FEDERAL MARITIME COMMISSION

[46 CFR PART 504]

PROCEDURES FOR ENVIRONMENTAL POLICY ANALYSIS

Sec.

AUTHORITY: 5 U.S.C. 552, 553; Secs. 21 and 43 of the Shipping Act, 1916 (46 U.S.C. app. 820 and 841a); secs. 13 and 17 of the Shipping Act of 1984 (46 U.S.C. app. 1712 and 1716); sec. 102 of the National Environmental Policy Act of 1969 (42 U.S.C. 4332(2)(b)) and sec. 382(b) of the Energy Policy and Conservation Act of 1975 (42 U.S.C. 6362).

§ 504.1 Purpose and scope.

(a) This part implements the National Environmental Policy Act of 1969 (NEPA) and Executive Order 12114 and incorporates and complies with the Regulations of the Council on Environmental Quality (CEQ) (40 CFR 1500 *et seq.*).

(b) This part applies to all actions of the Federal Maritime Commission (Commission). To the extent possible, the Commission shall integrate the requirements of NEPA with its obligations under section 382(b) of the Energy Policy and Conservation Act of 1975, 42 U.S.C. 6362.

(c) Information obtained under this part is used by the Commission to assess potential environmental impacts of proposed Federal Maritime Commission actions. Compliance is voluntary but may be made mandatory by Commission order to produce the information pursuant to section 21 of the Shipping Act, 1916 or section 15 of the Shipping Act of 1984. Penalty for non-compliance with a section 21 order is $100 a day for each day of default; penalty for falsification of such a report is a fine of up to $1,000 or imprisonment up to one year, or both. Penalty for violation of a Commission order under section 15 of the Shipping Act of 1984 may not exceed $5,000 for each violation, unless the violation was willfully and knowingly committed, in which case the amount of the civil penalty may not exceed $25,000 for each violation. (Each day of a continuing violation constitutes a separate offense).

§ 504.2 Definitions.

(a) "*Shipping Act, 1916*"—[46 U.S.C. app. 801–846] means the Shipping Act, 1916 as amended, 46 U.S.C. app. 801 *et seq.*

(b) "*Common carrier*" means any common carrier by water as defined in section 3 of the Shipping Act of 1984 or in the Shipping Act, 1916, including a conference of such carriers.

(c) "*Environmental Impact*" means any alteration of existing environmental conditions or creation of a new set of environmental conditions, adverse or beneficial, caused or induced by the action under consideration.

(d) "*Potential Action*" means the range of possible Commission actions that may result from a Commission proceeding in which the Commission has not yet formulated a proposal.

(e) "*Proposed Action*" means that stage of activity where the Commission has determined to take a particular course of action and the effects of that course of action can be meaningfully evaluated.

(f) "*Environmental Assessment*" means a concise document that serves to "provide sufficient evidence and analysis for determining whether to prepare an environmental impact statement or a finding of no significant impact" (40 CFR 1508.9).

(g) "*Recyclable*" means any secondary material that can be used as a raw material in an industrial process in which it is transformed into a new product replacing the use of a depletable natural resource.

(h) "*Shipping Act of 1984*" means the Shipping Act of 1984, (46 U.S.C. app. 1701–1720).

(i) "*Marine Terminal Operator*" means 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.

§ 504.3 General Information.

(a) All comments submitted pursuant to this part shall be addressed to the Secretary, Federal Maritime Commission, 1100 L Street, N.W., Washington, D.C. 20573.

(b) A list of Commission actions for which a finding of no significant impact has been made or for which an environmental impact statement is being prepared will be maintained by the Commission in the Office of the Secretary and will be available for public inspection.

(c) Information or status reports on environmental statements and other elements of the NEPA process can be obtained from the Office of Environmental Analysis, Federal Maritime Commission, 1100 L Street, N.W., Washington, D.C. 20573 (telephone [202] 523–5835).

§ 504.4 Categorical exclusions.

(a) No environmental analyses need be undertaken or environmental documents prepared in connection with actions which do not individually or cumulatively have a significant effect on the quality of the human environment because they are purely ministerial actions or because they do not increase or decrease air, water or noise pollution or the use of fossil

fuels, recyclables, or energy. The following Commission actions, and rulemakings related thereto, are therefore excluded:

(1) Issuance, modification, denial and revocation of Ocean Freight Forwarder licenses.

(2) Certification of financial responsibility of passenger vessels pursuant to 46 CFR Part 540.

(3) [Reserved.]

(4) Promulgation of procedural rules pursuant to 46 CFR Part 502.

(5) Acceptance or rejection of tariff filings in foreign and domestic commerce.

(6) Consideration of special permission applications filed pursuant to 46 CFR Parts 550 or 580.

(7) Receipt of terminal tariffs pursuant to 46 CFR Part 515.

(8) Suspension of and/or decision to investigate tariff schedules pursuant to section 3 of the Intercoastal Shipping Act, 1933.

(9) Consideration of amendments to agreements filed pursuant to section 15 of the Shipping Act, 1916 or section 5 of the Shipping Act of 1984, which do not increase the authority set forth in the effective agreement.

(10) Consideration of agreements between common carriers which solely affect intraconferene or inter-rate agreement relationships or pertain to administrative matters of conferences or rate agreements.

(11) Consideration of agreements between common carriers to discuss, propose or plan future action, the implementation of which requires filing a further agreement.

(12) Consideration of exclusive or non-exclusive equipment interchange or husbanding agreements.

(13) Receipt of non-exclusive transshipment agreements.

(14) Action relating to collective bargaining agreements.

(15) Action pursuant to section 9 of the Shipping Act of 1984 concerning the justness and reasonableness of controlled carriers' rates, charges, classifications, rules or regulations.

(16) Receipt of self-policing reports or shipper requests and complaints.

(17) Consideration of financial reports prepared by common carriers in the domestic offshore trades.

(18) Consideration of actions solely affecting the environment of a foreign country.

(19) Action taken on special docket applications pursuant to 46 CFR 502.92.

(20) Consideration of matters related solely to the issue of Commission jurisdiction.

(21) Investigations conducted pursuant to 46 CFR Part 555.

(22) Investigatory adjudicatory proceedings, the purpose of which is to ascertain past violations of the Shipping Act, 1916 or the Shipping Act of 1984.

(23) [Reserved.]

(24) Action regarding access to public information pursuant to 46 CFR Part 503.

(25) Action regarding receipt and retention of minutes of conference meetings.

(26) Administrative procurements (general supplies).

(27) Contracts for personal services.

(28) Personnel actions.

(29) Requests for appropriations.

(30) Consideration of all agreements involving marine terminal facilities and/or services except those requiring substantial levels of construction, dredging, land-fill, energy usage and other activities which may have a significant environmental effect.

(31) Consideration of agreements regulating employee wages, hours of work, working conditions or labor exchanges.

(32) Consideration of general agency agreements involving ministerial duties of a common carrier such as internal management, cargo solicitation, booking of cargo, or preparation of documents.

(33) Consideration of agreements pertaining to credit rules.

(34) Consideration of agreements involving performance bonds to a conference from a conference member guaranteeing compliance by the member with the rules and regulations of the conference.

(35) Consideration of agreements between members of two or more conferences or other rate-fixing agreements to discuss and agree upon common self-policing systems and cargo inspection services.

(b) If interested persons allege that a categorically-excluded action will have a significant environmental effect (e.g., increased or decreased air, water or noise pollution; use of recyclables; use of fossil fuels or energy), they shall, by written submission to the Commission's Office of Environmental Analysis (OEA), explain in detail their reasons. The OEA shall review these submissions and determine, not later than ten (10) days after receipt, whether to prepare an environmental assessment. If the OEA determines not to prepare an environmental assessment, such persons may petition the Commission for review of the OEA's decision within ten (10) days of receipt of notice of such determination.

(c) If the OEA determines that the individual or cumulative effect of a particular action otherwise categorically excluded offers a reasonable potential of having a significant environmental impact, it shall prepare an environmental assessment pursuant to § 504.5.

§ 504.5 Environmental assessments.

(a) Every Commission action not specifically excluded under § 504.4 shall be subject to an environmental assessment.

(b) The OEA may publish in the *Federal Register* a notice of intent to prepare an environmental assessment briefly describing the nature of the potential or proposed action and inviting written comments to aid in the preparation of the environmental assessment and early identification

of the significant environmental issues. Such comments must be received by the Commission no later than ten (10) days from the date of publication of the notice in the *Federal Register.*

§ 504.6 Finding of no significant impact.

(a) If upon completion of an environmental assessment, the OEA determines that a potential or proposed action will not have a significant impact on the quality of the human environment of the United States or of the global commons, a finding of no significant impact shall be prepared and notice of its availability published in the *Federal Register.* This document shall include the environmental assessment or a summary of it, and shall briefly present the reasons why the potential or proposed action, not otherwise excluded under § 504.4 will not have a significant effect on the human environment and why, therefore, an environmental impact statement (EIS) will not be prepared.

(b) Petitions for review of a finding of no significant impact must be received by the Commission within ten (10) days from the date of publication of the notice of its availability in the *Federal Register.* The Commission shall review the petitions and either deny them or order the OEA to prepare an EIS pursuant to § 504.7. The Commission shall, within ten (10) days of receipt of the petition, serve copies of its order upon all parties who filed comments concerning the potential or proposed action or who filed petitions for review.

§ 504.7 Environmental impact statements.

(a) *General.*

(1) An environmental impact statement (EIS) shall be prepared by the OEA when the environmental assessment indicates that a potential or proposed action may have a significant impact upon the environment of the United States or the global commons.

(2) The EIS process will commence:

(i) For adjudicatory proceedings, when the Commission issues an order of investigation or a complaint is filed;

(ii) For rulemaking or legislative proposals, upon issuance of the proposal by the Commission; and

(iii) For other actions, the time the action is noticed in the *Federal Register.*

(3) The major decision points in the EIS process are:

(i) the issuance of an initial decision in those cases assigned to be heard by an Administrative Law Judge (ALJ); and

(ii) the issuance of the Commission's final decision or report on the action.

(4) The EIS shall consider potentially significant impacts upon the quality of the human environment of the United States and, in appropriate cases, upon the environment of the global commons outside the jurisdiction of any nation.

(b) *Draft environmental impact statements.*

(1) The OEA will initially prepare a draft environmental impact statement (DEIS) in accordance with 40 CFR Part 1502.

(2) The DEIS shall be distributed to every party to a Commission proceeding for which it was prepared. There will be no fee charged to such parties. One copy per person will also be provided to interested persons at their request. The fee charged such persons shall be that provided in § 503.43 of this chapter.

(3) Comments on the DEIS must be received by the Commission within ten (10) days of the date the Environmental Protection Agency (EPA) publishes in the *Federal Register* notice that the DEIS was filed with it. Sixteen copies shall be submitted as provided in § 504.3(a). Comments shall be as specific as possible and may address the adequacy of the DEIS or the merits of the alternatives discussed in it. All comments received will be made available to the public. Extensions of time for commenting on the DEIS may be granted by the Commission for up to ten (10) days if good cause is shown.

(c) *Final environmental impact statements.*

(1) After receipt of comments on the DEIS, the OEA will prepare a final environmental impact statement (FEIS) pursuant to 40 CFR Part 1502, which shall include a discussion of the possible alternative actions to a potential or proposed action. The FEIS will be distributed in the same manner as specified in paragraph (b)(2) of this section.

(2) The FEIS shall be prepared prior to the Commission's final decision and shall be filed with the Secretary, Federal Maritime Commission. Upon filing, it shall become part of the administrative record.

(3) For any Commission action which has been assigned to an ALJ for evidentiary hearing:

(i) The FEIS shall be submitted prior to the close of the record, and

(ii) The ALJ shall consider the environmental impacts and alternatives contained in the FEIS in preparing the initial decision.

(4)(i) For all proposed Commission actions, any party may, by petition to the Commission within ten (10) days following EPA's notice in the *Federal Register*, assert that the FEIS contains a substantial and material error of fact which can only be properly resolved by conducting an evidentiary hearing, and expressly request that such a hearing be held. Other parties may submit replies to the petition within ten (10) days of its receipt.

(ii) The Commission may delineate the issue(s) and refer them to an ALJ for expedited resolution or may elect to refer the petition to an ALJ for consideration.

(iii) The ALJ shall make findings of fact on the issue(s) and shall certify such findings to the Commission as a supplement to the FEIS. To the extent that such findings differ from the FEIS, it shall be modified by the supplement.

(iv) Discovery may be granted by the ALJ on a showing of good cause and, if granted, shall proceed on an expedited basis.

§ 504.8 Record of decision.

The Commission shall consider each alternative described in the FEIS in its decisionmaking and review process. At the time of its final report or order, the Commission shall prepare a record of decision pursuant to 40 CFR 1505.2.

§ 504.9 Information required by the Commission.

(a) Upon request of OEA, a person filing a complaint, protest, petition or agreement requesting Commission action shall submit to OEA, no later than ten (10) days from the date of the request, a statement setting forth, in detail, the impact of the requested Commission action on the quality of the human environment, if such requested action will:

(1) Alter cargo routing patterns between ports or change modes of transportation;

(2) Change rates or services for recyclables;

(3) Change the type, capacity or number of vessels employed in a specific trade; or

(4) Alter terminal or port facilities.

(b) The statement submitted shall, to the fullest extent possible, include:

(1) The probable impact of the requested Commission action on the environment (*e.g.*, the use of energy or natural resources, the effect on air, noise, or water pollution), compared to the environmental impact created by existing uses in the area affected by it;

(2) Any adverse environmental effects which cannot be avoided if the Commission were to take or adopt the requested action; and

(3) Any alternatives to the requested Commission action.

(c) If environmental impacts, either adverse or beneficial, are alleged, they should be sufficiently identified and quantified to permit meaningful review. Individuals may contact the OEA for informal assistance in preparing this statement. The OEA shall independently evaluate the information submitted and shall be responsible for assuring its accuracy if used by it in the preparation of an environmental assessment or EIS.

(d) In all cases, the OEA may request every common carrier by water, or marine terminal operator, or any officer, agent or employee thereof, as well as all parties to proceedings before the Commission, to submit, within ten (10) days of such request, all material information necessary to comply with NEPA and this part. Information not produced in response to an informal request may be obtained by the Commission pursuant to section 21 of the Shipping Act, 1916, or section 15 of the Shipping Act of 1984.

§ 504.10 Time constraints on final administrative actions.

No decision on a proposed action shall be made or recorded by the Commission until the later of the following dates unless reduced pursuant

to 40 CFR 1506.10(d), or unless required by a statutorily-prescribed deadline on the Commission action:

(a) Forty (40) days after EPA's publication of the notice described in § 504.7(b) for a DEIS; or

(b) Ten (10) days after publication of EPA's notice for an FEIS.

§ 504.91 OMB control numbers assigned pursuant to the Paperwork Reduction Act.

This section displays the control number assigned to information collection requirements of the Commission in this part by the Office of Management and Budget pursuant to the Paperwork Reduction Act of 1980, Pub. L. 96–511. The Commission intends that this section comply with the requirements of section 3507(f) of the Paperwork Reduction Act, which requires that agencies display a current control number assigned by the Director of the Office of Management and Budget (OMB) for each agency information collection requirement:

Section	Current OMB Control No.
504.4 through 504.7	3072–0035
504.9	3072–0035

FEDERAL MARITIME COMMISSION

[46 CFR PART 505]

COMPROMISE, ASSESSMENT, SETTLEMENT AND COLLECTION OF CIVIL PENALTIES

Sec.

AUTHORITY: 5 U.S.C. 552, 553; secs. 32 and 43 of the Shipping Act, 1916 (46 U.S.C. app. 831 and 841a); secs. 10, 11, 13, and 17 of the Shipping Act of 1984 (46 U.S.C. app. 1709, 1710, 1712, and 1716.)

§ 505.1 Purpose and scope.

The purpose of this part is to implement the statutory provisions of section 32 of the Shipping Act, 1916, and section 13 of the Shipping Act of 1984, by establishing rules and regulations governing the compromise, assessment, settlement and collection of civil penalties arising under certain designated provisions of the Shipping Act, 1916, the Intercoastal Shipping Act, 1933, the Shipping Act of 1984, and/or any order, rule or regulation (except for procedural rules and regulations contained in part 502 of this chapter) issued or made by the Commission in the exercise of its powers, duties and functions under those statutes.

§ 505.2 Definitions.

For the purposes of this part:

(a) "*Assessment*" means the imposition of a civil penalty by order of the Commission after a formal docketed proceeding.

(b) "*Commission*" means the Federal Maritime Commission.

(c) "*Compromise*" means the process whereby a civil penalty for a violation is agreed upon by the respondent and the Commission outside of a formal, docketed proceeding.

(d) "*Person*" includes individuals, corporations, partnerships, and associations existing under or authorized by the laws of the United States or of a foreign country.

(e) "*Respondent*" means any person charged with a violation.

(f) "*Settlement*" means the process whereby a civil penalty or other disposition of the case for a violation is agreed to in a formal, docketed proceeding instituted by order of the Commission.

(g) "*Violation*" includes any violation of sections 14 through 21 (except section 16 First and Third) of the Shipping Act, 1916; section 2 of the Intercoastal Shipping Act, 1933; any provision of the Shipping Act of 1984; and/or any order, rule or regulation (except for procedural rules and regulations contained in part 502 of this chapter) issued or made by the Commission in the exercise of its powers, duties and functions under the Shipping Act, 1916, the Intercoastal Shipping Act, 1933, or the Shipping Act of 1984.

(h) Words in the plural form shall include the singular and vice versa; and words importing the masculine gender shall include the feminine and vice versa. The terms "includes" and "including" do not exclude matters not listed but which are in the same general class. The word "and" includes "or", except where specifically stated or where the context requires otherwise.

§ 505.3 Assessment of civil penalties: procedure; criteria for determining amount; limitations; relation to compromise.

(a) *Procedure for assessment of penalty.* The Commission may assess a civil penalty only after notice and opportunity for a hearing under section 22 of the Shipping Act, 1916, or sections 11 and 13 of the Shipping Act of 1984. The proceeding, including settlement negotiations, shall be governed by the Commission's Rules of Practice and Procedure in Part 502 of this Chapter. All settlements must be approved by the Presiding Officer. The full text of any settlement must be included in the final order of the Commission.

(b) *Criteria for determining amount of penalty.* In determining the amount of any penalties assessed, the Commission shall take into account the nature, circumstances, extent and gravity of the violation committed and the policies for deterrence and future compliance with the Commission's rules and regulations and the applicable statutes. The Commission shall also consider the respondent's degree of culpability, history of prior offenses, ability to pay and such other matters as justice requires.

(c) *Limitations: relation to compromise.* When the Commission, in its discretion, determines that policy, justice or other circumstances warrant, a civil penalty assessment proceeding may be instituted at any time for any violation which occurred within five years prior to the issuance of the order of investigation. A proceeding may also be instituted at any time after the initiation of informal compromise procedures, except where a compromise agreement for the same violations under the compromise procedures has become effective under § 505.4(e).

§ 505.4 Compromise of penalties: relation to assessment proceedings.

(a) *Scope.* Except in pending assessment proceedings provided for in § 505.3, the Commission, when it has reason to believe a violation has occurred, may invoke the informal compromise procedures of this section.

(b) *Notice.* When the Commission considers it appropriate to afford an opportunity for the compromise of a civil penalty, it will, except where circumstances render it unnecessary, send a registered or certified demand letter to the respondent describing specific violation(s) on which the claim is based, including the particular facts, dates and other elements necessary for the respondent to identify the specific conduct constituting the alleged violation; the amount of the penalty demanded; and the names of Commission personnel with whom the demand may be discussed, if the person desires to compromise the penalty. The demand shall also include the deadlines for the institution and completion of compromise negotiations and the consequences of failure to compromise.

(c) *Request for compromise.* Any person receiving a demand provided for in paragraph (b) of this section may, within the time specified, deny the violation, or submit matters explaining, mitigating or showing extenuating circumstances, as well as make voluntary disclosures of information and documents.

(d) *Criteria for compromise.* In addition to the factors set forth in § 505.3(b), in compromising a penalty claim, the Commission may consider litigative probabilities, the cost of collecting the claim and enforcement policy.

(e) *Disposition of claims in compromise procedures.*

(1) When the penalty is compromised, such compromise will be made conditional upon the full payment of the compromised amount upon such terms and conditions as may be allowed.

(2) When a penalty is compromised and the respondent agrees to settle for that amount, a compromise agreement shall be executed. (One example of such a compromise agreement is set forth as Appendix A to this part.) This agreement, after reciting the nature of the claim, will include a statement evidencing the respondent's agreement to the compromise of the Commission's penalty claim for the amount set forth in the agreement and will also embody an approval and acceptance provision which is to be signed by the appropriate Commission official. Upon compromise of the penalty in the agreed amount, a copy of the executed agreement shall be furnished to the respondent.

(3) Upon completion of the compromise, the Commission may issue a public notice thereof, the terms and language of which are not subject to negotiation.

(f) *Relation to assessment proceedings.* Except by order of the Commission, no compromise procedure shall be initiated or continued after institution of a Commission assessment proceeding directed to the same violations. Any offer of compromise submitted by the respondent pursuant to this

section shall be deemed to have been furnished by the respondent without prejudice and shall not be used against the respondent in any proceeding.

(g) *Delegation of compromise authority.* The compromise authority set forth in this part is delegated to the Director, Bureau of Hearing Counsel.

§ 505.5 Payment of penalty: method; default.

(a) *Method.* Payment of penalties by the respondent shall be made by:

(1) A bank cashier's check or other instrument acceptable to the Commission;

(2) Regular installments, with interest where appropriate, by check or other instrument acceptable to the Commission after the execution of a promissory note containing a confess-judgment agreement (Appendix B); or,

(3) A combination of the above alternatives.

(b) All checks or other instruments submitted in payment of claims shall be made payable to the Federal Maritime Commission.

(c) *Default in payment.* Where a respondent fails or refuses to pay a penalty properly assessed under § 505.3, or compromised and agreed to under § 505.4, appropriate collection efforts will be made by the Commission, including, but not limited to referral to the Department of Justice for collection. Where such a defaulting respondent is a licensed freight forwarder, such a default may also be grounds for revocation or suspension of the respondent's license, after notice and opportunity for hearing, unless such notice and hearing have been waived by the respondent in writing.

NOTE: This part does not contain any collection of information requests or requirements within the meaning of the Paperwork Reduction Act of 1980, Pub. L. 96–511.

APPENDIX A—EXAMPLE OF COMPROMISE AGREEMENT TO BE USED UNDER 46 CFR § 505.4

COMPROMISE AGREEMENT

FMC FILE NO. _____

This Agreement is entered into between:

(1) The Federal Maritime Commission and,

(2) _____ hereinafter referred to as respondent.

WHEREAS, the Commission is considering the institution of an assessment proceeding against respondent for the recovery of civil penalties provided under the _____ Act _____, for _____ alleged violation(s) of Section(s) _____.

WHEREAS, this course of action is the result of practices believed by the Commission to have been engaged in by respondent to wit;

_____

_____

WHEREAS, Section _____ of the _____ Act _____ authorizes the Commission to collect and compromise civil penalties arising from the alleged violation(s) set forth and described above; and,

WHEREAS, the respondent has terminated the practices which are the basis of the alleged violation(s) set forth herein, and has instituted and indicated its willingness to maintain measures designed to eliminate, discourage and prevent these practices by respondent or its officers, employees and agents.

NOW THEREFORE, in consideration of the premises herein, and in compromise of all civil penalties arising from the violation(s) set forth and described herein that may have occurred between (date) and (date), the undersigned respondent herewith tenders to the Federal Maritime Commission a bank cashier's check in the sum of $_____, upon the following terms of settlement:

1. Upon acceptance of this agreement of settlement in writing by the Director of the Bureau of Hearing Counsel of the Federal Maritime Commission, this instrument shall forever bar the commencement or institution of any assessment proceeding or other claims for recovery of civil penalties from respondent arising from the alleged violations set forth and described herein, that have been disclosed by respondent to the Commission and that occurred between (date) and (date).

2. The undersigned voluntarily signs this instrument and states that no promises or representations have been made to the respondent other than the agreements and consideration herein expressed.

3. It is expressly understood and agreed that this agreement is not to be construed as an admission of guilt by undersigned respondent to the alleged violations set forth above.

4. Insofar as this agreement may be inconsistent with Commission procedures for compromise and settlement of violations, the parties hereby waive application of such procedures.

By: _____

Title: _____

Date: _____

Approval and Acceptance

The above Terms and Conditions and Amount of Consideration are hereby Approved and Accepted;

By the Federal Maritime Commission:

_____

(Hearing Counsel)

_____

Director, Bureau of Hearing Counsel

Date_____

APPENDIX B—EXAMPLE OF PROMISSORY NOTE TO BE USED UNDER 46 CFR § 505.5

PROMISSORY NOTE CONTAINING AGREEMENT FOR JUDGMENT

FMC FILE NO. _____

For value received, _____ promises to pay to the Federal Maritime Commission (the Commission) the principal sum of $_____($_____) to be paid at the offices of the Commission in Washington, D.C., by bank cashier's or certified check in the following installments:

$_____ (_____) within _____ months of execution of the settlement agreement by the Director of the Bureau of Hearing Counsel;

$_____ ($_____) within _____ months of execution of the agreement;

[Further payments if necessary]

In addition to the principal amount payable hereunder, interest on the unpaid balance thereof shall be paid with each installment. Such interest shall accrue from the date of this execution of this Promissory Note by the Director of the Bureau of Hearing Counsel, and be computed at the rate of [_____ percent (_____) per annum.]

If any payment of principal or interest shall remain unpaid for a period of ten (10) days after becoming due and payable, the entire unpaid principal amount of this Promissory Note, together with interest thereon, shall become immediately due and payable at the option of the Commission without demand or notice, said demand and notice being hereby expressly waived.

If a default shall occur in the payment of principal or interest under this Promissory Note, (Respondent) does hereby authorize and empower any U.S. attorney, any of its assistants or any attorney of any court of record, Federal or State, to appear for him or her, and to enter and confess judgment against (Respondent) for the entire unpaid principal amount of this Promissory Note, together with interest, in any court of record, Federal or State; to waive the issuance and service of process upon (Respondent) in any suit on this Promissory Note; to waive any venue requirement in such suit; to release all errors which may intervene in entering such judgment or in issuing any execution thereon; and to consent to immediate execution on said judgment.

(Respondent) hereby ratifies and confirms all that said attorney may do by virtue thereof.

This Promissory Note may be prepaid in whole or in part by Respondent by bank cashier's or certified check at any time, provided that accrued

interest on the principal amount prepaid shall be paid at the time of the prepayment.

By: _____

Title: _____

Date: _____

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

[46 CFR PART 580 (FORMERLY PART 536)]

DOCKET NOS. 84–21, 84–23, AND 84–24

SERVICE CONTRACTS; LOYALTY CONTRACTS; AND PUBLISHING AND FILING OF TARIFFS BY COMMON CARRIERS IN THE FOREIGN COMMERCE OF THE UNITED STATES

November 9, 1984

ACTION: Final Rule.

SUMMARY: This Final Rule implements those provisions of the Shipping Act of 1984 which relate to the areas of (1) service contracts, (2) loyalty contracts, and (3) general tariff filing requirements. It amends and supersedes three previously published Interim Rules in these subject areas and consolidates them into one Final Rule.

DATES: Effective December 15, 1984.

SUPPLEMENTARY INFORMATION: The Shipping Act of 1984, Public Law 98–237, 98 Stat. 67, 46 U.S.C. app. 1701–1720 (the Act or 1984 Act), was enacted on March 20, 1984 and became effective 90 days later, on June 18, 1984. It significantly alters the statutory scheme which previously governed the oceanborne foreign commerce of the United States—the Shipping Act, 1916 (46 U.S.C. app. 801 *et seq.*) (the 1916 Act). As a result of these changes, the Commission determined that it would be necessary to promulgate rules to implement several provisions of the Act, including, *inter alia,* those relating to (1) service contracts and time/volume rates, (2) loyalty contracts and (3) general tariff filing requirements.

The Commission initially issued three Interim Rules covering these subjects, pursuant to the authority given it by section 17 of the Act—Docket No. 84–21 (26 F.M.C. 640) (service contracts and time/volume rates); Docket No. 84–23 (26 F.M.C. 659) (loyalty contracts); and Docket No. 84–24 (26 F.M.C. 663) (other foreign tariff regulations). These Interim Rules also requested comments by the public and, as a result, were commented on by many diverse interests. The Commission is now issuing Final Rules in these three proceedings. However, since they all relate to the general of area of tariffs and are all to be contained in a new Part 580 of the Code, they are consolidated in this Rule and Part 580 is published in its entirety. The comments to the Interim Rules will nonetheless be considered separately and, therefore, the remainder of this discussion will be divided as follows:

Part I. SERVICE CONTRACTS AND TIME/VOLUME RATES
(Sections 580.7 and 580.12)
[Docket No. 84–21]

Part II. LOYALTY CONTRACTS
(Section 580.16)
[Docket No. 84–23]

Part III. FOREIGN TARIFF FILING REGULATIONS—GENERAL
(Sections 580.0 to 580.6; 580.8 to 580.11; 580.13 to 580.15)
[Docket No. 84–24]

I. *SERVICE CONTRACTS AND TIME VOLUME RATES—DOCKET NO. 84–21* (Sections 580.7 and 580.12)

The Commission initiated Docket No. 84–21 on May 3, 1984, by publishing an Interim Rule (49 F. R. 18849) to implement certain provisions of the 1984 Act relating to service contracts and time/volume rates. Interested persons were given 90 days to comment on the rule. In addition the Commission indicated that concerned individuals could file comments prior to the effective date of the Interim Rule (June 18, 1984) if they perceived serious difficulties with it. The Commission subsequently modified the Interim Rule on June 14, 1984, in response to these emergency comments and solicited additional final comments by August 1, 1984 (49 F.R. 24701.

The Commission received 17 additional final comments on the Interim Rule. Commenting parties or groups of parties are: (1) Port of Oakland; (2) National Maritime Council; (3) Sea-Land Service, Inc.; (4) Tobacco Association of the United States; (5) Matson Navigation Company, Inc.; (6) The Journal of Commerce; (7) Chemical Manufacturers Association (CMA); (8) E.I. du Pont de Nemours and Company (DuPont); (9) United States Department of Transportation (DOT); (10) NPS International; (11) International Association of NVOCCs (IANVOCC); (12) Inter-American Freight Conference; (13) U.S. Atlantic & Gulf/Australia-New Zealand Conference; Iberian/U.S. North Atlantic Westbound Freight Conference; Greece/U.S. Atlantic Rate Agreement; Italy, South France, South Spain, Portugal/U.S. Gulf and the Island of Puerto Rico (Med-Gulf) conference; Mediterranean-North Pacific Coast Freight Conference; the "8900" Lines; The West Coast of Italy, Sicilian and Adriatic Ports/North Atlantic Range Conference; and Marseilles/North Atlantic U.S.A. Freight Conference (North Atlantic Conferences); (14) Pacific Coast European Conference; Latin America/Pacific Coast Steamship Conference; and Pacific Coast River Plate Brazil Conference (Pacific Coast Conferences); (15) Trans-Pacific Freight Conference of Japan/Korea; Japan/Korea-Atlantic and Gulf Freight Conference; Trans-Pacific Freight Conference; Trans-Pacific Freight Conference (Hong Kong); New York Freight Bureau; and Philippines North America Conference (Trans-Pacific Conferences); (16) Pacific Westbound Conference; Far East Conference; Pacific Straits Conference; and Pacific Indonesian

Conference (Far East Conferences); and, (17) North Atlantic United Kingdom Freight Conference; North Atlantic French Atlantic Freight Conference; North Atlantic Continental Freight Conference; North Atlantic Baltic Freight Conference; Scandinavia Baltic/U.S. North Atlantic Westbound Freight Conference; Continental North Atlantic Westbound Freight Conference; North Atlantic Westbound Freight Association; United Kingdom & U.S.A. Gulf Westbound Rate Agreement; Continental—U.S. Gulf Freight Association; Gulf-United Kingdom Conference; Gulf-European Freight Association; North Europe—U.S. South Atlantic Rate Agreement; and U.S. South Atlantic-Europe Rate Agreement (North European Conferences or NEC).

The following is a section-by-section summary of the various comments received and the Commission's disposition of them. Any comment not directly addressed here has nonetheless been fully considered by the Commission. In addition, the Commission has taken this opportunity to make minor editorial changes in the Final Rule for the sake of greater clarity.

I. *580.7(a) Definitions*

Section 580.7(a)(1)—"Contract Party"

Section 580.7(a)(1) of the Interim Rule defines "contract party" as "a party signing a contract as shipper or ocean common carrier" and any "related" entity "who may engage in the shipment of commodities in the trade covered by the contract." The Inter-American Freight Conference believes that only entities who have actually signed a service contract should be considered contract parties, and the North European Conferences suggest that all entities with any remote interest in the contract or relation to the contract signatories be specifically named in the contract. CMA suggests revisions which would allow less than the entire membership of an organization to enter into a contract.

The Commission has revised the definition of "contract party" originally proposed, in part, to resolve these comments. While the designation of contract parties is not an essential term subject to public disclosure under the Act, the Commission believes that all parties able to take advantage of the contract must be named in the contract itself. This will allow the Commission to determine which shipments by a carrier are covered by a contract and therefore entitled to a contract rate, and which must be charged the tariff rate. Without such disclosure, it would be virtually impossible to enforce the tariff adherence requirements of the Act. Accordingly, the Rule has been revised to require that all persons or entities entitled to receive or authorized to offer the service contract's non-tariff rates be expressly named in the contract as contract parties.

The Commission has also taken this opportunity to amend the definition of "contract party" to take into account the fluctuating membership which may occur in a shippers' association. The revision accomplishes this by considering any member of a shippers' association, regardless of whether

it joined or left the association during the course of the contract, to be a contract party without having to be specifically named in the contract.

Section 580.7(a)(2)—"Geographic Area"

Section 580.7(a)(2) of the Interim Rule defines "geographic area" as "the general location from which or to which the contract cargo will move in intermodal service."

The Inter-American Freight Conference and the North Atlantic Conferences contend that the Commission lacks the authority to require the application of a service contract to any location not actually agreed to by the contract parties, a result which they believe occurs when this definition is applied to the contract filing requirements of section 580.7(b). The North European Conferences argue that only the concise statement of essential terms, and not the service contract itself, is required by statute to include a reference to geographic areas.

The Commission does not believe that anything in these comments requires it to alter its definition of "geographic area." It is taken directly from language contained in the legislative history to the Act. See S. Rep. No. 3, 98th Cong., 1st Sess. 31 (1983). The confusion which has arisen over its use in the Interim Rule derives from the fact that though it was only intended to apply to the statement of essential terms, it might also have applied to the contract itself.

Section 580.7(b) requires service contracts filed with the Commission to state, among other things, "the essential terms." Section 580.7(g)(2) requires the essential terms to include ". . . the origin and destination port ranges in the case of port-to-port movements, and the origin and destination geographic areas in the case of through intermodal movements." Taken together, in conjunction with the definition of "geographic area," these sections could be read to require a broader statement of scope in the service contract than had been actually agreed to by the parties. To clarify this situation, section 580.7 is amended in paragraph (b)(3)(ii) to provide that, in the context of the contract filing requirements, the contract need only "reflect the actual locations agreed to by the contract parties."

However, as indicated above, the statement of essential terms must be set forth in terms of geographic areas for through intermodal movements. The description of the geographic area in the statement of essential terms may, within reason, be as broad or as narrow as the parties desire. Depending on the circumstances, "geographic areas" might be stated in terms of counties, regions, states, counties, cities, or zip codes. The propriety of any particular geographic area description contained in an essential terms publication in the initial stages of the implementation of this Final Rule will have to be determined on an *ad hoc* basis. As further experience is gained in this area, section 580.7 may be further amended to reflect the operational realities of this new commercial practice.

Section 580.7(a)(3)—"Port Range"

Comments similar to those discussed above in terms of "geographic area" were also received concerning the definition of "port range". The commenters again assume that the Commission is attempting to impose a broader scope on a service contract than that which may be intended by the contract parties. The amendment to section 580.7(b)(3)(ii), discussed above, should alleviate these concerns, at least with respect to the contract filing requirement. The Commission continues to believe, however, that the statement of essential terms must be in terms of "port ranges" in the case of port-to-port movements and that, in certain instances, this may result in a broader scope than that stated in the contract. This is nonetheless consistent with the Congressional intent referenced above.

Section 580.7(a)(4)—"Service Contract"

DuPont proposes that the definition of "service contract" include a statement that they are contract carriage arrangements and not common carriage. The Northern European Conferences suggest that the definition allow for a "fixed portion" of a shipper's cargoes and provide antitrust immunity for such arrangements.

The definition of "service contract" in the Interim Rule is taken directly from the Act and will not be modified. In any event DuPont's suggestion would not appear to be legally feasible, because the Act's service contract concept appears to contain elements of common carriage.

NEC's suggestion would, in effect, convert a service contract to a "loyalty contract" as that term is defined by the Act (46 U.S.C. app. 1702(14)). It would be inconsistent with Congress' treatment of loyalty contracts elsewhere in the Act (46 U.S.C. app. 1709(b)(9)) and will not therefore be adopted.

Section 580.7(a)(5)—"Shipper"

The definition of "shipper" is also derived directly from the Act and will be retained. We will, however, accommodate the suggestion of the inter-American Freight Conference and include a definition of "shippers' association" in the Final Rule for purposes of consistency.

Section 580.7(a)(6)—"Time/Volume Rate"

Section 580.7(a)(6) of the Interim Rule defines a "time/volume rate" as "a freight rate published in a tariff which must vary with the volume of cargo offered or freight revenues received over a specified period of time."

The North European Conferences express concern over use of the words "must vary", which they interpret as meaning that a time/volume rate must vary internally—*i.e.* it must be offered on a sliding scale—and if it merely varies from other tariff rates, only in that it is based on a volume of cargo over time, it is subject to rejection. In addition, noting

that the word "freight" is not used in the Act, they state that the Commission has not offered any reason for making a distinction between "freight rates" and "rates." The Inter-American Freight Conference offers an alternative definition for "time/volume rate", and also suggests that it and section 580.7(1), which relates to the use of time/volume rates, be moved to the tariff filing sections of Part 580.

The Commission agrees with this latter point and is redesignating Interim Rule sections 580.7(a)(6) and 580.7(1) as sections 580.12(a) and 580.12(b), respectively, in the Final Rule. In addition, the Commission believes that the definition proffered by the Inter-American Freight Conference may serve to accommodate NEC's comment and otherwise clarify any ambiguity which may have been inherent in the Interim rule's definition of "time/volume rate." We are therefore adopting it.

Section 580.7(b)—Contract Filing Requirements

The North European Conferences suggest that the Commission allow the optional filing of service contracts involving exempted commodities referenced in section 8(c) of the Act. While there does not appear to be any legal barrier to allowing the filing of service contracts involving exempted commodities on an optional basis by an individual carrier, conferences' authority to enter into and file such contracts is not as clear. The issue is whether Congress' exemption of certain commodities precludes concerted rate action on those commodities with or without antitrust immunity. That issue will be made the subject of a separate proceeding. At this point, conferences may file service contracts on exempt commodities, at their option. However, this is permitted without prejudice to any subsequent Commission determination of the legality of such practices.

Permitting such contracts to be filed, but then exempting them from the otherwise applicable regulatory requirements could, however, lead to discrimination between similarly situated shippers and allow potential abuse of the filing and publication process. Therefore, although the Commission will permit the optional filing of exempted-commodity contracts, the Final Rule is amended to make it clear that all other regulatory requirements applicable to non-exempt service contracts will apply to such filings.

As mentioned above in the context of "geographic area" and "port range", section 580.7(b) will also be modified to make clear that the only locations which must be included in the service contract are those actually agreed upon by the contracting parties.

We have also modified the numbering system to be used in the filing of service contracts. These changes will enable the Commission to more properly fulfill its responsibilities under the Act. The Final Rule will require that the filing carrier or conference assign each service contract a unique number bearing the prefix "SC"; and reference the applicable essential terms "publication" and the specific "set" of essential terms (which are to be identified by the prefix "ET") within the identified publication.

This was done for two purposes: to permit potential shippers to accurately identify the specific "set" of essential terms in which they may have an interest; and to enable the Commission to distinguish among several contracts with the identical essential terms.

Section 580.7(b)(5) of the Interim Rule requires that carriers and conferences identify, in each service contract, the shipment records which will be maintained to support the contract. The North Atlantic Conferences contend that the maintenance of shipment records for service contracts is inequitable, because the requirement is imposed only on shipments moving under service contracts. We believe the record maintenance requirement is necessary to the effective and efficient administration and enforcement of the service contract system. If the need arises, these records will enable the Commission to ascertain whether a particular contract has been used as a device to rebate or grant other unlawful rates or concessions. This requirement should serve to provide valuable competitive safeguards to both carriers and shippers. In addition, it does not appear to be particularly burdensome to the carriers. The Commission's previous regulations applicable to time/volume contracts contained a similar requirement, which was promulgated to assure that records would be available to verify that the terms of the contract were met. It did not appear to cause any particular difficulties in practice.

If any burden exists with respect to the maintenance of records, it more likely arises from the related requirement that such records be maintained by a U.S. resident agent. This is discussed below in the context of section 580.7(k).

Section 580.7(c)—Confidentiality

The North European Conferences submit that service contract *amendments* should be afforded the same confidential treatment as service contracts and that section 580.7(c) should be amended accordingly. The Commission notes that, to the extent a contract amendment alters an essential term of a service contract, it would not be permitted under paragraph (d)(i) of this section. Amendments to non-consequential terms of a service contract are permissible, and should be filed with the Commission for informational purposes. The Commission will accord such amendments the same confidential treatment which the original contract received. Section 580.7(c) has been revised to make this clear.

Section 580.7(d)—Contract Amendments

Section 580.7(d) states that amendments to service contracts will be treated as new contracts for the purposes of the filing and publication requirements. In addition, this section provides that no new contract may retroactively modify the terms or effects of a previously filed contract.

DuPont and CMA propose that only amendments to the essential terms of a service contract be considered new contracts. They further suggest

that the reference to "publication" requirements should be changed to "availability requirements" to avoid any confusion with general tariff concepts and to more closely track the language of the Act. In addition, CMA proposes a change to clarify that contract amendments do not terminate the original contract.

The North European Conferences express difficulty in understanding the basis for section 580.7(d), which they believe serves to restrict service contract amendments. They nonetheless offer changes in the wording of the section to ameliorate what they perceive to be detrimental consequences of the Interim Rule.

In light of these comments, the Commission has made several changes in section 580.7(d) of the Interim Rule. In the first place, the Commission agrees that the only modifications to a service contract which should be of any concern are those which modify an essential term of the contract. Modifications to non-essential terms are of little consequence but should nonetheless be filed with the Commission for informational purposes. The Commission does not believe, however, that modifications to essential terms of a service contract should be permitted during the duration of the contract, because they could potentially affect the rights of other similarly situated shippers. For instance, if a shipper was unable to meet its cargo volume commitment under a contract and the parties agreed to lower that amount during the term of the contract, this could discriminate against another shipper who was not able to take advantage of the contract during its initial 30-day offering, because of the volume of cargo originally required to be committed but who could have done so under the lower minimum. Also, the contract parties could agree to alter the geographic areas or port ranges covered by the contract thereby including similarly situated shippers who were not included under the original contract. These situations could be exacerbated if the non-contract shipper had already shipped all or a substantial portion of its cargo prior to the time of the modifications and is, therefore, no longer able to take advantage of the altered terms. The Commission has concluded that the best approach to avoid such situations is to prohibit any modification to an essential term during the term of the contract.

The parties remain free, however, to mutually agree to terminate the contract at any time during its term. If they take such action, and the minimum quantity has not been met, the cargo previously carried under the contract must be rerated according to the otherwise applicable tariff rates in effect at the time of the shipments (unless the contract provides a different procedure). This procedure would be similar to the carrier's or conference's basic measure of damages if the shipper did not meet the quantity term of the contract and there was no mutually agreed termination. Section 580.7(d)(iii) further recognizes, however, that the contracting parties may, pursuant to section 580.7(g)(2)(vii), set forth in their initial

contract specific terms to govern situations in which the "volume requirement" may not be met.

Section 580.7(e)—Transmittal of Service Contracts

DuPont suggests that the Interim Rule be amended to allow carriers and conferences to annotate the inner envelope (containing the service contract) for the purpose of identifying the number assigned to the corresponding statement of essential terms. This would allegedly obviate the need to compare the contract with the filed essential terms.

While the Commission has made certain amendments in this provision, it did so in order to clarify and streamline the administrative processing of service contracts and related statements of essential terms. However, contracts must still be compared with filed essential terms to ensure that the statement of essential terms contains a *concise* statement of all of the essential terms of the contract(s). The Commission cannot rely on representations on an envelope to meet its statutory responsibilities.

The Final Rule will protect the contents of each envelope containing a service contract by limiting the amount of information on such envelope to the statement "This Envelope Contains a Confidential Service Contract." The Commission cannot maintain the confidentiality of any contract transmitted by any other procedure. If a filing party fails to utilize the specific procedures contained in this section, the confidentiality of the contract could inadvertently be compromised.

Section 580.7(f)—Return of Contracts

Section 580.7(f) of the Interim Rule permits the Commission to return a service contract if its provisions are not substantiated by reference to its statement of essential terms. In addition, section 580.7(j) of the Interim Rule allows the rejection of a statement of essential terms which fails to conform to any of the requirements of the Rule.

As an initial matter, the North European Conferences question the Commission's authority to return or reject service contract filings, lacking express statutory authority to do so. We believe that a carefully circumscribed return and rejection procedure falls within the ambit of the Act's rulemaking authority in section 17, because such procedures are necessary for the enforcement and implementation of section 8(c) of the Act. Without such a procedure, contracts or statements of essential terms which are contrary to the Act or the Commission's regulations could remain in effect for a considerable period of time before being challenged. This would not only subvert the purposes of the service contract provision, but would also substantially affect the rights of similarly situated shippers.

The Commission has determined, however, to treat its return and rejection procedures in one section for purposes of clarity and uniformity. Within 15 days of filing, the Commission can return a contract or statement of essential terms which does not conform to the requirements of paragraph

(b) or (g) of section 580.7. When it does so, the Commission will provide a written explanation of its reasons. Parties then have 15 days to refile the document and the Commission can then reject it if it continues to fail to conform. This procedure should satisfy various concerns raised by CMA, the Journal of Commerce, National Maritime Council, North European Conferences, Trans-Pacific Conferences and Pacific Coast Conferences.

We have not adopted the recommendation of CMA that the contract rate should apply to shipments made prior to return or rejection, regardless of whether the contract or statement of essential terms is "cured" and refiled. The otherwise applicable tariff rate must be charged in such situations where rejected terms or returned contracts are not cured and refiled. Any other procedure would unduly favor contract parties who fail to adhere to the requirements of the Act to the disadvantage of competing carriers and shippers and would operate to the detriment of similarly situated shippers not fortunate enough to be the first shipper signatory of a contract.

The Commission will exercise its return and rejection procedure only during a limited 15-day review period. Moreover, this procedure will apply in situations involving significant deficiencies in contract and essential terms provisions, as suggested by the Inter-American Freight Conference.

Section 580.7(g)—Publication of Essential Terms

Section 580.7(g)(1)

Section 580.7(g)(1) of the Interim Rule requires that the essential terms of all service contracts be filed with the Commission and be made available to the general public in tariff format. In addition, this provision requires that the essential terms be made available to all shippers or shippers' associations which are similarly situated under the same terms and conditions for no less than 30 days from the date of filing.

The Inter-American Freight Conference proposes that the phrase "schedule of essential terms" be substituted for "publication of essential term", and that the heading of section 580.7(g) be changed to "Essential Terms". It also suggests that the first sentence of section 580.7(g)(1) (which requires the essential terms to be filed with the Commission) be deleted, because section 580.7(h) requires a summary of essential terms to be filed with the Commission and is allegedly more in keeping with the Act's requirements that "a concise statement of essential terms shall be filed with the Commission. . . ."

Du Pont would add the words "A concise statement of" at the beginning of section 580.7(g)(1). This suggested change is intended to reflect the statutory language quoted above and to distinguish between the "concise statement of essential terms", which is available to the general public, and the "essential terms" themselves, which are to be made available to all similarly situated shippers. To the extent possible, these suggestions are incorporated in the final Rule.

