disclose their activity.

Disclosure/Availability of Exempted Agreements

The Proposed Rule at 46 CFR 515.3(b)(2) required a certified true accounting of tariff matters exempted from the Commission's tariff filing requirements to be furnished to the Commission within 30 days of a Commission staff request. Private-sector MTOs/stevedores are concerned that the proposed requirement does not adequately provide for: confidential treatment of information submitted upon Commission request; a reasonable record-keeping time limit; or an explanation of what is meant by a "true accounting."

The Commission has reexamined the need for a separate record

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[12]Under the Commission's 1916 Act rules, agreements exempted from filing requirements have no explicit grant of antitrust immunity unless they are filed for 1916 Act approval.

retention requirement with respect to the information no longer subject to tariff filing and has decided to delete it from the Final Rule. The record retention/disclosure provisions applicable to matter exempted from the Commission's agreement filing requirements at 46 CFR §§ 560.301(f) and 572.301(f) will, however, apply.[12] These provisions require the parties to any agreement that has been exempted from filing to retain the agreement during its term and for a period of three years after its termination. The parties are also required to make the agreement available to the Commission during this period.

The Commission's agreement rules apply because the definition of a marine terminal services agreement,[13] as revised, includes matter exempted from tariff filing under the Final Rule. Arrangements between MTOs and carriers that might contain rates, charges, etc., subject to tariff filing fall within the definition

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[12]These requirements were not at issue in this proceeding.

[13]46 CFR §560.104(a) defines the term "agreement", for 1916 Act purposes, as:

> . . . an agreement, or modification thereof, which is a written document and which reflects an understanding, arrangement, or undertaking, between two or more common carriers by water in interstate commerce or other persons subject to the Act which is required by section 15 of the Act to be filed with the Commission.

46 CFR §572.104(a) defines the term "agreement", for 1984 Act purposes, as:

> . . . an understanding, arrangement or association, written or oral (including any modification, cancellation or appendix) entered into by or among ocean common carriers and/or marine terminal operators, but does not include a maritime labor agreement.

of an agreement under the provisions of the Shipping Acts and, as such, are subject to the record retention and inspection requirements of Parts 560 and 572.[14]

We believe that the withdrawal of proposed § 515.3(b) should satisfy the commenters' concerns. The agreement provisions that now otherwise apply, as described above, have a specified record-retention period of 3 years and do not provide for a "true accounting", as was the case for proposed §515.3(b). As to the confidentiality issue, the Commission intends to protect from public disclosure any materials inspected pursuant to 46 CFR §§ 560.301(f) and 572.301(f) to the fullest extent permitted by law.

Public port interests urge the Commission to require copies of exempted arrangements to be made available at reasonable cost to the general public upon request. They generally contend that, without such a condition, the exemption would place public operators at a competitive disadvantage. They note that some public agencies may still have their tariff and agreements available to the public through state "Freedom of Information Act" and other public disclosure statutes. Private-sector MTOs, on the other hand, point to the many competitive advantages enjoyed by the ports, and contend that it is not the Commission's proper role to level the playing field in this regard.

The Commission has considered the Comments urging that the

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[14]The Commission's existing agreement filing requirements, 46 CFR §§ 560.301(f) and 572.301(f), require exempted agreements to be retained by the parties and made available to the Commission's staff for inspection during the term of the agreement and for a period of three years after its termination.

exempted arrangements be available to the public and concludes such a condition for the exempted agreements would exceed the scope of this rulemaking. Moreover, it may negate the purpose of the exemption, and place a considerable additional administrative burden on the MTOs tasked with the processing of requests for exempted arrangements. Finally, it is noted that the scope of exempted arrangements may include activities of a confidential and/or unregulated (e.g., stevedoring) nature which have not normally been available to the public, either before or during the 5-year Waiver.[15] The Commission believes it has sufficient oversight[16] over the exempted agreements and that it is not necessary to further condition the exemption with the requirement that exempted arrangements be made available to the public. However, the Commission will monitor activity exempted pursuant to the Final Rule herein to examine the exemption's overall impact.

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[15] The Commission does not assert or claim jurisdiction over stevedoring activities. The dissent proposes that the preferable way to address the regulatory confusion, which our 5 1/2-year old waiver of penalties has covered, is for the Commission to assert new jurisdiction over stevedoring activities. Not only is there some doubt about our legal ability to do so, there is no suggestion in the record that the Commission should do so, and no factual record supporting a need for such an extension of regulatory jurisdiction and interference.

[16] The Final Rule does not grant an exemption from the substantive Prohibited Acts standards set forth under section 10 of the 1984 Act, 46 U.S.C. app. 1709; or from the so-called "general standard" of section 6(g) of the 1984 Act, 46 U.S.C. app. 1705; or from the counterparts to these standards under sections 15, 16 First and 17 of the 1916 Act, 46 U.S.C. app. 814-816. The Commission's agreement filing requirements provide that exempted agreements be retained by the parties and made available to the Commission's staff for a period of three years after the agreement's termination (46 CFR §§ 560.301(f) and 572.301(f)).

The Commission retains its authority to adjudicate formal complaints of Shipping Act violations with regard to activity occurring under an unfiled arrangement which has been exempted.

E. Definitions of Marine Terminal Services/Facilities and Recodification of MTO Tariff and Agreement Rules

Several commenters recommend retention of the Commission's current definitions of terminal services and facilities, while others urge the Commission to first revise and update these definitions before proceeding further to a final rule in this matter.

