FEDERAL MARITIME COMMISSION

[DOCKET NO. 90-6]

NOTICE OF INQUIRY -- MARINE TERMINAL REGULATIONS

46 CFR PARTS 515, 560 and 572

[DOCKET NO. 91-20]

EXEMPTION OF CERTAIN MARINE TERMINAL SERVICES ARRANGEMENTS

AGENCY: Federal Maritime Commission.

ACTION: Notice of Proposed Rulemaking.

SUMMARY: The Federal Maritime Commission discontinues Docket No. 90-6, Notice of Inquiry -- Marine Terminal Regulations, and proposes to amend 46 CFR Parts 515, 560 and 572 to conditionally exempt, pursuant to section 35 of the Shipping Act, 1916, and section 16 of the Shipping Act of 1984, certain marine terminal services arrangements from certain agreement filing requirements of the Shipping Act, 1916, the Shipping Act of 1984 and the Commission's implementing regulations thereunder, and to conditionally discontinue the Commission's tariff filing requirements for such matters.

DATE: Comments on or before (60 days after publication in the Federal Register). Replies on or before (90 days after publication in the Federal Register).

ADDRESS: Send an original and fifteen copies of comments and replies to:

Joseph C. Polking
Secretary
Federal Maritime Commission
1100 L Street, N.W.
Washington, D.C. 20573
(202) 523-5725

FOR FURTHER INFORMATION CONTACT:

Bryant L. VanBrakle
Deputy Director
Bureau of Domestic Regulation
Federal Maritime Commission
1100 L Street, N.W.
Washington, D. C. 20573
(202) 523-5796

SUPPLEMENTARY INFORMATION:

BACKGROUND

The Shipping Act of 1984, 46 U.S.C. app. 1701-1720, ("1984 Act") and the Shipping Act, 1916, 46 U.S.C. app. 801, et seq., ("1916 Act")(collectively, "Shipping Acts") govern the utilization of the marine terminal facilities and services that are provided in connection with oceanborne common carriage in U.S. foreign commerce (1984 Act) and certain oceanborne common carriage in the U.S. domestic offshore trades (1916 Act). The marine terminal operator ("MTO") is the entity which furnishes the marine terminal facilities and services which are subject to the Shipping Acts.[1] The Shipping Acts set forth standards governing activities among

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[1]Sec. 3(15) of the 1984 Act, 46 U.S.C. app. 1702(15), defines an MTO as:

> . . . a person engaged in the United States in the business of furnishing wharfage, dock, warehouse, or other terminal facilities in connection with a common carrier.

MTOs are included in the definition of "other person" in sec. 1 of the 1916 Act, 46 U.S.C. app. 801. The term "other person" is defined in pertinent part as:

> . . . any person not included in the term "common carrier by water, in interstate commerce," carrying on the business of . . . furnishing wharfage, dock, warehouse, or other terminal facilities in connection with a common carrier by water in interstate commerce.

MTOs, between MTOs and common carriers, and between MTOs and shippers/consignees.[2] The Shipping Acts require certain classes of agreements involving MTOs to be filed with the Federal Maritime Commission ("Commission" or "FMC"),[3] and the Commission's regulations require MTOs to publish their rates, charges, rules and regulations in tariffs filed with the Commission.[4]

In 1986, the Commission learned that through-put rates assessed by MTOs for combined terminal services/stevedoring services arrangements generally were not being filed with the Commission.[5] The emergence of this practice, and the uncertainty in certain sectors of the industry as to the filing requirements applicable to this practice, prompted the Commission to issue a limited Waiver of Penalties ("Waiver") in 1986, which continues in

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[2]See generally sections 6 and 10 of the 1984 Act, 46 U.S.C. app. 1705, 1709; sections 15, 16 First and 17 of the 1916 Act, 46 U.S.C. app. 814-816.

[3]See sections 4, 5 and 6 of the 1984 Act, 46 U.S.C. app. 1703-1705; section 15 of the 1916 Act, 46 U.S.C. app. 814. The Commission's implementing regulations are set forth in 46 CFR Parts 572 (1984 Act) and 560 (1916 Act).

[4]See 46 CFR Parts 515, 525 and 530.