The North European Conferences propose that the essential terms publication requirement of section 580.7(g) be revised to provide carriers or conferences with the option of filing a copy of the underlying service contract, minus the name of the shipper, in lieu of a concise statement of its essential terms. NEC further submits that, if such an option is exercised, there would be no reason to reject an essential terms' filing on the grounds that it did not include a term "essential" to the contract.

The Commission is not adopting this proposal. First, section 8(c) of the Act clearly requires that "each contract shall be filed with the Commission" and "*at the same time* a concise statement of its essential terms shall be filed with the Commission and made available to the general public in tariff format". (Emphasis added). This contemplates that initially two distinct documents are to be submitted to the Commission *simultaneously*—one, a contract, and the other, a summary of the contract's essential terms in tariff format. In addition, as explained above in the discussion of geographic areas and port ranges, the concise statement of essential terms may, in certain instances, be geographically broader than the locations stated in the contract. Lastly, a brief summary of essential terms will be easier for prospective shippers to review and will facilitate the administration of the service contract system generally and the possible future computerization of such data. To the extent that a service contract meets all the essential terms' format requirements and is appropriately stated in terms of geographic areas or port ranges, it could be submitted, minus the shipper's name, in lieu of a statement of essential terms.

The Trans-Pacific Conferences oppose section 580.7(g)(1) which requires a carrier or conference entering into a service contract to execute a similar contract, under the same essential terms, with any and all similarly situated shippers and shippers' associations which approach the carrier or conference within the first 30 days after the essential terms are filed. They contend that such a requirement is contrary to the Act and impractical under normal operating conditions. They read section 8(c) of the Act as mandating merely that the statement of essential terms must be made available to the general public and that a copy of those terms must be made separately available to any shipper similarly situated who specifically requests it. They do not believe, however, that they are *required* to accord those identical essential terms to other shippers.

The Commission rejects the contention that a carrier or conference which enters into a service contract has only to provide a copy of its essential terms to any similarly situated shipper who requests it. There is nothing in our review of the Act or its legislative history which supports this position. Section 8(c) makes it clear that carriers must make a concise statement of essential terms available to the general public, but that "*those essential terms shall be available to all shippers similarly situated.*" This latter requirement means more than providing similarly situated shippers with an opportunity to view a copy of the essential terms. If it meant

only that, it would be redundant, given the preceding requirement that a concise statement of essential terms be made available "to the general public."

The House Merchant Marine and Fisheries Committee put the publication requirement for essential terms in its proper context when it noted:

> It is hoped that the requirement that a service contract's essential terms be filed publicly so that those terms are available to all other shippers who may wish to use them, will preserve an important element of the common-carriage concept that the bill is based on.

H.R. Rep. No. 53, 98th Cong., 1st Sess. 17 (1983).

The Commission believes that section 8(c) requires a carrier which enters into a service contract to enter into similar contracts with other similarly situated shippers if they desire the same essential terms. This requires, of course, the exercise of sound business judgment on the part of the carrier. However, if a carrier chooses to induce business by means of a service contract, it should be prepared to offer the same essential terms to other similarly situated shippers.

The Commission will not attempt here to establish the limits of a carrier's or conference's obligations under a service contract. Nor will it attempt to define what constitutes a similarly situated shipper. These are matters which are more appropriately resolved on a case-by-case basis.

Section 580.7(g)(2)(iv)—Contract Rates

Section 580.7(g)(2)(iv) requires the statement of essential terms to include "the contract rate, rates or rate schedule, including any additional or other charges (viz. surcharges, terminal handling charges, etc.) that apply."

CMA objects to this provision on the ground that it is an unwarranted expansion of the statutory term "line-haul rate," which it believes is all that need be included. Whatever the definition of "line-haul rate" may be (and it is not defined in the statute), it is clear from the legislative history that this essential term was meant to encompass "all compensation to be paid" under a service contract. S. Rep. No. 3, 98th Cong., 1st Sess. 31, 32 (1983). The Commission's refinement of the term "line-haul rate" is thus fully supported and, moreover, should serve to provide all shippers the requisite information they will need in order to make an informed and intelligent decision concerning a service contract.

The Commission has modified section 580.7(g)(2)(iv) to incorporate Sea-Land's suggestion that conditions and terms of service or operation or concessions which in any way affect such rate or charge be disclosed. In addition, we have adopted Matson's suggestion that retroactive price adjustments based on experienced costs be allowed, if the method of determining such adjustments is disclosed in advance in the service contract and the statement of essential terms.

Section 580.7(g)(2)(v)—Term of Contract

Section 580.7(g)(2)(v) of the Interim Rule requires the statement of essential terms to include "the effective date, period, and expiration date of the contract." The North European Conferences contend that the essential terms' publication need only disclose the "term of the contract." The Commission has accepted this suggestion.

Section 580.7(g)(2)(viii)—Deviation

Section 580.7(g)(2)(viii) of the Interim Rule requires a clear description in the statement of essential terms of any circumstances which will permit deviations from the contract terms. CMA views this provision as an unwarranted expansion of the essential terms which are specified in the Act and suggests that it be deleted. The North European Conferences object to subsection (viii)(D) which permits "other deviations from the terms of the contract." NEC contends that the phrase "other deviations" is too vague, that the word "deviations" is incorrectly employed, and that such a catch-all provision is unnecessary to carry out the Act.

Admittedly, section 8(c) of the Act does not expressly include a deviation provision in its list of seven "essential terms." However, the Commission does not consider its deviation provision, section 580.7(g)(2)(viii), to be an "essential term" separate and apart from those set forth in the statute. Rather it relates back to those essential terms and states that if they are subject to change for any reason, that fact should be made apparent. Any contractual provision which can alter an essential term based on future events is a necessary part of the essential term which it affects. Any other interpretation would undermine the purpose for essential terms' publication and frustrate the requirement that such terms be made available to "similarly situated shippers." The Commission will therefore continue to require the statement of essential terms to include any deviation that may affect those terms.

Moreover, we do not believe that the term "other deviations" is vague or uncertain. A similar provision was included in the Commission's earlier time/volume rule and apparently engendered no confusion or difficulty. It is intended to be a catch-all provision so that the contracting parties have the maximum amount of flexibility to meet their commercial needs.

Section 580.7(h)—Form and Filing of Essential Terms

The Journal of Commerce suggests that carriers and conferences be allowed to publish essential terms' publication for both export and import trades. It believes that such a procedure would make it easier for the public and interested persons to determine applicable rates. The Journal of Commerce notes that it provides a computerized tariff watching service which would be better served by separate essential terms publications. We will not adopt its suggestion. It is the Commission's intent that a carrier or conference have only one publication containing its essential terms.

However, this publication may be divided by trade areas or any other way the carriers or conferences see fit. Requiring statements of essential terms to be included in one publication reduces the number of essential terms' publications and minimizes the scope of any inquiry to ascertain whether a carrier or conference has any essential terms in which a shipping party might be interested.

Section 580.7(h)(3) requires all essential terms' filings to be "printed on yellow paper using black ink." The North European Conferences would amend this provision to provide that the essential terms' publication be legibly printed in black, without using yellow paper. The yellow paper requirement was designed to facilitate mail sorting of essential terms' publications and thus permit their prompt review. The experience gained in the last 90 days has reinforced our belief that the requirement is workable and useful. It is, therefore, retained. The Commission is, however, incorporating the suggestion of NEC concerning clarification of the printing "in black" rather than "using black ink." This will permit the filing of documents printed other than with black ink (*e.g.*, photocopies).

Section 580.7(h)(5) is amended, as suggested by NEC, to require cross-references only in the general commodity tariff that applies in the particular area covered by the essential terms. In so doing, we reject CMA's suggestion that the requirement for cross-referencing be repealed altogether. Tariff cross-references are necessary for users of tariffs to identify all possible applicable rates.

The Commission is also adding a requirement that the essential terms of a service contract or contracts be identified by an essential terms' number in the governing essential terms publication, rather than a service contract number. Because it is anticipated that numerous contracts may be executed under the same essential terms, it is necessary to differentiate and identify which contracts correspond to the appropriate essential terms. *See also,* our discussion above on section 580.7(b).

Section 580.7(i)—Transmittals of Essential Terms Publications

Section 580.7(i) sets forth procedures for the transmittal of concise statements of essential terms. It is silent, however, on the timing of such filings vis-a-vis the filing of service contracts. The Journal of Commerce suggests the contemporaneous transmittal of a service contract with its statement of essential terms. This approach is consistent with the statutory language that a concise statement of essential terms be filed with the Commission "at the same time" a service contract is filed with the Commission. The Commission is amending section 580.7(i) accordingly.

Section 580.7(k)—Resident Agent

Section 580.7(k) of the Interim Rule requires every common carrier and conference to designate a United States resident representative to maintain contract shipment records for a period of five years from completion of

each contract. The North Atlantic Conferences and the Trans-Pacific Conferences oppose this provision, on the grounds that it is burdensome, will result in duplication and increased costs, is not directly supported by the Act, and may conflict with foreign non-disclosure statutes. The Trans-Pacific Conferences also contend that the Commission already possesses sufficient means to ensure that service contracts comport with the Act and that users of service contracts should not be burdened with requirements not applicable to others. They also note that the Commission previously rejected a proposal to require the maintenance of all self-policing records in the United States. Lastly, the North Atlantic Conferences recommend that, because of the impact of a U.S. recordkeeping requirement on inbound conferences, which mainly conduct their shipping transactions abroad, the Commission should, if a recordkeeping requirement is retained, permit inbound conferences to designate a representative abroad.

The Commission has determined to delete the U.S. recordkeeping requirement. Experience gained under our prior time/volume contract rules, which contained a similar provision, does not reveal a compelling necessity for this requirement, at least at this time. Its primary purpose was to aid the Commission in its enforcement efforts. However, the Commission should be able to obtain such records through normal processes, if needed, on a case-by-case basis. If the Commission encounters any difficulties in obtaining such information, it will consider reimposing the U.S. recordkeeping requirement.

Carriers and conferences must, of course, retain whatever records they deem sufficient to support their contractual arrangements (so identified pursuant to section 580.7(b)(3)(vi) of this Rule) and should do so for at least the five-year statute of limitations period contained in section 13(f)(2) of the Act. However, such records need not be maintained in the United States. Section 580.7(j) of the Final Rule reflects this requirement.

Section 580.7(l)—Time/Volume Rates

As mentioned above, this section and the definition of "time/volume rate" in section 580.7(a)(6) will be redesignated sections 580.12(b) and 580.12(a), respectively.

Two commenters object to the advance enrollment requirement whereby a shipper utilizing a time/volume rate must notify the offering carrier prior to tendering any shipments. The Pacific Coast Conferences believe that such a requirement might preclude multiple-level time/volume rates which automatically apply a second tier, lower rate once a given volume has been achieved. The North European Conferences contend that the word "enrollment" implies that there is only one acceptable method of administering a time/volume rate offering. They further contend that adequate notice of shipper participation could be provided by means other than "enrollment."

We do not believe that a notice requirement for a shipper intending to utilize a time/volume rate is either unwarranted or impractical. It is difficult to conceive how carriers will know when to apply the lower rate unless informed by the shipper that it intends to use it. The Commission further believes that even with such a requirement, multiple-level time/volume rates are still feasible, assuming some initial notification is provided. The Commission did not intend the word "enrollment" to serve as a limitation on the methods by which a shipper can notify a carrier of its intention to use a time/volume rate. It is therefore amending section 580.7(l) (now section 580.12(b)(3)) to eliminate any confusion which may exist.

The North European Conferences also object to the requirement that time/volume rates "remain in effect without amendment for the term specified." They view this requirement as inconsistent with the tariff provisions of the Act and the Commission's tariff filing rules. They concede, however, that it would be inappropriate to allow a time/volume tariff filing to be amended to reduce or terminate the term, if it is being used by at least one shipper.

It was not our intention to require a time/volume rate offering to remain in effect in a tariff for the full term if such an offering has not been accepted by a single shipper. However, the Commission continues to believe that once a shipper gives notice that it is tendering cargo under a time/volume rate offering, the terms of that offering may not be amended during the term specified.

CMA proposes that the record of a shipper's notice of its intention to use a time/volume rate should be maintained for at least one year after the shipper has ceased to use the rate. We find this suggestion to have merit and to impose a minimal burden on the carriers. However, in order to be consistent with the retention requirements for service contracts and the relevant statute of limitations (46 U.S.C. app. 1712(f)(2)), the Commission is going to impose a five-year shipper-notice retention requirement and additionally require that shipment records supporting the time/volume rate be maintained for this period of time.

Lastly, the Trans-Pacific Conferences propose that records supporting a time/volume rate be identified in a manner similar to that by which the shipment records regarding service contracts must be identified pursuant to section 580.7(b)(5) of the Interim Rule, *i.e.*, that the parties identify which shipment records will be used to support the contract. They believe that such a requirement will ensure accountability and aid the Commission in its enforcement efforts.

There is merit to placing a similar record identification requirement on both service contracts and time/volume rates. The Commission has, therefore, decided to amend its time/volume rate provision to require the identification of the shipment records which will be maintained to support application of a time/volume rate. Such an identification can easily be made

in the context of the time/volume rate offering in the carrier or conference tariff and should impose little burden on shippers or carriers.

GENERAL COMMENTS

A. *Thirty Day Notice*

In the preamble to the Interim Rule, the Commission suggested the possibility of requiring a 30-day advance notice requirement for the implementation of service contracts as an alternative to return or rejection of defective filings after their effective date. The ten parties that filed comments on this issue were divided as to which method was less disruptive of commercial arrangements and whether the Commission was authorized by law to implement such proposals.

Neither the 30-day notice procedure nor the rejection procedure is based upon an express statutory provision. Either would have to rely upon the general rulemaking authority of section 17 of the Act on the basis that such procedures are necessary to enforce the requirements of section 8(c). One other alternative is to abandon both and rely upon the reactive enforcement methods of sections 11 and 13 of the Act. Given these alternatives, the Commission has determined that a carefully circumscribed return and rejection procedure is the best method of ensuring that service contract filings will meet the requirements of the Act with minimal commercial disruption.

B. *Minimum Quantity Guidelines*

The Tobacco Association recommends that the Commission establish guidelines on minimum quantities eligible for contract rates to prevent unreasonable preference being given to any one industry. The Commission rejects this suggestion. First, the Commission does not possess the empirical economic data, at this time, upon which it could promulgate such guidelines. More importantly, such action would appear contrary to the fundamental Congressional policy underlying the Act that commercial interests be given maximum flexibility in arriving at their business arrangements. Cases of discrimination can be dealt with on an *ad hoc* basis. Any shipper who believes it has been unlawfully disadvantaged has remedies under the Act and may file a complaint with the Commission.

C. *Time/Volume Contracts*

Under the 1916 Act, the Commission had permitted the use of time/volume contracts by common carriers by water and had issued regulations governing their use (46 CFR 536.7). The May 3, 1984 Interim Rule continued to permit the use of time/volume contracts by "common carriers" and separately permitted the use of service contracts by "ocean common carriers." This position engendered much opposition from those filing emergency comments on that Rule, prior to its June 18, effective date. In response to these comments, the Commission revised the Interim Rule

on June 14, 1984 to *inter alia,* treat time/volume contracts as a form of service contract. No separate provision was made concerning the use of time/volume contracts. The net result of this action is that non-vessel-operating common carriers (NVOCC's or NVO's), which do not meet the definition of "ocean common carrier", are no longer able to offer time/volume rates on a contractual basis. They can, however, continue to offer time/volume rates in their tariffs pursuant to the June 14, 1984 Interim Rule and section 8(b) of the Act.

Several commenters support this position, contending that service contracts are the only type of volume contracting authorized by the Act and that time/volume contracts have been subsumed within the concept of service contract because they implicitly, if not explicitly, include a carrier service commitment to carry at least the minimum volume within the contract period. One commenter also notes that NVO's, by definition, do not operate any vessels and, therefore, are in no position to offer any meaningful service commitment as a *guid pro quo* for a volume commitment.

IANVOCC and NPS International, an NVOCC, challenge the Commission's treatment of time/volume contracts. NPS argues that the Commission erred in equating time/volume contracts with service contracts, because the former do not contain any service commitments while the latter do. It submits that nothing in the Act requires the Commission to eliminate NVO time/volume contracting and points to the absence of any useful legislative history on this issue. NPS concedes that ultimately this is a policy issue and not a legal one, but contends that policy considerations support continued time/volume contracting by NVO's. This commenter concludes that the Commission should republish its time/volume regulations previously in effect under the 1916 Act and make them applicable to both ocean common carriers and NVO's. Alternatively, NPS suggests that the Commission could limit the use of time/volume contracts to NVO's. The IANVOCC essentially reiterates NPS' comments.

As noted above, the Commission's May 3 Interim Rule treated service contracts and time/volume contracts as separate and distinct forms of volume contracting but attempted to apply similar regulatory treatment to them. The Commission's June 14 amendment altered this position by treating time/volume contracts as a form of service contract and thereby deleted any reference to time/volume contracts in the Rule. This decision was not made with the purpose of denying to NVO's the ability to offer time/volume contract arrangements. Rather, it was arrived at because the Commission became convinced that what was previously known as a time/volume contract was nothing more than a type of service contract. This decision was further influenced by its conclusion that Congress has only authorized service contracts and time/volume rates under the 1984 Act.

Section 8(b) of the Act, titled "Time-Volume Rates," permits rates in tariffs to vary with the volume of cargo offered over a specified period of time. Section 8(c), titled "Service Contracts," allows ocean common

carriers and conferences to enter into service contracts with shippers or shippers' associations. Nothing else in the Act expressly authorizes any other volume arrangements.[1] Nor is there any discussion in the legislative history of the Act which specifically mentions time/volume contracts or would support the concept of time/volume contracts as separate and distinct from service contracts. Thus, a reading of the statute and its legislative history indicates that Congress contemplated but two types of volume arrangements—time/volume rates, which are set forth in tariffs and are not based upon any contractual arrangement between the shipper and carrier, and service contracts, which are not filed in tariffs, and are based on reciprocal commitments by both the carrier and the shipper.

This position is supported by the language of other provisions of the Act. For instance a shippers' association is defined in section 3(24) as "a group of shippers that consolidates or distributes freight on a nonprofit basis for the members of the group in order to secure carload, truckload, or other *volume rates* or *service contracts*". (Emphasis added). If Congress had intended that time/volume contracts be offered as a separate category for volume contracting, it would surely have provided shippers' associations the opportunity to avail themselves of such arrangements. However, under the definition, as written, shippers' associations would be precluded from entering into time/volume contracts.

Sections 10(b)(1) through 10(b)(4) require common carriers to adhere to the rates and charges in their "tariffs" and "service contracts."[2] Time/volume contracts are not separately identified or treated. As a result, if time/volume contracts were allowed as a separate form of volume contracting, it is possible that they would not be subject to these constraints, which go to the essence of a common carrier's obligations to the public.

[1] The Commission's May 3 Interim Rule relied on the definition of "loyalty contract" (section 3(14)) as an indication that Congress recognized the concept of a time/volume contract. In view of the other statutory provisions discussed below, the Commission no longer draws this inference. It is important to note, however, that section 3(14) is the only reference in the statute or its legislative history to time/volume "contracts." That reference in section 3(14) to a "contract based upon time-volume rates" may be to nothing more than the arrangement which arises from a time/volume rate offering in a tariff. In any event, whatever Congress may have meant by a "contract based upon time-volume rates," it was doing so in the context of contracts offered by *ocean common carriers* and not NVO's.

[2] Section 10(b) states in pertinent part:

> No common carrier, either alone or in conjunction with any other person, directly or indirectly; may—
>
> (1) charge, demand, collect or receive greater, less, or different compensation for the transportation of property or for any service in connection therewith than the rates and charges that are shown in its *tariffs* or *service contracts;*
>
> (2) rebate, refund or remit in any manner, or by any device, any portion of its rates except in accordance with its *tariffs* or *service contracts;*
>
> (3) extend or deny to any person any privilege, concession, equipment, or facility except in accordance with its *tariffs* or *service contracts;*
>
> (4) allow any person to obtain transportation for property at less than the rates or charges established by the carrier in its *tariff* or *service contract* by means of false billing, false classification, false weighing, false measurement, or by any other unjust or unfair device or means. (Emphasis added).

Moreover, section 10(b)(6) prohibits any common carrier from engaging in any unfair or unjustly discriminatory practice in the matter of rates, cargo classifications, and cargo space accommodations. Likewise, section 10(b)(11) prohibits any undue or unreasonable preference or advantage to any particular person, locality, or description of traffic in any respect whatsoever. What is notable about both of these provisions is that they contain an express exception for *service contracts.* This reflects a Congressional recognition that service contracts would perforce favor some shippers, and might discriminate as to rates or cargo classification, or provide distinct preferences or advantages. *See* H.R. Rep. No. 600, 98th Cong., 2d Sess. 40 (1984). A similar exception was not made for time/volume contracts, which are just as inherently discriminatory. This leads us to conclude that Congress did not contemplate the separate availability of time/volume contracts under that name. Even assuming it did, however, it is clear that such contracts would soon run afoul of these proscriptions.

It has been argued that the reason a time/volume contract is different from a service contract is that the former contains no service commitment while the latter does. The Commission cannot accept this contention and moreover believes that its interpretation may explain Congress' silence on the matter of time/volume contracts—it also considered them subsumed within the definition of a service contract.

Under the Commission's prior time/volume rule, a time/volume rate was defined as "[a] rate conditioned upon the shipment of a specific or minimum quantity of cargo over a set period of time, implementation of which is accomplished pursuant to the terms of a time/volume contract. . . ." 46 CFR 536.2(p). However, any such contract had to provide, either explicitly or implicitly, basic service commitments on the carrier's part. The carrier had to provide the space necessary to meet the shipper's volume commitment and had to continue to operate in the trade for the duration of the contract. If a carrier failed to meet these obligations, the shipper would have a remedy at law for breach of contract. Time/volume contracts as previously recognized by the Commission thus fit into the definition of service contract contained in the 1984 Act. Whether explicitly or implicitly stated, it is clear that there were definite carrier service commitments under a time/volume contract. There is no meaningful difference between a service contract and a time/volume contract; the latter is simply a subcategory of the former.[3]

Any contrary conclusion would be inconsistent with Congress' treatment of independent action and its relation to service contracts. Congress gave

[3] While NVO's may have offered time/volume contracts under the Commission's previous rule, they had no actual service to commit since they do not actually operate vessels as ocean common carriers. However, that earlier rule had coupled the concept of time/volume rate with time/volume contract—a carrier could not offer one without entering into the other. Even though they had no service to commit, NVO's were forced by circumstances to enter into time/volume contracts with shippers. The 1984 Act expressly rectifies this anomaly by permitting time/volume rates by any common carrier (including NVO's) but restricting service contracts to ocean common carriers who have the requisite service.

conferences the authority to limit or prohibit the use of service contracts and also exempted such contracts from the mandatory right of independent action, since they were not required to be filed in tariffs. All conference agreements, however, had to provide their members independent action on any rate or service item required to be filed in a tariff, on not more than 10 days' notice. If the Commission were to permit all common carriers to offer time/volume contracts in lieu of or in competition with service contracts, the situation could arise where carriers, through the use of time/volume contracts (to which independent action would apply) could do indirectly what Congress has not authorized them to do directly.

The Commission is not unmindful of the concerns raised by NPS and IANVOCC. However, the Commission is constrained by the Act and is in no position to provide solely for NVO's something Congress saw fit to deny them. In any event, NVO's still have the option of offering time/volume rates, governed by the provisions of this Rule. Lastly, the Commission notes that even if time/volume contracts were permitted, it is likely that NVO's would have difficultly offering them, given their implicit service commitments and the fact that NVOs have, by definition, no meaningful service to commit and no control over the underlying carrier's schedules, capacity, or services in a particular trade.

II. *LOYALTY CONTRACTS—DOCKET NO. 84–23* (Section 580.16)

On May 17, 1984, the Commission published an Interim Rule (49 FR 20817) in Docket No. 84–23 governing loyalty contracts (or dual rate contracts, as they were referred to under 1916 Act regulation (46 CFR Part 538)). The purpose of the Interim Rule was to implement section 10(b)(9) of the 1984 Act (46 U.S.C. app. 1709(b)(9)) which states that:

> (b) No common carrier, either alone or in conjunction with any other person, directly or indirectly, may—
>
> * * * * *
>
> (9) use a loyalty contract, except in conformity with the antitrust laws; [4]

The Interim Rule deleted the Commission's regulations governing "dual rate contracts" in 46 CFR Part 538 and added a new provision to the Commission's tariff filing regulations in 46 CFR Part 536 (now 46 CFR Part 580) reading as follows:

[4] "Loyalty contract" is defined in section 3(14) of the Act (and in the Commission's tariff rules at 46 CFR 580.2(k)) as:

> . . . a contract with an ocean common carrier or conference, other than a service contract or contract based upon time-volume rates, by which a shipper obtains lower rates by committing all or a fixed portion of its cargo to that carrier or conference.

§ 536.16 Loyalty Contracts

(a) A sample of any loyalty contract, as defined in this part, must be filed in the applicable tariff together with rules which set forth the scope and application of the contract system.

(b) Every sample loyalty contract and applicable rule filed for inclusion in a tariff under paragraph (a) of this section shall make specific reference to a Business Review Letter, issued pursuant to 28 CFR § 50.6, indicating no objection to the use of that contract. A copy of the Business Review Letter shall be simultaneously furnished to the Commission's Director, Bureau of Tariffs. Failure to comply with these requirements will result in the rejection of the contract and the applicable rules pursuant to § 536.10(d).

(c) The use of any loyalty contract in effect prior to June 18, 1984 shall be prohibited after September 18, 1984 unless supported by a Business Review Letter issued pursuant to 28 CFR § 50.6. Such Business Review Letter shall be furnished to the Director, Bureau of Tariffs.

The Interim Rule became effective on June 18, 1984 and interested persons were provided 60 days to comment on the Rule. Prior to the Interim Rule's effective date, "emergency" comments were received from Admiral R.A. Ratti, Chemical Manufacturers Association, and Trans-Pacific Freight Conference of Japan/Korea and Japan/Korea-Atlantic and Gulf Freight Conference (TPFCJ/K). The Commission published a response to the "emergency" comments on June 14, 1984 (49 FR 24696), in which it restated its earlier interpretation of the Act as it applied to loyalty contracts and affirmed the Interim Rule.

Ten additional comments were filed between the effective date of the Interim Rule and the close of the comment period. The Council of European & Japanese National Shipowner's Associations (CENSA), the National Maritime Council (NMC), TPFCJ/K and the Gulf Freight Conference, and U.S. Atlantic & Gulf/Australia New Zealand Conference, et al. (USA&G/A–NZ) generally oppose the Interim Rule. Sea-Land Service, Inc. favors the Rule with some modifications. The Department of Justice (DOJ), the Department of Transportation, and Corning Glass Works generally support the Rule as written, and the Tobacco Association of United States favors elimination of all loyalty contracts.[5]

USA&G/A–NZ, TPFCJ/K and CENSA argue that the Commission, as the agency charged with enforcement of the 1984 Act, is responsible for enforcing section 10(b)(9). They believe that the Commission's reliance on a Business Review Letter (BRL) improperly delegates enforcement of section 10(b)(9) to DOJ. These parties further submit that the Commission

[5] The suggestion that the Commission abolish *all* loyalty contracts goes beyond the scope of this rulemaking and, moreover, appears contrary to the 1984 Act.

has the necessary expertise to deal with the antitrust issues which will arise under section 10(b)(9).

USA&G/A–NZ, TPFCJ/K and CENSA point out that a BRL only states DOJ's current enforcement intentions and does not determine whether the proposed activity is contrary to the antitrust laws. Accordingly, they argue that, by relying on the BRL, the Commission is applying the wrong standard to determine whether carriers and conferences are in compliance with section 10(b)(9).

CENSA further contends that carriers and conferences do not have the burden of proving that they fall within the exception to section 10(b)(9). Accordingly, it believes that the Commission cannot even require carriers and conference to obtain BRL's before entering into loyalty contracts with shippers.

CENSA and TPFCJ/K also submit that the Commission has no summary tariff rejection authority for substantive violations of the 1984 Act, including a violation of section 10(b)(9). They argue therefore that a loyalty contract may only be rejected after notice and the opportunity for hearing. USA&G/A–NZ, TPFCJ/K and CENSA interpret the Interim Rule as providing no appeal from denial of a BRL and no opportunity for hearing under the procedure contemplated by the Interim Rule. Sea-Land concurs with these observations and suggests that carriers and conferences be permitted to either file a BRL or prove in a hearing that no antitrust violation exists by use of a particular loyalty contract.

In supporting the Interim Rule, DOJ argues that the Rule fully comports with the 1984 Act, properly reflects applicable antitrust law, and that its promulgation met all appropriate statutory procedures. With respect to the prospect of its issuance of the BRL's contemplated by the Rule, DOJ advises that:

> Such a favorable business review will be likely where the Department is presented with a unilateral loyalty contract involving but a single carrier that does not possess significant market power. A favorable business review letter will not be issued, however, for existing and future loyalty contracts of conferences or groups of competitors, because the Department of Justice does not intend to issue business review letters supporting collective loyalty contracts. [Footnote omitted]

All conference loyalty contracts in existence on June 18, 1984 have now been cancelled. This effectively renders moot that portion of the Interim Rule dealing with contracts "in effect" prior to that date (paragraph C) of the Interim Rule.[6] Thus, it is appropriate for the Commission to now

[6] On June 18, 1984, there were 34 loyalty contracts on file with, and approved by, the Commission. Thirty-three of these involved conferences of carriers. The limited legislative history relating to the loyalty contract provision in the Act indicates that while "loyalty contracts involving a single carrier would probably be law-

Continued

focus on those portions of the Interim Rule that apply to *new* loyalty contracts, that is, contracts filed after June 18, 1984 (paragraphs (a) and (b) of the Interim Rule).

The regulatory scheme pertaining to loyalty contracts filed after June 18, 1984 differs in some respects from that applicable to loyalty contracts existing at the time the 1984 Act became effective. In the case of an existing loyalty contract that was not accompanied by a BRL, the Interim Rule contemplated that the Commission would afford the parties some form of hearing before terminating the contract.[7] The same procedure would not necessarily apply to new loyalty contracts because the Interim Rule provides that the Commission will "reject" any loyalty contract that is not accompanied by a BRL. In addition to this procedural distinction, the possible broader antitrust exposure of new loyalty contracts must also be considered. Whatever the antitrust exposure of existing loyalty contracts may have been, the Commission believes, for reasons discussed below, that the use of a loyalty contract filed after June 18, 1984 may violate *both* the antitrust laws[8] *and* section 10(b)(9) of the Act. This suggests that the considerations which prompted the mandatory BRL requirement for existing loyalty contracts may be different from those applicable to new loyalty contracts.

Therefore, the Commission has decided to modify its procedures applicable to loyalty contracts by deleting the mandatory Business Review Letter requirement in the Final Rule. Section 580.16 will be modified in paragraph (b) to make the filing of a BRL *permissive*, with BRL's creating a presumption of legality under section 10(b)(9) of the 1984 Act. Paragraph (a) of section 580.16, which requires that conferences and carriers reflect in their tariffs on file with the Commission any loyalty contract system employed, is mandated by section 8(a)(1)(E) of the 1984 Act and will be retained.

This amended procedure will leave the Commission free to address the merits of individual loyalty contracts under section 10(b)(9) on a case-by-case basis upon complaint or its own motion where circumstances war-

---

ful, . . . any concerted use of loyalty contracts by carriers is likely to violate the antitrust laws." 129 Cong. Rec. H8125 (daily ed. Oct. 6, 1983) (statement of Rep. Jones).

[7] As was stated in the Supplementary Information to be Interim Rule in addressing the concerns expressed by a commenter that paragraph (c) of the Interim Rule automatically terminated existing contracts without opportunity for hearing:

> The rule simply does not provide for the "automatic" termination of loyalty contracts. Failure by the carriers and conferences to comply with the rule would require further action by the Commission under the 1984 Act. Such further action would necessarily afford the opportunity for any hearing required by law.

49 FR at 24697.

[8] In mandating BRL's in its Interim Rule, the Commission explained that:

> Only the Department of Justice, which is charged with the enforcement of the antitrust laws, can provide carriers with some assurance that they will not be prosecuted under the antitrust laws for use of a loyalty contract.

49 FR at 20818 n. 2.

rant. The result will be to treat section 10(b)(9) in the same manner as any other act "prohibited" under section 10.[9]

It has been suggested that the use of a loyalty contract filed after June 18, 1984, while required to be "in conformity with the antitrust laws" under section 10(b)(9) of the 1984 Act, is an "activity" which otherwise enjoys antitrust immunity by virtue of section 7(a)(2) of that Act.[10] A review of the legislative history of the 1984 Act suggests otherwise.

Section 7(a)(3) of H.R. 1878, as reported out of the House Merchant Marine and Fisheries Committee and the House Judiciary Committee, conferred antitrust immunity on:

> (3) any loyalty contract in compliance with section 6 or any activity pursuant to such loyalty contract:

Section 6, to which section 7(a)(3) referred, set forth the requirements pertaining to loyalty contracts. There was significant disagreement between the two Committees regarding the contents of section 6. In order to resolve this dispute, the two Committees reached a compromise which resulted in the deletion of sections 6 and 7(a)(3) and the addition of what is now section 10(b)(9). The following explanation of the deletion of antitrust immunity was given on the floor of the House of Representative Jones:

> The compromise eliminates subsection (a)(3), a provision no longer needed in view of the broader proscription on the use of loyalty contracts in section 9(b)(9) [now 10(b)(9)].

129 Cong. Rec. H 8125 (daily ed. Oct. 6, 1983) (statement of Rep. Jones).

It would appear, therefore, that Congress intended to subject loyalty contracts filed after June 18, 1984 to both section 10(b)(9) of the 1984 Act *and* the antitrust laws.[11] Accordingly, to construe section 7(a)(2) as conferring antitrust immunity on loyalty contracts could well frustrate the intent of Congress. Moreover, if Congress did not intend to impose liability apart from the antitrust laws, there would appear to have been no need for section 10(b)(9). In order to give meaning to section 10(b)(9), therefore,

---

[9] As indicated in the "Supplementary Information" to the Interim Rule, substantive provisions of section 10, other than 10(b)(9), may be applicable to loyalty contracts. In *Federal Maritime Board* v. *Isbrandtsen Company, Inc.*, 356 U.S. 481 (1958), the Supreme Court set aside the Board's approval of a dual-rate system on the ground that it was a discriminatory and unfair method to stifle outside competition in violation of the 1916 Act. The substantive prohibitions underlying the *Isbrandtsen* decision have been carried over in one form or another to the 1984 Act in section 10. While the *Isbrandtsen* decision led to the 1961 enactment of section 14b, an amendment to the 1916 Act to permit dual rate contracts with Commission approval, section 14b was repealed by section 20 of the 1984 Act (46 U.S.C. app. 1719).

[10] Section 7(a)(2) of the 1984 Act (46 U.S.C. app. 1706) provides:

> The antitrust laws do not apply to . . . any activity . . . within the scope of this Act, whether permitted or prohibited by this Act, undertaken or entered into with a reasonable basis to conclude that . . . it is pursuant to an agreement on file with the Commission and in effect when the activity took place . . . .

[11] It is possible that shippers may also have antitrust exposure to the extent they are party to unlawful loyalty arrangements with such carriers.

it would be logical and reasonable to construe it as imposing liability separate from that imposed by the antitrust laws.

III. *FOREIGN TARIFF REGULATIONS GENERAL—DOCKET NO. 84–24* (Sections 580.0 to 580.6; 580.8 to 580.11; 580.13 to 580.15)

On May 23, 1984, the Commission issued an Interim Rule in Docket No. 84–24 governing the publishing and filing of tariffs by common carriers in the foreign commerce of the United States to implement the 1984 Act (49 FR 21713). The Interim Rule was to become effective on June 18, 1984, and interested persons were permitted to file comments on or before June 22, 1984. In addition, persons believing the Interim Rule created serious problems were urged to bring those concerns to the Commission's attention in writing for immediate review without prejudice to the right of any such party to file further comments within the comment period.

Thereafter, on June 11, 1984, the Commission extended the comment period to July 23, 1984 (49 FR 24023). Between the May 23 and June 11 notices, two carriers filed "emergency" comments requesting certain technical amendments to the Interim Rule. The Commission acceded to the requests of those parties and adopted appropriate modifications.

Thereafter, final comments were filed by 36 parties or groups of parties [12] representing all segments of the maritime community.

All of the comments have been carefully considered and many adopted. Several miscellaneous non-substantive administrative and technical changes have been incorporated into the Final Rule without being expressly discussed.

Some comments were received concerning sections of 46 CFR 580 which were not changed by the Interim Rule. The revisions to Part 580 that were made in this proceeding were limited to those required by changes in law brought about by the enactment of the 1984 Act. Accordingly, whatever their merits, comments suggesting substantive changes to Part

[12] North Atlantic European Conferences (NEC); Greece/U.S. Atlantic Rate Agreement, Iberian/U.S. North Atlantic Freight Conference, Marseilles North Atlantic U.S.A. Freight Conference, Med-Gulf Conference, Mediterranean-North Pacific Coast Freight Conference, U.S. Atlantic & Gulf/Australia-New Zealand Conference, and West Coast of Italy, Sicilian and Adriatic Ports North Atlantic Range Conference (WINAC); Trans-Pacific Freight Conference of Japan/Korea, Japan/Korea Atlantic and Gulf Freight Conferences, Trans Pacific Freight Conference (Hong Kong), New York Freight Bureau and Philippines North America Conference; Latin America Pacific Coast Steamship Conference, North Europe-U.S. Pacific Freight Conference, and Pacific Coast River Plate Brazil Conference and their Member Lines (Latampac); Chemical Manufacturers Association (CMA); Matson Navigation Company, Inc. (Matson); Zim Container Service; Inter-American Freight Conference (IAFC); Sea-Land Service, Inc. (Sea-Land); National Maritime Council (NMC); Westwood Shipping Lines, Inc.; Greene Companies International, Inc.; Coordinated Caribbean Transport, Inc.; Neptune Orient Lines, Ltd.; Box Caribbean Agencies Trinidad Ltd.; Barber Blue Sea Lines, Inc.; Hanjin Container Lines, Ltd.; Central Gulf Lines, Inc.; International Tariff Filing Services, Inc. (Transax Data Corporation); Norton Lilly & Co., Inc.; Maritime Cost and Service Company; T.M.T. Shipping & Chartering of La. Inc.—Agents for Deppe Line; M. G. Otero Company Inc.; Hapag-Lloyd Transpacific Service; Yellow Freight International; Spartan International; Pacific Coast European Conference, Latin America/Pacific Coast Steamship Conference; Pacific Coast River Plate Brazil Conference; Southern Cross Overseas Agency, Inc.; Traffic Service Bureau, Inc.; Distribution-Publications, Inc.; Transmares S.A.; Interocean Express Line; Sherwood Medical; Foss Alaska Lines; TAT Airfreight, Inc.; and F.W. Myers & Co.; Inc.

580 not contemplated by the Interim Rule are beyond the scope of this proceeding and will not be considered. Among such comments are NEC's suggestion to further define the term "all or a fixed portion" in the "loyalty contract" definition (section 580.2(k)), and the recommended expansion of the "open rate" definition (section 580.2(o)). Several other suggested non-substantive style or technical revisions which result in a simplification or clarification of Part 580 provisions were adopted, *e.g.*, section 580.3(j) (exceptions to the single tariff requirement) and section 580.2(w)(1) (electronic tariff filing format exception).

Summarized below are the significant suggestions of the commenting parties. These comments, together with discussion and disposition, are presented sequentially, according to the section number they address. Any comments not expressly mentioned herein, have either been incorporated as a technical change without discussion or have been found to be without merit, unwarranted, or unnecessary.

GENERAL COMMENTS

One of the stated purposes of the 1984 Act is to establish a nondiscriminatory regulatory process for the common carriage of goods by water in the U.S. foreign commerce. These regulations implement the tariff filing requirements of the Act.

Included in section 3 of the Act (46 U.S.C. app. 1702) are new and revised common carrier definitions. Common carriers are divided into two categories: ocean common carriers (otherwise known as vessel operating common carriers or VOCC's) and non-vessel-operating common carriers (also known as NVOCC's or NVO's). This latter type of carrier was not previously defined by statute. Because the Act makes no distinctions in the tariff filing responsibilities between VOCC's and NVOCC's, parties should note that the requirements contained in the Final Rule are equally applicable to both types of common carriers, whether they are domiciled in the United States or in a foreign country.

IAFC suggests that the Commission should explicitly state that any references to a section in Part 536 are amended to refer to the section with the same suffix number in Part 580.

The Commission has adopted IAFC's suggestion to the maximum extent possible. The Interim Rule stated that Part 536 of Title 46, Code of Federal Regulations was redesignated Part 580 and that all internal references would be changed accordingly. Such changes have now been made and any references to Part 536 have been deleted.

Section 580.1—Exemptions and Exclusions

Section 580.1(a)

Sections 580.1(a) exempts bulk cargo, forest products, recycled metal scrap, waste from tariff filing requirements consistent with the treatment of those commodities under the Act. NEC suggests that this paragraph

be revised to allow common carriers and conferences to optionally file rates and charges on those exempted commodities in their tariffs.

While there does not appear to be any legal barrier to allowing the filing of rates and charges on exempted commodities on an optional basis by an individual carrier, conferences' authority to do so is not as clear. The issue is whether Congress' exemption of certain commodities precludes concerned rate action on those commodities with or without antitrust immunity. That issue will be the subject of a separate proceeding. At this point, conferences may file rates and charges on exempt commodities, at their option. However, this is permitted without prejudice to any subsequent Commission determination of the legality of such practices.

However, to the extent carriers and conferences elect to file rates and charges on exempt commodities, the Final Rule makes it clear that the prohibitions of section 10 of the 1984 Act and any other statutory and/or regulatory requirements applicable to non-exempt commodities will apply to such filings.

Section 580.2—Definitions

Section 580.2(b)

CMA urges the Commission to clarify that bulk cargo loaded in LASH and Seabee barges is included within the definition of "bulk cargo." This suggestion is consistent with earlier Commission interpretations, and has, accordingly, been incorporated into the Final Rule.

Section 580.2(e)

NEC notes that the Commission, in defining "common carrier" in section 580.2(e), used the term "responsibility", but used the term "liability" in section 580.8(b)(3) when describing the obligations of common carriers, and requests a clarification of these terms.

The definition contained in section 580.2(e) reflects the Act's definition of "common carrier." There was no intention to create a distinction between "responsibility" and "liability." In the interest of consistency, "responsibility" is substituted for "liability" in section 580.8(b)(3) of the Final Rule.

Section 580.2(i) and (j)

NEC submits that the definitions of "joint rates" and "local rates" in sections 580.2(i) and (j), respectively, are inadequate. It suggests that: (1) both be characterized as "ocean" rates; (2) "joint rates" be limited to route combinations resulting from transshipment agreements, and; (3) the definition of "local rates" expressly identify the specified types of prior or subsequent movements which do not alter the rate charged. The purpose of those suggestions is to allow a common carrier to employ other types of water carriers to perform part of the all-water service covered by its "local rates."

The Commission has substantially revised the intermodal tariff filing requirements of section 580.8 and has reduced the number of definitions. These revisions should eliminate any confusion between joint rates and local rates. Similarly, because the definition of "local rates" can reasonably be construed as permitting the employment of other water carriers by a common carrier in establishing an all-water route, the revisions suggested by NEC are not required.

Section 580.2(k)

Transpac, IAFC and NEC recommend that the definition of "loyalty contract" be revised to track the definition of section 3(14) of the 1984 Act. Transpac claims that the Interim Rule could be read to cover forms of arrangements not includable under the statutory definition.

The Commission has modified the definition of "loyalty contract" in the Final Rule as suggested by Transpac, IAFC, and NEC.

Section 580.2(p)

NEC suggests that the "open for public inspection" requirement for tariffs be eliminated entirely. It argues that no regulatory or commercial purpose is served by requiring carriers to maintain tariffs in all of the places the Interim Rule describes.

The Commission is presently giving consideration to the automation of tariffs. If and when tariff publications are automated, which would permit the ready retrieval of information at a variety of locations, this requirement may become unnecessary. Until that time, however, the need to have tariffs "open for public inspection" at locations convenient to the tariff user is the only practical way of implementing the publication requirement of section 8 of the Act.

Section 580.2(q)

NEC suggests that "another country" be used instead of "foreign country" in defining "person" and elsewhere in the Final Rule. "Foreign country" is used in the Act's definition of "person" and will be retained.

Section 580.2(w)(1)

NEC recommends that the Final Rule allow the electronic filing of entire tariffs and not just "tariff pages." It argues that because section 580.5(a) requires title pages to be filed on "heavier paper than the paper used in the body of the tariff" an exception should be made for those title pages filed electronically to avoid the problems inherent in using two different qualities of paper on computer printers.

The NEC comment is well taken. Accordingly, the Final Rule eliminates the "heavy paper" requirement for title pages in section 580.5(a).

Section 580.3—Filing of Tariffs; General

Section 580.3(j)

NEC suggests that an exception to the single tariff requirement for conferences and rate agreements be allowed for ratemaking agreements between groups of conferences, or between conferences and independent carriers, or new conference agreements, new members to such agreements, or enlargements of the geographic scope of conference agreements. NEC argues that, administratively and practically, effective tariff harmonization cannot be accomplished by a newly approved agreement's effective date and that, therefore, the Commission's present single tariff requirement has to be routinely waived whenever a new conference is formed or an existing conference's authority is expanded.

NEC's suggestion has merit and is incorporated in the Final Rule.

Section 580.4—Tariff Format

Section 580.4(f)

The Interim Rule eliminated a previous Part 536 requirement that a check sheet be included in a tariff. The Final Rule makes such "check sheets" optional. Check sheets are used to provide a record of the correction numbers assigned to amendments issued to tariffs. Typically, correction numbers are handwritten on the check sheet as the new tariff amendments are published or, for the agency's purposes, as the amendments are received for filing with the Commission. A limited number of tariff publishers avoid the manual notation of correction numbers on check sheets by publishing and filing a check sheet containing the preprinted numbers of all the effective corrections with page identifications each time the tariff is amended. This practice stems from the domestic tariff filing rules of the Interstate Commerce Commission which require such a control system.

Those opposing the elimination of check sheets described its use as a necessary means of confirming or ensuring that all amendments have been received and accounted for up to the date and correction number shown on the last entry on the check sheet. It is also argued that the procedure preserves the integrity of rate quotations.

Many comments were directed towards describing the commenters' individual needs for tariff check sheets. Most of the comments noted that without a check sheet a tariff user would be unable to determine whether the publication was complete at any given time. It is pointed out that under the check sheet recording system, gaps in the numbers noted on the check sheet alert a tariff user to the potential that there may be page amendments missing or unaccounted for which could affect any rate quotation or tariff rule. Check sheets are also said to be used to monitor rate changes of selected carriers where, by merely recording the latest correction number, a competing carrier or tariff watching service can readily determine at any later date the identification of pages or rate changes which were filed since the tariff was last reviewed.

Admittedly, the check sheets provide a simple means of monitoring tariff changes. However, at issue here is whether the Commission should be called upon to bear the considerable expense and burden of maintaining the tariff check sheet requirement for use by the shipping industry when, for the purpose of carrying out its functions and responsibilities, the check sheet is not necessary to the Commission.

From the Commission's standpoint the check sheet serves little, if any, regulatory or tariff husbanding purpose. When a new or initial tariff is filed, every page is reflected as "original page." When a page is amended, the replacement page must be numbered in a numerically consecutive order with the first revised page cancelling the original page, the 2nd revised page cancelling the first revised page, etc. Hence, the highest numbered revised page contains the rates in effect. The effective time period of any rate item is easily traced by observing the effective date published on each and every revised page. In the event that any consecutively numbered revised page is not received for filing (which would show up as a gap on a check sheet) the subsequent filing could be rejected since it would cancel a non-existing tariff page. The check sheet, it should be noted, does not alter the application of rates in any manner.