Under the Final Rule, the definition of the term "marine terminal services agreement" in §§ 560.308(a)(1) and 572.310(a)(1) has been revised to make clear that the exemption does not cover agreements authorizing carriers to operate a marine terminal facility (as opposed to using a facility operated by an MTO). These definitional revisions in the Final Rule should obviate the need for any further definitional rulemaking proceedings.

CONCLUSION

The Commission finds that the exemption from agreement filing and discontinuance of certain terminal tariff filing requirements as provided for in the Final Rule will not substantially impair effective regulation, be unjustly discriminatory, be detrimental to commerce, or result in a substantial reduction in competition.

Few comments have specifically addressed the statutory exemption criteria and none have provided any convincing evidence that the exemption in the Final Rule would not meet those criteria. Moreover, the Final Rule adopted in this proceeding is modeled

after the Waiver. During the five years the Waiver has been in effect, the Commission has not received any formal or informal complaints, requests or inquiries concerning adverse effects caused by the Waiver. For that matter, none of the commenters in this proceeding have demonstrated that the Waiver has caused any harm either to them individually or the industry as a whole, or shown that it has impaired the Commission's ability to carry out its statutory responsibilities. We believe, therefore, that the Waiver as carried forward in the Final Rule will not operate in a manner contrary to the exemption standards set forth in the Shipping Acts. This finding is buttressed by the fact that the full range of Shipping Act standards, e.g., the prohibitions of section 10 of the 1984 Act, will continue to apply to the activities exempted from the Commission's filing requirements.

The Commission believes that these statutory safeguards will ensure that the Final Rule will operate in a manner conforming with the requirements of the Commission's exemption authority. Under the Final Rule, the Commission retains its authority to adjudicate formal complaints and to investigate and take appropriate action to address any Shipping Act violations occurring under arrangements which have been exempted from filing requirements. Exempted agreements must be retained by the parties and be made available to the Commission's staff. Additionally, section 12 of the 1984 Act, 46 U.S.C. app. 1711, and section 27 of the 1916 Act, 46 U.S.C. app. 826, confer the Commission with subpoena powers to obtain the information it may need for investigations and adjudicatory

proceedings involving exempted activity. Finally, the Commission will monitor activity exempted under the Final Rule to examine the exemptions' overall impact.

Although the Commission, as an independent regulatory agency, is not subject to Executive Order 12291, dated February 17, 1981, it has nonetheless reviewed the rule in terms of this Order and has determined that this rule is not a "major rule" because it will not result in:

(1) an annual effect on the economy of $100 million or more;

(2) a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; or

(3) significant adverse effect on competition, employment, investment, productivity, innovations, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic or export markets.

The Federal Maritime Commission certifies, pursuant to section 605(b) of the Regulatory Flexibility Act, 5 U.S.C. 605(b), that the Final Rule will not have a significant economic impact on a substantial number of small entities, including small businesses, small organizational units or small governmental organizations.

Approval for the Proposed Rule in this proceeding was granted by the Office of Management and Budget ("OMB") on June 21, 1991. Since this Final Rule does not contain the information collection requirement that was subject to OMB review under the Paperwork Reduction Act of 1980, as amended, OMB approval does not apply.

LIST OF SUBJECTS IN 46 CFR Parts 515, 560 and 572:

Antitrust, Contracts, Maritime carriers, Administrative practice and procedure, Rates and fares, Reporting and record-keeping requirements.

Therefore, pursuant to 5 U.S.C. 553; sections 5, 16 and 17 of the Shipping Act of 1984, 46 U.S.C. app. 1704, 1715 and 1716; and sections 15, 16, 17, 35 and 43 of the Shipping Act, 1916, 46 U.S.C. app. 814-816, 833a and 841a, the Commission amends Parts 515, 560 and 572 of Title 46 of the Code of Federal Regulations as follows:

Part 515 - [AMENDED]

1. The authority citation to Part 515 is revised to read:

Authority: 5 U.S.C. 553; 46 U.S.C. app. 816, 820, 833a, 841a, 1709, 1714, 1715 and 1716.

2. Section 515.3 is amended to redesignate the language of the existing section as paragraph (a), to remove the phrase in the last sentence thereof which reads ". . . for terminal services performed for water carriers pursuant to negotiated contracts, and . . . ." and to add new paragraphs (b) and (c) to read as follows:

(b) Rates, charges, rules and regulations governing terminal services provided to and paid for by common carriers by water pursuant to a marine terminal services agreement as defined in 46 CFR §§ 560.308(a) or 46 CFR 572.310(a), need not be separately filed in tariffs for the purposes of this part, on condition that such rates, charges, rules and regulations are not determined through a marine terminal conference agreement, as defined in 46 CFR §§ 560.307(b) and 572.307(b).

(c) Rates, charges, rules and/or regulations which but for § 515.3(b) would be subject to the tariff-filing requirements of this part may not unilaterally impose exculpatory provisions of a nature prohibited by § 515.7.

Part 560 - [AMENDED]

1. The authority citation to Part 560 continues to read:

Authority: 5 U.S.C. 553; 46 U.S.C. app. 814, 817(a), 820, 821, 833a and 841a.

2. A new § 560.308 is added to read as follows:

§ 560.308 Marine terminal services agreements -- exemption.