[5]"Stevedoring" traditionally has been considered to be the business of hiring and furnishing longshore labor and related facilities and equipment for the transfer of cargo between a vessel and a "point of rest" on a marine terminal facility (the "point of rest" is the place at which inbound cargo is tendered for delivery to the consignee and outbound cargo is received from shippers for loading on a vessel). The status of stevedores is not specifically addressed under the Shipping Acts. Stevedores have not been held to be subject to the Commission's MTO filing requirements, provided that their services are limited to stevedoring and do not include either furnishing the terminal facilities upon which the stevedoring is performed, or furnishing terminal services involving the handling of cargo elsewhere than between the vessel and the "point of rest".

effect today.[6]

Following the publication of the Waiver, the Commission instituted Fact Finding Investigation No. 17, Rates, Charges and Services Provided at Marine Terminal Facilities ("FF-17") to examine practices in the MTO industry. Former Commissioner Moakley's August 31, 1988 Report of Fact Finding Officer ("Report") in FF-17 concluded that the Commission should either expand or contract its current MTO regulations to accommodate the practice of combining terminal services and stevedoring services under a single transaction.[7]

The Report proposed a restructuring of the Commission's regulations to base filing requirements upon the involved terminal's ownership/control/location characteristics (Recommendation No. 1 of the Report).[8] The Report envisioned an

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[6]June 25, 1986 Notice of Waiver of Penalties (51 FR 23154); October 15, 1986 Supplemental Notice of Waiver of Penalties (51 FR 36755); May 19, 1987 Second Supplemental Notice of Waiver of Penalties (52 FR 18744). 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. The Commission intends to discontinue the Waiver if a final rule is issued in this proceeding.

[7]This was based on the finding that regulating only the "terminal" portion of combined services would not be a viable approach because regulation of one portion of the combined services would be meaningless if the other were to remain unregulated.

[8]The Report also recommended that the Commission reinforce its regulation of marine terminal conference/interconference and discussion agreements (Recommendation No. 2); authorize the staff to utilize FF-17's record for purposes of the Commission's 1989 Section 18 Report (Recommendation No. 3); and continue the Waiver until final disposition of the Report's recommendations (Recommendation No. 4). These latter three recommendations were adopted by the Commission at the time it instituted the Inquiry.

expansion of filing requirements for facility-owning/controlling MTOs ("FOMTOs") to include the stevedoring component of a combined services transaction; and discontinuing filing requirements for (1) non-facility-owning/controlling MTOs ("Non-FOMTOs") and (2) "Off-pier", non-waterfront MTOs, irrespective of either the functions they perform or their ownership/control of the involved facilities.

THE INQUIRY

In order to narrow -- to the extent practicable -- the wide range of issues involved in implementing the Report's recommended restructuring of the Commission's MTO regulations, the Commission discontinued FF-17 and instituted Docket No. 90-6, Notice of Inquiry -- Marine Terminal Regulations ("Inquiry").[9] The Inquiry solicited comment on:

(A) The restructurings envisioned under:

(1) the Report's recommendation;

(2) a "full filing exemption" alternative;[10]

(3) a "full disclosure" alternative;[11] and

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[9]The Inquiry was served February 12, 1990 (55 FR 5826 (February 16, 1990)); by order served March 13, 1990, the comment period was extended to May 17, 1990 (55 FR 10259 (March 20, 1990)); by order served May 11, 1990, the comment period was again extended to May 31, 1990 (55 FR 20482 (May 17, 1990)).

[10]This alternative would exempt all MTOs (FOMTOs as well as Non-FOMTOs/Off-pier MTOs) from all filing requirements for marine terminal facilities and marine terminal services, including the stevedoring services provided by MTOs under combined terminal services/stevedoring services arrangements.

[11]I.e., complete disclosure of all MTO activities and practices subject to the Shipping Acts, including the stevedoring component of combined terminal services/stevedoring services arrangements. This alternative is the one most similar to current

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(4) any other alternatives that may be viable approaches.

(B) Filing requirements for tariffs reflecting Non-FOMTO conference activity;

(C) The treatment of Off-pier MTOs;

(D) Suggestions for updating the Commission's definitions of marine terminal facilities under 46 CFR Part 515;

(E) The desirability of recodifying the Commission's MTO tariff and agreement rules under the same CFR part; and

(F) Suggestions and comment on any additional proposals or considerations which may aid the Commission in restructuring its MTO agreement and tariff rules.