It is neither practical nor meaningful for the Commission to expend considerable time and resources working with a carrier or publishing agent when gaps or missing correction references occur on a check sheet because there is no requirement that the relating correction numbers be filed in consecutive order. A tariff filer who fails to place its publication on file, or fails to ensure that amendments are received by the Commission, does so at its own risk. The Final Rule contains provisions to provide for the receipt of tariffs and amendments. Because "filing" is elsewhere defined as receipt *by the Commission* (*see* section 580.3(a)(1)) and the failure to file is a statutory violation, the check sheet safeguard is only a commercial convenience.

The Commission is not insensitive to the needs of persons utilizing tariffs and check sheets. However, it cannot afford to dedicate a substantial portion of its resources on functions which are superfluous to its regulatory responsibilities. In order to accommodate the needs of these persons, the use of check sheets will be permitted on a voluntary basis for use by such entities and not for processing by the Commission. This alternative is preferable to either prohibiting them or imposing them as an additional regulatory burden on all tariff filers.

Section 580.5—Tariff Contents

Section 580.5(d)

Former section 536.5(d) governing "transshipment service" was deleted in the Interim Rule. Certain commenters note that the Commission's Interim Rule on agreements continues to require that any transshipment service

be reflected in a tariff (46 CFR 572.310).[13] The Commission is urged to resolve the apparent conflict.

The Commission has decided to reinstate the transshipment service provision in the Final Rule to ensure consistency between the requirements of Part 580 and Part 572. However, to avoid subjecting tariff filers to unnecessary paperwork or expense, the Commission is deleting Exhibit 8, referred to in the previous section 536.5(c)(13), which specified a detailed format for transshipment service tariffs. Transshipment service tariffs which comply with the general tariff format requirements and the specific requirements of section 580.5(d)(13) should be sufficiently clear to serve their regulatory purpose.

Section 580.5(d)(18)

This section, redesignated section 580.5(d)(2) in the Final Rule, governs "overcharge claims" and provides, *inter alia,* that refund claims for overcharges may be filed within three years of the date the cause of action accrued. NEC contends that compliance with this section could be construed to constitute a waiver of constitutional rights and defenses.

Section 11(g) of the 1984 Act (46 U.S.C. app. 1710(g)) permits claims to be filed within three years. This change from the Shipping Act, 1916, which provided a two year limitations period, is reflected in the Final Rule. Questions regarding attempts to revive claims barred by the two year limitation of the 1916 Act will be determined on an *ad hoc* basis in cases where they arise. *See Application of Shipping Act of 1984 to Formal Proceedings Pending Before Federal Maritime Commission on June 18, 1984,* 49 FR 21798, May 23, 1984.

Section 580.6—Statement of Rates and Charges

IAFC urges clarification of the use of the terms "rate" and "charge", noting that although the terms are used conjunctively in the title to section 580.6, there is no reference to the term "charges" in the text of the section itself.

The Act requires the filing of both "rates" and "charges" but draws no clear distinction between them. The Final Rule will, therefore, reflect the statutory language where appropriate.

Section 580.8—Tariffs Containing Through Rates for Through Transportation

Many of the commenters suggestions intended to simplify and clarify filing regulations have been incorporated into the Final Rule. The provisions contained in the Final Rule should also more closely follow the statutory scheme of the 1984 Act.

[13] Docket No. 84-26—*Rules Governing Agreements by Ocean Common Carriers and Other Persons Subject to the Shipping Act of 1984,* (49 FR 22296; May 29, 1984).

Section 580.8(a)

Section 580.8(a) of the Final Rule defines only two intermodal tariffs terms: "through rate" and "through transportation." These are the only definitions needed to implement existing intermodal tariff filing requirements and concepts. The definitions of "contracting carrier," "joint through intermodal rate," "participating carrier," "through rate" and "through intermodal rate" contained in the Interim Rule were deemed unnecessary and have been deleted.

The Interim Rule defined the terms "contracting carrier" and "participating carrier" to draw distinctions between "through intermodal rates" and "joint through intermodal rates." The 1984 Act, however, does not make this distinction and requires only that each carrier and conference file tariffs showing all its rates, charges, etc., ". . . between all points or ports on its own route and on any through transportation route that has been established." (46 U.S.C. app. 1707). The Final Rule will allow common carriers and conferences to file through rates for any *type* of through transportation. The through transportation services provided by common carriers and conferences may be the result of various forms of contractual relationships between those participating in the service. The matter of a common carrier providing a through transportation service in conjunction with a carrier not subject to the Act is governed by section 580.8(b)(3), which requires common carriers to provide in the contract of affreightment a clear explanation of the carrier's responsibility when through transportation services are offered.

Section 580.8(b)

Section 580.8(b) prescribes tariff filing requirements for through transportation services. These requirements are in addition to those for port-to-port service tariffs.

Matson suggests that the Interim Rule be amended to clarify whether through rates must be published in separate tariffs or may be combined with tariffs containing port-to-port rates. Carriers and conferences will not be precluded from including both through rates and port-to-port rates in the same tariff publication. The Final Rule is clarified accordingly.

NEC commented that the Interim Rule should not be interpreted to require that a comprehensive list of services be named on the title page of each tariff. The Final Rule is amended to require that the title page of each through rate tariff contain only a list of the countries to, from, or between which the through rates apply, and a *brief* description of the modes of service offered under the tariff.

The Final Rule further modifies the previous tariff filing requirement that specific ports through which through shipments may move be listed, and permits carriers and conferences to name a range or ranges of ports to be utilized for through movements to reflect the routing for through intermodal transportation.

Likewise, the Final Rule carries forward the Interim Rule provisions which allow common carriers and conferences to establish through rates to, from or between all points within a region. While official government publications naming identified regions, such as the *National Five Digit ZIP Code and Post Office Directory,* are acceptable to specify a region, the suggestions of NEC and WINAC that tariff filers be permitted to define regions by non-official descriptions are rejected. Absent an objective standard to guide tariff writers and users, a proliferation of methods to describe regions can be anticipated, undermining the Commission's underlying policy of tariff simplification.

Sea-Land proposes several amendments to expand the disclosure of participating carrier services to all types of intermodal tariffs. In eliminating the definitions of "joint through intermodal rate" and "participating carrier", the Final Rule also necessarily does away with the Interim Rule's requirement that intermodal tariffs separately list each point served by each participating carrier. By expressly providing that inland through rate divisions need not be disclosed in intermodal tariffs, Congress made a basic determination not to subject the specifics of inland carrier rates to Shipping Act tariff disclosure. This policy underlies the elimination and simplication of many previously prescribed through rate tariff requirements as they applied to inland movements. Sea-Land's proposals are contrary to this basic policy and, therefore, are not adopted.

NEC suggests that the requirement in section 580.8(b) that tariffs contain on the "title page or an interior page referenced on the title page" a list of the points/ports to which the rates apply be eliminated because this information is already contained on the rate pages themselves and need not be repeated elsewhere. This suggestion will not be adopted. Absent a list or description on a tariff's title or interior page of the points/ports to which the tariff applies, tariff users would have great difficulty finding the rate to be applied to their particular shipments. Some title pages filed with the Commission have contained broad scope descriptions, *e.g.,* "European Continent," but internally listed ports/points in only a few countries. This has resulted in shippers being required to examine each page of a number of generally described tariffs, a practice which has substantially thwarted the underlying regulatory purpose of tariffs, *i.e.,* the ready disclosure of rates to shippers. It is only through a title or internal page listing that the tariff user is able to determine the scope of the publication and find the desired rate without having to page through each tariff. Accordingly, the Final Rule requires that the listing of points, ports, or regions be shown in Rule No. 1 of the tariff, and that the title page describe the general scope of the tariff by naming the countries to, from or between which the rates apply. These requirements will facilitate rapid determination of the appropriate intermodal tariff.

Section 580.8(c)

Section 580.8(c) of the Interim Rule governs amendments to intermodal tariffs. Latampac contends that this paragraph could allow an individual conference line to take one-day independent action on a new service point. This would allegedly cause disruptive intra-conference competition with a deleterious impact on the trades as a whole and would be inconsistent with conference authority to regulate advance notice of independent action, subject to the 10-day limitation of section 5 of the 1984 Act. Latampac urges the Commission to clarify section 580.8(c) by reference to such conference authority under section 5 of the 1984 Act.

The Final Rule contains a number of provisions which may generally authorize filings that conflict with limitations placed on conference members by their particular conference agreement. Rather than complicate the Final Rule with a number of exceptions such as the one suggested by Latampac, the Commission will generally interpret such provisions as not authorizing violations of conference agreements. The provision allowing the filing of new inland points is retained and now appears in section 580.8(b).

NEC opposes exempting controlled carriers from the 30-day notice requirements with respect to tariffs establishing new or initial joint through intermodal rates and/or through intermodal rates. NEC argues that the Interim Rule repeals the special permission provisions of section 9(c) of the 1984 Act (46 U.S.C. app. 1708(c)) and that such an exemption otherwise undermines the purposes of the controlled carrier provisions of the statute.

NMC is also opposed to easing the 30-day notice requirements for controlled carriers. NMC contends that the Interim Rule appears to be inconsistent with the 1984 Act and recommends that the Commission reinstate the requirement that controlled carriers observe a 30-day filing period, subject to *ad hoc* exceptions, rather than extend exceptions on an across-the-board basis.

Likewise, Sea-Land recommends that the Commission apply a special permission approach similar to that found in section 580.10(a)(3) to allow controlled carriers' rates to be filed on less than 30 days notice in lieu of a general waiver of the notice period for rates that meet but do not go below those previously established by non-controlled carriers. Sea-Land claims that the proposed modifications would maintain the proper conformity between Part 580 and section 9 of the 1984 Act.

To avoid a possible conflict with the intent of the controlled carrier provisions of the Act, section 580.8(c) is deleted. Controlled carriers will, therefore, remain fully subject to the requirements of section 9 of the 1984 Act when publishing new or initial through rates for through intermodal transportation, unless special permission is granted under the provisions of section 580.15 of the Final Rule. This does not alter the previous provisions of former Part 536, carried forward in the Final Rule, allowing the filing of open rates and lower independent action rates by controlled carriers on less than 30-days notice. *See,* sections 580.6(m) and 580.10(a).

In lieu of a provision governing amendments to intermodal tariffs, a new provision has been substituted at section 580.8(c) which governs multiple tariffs. As a result of the determination to allow multiple tariffs in a trade, common carriers and conferences can now be expected to publish rates for the same commodity in different tariffs based upon differences in the modes of service. Similarly, a commodity rate could also be closely related to a separately filed rate in a specialized commodity tariff. Therefore, to allow rate filers needed flexibility and at the same time enable the Commission and all tariff users to locate the appropriate through rate tariff, a new requirement to cross-reference all through rate tariffs when more than one such tariff is published in the same general trade area is imposed. This information must also be disclosed in Rule No. 1 of each tariff.

EXHIBITS

In addition to the other changes to the tariff filing requirements, new exhibits are provided to facilitate understanding of and compliance with the regulations.

The Commission has determined that this Final Rule is not a "major rule" as defined in Executive Order 12291, dated February 17, 1981, 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 effects 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 Chairman of the Federal Maritime Commission certifies that this Final Rule will not have a significant economic impact on a substantial number of small entities, including small businesses, small organizations and small governmental jurisdictions.

List of Subjects in 46 CFR Part 580.

Antitrust, Cargo, Cargo vessels, Contracts, Exports, Harbors, Imports, Maritime carriers, Rates and fares, Reporting and recordkeeping requirements, Water carriers, Water transportation.

CORRECTIONS

These final rules are subject to review and editing of form before publication in the Code of Federal Regulations. Users are requested to notify the Commission of any omissions and typographical type errors in order that corrections can be made before the Commission's CFR book goes to press in January 1985.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

THEREFORE, pursuant to 5 U.S.C. 553: secs. 3, 4, 5, 6, 8, 9, 10, 13, 15, 16, 17, and 19 of the Shipping Act of 1984 (46 U.S.C. app. 1702–1705, 1707, 1709, 1712, 1714–1716, and 1718) Part 538 of Title 46, Code of Federal Regulations, is removed and Part 580 of Title 46, Code of Federal Regulations, is revised to read as follows:

FEDERAL MARITIME COMMISSION

[46 CFR PART 580]

PUBLISHING AND FILING OF TARIFFS BY COMMON CARRIERS IN THE FOREIGN COMMERCE OF THE UNITED STATES

Sec.

AUTHORITY: 5 U.S.C. 553; secs. 3, 4, 5, 6, 8, 9, 10, 13, 15, 16, 17 and 19 of the Shipping Act of 1984 (46 U.S.C. app. 1702–1705, 1707, 1709, 1712, 1714–1716 and 1718).

§ 580.0 Scope.

(a) These regulations govern the publication and filing of tariffs for the transportation of property performed by common carriers in the foreign

commerce of the United States and by combinations of such common carriers, including through transportation offered in conjunction with one or more carriers not otherwise subject to the Shipping Act of 1984.

(b) Section 8 of the Shipping Act of 1984 requires common carriers and conferences of such common carriers to file with the Commission and keep open to public inspection, tariffs showing all rates and charges for transportation between U.S. and foreign ports and between points on any through route which is established. These regulations implement this requirement and, in addition, the requirements of section 9, 10 and 16 of the Shipping Act of 1984. The tariff format and content requirements of this part also reflect the Commission's responsibilities in identifying and preventing unreasonable preference or prejudice and unjust discrimination pursuant to section 10 of the Shipping Act of 1984.

(c)(1) Compliance with this part is mandatory and any tariff submitted for filing which fails to meet criteria specified in this part is subject to rejection pursuant to § 580.10(d)(1). Upon rejection it shall be void and its use unlawful.

(2) Operating without an effective tariff on file with the Commission or charging rates not in conformance with such a tariff is unlawful and, pursuant to section 13 of the Shipping Act of 1984, is subject to a civil penalty of not more than $5,000 for each violation unless the violation was willfully and knowingly committed, in which case the amount of civil penalty may not exceed $25,000 for each violation. Each day of a continuing violation constitutes a separate offense. Additionally, the Commission may suspend any or all tariffs of the common carrier, or that common carrier's right to use any or all tariffs of conferences of which it is a member, for a period not to exceed 12 months.

§ 580.1 Exemptions and exclusions.

(a) This part does not apply to bulk cargo, forest products, recycled metal scrap, waste paper and paper waste, except that carriers or conferences which voluntarily file tariff provisions covering otherwise exempt transportation thereby subject themselves to all statutory provisions and the requirements of this part, including the requirement to adhere to the filed tariff provisions.

(b) This part does not apply to transportation of cargo between foreign countries, including that which is transshipped from one ocean common carrier to another (or between vessels of the same common carrier) at a U.S. port or transferred between an ocean common carrier and another transportation mode at a U.S. port for overland carriage through the United States, where the ocean common carrier accepts custody of the cargo in a foreign country and issues a through bill of lading covering its transportation to a foreign point of destination.

(c) The following services are exempt from the tariff filing requirements of the Act and the rules of this part:

(1) Transportation by vessels operated by the State of Alaska between Prince Rupert, Canada and ports in southeastern Alaska, if all the following conditions are met:

(i) Carriage of property is limited to vehicles;

(ii) Tolls levied for vehicles are based solely on space utilized rather than the weight or contents of the vehicle and are the same whether the vehicle is loaded or empty;

(iii) The vessel operator does not move the vehicles on or off the ship; and

(iv) The common carrier does not participate in any joint rates establishing through routes or in any other type of agreement with any other common carrier.

(2) Transportation of passengers, commercial buses carrying passengers, personal vehicles and personal effects by vessels operated by the State of Alaska between Seattle, Washington and Prince Rupert, Canada, if such vehicles and personal effects are the accompanying personal property of the passengers and are not transported for the purpose of sale.

(3) Transportation of mail between the United States and foreign countries.

(4) (i) Transportation by Incan Superior, Ltd. of cargo moving in railroad cars between Thunder Bay, Ontario and Superior, Wisconsin, if:

(A) The through rates are filed with the Interstate Commerce Commission and/or the Canadian Transport Commission; and

(B) Certified copies of the rate divisions and of all agreements, arrangements or concurrences entered into in connection with the transportation of such cargo are filed with the Commission within 30 days of the effectiveness of such rate divisions, agreements, arrangements or concurrences.

(ii) This exemption is inapplicable to cargo originating in or destined to foreign countries other than Canada.

(5) (i) Transportation by water of cargo moving in rail cars between British Columbia, Canada and United States ports on Puget Sound, and between British Columbia, Canada and ports or points in Alaska, if:

(A) The through rates are filed with the Interstate Commerce Commission and/or the Canadian Transport Commission; and

(B) Certified copies of the rate divisions and of all agreements, arrangements or concurrences entered into in connection with the transportation of such cargo are filed with the Commission within 30 days of the effectiveness of such rate divisions, agreements, arrangements or concurrences.

(ii) This Exemption is inapplicable to cargo originating in or destined to foreign countries other than Canada.

(6) (i) Transportation by water of cargo moving in bulk without mark or count in rail cars on a local port-to-port rate basis between ports in British Columbia, Canada and United States ports on Puget Sound, if the rates charged for any particular bulk type commodity on any one sailing are identical for all shippers.

(ii) This exemption shall not apply to cargo originating in or destined to foreign countries other than Canada.

(iii) The carrier will remain subject to all other provisions of the Shipping Act of 1984.

(7) Transportation of used military household goods and personal effects by non-vessel-operating common carriers.

(d) The following services are subject to continuing special permission authority to deviate from the 30-day notice requirement of section 8 of the Act and the form and content requirements of this part: Transportation of U.S. Department of Defense cargo by American-flag common carriers under terms and conditions negotiated and approved by the Military Sealift Command (MSC), if all the following conditions are met:

(1) Exact copies of all common carrier quotations or tenders accepted by MSC are filed with the Commission as soon as possible after they are approved by MSC, but on not less than one day's filing notice prior to the effective date thereof;

(2) All tenders are filed in triplicate, one copy of which is signed and maintained at the Commission's Washington Office for public inspection;

(3) A letter of transmittal accompanies the filing stating that the documents are submitted in accordance with the requirements of the Shipping Act of 1984 and this section;

(4) Tenders submitted for filing are to be numbered by the respective common carriers as part of a distinct tariff series, with each common carrier's series to begin with the number "1" and run consecutively thereafter;

(5) Each tender which supersedes a prior tender must specifically cancel the prior tender by its series number; and

(6) Amendments or supplements to tenders must also be filed with the Commission upon not less than one day's filing notice and contain an appropriate reference to the original tender being amended or supplemented.

(e) *Controlled common carriers.*

(1) A controlled common carrier shall be exempt from the provisions of this part exclusively applicable to controlled common carriers when:

(i) The vessels of the controlling state are entitled by a treaty of the United States to receive national or most-favored-nation treatment;

(ii) The controlling state subscribed, as of November 17, 1978, to the shipping policy statement contained in note 1, Annex "A" of the Code of Liberalization of Current Invisible Operations, adopted by the Council of the Organization for Economic Cooperation and Development;

(iii) As to any particular rate, the controlled common carrier's tariff contains an amount set by the duly authorized action of a ratemaking body, except that this exemption is inapplicable to rates established pursuant to an agreement in which all the members are controlled common carriers not otherwise excluded by this paragraph;

(iv) The controlled common carrier's rates, charges, classifications, rules or regulations govern transportation of cargo between the controlling state and the United States (including its districts, territories and possessions); or

(v) The controlled common carrier operates in a trade served exclusively by controlled common carriers.

(2) The Commission will notify any common carrier of its classification as a controlled common carrier.

(3) (i) Any common carrier contesting such a classification may, within 30 days after the date of the Commission's notice, submit a rebuttal statement.

(ii) The Commission shall review the rebuttal and notify the common carrier of its final decision within 30 days from the date the rebuttal statement was filed.

§ 580.2 Definitions.

For the purposes of this part, the following definitions of terms shall apply unless otherwise indicated by the context of this part (for other definitions see §§ 580.3(a)(1), 580.7(a), 580.8(a), 580.10(a)(1) and 580.12(a)):

(a) *Act* means the Shipping Act of 1984.

(b) *Bulk cargo* means cargo that is loaded and carried in bulk without mark or count, in a loose unpackaged form, having homogeneous characteristics. Bulk cargo loaded into intermodal equipment, except LASH or Seabee barges, is subject to mark and count and is, therefore, subject to the tariff filing requirements of this part.

(c) *Class rates* means rates applicable to all articles which have been grouped or "classified" together in a classification tariff or a classification section of a rate tariff.

(d) *Commodity rates* means rates applying to a commodity or commodities specifically named or described in the tariff in which the rate or rates are published.

(e) *Common carrier* means a person holding itself out to the general public to provide transportation by water of cargo between the United States and a foreign country for compensation that:

(1) Assumes responsibility for the transportation from the port or point of receipt to the port or point of destination; and

(2) Utilizes, for all or part of that transportation, a vessel operating on the high seas or the Great Lakes between a port in the United States and a port in a foreign country.

(f) *Conference* means an association of ocean common carriers permitted, pursuant to an approved or effective agreement, to engage in concerted activity and to utilize a common tariff; but the term does not include a joint service, consortium, pooling, sailing or transshipment arrangement.

(g) *Controlled common carrier* means an ocean common carrier that is, or whose operating assets are, directly or indirectly owned or controlled

by the government under whose registry the vessels of the common carrier operate; ownership or control by a government shall be deemed to exist with respect to any common carrier if:

(1) A majority portion of the interest in the common carrier is owned or controlled in any manner by that government, by any agency thereof, or by any public or private person controlled by that government; or

(2) That government has the right to appoint or disapprove the appointment of a majority of the directors, the chief operating officer or the chief executive officer of the common carrier.

(h) *Forest products* means forest products in an unfinished or semifinished state that require special handling moving in lot sizes too large for a container, including, but not limited to, lumber in bundles, rough timber, ties, poles, piling, laminated beams, bundled siding, bundled plywood, bundled core stock or veneers, bundled particle or fiber boards, bundled hardwood, wood pulp in rolls, wood pulp in unitized bales, paper board in rolls and paper in rolls.

(i) *Joint rates* means rates or charges established by two or more common carriers for ocean transportation over the combined routes of such common carriers.

(j) *Local rates* means rates or charges for transportation over the route of a single common carrier (or any one common carrier participating in a conference tariff), the application of which is not contingent upon a prior or subsequent movement.

(k) *Loyalty contract* means a contract with an ocean common carrier or conference, other than a service contract or contract based upon time-volume rates, by which a shipper obtains lower rates by committing all or a fixed portion of its cargo to that carrier or conference.

(l) *Non-vessel-operating common carrier* means a common carrier that does not operate the vessels by which the ocean transportation is provided and is a shipper in its relationship with an ocean common carrier.

(m) *Ocean common carrier* means a vessel-operating common carrier; but the term does not include one engaged in ocean transportation by ferry boat or ocean tramp.

(n) *Ocean freight forwarder* means a person in the United States that:

(1) Dispatches shipments from the United States via common carriers and books or otherwise arranges space for those shipments on behalf of shippers; and

(2) Processes the documentation or performs related activities incident to those shipments.

(o) *Open rate* means a rate on a specified commodity or commodities over which a conference relinquishes or suspends its ratemaking authority, in whole or in part, thereby permitting each individual common carrier member of the conference to fix its own rates on such commodity or commodities.

(p) *Open for public inspection* means the maintenance of a complete and current set of the tariffs used by a common carrier, or to which it is a party, in each of its offices and those of its agent in every city where it transacts business involving such tariffs.

(q) *Person* includes individuals, corporations, partnerships and associations existing under or authorized by the laws of the United States or of a foreign country.

(r) *Proportional rates* means rates or charges assessed by a common carrier for transportation services, the application of which is conditioned upon a prior or subsequent movement.

(s) *Shipment* means all of the cargo carried under the terms of a single bill of lading.

(t) *Shipper* means an owner or person for whose account the ocean transportation of cargo is provided or the person to whom delivery is to be made.

(u) *Tariff* means a publication containing the actual rates, charges, classifications, rules, regulations and practices of a common carrier or conference of common carriers. The term "practices" refers to those usages, customs or modes of operation which in any way affect, determine or change the transportation rates, charges or services provided by a common carrier, and, in the case of conferences, must be restricted to activities authorized by the basic conference agreement.

(v) *Tariff filing* means any tariff, or modification thereto, which is received by the Commission as properly filed pursuant to these rules.

(w) *Tariff filing, electronic* means the transmission of tariff filings to the Commission through the use of commercial data processing terminals. The data processing receiving terminal(s) are to be located in the Commission's Washington, D.C. offices. Tariff material filed electronically must conform to all the regulations applicable to permanent tariff filings, except as follows:

(1) Electronically filed tariff pages received from data processing terminals may be used for filing with the Commission; and

(2) Electronically filed tariff matter shall be accompanied by an electronically filed letter of transmittal.

§ 580.3 Filing of tariffs; general.

(a)(1) As used in this part the terms "file," "filed" or "filing," when used with respect to the filing of tariffs with the Commission, mean actual receipt at the Commission's Washington, D.C. offices.

(2) The Commission will receive tariff filings on an around-the-clock basis. Receipt of tariff filings during other than normal business hours will be time-stamped at a tariff mail drop located in the lobby of the Commission's Washington, D.C. offices. Electronic tariff filings transmitted to the Commission by electronic modes will be receipted by a date/time device on the receiving machine.

(b) Tariffs shall be published and filed by an officer or employee of the common carrier or, if a conference tariff, by an officer or employee of the conference. In the alternative, publication and filing may be accomplished through an agent authorized to act for such common carrier or conference by a specific written delegation of authority.

(1) A common carrier or conference may delegate authority to a person, not an official or employee of such common carrier or conference, for the purpose of issuing all its tariffs or any particular tariff.

(2) Whenever there is a delegation of tariff-issuing authority by a common carrier or conference, there shall be filed with the Commission a written statement indicating the appointment of the agent and setting forth the exact limits of the agent's authority.

(c)(1) No common carrier or conference shall publish and file any tariff or modification thereto which duplicates or conflicts with any other tariff on file with the Commission to which such common carrier or conference is a party, whether filed by such common carrier, conference, or by an authorized agent.

(2) No common carrier shall publish and file any tariff or modification thereto which conflicts with any other tariff on file with the Commission and which names such common carrier as a participant therein.

(d) All tariffs published in a foreign language shall be accompanied by two true copies translated into the English language when submitted for filing, except that controlled common carriers shall submit three true copies translated into the English language.

(e) All tariff matter filed with the Commission shall be accompanied by a letter of transmittal which clearly identifies the tariff and pages involved. If the sender desires a receipt, a duplicate of such letter must be furnished together with a plain, self-addressed, stamped envelope measuring approximately 4½ by 9¾ inches. The duplicate letter will be stamped with the date of receipt and mailed to the sender in the envelope provided. If a duplicate letter and self-addressed stamped envelope are not submitted, a receipt will not be furnished.

(f) All tariff matter shall be filed in duplicate, except that controlled common carriers shall file all tariff matter in triplicate.

(g) Tariff filings shall be addressed to:

Bureau of Tariffs, Federal Maritime Commission, Washington, D.C. 20573.

(h) Each common carrier shall keep open for public inspection all tariffs published by it or to which it is a party in the foreign commerce of the United States.

(i) Common carrier participants in a conference tariff are not relieved from the necessity of complying with the Commission's regulations and the requirements of section 8(a)(1) of the Act with regard to keeping tariffs open for public inspection.

(j) A common carrier's obligation to file tariffs pursuant to section 8(a) of the Act and this part must be carried out as follows:

(1) When the common carrier is not a party to an agreement, by filing its own tariff or tariffs.

(2) When the common carrier is party to an agreement, by participation in a single tariff filed by the conference, except that this requirement shall not apply to:

(i) Ratemaking agreements either between or among conferences, or between one or more conferences and one or more independent carriers; or

(ii) New conference agreements, new members to such agreements, or enlargements of the geographic scope of conference agreements, until ninety (90) days after the fact, unless special permission to extend that period is granted for good cause shown.

(k) When a common carrier is admitted to membership in a conference, cancellation of the common carrier's individual tariff (if any) in the trade served by the conference and revision of the participating common carrier page of the conference tariff (naming the newly admitted common carrier) shall be published and filed with the Commission and may become effective upon the date of such filing, except that:

(1) If the common carrier has an individual tariff in the trade served by the conference and cancellation of that tariff and revision of the participating common carrier page of the conference tariff (naming the newly admitted common carrier) would result in an increase in that common carrier's rates, the common carrier shall, 30 days prior to being admitted as a new conference member, cancel its individual tariff effective 30 days from date of publication, making reference to the conference tariff and where it may be examined, unless special permission to become effective in less than 30 days has been granted by the Commission pursuant to § 580.15; and

(2) A controlled common carrier newly admitted to membership in a conference shall, 30 days prior to admission, file notice of cancellation of any applicable independent tariff effective upon the date of admission to conference membership, unless special permission has been granted by the Commission pursuant to § 580.15.

(l) [Reserved.]

(m) Copies of all tariffs on file with the Commission (including all subsequent revisions and changes thereto) shall be made available by common carriers and conferences to any person. A reasonable charge may be made for this service.

(n) New or initial tariffs shall be published and filed to become effective not earlier than 30 days after publication and filing, unless special permission to become effective on less than 30 days' notice has been granted by the Commission pursuant to § 580.15.

(o) Rules applicable to tariffs containing rates, charges, rules and regulations for through transportation, set forth in § 580.8, are additional requirements for use only for through transportation and are not a substitute for any other requirements of this part.

§ 580.4 Tariff format.

(a) All tariffs which are filed and kept open to public inspection shall be clear and legible and shall be plainly printed, mimeographed, multilithed or prepared by some other similar permanent process on durable paper of good quality.

(b) No alteration in writing or erasure shall be made in any tariff publication.

(c) Sufficient marginal space of not less than three-fourths of an inch shall be allowed at the left side of each tariff page to permit insertion in tariff binders. In addition, a margin of not less than one-half inch shall be allowed at the bottom of each tariff page for application of the Commission's receipt stamp.

(d) Tariffs shall be in looseleaf form and printed on pages approximately 8½ by 11 inches. If other than a looseleaf tariff is to be filed, application for permission to make such filing shall be made to the Commission. If permission to file other than a looseleaf tariff is granted by the Commission, such permission will set forth the form and manner of filing the tariff and any amendments or supplements thereto.

(e)(1) Tariff pages shall be printed on one side only and each page after the title page shall be numbered in the upper right-hand corner, except that the anti-rebating statement, as set forth in § 580.5(c)(2)(ii), must be published on the reverse side of the tariff title page (See Exhibit No. 2 to this part) or, alternatively, at any location in the tariff, provided that reference to such location is shown on the title page thereof.

(2) Each tariff page must show the name of the common carrier or conference for whose account the tariff is issued, the effective date, the page number, the FMC number of the tariff, etc., as illustrated by Exhibit No. 4 to this part.

(3) When the common carrier's tariff is a conference tariff, the common carrier shall ensure that the conference publishes the common carrier's tariff provisions in the conference tariff.

(f) To the extent applicable, all tariffs filed pursuant to this part shall be arranged in the following order:

> Title Page; Check Sheet (optional); Table of Contents; Participating Common Carrier Page; Surcharge and/or Arbitrary/Differential/ Outport Differential (or other identifying term) Section; Rules and Regulations Section; Index of Commodities and Classifications; Commodity Rate Section; Classification and Class Rate Section; and Open Rate Section.

§ 580.5 Tariff contents.

(a) The first page of every tariff shall be a title page which shall contain the following information (see Exhibit No. 1 to this part):

(1) The name of the common carrier, appropriately identified as a Non-Vessel-Operating Common Carrier or a Vessel-Operating Common Carrier, or the name of the conference. Tariffs filed pursuant to an agreement shall be further identified with the agreement number. A controlled common carrier subject to section 9 of the Act shall so identify itself under the common carrier name on the title page.

(2) An FMC tariff number assigned by the common carrier or conference. For example:

Smith Line Tariff FMC–1.

The first tariff filed by a common carrier or conference pursuant to this or any prior regulation shall be assigned the number FMC–1. Each tariff thereafter issued by the common carrier or conference shall be assigned the next, consecutive FMC number. Beneath the FMC tariff number shall be shown the number or numbers of any FMC tariff or tariffs cancelled by the issuance of such tariff. For example:

Smith Line Tariff FMC–14 cancels Smith Line Tariff FMC–5 and Smith Line Tariff FMC–9.

or

Smith Line Tariff FMC–14 cancels Smith Line Tariff FMC–12.

(3) When an individual common carrier, partnership or joint service operates under a trade name, the legal name or names of each individual common carrier shall be shown as well as the trade name. Alternatively, reference may be made to an internal tariff page where this information is shown.

(4)(i) A list of the ports/regions covered by the tariff or reference to an internal tariff page where such ports/regions are listed. In lieu of such listing of ports, a statement of the range of ports served will be accepted if any exclusion of a port within the range or any restriction applying at a port within the range is specifically stated.

(ii) Whenever tariff application is shown by identification of a range of ports in lieu of listing individual ports, such range of ports must be within a geographical area generally served by the common carrier(s) participating in the tariff.

(5) A statement showing the type of service offered by the common carrier(s), e.g., direct service, transshipment, etc. When transshipment service is indicated, reference shall be made to the page in the tariff describing such service.

(6) A statement showing the type of rates contained in the tariff. For example: local, proportional, through, class, commodity, overland common point, etc.

(7) A reference to other publications which in any manner govern the tariff. Alternatively, reference may be made on the title page to an internal page identifying such governing publications as prescribed in paragraph (c)(8) of this section.

(8) The date on which the tariff will become effective. Every tariff in which any provision is to become effective upon a date different from the general effective date of such tariff shall so indicate in substantially the following form:

> Effective: _____ (except as otherwise herein provided) or (except as provided in Item No. _____) or (except as provided on page _____).

(9) The name, title and address of the person issuing the tariff or, if the common carrier or conference has appointed a tariff filing agent pursuant to § 580.3(b), the name, title and address of the agent making such filing.

(10) An expiration date if the entire tariff publication is to expire on a specified date.

(11) The names of all participating common carriers in the tariff if more than one common carrier participates. Alternatively, reference may be made to an internal page on which are listed the names of all participating common carriers (see paragraphs (c)(2) and (c)(3) of this section).

(12) The subscription price of the tariff (and any major components thereof offered separately) or a statement that the entire tariff will be furnished without charge, accompanied by a reference to a tariff rule which clearly states where subscriptions may be obtained and the materials which will be furnished to subscribers.

(b) All pages after the title page shall be numbered beginning with "Original Page 1," "Original Page 2," etc. Each page as thereafter revised shall be a consecutively numbered revision of the same page in the form required by paragraphs (a)(6) and (a)(8) of § 580.10. (See Exhibit No. 4 to this part). For example:

> The 7th page in a tariff as originally filed would be titled "Original Page 7." The first revision of this page would be titled "First Revised Page 7 cancels Original page 7."

(c) The body of the tariff shall contain the following:

(1) A table of contents containing a full and complete statement of the exact locations where information in the tariff will be found. Such statement shall list all subjects in alphabetical order and shall show the page number and number of the item, rule or unit where such subject will be found.

(2) (i) The full legal name of each participating common carrier, appropriately identified as a Non-Vessel-Operating Common Carrier or Vessel-Operating Common Carrier and the address of its principal office. Where a joint service participates, the FMC number of the agreement authorizing the joint service shall also be shown.

(ii) Every common carrier shall publish a tariff provision to be effective upon filing which shall read substantially as follows (see Exhibit No. 2 to this part):

> (Name of company) has a policy against the payment of any rebate by the company or by any officer, employee, or agent thereof, which payment would be unlawful under the United States Shipping Act of 1984. Such policy has been certified to the Federal Maritime Commission in accordance with the Shipping Act of 1984 and the regulations of the Commission set forth in 46 CFR 582.

(iii) When the common carriers's tariff is a conference tariff, the common carrier shall ensure that the conference publishes the common carrier's tariff provision set forth in paragraph (c)(2)(ii) of this section in the conference tariff.

(3) All trade names, if any, under which service will be provided and the names of the common carrier or common carriers operating under each such trade name if not shown on the title page.

(4) A list of the ports or ranges of ports to and from which the tariff rates apply, if not shown on the title page, in conformity with paragraph (a)(4) of this section.

(5) A statement indicating the extent of any limitation or restriction if the application of any of the rates, charges, rules or regulations stated in the tariff are restricted to any particular port, pier, etc., or otherwise limited.

(6) A single, complete, alphabetically arranged index listing all commodities for which the tariff names rates, together with a reference to each item or page where a particular article is shown. If a rate item embraces two (2) or more commodities, each commodity shall be shown in the index. Class rate tariffs and tariffs containing both class and commodity rates shall contain, in addition to applicable item or page references, the ratings of commodities to which class rates apply. (See Exhibit No. 3 to this part). Such index may be omitted where rates on less than 100 commodities are included in the tariff. All articles generic to different species of the same commodity should be grouped together. For example: Paper, building; paper, printing; paper, wrapping.

(7) A full explanation of any symbols, reference marks or abbreviations used in the tariff. If such explanation does not appear on the page where the reference marks or symbols are used, such page shall refer to the page in the tariff where the explanation is given. The symbols shown in § 580.10(a)(7)(i) shall be used only for the purposes indicated therein.

(8) If governed in any manner by other publications, as may be permitted herein, a reference thereto substantially in the following form:

> This tariff is governed, except as otherwise provided herein, by Bill of Lading Tariff FMC No. _____ (or by Rules Tariff No. _____), etc.

Where such reference is fully made on the title page, reference elsewhere in the tariff is unnecessary. Governing publications must be on file with the Federal Maritime Commission.

(9) All rates applicable to the transportation of the articles or classes of articles named in the tariff. Rates shall be stated as required by § 580.6.

(10) Rules and regulations which in any way affect the application of the tariff.

(d) Specific tariff rules shall be published to govern each of the following subjects and shall be designated in all tariffs by the numbers and headings specified below. In the event that a specified rule does not apply to the service offered, the rule number and heading shall be published with a statement that the rule is not applicable. For example: "*Rule No. 15. Open Rates.* Not Applicable."

(1) *Scope.* A list of the ports or range of ports to and from which the tariff rates apply, if not shown on the title page, in conformity with paragraph (a)(4) of this section.

(2) *Application of rates.* A clear statement of all the services provided to the shipper and included in the transportation rates set forth therein.

(3) *Rate applicability rule.* A clear and definite statement of the time at which a rate becomes applicable to any given shipment.

(4) *Heavy-lift.*

(5) *Extra length.*

(6) *Minimum bill of lading charge(s).*

(7) *Payment of freight charges.*

(i) A clear statement of all requirements for the payment of freight charges.

(ii) Currency restrictions, if any, must be specified and the basis for determining the rates of currency exchange must be set forth.

(iii) If credit is extended to shippers, the rule must include the credit terms available and the conditions upon which credit is extended. When credit applications or agreements are required, specimens of such applications or agreements shall be published as part of this rule.

(8) *Specimen Bill(s) of Lading.* A specimen copy of any bill of lading, contract of affreightment or other document evidencing the transportation agreement applicable to the service offered shall be submitted with the tariff, unless a separate bill of lading tariff is on file as permitted by § 580.13(a). Such documents shall not contain provisions inconsistent with the rules and regulations published in any applicable tariff.

(9) *Freight forwarder compensation.* A statement describing the rate or rates of compensation to be paid to licensed ocean freight forwarders on United States export shipments in accordance with § 510.23(b) of this chapter.

(10) *Application of surcharge and/or arbitraries, differentials, outport differentials or other identifying term.* Tariffs imposing upon the same shipment more than one surcharge and/or arbitrary, expressed in percentage terms, shall also clearly state the manner in which the percentages shall be applied in computing the additional charges.

(11) *Minimum quantity rates.* Tariffs naming two or more rates for different quantities of commodities covered by the same description shall state:

> When two or more freight rates are named for carriage of goods of the same description over the same route and under similar conditions and the application is dependent upon the quantity of the goods shipped, the total freight charges assessed against the shipment shall not exceed the total charges computed for a larger quantity, if the rate noted alongside a qualification specifying a required minimum quantity (either weight or measurement per container or in containers), will be applicable to the contents of the container(s), and if the minimum set forth is met or exceeded. At the shipper's option, a quantity less than the minimum level may be freighted at the lower rate if the weight or measurement declared for rating purposes is increased to the minimum level.

(12) *Ad Valorem rates.* A statement specifying the exact method of computing the charge (e.g., shipper's declaration, invoice value, delivered value), and the additional liability, if any, assumed by the common carrier in consideration therefor.

(13) *Transshipment.* Tariffs providing for transshipment service pursuant to an ongoing agreement shall provide:

(i) The through rate;

(ii) The routings (origin, transshipment and destination ports); additional charges, if any (e.g., port arbitrary and/or additional transshipment charges); and participating carriers; and

(iii) A tariff provision substantially as follows:

> The rules, regulations, and rates in this tariff apply to all transshipment arrangements between the publishing carrier or carriers and the participating connecting or feeder carrier. Every participating connecting or feeder carrier, which is a party to transshipment arrangements, has agreed to observe the rules, regulations, rates, and routings established herein as evidenced by a connecting carrier agreement between the parties.

(14) [Reserved.]

(15) *Open rates.* A clear and complete explanation of the extent to which conference rates have been opened pursuant to paragraphs (l) and (m) of § 580.6. Any restriction or limitation on the right of participating common carriers to fix their own rate items, and the extent to which applicable rules and regulations of the conference tariff will continue to govern the rates filed by each individual line, shall also be stated.

(16) *Explosives or other dangerous articles.* A clear statement of all regulations governing the transportation of explosives, inflammable or corrosive material, or other dangerous articles, or a reference to a separate publication which contains such regulations.

(17) *Green salted hides.* A rule which requires that:

(i) The shipping weight for purposes of assessing transportation charges be either a scale weight or a scale weight minus a deduction which amount and method of computation are specified in said rule; and

(ii) The shipper furnishes the common carrier a weighing certificate or dock receipt from an inland common carrier for each shipment of green salted hides at or before the time the shipment is tendered for ocean shipment.

(18) *Returned cargo.* Tariffs offering the return shipment of refused, damaged or rejected shipments, or exhibits at trade fairs, shows or expositions, to port of origin at the rates assessed on the original movement when such rates are lower than prevailing rates, shall also provide that:

(i) The return of shipments be accomplished within a specific period not to exceed one year;

(ii) The return movement be made over the line of the same common carrier performing the original movement, except that in the case of a conference tariff, return may be made by any member line when the original shipment was carried by a conference member under the conference tariff; and

(iii) A copy of the original bill of lading showing the rate assessed be surrendered to the return common carrier.

(19) *Shippers requests, consultations and complaints.* Clear and complete instructions in accordance with the effective agreement's provisions, stating where and by what method shippers may file their requests and complaints and how they may engage in consultation under section 5(b)(6) of the Act, together with a sample of the rate request form if one is used or, in lieu thereof, a description of the information necessary for processing the request or complaint.

(20) *Overcharge Claims.*

(i) No tariff in the foreign commerce shall limit the filing of overcharge claims with a common carrier for private settlement to a period of less than three years after accrual of the cause of action nor shall the acceptance of any overcharge claim be conditioned upon the payment of a fee or charge.

(ii) No tariff in the foreign commerce shall require that overcharge claims based on alleged errors in weight, measurement or description of cargo be filed before the cargo has left the custody of the common carrier.

(iii) Tariffs shall contain a rule which states that shippers or consignees may file claims for the refund of freight overcharges resulting from errors in weight, measurement, cargo description or tariff application. This rule shall clearly indicate where and by what method such claims are to be filed with the common carrier and shall further advise that such claims may also be filed with the Federal Maritime Commission. At a minimum, tariffs shall contain the following provisions:

(A) Claims seeking the refund of freight overcharges may be filed in the form of a complaint with the Federal Maritime Commission, Washington, DC 20573, pursuant to section 11(g) of the Shipping Act of 1984. Such claims must be filed within three years of the date the cause of action accrued; and

(B) Claims for freight rate adjustments filed in writing will be acknowledged by the common carrier within twenty days of receipt by written notice to the claimant of the tariff provisions actually applied and the claimant's rights under the Act.

(e) Additional rules which affect the application of the tariff shall follow immediately the rules specified in paragraph (d) of this section and shall be numbered consecutively.

(f) Where a tariff rule affects only particular items or rates, the affected items or rates shall specifically refer to such rule.

(g) No rate tariff shall require reference to any other rate tariff for determination of any applicable rate, except that:

(1) Reference may be made to another tariff for terminal and accessorial charges;

(2) Returned cargo rates accompanied by the rule specified in paragraph (d)(18) of this section are permitted;

(3) Reference may be made to another tariff (not containing rates) for commodity lists or generic descriptions as provided in paragraphs (f) and (g) of § 580.6; and

(4) References may be made to another tariff (not containing rates) covering:

(i) Explosives, inflammable or corrosive materials, or other dangerous articles;

(ii) Bills of lading or contracts of affreightment;

(iii) Commodity classifications; and

(iv) Routing guides or other similar tariffs as provided in § 580.13.

§ 580.6 Statement of rates and charges.

(a) The application of all rates and charges shall be clear and definite and explicitly stated per 100 pounds, per cubic foot, per ton of 2,000 pounds, per ton of 2,240 pounds or some other expressly defined unit.

(b) All rates and charges shall be stated in a simple and systematic manner. Commodities and generic commodity groupings on which rates are stated shall be listed in alphabetical order. If published in the index, item numbers shall also be shown in the body of the tariff.

(c) Where rates are stated in amounts per package, the method of packing and specifications, showing size, measurement or weight of the packages to which such rates apply shall be shown.

(d) Where rates vary depending upon whether cargo is packed, crated, palletized, bundled, strapped, loose or otherwise prepared or delivered for shipment, there shall be a statement clearly and specifically governing the application of such rates. See Exhibit No. 4 to this part.

(e) Where rates and charges to or from designated ports are determined by the adding or subtracting of arbitraries or differentials to or from rates applicable at other ports, such application shall be clearly shown.

(f) A commodity item may, by use of a generic term, provide rates on a number of articles if such term contains reference to an item in the tariff which clearly defines the type of commodities contained in such generic term or which contains a complete list of such articles, or contains a reference to the FMC number of a separate tariff of the same common carrier or conference containing such definition or list of such articles.

Example: Packinghouse products as described in Item _____; or packinghouse products as described under heading "Packinghouse products" in FMC No. _____ or successive issues thereof.

(g) A separate tariff, not containing rates, may be filed by a common carrier or conference showing a list of the commodities on which rates published by reference to generic terms will apply; rate tariffs shall be made subject thereto as provided in paragraph (f) of this section.

(h) When commodity rates are established, the description of the commodity must be specific. Rates may not be applied to analogous articles.

(i) The rate section of a tariff may include a rate applicable to all commodities, or all commodities of a class, on which specific commodity rates are not stated in the tariff, to be called "cargo, n.o.s." (not otherwise specified), "general cargo" or other identifying name, or by broad generic heading such as "chemicals, n.o.s."

(j) A separate tariff naming rates on a group of related commodities may be published if such tariff contains all of the rates applicable to such commodities, which are published by the same common carrier or conference, to or from the same ports or points. When such tariffs are published, reference shall be made thereto in the tariff of general application for the same common carrier or conference, to or from the same ports or points.

(k)(1) Publication of rates which duplicate or conflict with the rates published in the same or any other tariff is prohibited.

(2) The publication of a statement in a tariff to the effect that the rates published therein take precedence over the rates published in some

other tariff, or that the rates published in some other tariff take precedence over or alternate with rates published therein, is prohibited.

(3) Where a common carrier or conference publishes both commodity and class rates, a statement shall be published in the tariff clearly indicating which of the two rates shall apply on the commodity or commodities on which both class rates and commodity rates are published.

(l) Where a conference opens any or all rates, each tariff item so opened shall be amended to indicate the word "open" in place of the previously stated rates and shall indicate a reference to a published rule in the tariff clearly defining the word "open" as used in each tariff and indicate where the rates of the individual conference member lines on such items will be found.

(m)(1) Where a conference opens rates pursuant to paragraph (1) of this section, an individual conference member shall not charge rates on the open item unless and until the individual member files a proper tariff rate covering such item as required by these rules. This may be accomplished by the individual common carrier (or its tariff agent) filing a complete tariff pursuant to this part, or by the conference (or its tariff agent) filing a separate supplement at the end of the conference tariff indicating the rates which will be charged by each individual common carrier and the governing rules and provisions of the conference tariff applicable to each common carrier. Separate open rate tariffs may also be published by a conference (or its tariff agent). When conference members publish their open rates in a separate tariff, such tariffs must reference, on the title page, the conference tariff in which the open rated condition is reflected.