(a) Marine terminal services agreement means an agreement, contract, understanding, arrangement or association, written or oral (including any modification, cancellation or appendix) between a marine terminal operator and a common carrier by water in interstate commerce that applies to marine terminal services as defined in 46 CFR § 515.6(d)(including any marine terminal facilities, as defined in 46 CFR 515.6(b), which may be provided incidentally to such marine terminal services) that are provided to and paid for by a common carrier by water in interstate commerce. The term "marine terminal services agreement" does not include:

(1) any agreement which conveys to the involved carrier any rights to operate any marine terminal facility by means of a lease, license, permit, assignment, land rental, or similar other arrangement for the use of marine terminal facilities or property; or

(2) any agreement (or any modification to any agreement)

previously filed with the Commission pursuant to the Shipping Act, 1916, unless said agreement, together with all previously-filed modifications, have been formally withdrawn.

(b) All marine terminal services agreements as defined in § 560.308(a) are exempt from the filing and approval requirements of section 15 of the Shipping Act, 1916, and Part 560 of this chapter, on the condition that they do not include rates, charges, rules and regulations which are determined through a marine terminal conference agreement, as defined in 46 CFR § 560.307(b).

Part 572 - [AMENDED]

1. The authority citation to Part 572 continues to read:

Authority: 5 U.S.C. 553, 46 U.S.C. app. 1701-1707, 1709-1710, 1712 and 1714-1717.

2. A new § 572.310 is added to read as follows:

§ 572.310 Marine terminal services agreements -- exemption.

(a) Marine terminal services agreement means an agreement, contract, understanding, arrangement or association, written or oral (including any modification, cancellation or appendix) between a marine terminal operator and an ocean common carrier that applies to marine terminal services as defined in 46 CFR § 515.6(d) (including any marine terminal facilities, as defined in 46 CFR § 515.6(b), which may be provided incidentally to such marine terminal services) that are provided to and paid for by an ocean common carrier. The term "marine terminal services agreement" does not include:

(1) any agreement which conveys to the involved carrier any

rights to operate any marine terminal facility by means of a lease, license, permit, assignment, land rental, or similar other arrangement for the use of marine terminal facilities or property; or

(2) any agreement (or any modification to any agreement) previously filed with the Commission pursuant to the Shipping Act of 1984, unless said agreement, together with all previously-filed modifications, have been formally withdrawn.

(b) All marine terminal services agreements as defined in § 572.310(a) are exempt from the filing and waiting period requirements of sections 5 and 6 of the Shipping Act of 1984 and Part 572 of this chapter on condition that:

(1) they do not include rates, charges, rules and regulations which are determined through a marine terminal conference agreement, as defined in 46 CFR § 572.307(b); and

(2) no antitrust immunity is conferred pursuant to section 7 of the Shipping Act of 1984, 46 U.S.C. app. 1706, with regard to terminal services provided to a common carrier by water under a marine terminal services agreement which is not filed with the Commission pursuant to the exemption provided by § 572.310(b).

* * * * *

IT IS ORDERED, That the Waiver of Penalties (as noticed at 51 FR 2315, 51 FR 36755, and 52 FR 18744), is hereby discontinued on the effective date of the Final Rule herein.

IT IS FURTHER ORDERED, That this proceeding is discontinued.

By the Commission.[17]

Joseph C. Polking
Secretary

[17] Commissioner Hathaway's dissent is attached.

Commissioner William D. Hathaway dissenting:

Section 16 of the Shipping Act of 1984 (46 U.S.C. app. 1715) gives the Commission the authority, after affording opportunity for hearing and making certain findings, to exempt any activity of persons subject to the Act from any requirement of the Act. However, the Commission is under no obligation to entertain a petition for exemption nor once entertained to grant an exemption even if the findings necessary for such an exemption could be made. Section 16 is designed to assist the Commission in the exercise of its regulatory function and does not confer any rights upon the regulated to become unregulated. Commission action under section 16 is discretionary. The operating words in the section are "The Commission . . . may." (emphasis added).

The accepted rule of statutory construction is that if a statute is clear on its face reference to extrinsic matter is precluded.[1] However, assuming arguendo section 16 is clear, extrinsic data relevant to the section nevertheless can and should be employed to assist us in determining how to apply the section.

The legislative history very clearly and pointedly demonstrates that section 16 should be used only in minor cases

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[1]See Caminetti v. U.S., 242 U.S. 470, 485 (1917) and Griffin v. Oceanic Contractors, Inc., 458 U.S. 564, 571 (1982).

where there is no substantial opposition.[2] This is not a minor case, it covers all of the marine terminal operators in the country. Nor is the petition without substantial opposition. Sea-

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[2]H.R. Rep. No. 2248, 89th Cong., 2d Sess. 1 (1966).

> This bill would simply allow the Commission under appropriate safeguards against abuse, to exercise limited authority to exempt from the requirements of the Act certain operations now subject to the act, which are not of significance in the overall design of regulation contemplated by the Act. (emphasis added).

S. Rep. No. 1459, 89th Cong., 2d Sess. 3 (1966)(Statement of Harlee, Chairman of the FMC):

> The Commission views exemption legislation as a matter of the convenience to the Commission and the parties it regulates, rather than a matter of substance and, therefore, would be unlikely to grant exemptions from the Shipping Act in the face of substantial opposition. (emphasis added).

Omnibus Maritime Bill - Part I: Hearings on H.R. 4769 Before the Subcomm. on Merchant Marine of the House Comm. on Merchant Marine and Fisheries, 96th Cong., 1st Sess. 93-94 (1979)(Statement of Daschbach, Chairman of the FMC):

> The Commission views exemption legislation as a matter of disposing of needless, unnecessary and unproductive procedural requirements rather than a matter of substance and, therefore would be unlikely to grant exemption from the acts in the face of substantial opposition.
>
> In the face of this history, section 35 (now section 16) has had less impact than its language would indicate. The Commission has utilized this exemption authority in areas that have been generally noncontroversial and inconsequential in the overall context of ocean commerce regulation. For example, exemptions have been granted to nonexclusive transshipment agreements, transportation of mail in foreign commerce, round-trip passenger excursion voyages in the domestic offshore trades, transportation in the domestic offshore trades by small boats, and transportation of certain bulk liquid cargo in the domestic offshore trades. (emphasis added).