COMMENTS

The Inquiry elicited twenty-eight comments from a broad variety of port, private-sector MTO/stevedore and carrier interests.[12] Other than for general concurrence that (1) the Commission

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[11](...continued)
requirements. The Commission requested that comments on this alternative also address: (1) handling such transactions on a simplified basis whereby disclosure could be accomplished through the tariff filing process, instead of the current agreement filing/Federal Register notice process; and (2) permitting tariff deviations to accommodate particular single-event or short-term requirements of individual shippers/consignees, on condition that such deviations be referenced in the MTO's tariff (within 7-15 days of occurrence, for example) for the benefit of similarly-situated shippers/consignees.

[12]Comments were filed by the American Association of Port Authorities; the California Association of Port Authorities; the Foreign Shipowners Association of the Pacific Coast; International Transportation Service, Inc.; the Master Contracting Stevedore Association of the Pacific Coast, Inc.; the National Association of Stevedores; the Stevedore/Marine Terminal Operator Members of the New Orleans Steamship Association Marine Terminal Discussion
(continued...)

should update and recodify its MTO regulations; and (2) tariffs reflecting Non-FOMTO conference activity should continue to be filed as a necessary quid pro quo for antitrust immunity, no industry-wide consensus emerged on the Inquiry's issues. Positions within major sectors of the industry were often diametrically opposed on particular issues.

The exemption of terminal/stevedoring activity on the basis of facility ownership/control/location characteristics envisioned under the Report was supported by some private-sector MTO interests, but was opposed by most (but not all) ports. On the one hand, many private-sector MTOs support either this approach, or a total exemption of terminal services and stevedoring services arrangements from filing requirements (i.e., the "full filing exemption").

On the other hand, many ports oppose the exemption of terminal/stevedoring activity on the basis of facility ownership/control/location characteristics. Several assert that an approach that would subject them to continued filing requirements, while relieving their private-sector competitors from filing, would

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[12](...continued)
Agreement; the Northwest Marine Terminal Association; Stevedoring Services of America; the Terminal Operators Conference of Hampton Roads; the West Gulf Maritime Association; the Alabama State Docks Department; the Port of Port Angeles; the Port of Beaumont; the Port of Bellingham; the Massachusetts Port Authority; the Port Authority of New York and New Jersey; the Port of Olympia; the Port of Palm Beach District; the Port of Portland, Oregon; the Port of Sacramento; the Port of Seattle; the Port of Stockton; the Port of Tacoma; the Tampa Port Authority; the Virginia Port Authority; American President Lines, Ltd. and Eagle Marine Services, Ltd.; and Sea-Land Service, Inc.

place ports at a significant competitive disadvantage.

The "full filing exemption" alternative enjoyed even stronger private-sector MTO support, but was opposed by most (but not all) ports.

There was little support for the "full disclosure" alternative; however, the American Association of Port Authorities suggested a parallel approach. Private-sector MTOs argued adamantly against any approach that would result in the disclosure of their stevedoring activities and tended to favor a filing exemption for terminal services furnished to carriers.

DISCUSSION

The Commission has carefully considered all of the comments received in response to the Inquiry. The wide divergence of views on the Inquiry's issues indicates that none of the alternatives presented would be fully responsive to all of the commenters' concerns. Nonetheless, the comments generally agree with the Report's conclusion that the Commission's rules should be restructured to address combined terminal services/stevedoring services arrangements, and the Commission has determined to proceed to that end.

1. The Proposed Rule

The rule proposed in this proceeding establishes a filing exemption modeled after the Waiver of Penalties. It also modifies Part 515 to remove the tariff filing requirement for terminal services provided directly to and paid for by common carriers.

A restructuring along the lines of the current Waiver was not

proffered for comment in the Inquiry. However, the Commission considers it noteworthy that no substantive complaints of activity in violation of the Shipping Acts occurring under the cover of the Waiver have been filed during the period the Waiver has been in effect. Moreover, there have been no complaints that the Waiver has been operating in a manner unduly denying access to the regulatory process administered by the Commission.