(2) (i) Controlled common carriers filing open rates are subject to the 30-day controlled common carrier notice requirement of § 580.10(a)(3)(i), except when special permission is granted by the Commission under § 580.15.

(ii) Notwithstanding paragraph (m)(2)(i) of this section, a conference may, on less than 30 days' notice, file reduced rates on behalf of controlled common carrier members for open-rated commodities:

(A) At or above the minimum level set by the conference; or

(B) At or above the level set by a member of the conference that has not been determined by the Commission to be a controlled common carrier subject to section 9 of the Act, in the trade involved.

(n) Special or emergency rates, or rates conditioned upon an expiration date or other factor, shall be shown under the same commodity item, generic heading or class, in the same place in the tariff as the ordinarily applicable rates. (See Exhibit No. 4 to this part.)

(1) If only a portion of particular rates or other provisions will expire with a special date, a notation to that effect shall clearly be shown in connection with such items as indicated in Exhibit No. 4 to this part.

(2) Project rates may be placed in a special section of the tariff if the Table of Contents or Commodity Index contains a specific reference to "Project Rates."

(o) All rate pages shall be filed in the form and manner shown in Exhibit Nos. 4 and 5 to this part.

(p) The number of rate columns may vary as required to state rates to one or more ports, port groupings or port ranges. The width of all columns in the rate block section of tariff rate pages may vary as required. (See Exhibit No. 5 to this part.)

§ 580.7 Filing of service contracts and availability of essential terms.

(a) *Definitions.* The following definitions shall apply for purposes of this section:

(1) *Contract party* means a party signing a service contract as shipper, shippers' association, or ocean common carrier and any other named entity associated with such party entitled to receive or authorized to offer services under the contract, except that in the case of a shippers' association, individual members need not be named in the contract.

(2) *Geographic area* means the general location from which or to which cargo subject to a service contract will move in intermodal service.

(3) *Port range* means those ports in the countries of loading or unloading of the contract cargo that are regularly served by the contracting carrier or conference, as specified in the tariff applicable to the service in which the contract is to be employed, even if the contract itself contemplates use of but a single port within that range.

(4) *Service contract* means a contract between a shipper or a shippers' association and an ocean common carrier or conference in which the shipper makes a commitment to provide a certain minimum quantity of cargo or freight revenue over a fixed time period, and the ocean common carrier or conference commits to a certain rate or rate schedule as well as a defined service level—such as, assured space, transit time, port rotation, or similar service features. The contract may also specify provisions in the event of nonperformance on the part of either party.

(5) *Shipper* means an owner or person for whose account the ocean transportation of cargo is provided or the person to whom delivery is to be made.

(6) *Shippers' association* means a group of shippers that consolidates or distributes freight on a nonprofit basis for the members of the group in order to secure carload, truckload, or other volume rates or service contracts.

(b) *Contract filing requirements.*

(1) Except for contracts relating to bulk cargo, forest products, recycled metal scrap, waste paper, or paper waste, every ocean common carrier and conference that enters into a service contract with a shipper or shippers' association shall file with the Director, Bureau of Tariffs, as specified

in paragraph (e) of this section, a true and complete copy of each contract prior to its effective date.

(2) Service contracts involving the exempted commodities listed in paragraph (b)(1) of this section may be filed pursuant to this section at the option of the contract parties. Upon filing, such contracts will be subject to the same requirements as those contracts involving non-exempt commodities.

(3) Service contracts shall clearly state:

(i) The contract parties;

(ii) The essential terms, except that the origin and destination of cargo moving pursuant to the contract need not be stated in the form of "port ranges" or "geographic areas" but shall reflect the actual locations agreed to by the contract parties;

(iii) A unique service contract number bearing the prefix "SC";

(iv) The FMC number of the governing essential terms publication which contains the carrier's or conference's statement of essential terms;

(v) A specific reference to the essential terms number ("ET No. _____") in the governing publication which contains the summary of the essential terms of the contract as provided in paragraph (h) of this section; and

(vi) The shipment records which will be maintained to support the contract.

(c) *Confidentiality.*

(1) All service contracts filed with the Commission will, to the full extent permitted by law, be held in confidence.

(2) Amendments to non-essential terms of a service contract will be accorded similar confidential treatment.

(d) *Modification and termination of contracts.*

(1) The essential terms of a service contract cannot be modified during the duration of the contract.

(2) Service contracts may be terminated by mutual agreement of the parties.

(3) In the event of a contract termination as provided in paragraph (d)(2) of this section, if the minimum quantity required by the contract has not been met, the cargo previously carried under the contract must be rerated according to the otherwise applicable tariff provisions of the carrier or conference in effect at the time of such shipments, unless the contract itself provides an alternative procedure for dealing with such a situation.

(e) *Transmittal of service contracts.*

Service contracts are to be filed in single copy contained in double envelopes which contain no other material. The outer envelope is to be addressed to the Director, Bureau of Tariffs, Federal Maritime Commission, Washington, D.C. 20573. The inner envelope is to be sealed, contain only the executed contract(s) and shall state: "This Envelope Contains a Con-

fidential Service Contract." The top of each page of a filed service contract shall be stamped "Confidential."

(f) *Contract implementation, return and rejection.*

(1) Performance under a service contract may begin without prior Commission authorization, on the date the service contract and statement of essential terms are on file with the Commission.

(2) (i) Within 15 days of filing of the contract and statement of essential terms, the Commission may return to the contract parties a service contract or statement of essential terms that does not conform to the requirements of paragraph (b) or paragraph (g) of this section. The Commission shall provide the contract parties a written explanation of the reasons for such return. The contract parties shall have 15 days from the date of return to refile the contract or statement of essential terms.

(ii) Within 15 days of refiling, the Commission may reject a refiled contract or statement of essential terms that does not conform to the requirements of paragraph (b) or paragraph (g) of this section.

(3)(i) If a returned service contract or statement of essential terms is not refiled, performance under the service contract shall be unlawful after the 15-day refiling period has expired.

(ii) If refiled and subsequently rejected, performance under the service contract shall be unlawful after the contract parties receive notice of the rejection.

(4) If performance under the service contract becomes unlawful by operation of this paragraph, all services theretofore performed under the service contract shall be rerated in accordance with the otherwise applicable tariff provisions for such services.

(5) The minimum 30-day period of availability of essential terms required by paragraph (g) of this section shall be suspended upon return of a service contract or statement of essential terms and a new 30-day period shall commence upon refiling thereof.

(g) *Availability of essential terms.*

(1)(i) A concise statement of the essential terms of each service contract shall be filed with the Commission and made available to the general public in tariff format pursuant to the requirements of paragraph (h) of this section.

(ii) The essential terms of each service contract must be made available to all shippers or shippers' associations similarly situated under the same terms and conditions for a specified period of no less than 30 days from the date of filing of the concise statement of essential terms.

(2) The essential terms shall include, where applicable, the following:

(i) The origin and destination port ranges in the case of port-to-port movements, and the origin and destination geographic areas in the case of through intermodal movements;

(ii) The commodity or commodities involved;

(iii) The minimum quantity of cargo or freight revenue necessary to obtain the rate or rate schedule(s);

(iv) The contract rate, rates or rate schedule(s), including any additional or other charges (viz. surcharges; terminal handling charges, etc.) that apply; provisions specifying methods or retroactive rate adjustments based upon experienced costs; and any and all conditions and terms of service or operation or concessions which in any way affect such rates or charges;

(v) The term of the contract;

(vi) Carrier or conference service commitments;

(vii) Liquidated damages for nonperformance, if any, or where the volume requirement may not be met during the contract period in situations other than those described in paragraph (g)(2)(viii) of this section, the rate, charge, or rate basis which will be applied; and

(viii) A clear description of any circumstances which will permit:

(A) A reduction in the quantity of cargo or amount of revenues required under the contract;

(B) An extension of the contract term without any change in the contract rate or rate schedule;

(C) A discontinuance of the contract; or

(D) Any other deviation from the terms of the contract.

(h) *Form and filing of essential terms.*

(1) Each carrier or conference shall summarize the essential terms of service contracts it has executed in a governing publication on file with the Commission.

(2) (i) The form and manner requirements applicable to governing tariffs as set forth in this part shall apply to the essential terms publication.

(ii) Such publication shall include an alphabetical index of the commodities covered by the service contracts.

(3) All essential terms filings shall be printed in black on yellow paper.

(4) The essential terms of a service contract or contracts shall be identified with an essential terms number bearing the prefix "ET No." The "ET No." shall be located on the top of each page used to summarize the essential terms of a service contract or contracts.

(5) (i) The essential terms publication shall contain on its title page or in a rule of such publication reference to the carrier's or conference's tariff(s) of general applicability. The tariff of general applicability is the tariff which would apply in the absence of a service contract.

(ii) Every tariff of general applicability shall bear a reference to the FMC number of a carrier's or conference's governing essential terms publication.

(i) *Transmittal of essential terms publications.*

At the same time that a service contract is filed with the Commission, publications containing the essential terms of service contracts shall be transmitted to the Commission with an accompanying transmittal letter in an envelope which contains only matter relating to essential terms. The

envelope and the inside address on the transmittal letter are to be addressed to the "Director, Bureau of Tariffs, Federal Maritime Commission, Washington, D.C. 20573."

(j) *Recordkeeping.*

Every common carrier or conference shall maintain contract shipment records for a period of five years from the termination of each contract.

(k) *Submission of modifications.*

Any time a service contract is modified, terminated, or extended, a notice to that effect shall be filed with the Commission.

§ 580.8 Tariffs containing through rates for through transportation.

(a) *Definitions.* The following definitions shall apply for purposes of this section:

(1) *Through rate* means the single amount charged by a common carrier in connection with through transportation.

(2) *Through transportation* means continuous transportation between points of origin and destination, either or both of which lie beyond port terminal areas, for which a through rate is assessed and which is offered or performed by one or more carriers, at least one of which is a common carrier, between a United States point or port and a foreign point or port.

(b) *Filing requirements.* Every common carrier and conference subject to the Act, which establishes through rates for through transportation shall file tariffs which state all such rates and related charges, rules, regulations, privileges or facilities, granted or allowed. Through rates may be filed in separate tariff publications or as a part of a port-to-port tariff. Such tariffs shall be filed and maintained in the manner set out in the Act and in accordance with the rules of this part. Through rate tariffs shall be filed in the name of the common carrier or conference subject to the Act. Through rate tariffs shall be initially filed on thirty days' notice as provided by sections 8 and 9 of the Act, unless a shorter notice is permitted pursuant to special permission. Amendments to tariffs containing through rates which provide for the addition of new inland points may, however, become effective upon publication and filing. Such tariffs shall contain the following provisions:

(1) The title page shall identify the tariff as a "through rate" tariff and shall also provide a brief description of the modes of services covered by the tariff (e.g., rail/motor/ocean services) and the trade area covered by the tariff. The trade area shall be described on the title page by naming the countries to, from or between which the through rates apply and the port(s) or range(s) of ports via which through transportation will be performed.

(2) Rule No. 1 of each through rate tariff shall provide:

(i) A clear description of the points, regions, or ports to, from or between which the rates apply. Each point, region or port shall be described by

its commonly used geographic name. The utilization of U.S. postal ZIP codes is permitted; and

(ii) The name of the port or ports via which through shipments will be moved; or a clear description of the range or ranges of ports via which through shipments will be moved.

(3) A contract of affreightment clearly setting forth the responsibility for through transportation which is consistent with the holding out provided by the application of the rates and conditions of the tariff.

(c) *Multiple tariffs.* Common carriers and conferences which publish more than one through rate tariff from, to or between the same points, ports or regions, based on mode of service, description of commodities, etc., shall provide in Rule No. 1 of each respective tariff a cross-reference to the FMC number and description of the application of such other tariff(s).

§ 580.9 Terminal rules, charges and allowances; free time allowed at New York.

(a) Every tariff filed pursuant to this part shall state separately all terminal or other charges, privileges or facilities under the control of the common carrier or conference which are granted or allowed to shippers.

(b) Wherever a tariff includes charges for terminal services, canal tolls or additional charges not under the control of the common carrier or conference, which merely acts as a collection agent for the charges, and the agency making such charges to the common carrier increases the charges without notice to the common carrier or conference, such charges may be increased in the common carrier or conference tariff without being subject to the 30-day advance filing requirement of this part or separately stated on the bill of lading.

(c) Every tariff naming rates on import traffic shipped through the port of New York, or to a range of ports which includes New York, shall contain a rule in compliance with Part 525 of this chapter.

§ 580.10 Amendments to tariffs; rejection.

(a) *Tariff amendments.*

(1) For the purposes of this part, "amendments" means all changes in, additions to, or deletions from a tariff.

(2) Amendments which provide for new or initial rates, or amendments which provide for changes in rates, charges, rules or other provisions resulting in an increase in cost to the shipper, shall be published and filed to become effective not earlier than 30 days after the date of publication and filing, unless special permission to become effective on less than said 30 days' notice has been granted by the Commission pursuant to § 580.15.

(3) (i) Amendments which provide for changes in rates, charges, rules, regulations or other provisions resulting in a decrease in cost to the shipper, or amendments which result in no change in cost to the shipper, may become effective upon publication and filing, except that all changes to controlled common carrier tariffs shall not become effective earlier than 30 days from the date of filing unless special permission has been granted

by the Commission under § 580.15, or the change affects tariff matters which are the subject of a suspension proceeding, in which case § 580.11(g) shall apply.

(ii) Conferences may file on behalf of their controlled common carrier members lower independent-action rates on less than 30 days' notice, subject to the requirements of their basic agreements and subject to such rates being filed at or above the level set by a member of the conference that has not been determined by the Commission to be a controlled common carrier subject to section 9 of the Act, in the trade involved.

(4) An amendment containing a rate on a specific commodity not previously named in a tariff which is a reduction or no change in cost to the shipper may become effective upon publication and filing, if:

(i) The tariff contains a "cargo, n.o.s." or similar general cargo rate which would otherwise be applicable to the specific commodity;

(ii) The specific commodity rate is equal to or lower than the previously applicable general cargo rate; and

(iii) The common carrier is not a controlled common carrier which has not received special permission authorizing the amendment.

(5) An amendment which deletes a specific commodity and rate applicable thereto from a tariff, thereby resulting in the application of a higher "Cargo, n.o.s." or similar general cargo rate, is a rate increase and shall be published and filed to become effective not earlier than 30 days after the date of filing in the absence of special permission for an earlier effective date pursuant to § 580.15.

(6) Looseleaf tariffs shall be amended by reprinting the entire page upon which any modification is made. An amended tariff page shall be designated in the upper right-hand corner as a "revised page" in the manner illustrated by Exhibit No. 4 to this part. For example:

First revised page 1;
or
First revised page 21.

(7) (i) The revised page filed to accomplish a tariff amendment shall reprint the page to be replaced in its entirety, changing only the matter on the page which is modified. Changes in existing rates, charges, classifications, rules or other provisions accomplished by an amendment shall be indicated on the revised page by the following uniform symbols:

(R) To denote a reduction.

(A) To denote an increase.

(C) To denote changes in wording which result in neither an increase nor a decrease in charges.

(D) To denote a deletion.

(E) To denote an exception to a general change.

(N) To denote reissued matter.

(I) To denote new or initial matter.

(K) To denote a rate or charge that is filed by a controlled common carrier member of a conference under independent action.

(ii) An explanation of such symbols shall be set forth in the tariff as required by § 580.5(c)(7).

(8) Each revised tariff page shall cancel the previously issued page upon which a change is made. The previous page being cancelled shall be indicated immediately under the designation of the new revised page number as illustrated by Exhibit No. 4 to this part. For example:

First revised page 1 cancels original page 1;

or

First revised page 21 cancels fourth revised page 21.

All matter on a cancelled page which is not being changed shall be reissued on the revised page as it appeared on the page being cancelled.

(9) Each revised page shall, in the upper right-hand corner, state the effective date of the changes made on that page. Such effective date shall be subject to the requirements of sections 8 and 9 of the Act and of this section. Revised pages may also state the issue date.

(10) When a revised page cancelling a previous page deletes any matter contained in the previous page, the deletion shall be indicated by the symbol "(D)" and any other symbol under paragraph (a)(7)(i) of this section applicable to the effect of the deletion upon the common carrier's rates or charges.

(11) Every tariff amendment effective upon less than statutory notice pursuant to special permission granted by the Commission, shall show in connection with such change the notation required by § 580.15(f).

(12) Increased rates brought forward from a previously filed page prior to their effective date, shall be designated with the symbol "(N)" as "reissued" and state their original effective date.

(13) If, on account of expansion of matter of any page, it becomes necessary to add an additional page in order to accommodate said new matter, such additional page (except when it follows the final page) shall be given the same number as the previous page with a letter suffix unless all subsequent pages are reissued and renumbered. For example:

Original Page 4–A, Original Page 4–B, etc.

If it is necessary to change matter on Original Page 4–A it may be done by issuing First Revised Page 4–A which shall indicate the cancellation of Original Page 4–A.

(14) When a revised page deletes rates, rules or other provisions previously published on the page which it cancels and such rates, rules or provisions are published on a different page, the revised page shall make a specific reference to the page on which the rates, rules or provisions will be found and the page to which reference is made shall contain

the following notation in connection with such rates, rules or other provisions:

> For (here insert rates, rules or other provisions in question) in effect prior to the effective date hereof see page _____.

Subsequently revised pages of the same number shall omit this notation insofar as this particular tariff matter is concerned.

(b) [Reserved]

(c) [Reserved]

(d) *Rejection of tariff amendments or other tariff publications.*

(1) Any amendment (or other tariff publication) submitted for filing which fails in any respect to conform with the Act, or with the provisions of this part, is subject to rejection or partial rejection. When tariff matter is rejected, either in whole or in part, the Commission, acting through a designated official, will inform the person tendering the material for filing of the rejection by telegram, cablegram or letter.

(2) Upon receipt of notice of a rejection, the filing party shall immediately remove such rejected material from its effective tariff and immediately notify all subscribers to affected tariffs that the rejected material is void.

(3) The number assigned to an amendment (or other tariff publication) which has been rejected may not be used again. The rejected material may not be referred to any subsequent amendment (or other tariff publication) in any manner whatsoever, except that a notation shall appear at the bottom of any new tariff matter issued to replace rejected matter which reads substantially as follows:

> Issued in lieu of _____ Page No. _____ rejected by the Federal Maritime Commission.

§ 580.11 Supplements to tariffs.

(a) Supplements to tariffs may be filed only to accomplish the following:

(1) To cancel a tariff in whole or in part.

(2) To provide for a general rate decrease applicable to all, or substantially all, the commodities listed in a tariff.

(3) To provide for a general rate increase applicable to all, or substantially all, the commodities listed in a tariff.

(4) To indicate seasonal discontinuance, temporary suspension or reinstitution of service covered by a tariff.

(5) To provide for change in name of the publishing common carrier or its tariff agent.

(6) To indicate controlled common carrier rates which have been suspended by the Commission.

(b) Supplements filed pursuant to paragraphs (a)(2) and (a)(3) of this section which do not change the rates applicable to all listed commodities shall bear one of the following notations:

(1) The general rate increase/decrease provided for on this page applies to all commodities stated herein except the following (here list the excepted commodities or commodity item number); or
(2) The general rate increase/decrease provided for on this page applies to all commodities stated herein except those noted on page _____.

(c) General rate change supplements (paragraphs (a)(2) and (a)(3) of this section) shall bear an expiration date that coincides with the date the changes will be reflected in the rates and charges in the tariff. Such date shall not be more than 90 days after the date of filing. No more than one such supplement may be in effect at any time.

(d) Additional supplements to other than looseleaf tariffs shall be filed as provided by any special permission authority granted by the Commission pursuant to §§ 580.4(d) and 580.15.

(e) Supplements shall be numbered consecutively on the upper right-hand corner of each page. For example:

Supplement No. 1 to FMC Tariff No. _____

(f) General rate increase/decrease supplements filed by controlled common carriers are subject to the 30-day notice requirements of § 580.10, unless special permission has been granted pursuant to § 580.15 or the change affects tariff matter which is the subject of a suspension proceeding, in which case § 580.11(g) shall apply.

(g) *Treatment of suspended tariff matter (controlled common carriers).*

(1) Tariff matter filed by a controlled common carrier may be suspended at any time before its effective date. Tariff matter already in effect may be suspended upon issuance of a show cause order on not less than 60 days' notice to the common carrier. In either instance, the suspension period shall not exceed 180 days.

(2) Upon receipt of a suspension order the controlled common carrier shall immediately file a supplement which:

(i) Contains the specific rates, charges, classifications or rules suspended;

(ii) Cites the date upon which the suspension becomes effective; and

(iii) States that all use and application of the suspended tariff matter is deferred for the period specified in the suspension order.

(3) Controlled common carrier tariff matter filed to become effective during a suspension period in lieu of the suspended matter may become effective immediately upon filing or upon the effective date of the suspension, whichever is later. In determining whether to reject replacement rates, the Commission will consider whether such rates result in total charges (e.g., rate plus applicable surcharges) that are lower than the lowest comparable charges effective for a U.S.-flag or reciprocal-flag common carrier serving the same trade.

(i) The filing controlled common carrier shall identify the specific U.S.-flag or reciprocal-flag common carrier's rates, charges, classifications or rules resulting in total charges which equal or are lower than its own.

(ii) All replacement filings shall state on the appropriate tariff page the following:

Filed pursuant to 46 U.S.C. app. 1708(d) and 46 CFR 580.11(g).

§ 580.12 Time/Volume Rates.

(a) *Definition.* "Time/volume rate", for the purposes of this section, means a rate published in a tariff which is conditional upon receipt of a specified aggregate volume of cargo or aggregate freight revenue over a specified period of time.

(b) *General requirements.*

(1) Time/volume rates may be offered by common carriers or conferences. All rates, charges, classifications, rules and practices concerning time/volume rates must be published in an applicable tariff on file with the Commission. The time/volume rate offering must identify the shipment records which will be maintained to support the rate.

(2) Once a time/volume rate is accepted by one shipper, it shall remain in effect for the time specified, without amendment.

(3) Any shipper utilizing a time/volume rate must give notice to the offering carrier or conference of its intention to use such a rate prior to tendering any shipments under such an arrangement. Notice may be accomplished by any effective method deemed appropriate by the offering carrier or conference and set forth in the applicable tariff.

(4) Shipper notices and shipment records supporting a time/volume rate shall be maintained by any offering carrier or conference for at least five years after any shipper's use of a time/volume rate has ended.

(c) *Continuation of contracts.*

Any contract with respect to a time/volume rate entered into prior to June 18, 1984, pursuant to former § 536.7, and in effect on that date, shall be permitted to remain in effect for the duration of the term specified in the contract or until June 17, 1985, whichever occurs first.

§ 580.13 Governing tariffs.

(a) If it is undesirable or impractical to include tariff rules or bills of lading/contracts of affreightment in a rate tariff as required by paragraphs (c)(10) and (d)(8) of § 580.5, such materials may be separately published and filed as a "rules tariff" and/or "bill of lading tariff." Classifications of freight and similar tariff matter may also be published and filed as separate "governing tariffs." Rate tariffs affected by such governing publications shall be made expressly subject thereto by the inclusion of a reference in substantially the following form:

Except as otherwise provided, this tariff is governed by (insert type of tariff) FMC No. _____.

(b) No rate tariff shall refer to or be governed by another rate tariff.

(c) Tariffs naming rates for the transportation of explosives, inflammable or corrosive material, or other dangerous articles, shall contain (as required by § 580.5(d)(16)) the rules and regulations issued by the common carrier or conference governing the transportation of such articles or reference to a separate publication, commercial or governmental, where such regulations are available to the general public.

§ 580.14 Transfer of operations, transfer of control, changes in common carrier name and changes in conference membership.

(a) Whenever a common carrier with an individual tariff on file changes its name or transfers operating control to another person, the person who will thereafter operate the common carrier service shall make appropriate tariff filings to indicate the change in name. Subsequent amendments to such tariffs shall be in the name of the new common carrier.

(b) Whenever the name of a common carrier which participates in a conference is changed, the conference shall file an appropriate amendment to its tariff indicating the participating common carrier's new name.

(c) Whenever the operation, control or ownership of a common carrier is transferred resulting in a majority portion of the interest of that common carrier being owned or controlled in any manner by a government under whose registry the vessels of the common carrier are operated, the common carrier shall immediately notify the Commission in writing of the details of the change.

§ 580.15 Applications for special permission.

(a)(1) Section 8(d) of the Act authorizes the Commission, in its discretion and for good cause shown, to permit increases in rates or the issuance of new or initial rates on less than statutory notice. Section 9(c) of the Act authorizes the Commission to permit a controlled common carrier's rates, charges, classifications, rules or regulations to become effective on less than 30 day's notice. The Commission may also in its discretion and for good cause shown, permit departures from the requirements of this part. The Commission will grant such permission only in cases where merit is demonstrated.

(2) Typographical and/or clerical errors constitute good cause for the exercise of special permission authority but every application based thereon must plainly specify the error and present clear evidence of its existence, together with a full statement of the attending circumstances, and shall be filed with reasonable promptness after issuance of the effective tariff publication.

(b) Application for special permission to establish rate increases or decreases on less than statutory notice or for waiver of the provisions of this part, shall be made by the common carrier, conference or agent that holds authorization to file the tariff publication. Such applications shall be accompanied by a filing fee of $90.

(c) Application for special permission shall be made only by cable, telegram or letter except that in emergency situations, application may be made by telephone if the telephone communication is promptly followed by a cable, telex or letter and the filing fee of $90.

(d)(1) If the authority granted by special permission is used, it must be used in its entirety and in the manner set forth by the Commission.

(2) If the exact authority granted by the special permission is not used, and more, less or different authority is desired, a new application complying with the requirements of this part in all respects and referring to the previous special permission must be filed.

(e) Applications for special permission shall contain the following information:

(1) The name of the conference or carrier.

(2) The FMC number and description of the specific tariff involved.

(3) The rate, commodity, rules, etc. (related to the application), and the special circumstances which the applicant believes constitute good cause to depart from the requirements of this part or to warrant a tariff change upon less than the statutory notice period.

(f) Every tariff or tariff amendment filed pursuant to special permission granted by the Commission shall contain the following notation:

> Issued under authority of Federal Maritime Commission Special Permission No. _____.

The filing common carrier(s) shall fill in the blank with the special permission letter and number assigned by the Commission. For example: No. F–1212 or No. CC–1212.

§ 580.16 Loyalty contracts.

(a) A sample of any loyalty contract, as defined in this part, must be filed in the applicable tariff together with rules which set forth the scope and application of the contract system.

(b) The use of any sample loyalty contract and applicable rules filed for inclusion in a tariff under paragraph (a) of this section shall be presumed to be "in conformity with the antitrust laws," within the meaning of section 10(b)(9) of the Act, if such contract makes reference to a Business Review Letter, issued pursuant to 28 CFR § 50.6, indicating no objection to the use of that contract.

§ 580.91 OMB control numbers assigned pursuant to the Paperwork Reduction Act.

This section displays the control numbers assigned to information collection requirements of the Commission in this part by the Office of Management and Budget pursuant to the Paperwork Reduction Act of 1980, Pub. L. 96–511. The Commission intends that this section comply with the requirements of section 3507(f) of the Paperwork Reduction Act, which requires that agencies display a current control number assigned by the

Director of the Office of Management and Budget [OMB] for each agency information collection requirement:

Section	Current OMB Control No.
580.3	3072–0009
580.7(f)	3072–0044
580.8 through 580.15	3072–0009

EXHIBIT NO. 1 TO PART 580

Title Page (Front) Format
(See § 580.5(a))

ORIGINAL TITLE PAGE
TO
FMC NO. 1

EFFECTIVE DATE: JANUARY 1, 1985

CARLETON STEAMSHIP LINE

A VESSEL OPERATING COMMON CARRIER

FREIGHT TARIFF NO. 1

NAMING
CLASS AND COMMODITY RATES
AND
RULES AND REGULATIONS

GOVERNING THE TRANSPORTATION OF
GENERAL COMMODITIES
VIA
DIRECT/TRANSSHIPMENT SERVICE
(SEE PAGE 8)

FROM
U. S. PACIFIC COAST PORTS
(AS SPECIFIED IN RULE 1)
TO
PORTS IN JAPAN AND KOREA
(AS SPECIFIED IN RULE 1)

FOR REFERENCE TO GOVERNING PUBLICATIONS, SEE PAGE 11.

FOR LIST OF PARTICIPATING COMMON CARRIERS, SEE PAGE 4.

SUBSCRIPTION PRICE: U. S. $200.00 PER CALENDAR YEAR OR FRACTION THEREOF, INCLUDING ALL SUPPLEMENTARY MATTER AND REVISIONS THERETO. SEE RULE NO. 23.

ISSUED BY:

CARLETON B. JOHANSEN
ISSUING OFFICER
6402 BRYAN STREET
BUCKLER, CALIFORNIA 94199

EXHIBIT NO. 2 TO PART 580

Title Page (Reverse) Format
(See §§ 580.4(a) and 580.5(c)(2))

ANTI-REBATING POLICY

Carleton Steamship Line has a policy against the payment of any rebate by the company or any officer, employee, or agent thereof, which payment would be unlawful under the United States Shipping Act of 1984. Such policy has been certified to the Federal Maritime Commission in accordance with the Shipping Act of 1984 and the regulations of the Commission set forth in 46 CFR 582.

EXHIBIT NO. 3 TO PART 580

Class Tariff or Class and Commodity Tariff Index
(See § 580.5(c)(6))

CARLETON STEAMSHIP LINE FREIGHT TARIFF NO. 1	FMC NO.	ORIG/REV	PAGE
	FMC NO. 1	1st Rev.	28
		CANCELS	PAGE
		Original	28
FROM: U. S. PACIFIC COAST PORTS		EFFECTIVE DATE:	
TO : PORTS IN JAPAN AND KOREA		January 3, 1985	

COMMODITY AND/OR CLASS RATE INDEX

Commodity	Class or Item Number	Commodity	Class or Item Number
Abrasives.....	5	Implements, Agricultural....	1000
Acids.....	1	Iron or steel articles, viz:	
Agricultural Implements...	1000	Cable, rope and strand.....	2400
		Pipes and tubes.....	100
		Structural, N.O.S.....	85
		Washers.....	1315

NOTE: Where a tariff publishes both class and commodity rates, different numerical series must be used to differentiate between item numbers and class rating numbers. For example, as shown above, the class ratings are numbered from 1 to 100 and the commodity item numbers series begin with 1000.

EXHIBIT NO. 4 TO PART 580

Single Level of Rates, Packed/Unpacked Rates,
Special Rates, Emergency Rates and Valuation Rates
(See §§ 580.4(c)(2); 580.5(b); 580.6(d); 580.6(e); 580.6(e) and 580.10(a))

CARLETON STEAMSHIP LINE FREIGHT TARIFF NO. 1	FMC NO. FMC NO. 1	ORIG/REV 2nd Rev. CANCELS 1st Rev.	PAGE 33 PAGE 33
FROM: U. S. PACIFIC COAST PORTS TO : PORTS IN JAPAN AND KOREA		EFFECTIVE DATE:	
Except as otherwise provided herein, rates apply per ton of 1000 Kilos (W) or 1 Cubic Metre (M), whichever produces the greater revenue.		January 6, 1985	

Commodity Description and Packaging	Rate Basis	Rates in U.S. Dollars		Item No.
		Japan	Korea	
Fans, electric	W/M	76.00	—	3100-00
Fish, frozen, in bulk	W	230.00	237.00	3110-90
Iron and steel:				3600-10
Turnbuckles	W	29.50	32.00	
Emergency rate effective 1-15-85 to 3-15-85(R)1/	W	26.00	28.00	
Lime, hydrated, packed	W	29.25	34.75	4125-40
Medicines, patent preparations:				5000-10
Values up to $200 per 40 CFT	M	34.00	37.00	
Values exceeding $200 but not exceeding $500 per 40 CFT	M	52.75	58.00	
Values exceeding $500 per 40 CFT	M	67.75	74.00	
Tractors:				7127-05
Unpacked	W/M	145.00	134.00	
Packed	W/M	140.00	149.00	
Zinc, viz:				9259-00
Bars, circles, ingots, pigs, plates, sheets and slabs	2240 lbs or 40 CFT	—	49.00	
Ingots: Special rate effective 1-15-85 expiring 3-15-85(R)1/	2240 lbs	—	47.00	
Ingots: Special rate effective 3-15-85 expiring 6-15-85(R)1/	2240 lbs	—	48.00	

1/Symbols denoting a change, as set forth in § 580.10(a)(7), must be shown in the commodity description column either to the left or right of the commodity.
NOTE: All tariff pages, except the title page and reverse side of the title page, shall be filed in the form and manner as prescribed above the rate block on this page.

EXHIBIT NO. 5 TO PART 580

Class Rate Tariff or Class Rate
Section of Class and Commodity Tariff
(See §§ 580.6(o) and 580.6(p))

CARLETON STEAMSHIP LINE FREIGHT TARIFF NO. 1	FMC NO.	ORIG/REV	PAGE
		ORIGINAL	35
	FMC NO. 1	CANCELS	PAGE
FROM: U. S. PACIFIC COAST PORTS			
TO : PORTS IN JAPAN AND KOREA		EFFECTIVE DATE:	
CLASS RATES		January 1, 1985	

Except as otherwise provided, rates apply per ton of 2240 lbs. or 40 CFT whichever produces the greater revenue.	CLASS			
PORTS TO WHICH RATES APPLY	5	10	15	20
Ports A, B, C	$50.00	$82.50	$95.00	$102.00
Ports D, E, F, G	47.00	56.30	84.00	90.00
Ports H, I	37.75	53.00	66.00	78.00

FEDERAL MARITIME COMMISSION

[46 CFR PARTS 585 AND 587]

DOCKET NO. 84–22 (FOR PART 587)

ACTIONS TO ADDRESS CONDITIONS UNFAVORABLE TO SHIPPING IN THE FOREIGN TRADE OF THE UNITED STATES AND CONDITIONS UNDULY IMPAIRING ACCESS OF U.S.-FLAG VESSELS TO OCEAN TRADE BETWEEN FOREIGN PORTS

November 9, 1984

ACTION: Final Rules.

SUMMARY: These Final Rules revise and supersede the Commission's regulations in Subchapter D implementing section 19 of the Merchant Marine Act, 1920 and the Interim Rule implementing section 13(b)(5) of the Shipping Act of 1984 which became effective on June 18, 1984. The revision of Part 585 implementing section 19 of the 1920 Act merely makes technical corrections. The revisions of Part 587 implementing the 1984 Act relate to, among other items, definitions, factors which would indicate conditions unduly impairing access of U.S.-flag vessels in cross trades, petitions for relief, proceedings, decisions, sanctions and effective date of decisions.

DATES: Effective December 15, 1984.

SUPPLEMENTARY INFORMATION:

I. *REGULATIONS TO ADJUST OR MEET CONDITIONS UNFAVORABLE TO SHIPPING IN THE FOREIGN TRADE OF THE UNITED STATES*

In the Commission's program to review and republish all of its regulations since the passage of the Shipping Act of 1984 (the Act) (46 U.S.C. app. 1701), certain technical and style changes appeared to be required for Part 585, "*Regulations to Adjust or Meet Conditions Unfavorable to Shipping in the Foreign Trade of the United States*" (formerly 46 CFR Part 506). These regulations implement section 19(1)(b) of the Merchant Marine Act, 1920 (46 U.S.C. app. 876(1)(b)). Previously, a Final Rule on Part 585 was published in the *Federal Register* at 49 FR 20816 (May 17, 1984) but further changes were deemed necessary.

The non-substantive technical and style changes to Part 585 reflect revisions in nomenclature and Commission organization, correction of typographical errors and removal of superfluous verbiage. Outdated and obsolete provisions have also been deleted. Also changed or deleted, where feasible,

are citations to other laws required by recodifications and other statutory changes; references to the obsolete General Order system; "Provided, howevers"; and gender specific terms. There are no substantive changes to Part 585.

II. *ACTIONS TO ADDRESS CONDITIONS UNDULY IMPAIRING ACCESS OF U.S.-FLAG VESSELS TO OCEAN TRADE BETWEEN FOREIGN PORTS*

The Shipping Act of 1984 was enacted on March 20, 1984, with an effective date of June 18, 1984. Section 13(b)(5) (46 U.S.C. app. 1712(b)(5)) of the Act provides that:

> If, after notice and hearing, the Commission finds that the action of a common carrier, acting alone or in concert with any person, or a foreign government has unduly impaired access of a vessel documented under the laws of the United States to ocean trade between foreign ports, the Commission shall take action that it finds appropriate, including the imposition of any of the penalties authorized under paragraphs (1), (2), and (3) of this subsection [13(b)].[1]

On May 16, 1984, the Commission published in the *Federal Register* (49 FR 20654, corrected 49 FR 21931, May 24, 1984) (26 F.M.C. 649), an Interim Rule implementing section 13(b)(5) of the Act. The Commission provided ninety days for comments on the Interim Rule. Comments were received from: (1) Parties to FMC Agreement No. 10050 (Agreement No. 10050); (2) American President Lines, Ltd.; (3) Chilean Line, Inc.; (4) China Ocean Shipping Company (COSCO); (5) Council of European and Japanese National Shipowners' Associations (CENSA); (6) Consultative Shipping Group (CSG)[2] (7) Delta Steamship Lines, Inc. (Delta); (8) Government of Japan; (9) National Maritime Council (NMC); (10) Sea-Land Service, Inc.; (11) United States Department of State; (12) Transportes Navieros Ecuatorianos (Transnave); and (13) United States Department of Transportation (DOT). After consideration of these comments, the Commission is issuing this Final Rule to supersede the Interim Rule.

[1] These penalties include suspension of the tariffs of a common carrier, or that common carrier's right to use any or all tariffs of conferences of which it is a member, and the imposition of a civil penalty of not more than $50,000 per shipment for the acceptance or handling of cargo for carriage under a tariff that has been suspended or after the common carrier's right to utilize that tariff has been suspended. *See* 46 U.S.C. app. 1712(b)91)(3).

[2] The CSG includes the governments of Belgium, Denmark, Finland, France, Federal Republic of Germany, Greece, Italy, Japan, Netherlands, Norway, Spain, Sweden and the United Kingdom.

DISCUSSION OF COMMENTS

Section 587.1. Purpose.

Section 587.1(a)

Agreement No. 10050 proposes definitions that it believes will clarify three terms: "U.S.-flag vessel," "U.S.-flag carrier," and "ocean trade between foreign ports."

"U.S.-flag vessel" is defined in the Interim Rule as "a vessel documented under the laws of the United States". Agreement No. 10050 takes the position that, while this definition is technically correct, it should be amended to make clear that the term includes vessels of all types, whether liner, bulk, tramp or other category as recognized in section 587.39(a). The Commission agrees with this clarification and the Final Rule is being revised accordingly.

The suggested change clarifies the definition of a U.S.-flag vessel in the Final Rule. This definition is supported by the legislative history of the Act. Both the House and Senate Reports point out that section 13(b)(5) "is broad enough to permit retaliation against liner operators in U.S. trades for events occurring in foreign bulk trades."[3] As noted in the Reports, section 13(b)(5) supersedes section 14(a) of the Shipping Act, 1916. Congress, however, did not use the language of section 14(a) which limited relief to "a common carrier by water which is a citizen of the United States . . ." Instead, in section 13(b)(5) reference is made to the much broader category of vessels documented under the laws of the United States. For reasons stated above, we believe relief under section 13(b)(5) is intended to cover the types of U.S.-flag vessels mentioned in the Final Rule.

"U.S.-flag carrier" is defined in the Interim Rule as an "owner or operator of a U.S.-flag vessel." Agreement No. 10050 suggests that, in light of modern service freight systems, including intermodal, feeder, relay and other connecting operations, the definition be expanded so that relief under section 13(b)(5) is not limited to all-water or exclusively U.S.-flag vessel operations. The Commission has not adopted this suggestion because the Act only protects "vessels documented under the laws of the United States". The suggested changes would go beyond the scope of the Act.

In the area of intermodal transport, section 587.2(d) makes clear that relief is offered to U.S.-flag carriers in instances where a government or commercial practice results in, or may result in, unequal or unfair opportunity for U.S.-flag vessel access to port or intermodal facilities or services related to the carriage of cargo inland to or from ports in a cross trade. It is not necessary, therefore, to revise the definition of a U.S.-flag carrier to accomplish this purpose.

The phrase "ocean trade between foreign ports" was not defined in the Interim Rule. However, in the "Supplementary Information" accom-

[3] *See* H.R. Rep. No. 53, 98th Cong., 1st Sess. 22–23; S. Rep. No. 3, 98th Cong., 1st Sess. 38 (1983).

panying the Interim Rule, it was pointed out that the phrase "ocean trade between foreign ports," includes intermodal movements. Agreement No. 10050 suggests that the phrase "ocean trade between foreign ports" be defined as "cargo moving entirely or in part by ocean carriage between ports and/or points in foreign countries." The Commission agrees that the phrase should be explained in the text of the Final Rule and has done so in section 587.1(a)(1) by inserting the words, "which includes intermodal movements," after "ocean trade between foreign ports."

CENSA notes that section 587.1(a) of the Interim Rule refers to only one of the purposes of the Act, which is to encourage the development of the U.S.-flag liner fleet (46 U.S.C. app. 1701). CENSA suggests that any action taken by the Commission must balance all of the Act's "purposes," including the other two which are: (1) to establish a non-discriminatory regulatory process; and (2) to provide an efficient and economic transportation system insofar as possible, in harmony with, and responsive to international shipping practices.

Section 13(b)(5) protects U.S.-flag vessel access to cross trades, thus encouraging the development of the U.S.-flag liner fleet. To the extent that the other purposes of the Act are pertinent in any particular section 13(b)(5) matter, they will be taken into consideration.

Sections 587.1 (b) and (c)

Agreement No. 10050 suggests that sections 587.1 (b) and (c) be strengthened to provide relief for *prospective* harm. Delta suggests changes in section 587.1(c) to authorize Commission action upon a finding that a U.S.-flag carrier will incur "imminent" harm in the trade. Transnave objects to any imposition of sanctions for prospective harm and suggests that paragraph (c) be changed to allow Commission action, but no punitive sanctions until actual harm is shown.

It is the Commission's intention, as pointed out in the Supplementary Information accompanying the Interim Rule, that Commission flexibility to act swiftly when harm to a U.S.-flag carrier has been demonstrated or is imminent be preserved. In order to make this point clear, paragraphs (b) and (c) of section 587.1 of the Interim Rule are being amended to indicate that Commission action may be taken when undue impairment is "imminent."

On the other hand, we appreciate Transnave's concern with respect to remedial versus punitive measures that may be taken by the Commission on the basis of prospective harm. Should the Commission find that the adverse practice or activity from which relief is sought has not yet occurred, but that punitive sanctions are warranted when it does occur, such sanctions will be made effective concurrently with the actual implementation of the practice or activity threatening undue impairment of access. Section 587.7(c) of the Final Rule now so provides.

Delta points out that section 587.1(c) would appear to limit conditions unduly impairing the access of a U.S.-flag carrier to those where the carrier is unable to enter the trade or where actual participation is being eroded for reasons other than its commercial ability or competitiveness. Delta, therefore, suggests that this provision be expanded to enable the Commission to find impairment of access when a U.S.-flag carrier is prevented from *increasing* its participation in a cross trade for reasons other than its competitive ability.

The Commission agrees that the term "eroded" could be interpreted to limit the Commission's ability to find the expansion of a U.S.-flag carrier's participation in a trade may have been unfairly restricted. The Interim Rule is, therefore, being amended to clarify this point by substituting the term "restricted" for "eroded."

Agreement No. 10050 and Delta recommend the deletion of the cautionary language in section 587.1(c) of the Interim Rule, which provides that section 13(b)(5) procedures should not be used as an instrument for the harassment of foreign-flag carriers operating in the U.S. foreign trade. These commenters believe that adequate safeguards against the filing of frivolous petitions are elsewhere provided for in the Interim Rule. CENSA, however, favors retention of the cautionary language.

The Commission agrees that the Rule otherwise provides ample safeguards against potential harassment. Section 587.3 allows the Commission to reject frivolous or deficient petitions and requires petitions for relief to be supported by affidavits and other supporting documents. Given these safeguards, the cautionary language in section 587.1(c) would appear unnecessary and is, therefore, deleted. This deletion, however, does not reflect a change in Commission policy. The Commission will carefully review section 13(b)(5) petitions in order to ensure that the procedures of Part 587 are not abused.

CENSA suggests that, when the Commission evaluates the operational ability of a carrier to offer a service, it consider recent U.S./CSG discussions on the criteria which such a carrier should meet. CENSA goes on to note that the specific criteria set out in the Interim Rule have been overtaken by developments in those discussions.

The Commission is aware of and closely follows the U.S./CSG discussions, which have centered on reaching an agreement regarding reciprocal competitive access for U.S. and CSG vessels to U.S. and CSG trades with developing nations. These discussions are ongoing and no agreement has been concluded between the United States Government and the CSG Governments. It would, therefore, be premature to even consider formalizing, in the Final Rule, the policies still under discussion.

Section 587.1(c) of the Interim Rule provided that the condition of unduly impaired access would be found only where a U.S.-flag carrier is "fit, willing and able" to enter a trade in which its access is being unduly impaired. Upon further consideration, the Commission does not believe

that U.S.-flag carriers should be required to meet a rigid "fit, willing and able" standard with regard to foreign-to-foreign trades when foreign-flag carriers have free and unrestricted access to U.S. trades. Therefore, the term "fit, willing and able" has been deleted from the Final Rule and in its place is substituted the term "commercially able." The "commercially able" standard will still allow the Commission to screen out a frivolous petition without imposing an overly restrictive standard on U.S.-flag carriers.

Section 587.1(d)

Section 587.1(d) provides that when examining conditions in a trade between foreign ports, and considering appropriate action, the Commission will give due regard to U.S. maritime policy and U.S. Government shipping arrangements with other nations, as well as the degree of reciprocal access afforded in U.S. foreign trades to the carriers of the countries against whom action is requested.

CENSA and the CSG suggest that the Commission also give due regard to the U.S./CSG discussions, particularly on the issue of restrictive commercial practices and derogations from reciprocal competitive access. CENSA urges that complaints received by the Commission concerning restrictive commercial practices be first taken up at the diplomatic level with the governments of the carriers concerned. The CSG believes that the Commission should make clear that it would normally look to the CSG Governments to remedy any restrictive commercial practices in their trades. In addition, the CSG notes that the Commission should avoid any threat to derogations agreed upon in the U.S./CSG discussions. These derogations include certain government and commercial agreements which in some way restrict competitive access but were in effect prior to the start of the ongoing U.S./CSG discussions.

As discussed in connection with section 587.1(c) above, an agreement between the U.S. and CSG has not yet been accepted by either party and, therefore, cannot be considered by the Commission for the purposes of the Final Rule. In appropriate circumstances the Commission will, under section 587.6 of the Final Rule, request that the Secretary of State seek resolution of restrictive practices through diplomatic channels.

Section 587.2. Factors indicating conditions unduly impairing access.

This section provides various examples of factors which would be deemed to indicate conditions unduly impairing access of a U.S.-flag vessel to cross trades. Numerous comments addressed various portions of this section. DOT is generally concerned that certain of the listed practices of ocean carriers or foreign governments might be considered as *per se* impairment of access of U.S.-flag vessels to a cross trade. Specifically mentioned is section 587.2(c) which cites certain commercial activities, e.g. closed conferences employing deferred rebates, as indicating conditions unduly

impairing access. The discussion below with respect to section 587.2(c) should allay any concern that closed conferences employing deferred rebates would be treated by the Commission as *per se* violations of section 13(b)(5).

Delta suggests that this section be expanded to list additional factors indicating conditions of impaired access, including: (1) the existence of foreign intergovernmental agreements; (2) discriminatory fines, taxes or other financial penalties levied on cargo, shippers and consignees when using U.S.-flag vessels; and (3) discriminatory financial benefits granted to shippers or consignees when using other than U.S.-flag vessels.