Land entered a well reasoned comment in opposition,[3] and Sea-Land is a party for whose protection the agreement filing requirement was designed.

I believe the legislative history of section 16 clearly indicates that in exercising our discretion we should defer to the Congress in matters of any consequence.[4] The Congress certainly did not intend that three Commissioners could change the law in any significant way. I believe what the majority is doing by its decision is changing the law in a significant way.

Furthermore, Section 16 requires the Commission to find that the exemption "will not substantially impair effective regulation

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[3]Sea-Land's comment states in part,

> With respect to the proposed filing exemption, however, Sea-Land supports the Commission's current tariff and agreement filing regulations. It is essential that marine terminal operators continue to file their tariffs and agreements with the Commission to enable the Commission to enforce the substantive standards of the Shipping Acts. The requirement to file publicly the marine terminal service arrangements which are the subject of this proposal enables those who are affected, including carriers, shippers, marine terminal operators, and the Commission to be aware of the specific nature and scope of terminal service arrangements within limited waterfront space. By granting terminal operators the option not to file tariffs and agreements for such arrangements, the Commission is unjustifiably abandoning its most effective mechanism to enforce the provisions of the Shipping Acts.

[4]"The 1984 Act prescribes a specific statutory scheme which the Commission has been charged with enforcing. [footnote deleted] Section 16 of that Act does not provide authority to repeal or substantially amend that regulatory scheme." Motor Vehicle Manufacturers Ass'n -- Application, 25 S.R.R. 849, 852 (1990).

by the Commission, be unjustly discriminatory, result in substantial reduction in competition, or be detrimental to commerce." It is not up to those who oppose the exemption to disprove these findings.[5] The burden is on the Commission to substantiate the findings in such a way that a reviewing tribunal could determine whether or not there is sufficient evidence to support them.[6]

I find no such evidence in the record or in the majority opinion with respect to the last three findings, viz. unjustly discriminatory, substantial reduction in competition or detrimental to commerce, and find the analysis purporting to support the first standard to "not substantially impair effective regulation by the Commission" not persuasive.[7] The fact that no one has complained

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[5]"The burden is on anyone seeking an exemption to show that such exemption will not have any of these effects." Motor Vehicle Manufacturers Ass'n, 25 S.R.R. at 850.

[6]5 U.S.C. section 706 (1988).

[7]See S. Rep. No. 1459, 89th Cong., 2d Sess. 2 (1966) which states that, "This legislation includes safeguards against possible abuse of the powers and privileges to be conferred upon the Federal Maritime Commission. . ." See also Cong. Rec. S., 11148 (1966) which provides,

> "This proposed bill includes safeguards against possible abuse of the powers and privileges to be conferred upon the Federal Maritime Commission by imposing limitations and conditions upon the exercise of the authority to exempt. An order of exemption may be issued or reviewed only after interested persons have been accorded a reasonable opportunity to be heard and only upon a definite Commission finding which would be based upon a through analysis of the nature, character and quantity of the involved transportation as to the effect it may have upon uniform Commission regulation of water carrier

during the time the waiver was in effect nor said that the waiver caused no harm means little. The interested parties have not had any tariffs or agreements to go by and may well have not been motivated to find out thru other means about possible adverse practices because they were awaiting the final outcome of this proceeding.

Granting the exemption will certainly substantially impair effective regulation because it will be much easier to find any infraction of the Act if the agreements are on file than if the Commission must spot check agreements from time to time or rely upon complaints from carriers who will have to be quite resourceful to discover actions that would be a violation of the Act. Also, the filing of agreements and tariffs will certainly inhibit MTO's from violating the Act.

Obviously, I also disagree with the majority action in revoking the rule requiring filing of tariffs because this rule was designed to complement the statutory agreement filing requirement.

Finally, the Section 18 Advisory Commission has this matter under consideration. The Commission was established by Congress to review the entire Act. It is scheduled to report to Congress in April of this year. Certainly we could wait until then to see

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transportation under the Shipping Act. This would of course be subject to appropriate judicial review."(emphasis added).

what recommendation is made.

The action I would prefer the Commission to take is as stated in my motion that was voted down at the meeting i.e. withdraw the proposed rule, continue the waiver of penalty in effect and issue a new proposed rule to assert jurisdiction over stevedores. I believe the Commission is warranted in asserting such jurisdiction based upon Gillen's Sons Lighterage v. American Stevedores, 12 FMC 325 (1969), A.P. St. Philip, Inc. v. Atlantic Land & Improvement Co. etc., 13 FMC 166 (1969) and the definition of "marine terminal operator" in section 2 of the Shipping Act of 1984 (46 U.S.C. app. 1701).