Indeed, substantial competition appears to exist in the marine terminal industry. Because we have no indication that this competition is disruptive or destructive, we believe that it should not be discouraged. It appears that a restructuring of the Commission's filing requirements along the lines of the Waiver would accomplish that objective in a manner which both accommodates contemporary practices in the industry and represents a proper, equitable and workable balance between the concerns expressed by the commenters and the Commission's administration of its Shipping Act responsibilities.

This approach should impact all classes of MTOs uniformly. Additionally, it avoids an approach that could either be unduly burdensome in accommodating short-term operational requirements, or unnecessarily compromise bona fide commercially-sensitive trade information which may be included in the involved rates, charges and conditions of service. Finally, the conditions attached to the filing exemption should provide adequate assurance that activity occurring under the cover of the exemption will comply with substantive Shipping Act standards. In short, the Commission

believes that this Proposed Rule represents an approach in keeping with the balance suggested by section 2(1) of the 1984 Act.[13]

Accordingly, this Proposed Rule essentially codifies the current Waiver in the form of a conditional exemption with respect to the agreement filing requirements of the Shipping Acts. It also eliminates the tariff filing requirements of Part 515 with respect to MTO/carrier relationships. Both proposals are limited to transactions between MTOs and common carriers by water relating to marine terminal services (and the terminal facilities which may be furnished incidentally in connection with such services) which are provided directly to and are paid for by the involved carrier. Unlike the approach recommended in the Report, the involved terminal's ownership/control/location characteristics would have no bearing on determining filing requirements.

The Proposed Rule's exemption from filing does not apply to rates, charges, rules and regulations determined through marine terminal conference agreements as defined in 46 CFR §§ 560.307(b) and 572.307(b) (this class of agreements has binding rate authority). However, the Commission also solicits comment on the following alternatives with regard to the exemption's treatment of rates, charges, rules and regulations collectively determined through conference, discussion or interconference agreements:

(a) further limiting the exemption to also exclude rates, charges, rules and regulations determined through marine

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[13]Section 2(1) in pertinent part provides that the Act's purposes include establishing ". . . a nondiscriminatory regulatory process . . . with a minimum of government intervention and regulatory costs . . . ."

> terminal discussion and interconference agreements as defined in 46 CFR §§ 560.307(c) and (d) and 572.307 (c) and (d), respectively. (these classes of agreements do not have binding rate authority); or
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> (b) removing all limitations with regard to the exemption of collectively-determined rates, charges, rules and regulations.

The exemption is also limited by several conditions, which the Commission has determined to be necessary in order to meet the criteria set forth in its 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.[14] Thus, the exemption does not confer Shipping Act antitrust immunity to an exempted arrangement or activity.[15] Also, there are a number of agreements currently on

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[14]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 in a substantial reduction in competition (1984 Act only), or be detrimental to commerce.

[15]Given the fact that the activity addressed by this Proposed Rule occurs exclusively within the United States, and in the absence of any compelling arguments to the contrary, the Commission believes that the removal of antitrust immunity appears to be appropriate under these circumstances. 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:

> . . . the Commission [may] 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.

See Cong. Rec. H 8125 (October 6, 1983); H. Rept. 98-600, p. 42.

The Commission solicits comments on whether it should allow those desiring 1984 Act antitrust immunity for activity otherwise eligible for the filing exemption under the Proposed Rule to file under the waiting period exemption currently set forth at 46 CFR § 572.307.

file with the Commission that would be eligible for exemption under the Proposed Rule. In order to ensure that agreements which are on file with the Commission pursuant to the Shipping Acts accurately reflect the parties' present understanding, the exemption provided under the Proposed Rule does not extend to modifications of agreements which are on file with the Commission. Parties wishing to avail themselves of the exemption under the Proposed Rule with regard to modifications to agreements previously filed with the Commission could do so after formally withdrawing such agreements and any prior modifications.

With regard to the exemption from the Shipping Acts' agreement filing requirements, 46 CFR §§ 560.301 and 572.301 already 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. The Proposed Rule establishes a parallel requirement with regard to activity removed from the Commission's marine terminal tariff filing requirements under Part 515.

It should be emphasized that the Proposed Rule only provides for relief from filing requirements. It 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" under 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.[16] Thus, the Commission will retain its authority to adjudicate formal complaints of Shipping Act violations with regard to activity occurring under an unfiled agreement or tariff.