The first factor suggested by Delta, i.e., foreign intergovernmental agreements, is too broad and indefinite to be included in this section. However, to the extent that an intergovernmental agreement reserved substantial amounts of cargo or otherwise restricted access to cargo, it could be a factor indicating unduly impaired access. Such cargo reservation arrangements are covered in section 587.2(b).

Fines (fees) for those employing U.S.-flag vessels or benefits for those not doing so are factors which the Commission would consider as unduly impairing access. Accordingly, section 587.2(a) is being so amended.

Section 587.2(a)

Section 587.2(a) states that the imposition upon U.S.-flag vessels of fees, charges, requirements, or restrictions different from those imposed on other vessels, or which preclude or tend to preclude U.S.-flag vessels from competing in the trade on the same basis as any other vessel, is a factor which may indicate unduly impaired access.

Agreement No. 10050 notes that section 587.2(a) of the Interim Rule does not make specific references to "national-flag" operators. Agreement No. 10050 is concerned that this omission might be read as an unintended limitation on the scope of this section especially in view of the express reference to national-flag vessels in section 587.2(b). Such a limitation on the scope of section 587.2(a) was not intended. Section 587.2(a) is, therefore, being clarified by amending the phrase "from those imposed on other vessels" to read "from those imposed on national-flag or other vessels" in the Final Rule. This is not to say that imposition of different restrictions on national and non-national carriers results in a *per se* finding of conditions unduly impairing the access of U.S.-flag vessels. The United States Government itself makes a distinction between U.S.-flag carriers and other carriers under its various cargo preference statutes. The Commission will determine whether the alleged restrictions are unfair or unreasonable after consideration of all the facts relevant to each case.

COSCO reads sections 587.2 (a) and (d) as requiring that U.S.-flag vessels receive not merely the same treatment as other cross-trading vessels, but instead, treatment as favorable as is accorded vessels flying the flag of the bilateral trading partners. COSCO believes that the effect of these sections is to require foreign governments to give U.S.-flag vessels most

favored nation (MFN) treatment.[4] COSCO asserts that the United States Government does not accord MFN treatment to COSCO vessels and concludes that these sections are contrary to principles of equality and mutual benefit.

As stated above, the Commission is charged by the Act with determining whether alleged restrictions are unfair or unreasonable to U.S.-flag vessel access. The Commission will make such a determination after consideration of all facts relevant to each case. Facts that the Commission would consider would include the treatment of national-flag and other vessels in U.S. cross trades, as well as the degree of reciprocal access afforded in U.S. foreign trades to the carriers of the countries against whom the Commission action is contemplated.

Agreement No. 10050 suggests that discriminatory burdens applied to intermodal and connecting services should be mentioned in section 587.2(a). We do not believe this change is necessary. As previously discussed, section 587.2(d) should adequately address the concerns regarding intermodal restrictions expressed by Agreement No. 10050.

Section 587.2(b)

Section 587.2(b) includes, as a factor indicating undue impairment, the "reservation" of a substantial portion of the total cargo in the trade to national-flag or other vessels which results in failure to provide reasonable competitive access to cargoes by U.S.-flag vessels. CENSA and the CSG suggest that this provision be clarified to indicate that it does not apply to commercial cargo-sharing arrangements. Agreement No. 10050 urges that it be strengthened to state that the United States will oppose cargo-sharing schemes and that 40/40/20 and other restrictive devices may be met by similar restrictions.

Use of the word "reservation" in section 587.2(b) refers to government reservation laws. Only governments can reserve cargoes to carriers. Commercial pools may allocate the commercial cargo captured by its members but these are cargoes for which they compete. Section 587.2(b) would, however, cover the situation where a commercial cargo-sharing agreement is government-influenced, or a conference pool or any other conference practice operates in a predatory fashion, such that it is unduly impairing the access of a U.S.-flag carrier in a cross trade.

Section 587.2(c)

The Interim Rule provides that the use of predatory practices, including, but not limited to, closed conferences employing fighting ships or deferred rebates, is a factor which may unduly impair the access of a U.S.-flag vessel to cross trades. Although the wording of this paragraph follows

[4] In these circumstances MFN treatment would generally require that a nation give U.S.-flag carriers treatment, e.g. regarding port call notice, fees, etc., no less favorable than the treatment accorded that nation's most favored trading partner.

the language used in both the House and Senate Reports,[5] which listed "closed conferences employing fighting ships or deferred rebates" as practices which could have the effect of unduly impairing the access of U.S.-flag vessels to trade between foreign ports, several commenters objected to its inclusion in the Interim Rule.

DOT, Department of State, CENSA, CSG and COSCO all suggest that specific references to closed conferences employing deferred rebates be deleted as a factor indicating unduly impaired access. It is pointed out that these practices are not unlawful in some foreign trades. As stated above, DOT believes that reference to these practices creates the impression that they may be considered as *per se* violations of section 13(b)(5).

Delta, on the other hand, submits that "closed conferences employing . . . deferred rebates," is one of the most effective devices used in foreign-to-foreign trades for closing a trade to outsiders and the fact that this practice is not considered predatory by many of our trading partners is irrelevant. Delta maintains that while the Commission need not impose U.S. open-conference policy on foreign-to-foreign trades to secure reasonable access to those trades for U.S. vessels, it should consider that policy in determining whether conditions exist which unduly impair the access of a U.S.-flag vessel.

Agreement No. 10050 suggests that the reference to possible entities which may engage in predatory practices be expanded to include not only "closed conferences" but all conferences, open or closed, pools and carriers employing fighting ships. Agreement No. 10050 would agree to the removal of the term "deferred rebates," provided that the Commission state that its removal is without prejudice to future consideration of finding deferred rebates as a factor impairing access.

The "factors" enumerated in section 587.2 were not intended to be either exclusive or conclusive. These practices would ultimately require a finding that they resulted in undue impairment of access before sanctions would be imposed. Thus, the mere existence in a trade of a closed conference which utilizes deferred rebates would not, in and of itself, support a conclusion that deferred rebates unduly impair access of a U.S.-flag vessel. It is only where they are used in a predatory fashion that such practices would violate this section. To make this clear we are inserting the word "possibly" prior to the phrase "including but not limited to closed conferences employing fighting ships or deferred rebates. . ." in section 587.2(c). Furthermore, the list of practices that may be predatory was not meant to be exhaustive. By its terms, section 587.2(c) includes use of any "predatory practice." Delta's suggestion that the Commission consider U.S. open-conference policy when determining whether undue impairment exists under section 587.2(c), is accommodated by section 587.1(d) which provides that the Commission will consider the degree of reciprocal

[5] *See* H.R. Rep. No. 53, 98th Cong., 1st Sess. 22-23; S. Rep. No. 3, 98th Cong., 1st Sess. 38 (1983).

access afforded in U.S. foreign trades to the carriers of the countries against whom Commission action is contemplated.

Section 587.2(d)

The Government of Japan suggests that the reference in section 587.2(d) to unequal treatment with respect to intermodal facilities is inappropriate for inclusion as a factor requiring retaliatory action because it extends U.S. regulatory authority to the domestic transportation systems of another country. Agreement No. 10050 supports retention of section 587.2(d).

In light of the world-wide growth and development of intermodal transportation systems, the reference in section 587.2(d) to "intermodal facilities and services" is necessary in order to provide meaningful protection to U.S.-flag vessels. Denial of the opportunity to compete for intermodal cargo on a fair basis can constitute an undue impairment of access in the same fashion as unfair discrimination in access to port-to-port cargo movements. For this reason, no change to section 587.2(d) is being made.

Sections 587.2 (b), (c), (d) and (e)

Agreement No. 10050 suggests that references to "U.S.-flag vessel(s)" in sections 587.2 (b), (c), (d) and (e) should be changed to "U.S.-flag carrier(s)," thereby incorporating this commenter's proposed definition of "U.S.-flag carrier" which, in part, was meant to expand the coverage for relief to foreign-flag feederships of U.S. carriers. For the reasons discussed above in connection with section 587.1(a), Agreement No. 10050's proposed definition of "U.S.-flag carrier" is not accepted and changes to these paragraphs are not made.

Section 587.3. Petitions for relief.

Agreement No. 10050 suggests that a new paragraph be added to section 587.3 stating that petitioners may recommend time periods for Commission action on a petition. We are not adopting this suggestion. If a filing party desires to specify a time period for Commission action, it may do so under section 587.3(b)(9). However, due to the possible significant foreign policy implications of any action taken, the Commission believes it requires maximum flexibility in structuring section 13(b)(5) proceedings and determining when sanctions should be applied. It cannot be locked into any rigid, pre-determined time frames.

Section 587.3(a)—Filing

Agreement No. 10050 suggests that the term "U.S.-flag carrier" be substituted for the "owner or operator of a liner, bulk, tramp or other vessel documented under the laws of the United States" as the person who may file a petition for relief under section 587.3(a). This suggested language change is predicated on the Commission's acceptance of Agreement No. 10050's definition of "U.S.-flag carrier." For the reason discussed above in connection with section 587.1(a), this suggestion is not adopted.

In any event, a "U.S.-flag carrier" obviously may file a petition under section 587.3(a).

Section 587.3(b)—Contents

Section 587.3(b) lists what should be included in the contents of petitions for relief. Delta and Agreement No. 10050 believe that many of the mandatory submission requirements, e.g., certified documents, statistics, affidavits, of fact and memoranda of law, should be made permissive. We disagree. By requiring a complete submission at the initial stage of the proceeding, the Commission is better able to move with dispatch if warranted. The mandatory requirements of this section therefore shall, except as modified below, be continued.

Delta and Agreement No. 10050 suggest that certain information, i.e., certified copies of foreign laws and certain statistics, may be difficult or impossible for the petitioner to provide, and that in such a case, the petition could be rejected by the Commission as deficient, causing undue delay or denial of consideration of an otherwise meritorious petition. The Commission understands that obtaining a certified copy of a foreign law may sometimes be difficult and is revising section 587.3(b)(4) to provide that certified copies of the law, rule, regulation or other document are to be provided "when available." The Commission believes, however, that the petitioning parties should *generally* be able to provide a concise description and citation of the foreign law, rule, or government or commercial practice which is alleged to impair access to a trade. This information will obviously be essential to section 13(b)(5) deliberations.

Likewise, the Commission concludes that statistics relating to alleged harm required under sections 587.3(b)(7)(i) and (b)(7)(iii), are necessary to make an informed decision regarding the merits of the petition and the harm alleged. The Commission will exercise its judgment when evaluating the statistics provided, including the particular circumstances surrounding each petition, and will consider the difficulties involved in obtaining and/or compiling these statistics.

In addition, affidavits of fact and memoranda of law provide needed information to enable the Commission to evaluate the merits of the petition and proceed expeditiously where swift action may be critical to prevent irreparable harm to the U.S.-flag carrier. Therefore, these documents remain a requirement for petition contents.

Section 587.3(b)(2)

Section 587.3(b)(2) of the Interim Rule requires that "the name and address of each party (carrier, person, or foreign government agency) against whom the petition is made" be included in the petition. DOT believes that this section should be amended to require "the name of each party (foreign government, agency or instrumentality thereof, carrier or other person) against whom the petition is made." DOT points out that addition of the language "foreign government, agency or instrumentality thereof,"

would enable a petitioner to name a quasi-governmental organization, such as a national commodity or cargo allocation authority, that is acting in concert with common carriers to unduly impair the access of a U.S.-flag vessel. The language, "carrier or other person" is intended to make section 587.3(b)(2) more consistent with the Act which defines "person" to, in effect, include a carrier. DOT's suggestion clarifies the definition of "party" and is, therefore, being adopted.

CENSA notes that section 587.3(b)(2) fails to require the petition to be served on the parties. The CENSA comment has merit and section 587.4(b) of the Final Rule (previously section 587.6(b)) provides for such service by the Commission. In cases where a foreign government, agency or instrumentality thereof, is named as a party in the petition, the Commission will seek service through appropriate diplomatic channels. In order for the Commission to recognize, with certainty, whether a party name in a petition is a foreign government, agency or instrumentality thereof, it is requiring a statement to that effect under section 587.3(b)(2) of the Final Rule.

Section 587.3(b)(5)

Section 587.3(b)(5) of the Interim Rule requires that a petition include "any other evidence" of the existence of a government or commercial practice alleged to be causing undue impairment of access. Agreement No. 10050 has suggested that section 587.3(b)(5) be expanded to include other evidence relating to any "law, rule or regulation" as well as any "government or commercial practice." Agreement No. 10050 believes this change is appropriate because, as it noted in its comment on section 587.3(b)(4), a certified copy of foreign laws may not be obtainable. Although this section would probably allow for the inclusion of such information under either section 587.3(b)(3) or section 587.3(b)(7), the change suggested in section 587.3(b)(5) is being adopted to include "any other information relating to any law, rule, or regulation, or indicating the existence of any government or commercial practice."

One other change is being made to section 587.3(b)(5). The term "evidence" is being deleted and in its place the term "information" is being inserted. This change is made here and in any other section of the Final Rule where the term "evidence" is used. The contents of the petition cannot be properly characterized as "evidence" at this point in the section 13(b)(5) procedure.

Section 587.3(b)(8)

Section 587.3(b)(8) of the Interim Rule requires a memorandum of law addressing relevant legal issues. Agreement No. 10050 believes that it is not clear whether this provision contemplates submission of a separate document. It suggests that a change be made to indicate that any legal discussion, where appropriate, may be incorporated in the petition for relief.

This suggestion is being adopted in the Final Rule. The Commission will permit the petitioner to submit a separate memorandum as part of the petition or, where appropriate, incorporate any legal discussion within the petition. Section 587.3(b)(8) is being amended accordingly.

Section 587.4. Receipt of relevant information.

(Redesignated Section 587.5 in the Final Rule)

CENSA suggests that information submitted to the Commission be made available to all interested parties. Agreement No. 10050 suggests that any information submitted pursuant to this section should be provided to the petitioning or affected U.S.-flag carrier before it is made part of the record. DOT recommends the establishment of standards for confidential treatment and procedures for segregating proprietary information from other factual statements and arguments in order to provide maximum disclosure of information.

Persons submitting information pursuant to section 587.5 of the Final Rule may request that all or any portion of that information be accorded confidential treatment under an appropriate exemption of the Freedom of Information Act (FOIA) (5 U.S.C. 552). Where an exemption applies, proprietary or other information would be protected from disclosure. The Commission does not believe it is necessary to specifically provide for confidential treatment of business or other information in Part 587.

It should be noted that any information which is submitted, even if covered by a FOIA exemption, must be disclosed to all parties in any proceeding under Part 587 if that information is made part of the record in the proceeding upon which the Commission will base its decision. Fundamental precepts of due process require that such information be made available to all parties in a proceeding. Where appropriate, such information may be shielded from public disclosure through a protective order. In any event, Commission action will be based on the record before it. Finally, there does not appear to be any need or reason for submitting information to a petitioning or affected U.S.-flag carrier prior to making the information a part of the public record.

Section 587.4(a)

(Redesignated Section 587.5(a) in the Final Rule)

DOT recommends that section 587.4(a) of the Interim Rule be modified to provide for both compulsory production of information in appropriate circumstances and express sanctions for failure to produce information, noting comparable provisions under the Commission's regulations implementing section 19(1)(b) of the Merchant Marine Act of 1920.[6]

The Commission believes it unnecessary to make a specific reference in the Final Rule to the Commission's subpoena powers conferred by

[6] See 46 C.F.R. 585 (formerly Part 506), as amended. 49 FR 20816 (May 17, 1984).

section 12 of the Shipping Act of 1984 (46 U.S.C. app. 1711). Nothing precludes the Commission from employing its subpoena powers in a section 13(b)(5) proceeding. Furthermore, the failure of affected parties to provide information may result in findings or conclusions that would be adverse to them.

Section 587.4(b)

(Redesignated section 587.5(b) in the Final Rule)

The phrase "*bona fide*" has been deleted from section 587.5(b) of the Final Rule. A petition which has been published in the *Federal Register* has in effect been determined to be *bona fide* and the phrase "*bona fide*" in this section is unnecessary.

Section 587.5. Notification to Secretary of State.

(Redesignated Section 587.6 in the Final Rule)

Section 587.5 (now section 587.6 in the Final Rule) provides for notification to the Secretary of State by the Commission when there are indications that conditions unduly impairing the access of a U.S.-flag vessel to trade between foreign ports exist. The section provides that the Commission may request that the Secretary of State seek resolution of the matter through diplomatic channels and may request the Secretary to report the results of such efforts within a specified time period.

CENSA suggests that this section be amended to explicitly permit the Secretary of State to "concert" with friendly governments sharing the same aim of free access to trade, so that joint efforts may be made to seek a diplomatic solution. The CSG states that where resistance against restrictive trade practices is intended to be collective, the Commission should invariably request the Secretary of State to join in the pursuit of a diplomatic resolution to each problem.

COSCO suggests that in the event actions complained of are those of a controlled carrier or of a foreign government, the Final Rule should *require* the Commission to request that the Secretary of State seek diplomatic resolution and report to the Commission on those diplomatic efforts before a Commission proceeding begins.

These suggestions are not being adopted. The Commission would, of course, seek assistance from the State Department, where feasible and appropriate, and prefers, where possible, diplomatic resolution of matters raised in section 13(b)(5) petitions. However, in some cases, attempts to seek resolution through diplomatic channels may be time consuming and could result in a U.S.-flag carrier suffering irreparable harm. Commission requests that the Secretary of State seek diplomatic resolution of section 13(b)(5) matters will, therefore, be kept discretionary.

Delta seeks to clarify the Commission's enforcement role by modifying section 587.5 to clearly indicate that the Commission and not the Department of State is responsible for the enforcement of section 13(b)(5). Delta

also suggests that an affected U.S.-flag carrier be kept apprised of the progress of any diplomatic negotiations undertaken by the Secretary of State.

The Shipping Act of 1984 unequivocally entrusts this Commission with the administration and enforcement of section 13(b)(5). We have no intention of abdicating those responsibilities in any way. The Commission is neither required to request assistance from the Secretary of State nor required to delay action pending a diplomatic resolution. As noted above, however, the diplomatic resolution of grievances presented in section 13(b)(5) matters would generally appear preferable to unilateral Commission action. The Commission may, of course, assist in these diplomatic efforts if requested.

We do not believe it necessary or appropriate to provide in the Final Rule that the U.S.-flag carrier or any other party will be apprised by the Commission of the progress of diplomatic negotiations. U.S.-flag carriers or other parties can, of course, contact the Department of State with respect to the status of diplomatic negotiations.

The Department of Transportation suggests that section 587.5 be amended to provide that the Commission also notify the Secretary of Transportation and when appropriate consult with the Secretaries of State and Transportation on policy questions. The Interim Rule specifies notification to the Secretary of State because it is our understanding that the Department of State is the agency which would have the primary responsibility to seek diplomatic resolution of 13(b)(5) matters which will involve foreign laws and commercial practices existing in foreign-to-foreign trades. However, the Commission will, as in the past, consult with the Secretary of Transportation, who is the Administration's chief spokesperson for maritime policy, and with various other agencies of the Executive Branch in matters relevant to their areas of interest, and will keep them informed as requested. The Commission does not believe that DOT's proposal should be incorporated into the Final Rule, but rather that consultation with other agencies should be handled on an *ad hoc* basis.

NMC suggests that once a "proper" petition for relief has been filed, notification to the Secretary of State under section 587.5 should be provided within a specified number of days. As indicated in connection with section 587.3, the Commission requires maximum flexibility in structuring the procedures and cannot be locked into any pre-determined time frames. The Commission will act as expeditiously as possible in each instance.

Section 587.6. Hearing.

(Redesignated Section 587.4 in the Final Rule)

Section 587.6 (now section 587.4 in the Final Rule) provides for proceedings pursuant to section 13(b)(5). DOT believes that it is unclear whether the term "hearing" refers to oral argument or to the more general opportunity to be heard, either orally or in writing, on matters potentially affecting

one's interests. DOT suggests that the title of the section be changed to "Procedure" or "Notice and Opportunity to be Heard" and that the word "proceedings" be substituted for the word "hearing" where it appears in this section.

Section 587.6 establishes a basic procedure of notice and opportunity to be heard in a section 13(b)(5) proceeding. Section 587.6(a) provides for the institution of a proceeding upon the filing of a meritorious petition or upon the Commission's own motion. Section 587.6(b) further provides that notice of any such proceeding will be published in the *Federal Register* and interested or affected persons will have an opportunity to reply to the petition. Section 587.6(c) provides that the Commission may issue a final determination after there has been notice and opportunity to be heard or it may order further hearing if warranted. Any further hearings ordered by the Commission will be structured on a case-by-case basis.

The meaning of the term "hearing" in section 587.6(c) would appear to be sufficiently clear and this term shall be retained. However, the title of this section shall be changed from "Hearing" to "Proceeding" in order to more accurately reflect the contents of this section which includes procedures other than hearing procedures. This section is also being amended to require that an original and 15 copies of replies be filed with the Secretary. Finally, section 587.6 has been redesignated as section 587.4. This placement provides for a more logical sequence in the Final Rule.

Section 587.6(b) of the Interim Rule is being amended to indicate that notice of the institution of a proceeding will be served on the parties by the Commission (section 587.4(b)(1) of the Final Rule). Additionally, this paragraph is being amended to note that replies to a petition by interested, or adversely affected parties will be submitted pursuant to section 587.5 of the Final Rule (previously section 587.4). This amendment is being made to clarify that section 587.5 of the Final Rule provides respondents or other interested parties the opportunity to reply to a petition by submitting information. In addition, a technical language modification is being made to section 587.6(b) of the Interim Rule regarding the form of factual submissions (section 587.4(b)(2) of the Final Rule).

Transnave suggests that special procedures be established in the Final Rule to provide for expedited evidentiary hearings and Commission decision within 120 days. It believes that the Final Rule should expressly guarantee the respondent the right to challenge information received by the Commission under section 587.5 (previously section 587.4). Similarly, CENSA expresses concern that the *ad hoc* hearing procedures satisfy the standards of due process and the Administrative Procedure Act (APA) (5 U.S.C. 553).

A formal procedural framework for consideration of petitions would not provide the necessary flexibility to address all the various circumstances under which an action for impairment of access might arise. In establishing the appropriate procedures for each case, the mandates of fundamental

due process will, however, be observed and respondents will have an opportunity to confront petitioners' allegations. In certain situations the requirements of due process may be met by the filing of written submissions. In others, more formal procedures may be appropriate. Whatever procedures the Commission establishes, it will ensure that all procedures will satisfy the requirements of due process and, where applicable, the APA.

Section 587.6(b)

(Redesignated Section 587.4(b) in the Final Rule)

CENSA points out that section 587.6(b) of the Interim Rule appears to require that factual submissions of persons responding to a petition be supported by affidavits and sworn documents, but that it does not clearly make the same requirement for the submission of the petitioner's factual allegations. It is the Commission's intention that both the petitioner(s) and respondent(s) provide supporting affidavits and sworn documents. In addition to the requirement in section 587.4(b)(2) of the Final Rule, that factual submissions shall be in affidavit form, sections 587.3(b) and 587.5(a) (previously 587.4(a)) are being amended to make this clear.

CENSA suggests that actual notice of a proceeding should be given to affected parties. As mentioned above, such notice will be given by the Commission and section 587.4(b) of the Final Rule so provides.

Transnave submits that due process requires that affected parties be given not less than 30 days to reply to a petition. It is unlikely that the Commission would prescribe a period of less than 30 days for response to a petition, given the fact that certain responses might be based on information located outside of the United States and that certain documents might require English translations. The Commission, however, will consider the length of time needed to respond, as well as the likelihood that injury will result from a delay, on a case-by-case basis.

Agreement No. 10050 believes that procedural time frames are inadequately addressed in the Interim Rule and proposes that a new provision be added which states that prompt response and expeditious action may be required in any given case. NMC suggests the imposition of specific deadlines for completion of the various procedural stages of a section 13(b)(5) proceeding.

As noted earlier in discussing comments on section 587.3, because of the possible complexity and significant foreign policy considerations underlying section 13(b)(5) petitions, the Commission requires maximum flexibility in structuring appropriate proceedings and formulating the necessary time frames. The Commission will, therefore, not attempt to prescribe procedural deadlines in its Final Rule.

Section 587.7. Decisions; sanctions; effective date.

Section 587.7 (a) and (b)

COSCO suggests that prior to the imposition of sanctions, the Commission take into consideration the fault of the person against whom the sanction would be imposed and the effect of such sanctions on the trade. In resolving a section 13(b)(5) petition, the Commission intends, as the law requires it to do, to consider the complete record and make an informed decision based on all the facts, taking into account all the ramifications of its decision such as those raised by COSCO.

Section 587.7(b)

CENSA suggests that section 587.7(b) should be amended to provide that sanctions based on the restrictive trade practices of a foreign government will be imposed only against that government or a carrier of that government. COSCO notes that it is inappropriate for the Commission to impose sanctions against a carrier which is acting in compliance with the laws of a foreign government. The Commission cannot limit itself with respect to the nationality of a carrier on which sanctions may be imposed. In each case brought before the Commission, the role that a government plays in unduly impairing the access of a U.S.-flag carrier, as well as the role of the national-flag lines of that government and other carriers, will be considered. Whatever sanctions might be imposed by the Commission will be against those parties which are either directly or indirectly responsible for undue impairment of access of a U.S.-flag vessel.

Section 587.7(c)

(Redesignated Section 587.7(d) in the Final Rule)

Section 587.7(c) of the Interim Rule provides for the publication and effective date of a Commission decision. CENSA suggests that all parties should be served with a decision. It is the intention of the Commission to serve the decision on all parties and section 587.7(a) is being amended to make this clear.

CENSA suggests that all decisions should be published in the *Federal Register*. The Commission agrees with this suggestion and section 587.7(d) of the Final Rule is so amended.

CENSA believes it is improper to set the effective date of a Commission action under section 13(b)(5) prior to Presidential review. As previously discussed, the Executive Branch will have ample opportunity to comment on section 13(b)(5) petitions and participate in section 13(b)(5) proceedings, if it desires. Moreover, the Commission has already established procedures for advising, and consulting with, the Department of State, prior to the issuance of any final order. In no event will the Commission establish an effective date of less than 10 days from the date an order is issued. This should provide the President time to review a decision of the Commission issued under section 13(b)(5). It would neither be appropriate nor

fair to any affected carrier to allow the Presidential review period to delay publication of an effective date.

Agreement No. 10050 and Delta believe that 30 days is too lengthy a time period between publication of the Commission decision and its effective date. The Commission believes that a 30-day notice period would generally be appropriate and necessary, given the international ramifications of a section 13(b)(5) action. However, because there may be circumstances and situations requiring more expedited action, section 587.7(d)(2) of the Final Rule allows the Commission, "for good cause," to prescribe an effective date of less than 30 days.

Section 587.7(e)

A new procedure has been added to section 587.7 which provides that any party may file a petition for reconsideration of any final decision under this part. Section 587.7(e) further provides for service of the petition upon all parties and states that the petition does not in itself stay the effective date of Commission action.

Section 587.8. Submission of orders to the President.

Sections 587.7, 587.8, and 587.9

DOT suggests that sections 587.7, 587.8, and 587.9 be modified to allow the President a reasonable opportunity to classify the Commission's decision for national security reasons and thereby withhold it from publication in appropriate circumstances. We do not agree. Any potentially sensitive issue involving national defense or national security surrounding a section 13(b)(5) case or its outcome, can be expected to be brought to the Commission's attention by the Executive Branch well prior to a Commission decision. In addition, section 587.8 procedures are consistent with those established in section 9 of the Act (46 U.S.C. app. 1708), which provides for the publication of a Commission order of "suspension or final order of disapproval of rates, charges . . . of a controlled carrier . . .," concurrent with submission of the order for Presidential review. Similarly, as in any section 13(b)(5) order, the President may stay the effect of the Commission's order for reasons of national defense or foreign policy. Therefore, the Commission will not withhold a section 13(b)(5) decision pending Presidential review.

Section 587.8

The Interim Rule provided that a decision imposing sanctions would be transmitted to the President concurrently with the submission of the decision for publication in the *Federal Register*. CENSA believes that *all* decisions, including those that do not impose sanctions, should be submitted immediately to the President. We see no reason to submit decisions to the President which do not impose sanctions. If no action is being taken

there is no reason to involve the President. CENSA's suggestion, therefore, is not adopted.

To clarify the term "decision," this section is being amended in the Final Rule to refer to "any decision imposing sanctions." In certain situations where impairment of access may be "imminent," the Commission may wish to issue two decisions. The first decision would be a notice of intent to impose sanctions should the action threatening the impairment of access occur. This decision would be followed by a second notice imposing sanctions when the action impairing access actually takes place. In such a situation, both decisions would be transmitted to the President. Alternatively, the Commission could, in its discretion, issue a single decision, to be served on the President, imposing sanctions at the time the action impairing access actually occurs.

Conforming changes have been made throughout the Rule to accommodate this change. Reference to "final" determinations or decisions have, therefore, been dropped. A "decision" however must pertain to a substantive finding or conclusion as distinguished from a procedural ruling.

Section 587.9. Postponement, discontinuance or suspension of action.

Section 587.9 provides that the Commission may, on its own motion, upon petition or by order of the President, postpone, discontinue or suspend any or all actions taken by it under the provisions of this part. Agreement No. 10050 suggests that this section state that the filing of a petition does not stay the effective date of a Commission action except upon compelling showing. As with petitions for reconsideration under new section 587.7(e), the filing of a petition to postpone, discontinue or suspend would not, in and of itself, stay the effective date of that action. Section 587.9 of the Interim Rule is being amended to make this clear. In addition, section 587.9 has been reorganized in order to clarify the distinction between discretionary and mandatory postponements. Finally, some editorial changes have been made in the language of this section.

The Commission has carefully considered all comments submitted to the Interim Rule and as discussed above, has made a number of changes to accommodate valid suggestions therein. Other non-substantive technical or style changes have been made and not expressly discussed. Any comments not expressly mentioned herein, nevertheless have been considered and found to be without merit, unwarranted, or unnecessary.

The Chairman of the Federal Maritime Commission certifies, pursuant to section 605(b) of the Regulatory Flexibility Act (5 U.S.C. 601, *et seq.*) that the Final Rule published herein will not have a significant economic impact on a substantial number of small entities, within the meaning of that Act. The primary economic impact of the Final Rule would affect common carriers by water, which generally are not small entities. A secondary impact may fall on shippers, some of which may be small entities, but that impact is not considered to be significant.

List of Subjects in 46 CFR Parts 585 and 587.

Foreign relations; Foreign trade; Maritime carriers; Rates and fares.

Therefore, pursuant to 5 U.S.C. 553; section 19(1)(b) of the Merchant Marine Act, 1920 (46 U.S.C. app. 876(1)(b); sections 13(b)(5), 15 and 17 of the Shipping Act of 1984 (46 U.S.C. app. 1712(b)(5), 1714 and 1716); and Reorganization Plan No. 7 of 1961 (75 Stat. 840) Parts 585 and 587 of Title 46, Code of Federal Regulation are revised to read as follows:

FEDERAL MARITIME COMMISSION

[46 CFR PART 585]

REGULATIONS TO ADJUST OR MEET CONDITIONS UNFAVORABLE TO SHIPPING IN THE FOREIGN TRADE OF THE UNITED STATES

Sec.

AUTHORITY: 5 U.S.C. 553; sec. 19(1)(b) of the Merchant Marine Act, 1920 (46 U.S.C. app. 876(1)(b)); secs. 15 and 17 of the Shipping Act of 1984 (46 U.S.C. app. 1714 and 1716); and Reorganization Plan No. 7 of 1961 (75 Stat. 840).

§ 585.1 Purpose.

It is the purpose of the regulations of this part to declare certain conditions resulting from governmental actions by foreign nations or from the competitive methods or practices of owners, operators, agents, or masters of vessels of a foreign country unfavorable to shipping in the foreign trade of the United States and to establish procedures by which persons who are or can reasonably expect to be adversely affected by such conditions may petition the Federal Maritime Commission for the issuance of regulations under the authority of section 19 of the Merchant Marine Act of 1920. It is the further purpose of the regulations of this part to afford notice of the general circumstances under which the authority granted to the Commission under section 19 may be invoked and the nature of the regulatory actions contemplated.

§ 585.2 Scope.

Regulatory actions may be taken when the Commission finds, on its own motion or upon petition, that a foreign government has promulgated and enforced or intends to enforce laws, decrees, regulations or the like, or has engaged in or intends to engage in practices which presently have or prospectively could create conditions unfavorable to shipping in the foreign trade of the United States, or when owners, operators, agents or masters of foreign vessels engage in or intend to engage in, competitive methods or practices which have created or could create such conditions.

§ 585.3 Findings—Conditions unfavorable to shipping in the foreign trade of the United States.

For the purposes of this part, conditions created by foreign governmental action or competitive methods of owners, operators, agents or masters of foreign vessels are found unfavorable to shipping in the foreign trade of the United States, if such conditions:

(a) Impose upon vessels in the foreign trade of the United States fees, charges, requirements, or restrictions different from those imposed on other vessels competing in the trade, or which preclude vessels in the foreign trade of the United States from competing in the trade on the same basis as any other vessel;

(b) Reserve substantial cargoes to the national flag or other vessels and fail to provide, on reasonable terms, for effective and equal access to such cargo by vessels in the foreign trade of the United States;

(c) Are otherwise unfavorable to shipping in the foreign trade of the United States;

(d) Are discriminatory or unfair as between carriers, shippers, exporters, importers, or ports or between exporters from the United States and their foreign competitors and which cannot be justified under generally-accepted international agreements or practices and which operate to the detriment of the foreign commerce or the public interest of the United States.

§ 585.4 Petitions for section 19 relief—General—Who may file.

Any person, including, but not limited to, any importer, exporter, shipper, consignee, or owner, operator or charterer of a liner, bulk, or tramp vessel, who has been harmed by, or who can reasonably expect harm from existing or impending conditions unfavorable to shipping in the foreign trade of the United States, may file a petition for the relief under the provisions of this part.

§ 585.5 Petitions—How filed.

All requests for relief from conditions unfavorable to shipping in the foreign trade shall be by written petition. An original and fifteen copies of a petition for relief under the provisions of this part shall be filed with the Secretary, Federal Maritime Commission, Washington, D.C. 20573.

§ 585.6 Petitions—Contents.

Petitions for relief from conditions unfavorable to shipping in the foreign trade of the United States shall set forth the following:

(a) A concise description and citation of the foreign law, rule, regulation, practice or competitive method complained of;

(b) A certified copy of any law, rule, regulation or other document involved and, if not English, a certified English translation thereof;

(c) Any other evidence of the existence of such practice or competitive method;

(d) A clear description, in detail, of the harm already caused or which may reasonably be expected to be caused petitioner, including:

(1) Statistics for the representative period showing a present or prospective cargo loss if harm is alleged on that basis. Such statistics shall include figures for the total cargo carried or projected in the trade for the period;

(2) Statistics or other evidence for the representative period showing increased costs, inferior services or other harm to cargo interest if injury is claimed on that basis; and

(3) A statement as to why the period is representative.

(e) A recommended regulation, the promulgation of which will, in view of the petitioner, adjust or meet the alleged conditions unfavorable to shipping in the foreign trade of the United States.

§ 585.7 Petitions—Amendment or dismissal of.

Upon the failure of a petitioner to comply with the provisions of this part, the petitioner will be notified by the Secretary and afforded reasonable opportunity to amend its petition. Failure to timely amend the petition will result in its dismissal. For good cause shown additional time for amendment may be granted.

§ 585.8 Initial action to meet apparent conditions unfavorable—Resolution through diplomatic channels.

Upon the filing of a petition, or on its own motion when there are indications that conditions unfavorable to shipping in the foreign trade of the United States may exist, the Commission will notify the Secretary of State that such conditions apparently exist, and may request he or she seek resolution of the matter through diplomatic channels. If request is made, the Commission will give every assistance in such efforts, and the Commission may request the Secretary to report the results of his or her efforts at a specified time.

§ 585.9 Actions to meet conditions unfavorable to shipping in the foreign trade of the United States.

Upon a submission of a petition filed under the rules of this part, or upon its own motion, the Commission may find that conditions unfavorable to shipping in the foreign trade of the United States do exist, and may, without further proceeding, issue regulations. Such regulations may effect the following:

(a) Imposition of equalizing fees or charges;

(b) Limitation of sailings to and from United States ports or of amount or type of cargo during a specified period;

(c) Suspension, in whole or in part, of any or all tariffs filed with the Commission for carriage to or from United States ports; and

(d) Any other action the Commission finds necessary and appropriate in the public interest to adjust or meet any condition unfavorable to shipping in the foreign trade of the United States.

§ 585.10 Participation of interested persons.

In the event that participation of interested persons is deemed necessary by the Commission, notice will be published in the *Federal Register* and interested persons will then be allowed to participate in this procedure by the submission of written data, views or arguments, with or without opportunity to present same orally.

§ 585.11 Production of information.

In order to aid in the determination of whether conditions unfavorable to shipping in the foreign trade of the United States exist, or in order to aid in the formulation of appropriate regulations subsequent to a finding that conditions unfavorable to shipping in the foreign trade of the United States exist, the Commission may, when it deems necessary or appropriate, and without further proceedings, order any owner, operator, or charterer in the affected trade to furnish any or all of the following information:

(a) Statistics for a representative period showing cargo carried to and from the United States in the affected trade on vessels owned, operated or chartered by it by type, source, value and directions.

(b) Information for a representative period on the activities of vessels owned, operated, or chartered, which shall include sailings to and from United States ports, costs incurred, taxes or other charges paid to authorities, and subsidies or other payments received from foreign authorities; and such other information that the Commission considers relevant to discovering or determining the existence of general or special conditions unfavorable to shipping in the foreign trade of the United States.

(c) Information for a specified future period on the prospective activities of vessels which it owns, operates or charters or plans to own, operate or charter, to and from United States ports, which shall include projected sailings, anticipated costs, taxes or other charges to be paid to authorities, and expected subsidies or other payments to be received from foreign authorities; and such other information that the Commission considers relevant to discovering or determining the existence of general or special conditions unfavorable to shipping in the foreign trade of the United States.

§ 585.12 Production of information—Failure to produce.

The Commission may, when there is a failure to produce any information ordered produced under § 585.11, make appropriate findings of fact or

deem such a failure to produce as an admission that conditions unfavorable to shipping in the foreign trade of the United States do exist.

§ 585.13 Postponement, discontinuance, or suspension of action.

The Commission may, on its own motion or upon petition, postpone, discontinue, or suspend any and all actions taken by it under the provisions of this part. The Commission shall postpone or discontinue any or all such actions if the President informs the Commission that postponement, discontinuance, or suspension is required for reasons of foreign policy or national security.

§ 585.14 Content and effective date of regulation.

The Commission shall incorporate in any regulations adopted under the rules of this part a concise statement of their basis and purpose. Regulations shall be published in the *Federal Register*. Except where conditions warrant and for good cause, regulations promulgated under the rules of this part shall not become effective until 30 days after the date of publication.

NOTE: In accordance with 44 U.S.C. 3506(c)(5), any information request or requirement in this part is not subject to the requirements of section 3507(f) of the Paperwork Reduction Act, because there are nine or fewer respondents.

FEDERAL MARITIME COMMISSION

[46 CFR PART 587]

ACTIONS TO ADDRESS CONDITIONS UNDULY IMPAIRING ACCESS OF U.S.-FLAG VESSELS TO OCEAN TRADE BETWEEN FOREIGN PORTS

Sec.

AUTHORITY: 5 U.S.C. 553; secs. 13(b)(5), 15 and 17 of the Shipping Act of 1984 (46 U.S.C. app. 1712(b)(5), 1714, and 1716).

§ 587.1 Purpose; general provisions.

(a)(1) It is the purpose of this part to enumerate certain conditions resulting from the action of a common carrier, acting alone or in concert with any person, or a foreign government, which unduly impair the access of a vessel documented under the laws of the United States whether liner, bulk, tramp or other vessel, (hereinafter "U.S.-flag vessel") to ocean trade between foreign ports, which includes intermodal movements, and to establish procedures by which the owner or operator of a U.S.-flag vessel (hereinafter "U.S.-flag carrier") may petition the Federal Maritime Commission for relief under the authority of section 13(b)(5) of the Shipping Act of 1984 ("the Act") [46 U.S.C. app. 1712(b)(5)].

(2) It is the further purpose of this part to indicate the general circumstances under which the authority granted to the Commission under section 13(b)(5) may be invoked, and the nature of the subsequent actions contemplated by the Commission.

(3) This part also furthers the goals of the Act with respect to encouraging the development of an economically sound and efficient U.S.-flag liner fleet as stated in section 2 of the Act (46 U.S.C. app. 1701).

(b)(1) This part implements the statutory notice and hearing requirement and ensures that due process is afforded to all affected parties. At the same time, it allows for flexibility in structuring proceedings so that the Commission may act expeditiously whenever harm to a U.S.-flag carrier resulting from impaired access to cross trades has been demonstrated or is imminent.

(2) The provisions of Part 502 of this chapter (Rules of Practice and Procedure) shall not apply to this part except for those provisions governing *ex parte* contacts (§ 502.11 of this chapter) and except as the Commission may otherwise determine by order.

(c) The condition of unduly impaired access will be found only where a U.S.-flag carrier is commercially able to enter a trade in which its access is being unduly impaired, or is reasonably expected to be impaired, or where actual participation in a trade by a U.S.-flag carrier is being restricted for reasons other than its commercial ability or competitiveness.

(d) In examining conditions in a trade between foreign ports, and in considering appropriate action, the Commission will give due regard to U.S. maritime policy and U.S. Government shipping arrangements with other nations, as well as the degree of reciprocal access afforded in U.S. foreign trades to the carriers of the countries against whom Commission action is contemplated.

§ 587.2 Factors indicating conditions unduly impairing access.

For the purpose of this part, factors which would indicate the existence of conditions created by foreign government action or action of a common carrier acting alone or in concert with any person, which unduly impair access of a U.S.-flag vessel engaged in or seeking access to ocean trade between foreign ports, include, but are not limited to:

(a) Imposition upon U.S.-flag vessels or upon shippers or consignees using such vessels, of fees, charges, requirements, or restrictions different from those imposed on national-flag or other vessels, or which preclude or tend to preclude U.S.-flag vessels from competing in the trade on the same basis as any other vessel.

(b) Reservation of a substantial portion of the total cargo in the trade to national-flag or other vessels which results in failure to provide reasonable competitive access to cargoes by U.S.-flag vessels.

(c) Use of predatory practices, possibly including but not limited to closed conferences employing fighting ships or deferred rebates, which unduly impair access of a U.S.-flag vessel to the trade.

(d) Any government or commercial practice that results in, or may result in, unequal and unfair opportunity for U.S.-flag vessel access to port or intermodal facilities or services related to the carriage of cargo inland to or from ports in the trade.

(e) Any other practice which unduly impairs access of a U.S.-flag vessel to trade between foreign ports.

§ 587.3 Petitions for relief.

(a) *Filing.*

(1) Any owner or operator of a liner, bulk, tramp or other vessel documented under the laws of the United States who believes that its access to ocean trade between foreign ports has been, or will be, unduly impaired may file a written petition for relief under the provisions of this part.

(2) An original and fifteen copies of such a petition including any supporting documents shall be filed with the Secretary, Federal Maritime Commission, Washington, D.C. 20573.

(b) *Contents.* Petitions for relief shall include the following and shall also include an affidavit attesting to the truth and accuracy of the information submitted:

(1) The name and address of the petitioner;

(2) The name and address of each party (foreign government, agency or instrumentality thereof, carrier, or other person) against whom the petition is made and a statement as to whether the party is a foreign government, agency or instrumentality thereof;

(3) A concise description and citation of the foreign law, rule or government or commercial practice complained of;

(4) A certified copy of any law, rule, regulation or other document concerned, when available and, if not in English, a certified English translation thereof;

(5) Any other information relating to any law, rule or regulation, or indicating the existence of any government or commercial practice;

(6) A description of the service offered or proposed, as a result of which petitioner is alleging harm, including information which indicates the ability of the petitioner to otherwise participate in the trade;

(7) A clear description, in detail, of the harm already caused, or which may reasonably be expected to be caused, to the petitioner for a representative period, including:

(i) Statistics documenting present or prospective cargo loss due to discriminatory government or commercial practices if harm is alleged on that basis; such statistics shall include figures for the total cargo carried or projected to be carried by petitioner in the trade for the period, and the sources of the statistics;

(ii) Information documenting how the petitioner is being prevented from entering a trade, if injury is claimed on that basis;

(iii) Statistics or other information documenting the impact of discriminatory government or commercial practices resulting in an increase in costs, service restrictions, or other harm on the basis of which injury is claimed, and the sources of the statistics; and

(iv) A statement as to why the period is representative.

(8) A separate memorandum of law or a discussion of the relevant legal issues.

(9) A recommended action, rule or regulation, the result of which will, in the view of the petitioner, address the alleged conditions unduly impairing the access of petitioner to the affected trade.

(c) *Deficient petition.* A petition which substantially fails to comply with the requirements of paragraph (b) of this section shall be rejected and the person filing the petition shall be notified of the reasons for

such rejection. Rejection is without prejudice to filing of an amended petition.

§ 587.4 Proceeding.

(a) Upon the Commission's own motion or upon the filing of a petition which meets the requirements of § 587.3, when there are indications that conditions unduly impairing the access of a U.S.-flag vessel to trade between foreign ports may exist, the Commission will institute a proceeding pursuant to this part.

(b)(1) Notice of the institution of any such proceeding will be published in the *Federal Register*, and that notice and petition, if any, will be served on the parties.

(2) Interested or adversely affected persons will be allowed a period of time to reply to the petition by the submission of written data, views or legal arguments pursuant to § 587.5 of this part. Factual submissions shall be in affidavit form.

(3) An original and 15 copies of such submissions will be filed with the Secretary, Federal Maritime Commission, Washington, D.C. 20573.

(c) Following the close of the initial response period, the Commission may issue a decision or order further hearings if warranted. If further hearings are ordered, they will be conducted pursuant to procedures to be outlined by the Commission in its order.

§ 587.5 Receipt of relevant information.

(a) In making its decision on matters arising under section 13(b)(5) of the Act, the Commission may receive and consider relevant information from any owner, operator, or conference in an affected trade, or from any foreign government, either directly or through the Department of State or from any other reliable source. All such submissions should be supported by affidavits of fact and memorandum of law. Relevant information may include, but is not limited to:

(1) Statistics, with sources, or, if unavailable, the best estimates pertaining to:

(i) The total cargo carried in the affected liner or bulk trade by type, source, value, tonnage and direction.

(ii) Cargo carried in the affected trade on vessels owned or operated by any person or conference, by type, source, value, tonnage and direction.

(iii) The percentage such cargo carried is of the total affected liner or bulk trade, on a tonnage and value basis.

(iv) The amount of cargo reserved by a foreign government for national-flag or other vessels in the affected trade, on a tonnage and value basis, and a listing of the types of cargo and specific commodities which are reserved for national-flag or other vessels.

(2) Information on the operations of vessels of any party serving the affected trade, including sailings to and from ports in the trade, taxes or other charges paid to foreign authorities, and subsidies or other payments received from foreign authorities.

(3) Information clarifying the meaning of the foreign law, rule, regulation or practice complained of, and a description of its implementation.

(4) Complete copies of all conference and other agreements, including amendments and related documents, which apply in the trade.

(b) Once introduced or adduced, information of the character described in paragraph (a) of this section, and petitions and responses thereto, shall be made part of the record for decision and may provide the basis for Commission findings of fact and conclusions of law, and for the imposition of sanctions under the Act and this part.

§ 587.6 Notification to Secretary of State.

When there are indications that conditions unduly impairing the access of a U.S.-flag vessel to trade between foreign ports may exist, the Commission shall so notify the Secretary of State and may request that the Secretary of State seek resolution of the matter through diplomatic channels. If request is made, and the Commission will give every assistance in such efforts and the Commission may request the Secretary to report the results of such efforts within a specified time period.

§ 587.7 Decision; sanctions; effective date.

(a) Upon completion of any proceeding conducted under this part, the Commission will issue and serve a decision on all parties.

(b) If the Commission finds that conditions unduly impairing access of a U.S.-flag vessel to ocean trade between foreign ports exist, any of the following actions may be taken:

(1) Imposition of equalizing fees or charges applied in the foreign trade of the United States;

(2) Limitation of sailings to and from United States ports, or of amount or type of cargo carried, during a specified period;

(3)(i) Suspension, in whole or in part, of any or all tariffs filed with the Commission for carriage to or from United States ports, including the carrier's right to use any or all tariffs of conferences in U.S. trades of which it is a member for any period the Commission specifies, or until such time as unimpaired access is secured for U.S.-flag carriers in the affected trade.