APPENDIX TO SUPPLEMENTARY INFORMATION

DOCKET 91-20, EXEMPTION OF CERTAIN MARINE TERMINAL ARRANGEMENTS

SUMMARY OF COMMENTS[1] AND REPLIES[2]

I. COMMENTS

A. Ports

AAPA supports the Commission's rejection of the approach suggested in the August 31, 1988 Report of Fact Finding Officer in Fact Finding Investigation No. 17, Rates, Charges and Services Provided at Marine Terminal Facilities. That approach would have based filing requirements on ownership/control/location characteristics. However, AAPA -- along with other public ports -- states that the Commission's espousal of a Waiver-based approach on the basis of an absence of complaints under the Waiver may be misplaced, because parties that may have been adversely affected under the Waiver may not have had sufficient information upon which to base a complaint. AAPA requests that the Proposed Rule be amended to require exempted arrangements to be provided to the

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[1]Comments were filed by the American Association of Port Authorities ("AAPA"); the California Association of Port Authorities ("CAPA"); the Foreign Shipowners Association of the Pacific Coast ("FSAPC"); the Master Contracting Stevedore Association of the Pacific Coast, Inc. ("MCSAPC"); the National Association of Stevedores ("NAS"); the Gulf Seaports Marine Terminal Conference ("GSMTC"); the Northwest Marine Terminal Association ("NWMTA"); Stevedoring Services of America ("SSA"); the West Gulf Maritime Association ("WGMA"); the Massachusetts Port Authority ("MPA"); the Port Authority of New York and New Jersey ("PANYNJ"); the Port of Seattle ("Seattle"); the Port of Tacoma ("Tacoma"); the Tampa Port Authority ("Tampa"); American President Lines, Ltd. and Eagle Marine Services, Ltd. ("APL/Eagle"); Sea-Land Service, Inc.("Sea-Land"); Guam Port Authority ("Guam"); Jacksonville Port Authority ("Jacksonville"); and the U.S. Department of Justice ("DOJ").

[2]Replies to Comments were filed by NAS, AAPA, MCSAPC, GSMTC, PANYNJ, Tampa, APL/Eagle, Guam, and DOJ.

public, in addition to the Commission's staff. It also urges that the definition of "marine terminal facilities" be updated as part of this proceeding, rather than through a separate proceeding. Finally, AAPA disputes the Commission's authority to remove the 1984 Act's antitrust exemption, stating that it is the Commission's regulatory jurisdiction that results in antitrust immunity.[3]

Although CAPA supports the major elements of the Proposed Rule, it opposes proceeding to a final rule without first defining the dividing line for filing/non-filing requirements. It also urges that exempted arrangements be made available to the public upon request.

GSMTC supports the Proposed Rule, but urges that the exemption be expanded to include terminal conference agreements. It opposes the removal of antitrust immunity from exempt agreements, and suggests that exempt transactions be made available to the general public upon specific written request.

NWMTA disagrees that a Waiver-based exemption would impact all classes of MTOs uniformly. It asserts that private MTOs will possess a significant advantage over public MTOs because they tend always to operate at facilities that they do not own, and therefore would be in a much better position to assert they are only providing "services". It also urges the Commission not to defer revising its definitions, stating that it would not be prudent to create a regulatory scheme until key definitions are in place.

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[3]MPA and PANYNJ support the comments of AAPA, of which they are members.

Although Seattle is concerned that the Proposed Rule will not affect all MTOs equally, it appreciates the Commission's willingness to try different approaches in order to respond to this concern. Otherwise, it generally supports NWMTA's and AAPA's comments, both of which it is a member.

Tacoma agrees with NWMTA's position, asserting that the Proposed Rule will continue the inequities of the present regulatory regime, absent a clarification of the Commission's definitions of services and facilities. It believes that the Alternate Proposal may merit some further study, but urges the Commission not to defer revising its definitions.

Tampa believes that the Proposed Rule would cause more confusion, uncertainty and opportunity to discriminate than presently exists due to differing methods of breakbulk/containerized operations, the treatment of facilities, and the treatment of wharfage charges. Tampa urges that terminal conference, discussion and interconference agreements be excluded from the exemption. It also opposes the exemption's removal of antitrust immunity but supports a requirement that exempted transactions be made available upon request. Tampa also advises that it is opposed to the Alternative Proposal. (Tampa Comments, pp. 7-13)

Tampa requests the Commission to instead consider exempting throughput rates and charges on container cargo movements, and that the regulated portions of the throughput rates be made available to MTOs, carriers or shippers/consignees upon reasonable request.

Under this approach, all breakbulk cargo movements would continue to be subject to existing FMC agreement and tariff filing requirements. Tampa believes that this approach would solve the problem which led to the Waiver and retain regulation to the extent necessary for the Commission to carry out its enforcement and regulatory functions. (Tampa Comments, p. 14)

Tampa also states that it is necessary to clarify such current uncertainties as: (a) what is specifically included in "marine terminal facilities" and "marine terminal services"; (b) whether these definitions need to be expanded to include up-to-date terms; (c) when does a MTO cease to be a MTO and become a stevedore (and vice versa) when handling containerized cargo, when handling breakbulk cargo, and whether there is a difference; and (d) where actually is the "point of rest"? (Tampa Comments, pp. 14 and 15)[4]

Guam stresses its unique geographical and economic position and states that for this reason, continued Commission regulation is essential.

B. Private-Sector MTOs and Stevedores

MCSAPC supports the Proposed Rule, but believes the definition of "marine terminal services" agreement should be clarified to specifically include stevedoring services provided in connection with marine terminal services. In so doing, MCSAPC requests that the phrase "and any stevedore services in connection therewith" be included under the definition of the exempted classes of agreements

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[4] The comments of the Jacksonville Port Authority essentially track those of the Tampa Port Authority.

under proposed 46 CFR 560.308(a) and 572.310 (MCSAPC Comments, pp. 7-9). This commenter is also concerned about the Proposed Rule's record retention requirement and the safeguarding of information covered by the exemption (Ibid., p. 11). MCSAPC does not, however, support the Alternative Proposal.