It is also important to note that the exemption in this Proposed Rule does not extend to leases, licenses, assignments, permits or other arrangements of a similar nature between an MTO and a common carrier by water for the use of the marine terminal facilities upon which the exempted terminal services are conducted. Nor does the Proposed Rule extend to tariffs setting forth the rates, charges, rules and regulations governing the marine terminal facilities and services provided to shippers and consignees. MTOs must continue to file such tariffs with the Commission, as presently set forth in 46 CFR Part 515.

2. An Alternative

The Commission is also inviting comments on an alternative to the proposal contained in the rule set forth in this proceeding ("Alternative Proposal"). The Alternative Proposal would provide an exemption from agreement filing on the condition that (1) the tariff of the involved MTO list (a) the cargo-handling services and related terminal facilities provided under the exempted arrangements and (b) the minimum/maximum range of rates and charges

[16]In particular, it should be noted that the change made with regard to terminal tariff filing requirements under 46 CFR Part 515 does not authorize the unilateral imposition by MTOs of exculpatory clauses of a nature prohibited by 46 CFR § 515.7.

actually assessed for such services and facilities;[17] and (2) any changes in either of these elements be published in the MTOs' tariff and filed with the Commission no later than one week after the change's occurrence.

The Proposed Rule would not change current tariff filing requirements with regard to marine terminal facilities and services provided to shippers and consignees. However, the Alternative Proposal would authorize tariff deviations for terminal facilities and services that are provided directly to and are paid for directly by shippers and consignees, on condition that such deviations be published in the involved MTOs' tariff and filed with the Commission within one week of occurrence and made available to similarly-situated shippers/consignees.

The Commission invites comment on the Alternative Proposal and hereby gives notice that it may incorporate or substitute parts or all of its requirements in any final rule. However, if meritorious suggestions for an approach other than that reflected in the Proposed Rule or the Alternative Proposal are received, the Commission will afford an opportunity for comment thereon prior to adoption of such an approach.

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[17]The range of such rates and charges could be expressed as a lump-sum, throughput rate which includes all cargo-handling services, or the cargo-handling services could be individually broken out, at the option of the involved MTO. As noted at page 28 of the Report, a requirement to separate the terminal portion of a throughput charge from the stevedoring portion would likely produce "arbitrary, meaningless figures." The Alternative Proposal would not require the MTO's tariff to identify, on a carrier-by-carrier basis, the individual carrier being assessed a particular rate or charge.

3. Jurisdictional Basis for MTO Tariff Filing Requirements under the 1984 Act

In its comments on the Inquiry, the National Association of Stevedores ("NAS") asserts that the Commission may not have the same specific authorities under the 1984 Act that it held under the 1916 Act to require the filing of MTO tariffs. It states that the two statutory bases in the 1916 Act for the Commission's MTO tariff filing requirements, i.e., sections 17 and 21, are not the same as their counterparts under the 1984 Act. Specifically, NAS notes that, unlike section 17 of the 1916 Act,[18] section 10(d)(1) of the 1984 Act[19] does not authorize the Commission to "determine, prescribe and order enforced" just and reasonable cargo-handling regulations and practices; and, unlike section 21 of the 1916 Act,[20]

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[18]Section 17 of the 1916 Act, 46 U.S.C. app. 816, provides:

> Every person subject to this act shall establish, observe, and enforce just and reasonable regulations and practices relating to or connected with the receiving, handling, storing, or delivering of property. Whenever the board finds that any such regulation or practice is unjust or unreasonable it may determine, prescribe, and order enforced a just and reasonable regulation or practice.

[19]Section 10(d)(1) of the 1984 Act, 46 U.S.C. app. 1709, provides, in pertinent part:

> No . . . marine terminal operator may fail to establish, observe, and enforce just and reasonable regulations and practices relating to or connected with receiving, handling, storing, or delivering property.

[20]Section 21 of the 1916 Act, 46 U.S.C. app. 820, provides in pertinent part:

> . . . the Federal Maritime Commission . . . may require any . . . other person subject to this Act, or any officer, receiver, trustee, lessee, agent, or employee thereof, to file with it . . . any periodical or special report or any account,

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section 15 of the 1984 Act does not authorize the Commission to require MTOs to "file with it . . . any periodical or special report or any account, rate, or charge, or any memorandum of any facts appertaining to" its business.[21]

Differences do exist between the provisions of the 1916 and 1984 Acts in the areas noted by NAS. The Commission does not believe, however, that these differences between the 1916 and 1984 Acts legally preclude the Commission from requiring the filing of MTO tariffs.