(ii) Acceptance or handling of cargo for carriage under a tariff that has been suspended, or after a common carrier's right to utilize that tariff has been suspended pursuant to this part, will subject a carrier to the imposition of a civil penalty as provided under the Act (46 U.S.C. app. 1712(b)(3)) of not more than $50,000 per shipment; and

(4) Any other action the Commission finds necessary and appropriate to address conditions unduly impairing access of a U.S.-flag vessel to trade between foreign ports.

(c) If the Commission finds that conditions impairing access of a U.S.-flag vessel to ocean trade between foreign ports has not yet occurred, and punitive sanctions are warranted, such sanctions will be imposed to

become effective simultaneously with the implementation of the action that would unduly impair the access of a U.S.-flag vessel.

(d)(1) All decisions will be published in the *Federal Register.*

(2) Decisions imposing sanctions, except where conditions warrant and for good cause, will become effective 30 days after the date of publication.

(e) Any party may file a petition to reconsider any decision under this part. Such a petition shall be served on all other parties to the proceeding and shall not, in and of itself, stay the effective date of the Commission action.

§ 587.8 Submission of decision to the President.

Concurrently with the submission of any decision imposing sanctions to the *Federal Register* pursuant to § 587.7(d)(1), the Commission shall transmit that decision to the President of the United States who may, within ten days after receiving the decision, disapprove it if the President finds that disapproval is required for reasons of the national defense or the foreign policy of the United States.

§ 587.9 Postponement, discontinuance, or suspension of action.

(a) The Commission may, on its own motion or upon a petition, postpone, discontinue, or suspend any action taken by it under the provisions of this part. Such a petition will be served on all other parties and will not, in and of itself, stay the effective date of Commission action.

(b) The Commission shall postpone, discontinue or suspend any action provided for in its final decision if so directed by the President for reasons of national defense or foreign policy of the United States as provided in § 587.8.

NOTE: In accordance with 44 U.S.C. 3518(c)(1)(B), and except for investigations undertaken with reference to a category of individuals or entities (e.g., an entire industry), any information request or requirement in this part is not subject to the requirements of section 3507(f) of the Paperwork Reduction Act because such collection of information is pursuant to a civil, administrative action or investigation by an agency of the United States against specific individuals or entities.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

[46 CFR PART 572]

DOCKET NO. 84–26 AND DOCKET NO. 84–32

RULES GOVERNING AGREEMENTS BY OCEAN COMMON CARRIERS AND OTHER PERSONS SUBJECT TO THE SHIPPING ACT OF 1984

November 14, 1984

ACTION: Final Rule.

SUMMARY: This Final Rule revises and supersedes the Interim Rule on agreements which implemented those provisions of the Shipping Act of 1984 governing agreements by or among ocean common carriers as well as certain marine terminal operator agreements. This Rule modified by addition, deletion, and revision the Interim Rule in the areas of definitions, exclusions and exemptions, agreement format, reporting and record keeping and the information requirements of the Information Form. In addition the transitional rules regarding mandatory provisions in agreements are deleted in their entirety. The Rule also makes various editorial, technical, and clarifying changes in the Interim Rule. As of this publication, all of the Commission's interim regulations to implement the 1984 Act are finalized.

DATE: This Rule is effective on December 15, 1984.

SUPPLEMENTARY INFORMATION:

I. *Background*

The Shipping Act of 1984, Public Law 98–237, 98 Stat. 67, 46 U.S.C. app. 1701–1720 (the Act or the 1984 Act) was signed into law on March 20, 1984 with an effective date of June 18, 1984. The 1984 Act superseded the Shipping Act, 1916 (1916 Act) (46 U.S.C. app. 801 *et seq.*) with respect to the regulation of agreements by or among ocean common carriers, and certain other subject persons, in the foreign oceanborne commerce of the United States. The Act makes significant changes with regard to the kinds of agreements that are within its scope, the mandatory content of certain kinds of agreements, the procedures for filing, processing, and reviewing agreements, and the parameters on the antitrust immunity which it confers on agreements. Other areas of significant change include new statutory definitions, and a somewhat modified exemption authority. The

Act authorizes the requiring of periodical or special reports as well as the filing of conference minutes and provides for penalties for infringement of its provisions.

The Act and its legislative history sets forth certain policies to guide regulation under the new statutory scheme. One fundamental purpose of the Act is to establish a nondiscriminatory regulatory process with a minimum of government intervention and regulatory costs. Another is to provide an efficient and economic ocean transportation system in harmony with international shipping practices. To these ends, agreements are to be reviewed and processed within a fixed period of time and generally will become effective after a short waiting period. Only those pending agreements which raise concern under the general standard or the conduct prohibited by section 10 of the Act are to be subjected to injunctive challenge in federal court where the Commission has the burden of proof. The Act thereby places greater emphasis on the subsequent monitoring of an agreement after it has become effective in order to ensure that agreement operations are conducted consistent with the requirements of the Act.

On May 29, 1984, pursuant to section 17(b) of the Act (46 U.S.C. app. 1716(b)) which authorizes the Commission to prescribe interim rules without adhering to the usual notice and comment procedures under the Administrative Procedure Act (5 U.S.C. 553), the Commission published an Interim Rule implementing those provisions of the Act which govern agreements. *Rules Governing Agreements By Ocean Common Carriers and Other Persons Subject to the Shipping Act of 1984,* Docket No. 84–26 (26 F.M.C. 681). Interested persons were given 90 days to comment on the Interim Rule. In addition, interested persons were afforded an opportunity to submit emergency comments addressing any matters which might warrant modification prior to the June 18, 1984 effective date. A number of emergency comments were received and on June 14, 1984, the Commission published amendments to the Interim Rule (26 F.M.C. 748).[1]

Subsequently, during the comment period, the Commission received petitions from a number of conferences to suspend certain record keeping and reporting requirements in Subpart G. On September 17, 1984 the Commission published a further amendment to the Interim Rule which deferred the implementation of certain of those requirements pending the issuance of a Final Rule (27 F.M.C. 121).

Thirty-nine filings were received in Docket No. 84–26: 14 emergency comments filed prior to June 18, 1984; 23 final comments either timely filed or filed shortly after the deadline and granted an extension of time for filing;[2] and two petitions seeking relief from certain requirements of

[1] The Office of Management and Budget (OMB) clearance number was also published in the *Federal Register* on June 14, 1984 (49 FR 24521).

[2] Several persons sought to file late comments in Docket No. 84–26 well after the close of the comment period and these requests were denied. For the most part these comments are either repetitious of points al-

Continued

Subpart G. Because of the extensive number of parties that participated in this proceeding, comments are identified by number in the following discussion. A list of comments filed in Docket No. 84–26 is provided in the conclusion to the Supplementary Information.

On September 17, 1984, again pursuant to the section 17(b) rulemaking authority, the Commission published a third amendment to the Interim Rule. *Amendments to Rules Governing Agreements by Ocean Common Carriers and Other Persons,* Docket No. 84–32 (27 F.M.C. 121). This amendment added a new section 572.103(g) to state Commission policy regarding the completeness and definiteness with which agreement authority must be described, and a new section 572.406 to establish guidelines regarding open-ended authority and interstitial authority. Interested persons were given 30 days to comment on this amendment. Ten timely comments were received in Docket No. 84–32. These comments are also listed in the conclusion to the Supplementary Information.

Many of the concerns raised in the emergency comments and in the Subpart G petitions filed in Docket No. 84–26 have been addressed through changes in the mandatory provisions of Subpart H and through the temporary suspension of certain requirements in Subpart G. Matters raised in the emergency comments and the petitions which were not addressed in the June amendments or the September Order have been considered in connection with the issuance of the Final Rule. Thus, all timely comments received in Docket Nos. 84–26 and 84–32 have been reviewed and considered. The Supplementary Information discusses significant matters raised in the comments. Any comments not expressly mentioned herein, have either been incorporated as a technical change without discussion or have been found to be without merit or irrelevant.

In the discussion which follows, the term Interim Rule (designated Part 572) refers to the rules issued in Docket No. 84–26, as subsequently amended and suspended, and the amendment to Part 572 issued in Docket No. 84–32. The rule which is now published is referred to as the Final Rule.

II. *Discussion of Comments on Part 572 and Appendix A*

A number of technical changes have been made throughout Part 572 and Appendix A. Some changes were prompted by comments and others are clarifying or technical changes made to improve this Part. One change made throughout has been the substitution of the phrase "this part" for phrases such as "this rule" or "these rules."

---

ready raised in other comments or are rendered moot by the Commission's action regarding Subpart H. For a discussion of the reasons for rejecting these late filed comments see the Commission's Order of Denial in Docket No. 84–26 dated October 17, 1984.

SUBPART A—GENERAL PROVISIONS

Subpart A contains provisions which are of general applicability to Part 572. Specific sections state the authorities, purpose and policies of part 572 and define certain terms.

Section 572.101—Authority

Section 572.101 states the statutory authorities for Part 572. No comments were received on this section and no substantive changes have been made to it in the Final Rule.

Section 572.102—Purpose

Section 572.102 states the purpose of Part 572, namely to implement those provisions of the Act which govern agreements among ocean common carriers and other subject entities. Comment 38 states that the words "other entities" should be changed to "marine terminal operators" because such operators are the only entities other than ocean common carriers which are required to file agreements under the Act. This point is well taken. Therefore, as a clarification, section 572.102 is amended to recite the language of section 4 of the Act which states that the Act applies to agreements by or among ocean common carriers and to agreements among marine terminal operators and among one or more ocean common carriers. Marine terminal operator agreements subject to Part 572 must have a nexus with foreign commerce.

Section 572.103—Policies

Section 572.103 sets forth the general policies to be followed in administering the regulatory regime established by Part 572.

Section 572.103(b)

Section 572.103(b) states that in reviewing agreements under the general standard only that information which is relevant and necessary to a section 6(g) review shall accompany particular types of agreements. Comment 22 takes issue with section 572.103(b) specifically and section 572.103 generally to the extent that they establish a basis for requiring the Information Form with certain agreement filings. The basis for the Information Form requirement is discussed below in connection with the comments to Subpart D, Subpart F and Appendix A. As indicated below, some adjustments have been made in the Information Form in response to comments. However, the basic requirement of a Form is being retained. Therefore, there is no need to modify the statement of policies with regard to informational needs.

Section 572.103(f)

Section 572.103(f) states Commission policy regarding the need for and means of achieving compliance with the Act's requirement that mandatory

provisions be included in certain kinds of agreements. Comment 22 urges that conferences continue to be allowed to draft their own mandatory provisions. As indicated below in the discussion of Subpart H, the purpose of requiring adoption of the model mandatory provisions in Subpart H has been achieved, and Subpart H is deleted from the Final Rule. Appropriate changes have been made in the statement of policy in paragraph (f) to indicate that parties to conference agreements may develop their own mandatory provisions.

Section 572.103(g)

Section 572.103(g) together with section 572.406, were added in Docket No. 84–32 as new sections of Part 572. Section 572.103(g) states Commission policy that agreements must be clear and definite, must embody the complete understanding of the parties, and must set forth the specific authorities and conditions under which the parties to the agreement will operate.

Although Comment 102 expresses strong support for inclusion of section 572.103(g), a number of other comments suggest that it is vague, unnecessary, or inappropriate and should be deleted or modified. The necessity of such a policy statement was not apparent at the time the Interim Rule was issued. The principles set forth in the policy statement were well settled under the administration of the 1916 Act and nothing in the 1984 Act or its legislative history indicated any departure from those established principles. However, the early experience in the administration of the 1984 Act provided a number of significant instances in which filed agreements contained unacceptably vague, incomplete or indefinite statements of authority. It was this experience that prompted the addition of section 572.103(g) and section 572.406 to Part 572.

This statement of policy merely represents a codification of existing policy. As a point of clarification, it should be noted that it is not the intent of this section to provide a basis for imposing detailed limits on every agreement. Its purpose is to ensure that a complete agreement is filed in sufficient detail to conduct a meaningful review. However, no change in the language of section 572.103(g) is necessary and it is retained in the Final Rule. The other issues raised by the comments are addressed below in the discussion of section 572.406.

Section 572.104—Definitions

Section 572.104 lists definitions used in Part 572. Changes have been made in response to comments to state more precisely particular definitions.

Section 572.104(a)—Agreement

Section 572.104(a) recites the definition of agreement. This definition is amended to include "cancellation", thereby conforming the definition to the statute.

Section 572.104(b)—Antitrust Laws

Section 572.104(b) recites the definition of "antitrust laws" found in section 3(2) of the Act. Comment 38 states that this definition is used only once in the Interim Rule and should be eliminated, or, in the alternative, rephrased to provide the United States Code citations of the referenced statutes. This definition was included to improve the efficiency of Part 572 as a complete document and for that reason it shall be retained. The definition, however, has been modified to use the United States Code citations in order to make the definition more functional.

Section 572.104(c)—Appendix

Section 572.104(c) defines the additional material which is appended to, and constitutes a part of, an agreement as an "appendix". Comment 22 suggests that the definition is so narrow as to preclude the use of an appendix to publish provisions, such as self-policing rules, which have routinely been published in an appendix. Comment 39 suggests that the definition, in conjunction with other sections of Part 572, would impose the full 45-day waiting period on "appendices" contents.

The use of an appendix is explained at section 572.402(f), which governs the contents of such an appendix. Section 572.402(f) is amended to permit an expansion of the use of an appendix. The "appendix" publication is not mandatory, nor is there any prohibition against the "appendix" publication of other agreement provisions whose physical location in an agreement is not otherwise specified in this part. The period of review conducted for such filings depends upon the substantive content of the "appendix" and not its form. Parties are not precluded from routine use of appendices, unless the particular provision is one whose placement is required elsewhere in the agreement pursuant to sections 572.402, 572.501, and 572.502. The Interim Rule definition fulfills these objectives and is retained.

Section 572.104(e)—Common Carrier

Section 572.104(e) recites the definition of the term "common carrier" which is set forth in section 3(6) of the Act. The statutory definition is stated conjunctively rather than disjunctively and requires both the assumption of responsibility for transportation and the utilization of a vessel. Comment 2 suggests that the word "and" be deleted from paragraph (e)(1) and replaced with the word "or". Because this suggested change would substantively alter the statutory definition of a common carrier, the change is not appropriate. The Final Rule therefore continues to recite the statutory definition.

Section 572.104(f)—Conference Agreement

Section 572.104(f) defines a "conference agreement" as one which provides for the collective fixing of rates, an administrative structure, and the filing of a common tariff, unless other features of the arrangement

bring it within the definition of a consortium, joint service, pooling, sailing or transshipment agreement. Comment 22 suggests that the "central organization" element of this definition does not clearly encompass simple administrative structures. Comment 28 also suggests that the minimal administrative structure of agreements previously designated "rate agreements" is not clearly embraced by the definition. This definition is intended to include rate agreements. The Interim Rule definition shall therefore be revised to remove any implication that only a large, complex administrative structure would bring a ratemaking agreement within the scope of this definition.

Section 572.104(g)—Consultation

Section 572.104(g) defines "consultation" as the process of conferring between carriers and shippers for the purposes of resolving commercial disputes or reducing malpractices. Comment 39 suggests that the definition's "resolving commercial disputes" language potentially oversteps the "promote . . . commercial resolution" language of the Act and could be interpreted to impose a requirement of binding arbitration.

In response to this suggestion, the definition in the Final Rule shall be clarified to state that "consultation" means a process whereby a conference and a shipper confer for the purpose of promoting the commercial resolution of disputes and/or the prevention and elimination of the occurrence of malpractices.

Section 572.104(i)—Effective Agreement

Section 572.107(i) defines an "effective agreement" as one approved pursuant to section 15 of the 1916 Act or one permitted to become effective pursuant to sections 5 and 6 of the 1984 Act. Comment 38 states that the term is not used in Part 572 and should be deleted. Comment 24 contends that the definition does not encompass agreements which are exempted under either the 1984 Act of the 1916 Act.

The term "effective agreement" is used in the definition of "modification" in section 572.104(r), which in turn supports sections 572.402 and 572.403. Definition of the term is retained, but its scope is expanded to include an agreement previously approved pursuant to section 15 of the 1916 Act or effective pursuant to an exemption under the 1916 Act, or filed and effective pursuant to sections 5 and 6 of the 1984 Act or exempt pursuant to section 16 of the 1984 Act.

Section 572.104(m)—Interconference Agreement

Section 572.104(m) defined an "interconference agreement" as one between conferences serving different trades. Comments 22 and 28 contend that the definition is unnecessarily restricted by the "different trades'" condition. These Comments have merit. Because there is no prohibition against an agreement between two conferences in the same trade, such an agreement should be included in the definition of "interconference agreements" and made subject to the requirements placed on such agreements

by the Act and Part 572. The Final Rule therefore simply defines "interconference agreement" to mean an agreement between conferences.

Section 572.104(n)—Joint Service/Consortium Agreement

Section 572.104(n) Defines a "joint service" or "consortium" agreement as a price fixing arrangement between ocean common carriers wherein the parties operate generally as a single carrier, under a single operating name and common operating management.

Comment 27 suggests that the definition is too narrow and fails to contemplate a situation where a joint service holds out service only through its participation in a conference and does not independently fix its own rates or publish its own tariff. Comment 22 also contends that a joint service does not always include all of the attributes prescribed by the Interim Rule definition.

The 1984 Act refers to joint service/consortia but does not define these terms. In the interest of providing the industry same guidance in this area, we have developed a definition as consistent as possible with prior convention. We believe that agreements which engage in, or have the authority or potential to engage in, the activities described in this definition are properly treated as a single type of agreement and denominated a "joint service" or "consortium" agreement for the purposes of the Act and Part 572. We agree, however, that the joint service definition should be amended to include those agreements in which the parties choose to exercise their rate fixing and tariff authorities through participation, as a single entity, in a conference or other duly authorized agreement. Accordingly, section 572.104(n) (2) and (3) are revised to read: "(2) independently fixes its own rates, charges, practices and conditions of service or chooses to participate in its operating name in another agreement which is duly authorized to determine and implement such activities; (3) independently publishes its own tariff or chooses to participate in its operating name in an otherwise established tariff."

Section 572.104(o)—Marine Terminal Facilities

Section 572.104(o) defines the term "marine terminal facilities" to include off-dock container freight stations at inland locations. Comment 38 urges the deletion of this definition because the term does not otherwise appear in Part 572.

This term supports the definition of a marine terminal operator in section 572.104(p). It is appropriate, therefore, to define the facilities utilized by marine terminal operators in order to resolve uncertainties as to the Commission's jurisdiction over agreements governing the use or operation of such facilities. As indicated in some of the other comments, there appears to be some confusion concerning the facilities that are provided by the "marine terminal operator" defined in section 3 of the 1984 Act.

Comments 20 and 34 state that Commission jurisdiction is improperly expanded by defining the term "marine terminal facility" to include off-dock container freight stations at inland locations or other similar facilities from which cargo is tendered to a consignee or received from shippers for vessel or container loading. These Comments suggest that Congress intended the reach of the 1984 Act to be no greater than that of the 1916 Act with respect to marine terminals. Comment 22 argues that the definition would subject importers and exporters to commission regulation as marine terminal operators and enable them to obtain antitrust immunity under the 1984 Act.

Off-dock container freight stations are properly included within the term "marine terminal facilities." Both the 1984 Act and the 1916 Act refer to terminal operators as persons "furnishing wharfage, dock, warehouse, or other terminal facilities in connection with a common carrier by water." As Comment 20 acknowledges, this phrase has been construed under the provisions of the 1916 Act in *Richmond Transfer and Storage Company,* 23 F.M.C. 362, (1980), to include marine terminal facilities not located on the dock at the water's edge. There is nothing in the 1984 Act or its legislative history to indicate the Congress intended the Commission to now construe marine terminal facilities so as to exclude off-dock container freight stations. Accordingly, the Commission will not, as urged by some comments, delete off-dock container freight stations from the marine terminal facility definition is section 572.104(o).

Comment 28 is concerned that agreements for "pure labor services," such as stevedoring contracts, may be made subject to the filling requirements of the 1984 Act because the phrase "and services connected therewith" is used in defining "marine terminal facilities" in section 572.104(o). Comment 28 misconstrues this definition. The "Supplementary Information" to the Interim Rule indicated that neither the term "marine terminal facility," nor the term "marine terminal operator," would operate to extend Commission jurisdiction over stevedoring or "pure labor services." The phrase "and services connected therewith" is intended to refer to those labor services that are incidental to terminal operators, such as free time, checking, or handling accordingly, the suggestion that the above-referenced phrases be deleted has not been adopted.

Section 572.104(p)—Marine Terminal Operator

Section 572.104(p), which tracks the language of the 1984 Act, defines a "marine terminal operator" as a person:

> . . . *engaged* . . . in the business of furnishing wharfage, dock, warehouse, or other terminal facilities in connection with a common carrier by water. (Emphasis added).[3]

[3] There is a subtle but possibly significant difference between the 1984 Act's definition of marine terminal operator and the 1916 Act's definition of a terminal operator as an "other person." Section 1 of the 1916 Act defines the term "other person" as any person 'carrying on the business of forwarding' *or* furnishing

This definition shall be modified to make clear that shippers, or consignees, as well as their facilities, are not made subject to Part 572 and the Commission's jurisdiction merely because the shippers' or consignees' facilities are used to tender or receive proprietary cargo. Shippers or consignees, who for their own or the carrier's convenience, tender or receive proprietary cargo at their owned or leased facilities are not *engaged* in the business of furnishing terminal facilities in connection with a common carrier by water. Such shippers or consignees provide facilities to common carriers only as an incidental element of their primary business concern. Such consignees and shippers do not meet the statutory definition of a marine terminal operator and are not subject to Part 572 and the agreement provisions of the 1984 Act. Accordingly, section 572.104(p) is amended by adding a statement that the term "marine terminal operator" does not include shippers or consignees who exclusively furnish marine terminal facilities or services in connection with the tendering or receiving of proprietary cargo from a common carrier by water.

Section 572.104(r)—Modification

Section 572.104(r) defines those changes which are interpreted to be "modifications" to agreements and therefore subject to sections of Part 572 dealing with "modifications." Comment 22 contends that "cancellations" are not properly includable in the definition. The Act at section 3(l) suggests a distinction between "modification" and "cancellation." Section 572.104(r) is therefore amended to delete the reference to "cancellations."

Section 572.104(s)—Non-Vessel-Operating Common Carrier

Section 572.104(s) defines a common carrier which does not operate the vessels by which the ocean transportation is provided as a "non-vessel-operating common carrier" (NVOCC) and establishes its relationship to the underlying "ocean common carrier" as that of a "shipper." Comment 39 suggests that this definition be modified to expressly state that an NVOCC is a "common carrier" in its relationship with the underlying shipper. The Interim Rule definition, however, recites the statutory definition and shall be retained in the Final Rule.

Section 572.104(x)—Port

Section 572.104(x) defines the term "port" as the place at which an ocean common carrier originates or terminates (and/or transships) its actual ocean carriage of cargo or passengers as to any particular transportation

wharfage, dock, warehouse or other terminal facilities in connection with a common carrier." The term "carrying on the business of forwarding" is defined separately in the 1916 Act. Although the Commission has previously referred to terminal operators as persons carrying on the business of furnishing wharfage dockage etc., the phrase "carry on the business of" does not clearly modify the language "furnishing wharfage, dockage, etc." The 1984 Act, on the other hand, unequivocally requires marine terminal operators to be "engaged in the business of furnishing wharfage, dockage, etc."

movement. Comment 23 suggests certain revisions to the definition of "port" as well as to the instructions to part V(A) of the Information Form. Comment 23 objects that the way in which the term "port call" is used in the Form is overly broad and imposes an enormous data collection burden. Certain revisions have been made to the Information Form which should resolve this concern. Therefore, there is no need to change the definition of "port" in section 572.104(x).

Section 572.104(z)—Service Contract

Section 572.104(z) defines the term "service contract" as used in Part 572. This definition recites the definition set forth in the Act and makes no express reference to service contracts with shippers' associations. Comment 39 states that this definition would be improved by expressly recognizing the authority of conferences to enter into service contracts with shippers' associations. Comment 39 states that this change would better reflect the intent of the Act and its legislative history. This suggestion has merit and the definition shall be amended as suggested.

Section 572.104(aa)—Shipper

Section 572.104(aa) tracks section 3(23) of the Act and defines the term shipper as an owner or person for whose account the ocean transportation of cargo is provided or the person to whom delivery is made. Comment 28 suggests clarification of the definition by the inclusion of the word "other" after the words "owner or." Comment 33 suggests the addition of a statement that the term "shipper" also includes "shippers' associations." The first suggestion is adopted. This revision should also accommodate the other suggestion that the term "shipper" be expanded to include shippers' association.

Section 572.104(bb)—Shippers' Association

Section 572.104(bb) recites the statutory definition of a shippers' association. Comment 33 states that this definition should make clear that shippers' associations are included within the meaning of the term "shipper" wherever that term is used in Part 572. In view of the change made in the term "shipper," no change in this definition is deemed necessary. The question of whether a shippers' association should be composed only of persons who are the beneficial owners of cargo, as noted in Comment 22, is the subject of a pending petition and is not addressed here.

Section 572.104(cc)—Shippers' Requests and Complaints

Section 572.104(cc) describes the shipper/conference communications which constitute "shippers' requests and complaints" and which are subject to Part 572. Comment 39 suggests that the definition be limited to written communications and exclude misrating claims.

Limiting shippers' requests and complaints to written communications and excluding complaints pertaining to misratings is unduly restrictive and

unwarranted. The matter of written versus oral communications is a procedural matter better dealt with in the context of the conference's rules regarding shippers' requests and complaints. Moreover, there appears to be no reason for excluding misratings as a subject matter for shippers' requests and complaints. The handling of misratings is a matter commonly dealt with in tariff publications and as such should not be excluded. Given the nature of misratings, and as long as the conference tariff provides an efficient and fair mechanism for their resolution, it is doubtful that such matters would come to the conference as a shippers' request or complaint. However, if the tariff fails to provide an appropriate remedy, then the tariff itself is open to criticism and is a valid subject for a request or complaint.

It is also suggested that section 572.104(cc) be expanded to include communications involving service contracts. This suggestion has merit and section 572.104(cc) has, therefore, been revised to provide that "shippers' requests and complaints" includes a communication from a shipper to a conference "requesting to enter into a service contract."

Section 572.104(dd)—Space Charter Agreement

Section 572.104(dd) defines that combination of intercarrier activities which constitutes a "space charter agreement." Comment 28 suggests that there is a possible overlap between the "space charter" and "transshipment" agreement definitions and suggests that the definition of a space charter agreement expressly exclude transshipment agreements.

There is indeed some overlap between the two definitions. This occurs because a transshipment agreement is a type of space charter. To specifically exclude them from the definition of space charter would confuse this relationship. The suggestion therefore is not adopted.

Section 572.104(ff)—Transshipment Agreement

Section 572.104(ff) defines that combination of intercarrier activities and authorities which are classified as "transshipment agreements." Apart from the previously discussed comment relative to the overlap between "space charter" and "transshipment agreements," Comment 38 contends that the "transshipment agreement" definition is unused in Part 572 and should be deleted. The term "transshipment agreement" is used as an exclusion in defining conference agreements in section 572.104(f) (an exclusion cited in section 3(7) of the Act). The term is also used and components of its definition are repeated in the exemption for "non-exclusive transshipment agreements." The definition therefore will be retained.

SUBPART B—SCOPE

The purpose of Subpart B is to set forth those agreements which are subject to Part 572 and to specifically list certain kinds of agreements to which the rules of Part 572 do not apply. In response to certain comments

and in order to state the distinction between subject and non-subject agreements more clearly, Subpart B is being reorganized as two sections. Section 572.201 of the Final Rule encompasses the agreements which were set forth in sections 572.201 and 572.202 of the Interim Rule and is retitled "Subject Agreements." Section 572.202 of the Final Rule includes those agreements which were set forth in sections 572.203 through 572.208 of the Interim Rule and is retitled "Non-subject agreements."

Comment 38 proposes that Subpart B be expanded to include "agreements related to transportation to be performed within or between foreign countries." Comment 22, on the other hand, urges that this same category of agreements be added as an exclusion in Subpart C.

Section 5(a) of the Act expressly provides that foreign transportation agreements are not required to be filed with the Commission. Because these agreements are not subject to filing, Subpart B is being modified to include them as agreements which are not subject to Part 572. Because of this addition of the broad class of foreign transportation agreements in Subpart B, the inclusion of foreign inland agreements or foreign marine terminal agreements in Subpart C has been eliminated from the Final Rule. Foreign transportation agreements are not subject to Part 572.

Comment 22 argues that transshipment agreements fall within the class of foreign transportation agreements specified in section 5(a) of the Act and should be excluded from filing. The Comment objects to continued regulation of transshipment agreements whether exclusive or non-exclusive. To the extent that these agreements are not subject to this part under section 572.202(c) or fall within the exemption of section 572.306, they need not be filed. Other types of transshipment agreements, however, are subject to filing requirements.

Section 572.201 (redesignated section 572.201(a))—Agreements By or Among Ocean Common Carriers

Section 572.201 recites the listing of agreements in section 4(a) of the Act. No substantive changes have been made to this section in the Final Rule.

Section 572.202 (redesignated section 572.201(b))—Marine Terminal Operator Agreements Involving Foreign Commerce

This section is based on section 4(b) of the Act. In conjunction with section 572.202(e) it clarifies and implements the distinction under the Act between marine terminal operator agreements which involve foreign commerce and those which are exclusively in interstate commerce. The suggestion in Comment 20 that further clarification of the status and treatment of marine terminal operator agreements is necessary has been addressed above in discussing the definitions of "marine terminal facility" and "marine terminal operator".

Section 572.203 (redesignated section 572.202(e))—Marine Terminal Operator Agreements Exclusively in Interstate Commerce

This section states that a marine terminal operator agreement exclusively in interstate commerce is not subject to Part 572. Comment 38 suggests that this section is superfluous and recommends that it be deleted. Inasmuch as this section, together with section 572.201(b), distinguishes those exclusively domestic marine terminal operator agreements which are outside the scope of Part 572 from those terminal agreements involving foreign commerce, this section serves a useful purpose and shall be retained. Certain technical changes suggested by Comment 38, however, have been adopted.

Comment 21 expresses concern about inadvertent antitrust exposure and would prefer a procedure whereby parties could obtain antitrust immunity under both the 1984 and 1916 Shipping Acts. Parties that have such concern may file an agreement under both the 1984 and 1916 Shipping Acts and seek to obtain antitrust immunity under both Acts.

Section 572.204 (redesignated 572.202(d))—Common Carrier Marine Terminal Agreements

This section provides that Part 572 does not apply to common carrier terminal agreements. Comment 38 suggests that the word "marine" should be added before the word "terminal". This change would bring the language of this section into conformity with section 7(b)(3) of the Act and therefore it is adopted.

Section 572.205 (redesignated 572.202(f))—Non-Vessel-Operating Common Carrier Agreements

This section states that agreements solely and exclusively between non-vessel-operating common carriers are not subject to Part 572. Comment 38 states that this section is superfluous and should be deleted. The purpose of this section is to provide guidance with regard to agreements between or among NVOCC's. Such agreements were subject to the 1916 Act but are not within the Commission's jurisdiction under sections 4 and 5 of the 1984 Act. An express statement that these agreements are not subject to Part 572 is therefore appropriate and will be retained in the Final Rule.

Two technical changes shall be made in this section. Comment 38 believes that the use of the word "by" in this section might be read to exclude a three-party space-charter and sailing agreement between one NVOCC and two ocean common carriers. To avoid this unintended interpretation, the word "by" has been deleted from the Final Rule. In addition, the phrase "solely and exclusively" is added in order to further clarify the status of agreements among NVOCC's under the Act.

Section 572.206 (redesignated section 572.202(g))—Ocean Freight Forwarder Agreements

This section states that ocean freight forwarder agreements are not subject to Part 572. Comment 38 argues that this section is superfluous and should be deleted. Again there would appear to be a useful purpose served by retaining this section in order to provide guidance on those maritime industry agreements which were subject to the 1916 Act but not subject to sections 4 and 5 of the 1984 Act. The technical change suggested in Comment 38 would improve this section and the words "by or" are deleted. In addition, the phrase "solely and exclusively" is added to further clarify this section.

Section 572.207 (redesignated section 572.202(b))—Maritime Labor Agreements

This section is a restatement of section 5(e) of the Act. No comments were received on this section and no substantive changes have been made to it in the Final Rule.

Section 572.208 (redesignated section 572.202(a))—Acquisitions

This section is a restatement of section 4(c) of the Act. No comments were received on this section and no substantive changes have been made to it in the final Rule.

SUBPART C—EXEMPTIONS

Subpart C treats those agreements which have been exempted from filing or other requirements by the Commission pursuant to section 16 of the Act. In response to certain comments, Subpart C has been reorganized to deal solely with Commission ordered exemptions. The statutory exclusions formerly listed in this subpart have been relocated in Subpart B, as discussed above. Section 572.301 sets forth the procedures applicable to exemptions. Thereafter, each separate exemption is listed in a separate section. This arrangement will facilitate the orderly addition of any new exemptions to this subpart.

Section 572.301—Exemption Procedures

Section 572.301 sets forth procedures for exempting agreements subject to the Act from any requirement of the Act.

Section 572.301(a)—Authority

Section 572.301(a) concludes with the statement that: "The antitrust laws do not apply to any agreement exempted from any requirement of the Act, including filing and Information Form requirements." Comment 38 states that this sentence should be deleted because the Commission does not have jurisdiction over the antitrust laws. This language was suggested by section 7 of the Act which states that the antitrust laws do not apply to certain agreements. Its purpose was merely to indicate, as provided

in the Act, that agreements exempt pursuant to section 16 enjoy antitrust immunity. It was not the intention of this statement to assert or imply Commission jurisdiction over the antitrust laws. In order to eliminate any confusion, this sentence shall be deleted. Deletion, of course, does not in any way affect whatever antitrust immunity attaches to exempt agreements.

Section 572.301(c)—Application for Exemption

Comment 38 suggests that in the first sentence of section 572.301(c) the words "or revocation" should be changed to read "or revocation of an exemption." This suggested change clarifies this section and is adopted.

Section 572.301(f)—Retention of Agreement by Parties

Section 572.301(f) requires that any agreement which has been exempted pursuant to section 16 of the Act shall be retained by the parties and be made available upon request for inspection during the term of the agreement and for a period of three years after its termination.

Comments 22 and 38 object to the requirement that copies of exempt agreements be retained for a three-year period. These Comments do not question the Commission's authority to require retention of agreements but argue that the Commission should not, as a matter of policy, impose an across-the-board requirement for agreements with a *de minimis* impact.

This record keeping requirement is necessary to ensure that the Commission is able to carry out its trade monitoring responsibilities under the Act. Should a question of violation of the Act arise, the exempt agreement must be available for review. Moreover, a three-year period does not appear to be unreasonable. Finally, it does not appear to be a significant burden for parties to retain a copy of an agreement for a period of three years after its expiration. The record retention requirement, therefore, shall be retained as to exempt agreements.

Section 572.302—Foreign Inland Transportation Agreements—Exclusion

This section in the Interim Rule stated an exclusion from filing for foreign inland transportation agreements. Comment 38 states that such agreements are not statutorily excluded from filing but should nevertheless be exempt from filling pursuant to section 16 of the Act. Section 5(a) of the Act excludes from filing "agreements related to transportation to be performed within or between foreign countries." The Commission interprets this broad class of agreements to include foreign inland transportation agreements. Because of the inclusion of foreign transportation agreements in Subpart B there is no longer any need to retain this section and it is deleted from the Final Rule.

Section 572.303—Foreign Marine Terminal Agreements—Exclusion

Section 572.303 in the Interim Rule states the statutory exclusion from filing for foreign marine terminal agreements. Comment 38 states that these agreements should be treated as exemptions rather than as exclusions. Foreign marine terminal agreements, however, are also a specific type of the foreign transportation agreement referred to in section 5(a) of the Act. They are, therefore, included within the scope of section 572.202(c) in the Final Rule and are deleted from Subpart C.

Section 572.304 (redesignated section 572.302)—Non-Substantive Modifications to Existing Agreements—Exemption

This section is based on the exemption which formerly appeared at 46 CFR 524.3(d). The former exemption covered three specific kinds of agreements or modifications: (1) technical changes to the text of the agreement itself; (2) changes in titles of persons or committees; and (3) agreements and changes affecting office facilities, furnishings, supplies and other housekeeping matters. The exemption in the Interim Rule narrowed the former exemption by eliminating the first two types of changes.

Comments 22, 24, 26, 38 and 39 urge that the full scope of the former exemption be restored in the Final Rule. The reason for restricting the former exemption was to ensure that certain changes to the text of the agreement or in the personnel of the agreement administration would be filed so that the agreement on file with the Commission would accurately reflect the actual agreement currently in effect among the parties.

These Comments have merit and the full scope of the former exemption is restored. The purposes to be achieved by limiting the exemption can still be achieved if all such non-substantive agreements or modifications are filed with the Commission for informational purposes. Finally, this section is amended, as suggested by Comment 26, to allow parties to seek a determination from the Director, Bureau of Agreements and Trade Monitoring as to whether a particular agreement or modification is non-substantive.

Section 572.305 (redesignated section 572.303)—Husbanding Agreements—Exemption

This section in the Interim Rule clarified and continued the exemption of husbanding agreements. No comments were received on this section, and no substantive changes have been made to this section in the Final Rule.

Section 572.306 (redesignated section 572.304)—Agency Agreements—Exemption

This section in the Interim Rule clarified and continued the exemption for agency agreements pursuant to section 16 of the 1984 Act. Comment 19 states that a blanket exemption for agency agreements is not appropriate.

This comment, filed by the Port of Los Angeles, notes that in Docket No. 83–48, *Alaska Maritime Agencies, Inc., et al. v. Port of Anacortes, et al.,* agents took the position that they should not be responsible for certain charges where they act for disclosed principals. The Port, however, states that it is not always clear for whom an agent is working or whether the agent is authorized to make certain representations. The Port, therefore, seeks some modification of the exemption to address the alleged need of marine terminal operators to know the scope of the authority of the parties with whom they are dealing.

Subsequent to the filing of Comment 19, a settlement was reached and approved by the Presiding Officer in Docket No. 83–48 which may address the Port's concern. *See Alaska Maritime Agencies Inc., et al. v. Port of Anacortes, et al.,* 27 F.M.C. 137 (1984). In addition, section 572.301(f) requires that exempt agreements be retained for a period of three years. Should any problems develop, an affected party could bring them to the Commission's attention. Finally, ports or other parties may seek modification or revocation of this exemption at any time in a separate proceeding under the procedures of this subpart. Such modification, if warranted, would then be based upon a proper factual record. Neither substantive modification nor revocation, however, would appear to be warranted at this time.

Section 572.306(a) (redesignated section 572.304(a))

Comment 22 believes that the comma following "an agent" where it first appears in this section might imply that the agent is subject to the Act rather than merely state the type of agent whose agreement is subject to the Act. In order to remove any implication that all agents are subject to the Act, the recommended change shall be made and the comma shall be deleted.

572.306(b) (redesignated section 572.304(b))

Comment 22 also believes that a change is necessary to paragraph (b)(2). This Comment suggests that the words "do not" may have been omitted from paragraph (b)(2) and therefore suggests that the paragraph be revised to read "except those . . . (2) which *do not* permit an agent to enter into similar agreements with more than one carrier in the trade. . . ." There was no omission in the Interim Rule. The language in the Interim Rule carried over the exemption as it was formerly stated in 46 CFR 520.12(b). The former exemption did not apply to agency agreements which permit an agent to enter into similar agreements with more than one carrier in the trade. Because of the potential competitive significance of such agreements an exemption from filing would not be appropriate. This suggestion therefore has not been adopted.

Section 572.307 (redesignated section 572.305)—Equipment Interchange Agreements—Exemption

Section 572.307 in the Interim Rule clarified and continued the exemption for equipment interchange agreements. No comments were received on this section, and no substantive changes have been made to it in the Final Rule.

Section 572.308—Joint Policing Agreements—Exemption

Section 572.308 continued the 1916 Act exemption for joint policing agreements only for the period of the Interim Rule. This exemption terminates thirty days after the issuance of the Final Rule, and thereafter, joint policing agreements must be filed pursuant to the requirements of the Act and Part 572. Comment 33 supported the termination of this exemption. Comments 22 and 38 are opposed to termination. Comment 22 questions whether joint policing arrangements are even subject to filing.

Joint policing agreements, at a minimum, come within section 4(a)(5) of the Act which applies to agreements among ocean common carriers to engage in an exclusive, preferential, or cooperative working arrangement. In addition, sections 4(a) (1) and (2) of the Act might also apply under certain circumstances. Joint policing arrangements are therefore clearly within the scope of the Act.

Comment 22 argues further that even if such arrangements are subject to sections 4 and 5 of the Act, they should nevertheless be exempt from filing. Comment 22, as does Comment 38, maintains that this exemption may not be terminated at this time without further notice and opportunity for hearing.

This rulemaking proceeding was instituted, among other authorities, pursuant to section 16 of the 1984 Act. *See* 46 CFR 572.101. The Interim Rule published in the *Federal Register* on May 29, 1984, 49 FR 22300, notified all interested parties pursuant to the Administrative Procedure Act (APA) (5 U.S.C. 552(b)) of the proposed elimination of this exemption. All interested parties have had an opportunity to be heard through the filing of written comment in accordance with section 16 of the Act and the APA (5 U.S.C. 552(c)). Having provided the parties notice and opportunity for hearing, the Commission may properly terminate the exemption of joint policing agreements. Finally, no adequate reason not to terminate this exemption has been provided.

Comment 38 questions the rationale provided for terminating the exemption on joint policing agreements. As noted in the discussion of the Interim Rule, there are potential adverse effects on shippers resulting from a joint policing agreement. Joint policing arrangements may involve significant numbers of carriers and consequently may have a widespread effect on shippers utilizing these carriers. The Commission believes that these arrangements are significant enough to require that they they be filed and reviewed.

Comment 38 argues that joint policing arrangements are beneficial in that they promote cost savings. Elimination of the exemption, however, will not destroy this benefit. The only result of terminating the exemption is to subject such arrangements to the Act's filing requirements. Given the fact that such arrangements need not be accompanied by elaborate information, and the relatively short waiting period before effectiveness, the burden of requiring that they be filed is minimal. This exemption therefore is terminated in the Final Rule. In light of the fact that this exemption is being terminated, it is unnecessary to address changes to section 572.308 suggested in the comments.

Section 572.309—Credit Information Agreements—Exemption

Section 572.309 continued the 1916 Act exemption for credit information agreements only for the period of the Interim Rule. This exemption terminates thirty days after the issuance of the Final Rule, and thereafter, these agreements will be subject to the filing requirements of sections 4 and 5 of the Act and Part 572. Comment 33 supported the termination of the exemption for credit information agreements. Other comments (Comments 22, 24, 38, 39) urged that it be retained.

One misconception seems to be common to the comments opposed to termination of the exemption. The result of eliminating the exemption will not be to bar the formation of credit information agreements, but merely to require the parties to comply with the filing requirements. The filing requirements should not present a significant barrier to the formation of these agreements and the parties will be free to share credit information as they did under the 1916 Act.

Comments 24 and 38 take issue with the Commission's statement in the Supplemental Information that "credit is an important factor in price competition." Comment 24 maintains that this exemption does not authorize the collective pricing of credit. Comment 38 asserts that the limitation contained in section 572.309(c) barring the discussion of any matter which is required to be published in a tariff, ensures that these agreements will not result in antitrust abuses.

Credit information agreements must be filed because the distinction between the sharing of credit information and the collective formation of credit policy and pricing can easily become blurred. Accordingly, these agreements should be filed and reviewed in order to ensure that the directives of the Act are satisfied.

Similar to its position taken with respect to joint policing agreements, Comment 22 asserts that there is no requirement that credit information agreements be filed and that if the Commission wishes to terminate the exemption it must provide for additional notice and comment.

The Commission's position on this issue is the same as it is with respect to joint policing agreements. A credit information agreement is a "cooperative working arrangement," within the meaning of section 4(a)(5) of the

Act, and therefore is an agreement within the scope of the Act. Consequently, the filing requirements of section 5 and Part 572 must be met. In addition, adequate notice and comment has been provided. The termination of the exemption was duly noticed in the *Federal Register* with the publication of the Interim Rule (49 FR 22301 (1984)). Parties were given an opportunity to comment and the Commission has considered these submissions in accordance with the provisions of the APA.

Comment 24 asserts that the authority to set credit terms is interstitial to collective ratemaking authority. Therefore, according to this Comment, the exemption for credit information agreements should be continued where the parties already have collective ratemaking authority.

Although the establishment of credit rules is interstitial to collective ratemaking authority, establishment of credit rules is not within the scope of activity permitted by a credit information agreement. The two activities are distinct. As mentioned earlier, the purpose of a credit information agreement is the sharing of credit information, not the formation of credit rules. The Commission recognizes, however, that the sharing of certain credit information is inherent in the process of forming collective credit rules. Therefore, where the parties already have collective ratemaking authority and wish to form a credit information agreement, depending on the contents of that agreement, they may already have all the authority they require and may not need an additional agreement.

Finally, Comment 24 maintains that the expiration of this exemption is contrary to the provisions of section 2(1) of the Act to achieve a regulatory system involving a "minimum of government intervention and regulatory costs."

The Commission disagrees. This is not an example of the agency arbitrarily increasing the regulatory burden upon parties subject to the Act. Credit information agreements are properly within the scope of the Act and their significance to price competition requires that they not be exempted from the filing requirements. Because this exemption is being terminated, it is unnecessary to discuss the various suggested modifications to this section.

Section 572.310 (redesignated section 572.306)—Nonexclusive Transshipment Agreements—Exemption

Section 572.310 continues the exemption under the 1916 Act for nonexclusive transshipment agreements pursuant to section 16 of the 1984 Act. The exemption in the Interim Rule made a number of changes to the previous exemption in 46 CFR Part 524. The requirements appearing at section 572.310(a) (2) and (3) were added to the definition of the agreements which fall within the exemption. The specific items which must appear in a tariff were generally retained in section 572.310(c). Section 572.310(d) replaced the former mandatory agreement language with a description of the required and permissive contents of such agreements.

Section 572.310(a) (redesignated section 572.306(a))

Comment 28 objects to the requirement in section 572.310(a)(2) which limits the class of exempt agreements to those which, among other things, do not "guarantee any particular volume of traffic or available capacity." Comment 28 explains that often when a publishing carrier solicits the participation of a connecting or feeder carrier in meeting the needs of a developing trade or carrying cargoes of opportunity, the connecting carrier does not have sufficient unused vessel capacity in place and is obliged to charter additional vessel capacity. The connecting carrier, however, may be reluctant to charter additional capacity unless the publishing carrier agrees to guarantee a minimum volume of cargo. In order to facilitate such arrangements, Comment 28 urges the deletion of the second disqualifying element in paragraph (a)(2).

This exemption indeed is intended to be limited to arrangements that do not guarantee any particular volume of traffic or available capacity. Agreements that contain such guarantees may have anticompetitive consequences and are more akin to space charter arrangements and therefore are subject to all requirements applying to those arrangements. Accordingly, this suggested change is not made in the Final Rule.

Sections 572.310 (c), (d) and (e) (redesignated sections 572.306 (c), (d) and (e))

Comment 24 suggests that paragraphs (c)(2) and (d)(4) which refer to origin, transshipment and destination "ports" should be modified to make clear that such agreements can apply to intermodal cargo. Transshipment arrangements, by their nature, are limited to the all-water movement of cargo. The suggested change, therefore, is not appropriate. This does not in any way, however, preclude the filing of through intermodal rates by participants in such arrangements.