NAS generally supports the Proposed Rule, but is also concerned about the definitional treatment of stevedoring services (its comments here parallel MCSAPC's) and the record retention/safeguarding aspects of the proposal. NAS believes that the exemption's limitation with regard to rates, charges, rules or regulations determined through a marine terminal conference agreement should be deleted entirely. NAS also urges rejection of the minimum/maximum rate filing approach under the Alternative Proposal.

SSA supports MCSAPC's and NAS' comments, both of which it is a member. It is concerned, however, about appropriate treatment of the allegedly proprietary and sensitive data that would be submitted to the Commission under 46 CFR 515.3(b)(2)[5] , or guidelines upon which such requests should be based.

WGMA's position is similar to MCSAPC's and NAS' with regard to inserting "including stevedoring" in 46 CFR 560.308 and 572.310, and recommends deletion of the exemption's limitation with regard to rates, charges, rules and regulations determined through marine

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[5] The Proposed Rule at 46 CFR 515.3(b)(2) provided that a certified true accounting of tariff rates, charges, rules and regulations exempted by the proposal be furnished to the Commission within 30 days of a Commission written request.

terminal discussion and interconference agreements. Although it supports the Alternative Proposal to the extent it would afford greater flexibility with regard to shippers, it believes that a listing of minimum/maximum rates would be meaningless.

C. Carriers

FSAPC urges adoption of the Proposed Rule.

APL/Eagle support the Proposed Rule, and urge that it be expanded to apply to through-put marine terminal services agreements between carriers.

Sea-Land supports the Commission's current tariff and agreement filing regulations, stating that such filing is essential to the Commission's ability to enforce substantive Shipping Act standards. By granting MTOs the option not to file these matters, Sea-Land asserts that the Commission is unjustifiably abandoning its most effective mechanism to enforce Shipping Act requirements, thus seriously impairing effective Commission regulation pursuant to these Acts. Therefore, Sea-Land urges the Commission not to adopt the Proposed Rule, but to continue with its existing tariff and agreement filing regulations. Sea-Land does suggest, however, that the Commission should exempt off-pier MTOs from tariff and agreement filing requirements, since they are not constrained by limited waterfront space.

D. U.S. Department of Justice

DOJ, in supporting the Proposed Rule, urges the Commission to expand it and eliminate filing requirements and antitrust immunity for all agreements by or between MTOs, including marine terminal

conference agreements. In this regard, DOJ states:

> MTO services are similar to those provided by many businesses, such as warehouses, that ordinarily operate efficiently and profitably in unregulated, competitive markets. Neither destructive competition nor conflicts with the laws of other nations, sought by some to justify extensive regulation and antitrust immunity for ocean carriers, are present in the MTO business. Consequently, there is no need for prior government review of any MTO agreement. The antitrust laws and the substantive prohibitions of the Shipping Acts can adequately protect shippers and carriers from anticompetitive behavior by MTOs. (DOJ Comments, p.4)

II. REPLIES

A. Ports

AAPA states that "substantial evidence" supporting its position can be found in the comments submitted by various private-sector MTOs. First, AAPA contends that the private-sector MTO comments indicate that their primary interest is operating in secret, not in the expense and burden of filing. AAPA asserts that the strongly-expressed concerns about the confidential commercial and financial information said to be reflected in private-sector MTO rates belies the private-sector MTOs' assertions that their goal is to eliminate administrative burden and reveals their true goal -- to acquire the ability to operate in secret.

In this connection AAPA states that this proceeding and its predecessors were instituted not to protect the confidentiality of MTO agreements and tariffs, but to resolve a regulatory dilemma posed by the blurring of the distinction between regulated terminal services and non-regulated stevedoring services. Moreover, AAPA states that the inspection condition under the Proposed Rule, and the public availability of information condition requested by AAPA,

are both appropriate and necessary in order to ensure that the exemption meets the criteria of section 16 of the 1984 Act. AAPA reasserts its earlier comment that public access to the exempted information must be provided if the Commission is to effectively exercise its jurisdiction because the Commission is most likely to discover potential Shipping Act violations from parties hurt by preferential or discriminatory treatment.

Second, AAPA notes NAS' suggestion that third parties can invoke Commission complaint procedures "if they want to find out what is in agreements exempted from filing." AAPA criticizes the suggestion that a party must assert a Shipping Act violation by a formal complaint merely to discover whether agreements have been entered into and the contents thereof. It contends that the Commission's complaint process should only be used when and if a party has a reason to believe it has a potential cause of action, not for "fishing" for information. AAPA asserts that such an approach would be an egregious and improper use of the administrative process since it could lead to unnecessary, time-consuming and expensive litigation creating an administrative burden on all concerned.

Third, AAPA notes that other comments support its point that the exemption proposal does not clarify the distinction between terminal and stevedoring services and that the exemption proposal does not clarify what information an MTO is required to keep for inspection. AAPA reiterates its suggestion that the Commission must address the issue of updating the definition of "marine

terminal facilities" in this proceeding.