Although it would appear that the reporting requirements of section 15 of the 1984 Act may not directly apply to MTOs,[22] when the Commission adopted its tariff filing rules for MTOs in 1965, it relied upon both sections 17 and 21 of the 1916 Act. The 1916 Act section 17 requirement has been carried forward under section

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[20](...continued)
record, rate, or charge, or any memorandum of any facts and transactions appertaining to the business of such . . . other person subject to this Act.

[21]Section 15 of the 1984 Act, 46 U.S.C. app. 1714, provides, in pertinent part:

> The Commission may require any common carrier, or any officer, receiver, trustee, lessee, agent, or employee thereof, to file with it any periodical or special report or any account, record, rate, or charge, or memorandum of any facts and transactions appertaining to the business of that common carrier.

[22] However, section 15(a) of the 1984 Act could be interpreted to extend indirectly to MTOs to the extent that they can be considered to be "agents" of a common carrier in enabling the carrier to fulfill its common carriage obligations with regard to receiving cargo from shippers and tendering cargo for delivery to consignees.

10(d)(1) of the 1984 Act.[23] Moreover, section 17 of the 1984 Act authorizes the Commission to prescribe the rules and regulations necessary to carry out the 1984 Act.

Finally, a statement in the 1984 Act's Conference Report, House Report 98-600 (February 23, 1984), page 39, indicates that Congress believes that the 1984 Act authorizes the Commission to require MTOs to file tariffs:

> Pursuant to its responsibilities under the Shipping Act of 1916, the Federal Maritime Commission has, by regulation, required the filing of terminal tariffs by persons engaged in carrying on the business of furnishing wharfage, dock, warehouse or other terminal facilities. (citation deleted) If the Commission continues this requirement, the conferees intend that forest products, bulk cargo, and recyclable metal scrap, waste paper, and paper waste not be included within the ambit of any such requirement. (Emphasis supplied)

Given the MTO standards entrusted to the Commission's administration, together with the Commission's general rulemaking authority, the Commission is of the opinion that it has authority under the 1984 Act to continue the MTO tariff-filing requirements established under the 1916 Act.

4. Updating the Commission's Definition of Marine Terminal Facilities under 46 CFR Part 515

Several commenters recommend retention of the Commission's current definitions of terminal facilities. Others urge revising or updating these definitions.

"[P]ort terminal facilities" are defined under 46 CFR

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[23] Therefore we do not necessarily concede NAS' assertion regarding the legal limits to the Commission's authority of section 10(d)(1) of the 1984 Act.

515.6(b). The definitions under this heading have not been changed since the MTO tariff rules first became effective over twenty-five years ago. The industry has evolved considerably over this period with the advent of intermodalism. This evolution has resulted in an expansion of the facilities that can be conceptually considered to be "marine terminal facilities" for the purposes of the Shipping Acts, e.g., off-pier marine terminals. This, together with the apparent industry support for such a clarification, indicates that these definitions could be updated to reflect contemporary operations to the extent practicable.[24]

The Proposed Rule does not set forth updated definitions for marine terminal facilities. However, in the interest of focusing comments on the merits of the exemption being proposed in this proceeding, the Commission intends to address the definitions in Part 515 as necessary in a separate proceeding once the comments on the exemption proposed herein have been evaluated.

5. Recodification of MTO Tariff and Agreement Rules

There was general support in the comments filed in the Inquiry for updating and recodifying the Commission's MTO rules. Commis-

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[24]The Port of Portland, Oregon, suggests that the Commission form a committee representing various ports and other MTOs from all port ranges to suggest definitions more in keeping with current common usage (Portland Comments, page 6). The American Association of Port Authorities ("AAPA") suggests that the Commission may want to consider a separate effort, through a task force or study group (involving the industry to whatever extent appropriate), to examine and revise the definitions contained in its regulations (AAPA Comments, page 9). Any Commission-sponsored group might involve the procedural requirements of the Federal Advisory Committee Act. The Commission does not, at least at the present time, intend to establish such a group.