Comment 38 urges certain substantive modifications to section 572.310 (c) (d) and (e) and a conforming technical change in section 572.310(b). Comment 38 would delete the reference to the required tariff provisions cited in section 572.310(b) and enumerated in section 572.310(c). This Comment believes that the tariff regulations are sufficient in this regard. Comment 38 states that making the filing of a tariff a condition to the existence of an exemption is logically inconsistent because there can be no tariff provision until the agreement is effective and no such agreement can be effective unless it is exempt. The provision of section 572.310(c) will be retained in the Final Rule. There would appear to be no harm in having these tariff items enumerated in this exemption section as well as in the tariff rules. Moreover, this is a condition which will only be complied with subsequent to the effectiveness of a nonexclusive transshipment agreement. The apparent dilemma posed by Comment 38 is artificial.

Finally, Comment 38 suggests that section 572.310 (d) and (e) be deleted as unnecessary restrictions on the commercial arrangements of agreement

parties. Section 572.310(d) requires that nonexclusive transshipment agreements contain a declaration of the nonexclusive character of the arrangement and lists 13 permissible terms or specifications in such agreements. Section 572.310(e) states that no other subject other than those listed in section 572.310(d) shall be included in an exempted nonexclusive transshipment agreement.

The requirements of section 572.310 (d) and (e) shall be retained. Those provisions are necessary in order to ensure with some degree of specificity the exact parameters of the exemption. Only agreements which meet these requirements need not be subject to the usual filing and review. Parties that wish to have terms other than those permitted under the exemption may draft their agreements accordingly. Such agreements, however, will be subject to filing and review.

SUBPART D—FILING AND FORM OF AGREEMENTS

Subpart D implements the filing requirements of section 5 of the Act. It establishes filing and form requirements, defines and establishes procedures for filing modifications of agreements and specifies those agreements which must be accompanied by an Information Form. Subpart D also provides for a waiver of certain form requirements upon a showing of good cause.

Section 572.401—Filing of Agreements

Section 572.401 specifies the time and place for submitting an agreement, describes the contents of the transmittal letter, and provides that any agreement and accompanying Information Form which does not meet the requirements of filing shall be rejected in accordance with section 572.601.

Section 572.401(a)

Several comments (Comments 1, 22, 24, 28, 34, 38) suggested changes in the filing specifications of section 572.401(a). Comment 38 states that this section should fully carry out the terms of the Act and should therefore provide for the filing of a complete memorandum which specifies the substance of any oral agreement subject to the Act. This suggestion has merit and is adopted. Section 572.401(a) now makes it clear that all agreements, including oral agreements reduced to writing in accordance with the Act, are subject to Part 572 and must be filed.

Comments 24, 28, and 38 contend that the requirement regarding authority to file is cumbersome or unnecessary. Comments 1 and 34 suggest that, consistent with 46 CFR 502.24, an attorney should be allowed to file without further statement of authority. The purpose of the authority to file requirement as set forth in the Interim Rule was to ensure that persons purporting to represent a group of principals did in fact have the authority to do so. There have been some instances in the past where the submissions tendered by parties allegedly on behalf of a group of principals were

questionable representations of the intentions of the principals. In addition, there have been occasional failures under the Interim Rule and under predecessor agreement rules to provide verification of the authority to file. Upon inquiry, however, these deficiencies have been found to be an oversight or a technical failing and have been quickly remedied. In the case of a possible misrepresentation there appear to be sufficient safeguards (*e.g.*, public notice of filing and penalties for misrepresentation in the Final Rule to protect against or remedy any serious filing abuse. Therefore, the requirement for specification of authority to file has been deleted in the Final Rule.

Comment 22 notes that section 572.401(a) does not distinguish between a "subscribing" and "filing" party. Comments 22 and 38 take exception to the reference in this section to the Information Form. Inasmuch as this section is not intended to address the requirements governing the execution (*i.e.* "subscription") of agreements or the required supporting documents (those matters being addressed at section 572.402(d) and Appendix A, Part IX(c)) no change has been made in response to these comments.

Finally, section 572.401(a) has been changed to require only an original and two copies of the Information Form rather than 15 as in the Interim Rule, thereby alleviating the paperwork requirements for parties to agreements.

Section 572.401(b)

Section 572.401(b) describes the contents of the transmittal letter which accompanies an agreement filing. Its purpose is to describe the minimum information that is necessary to assure the timely and proper receipt, acknowledgement, public notice and initiation of the review process associated with a filed agreement.

Comment 24 suggests that this section unnecessarily requires the repetition of the submitting party's address and telephone number beneath the letter signature when that information is already provided in the letterhead. An appropriate change has been made to eliminate repetition.

Comment 34 contends that this section should not require that the person executing the agreement and the person signing the transmittal letter be the same. In order to clarify section 572.401(b) in this respect, an appropriate change has been made.

Comment 38 suggests that this section be amended to make clear that the transmittal letter is "submitted" rather than "filed". An appropriate change has been made.

In addition to these changes, this section has been reorganized to more clearly set forth the contents of the transmittal letter.

Section 572.401(c)

Section 572.401(c) provides that any agreement and accompanying Information Form which does not meet the requirements of filing shall be

rejected in accordance with section 572.601. Comment 38 contends that the reference to the Information Form, and any filing deficiencies therein, as a basis for rejection of a filing exceeds the authority granted in section 6(b) of the Act. Comment 34 criticizes section 572.401(c) as an imprecise paraphrase of the statutory language and redundant of section 572.601 and urges its deletion.

The purpose of section 572.401(c) is to emphasize the consequences of failure to meet the submission requirements of the Act and Part 572, to include both those requirements applicable to the filed agreement itself and those applicable to any submissions required in support of that filing. The authority to include deficiencies in the Information Form as a basis for rejection is clearly provided in section 5(a) of the Act which empowers the Commission by regulation to prescribe the form and manner in which an agreement shall be filed and the additional information and documents necessary to evaluate the agreement. Section 6(b) of the Act directs the rejection of any agreement that does not meet the requirements of section 5. The Information Form is, by the regulations of Part 572, part of the "requirements" referenced in section 5 of the Act and any substantive failure in its submission is a failure to meet the requirements of section 5 and, therefore, an appropriate basis for rejection. While section 572.401(c) does, to some extent, repeat the requirements expressed in section 572.601, early experience in the administration of the 1984 Act has shown a need for the additional cautionary emphasis. Section 572.401(c) is therefore retained without change.

Section 572.402—Form of Agreements

Section 572.402 prescribes the form of agreements, with the exception of marine terminal and assessment agreements, filed with the Commission pursuant to section 5 of the Act. The provisions of this section were applicable to new and initial or replacement agreements filed on or after June 18, 1984. They were also made voluntarily applicable to modifications or restatements of agreements in effect before June 18, 1984 until such time as the Commission specifies a schedule for all governed agreements to be in conformity. The Commission's Interim Rule specifically solicited comments as to the compliance schedule to be established.

Comment 28 contends that the form requirements may be impractical and requests their voluntary application rather than their requirement. Comment 34 takes issue with the manner of page numbering specified at section 752.402(b) and the manner of page titling specified at section 572.402(c), stating that it would be preferable to begin the numbering of agreement pages with the first page after the required Title Page and Table of Contents. This Comment further submits that there is no basis for requiring an agreement to have both a "full" name and a "doing business as" name.

The purpose of section 572.402 is to establish a uniform format for agreements in order to facilitate: (1) timely, accurate execution of the

preliminary review imposed by section 6(b) of the Act and the substantive review and disposition directed generally by section 6 of the Act; (2) orderly maintenance and use of Commission records in support of the performance of its statutory obligations; and (3) eventual conversion of these records to a digitalized and/or micrographic form to enhance their cost effective use through computer assisted retrieval techniques. The brief experience under the Interim Rule has already served to demonstrate the utility of the new format in pursuing the first two of these objectives. Significant portions of the gains in processing efficiency can be directly attributed to this standardization.

With the eventual extension of these format requirements to all agreements, even greater economies may reasonably be expected. With respect to the numbering of the pages of an agreement, the division of an agreement into discretely numbered sections should enhance the efficiency with which an agreement can be compiled and maintained, and will improve the efficiency with which an agreement is utilized. As regards the matter of page titling, the purpose of this section is to avoid the identification problem that arises should the pages of a loose-leaf document become separated.

The Interim Rule requirement to use the agreement's "doing business as" name was primarily intended to minimize the space required to title the page because "dba" names are generally shorter than the full name. However, upon further consideration, we believe that it is preferable to require each page of an agreement to be titled with the name that appears on the Title Page and the Rule is modified accordingly.

The Supplementary Information to Interim Rule section 572.402 invited comment as to the time frames for making the format requirements of section 572.402 applicable to agreements existing prior to June 18, 1984. Comment 24 contends that the format requirements should not be made applicable to existing agreements prior to June 18, 1986. Comment 29 suggests a period of ninety days, presumably ninety days after publication of the Final Rule.

As indicated above, the Commission has already experienced significant benefit from the standardized format in terms of administrative efficiency in processing and reviewing agreements. The standardized format should also facilitate the implementation of the other record management initiatives discussed above. A fixed deadline for achieving compliance, however, might produce a crush of filings which would overtax the Commission's resources. Conformance to the format requirements therefore shall be achieved according to the following schedule: (1) all new agreements shall be submitted in the required format when initially filed; (2) any restatement of a previously effective agreement filed subsequent to December 15, 1984 shall be submitted in the required format; (3) any effective agreement which is modified to any degree and for whatever purpose subsequent to December 15, 1984 shall be restated in its entirety and filed in the required format, including the modification; and (4) all other governed agreements not other-

wise brought into compliance shall be conformed to the required format and filed with the Commission by not later than October 1, 1985. This schedule is set forth in section 572.402(h). Finally, we have amended section 572.402 to state that the form requirements do not apply to cancellations of agreements.

Section 572.403—Modification of Agreements

Section 572.403 establishes requirements with respect to modifications to agreements. Section 572.403(a) indicates which modifications are so significant as to require an accompanying Information Form. Section 572.403(d) provides a procedure for indicating textual changes in agreements and section 572.403(g) prescribes a two-year republication requirement. The comments addressing each of these sections are discussed below.

Section 572.403(a)

Section 572.403(a) defines significant modifications as those changes in an agreement that may result in a significant reduction in competition. Where the competitive consequences of an agreement modification are likely to be minor, the Information Form usually would not be required. For example, the addition of a single port to the geographic scope of an agreement would not be a significant modification, but the addition of an entire port range may have such a competitive impact as to be a significant modification. The June 12, 1984 amendment to the Interim Rule dropped the specification that the addition of members to a conference constitutes a significant modification. This amendment also added the word "significant" to changes in geographic scope, to reductions in service levels, and to changes in pool penalty provisions or varying charges, where such changes would require the filing of the Information Form.

Nine comments address section 572.403. Comment 18 argues that for joint service agreements, the Information Form should only be required where the modification entailed the addition of new parties to the agreement, but not for the addition of ports or vessels.

A joint service agreement may result in a substantial reduction in competition when two or more existing carriers in a trade consolidate their otherwise competing service. Modifications to a joint service agreement that add vessels or extend the port coverage of the agreement are not likely to lead to a substantial reduction in competition, except where the expansion of port coverage includes ports currently served outside the joint service by two or more of the parties. Modification to a joint service agreement that increases the number of parties and, therefore, increases the potential market power of the joint service may have a substantial competitive impact on the trade and raise questions under the general standard. Consequently, the Commission is persuaded that significant modifications to a joint service agreement also include those that add parties to the agreement. An appropriate change is made in the Final Rule.

Comment 22 argues that the Commission is not authorized to require an Information Form either for the initial filing of any agreement or for a modification of an agreement. The Commission addresses the question of its authority to require an Information Form in the discussion of Appendix A.

Comment 26 argues that for conference agreements the only modifications that should require the submission of an Information Form would involve a substantial expansion of geographic scope. The requirement that an Information Form be filed with any modification that results in a "significant reduction in competition" is argued to be too broad and vague.

The Commission generally concurs that, as a practical matter, modifications of conference agreements, which do not add new authorities, will ordinarily only require the Information Form where they substantially increase the geographic scope of the agreement. This requirement is outlined in the Commission's June 12, 1984 amendment to the Interim Rule. However, if a conference agreement is amended to add or expand authority authorizing reductions in service, then such a modification would likely be viewed by the Commission as a significant modification requiring the submission of an Information Form.

The concerns raised by Comment 28 regarding section 572.403 are discussed under Appendix A.

Comment 30, in addition to arguing for the requirement that equal access agreements and modifications thereto be accompanied by an Information Form (an argument that has been addressed along with the concerns of Comment 28 under the Commission's discussion of Appendix A), also urges express reference to specific types of modifications that might result in a significant reduction in competition. These would include: changes in cargo categories and descriptions that result in significant increases in cargo that is subject to a pooling, equal access, joint service, or consortium agreement; significant increases in the cargo or revenue share of a national-flag line in a pooling or equal access agreement; or a significant decrease in the cargo or revenue shares of a third-flag line in a pooling or equal access agreement.

The purpose of requiring an Information Form with significant modifications is to obtain needed information in order to properly and adequately review such modifications under the general standard. The Commission has specified certain modifications that may result in a significant reduction in competition, thereby requiring an Information Form. The Commission has not attempted to provide a *comprehensive* list of all such modifications. Because a pooling agreement is viewed as potentially substantially anti-competitive, any modification to such an agreement that reduced competition would likely be a significant modification requiring the Information Form.

The modifications to a pooling agreement referred to by Comment 30 would also likely result in a significant reduction in competition. Accordingly, as a clarification, section 572.403(a) is amended to state that signifi-

cant modifications also include "changes in cargo categories or descriptions that result in a significant increase in the amount of cargo subject to the pool, or changes in the allocation of cargo or revenue that significantly change the cargo or revenue shares of national or non-national flag lines."

Comment 30 also argues that the change effected by the June 12, 1984 amendment to the Interim Rule requiring the Information Form only for those modifications that result in "significant" changes in geographic scope, "significant" reductions in service levels and "significant" changes in penalty provisions allows the parties excessive discretion to determine what modifications are in fact "significant".

We do not agree. While parties to agreements are allowed some discretion, in the first instance, to determine which modifications to their agreements are significant, the Commission retains the option to request additional information from the parties under section 6(d) where the "modification" appears significant and the Information Form has not been filed. The Commission does not wish to impose burdensome filing requirements for each and every change regardless of its competitive significance. Parties should contact the Director, Bureau of Agreements and Trade Monitoring for advice as to whether or not a particular modification requires the filing of an Information Form.

Comment 34 urges that amendments to conference agreements which add authority to establish through intermodal rates should not be considered significant modifications.

One of the objectives of the 1984 Act is to clarify regulatory authority concerning conference intermodal authority. The Conference Report explicitly states that "no special stigma should attach" to conference agreement amendments that establish intermodal authority. H.R. Report 98–600, 98th Cong., 2d Sess. 34 (1984). This does not mean, however, that conference intermodal amendments which extend the scope of price fixing agreement and raised concerns under the general standard should not be scrutinized. An Information Form, therefore, is required. This should not place an excessive burden on the parties because the market share information required in the Form applies only to the relevant trade(s) as determined by the parties. Market share data need not be provided for interior points to be served.

Comment 37 argues that the Commission has no authority to request an Information Form for any conference agreement or modification, and that, in any event, it should not require the Form where the modification solely provides for the addition of members.

The Commission rejects the argument that it has no authority to require an Information Form for reasons stated in its discussion of Appendix A. In regard to the second point, the Commission has, in its June 12, 1984 amendment, already deleted the requirement that a modification adding members to conferences be accompanied by an Information Form.

Comment 38 makes two technical suggestions. First, it is suggested that the second paragraph of the Instructions in Appendix A be conformed with section 572.403(a) (repeating the requirement that the Information Form is to be filed with significant modifications). Second, the Commission is urged to list in one place all agreements that require the Information Form. The first change is adopted. The second recommendation is not practicable, at least for significant modifications under section 572.403(a), because not all the modifications encompassing various combinations of authorities that will be filed can be anticipated. A filing party may contact the Director, Bureau of Agreements and Trade Monitoring for advice in this regard. For the purposes of an initial agreement filing, the Instructions specify that parties to all agreements, with the exception of marine terminal agreements, assessment agreements and agreements exempted from filing under Subpart C of Part 572, are required to file an Information Form in conjunction with the agreement.

Section 572.403(d)

Section 572.403(d) establishes a mechanism for indicating textual changes in the language of an agreement. Comment 38 believes that the method of indicating changes is unnecessary and cumbersome. This comment suggests that parties should have the option of submitting separately, for information purposes, a copy of any agreement modification showing the deletions and new provisions.

Section 572.403(d) is intended to avoid any ambiguity as to what is being changed, deleted or added in an agreement and thereby facilitate the review of modifications to that agreement. This purpose may be equally achieved by the alternative method suggested by Comment 38. Section 572.403(d) therefore shall be amended to provide, as an alternative, for the informational filing of a page or pages indicating the proposed modification in the manner prescribed in sections 572.403(d)(1) and 572.403(d)(2).

Section 572.403(g)

Section 572.403(g) requires the republication of an agreement under certain circumstances but exempts such republication from certain requirements of Part 572 when no substantive changes are involved. Comments 24 and 26 contend that the republication requirement is unnecessary and wasteful.

The purpose of section 572.403(g) is to provide for the periodic republication of the entire text of an agreement and to remove those portions of the agreement which have been deleted through prior modifications. Removal of obsolete language enhances the readability of the agreement. This section, however, has been amended so that the republication requirement applies only to those agreements which retain deleted language within the text of the agreement. Agreements which make changes by indicating the change on a separate page filed for information purposes, as provided for in section 572.403(d)(3), need not republish the entire agreement.

Section 572.404—Application for Waiver

Section 572.404 provides for a waiver, upon a showing of good cause, of the form requirements of sections 572.401, 572.402 and 572.403 and establishes the procedure and content for waiver requests. No comments were received on this section.

Upon further consideration, the Commission believes that the scope of section 572.404 should be enlarged to provide for a waiver, under appropriate circumstances, from the agreement organization and content requirements of sections 572.501 and 572.502. There is a direct connection between section 572.402, on the one hand, and sections 572.501 and 572.502, on the other. Any waiver associated, in particular, with section 572.402(e)(2) would almost certainly require relief from all or portions of sections 572.501 and 572.502. This broadening of the waiver provision should not be interpreted as a lessening of the importance of these form and manner requirements. The purpose of expanding the waiver provision is to provide for the exceptional situation where some relief may be justified. Accordingly, section 572.404(a) is amended to include sections 572.501 and 572.502 within the matters for which a waiver may be sought.

Section 572.405—Information Form

Section 572.405 requires that a completed Information Form accompany certain agreements at the time of their filing. Complete responses are required for each item on the Information Form. Section 572.405(b) and the instructions to the Information Form require that, where the party is unable to provide a complete response, the party should provide either estimated data (with an explanation of why precise data are not available) or a detailed statement of reasons for noncompliance and the efforts made to obtain such information.

Because certain parts of the Information Form have been made voluntary or are only required to be completed for certain types of agreements, section 572.405(b) is amended to indicate that a complete response to the Information Form shall be supplied in accordance with the Instructions. In addition, in order to relieve any paperwork burden on the parties and to enhance the ability of the Commission to protect the confidentiality of the Information Form, only an original and two copies of the Information Form are required to be filed.

Several comments object to the required explanation for noncompliance, including the use of estimates, as a basis for rejection of the agreement under section 572.601. Comment 37 questioned whether the Commission would use the explanation to reject the agreement on the basis of, for example, the accuracy of estimates or the adequacy of sources. Comment 39 suggests that, where explanations are "meritorious", they should be accepted.

In order to effectively and efficiently utilize the data provided on the Information Form, it is necessary for the Commission to assess the accuracy

of such data. The identification of the sources of estimates allows the Commission to determine the extent to which such data should be incorporated in the analysis of the agreement. An explanation of why precise data are not available is required for certain parts of the Information Form in order to ensure that the parties make a reasonable attempt to provide data that is available to them. Available data, as addressed later in the discussions of Parts III and IV of the Information Form, are derived from data that the parties already have available, or would ordinarily acquire in the course of making the commercial decisions underlying the proposed agreement. The Commission has, however, deleted the requirement that an explanation of why precise data are not available accompany estimates in Parts III and IV, and the change is indicated in the relevant sections of the Final Rule. Reasonable explanations for the lack of availability of precise data will continue to be required for the remaining parts of the Information Form which require data and which are not voluntary. Where estimates are not provided, a statement of reasons for not providing estimates and the efforts made to obtain such information is required.

Six comments on section 572.405 address the issue of the Commission's authority to require the Information Form. Four comments took the position that the Commission does not have such authority under the Act. These Comments are addressed in the discussion of sections 572.401(c) and 572.601 and in the discussion of Appendix A—Information Form and Instructions.

Section 572.406—Complete and Definite Agreements

Section 572.406 provides that any agreement filed under the Act and Part 572 shall be the complete agreement among the parties and shall specify in detail the substance of the understanding of the parties. This section provides that open-ended provisions will be permitted only if the enabling agreement indicates that any further agreement cannot go into effect unless filed and effective under the Act. Finally, this section describes matters which are interstitial to the basic agreement authority. Ten comments were filed in Docket No. 84–32 addressing this section.

The Supplementary Information to Docket No. 84–32 stated:

> The rule does not state how the Commission will treat an agreement that is not sufficiently specific, complete and definite. In most cases, such deficiencies could probably be corrected through informal discussions between the Commission's staff and the parties. An agreement which is severely deficient, however, may be rejected, investigated or subject to a formal request for additional information or to challenge in the court under section 11(h) of the Act.

A number of comments (Comments 101, 105, 106, 107, 108) objected to the discussion insofar as it suggested that an agreement which was severely deficient under the criteria of section 572.406 could be rejected.

These Comments argue that the Commission does not have the authority to reject an agreement because it is unclear or indefinite. Such agreements allegedly may only be investigated, subjected to a request for additional information or challenged in court under section 11(h) of the Act. Comments 107 and 110 propose the addition of a new paragraph which would expressly limit the Commission's action on deficient agreements to such an investigation, an information request or an injunction.

As the Supplementary Information in the Interim Rule indicated, the Commission would in most cases seek to resolve deficiencies through informal negotiations and discussions between its staff and parties. Rejection of an agreement would only occur in a rare case where an agreement is so severely deficient that, on its face, it could not be construed as complete and where even the most basic analysis under the general standard would not be possible. Moreover, in such a case, it would not be possible to determine whether sections 10(a)(2) and 10(a)(3) were complied with. Finally, agreements should be sufficiently precise and definite to determine whether a particular activity is within the scope of the antitrust immunity conferred upon them by section 7 of the Act. The fact that there are other avenues available for dealing with deficient agreements, as suggested, does not preclude the use of rejection. Clearly, an informal resolution of such deficiencies is preferred. In other cases, requests for additional information, investigation, or court challenge under section 11(h) of the Act may be appropriate. However, where even the most minimal requirements with regard to definiteness and completeness are not met, rejection may be appropriate. The Commission does not believe that it is necessary to formally state the actions which might be available within the text of section 572.406.

Section 572.406(a)

Section 572.406(a) states that a filed agreement shall be the complete agreement among the parties and shall specify in detail the substance of their understanding. Comment 102 supported this section as it appeared in the Interim Rule. Comment 105 urges that this section be eliminated or alternatively amended.

The Commission believes that section 572.406(a) adequately states the general rule that agreements must be complete and definite and this section remains unchanged in the Final Rule.

Section 572.406(b)

Section 572.406(b) establishes guidelines concerning open-ended authority in agreements. Comment 102 supports this section in the Interim Rule. Comment 104 favors the elimination of this section but alternatively proposes certain modifications assuming that section 572.406(c) is not eliminated. Comment 105 considers sections 572.406(b) and (c) to be intertwined and proposes modifications to both sections.

Section 572.406(b) provides that agreement clauses which contain enabling authority expressly state that such authority may not be implemented unless the more specific implementing understanding or agreement is filed and effective under the Act. To that extent, this section merely states what the Act otherwise requires. Accordingly, section 572.406(b) is retained in the Final Rule. However, the phrase "open-ended or vague" is deleted.

Section 572.406(c)

Section 572.406(c) is intended to provide a guideline regarding interstitial agreement authority. The comments were unanimous in expressing concern with this provision. A majority of comments favor the elimination of paragraph (c) from the Final Rule. Others, as an alternative, propose modification to eliminate phrases such as "routine and ordinary", "anticompetitive effect" and "routine operational". Some comments suggest that this paragraph would revive certain antitrust issues which were intended to be put to rest by the 1984 Act. Other comments suggest that it would erode the "reasonable basis to conclude" defense under section 7(a)(2) of the Act.

Section 572.406(c) is retained in the Final Rule but is amended along the lines suggested in several of the comments. The standard of this section is one that will be applied on an *ad hoc* basis and is not intended to preclude parties from taking interstitial action.

SUBPART E—CONTENT AND ORGANIZATION OF AGREEMENTS

Subpart E provides for the standardization of the organization of an agreement, specifying the name, number, and order of particular agreement articles.

Comment 38 argues that the requirements of Subpart E exceed the Commission's authority and should be deleted. Comment 34 urges that a period of at least six months subsequent to the adoption of the Final Rule be permitted to conform agreements to the requirements of Subpart E. Comment 28 suggests that the requirements of Subpart E may not be suitable for all agreements and that alternative formats should be permitted. Comment 39 urges that the Commission continue its policy of not specifying the language of agreement provisions. It also urges the Commission to reconsider making the requirements of Subpart E applicable to agreements which were approved prior to June 18, 1984. However, two conferences subscribing to Comment 39 did not object to Subpart E requirements provided that republication is not required prior to June 17, 1985.

The objectives of Subpart E are to: (1) ensure that the text of an agreement contains the essential articles which are likely to appear in all agreements in a prescribed order; and (2) further support the standardization of agreement format and its associated goals and objectives as discussed above in connection with section 572.402. Nothing in the Act or its legisla-

tive history prohibits the Commission from establishing an orderly, minimum structure or organization for agreements filed with the Commission.

Upon consideration of the various proposed compliance schedules and available resources and obligations, the Commission has determined that a phased implementation schedule, both for sections 572.402 and 572.403 and sections 572.501 and 572.502, would minimize any burden by allowing up to ten months to achieve compliance. The elements required by section 572.501 are generally found in most agreements and provide the minimum information necessary for a general understanding of an agreement. These requirements, as revised below, shall continue for all agreements except cancellations, marine terminal agreements and assessment agreements. In the event that a waiver from these requirements is deemed necessary, section 572.404 has been expanded to permit application to be made for a waiver from the requirements of sections 572.501 and 572.502.

Section 572.501—Agreement Provisions—Organization

Section 572.501 provides a uniform organization for all agreements, except marine terminal agreements and assessment agreements.

Section 572.501(a)

Section 572.501(a) imposes a minimum organization and subject matter outline on filed agreements (except for those which are exempted) and reserves the use of certain article numbers. Comment 29 contends that section 572.501(a) should be modified to provide that the content of a specified article is not required to be published unless that content has been commercially agreed to, contending that some of the articles do not otherwise ordinarily exist in some forms of agreements.

Section 572.501(a) states that article numbers are reserved for the particular provision or authority as indicated in this section. Experience with agreements filed pursuant to the Interim Rule indicates that this statement has not clearly communicated its intended meaning. Some filing parties who perceive that they have no need for a particular article have simply omitted the subject matter of the article and assigned its number to another subject. Each of the articles enumerated in section 572.501 is generally found in nearly all types of agreements. The enumerated Articles 1 through 13 are reserved for the specified subject matter shown in sections 572.501 and 572.502 and may not be used for any other subject or purpose, regardless of the type of agreement. Where an article is legitimately not applicable, as for example, a charter agreement which is not likely to have a neutral body policing provision, the article number and name is to either be omitted altogether or, to preserve the sense of the article numbering in the agreement, to be included in the text of the agreement followed by the word "None". Accordingly, appropriate revisions have been made in section 572.501(a) to clarify the use of the reserved article numbering system.

Section 572.501(b)

Section 572.501(b) sets forth the specific order and describes generally the subject matter of the articles of an agreement.

Certain inquiries received by the Commission's staff suggest that some parties interpret the enumeration of Articles 1 through 13 in sections 572.501 and 572.502 to mean that these articles are the only articles or subject matter which may be included in an agreement. Section 572.402(e)(2) clearly states that "any additional material provisions shall be set forth as consecutively numbered articles." Moreover, an agreement that contained only Articles 1 through 13 would in most instances not contain the full understanding between the agreement parties expressed in the filed agreement. In order to eliminate any further confusion, section 572.501(b) has been amended to state that additional articles required to express the complete understanding between the parties to the agreement and not otherwise incorporated in appendices to the agreement shall immediately follow the enumerated articles. Such articles shall be numbered consecutively commencing with Article 14.

Section 572.501(b)(1)

Section 572.501(b)(1) requires the publication of the "full name of the agreement" in Article 1 of the agreement. Comment 34 suggests that the parties to an agreement be permitted to use an abbreviation, acronym, or "doing business as" name. We are not adopting this suggestion. Article 1 is the appropriate place in an agreement to identify that agreement by its complete legal name. We find this requirement to be administratively necessary and not to impose any particular burden on the agreement parties. It therefore shall be retained.

Section 572.501(b)(2)

Section 572.501(b)(2) requires a statement of the "Purpose of the Agreement" in Article 2. Comment 34 contends that the elaboration on the meaning of the term "purpose" is unnecessary. While paragraph (b)(2) will be retained, because section 5(b)(1) of the Act requires an agreement to state its "purpose", the elaboration objected to is deleted.

Section 572.501(b)(3)

Section 572.501(b)(3) requires the statement of the name, address and corporate/domicile nationality of each party to the agreement in Article 3.

Five comments (Comments 22, 24, 26, 34, 38) question the need for this requirement. Comments 26 and 38 contend that the requirement is burdensome and contrary to the Act and should be deleted. Comment 24 states that this section should be amended to avoid delays in the admission or resignation of agreement members. Comment 22 questions the relevance of stating the parties' nationality.

The purpose of section 572.501(b)(3) is to ensure that the Commission has accurate and current information with respect to the agreement's mem-

bership. The lack of such information has been a long-standing problem. It is not the purpose of this section, however, to unreasonably delay the effectiveness of changes in membership, to unnecessarily burden the agreement document itself, or to collect unneeded information. Therefore, appropriate changes have been made to section 572.501(b)(3) and to section 572.605 to provide for expedited review of modifications effecting change in conference membership.

Section 572.501(b)(4)

Section 572.501(b)(4) requires a statement of the geographic scope in Article 4. Comment 34 states that agreement members do not necessarily serve their respective trades pursuant to the authority of an agreement and that the implication that they do so serve should be eliminated. It is not the purpose of section 572.501(b)(4) to capture any more than the geographic breadth of the basic agreement. Certain changes have therefore been made in this section.

Comment 28 states that section 572.501(b)(4), as well as 572.501(b)(5), should expressly require consortium agreements to specify the level and scope of service; otherwise, such agreements may contain "open-ended" or "blank check" authority. The fundamental concern of this Comment, *i.e.* "open-ended authority", has been addressed in section 572.103(g) and section 572.406. As this concern would appear to be met by these sections of the Final Rule, the suggested modifications to section 572.501(b)(4) or 572.501(b)(5) do not appear necessary.

Section 572.501(b)(5)

Section 572.501(b)(5) requires in Article 5 a statement of the authorities permitted by the Act and intended to be exercised by the parties to the agreement. Comment 24 states that this requirement creates a risk that persons opposing an action taken pursuant to an agreement may argue that the only authority of the agreement is that stated in Article 5. This Comment suggests the addition of a statement that the parties' authority is to be derived from the entire agreement.

The purpose of Article 5 is to provide a general statement of the activities which the parties are authorized to engage in. Section 572.501(b)(5) has been revised to make this clear and that, except for the specification of fundamental matters, it will require that additional articles be provided which are more specific as to the authority to be exercised and the mechanics of that exercise. Finally, this section is revised to state that the parties may rely on the contents of the entire agreement as authority for their activities.

Section 572.501(b)(6)

Section 572.501(b)(6) requires the titles and respective authorities of any agreement officials designated by the agreement parties be provided in Article 6.

Comment 38 contends that the requirements of section 572.501(b)(6) improperly prescribe substantive agreement content, exceed the authority of the Act and should be deleted. Comment 34 requests the clarification of the language and intent of the section with respect to the specification of agreement officials and their duties.

The purpose of section 572.501(b)(6) is to ensure that the Commission, the agreement parties and any other interested parties be informed as to who, by organizational title, is empowered to act on behalf of the agreement parties and in what capacity. This information is necessary to the effective and efficient administration of the Commission's agreement program, both with respect to the pre-effectiveness review of an agreement and the post-effectiveness monitoring of the activities of an agreement. It is not the purpose of this section, however, to unnecessarily delay the effectiveness of changes in such provisions or complicate the agreement document. Therefore, section 572.605 has been amended to provide for expedited review of modifications to Article 6.

Section 572.501(b)(7)

Section 572.501(b)(7) requires that the terms and conditions of membership to the agreement be provided in Article 7. Comment 26 contends that this requirement is overly detailed and, in some cases, too trivial to be included in the basic agreement.

Section 572.501(b)(7) is an extension of the requirements of section 5(b)(2) of the Act which mandates that conference agreements provide reasonable and equal terms and conditions for conference membership. Of the nine required articles in section 572.501, it is the least likely to apply to all agreements. The requirements of section 572.501 would only apply to certain rate agreements and would not have application to transshipment, equipment interchange or charter agreements. Section 572.501(b)(7), therefore, has been revised to indicate that its provisions do not apply to certain agreements.

Section 572.502—Organization of Conference and Interconference Agreements

Section 572.502 implements section 5(b) of the Act by requiring the inclusion of neutral body policing, prohibited acts, consultation, shippers' requests and complaints, and independent action provisions in conference and interconference agreements.

Section 572.502(a)

Section 572.502(a) specifies the scope and application of the section with respect to conference agreements. Certain clarifying editorial changes have been made to the section. In addition the section has been revised to provide for the inclusion in agreements of provisions in addition to those prescribed in sections 572.501 and 572.502.

Section 572.502(a)(1)

Section 572.502(a)(1) requires a statement that at the request of an agreement member the conference shall engage the services of an independent neutral body. The section further requires the inclusion of any neutral body procedures established.

Seven comments (Comments 22, 25, 26, 27, 34, 35, 39) were received on this section. None of the comments take exception to the requirement for an agreement to provide an affirmative statement that a single agreement member may request neutral body policing. However, some contend that there is no statutory authority for requiring that, once implemented, the neutral body policing procedures have to be incorporated into the text of the agreement. Of those, three propose that, if the procedures are required, they should be included in an appendix. It is also suggested this section use the term "self-policing" rather than the term "independent neutral body" policing.

Section 572.502(a)(1) implements section 5(b)(4) of the Act which provides for "an independent neutral body" to police the obligations of a conference and its members, if requested by a member line. The section will therefore continue to refer to an "independent neutral body." The requirement that any neutral body policing procedures be included in the agreement derives from the general requirement that an agreement contain the full understanding of the parties. To the extent that these procedures reflect concerted action by the parties, they are part of the agreement and must be filed.

Section 572.605 is amended, however, to provide for expedited review of neutral body policing procedures, excluding any modification of the triggering provision stemming directly from section 5(b)(4) of the Act. Section 572.502(a)(1) is also modified to allow neutral body procedures to be included in a designated appendix to the agreement, which is cross-referenced in Article 10.

Section 572.502(a)(2)

Section 572.502(a)(2) requires an affirmative statement that a conference will not engage in conduct prohibited by section 10(c)(1) or 10(c)(3) of the Act. Comment 33 requests that section 572.502(a)(2) be expanded to incorporate the prohibition on refusals to negotiate with shippers' associations contained in section 10(b)(13) of the Act.

Section 572.502(a)(2) implements section 5(b)(5) of the Act which, insofar as section 10 prohibited acts are concerned, requires conference agreements to expressly reference only those prohibitions specified in sections 10(c)(1) and 10(c)(3) of the Act. We note, however, that section 10(c)(1) of the Act prohibits a conference from boycotting or taking any other concerted action resulting in an unreasonable refusal to deal. While not addressing itself directly to shippers' associations, the prohibition against boycotting

and other concerted actions may encompass the concern of Comment 33. No change has been made to section 572.502(a)(2).

Section 572.502(a)(3)

Section 572.502(a)(3) requires that conference agreements provide procedures for consultation with shippers and for handling of shippers' requests and complaints. Comment 33 suggests that section 572.502(a)(3) should prescribe minimum time frames and other procedures for the consideration of shippers' complaints and requests in a manner similar to that of the mandatory provisions of Subpart H.

Section 572.502(a)(3) implements sections 5(b) (6) and (7) of the Act which require conference agreements to contain consultation and request/complaint handling procedures. The mandatory provisions of Subpart H, including sections 572.801 (c) and (d), served the purpose of bringing agreements into compliance with section 5(b) of the Act during the transition period. As discussed more fully below in connection with the disposition of Subpart H, that purpose has been served and the Commission is removing the mandatory provisions of Subpart H from the Final Rule. At this time there does not appear to be a need to require parties to agreements to adopt Commission prescribed provisions. Provisions drafted by parties to agreements are carefully reviewed to ensure that they contain sufficient specificity and detail. Accordingly, the changes to this section suggested in Comment 33 are not adopted.

Section 572.502(a)(4)

Section 572.(a)(4) requires that conference agreements specify its independent action procedures. Comment 34 proposes that this section be revised to permit: (1) independent action procedures which allow for the exercise of such action on less than 10 calendar days' notice; and (2) a conference member to independently elect to provide more than 10 calendar days' notice of its intention to exercise independent action.

Section 572.502(a)(4) tracks the language of section 5(b)(8) of the Act which, in relevant part, provides that conference agreement independent action provisions may not impose a notice period of ". . . more than 10 calendar days . . ." for the exercise of independent action. The revisions suggested by Comment 34 are unnecessary because their intended purpose is presently being served by section 572.502(a)(4). Therefore, no change to this section has been made.

Section 572.502(b)

Section 572.502(b) requires every interconference agreement to contain independent action procedures (in addition to the enumerated Articles 1 through 12). Comment 24 contends that interconference agreements should not be required to contain the provisions of Articles 10, 11 and 12 specified in section 572.502(a).

Interconference agreements are generally types of conference agreements and, as such, should be subject to the same requirements. Therefore, the argument that the requirements of section 572.502(a) should not apply to interconference agreements is not persuasive and is rejected. However, a waiver of this requirement may be applied for pursuant to the new provisions of section 572.404. Such a waiver would be available where any or all of Articles 1 through 12 would not be applicable or appropriate given the particular interconference agreement. Finally, it should be noted that provisions which appeared in section 572.802 have been relocated in this section.

SUBPART F—ACTION ON AGREEMENTS

Subpart F implements section 6 of the Act which establishes procedures under which agreements are reviewed and acted upon by the Commission. The statutory model for review of agreements is the premerger clearance procedures set forth in the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (Pub. L. 94–435, 90 Stat. 1390). The procedures of Subpart F are intended to facilitate the expeditious review of agreements based on necessary and relevant information within the time allowed by the Act.

Section 572.601—Preliminary Review—Rejection of Agreements

Section 572.601(b) provides for the rejection of any agreement that fails to comply with the filing and information requirements of the Act and Part 572. Comments 13, 17, 38, and 39 question the Commission's authority to reject an agreement for failure to meet filing and format requirements. Comments 29, 34, and 38 specifically challenge the authority to reject an agreement after preliminary review, pursuant to section 572.601(a), on the ground that the Information Form is not submitted, or is incomplete and an adequate explanation is not provided. They argue that only a deficiency in the agreement itself provides the basis for rejection. According to these Comments, an incomplete Information Form lacking an adequate explanation should be remedied by a request for additional information.

Section 5(a) of the Act authorizes the Commission to prescribe the additional information that should accompany an agreement. These requirements are contained in section 572.405 pertaining to the Information Form. Section 6(b) of the Act provides for rejection of a submission which does not meet the requirements of section 5(a) of the Act. Section 572.601 implements this rejection authority. An agreement which is submitted with an incomplete Information Form, lacking an adequate explanation where required by section 572.405, fails to comply with section 572.405 and may be rejected. Moreover, the purpose of a request for additional information is not to obtain information which all parties are required to submit with an agreement in the first instance, but to acquire, in special circumstances, further information.

Comment 39 suggests that, before an agreement is rejected, the filing party should have an opportunity to correct any deficiencies within a specified time without suspending the 45-day waiting period. It is further proposed that this section be clarified to explain that agreements may only be rejected for nonconformance with technical filing requirements rather than for substantive deficiencies. Comment 39 also suggests that section 572.601(b) be amended to provide that rejection must occur within 20 days of filing and that, prior to rejection, the filing parties should be notified and given an opportunity to correct any deficiency. Finally, Comment 39 proposes that this section be amended to expressly provide for appeal to the Commission itself when an agreement is rejected.

Most of these concerns expressed in these comments are, as a practical matter, met under the existing Bureau of Agreements and Trade Monitoring procedures for processing agreements. Filing parties presently are given the opportunity to make minor corrections without suspending the 45-day waiting period. These corrections are usually speedily made because of their technical nature.

Every effort is made to review an agreement and accompanying Information Form for deficiencies as expeditiously as possible. In most situations this preliminary review is completed within a few days after the agreement's receipt at the Commission. In the case of particularly complex agreements, slightly more review time may be needed. A specific time period for rejection therefore does not appear to be necessary or appropriate and could under certain circumstances, deny the Commission and the filing parties necessary flexibility.

As to Comment 39's concern about rejection for other than filing deficiencies, the nature of the preliminary review provided for in section 6(b) of the Act and section 572.601(a) makes clear that this rejection is not based on a substantive review of the agreement.

Decisions on rejection of agreements are presently made by the Commission and not the staff. There is, therefore, no need to provide for an appeal procedure to the Commission because they have already considered the matter. If, in the future, this procedure is changed, then, at that time, it would be appropriate to consider an appeal mechanism to provide for Commission review.

Section 572.602—Federal Register Notice

Section 572.602 implements section 6(a) of the Act which requires the Commission to transmit notice of the filing of an agreement to the *Federal Register* within seven days of receipt.

Section 572.602(a)

Comment 38 suggests that the words "A notice of" be added at the beginning of section 572.602(a). This clarifying change is made in the Final Rule.

Section 572.602(b)

Section 572.602(b) describes the contents of the notice to appear in the *Federal Register*. Comment 19 suggests the use of a standardized form of notice which would be completed and filed by the parties with the agreement. Present procedures appear to be adequate and little or no savings in time would appear to result from the suggested change. Accordingly, a standardized form for notice is not adopted.

Comments 24 and 28 suggest that the notice in the *Federal Register* identify the filing party. This suggestion has merit. This information is submitted with the agreement and its publication in the *Federal Register* would facilitate the effort of interested persons to communicate with the filing party. This section is amended accordingly.

Section 572.603—Comment

Section 572.603 provides for comment by any interested person to an agreement and addresses the status and confidentiality of such comments.

Section 572.603(a)

Section 572.603(a) allows third parties to submit comments to filed agreements. No limitations, except the response period indicated in the *Federal Register* notice, attach to the filing of such comments. Confidential treatment will be afforded comments where the commenter so requests and there exists a proper legal basis for nondisclosure.

This provision attracted a number of comments (Comments 19, 20, 24, 25, 26, 30, 34, 39) both supporting and opposing confidential treatment of third party comments. The majority of these (Comments 19, 20, 24, 25, 26, 34, 39) believe that confidentiality, where appropriate, for third party comments is contrary to the provisions of the Act. It is asserted that the disclosure exemptions of the Freedom of Information Act (FOIA), 5 USC 552, are the exclusive avenue for withholding third party comments. Some comments (Comments 19, 20, 24, 34, 39) suggest that the filing parties be provided with copies of third party comments. This would allegedly ensure administrative efficiencies, avoid the filing and processing of FOIA requests, and allow the filing party the opportunity to confront adverse information. On the other hand, Comment 30 submits that all information filed with an agreement, either by a filing party or third parties, is protected under section 6(j) of the Act. It is asserted that confidentiality for third party comments will encourage submission of more complete comments.

Comment 28 suggests that persons commenting on agreements be allowed to waive confidentiality and Comment 20 proposes that claims of confidentiality be supported by precise statutory grounds. Comment 20 further suggests that the parties be provided with all non-confidential comments. It is suggested that if complete confidentiality is claimed for all parts of a comment, notice of the filing and claimed exemptions be provided to the parties. Comment 20 requests that non-confidential oral communications

with Commission staff by persons in opposition to an agreement be made publicly available.

Many of these comments misconstrue both this section and the Act. First, third party comments are not protected by the confidentiality provisions of section 6(j) of the Act. Only information and documentary material filed with the Commission under section 5 or 6 is exempt from disclosure." 46 U.S.C. app. 1705(j). This information is solely provided by the filing parties. No mention is made in sections 5 and 6 of the Act of "information" to be submitted by third parties. Comments on agreements, however, may in appropriate circumstances be protected under the disclosure exemptions of FOIA (5 U.S.C. 552(b)(C) (1–7)), the Trade Secrets Act (18 U.S.C. 1905), or other similar statutes. Although third party comments are not protected under section 6(j) of the Act, it would be inappropriate and improper, particularly where a request for confidentiality has been received, to routinely make them available to the agreement parties, without prior Commission review.

Requiring commenting parties to provide the agreement parties with the non-confidential portions of comments, or notice (where the whole comment is claimed to be confidential), appears unnecessary. This information would be available from the Commission upon request. Nor do we believe this procedure, whereby non-privileged comments will be available from the Commission upon request, will lead to unnecessary FOIA requests. A FOIA request is not required to obtain clearly non-confidential information. It is properly used in close situations where the Commission and requester may differ on the confidentiality of certain information, and it accords the requesting party certain procedural and legal rights. Finally, it is both administratively burdensome and not required by law, to incorporate all oral comments into a publicly available written record.

As to the suggestion that agreement parties should be allowed to rebut comments, the Commission will provide the opportunity for rebuttal only where the comments become part of the record in a Commission or court proceeding. Prior to the institution of a proceeding no right of rebuttal is provided.

The Commission is adopting the recommendations of Comment 20 that all requests for confidentiality be accompanied by citation and explanation of relevant legal authority for witholding. In the event the Commission determines that it is proper to release information for which confidentiality has been claimed it will notify the submitter prior to such release.

Comment 38 suggests that the words "a written statement" in the first sentence of section 572.603(a) be changed to "written comments." This modification is also made in the Final Rule.

Section 572.603(b)

Section 572.603(b) provides that filing of comments does not entitle a party to a Commission reply, institution of a proceeding, discussion

of the comment in any Commission or court proceeding, or participation in a proceeding.

Comment 34, while not taking issue with the substance of this paragraph, suggests that the Commission further limit all substantive communications regarding pending agreements between any third person and any Commission employee.

The body of law pertaining to *ex parte* communications only applies when a formal proceeding has been instituted and the Commission is acting as decisionmaker (5 U.S.C. 557(a)). The waiting period prior to the effective date of an agreement is not such a legal proceeding and no *ex parte* rights attach. In any formal proceeding involving an agreement the present Commission rules embodied at 46 CFR 502.11 and 502.61 appear sufficient. It therefore is unnecessary to further provide for *ex parte* restrictions in this section.

Comment 28 states that the provisions of section 572.603(b), when read in conjunction with the rules on negotiations in section 572.609, flatly bar commenters from participating in negotiations. While Comment 28 recognizes that commenters have no *right* to participate in negotiations, it requests that the section be amended to allow such participation where appropriate. Comment 28 also proposes that the section be clarified to permit a commenter to engage in follow-up communications with the Commission at the Commission's discretion.

No change to section 572.603(b) will be made. The legislative history indicates that the role of third parties should be limited to submitting comments. Conf. Rept. No. 600, 98th Cong., 2d Sess. 31 (1984). Moreover, the involvement of third parties could complicate and delay the negotiation process by introducing irrelevant or parochial interests. However, the information provided in a comment may be considered by the Commission in the negotiations process. The Commission, however, does interpret the present language of section 572.603(b) and section 572.609 to permit follow-up communications between Commission staff and third party commenters.

Section 572.604—Waiting Period

Section 572.604 sets forth technical provisions governing the statutory waiting period.

Section 572.604(b)

Section 572.604(b) provides that, unless a request for additional information is made or a court order obtained, an agreement becomes effective 45 days after filing with the Commission or on the 30th day after publication in the *Federal Register*. Comment 28 proposes that the Commission publish a notice when it reaches a final determination on a filed agreement and that any commenters receive a copy of the determination.