GSMTC's reply notes other commenters' opposition to the removal of antitrust immunity for exempted agreements. It states that the 1984 Act's grant of antitrust immunity is unconditional and only Congress can withdraw the immunity it has granted. (GSMTC Reply, p.2)

GSMTC disputes NAS' suggestion that third parties seeking information about exempt material should have recourse to section 11 of the Act. It asserts that the cost and effort involved in filing a formal complaint, then pursuing the discovery process in a formal adjudicative proceeding, would discourage virtually all routine requests for information. GSMTC states that if every information request led to a Commission proceeding, the agency would be paralyzed with the volume of litigation. On these bases, GSMTC asserts that the NAS suggestion is without merit and should be summarily rejected. (GSMTC Reply, p. 3)

GSMTC also agrees with the concern expressed by many public ports that public- and private-sector MTOs are subject to different degrees of regulation by the Commission. GSMTC asserts that there have been instances where private-sector MTOs have not made necessary FMC filings, and if this is the nationwide problem it thinks it might be, it urges the Commission to immediately initiate a formal investigation of the problem. It states that the regulatory scheme does not tolerate one set of rules for public port authorities and another for private-sector MTOs.

Second, citing CAPA and Tampa comments concerning the

difficulties in distinguishing "facilities" from exempted "services", GSMTC suggests that the Commission give further attention to drafting a less ambiguous rule. It is GSMTC's position that the Commission's rules do not provide clear definitional differences between the two terms.

GSMTC also opposes APL/Eagle's request to exempt marine terminal services agreements between two common carriers. It observes that such an exemption would remove the entire landside aspect of ocean carrier conferences from FMC filing requirements. While there may be reasons to support such a proposal, GSMTC states that they have not been aired in this proceeding and the issue should be addressed in a separate proceeding.

PANYNJ supports AAPA's reply comments, reiterating AAPA's concerns relative to the distinct advantage private-sector MTOs would obtain if the secrecy of agreements and tariffs could be maintained. Moreover, if the Proposed Rule is adopted, PANYNJ asserts that "fishing trips" for information will become a necessary method to determine if anticompetitive or unfair practices exist. It states that this hardly seems like a worthwhile expenditure of time and money for either the FMC or the involved parties, nor would it be in keeping with the intent of the Shipping Acts.

Tampa concurs with many of the initial comments submitted by other public-sector MTOs. With regard to the deregulatory approaches advocated by many of the other commenters, Tampa observes that (1) regulatory and enforcement authority would be

very difficult to accomplish under confidentiality or secret agreement conditions; (2) there would be significant burden and expense involved in utilizing the Shipping Acts' formal complaint discovery procedures; and (3) DOJ's comparison of MTO services with warehouse services is not appropriate, because commercial warehousing does not involve the expenditures of the millions of dollars of public monies required in the infrastructure of a public port authority. Additionally, Tampa strongly disagrees with DOJ's suggestion that expanding the rule to apply to all MTO arrangements would promote competition while continued antitrust immunity could "harm competition" or be "detrimental to commerce".

Tampa therefore urges the Commission to:

(1) immediately initiate a proposed rulemaking proceeding to clarify and redefine the definitions set forth in 46 CFR 515.6, in addition to specifically defining the services and procedures within a marine terminal operation which properly fall under the terms "services" and "facilities";

(2) postpone further action on Docket No. 91-20 until the above rulemaking is concluded; and

(3) expand 91-20 to include:

(a) public availability of tariffs or agreements exempted from filing; and

(b) availability of Shipping Act antitrust immunity, or the option to file such tariffs and agreements and receive antitrust immunity.

(Tampa Reply, pp. 9 and 10)

Guam states that by delaying the definitional issue until the policy framework is set, the Commission opens the rulemaking process up to a "second bite out of the apple" in which parties with differing views will attempt to redraft the rule. Guam

observes that definitions are a cornerstone of policy and should be recognized as such. Therefore, Guam urges institution of a rulemaking proceeding to clarify and update the 46 CFR 515.6 definitions as a prerequisite to proceeding with Docket No. 91-20. Guam also submits that wholesale deregulation would have an unpredictable impact on Guam, and therefore urges limited rather than broad changes to the MTO regulatory regime. (Guam Reply, p. 5) Moreover, Guam states that the Proposed Rule does not resolve the problem of the original issue which started the proceedings leading up to Docket No. 91-20, i.e., the modern emergence of throughput MTO practices and how to deal with the non-regulated stevedoring costs included therein, and believes that Tampa's approach of separate filing requirements for containerized and breakbulk movements merits further consideration.

B. Private-Sector MTOs and Stevedores

NAS observes that the main issue is the difference in opinion between public ports and private-sector MTOs about the disclosure of sensitive competitive data, namely rates, to the public sector by the private sector. NAS states that the public sector complains that it operates under a competitive disadvantage because states and political subdivisions thereof control and regulate the public sector and in some cases compel the disclosure of its data. NAS asserts that it is for that reason the public sector is urging the Commission to compel the private sector to disclose proprietary data.

NAS contends that public-sector MTOs have significant

competitive preferences and advantages over the private sector, and that unlike private-sector MTOs, public-sector MTOs:

-- may finance their facilities and equipment with federally tax-exempt financing and at lower interest rates;

-- may cover their losses with tax revenue;

-- are not required to furnish workers' compensation to injured employees in accordance with the extremely costly federal Longshore and Harbor Workers' Compensation Act;

-- are not subject to the federal Occupational Safety and Health Act;

-- are not subject to the federal National Labor Relations Act;

-- are not subject to the Employee Retirement Income Security Act; and

-- are not required to pay state and federal income taxes on their profits.