sion rules applicable to MTOs, which generally have been developed independently over the past twenty-five years, are distributed through five parts (Parts 515, 525, 530, 560 and 572) located under three Subchapters (Subchapters B, C and D) of Chapter IV of Title 46 of the Code of Federal Regulations. Although the subject matter and requirements of many of these rules are often interdependent, their utility and comprehensibility may be impaired somewhat by the fact that cross-referencing is minimal.[25]

Therefore, recodification of MTO rules under the same CFR Subchapter,[26] with clear statements of filing obligations and content requirements with regard to tariffs, practices and agreements, could significantly enhance the utility and effectiveness of the Commission's rules in this area. The Commission intends to proceed with such a recodification once the comments on the exemption in this Proposed Rule have been evaluated.

Although the Commission, as an independent regulatory agency, is not subject to Executive Order 12291, dated February 17, 1981,

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[25]For example, the uncertainty which led to the Waiver, FF-17, the Report and the Inquiry may be at least partially attributable to the statement in 46 CFR § 515.3 that rates and charges for terminal services performed for water carriers pursuant to negotiated contracts need not be filed in MTO tariffs. Although the Commission has interpreted 46 CFR § 560.201 (1916 Act) and § 572.201(b) (1984 Act) to require such negotiated contracts to be filed with the Commission as agreements if they are not set forth in a tariff, the language of the existing MTO rules is not as clear as it might be on this point.

[26]Further analysis of the recodification issue indicates that it may be preferable, for the purposes of C.F.R. indexing, organization and overall utility to the industry, to recodify under a single CFR subchapter rather than under a single CFR part, as originally suggested.

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 this Proposed Rule, if adopted, will not have a significant economic impact on a substantial number of small entities, including small businesses, small organizational units or small governmental organizations.

The collection of information requirements contained in this rule have been submitted to OMB for review under section 3504(h) of the Paperwork Reduction Act of 1980, as amended. Public reporting burden for this collection of information is estimated to vary from one to three hours per response, including time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding the burden estimate or any other aspect of this collection of information,

including suggestions for reducing this burden, to John Robert Ewers, Director, Bureau of Administration, Federal Maritime Commission, Washington, D.C. 20573 and to the Office of Information and Regulatory Affairs, Office of Management and Budget, Attention: Desk Officer for the Federal Maritime Commission, Washington, D.C. 20503.

Interested parties are urged to take advantage of the opportunity to reply in the second round of comments. This will provide the Commission some industry input regarding suggestions made in the initial round, particularly on any comments addressing the alternative proposals set forth in the above Supplementary Information. Submissions for the second round shall be limited to replies to initial comments.

To facilitate the filing of reply comments, parties filing reply comments are required to serve a copy of their replies on all other commenters. The Secretary of the Commission will provide a service list for this purpose shortly after completion of the initial round of comments.

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 proposes to amend Parts

515, 560 and 572 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 revised to delete the phrase in the last sentence which reads ". . . for terminal services performed for water carriers pursuant to negotiated contracts, and . . . ." and to redesignate the section as § 515.3(a).

3. A new § 515.3(b) is added to read as follows:

(b) Rates, charges, rules and regulations governing terminal services provided directly to and paid for directly by common carriers by water need not be filed for the purposes of this part, provided that:

(1) 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); and

(2) a certified true accounting of the rates, charges, rules and regulations (and any modification thereto) shall be furnished to the Director of the Commission Bureau responsible for terminal operations within 30 days of any written request by the Director.

4. A new § 515.3(c) is added to read as follows:

(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, 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 solely to marine terminal services as defined in 46 CFR § 515.6 (including any marine terminal facilities which may be provided incidentally to such marine terminal services) that are provided directly to and paid for directly by a common carrier by water in interstate commerce.

The term "marine terminal services agreement" does not include 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 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, 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 solely to marine terminal services as defined in 46 CFR § 515.6 (including any terminal facilities which may be provided incidentally to such marine terminal services) that are provided directly to and paid for directly by an ocean common carrier.

The term "marine terminal services agreement" does not include 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 Docket No. 90-6, Notice of Inquiry -- Marine Terminal Regulations, is hereby discontinued.

By the Commission

Joseph C. Polking
Secretary