(NAS Reply, pp. 2 and 3)

NAS therefore argues that there is nothing the Commission can do under the Shipping Acts to balance the scales with regard to the competitive advantages afforded to public-sector MTOs by Congress and state legislatures; however, the Commission can continue to balance the scales with respect to regulations over which it does have legal authority. NAS states that there is nothing in existing Commission regulations nor the Proposed Rule that contributes to the unequal competition between the two sectors; however, the Commission should deny the public sector's request for a Commission-directed free look into the cards in the hands of its private-sector competitors, who are laboring under cost burdens the public sector is not.

Addressing Sea-Land's recommendation to retain the status quo,

NAS notes that Sea-Land believes that this approach is necessary because the Proposed Rule would seriously impair the Commission's effective regulation pursuant to the Shipping Acts, and faults Sea-Land for not saying how. In this connection, NAS offers its opinion that the real reason Sea-Land urges the status quo and full disclosure is because Sea-Land wants to be able to eliminate significant competition by being able to see what its competitors in the MTO/stevedoring business are charging their common carrier customers, so that it can incrementally undercut those rates.

NAS also opposes withdrawal of antitrust immunity for exempt agreements. With regard to the several comments urging revision of the 46 C.F.R. Part 515 definitions in this proceeding rather than in a subsequent proceeding, NAS supports the Commission's decision to recodify all MTO regulations in a separate proceeding, which it suggests could be a consensus rulemaking proceeding.

MCSAPC states that all but two of the nineteen comments filed in this matter seemed to overlook the fact that the issues in this rulemaking proceeding are not whether certain agreements and tariffs should be exempt from filing -- which it asserts has already been decided -- but rather what conditions, if any, need to be attached to the exemption under section 16 of the 1984 Act. (MCSAPC Reply, p. 1)

MCSAPC also contrasts the intense shipper participation in hearings being held around the country by the Advisory Commission on Ocean Conferences with the fact that no representatives of this constituency have filed any comments in this proceeding. It also

notes that eight other commenters joined it in fully supporting the Proposed Rule.[6]

With regard to the issue of disclosing exempt agreements and tariffs, MCSAPC makes a number of points. (MCSAPC Reply, pp. 4-7) First, it notes the public ports' argument that they will be placed at a competitive disadvantage unless this is appropriately addressed. Here, MCSAPC states that the public ports enjoy many competitive advantages in terms of tax treatment, public financing, etc., and submits, moreover, that the Commission's statutory role under the Shipping Acts is not to seek to equalize through its regulations the economic advantages/disadvantages between private- and public-sector MTOs.

Second, it asserts that the public ports' comments, while lamenting the competitive disadvantages purportedly flowing from their denial of access to private MTO agreements and tariffs, have conveniently failed to discuss the important fact that private-sector MTOs operate where they do by virtue of leases, licenses, etc., from the public ports, which set the economic terms and conditions of their tenancy and often dictate the terminal charges which can be charged. On this basis, MCSAPC concludes that it would seem that what the public ports really want to see are the stevedoring rates which neither they nor the Commission can regulate, and thus be in a position to gain business of the private MTO.

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[6]DOJ, APL/Eagle, SSA, FSAPC, NAS, WGMA, GSMTC and CAPA.

Third, MCSAPC states that is puzzled by the fact that most public ports are not in competition with private-sector MTOs and that many public port/private-sector MTO lease agreements operate in a manner whereby the better the private-sector MTO does, the more money the public port MTO landlord receives.

Fourth, MCSAPC urges that the requirement that certain information be made available to the Commission be further qualified with a "reasonable cause" proviso.

With regard to the issue of removing antitrust immunity for exempted agreements, MCSAPC reiterates its position that it can live with whatever administrative interpretation of the 1984 Act the Commission ultimately makes on this issue. (MCSAPC Reply, pp. 7 and 8)

With regard to the issue of updating the definitions of marine terminal facilities, MCSAPC states that no greater definitional clarity is needed to implement the terms used in the Proposed Rule; however, it again urges that the phrase "any stevedoring services in connection therewith" be added to clarify the scope of the exemption as including such matters. (MCSAPC Reply, pp. 9 and 10)

C. Carriers

APL/Eagle continues to believe that through-put marine terminal service agreements between two common carriers should be exempt from filing on the grounds that: (1) an exhaustive record failed to reveal any regulatory difficulty arising out of marine terminal services agreements between carriers; and (2) the possible lack of immunity of exempt agreements from the antitrust laws would

militate against any novel or significantly anti-competitive features appearing in such agreements in the future. APL/Eagle oppose the Alternative Proposal as a wasteful regulatory burden in the form of unnecessary tariff-filing.

D. U.S. Department of Justice

DOJ supports the Commission's conclusion that it has the legal authority under the 1984 Act to remove antitrust immunity as a part of a filing exemption. However, DOJ opposes the option in the Proposed Rule for MTOs to voluntarily file agreements in order to obtain antitrust immunity. In this connection, DOJ contends that it would be anomalous to conclude that parties may selectively override a lawful agency decision to deregulate a class or group of activities. Here, DOJ notes the ICC's approach to TOFC/COFC deregulation, whereby the ICC prohibited parties from opting for regulation (for the purpose of obtaining antitrust immunity) because it would "negate the intended benefits of the exemption." Improvement of TOFC/COFC Regulation, 364 I.C.C. 391, 395 (1980). (DOJ Reply, pp. 6 and 7) Given the FMC's finding that substantial competition exists in the marine terminal industry, if the industry is made subject to the antitrust laws, DOJ believes that it would be unlikely that MTOs would have the opportunity and means to exercise market power to the detriment of customers. DOJ therefore submits that voluntary filing would be unnecessary to protect customers and the immunity that results may lead to anticompetitive activity.