Currently, the Commission issues a notice of an agreement becoming effective pursuant to section 6(c) of the Act. This notice is not published

in the *Federal Register* but is available to the public in the Office of the Secretary. This procedure appears to be sufficient with respect to informing the public of the Commission's action. Accordingly, the suggested change is not adopted.

Section 572.604(c)

Section 572.604(c) provides that the waiting period before an agreement becomes effective is suspended when the Commission makes an oral or written request for additional information. The waiting period resumes at the time of the receipt of the requested additional material or an adequate statement of the reasons for noncompliance.

Comment 38 urges the deletion of section 572.604(c) on the grounds that it is duplicative and less clear than similar provisions in section 572.606. A request for additional information is pertinent to this section because it has an effect on the waiting period before an agreement becomes effective. Paragraph (c) therefore is retained.

Comment 19 suggests that parties be notified within 15 days of receipt of an agreement if additional information will be needed. While the goal is to review all agreements expeditiously and, where necessary, notify parties as soon as possible of the need for additional information, a 15-day limit on requests would not allow sufficient flexibility in reviewing complex agreements.

Comment 39 proposes that the parties be allowed to request an extension or suspension of the waiting period. This procedure would be utilized where an agreement was particularly complex and additional time was needed for review or where negotiations were continuing between the parties and the Commission. Alternatively, Comment 39 proposes that the parties be allowed to postpone the waiting period by submitting amendments delaying the agreement's implementation date to a date beyond the 45-day statutory period.

We believe that it would be contrary to the provisions of the Act to extend the waiting period for other than a request for additional information or court order. The parties are also always free to include within the terms of the agreement a date for implementation subsequent to the expiration of the 45-day waiting period to defer implementation of the agreement, or to withdraw the agreement altogether without prejudice to refiling.

Several comments (Comments 22, 27, 34, 39) urge that the procedures for requests for additional information be clarified. Comments 27 and 39 are concerned that routine communications between Commission staff and the agreement parties may be misconstrued as a request for additional information. Similarly, Comment 34 suggests that confusion could be avoided by having one Commission official, preferably the Secretary, responsible for issuing requests for additional information. The Comment also proposes that this section be amended to require a specific authorization statement from an appropriate Commission official to accompany each request which

would expressly identify the communication as a request for additional information.

Comments 22, 27 and 34 maintain that oral requests for additional information may be problematic. It is argued that the seven-day period for written confirmation of oral requests is too long. The concern is that the parties might not receive written confirmation of an oral request for additional information made after the 38th day of the waiting period until after they had begun to implement the agreement. Comments 22 and 27 suggest abandonment of the use of oral requests and Comment 34 proposes that an oral request be made only simultaneously or subsequent to the mailing of the written request.

The present procedures contained in section 572.604(c) governing requests for additional information appear adequate. When either an oral or written request for additional information is made, it will be unambiguously identified. There is no need either to have only one official make the requests or to include a specific authorization statement. In any situation where an oral request is intended to suspend the effective date of an agreement, that fact will be made clear to the filing parties.

Comment 24 argues that the resumption of the waiting period begins automatically after filing of the response to the request, or submission of the statement of noncompliance. This Comment argues that the Commission has no authority to evaluate the adequacy of the response and only the United States District Court for the District of Columbia can further suspend the waiting period. The Commission did not intend the language "*adequate*" statement of reasons for noncompliance to affect the resumption of the running of the waiting period. We have adopted the suggested change and the word "adequate" has been deleted.

Section 572.605—Request for Expedited Approval

Section 572.605 implements section 6 of the Act and sets forth grounds and procedures for applying for and granting expedited approval.

Comment 39 proposes that section 572.605 be amended to permit parties to request expedited approval after filing a response to a request for additional information under the same procedures for expedited approval otherwise applying.

The Commission concurs with this suggestion. It is clearly proper under section 6(e) of the Act to consider expedited approval for agreements whose effective date is suspended by the filing of a requests for additional information. An appropriate modification has been made in section 572.605 of the Final Rule.

The Commission is also adding a new paragraph (c) to this section to provide for expedited approval of cancellations of agreements and modifications which reflect changes in conference membership, officials of the agreement, and neutral body authority and procedures. This addresses the desire expressed in comments that these matters be effectuated without

unnecessary delay. The Commission will consider the institution of a separate proceeding to exempt these categories of agreements from the waiting period requirements of section 5 of the Act and allow them to become effective upon filing. However, given the notice requirements of section 16 of the Act, that relief cannot be granted within the scope of this proceeding.

Section 572.606—Requests for Additional Information

Section 572.606 implements section 6(d) of the Act which authorizes requests for additional information.

Section 572.606 (a) and (c)

Section 572.606(a) provides that the Commission may request additional information, prior to the expiration of the waiting period. When a full response is not supplied, the filing party must submit a statement of reasons for noncompliance.

Section 572.606(c) provides that a request for additional information may be made orally or in writing, but when made orally, written confirmation will be mailed within seven days of the request.

Comment 26 proposes that this section be amended to provide a statement that the Commission will attempt to make requests for additional information early in the waiting period. Only in exceptional circumstances would requests be made in the final days prior to the effective date.

There is no need to amend paragraph (a) as suggested. All requests for additional information will be made as promptly as possible. Of course, the timing of such requests will necessarily vary with the complexity of the agreement.

Several comments (Comments 22, 24, 27, 38) objected to the use of oral requests for supplementary information. The comments express concern with the ambiguities associated with oral requests, particularly when the request is made in the last days prior to the effective date and the parties are making plans to implement the agreement. Comments 22 and 24 submit that the parties are entitled to the certainty of a written request which would be addressed to specific, relevant and readily available material and be specifically identified. Comment 24 suggests that an oral request for additional information only be permitted if written confirmation is received prior to the 45th day of the waiting period.

Section 6(c) of the Act does not require requests for additional information or documentary matter under section 6(c)(2) to be made in writing. It only requires that they are made within the 45-day period. The Commission therefore retains the option to use oral requests followed by written confirmation for further information. When an oral request for additional information is issued the Commission will, as a matter of course, advise the parties of the consequences of this procedure. In the unlikely event parties are unsure of the nature of an oral request for further information,

prior to receipt of written confirmation, they may contact the Director, Bureau of Agreements and Trade Monitoring for clarification.

Section 572.606(d)

Section 572.606(d) provides that the Commission will specify a reasonable period for a party to reply to a request for additional information.

Comments 24 and 27 assert that the Commission does not have the authority to set a time limit for response. They submit that there is no burden on the Commission until the information is supplied and, therefore, the Commission should not be concerned when, if ever, the information is supplied. They propose that section 572.606(d) be deleted.

The purpose of providing for a reasonable period to respond is to conserve the Commission's resources. Once the Commission undertakes the review of a filed agreement it is beneficial to complete the review process and not have filed agreements pending indefinitely while awaiting responses to requests. This provision is necessary to maintain the orderly management of the agreement review process. In all cases, parties will be provided ample time in which to respond. Parties may always petition for more time, if necessary.

Section 572.606(e)

Section 572.606(e) is added to the Final Rule to provide for notice to commenting parties of a request for additional information. The purpose of this provision is to allow for further comment.

Section 572.607—Failure to Comply With Requests for Additional Information

Section 572.607 implements section 6(i) of the Act which authorizes the Commission to seek court enforcement of its information requests.

Section 572.607(a)

Section 572.607(a) of the Interim Rule provides that a failure to comply results "when the party responsible for filing the request" fails to substantially respond. Comment 34 suggests that the reference should be to "a person filing an agreement, or an officer, director, partner, agent or an employee thereof." This suggestion would clarify this section and has been adopted.

Comment 24 suggests that the word "satisfactory" be deleted on the ground that if a statement of reason for noncompliance is submitted only a court can evaluate its acceptability.

When the Commission believes a statement of reasons for noncompliance is inadequate it may bring an action in court pursuant to section 6(c)(2)(B) of the Act. The court's function will be to evaluate the sufficiency of the statement of reasons for noncompliance and take appropriate remedial action. This section is not intended to supplant the court's function. This suggested change, however, is not necessary.

Comments 27 and 34 assert that the Commission is not authorized to prescribe a period of time for reply to requests for additional information and thus cannot, pursuant to section 572.607(a), deem that a failure to reply has resulted when a response is not received within that time period. Comment 34 maintains that the only applicable time period is that provided for in section 6(c) of the Act.

These arguments are not convincing. The time periods provided for in section 6(c) of the Act only apply after a response has been received. They do not pertain to the period between the request and the response. As indicated with respect to section 572.606(d) above, the establishment of a time period for response to a request for additional information is necessary to the orderly administration of the agreements program. This does not mean, however, that the Commission will bring a court action pursuant to section 6(i) of the Act when no information has been filed, thereby compelling the parties to file a response and start the running of the waiting period on an agreement they may prefer to withdraw. Finally, where the parties have filed a response to a request for information which is inadequate, the Commission may bring an action pursuant to section 6(i) to compel a more responsive reply and extend the waiting period.

Section 572.607(b)

Section 572.607(b) implements the provisions of section 6(i) of the Act which permits the Commission to bring an action in District Court where there has been a failure to substantially comply with a request for additional information.

Comment 24 would remove the word "where" from the first sentence of this section and substitute the words "when it considers that". Comment 24 seeks a clarification that the Commission is not asserting authority reserved for a court under section 6(i) of the Act.

Before the Commission brings an action pursuant to section 6(i) of the Act it must first reach its own finding on the substantiality of a reply to a request for additional information. This finding does not substitute for the court's determination of the adequacy of the reply. To clarify the Commission's function, the recommended change in language has been made.

Section 572.608—Confidentiality of Submitted Material

Section 572.608 implements section 6(j) of the Act which provides that all information submitted by a filing party other than the agreement itself shall be exempt from disclosure under the FOIA.

Section 572.608(a)

Section 572.608(a) provides a general grant of confidentiality to the filing parties for all information submitted to the Commission and lists particular categories of protected information including the Information

Form, voluntary submissions of additional information, reasons for noncompliance, and replies to requests for additional information.

Comment 30, consistent with its recommendations concerning section 572.603 pertaining to comments from third parties, suggests that confidentiality be extended to third parties who submit information. Comment 30 submits that nondisclosure will encourage better quality and more detailed comment.

As indicated above, the Commission does not have authority under the 1984 Act to exempt third party comments from disclosure except in conformance with FOIA and the Trade Secrets Act.

Section 572.608(b)

Section 572.608(b) provides for the statutory exception to the overall policy of nondisclosure of information submitted by parties filing an agreement. Such information may be disclosed in an administrative or judicial proceeding or in response to a proper request from Congress.

Comment 24 suggests a change in section 572.608(b)(1) by adding the phrase "but only if disclosure takes place in the course of such proceedings" after the words "relevant to". The purpose of the change is to allow information to be released only in the course of a proceeding and not just where that information may be "relevant" to that proceeding.

The language which Comment 24 objects to, "relevant to . . . administrative or judicial proceeding", is adopted verbatim from section 6(j) of the Act. In order to preserve the full scope of this statutory provision, no change in section 572.608(b) is made.

Section 572.608(c)

Comment 28 suggests that this section be amended to allow a filing party to waive nondisclosure. Although the Commission itself may not disclose information filed by the parties to an agreement, the parties themselves are not bound by the provisions of section 6(j) of the Act. This section therefore has been amended to add a new paragraph (c) which expressly recognizes the parties' right to make a voluntary disclosure. The rule requires, however, that parties making such a disclosure promptly inform the Commission of their action.

Section 572.609—Negotiations

Section 572.609 makes clear that the negotiation process may take place at any time after the filing of an agreement up to the conclusion of an injunctive proceeding. The negotiation process will thus be available throughout the pendency of an agreement to resolve differences over an agreement. The negotiation process is limited to the filing party and Commission personnel. Shippers, other government departments or agencies, and other third parties may not participate in negotiations.

The most significant issues concerning this section focus on whether a modification which is the result of negotiations must be published in

the *Federal Register*, and the proper role of third parties in the negotiation process. Comment 28 submits that modifications which expand the parties' authority must be published in the *Federal Register*. Comment 26 takes the opposite view and further asserts that the waiting period should not be suspended.

It is unlikely that, as a result of negotiations, an agreement's authority would be expanded. However, in the event that expansion of authority does result from the negotiations, the agreement would be subject to filing as a new agreement pursuant to section 5 of the Act and the provisions of this part. Notice of the filing of the new agreement would therefore be published in the *Federal Register*, pursuant to section 572.602, provided it was not rejected for filing or technical deficiencies.

Comment 39 supports the present version of section 572.609 and notes that third parties are properly excluded from negotiations. Conversely, Comment 28 maintains that third parties should not be flatly barred from involvement in negotiations. The issue of involvement of third parties in negotiations has already been discussed in connection with section 572.603(b). No changes are warranted.

Finally, Comment 24 suggests a change in section 572.609 to clarify that negotiations concerning injunctive proceedings pertain exclusively to injunctions brought pursuant to section 6(h) of the Act.

Because negotiations pursuant to section 572.609 are not intended to be limited to section 6(h) injunctions, the suggested change has not been made. The Commission is not only authorized to seek injunctive relief pursuant to section 6(h) of the Act for violation of the general standard but also pursuant to section 6(i) for failure to substantially comply with a request for additional information and section 11(h) for actions in violation of the Act.

SUBPART G OF THE RULES—REPORTING AND RECORD RETENTION REQUIREMENTS

Subpart G contains rules which implement the reporting and record retention provisions of the Act. Its purpose is to ensure that the Commission has sufficient information to adequately monitor the concerted activities of regulated parties.

A number of comments object to the reporting and recordkeeping requirements of Subpart G. They object to the broadened definition of "meeting" for which minutes are required, the identification of documents circulated to the members in connection with meetings and the filing of an index on a quarterly basis of all documents distributed to the members and not otherwise filed with the Commission. These comments contend that, in many instances, the list of documents would be massive, and that to require their filing would be an unwarranted intrusion on due process rights. These requirements are said to be an undue and unreasonable burden

upon the industry and to be contrary to the legislative intent of the 1984 Act.

It is clear that Congress intended a law which would enable the ocean shipping industry to fashion agreements in a manner which meets their commercial needs and to have such agreements become effective within a relatively short period, unless there is an indication that such agreements might be contrary to the standard set forth in section 6(g) of the Act. However, it is also clear that Congress intended that the Commission maintain a degree of surveillance over the concerted activities of ocean common carriers and marine terminal operators, adequate to ensure that they do not violate the standards and prohibitions set forth in the Act and that they comply with the mandatory provisions expressly set forth therein. This imposes a greater rather than a lesser surveillance responsibility on the Commission, when compared with the provisions of the 1916 Act.

Upon consideration of the comments submitted and reevaluation of its information needs, the Commission has made several revisions to its Final Rule which relax the record reporting and retention requirements. The Final Rule requires the filing of minutes on the same basis as minutes were required under 46 CFR 537.3 of the former regulations, namely for meetings where the parties are authorized to take final action as opposed to being authorized to take any action. The requirement that the minutes specify any documents distributed to inform or assist the members is deleted. In addition, the index of documents requirement is being modified to include only those documents which are circulated to members and used to reach a final decision on specified matters.

These amendments strike a balance between the enhanced freedom the ocean shipping industry enjoys and the need to ensure that the Commission has the information needed to fulfill its responsibilities under the 1984 Act.

Several comments (Comments 16, 17, 22, 34) allege that the information collection requirements of Subpart G violate the Paperwork Reduction Act of 1980 (44 U.S.C. 3501). The United States Office of Management and Budget (OMB) is charged with the responsibility of reviewing agency regulations for compliance with the Paperwork Reduction Act. The Commission has followed the proper procedures for clearance of Part 572 by OMB. The collection of information requirements contained in this part have been submitted to the Office of Management and Budget under the provisions of the Paperwork Reduction Act and have been assigned an OMB control number. *See* section 572.991.

Comment 28 contends that consortium agreements should be included within the coverage of Subpart G and subjected to reporting and indexing requirements. Many consortia and joint service agreements are by their own terms required to submit reports. The addition of such agreements within the coverage of Subpart G would appear to be beyond the scope of this rulemaking proceeding. Should there develop a need to obtain such

information in order to effectively monitor consortia, then the Commission will consider an appropriate amendment to this subpart at that time.

Section 572.701—General Requirements

Section 572.701 contains certain general requirements which apply to all reports required by this subpart.

Section 572.701(b)—Serial Numbers of Reports

Section 572.701(b) provides that each filed report should be assigned a serial number. Comments 13 and 34 state that the serial numbering system should be made optional and that conferences should be allowed to continue to use their established numbered minute systems. It was not the purpose of this requirement to impose a precise numbering system but rather to establish a system for identifying minutes which might be missing. Accordingly, this section is being amended to add a provision which allows any conference or rate agreement which has its own sequential numbering system to continue to use that system in lieu of the system set forth in this section.

Section 572.701(c)—Retention of Records

Section 572.701(c) provides that a copy of each document referenced in the index of documents submitted pursuant to section 572.704 must be retained by the parties for as period of three years and be made available to the Commission upon request. As indicated below, the volume of documents required to be indexed has been substantially reduced. However, the retention of documents is of such importance for surveillance purposes that this requirement shall be retained without change in the Final Rule.

Three comments (Comments 13, 34, 39) object to the provision in this section which states that the Commission may obtain documents upon written request. This objection similarly pertains to section 572.701(d) which also states that documents shall be made available upon request. The comments maintain that the judicial precedent pertaining to section 21(a) of the 1916 Act (46 U.S.C. app. 820), which is similar to section 15(a) of the 1984 Act (46 U.S.C. app. 814), and forms the basis for this subpart, should be followed.

The procedures used for requests for documents under the 1916 Act will be continued and, in situations pertaining to issuance of a request for documents pursuant to section 572.701(c) and section 572.701(d), the Commission will state its basis for seeking the documents.

Section 572.701(d)

Section 572.701(d) provides that the Director, Bureau of Agreements and Trade Monitoring may request that documents be furnished within a specified time. These documents will be received in confidence.

Comments 13, 22, and 34 maintain that the requirement that documents must be produced upon request is contrary to due process of law. They

submit that parties should be permitted an opportunity to oppose the request. Comment 39 maintains that this record production requirement constitutes an unreasonable search and seizure. This objection is without merit. Notice and opportunity for hearing are not a prerequisite to issuance of a request for documents pursuant to section 572.701(d). *Montship Lines, Ltd.* v. *Federal Maritime Board,* 295 F.2d 147 (D.C. Cir. 1961).

Comment 26 objects to the fact that the Director, Bureau of Agreements and Trade Monitoring issues a request for documents. It is urged that the former procedures, applying to section 21(a) of the 1916 Act, under which the Commission itself issued the request for documents, be continued. No modification to this section is necessary. Requests for documents made by the Director may be appealed to the Commission.

Finally, Comment 34 points out that privileged documents such as attorney-client communications are not exempted from the scope of a request for documents. There is, however, no need to amend this section to specifically exclude information which may already be protected by law.

Section 572.701(e)

Section 572.701(e) specifies times when documents must be filed, one of which is after the issuance of a request for documents. Comment 34 refers to its objections pertaining to sections 572.701(c) and 572.701(d) and asserts that this section should be deleted. These concerns have already been addressed above and no change is required in this section.

Section 572.702—Filing of Reports Related to Shippers' Requests and Complaints and Consultations

Section 572.702 further implements section 5(b) of the Act which requires conferences to provide for a consultation process and to establish procedures for considering shippers' requests and complaints.

Section 572.702(a)—Shippers' Requests and Complaints

Section 572.702(a) provides that conferences shall annually file with the Commission a statistical report summarizing activity in several areas pertaining to shippers' requests and complaints. Comment 33 suggests that these reports should identify shippers' associations requests separately from those of individual shipper requests. This change is said to be necessary so that the Commission may carry out its responsibilities to administer and enforce section 10(b)(13) of the Act, which prohibits common carriers from refusing to negotiate with a shippers' association. Comment 27, on the other hand, contends that reports on the number of shipper complaints is unnecessary.

The contents of reports required under this section has been kept to a minimum. Only statistical totals without specific details are required. However, these statistics are important to determine the degree of conference responsiveness to sections 5(b), 6 and 7 as well as to section 10(b)(13) of the Act. With regard to section 10(b)(13) it would be useful to have

the statistical reports separately indicate shippers' associations or groups and section 572.702(a) has been amended accordingly in the Final Rule.

Section 572.702(b)—Consultations

Section 572.702(b) requires each conference to file an annual report setting forth a statistical summary of the number of consultations requested and conducted during the calendar year. Several of the comments already discussed in connection with section 572.702(a) make similar arguments with regard to this section. Comment 33 believes that this section also should provide for the separate compilation of statistics on consultations with shippers' associations. Comment 27 argues that this section is unnecessary. Comment 24 contends that the requirement to report on consultations should be eliminated because it will not produce any meaningful information and because it is contrary to the statutory goal of minimizing government intervention.

The reports required by section 572.702(a) are necessary and useful statistical information on the responsiveness of conferences to shippers concerns which would enable the Commission to determine whether a closer scrutiny of conference consultation activities might be warranted. This section is, however, modified in the Final Rule as was section 572.702(a) to require that reports separately identify shippers' associations and shippers' groups.

Section 572.703—Filing of Minutes

Section 572.703 defines the term "meeting" and requires certain types of agreements to file minutes of meetings. Certain matters, such as purely administrative discussion, are exempt from the filing requirements of this section.

Section 572.703(a)—Meetings

Section 572.703(a) defines "meetings" within the meaning of this section. It was initially considered desirable to have minutes of all meetings regardless of whether final action was contemplated. Upon further consideration and in light of the comments received, there would appear to be no need to require the submission of minutes of meetings which do not contemplate the taking of final action.

Therefore, this section is amended to provide that minutes need only be provided for meetings which authorize the taking of final action. This modification, in effect, continues the previous requirements under the 1916 Act. This amendment should satisfy the concerns of those comments (Comments 13, 25, 26, 34, 38, 39) which argued that the proposed definition of a "meeting" was too broad.

Section 572.703(b)—Content of Minutes

Section 572.703(b) of the Interim Rule required that the minutes identify all documents distributed at the meeting to inform or assist the members. This requirement is deleted from the Final Rule and the Commission will

rely primarily on the index of documents required by section 572.704. This change should meet the concern of those comments (Comments 17, 24, 25, 26, 29, 34, 38, 39) objecting to the minutes content requirement in the Interim Rule.

Comment 29 states that the minutes requirement should not apply to meetings of pooling and equal access agreements in this section. This would have the effect of eliminating not only the minute filing requirements for such agreements but all reporting and record keeping requirements under Subpart G. Comment 38 states that the reference to pooling, equal access and discussion agreements should be deleted.

Adequate surveillance under the 1984 Act is of particular importance with respect to pooling and equal access agreements. Therefore, it is necessary to obtain minutes from the parties to such agreements as part of that surveillance program. Final action taken by members of discussion agreements may also have significance for a particular trade. Therefore, the reference to pooling, equal access and discussion agreements is retained in the Final Rule.

Section 572.704—Index of Documents

Section 572.704 requires that agreements covered in section 572.703(a) index all documents which are distributed. Section 572.704(b) further requires this index to be filed with the Commission on a quarterly basis.

This section evoked considerable comment. Nine comments were received in objection (Comments 13, 16, 17, 25, 26, 29, 34, 38, 39). Seven of these comments (Comments 13, 16, 17, 26, 34, 38, 39) urge that the indexing requirement be deleted because it is unduly burdensome, unclear in its application, and contrary to one of the purposes of the Act, namely minimizing of government regulation. Comment 25 objected to the index but in the alternative suggested that, if retained, the Commission eliminate the double reporting of documents which must be identified in conference minutes and which also must be indexed.

The index requirement is modified to include only documents leading to final decision on specified matters. This should reduce the volume of materials to be indexed and limit the indexed documents to those which have substantial regulatory significance. The concern about double reporting expressed by Comment 25 has been addressed by eliminating the requirement in section 572.703(b) that minutes identify documents which are distributed.

Comment 29 requests that pooling and equal access agreements be permitted to submit, in lieu of the index, periodic and final accounting statements.

The requirement that pooling and equal access agreements must, where applicable, submit an index of documents distributed to members is retained. Accounting statements are not the equivalent of, or a substitute for, indexing of documents. The specificity of a document index is necessary to fulfill

monitoring responsibilities under the Act. Parties need only identify the documents, not furnish the documents themselves, unless specifically requested.

Section 572.705—Waiver of Reporting and Record Retention

Section 572.705 provides for a waiver of any provision of Subpart G upon a showing of good cause. No comments were received on this section and no substantive changes have been made to this section in the Final Rule.

SUBPART H—TRANSITIONAL RULES

Subpart H of the Interim Rule prescribes mandatory provisions in existing conference and interconference agreements and addresses expiration dates in existing agreements. As discussed more fully below, the mandatory provisions in section 572.801 are deleted from the Final Rule. Those portions of sections 572.802 and 572.803 which have a continuing purpose are transferred to other subparts of Part 572. All of the sections of Subpart H are therefore either deleted or relocated and the Subpart H designation shall be reserved for possible future use.

Section 572.801—Mandatory Provisions in Existing Conference Agreements

The purpose of section 572.801 was to facilitate the transition from regulation of agreements under the 1916 Act to the regulatory regime of the 1984 Act. In particular, it was important during the transitional phase to establish a mechanism to achieve compliance with section 5(b) of the Act on or before June 18, 1984, the effective date of the Act. To this end, the Commission required that conferences indicate their adoption of certain mandatory provisions set forth in section 572.801. This procedure worked to assure that conference agreements achieve compliance with section 5(b) of the Act.[4] Because the purpose of this section has been achieved, there is no need to retain it in the Final Rule.

Conferences have been permitted to draft their own amendments to supersede the Commission prescribed provisions and to comply with the statutorily mandated requirements. This procedure is continued in the Final Rule. Because this section is being deleted, there is generally no need to address the comments (Comments 22, 30, 31, 38) which proposed specific changes to this section. One comment, however, does merit further discussion at this time.

The U.S. Department of Justice (DOJ) submitted an extensive comment which focused on the right of independent action under section 5(b)(8) of the Act. DOJ contends that the model independent action provision

[4] A number of persons filed emergency comments (Comments 3, 4, 5, 6, 7, 11, 14, and 18) which either in whole or in part sought modifications of these mandatory provisions. On June 12, 1984 the Commission made certain amendments to the mandatory provisions in the Interim Rule in response to the concerns expressed in the emergency comments.

contained in section 572.801(e) of the Interim Rule should be strengthened and made mandatory for all conference agreements in order to ensure that independent action fulfills its purpose under the 1984 Act. Moreover, DOJ urges the Commission, by rule, to expressly prohibit: (1) all collusion among carriers concerning any carrier's decision to exercise or not exercise its right of independent action; (2) the imposition of procedural barriers on the right of independent action; and (3) acts of retaliation against carriers who exercise their right of independent action. To that end, DOJ's comment includes a proposed model conference agreement independent action clause which contains extensive safeguards for the exercise of independent action.

DOJ's proposal is not adopted in the Final Rule. First, this proposal is so far reaching as to be clearly beyond the scope of the current rulemaking proceeding. A separate rulemaking proceeding would be necessary with full opportunity for comment before such a comprehensive rule could be adopted. Second, there is no factual record to provide a basis for the DOJ proposal. Unlike the situation in the motor carrier industry cited by DOJ, where the Interstate Commerce Commission imposed procedures for independent action after it found that the statute was being frustrated, the Commission has only limited experience with independent action under the 1984 Act. At this time, the Commission believes that conferences should be free to draft their own independent action provisions and that such freedom is consistent with the deregulatory spirit of the Act. The Commission is aware of the critical role that independent action plays under the statutory scheme as a counterbalance to conference economic power. Therefore, such provisions receive close scrutiny in the review process.

Where it appears that a particular independent action provision may inhibit independent action, the Commission has sought and obtained modification of the provision by the parties through the negotiation process. These negotiations have led to the deletion from agreements of independent action provisions which mandate that a member taking independent action attend a meeting and explain the independent action before the action may go into effect and also provisions which provide for mandatory compromise of independent action. The negotiation process has worked thus far to remove objectionable independent action procedures from agreements. At this time it therefore does not appear necessary to undertake a rulemaking proceeding regarding independent action. However, should there be any indication that the right of independent action is being interfered with in any way, such a rulemaking proceeding will be considered.

Section 572.802—Mandatory Provisions in Existing Interconference Agreements

Section 572.802 in the Interim Rule provided that existing interconference agreements and agreements between carriers not members of the same conference must provide for independent action. Comment 38 suggests that

section 572.802 be transferred to section 572.502(b). This suggestion has been adopted.

Section 572.803—Expiration Dates in Existing Agreements

Section 572.803 provides that expiration dates in existing agreements remain in effect on and after June 18, 1984. The section further provides that parties to agreements with expiration dates must file any modification seeking renewal for a specific term, or elimination of the expiration date, in sufficient time to accommodate the waiting period required under the Act. Comment 38 suggests that section 572.803(b) should be transferred to section 572.401. This suggestion is adopted.

SUBPART I—PENALTIES

Subpart I prescribes penalties for violations of Part 572 as provided for in section 13(a) of the Act.

Section 572.901—Failure to File

Sections 4 and 5(a) of the Act provide for the filing of certain agreements with the Commission. Failure to file such an agreement is a violation of section 5(a) of the Act and Subpart D. This failure to file is subject to the penalties of section 13(a) of the Act (46 U.S.C. app. 1712(a)). Maximum penalties are $5,000 for each violation unless the violation was willfully and knowingly committed, in which case the maximum penalty is $25,000 for each violation.

Section 572.901 is amended to add the phrase "pursuant to sections 4 and 5(a) of the Act and this part and not exempted pursuant to section 16 or excluded from filing by the Act." This change clarifies that only agreements subject to the Act and requiring filing can be penalized for failure to file, as opposed to agreements subject to the Act but which do not require filing. This responds to Comments 34 and 38 which suggested these changes.

Section 572.902—Falsification of Reports

Falsification of any report required by the Act and Part 572, including falsification of any item on the Information Form, is made subject to the civil penalties set forth in section 13(a) of the Act. Such violations may also be subject to criminal sanctions under 18 U.S.C. 1001.

Comment 29 challenges the Commission's authority to provide by rule for penalties for falsification of reports when the Act does not specifically proscribe such activity.

Section 17(a) authorizes the Commission to prescribe rules necessary to carry out the Act and section 13(a), in turn, establishes penalties for violations of the Act and regulations issued thereunder. It is essential that information submitted to the Commission be truthful information if it is

to adequately administer the Act. The penalty provision furthers this fundamental purpose.

Comment 29 further asserts that this section is unnecessary because 18 U.S.C. 1001 already makes it a violation of the criminal code of the United States to intentionally make false statements within the context of any matter arising within the jurisdiction of a federal agency.

Section 572.902 is not superfluous. To supplement the criminal penalties under 18 U.S.C. 1001, it provides for civil penalties pursuant to section 13(a). Not all situations involving falsification of reports might merit the imposition of criminal penalties. In some situations civil penalties may be appropriate. Moreover, the reference to 18 U.S.C. 1001 in section 572.902 is a useful reminder of possible criminal liability.

Finally, Comment 29 maintains that the choice of the word "falsification" makes section 572.902 overbroad. It is submitted that unintentional misstatements could be construed as "falsifications" and thereby made subject to penalties.

Section 572.902 is amended by adding the word "knowing" before the word "falsification" where it appears. This modification clarifies that only parties who intentionally, and not mistakenly, submit false information will be subject to penalties.

Comment 22 submits that the penalties provided for in section 572.902 are excessive when considered in light of the difficulty of ascertaining some of the data required on the Information Form.

This Comment appears to be primarily addressed to the content of the Information Form. There should be no misunderstanding, however, of the application of the penalties provisions except in cases where parties knowingly falsify information. Parties will not be subject to penalty under Subpart I where they are unable to supply data required on the Information Form.

APPENDIX A TO PART 572—INFORMATION FORM AND INSTRUCTIONS

Commission Authority to Require Filing of the Information Form

Section 572.405 requires the party filing certain agreements to provide with the agreement information that is necessary under the Act to review the agreement. The required information is to be provided in the Information Form set forth in Appendix A. Where the filing party is unable to supply a complete response, the party should submit either estimated data with an explanation as to why the precise data are not available or a detailed statement of the reasons for noncompliance and the efforts made to obtain the required information.

Six comments address the issue of the Commission's authority to require the filing of the Information Form. Four comments disagree that the Commission has the authority to require the Information Form to accompany the filing of certain agreements. These comments make two related argu-

ments in support of their position: one, there is no explicit obligation for parties filing agreements under section 5(a) of the Act to submit supplemental detailed information concerning competitive factors with every agreement at the time of its filing; and two, the Information Form, which requests information relevant to the general standard, cannot be the basis for rejection of an agreement under section 5(a) of the Act, which contains no reference to the general standard.

Authority to require the Information Form is manifest for three main reasons. First, the statute clearly and explicitly authorizes the Commission to require that information accompany the filing of agreements and that agreements that do not meet this requirement may be rejected. Specifically, section 5(a) of the Act authorizes the Commission to "prescribe . . . the additional information and documents necessary to evaluate the agreement" (46 U.S.C. app. 1704(a)). The legislative history to section 5 of the Act specifies that the filing requirements are intended "only for information relevant to the Commission evaluation of an agreement rather than for information based on broad standards unrelated to that agreement." (H.R. Report 98–600, 98th Cong., 2d Sess. 28 (1984)). Section 6(b) of the Act authorizes rejection of any agreement filed under section 5(a) of the Act that does not meet the requirements of section 5 of the Act.

Congressional intent concerning the evaluation of an agreement prior to the agreement's effective date is interpreted to require not only a review pursuant to the section 6(b) standard (for compliance with section 5 requirements), but also an analysis based on the section 6(g) general standard for substantially anticompetitive agreements. Moreover, the authority under section 5(a)—to prescribe information to be filed *with* the agreement—differs from the authority under section 6(d)—to require *additional* information to be submitted after the agreement has been filed but prior to its effective date. The initial information filing requirements are designed to provide only the information needed to determine whether or not the agreement raises substantial issues of unreasonable and anticompetitive effects under the section 6(g) general standard. Where such anticompetitive effects are likely, additional information that is necessary in order to make a determination under section 6(g) whether or not to seek to enjoin the agreement may be requested under section 6(d).

Second, Congress has specifically cited in legislative history relevant portions of the Hart-Scott-Rodino Antitrust Improvements Act of 1976 as the model for the Commission's agreement review procedures. Pursuant to the Hart-Scott-Rodino Act, the Federal Trade Commission (FTC) developed a report form for information to aid the FTC in its preclearance review of proposed acquisitions and mergers ("Antitrust Improvements Act Notification and Report Form for Certain Mergers and Acquisitions").

Third, Congressional policy pronouncements in the Act and the legislative history indicate that one of the purposes of the Act was to end the delay in the processing of agreements and to provide a streamlined regulatory

process. Submission of relevant information at the time an agreement is filed that is not available to the Commission but is readily available to the filing party will expedite the processing of agreements.

Two comments specifically refer to the Commission's authority to require an initial Information Form related to the general standard. Comment 23 states that if an information filing requirement is prescribed, it must be limited to those instances where the agreement or modification raises a question under the general standard. Comment 34 accepts the premise that useful information not available to the Commission, but readily available to the parties filing substantially anticompetitive agreements, may be required in conjunction with such filings. Such requirements, according to Comment 34, will significantly reduce the need to request additional information from the filing parties, thereby aiding the review process.

In consideration of the above, it is concluded that the 1984 Act does confer the authority to require the submission of the Information Form in conjunction with the filing of certain agreements.

General Discussion of the Information Form

A number of comments argue that the Information Form is "excessive and irrelevant", "burdensome and unnecessary", seeks information not "readily available", or "resuscitates" the *Svenska* standard. Specific comments will be addressed in the discussion of the particular part of the Information Form. However, it should generally be stated that the requirements outlined in the Information Form are within the statutory limits on information gathering powers granted the Commission under sections 5 and 6 of the Act. The data requirements in the Information Form conform to the complicated decision calculus, described in the legislative history, that is required in order to render a determination that an agreement is or is not violative of the section 6(g) general standard. In the Interim Rule, the Commission stated,

> The Commission recognizes that the amount of information requested on the Information Form is significant. These information needs may be refined as the Commission gains experience under the general standard and determines what is relevant and essential to that review. In addition, the Commission plans to develop its own internal sources of trade information and as this information becomes available may be able to reduce the amount of information requested on the Form.

Since the publication of the Interim Rule, valuable experience has been gained in applying the Information Form to the analysis of agreements under the general standard. Moreover, the Commission has acquired and begun to utilize Journal of Commerce and Bureau of Census data sources which, when used in conjunction with its trade monitoring capabilities, provide a better picture of the competitive implications of ocean carrier agreements.

Moreover, the Information Form, as promulgated in the Final Rule, is not set in concrete, but will in all probability continue to evolve in order to appropriately reflect the Commission's regulatory needs in light of its data resources and changes in the regulated industry. Therefore, in the Final Rule there has been a general reduction in the amount of information required in the Form. Specific changes to the Information Form are indicated in the particular Part together with a discussion of the comments and the amendments to the Information Form.

PART-BY-PART DISCUSSION

Part I—Agreement Name

Part I requires the filing party to provide the full name of the agreement. One comment addressed this part simply to indicate that this requirement (along with Part II) was not objectionable as a quick identifier of the agreement. Accordingly, Part I will remain unchanged in the Final Rule.

Part II—Agreement Type

Part II requires the filing party to indicate whether or not the agreement authorizes the parties to collectively fix rates (Part II(A)), to pool cargoes or revenues (Part II(B)), or to establish a joint service or consortium (Part II(C)).

In the Interim Rule, the instructions to the Information Form state that the nature of the agreement determines the extent of information required. Specifically, the instructions require only those agreements that provide for rate-fixing, pooling or joint services/consortia to complete Parts III and IV, which seek information on market share and market competition. Such requirements are justified in the instructions on the basis that "these three types of agreements of all agreements historically filed with the Commission are the most likely to trigger the 6(g) standard because of their potential to create excessive market power."

Part II and the Instructions have been amended to clarify and conform Part II with the intention that only those agreements that provide for rate-fixing, pooling or joint services/consortia *or* significant modifications to such agreements are required to complete Parts III and IV. Parties filing amendments to agreements should refer to section 572.403(a) for guidance as to which amendments require the Information Form. Furthermore, the requirement that a completed Information Form include Part VIII (Reports, Studies of Other Research) for all filing parties has been limited to only those parties that have answered "yes" to any question in Part II (see the discussion under Part VIII).

Comment 23 states that only those types of agreements mentioned in Part II that could raise questions under the general standard should be required to file the Information Form. In particular, the comment argues that the Information Form should only be required for those agreements

or modifications that authorize or directly increase the authority of the parties to: (1) fix ocean rates; (2) allocate cargo or revenue between or among them; or, (3) reduce service at United States ports; and, which may also result in a significant reduction in competition.

The Commission generally agrees with the comment. The Information Form, as formulated in the Final Rule essentially conforms to the comment's suggestion. Part II identifies three types of agreements, the first two of which are identical to the first two agreement categories cited by the comment. Part V requires those agreements with service authority to specify any reduction in service that is likely to occur as a result of the agreement. Thus, Part V addresses those agreements in the comment's third agreement category.

Moreover, for all other agreements, the requirements imposed by the Information Form are minimal. In particular, the only parts of the Information Form required under the Final Rule for parties filing agreements, other than rate-fixing, pooling and joint service agreements, or agreements with service authority, or those agreements exempted from the filing requirement, are Parts I, II, VI and IX. For most agreements, all that these parts require is checking a box or entering name, address and signature. Other than those "Part II agreements" discussed above, the only other substantive requirement would be imposed upon those agreements that are required to complete Part VI. Because restrictions imposed by governments are the most effective limitations on competition in the ocean liner trades, Part VI captures important information for analysis under the general standard. For example, certain agreements that facilitate access to cargoes subject to foreign cargo preference laws or decrees which are not otherwise required to indicate any market information on the Form would be required to complete Part VI.

Five comments address the requirement that certain types of agreements must complete Parts III and IV of the Information Form.

Two comments refer specifically to the inclusion of joint service agreements in Part II. Comment 18 argues that the implication that joint service agreements are likely to be violative of the general standard should be rejected. Comment 30 supports the requirement that joint service/consortium agreements complete Parts III and IV, citing the potential for this type of agreement to reduce competition especially if the cooperating carriers dominate the relevant trade.

There are two major concerns with joint services under the general standard. The first, which was mentioned in Comment 30, involves a situation where two or more of the parties to the proposed joint service currently have an *existing* service in the trade. Thus, the formation of the joint service eliminates the existing competition between or among the parties in the relevant trade(s). The second concern involves the entry into a trade of a new joint service which is so large as to be able to exercise market dominance in the trade it plans to *enter*.

In order to assess the competitive impact of a new joint service agreement, the filing of an Information Form with such agreements will continue to be required. Therefore, no change is made in the Final Rule in this regard.

Comments 26, 28 and 38 argue that conference agreements are less likely to raise issues under the general standard than service coordination, pooling and joint service agreements. They also argue that the information required for conference agreements is excessive and should be deleted or reduced.

The Commission concurs in part with these comments that conference agreements "apart from extraordinary circumstances" are not likely to be violative of the general standard and that the specific statutory restrictions on conference activities diminish the ability of a conference to abuse its position of dominance in a trade. However, such a view, which appears to comport with Congressional intent, does not remove the Commission's responsibility under the Act to review conference agreements for possible violations of the Act. Such a review must consider accepted economic principles which hold that explicit collusion in the form of price-fixing agreements may result in prices that are higher than competitive levels.

There is, however, no presumption that conference agreements will violate the general standard. In setting out the requirements for completing the Information Form, in particular Parts III and IV concerning market share and market competition, the Commission considered those agreements among all the types of agreements with which it was familiar that had the greatest potential to reduce competition and create market power in such a manner as to raise concerns under the general standard. The Commission adheres to its belief that in the unusual and severe cases where the general standard may be violated, either one or a combination of rate-fixing, pooling or joint service agreements will be involved. Consequently, the Commission will continue to apply the more rigorous data requirements contained in Parts III, IV and VIII for conference agreements.

Two comments argue that certain classes of agreements should be added to those having potential substantial anticompetitive implications and that further information filing requirements should be imposed. Comment 28 specifically criticizes the failure to subject service coordination agreements (i.e., "cross chartering combined with joint control over sailings and itineraries") to greater scrutiny than conference agreements. The comment urges that service coordination agreements be required to complete Parts III and IV, and Part VII (Benefits of the Agreement), the completion of which is now voluntary for all types of agreements. Comment 30 proposes the addition of all equal access agreements to those agreements required to complete Parts III and IV.

In partial response to Comment 30, it should be noted that equal access agreements invariably arise in response to the actions of a government and, therefore, require the completion of Part VI. However, in considering

these and other recommendations for inclusion in the Final Rule, care must be taken to ensure that all parties affected by the Final Rule have the opportunity to comment. The Commission cannot create new filing requirements for a class of agreements without first availing the affected parties with the opportunity to comment. The Commission may in a separate rulemaking procedure consider and propose rules that would address the issues raised in Comments 28 and 30. Accordingly, the Commission here withholds any further discussion of these aspects of Comments 28 and 30.

Comment 39 recommends that the requirement to submit an Information Form together with the required information contained therein should be "tailored to the type of agreement filed."

The Commission concurs with this comment. The Commission has, consistent with its agreement review responsibilities under the Act, required the Information Form only for new agreements (excluding marine terminal agreements, assessment agreements and exempted agreements) and modifications of agreements that may present substantial issues of competitive harm under the general standard. Moreover, the requirement to complete certain parts of the Form (e.g., Parts III, IV, V and VIII) is, in fact, tailored to the type of agreement involved.

Part III—Market Share Information

Part III requires those parties answering "yes" to Part II (A), (B) or (C) to provide the combined market share of all parties to the agreement (Part III(C)) by providing the amount of liner cargo carried by all parties to the agreement in each sub-trade (Part III(A)) and dividing this amount by the total amount of cargo carried on all liner vessels operating in each sub-trade (Part III(B)). Background Information to Parts III and IV indicates that the amount of cargo is to be given in both weight tons and on a dollar value basis. Sub-trade is defined as liner movements between each foreign country and each U.S. port range within the scope of the agreement, where a port range is identical to the Bureau of Census' U.S. Coastal District. Liner service refers to a definite, advertised schedule, giving relatively frequent sailings at regular intervals between specific U.S. ports or port ranges and designated foreign ports or port ranges.

A number of comments address this part. They express a common concern that the information required in Part III is irrelevant, excessive, burdensome, and meaningless. The earlier discussion of the authority to require filing parties to submit an Information Form with certain agreements addressed the question of the relevancy of the Information Form.

A number of comments generally recommend that carriers be allowed to submit data in the form in which they actually keep it and use it. Several comments urge that market share should be requested as a good faith estimate based on available data and an explanation of the estimating process. Comments on specific data filing requirements in Part III are

summarized below. The discussion of the comments and the Commission's statement of its course of action will not allow the summary of each topic, but will pertain to all comments to Part III at the end of this section.

Sub-trade

Comments referring to the requirements that data be given by sub-trade generally object to it on the grounds that trade data is not kept by carriers on a sub-trade basis, and, therefore, such data is not readily available or within the parties' grasp. Cargo data, according to several comments, is kept by carriers on a port, or port range or rate group basis. Moreover, according to two comments (23, 26), the separation of foreign port ranges into foreign countries and the division of U.S. port ranges along the lines of Customs districts does not reflect the markets or trade routes over which carriers actually compete. With intermodalism, Comment 26 argues, the U.S. West Coast should be one port range, not two, because of the ease with which interior point and minilandbridge traffic can shift from one state to another.

Amount of Cargo on a Weight Ton and Dollar Value Basis

Six comments object to the requirement that cargo data be given in dollar value, two of which also object to a weight ton basis requirement. These comments generally argue that the dollar value of the cargo is not a significant statistic to the carriers so they do not ordinarily keep records of the cargo's dollar value. The dollar value is available through the Bureau of Census, but it is not within the parties' grasp. Comment 36 states that because cargo data compiling methods differ from trade to trade, parties should be permitted to specify the unit of measurement in submitting cargo data if weight ton and dollar value measures are unavailable.

Non-Party Cargo Data (Part III(B))

Comments generally argue that the cargo data collection problems for parties are increased when they are applied to nonparties to the agreement. Several comments maintained that the carriers do not have ready access to cargo information relating to their competitors in a trade. The most reliable information on carrier cargo statistics is Bureau of Census, which should, according to Comment 34, be purchased by the Commission directly instead of being purchased by the parties and then submitted to the Commission. This comment urges that Part III(B) be eliminated along with Part III(C).

Liner Service

Comment 30 recommends that the Commission specify in the Instructions to the Form where it defines liner terms that these definitions and descriptions apply only in the context of the Information Form. Such a clarification

would preclude any confusion as to what persons are subject to the Act. For example, bulk parcel tankers may meet the definition of a liner service but, according to the comment, are not subject to the Act.

The Commission generally agrees with the comments to Part III. The Commission does not wish to impose excessive burdens on the filing parties or to require the submission of data not within the parties' grasp. Moreover, the data submitted should be meaningful, that is, the data should not be an artificial manipulation of disparate data (e.g., a combination of parties' business records and Census data in order to derive market share). More importantly, the Commission, which now has access to both the Bureau of Census and Journal of Commerce data bases, is aware, as several comments argued, that these data bases contain weight and dollar value data which are not perfect indicators of market share. More relevant and preferable as a measure of market shares are revenue tons, which may include measurement tons or weight tons, or containers statistics measured in TEU's. Such data, where provided, can augment internal data sources.

Accordingly, the Final Rule will indicate that market share data provided in Parts III (A), (B), and (C) may be estimated based on data available to the filing party. All estimates should be accompanied by an explanation indicating how the estimates were derived (an explanation of why precise data are not available is no longer required for Parts III or IV; see discussion of section 572.405). "Available" data is data within the parties' grasp, that is, data that the parties have already acquired, or would ordinarily acquire in the course of undertaking such commercial decisions embodied in their proposed agreement. The Instructions and Explanation and the Information Form will be amended to require that market share data be provided for such sub-trade within the scope of the agreement only where such data is available to the parties of where sub-trades represent the relevant market for liner service. Where the relevant market for liner service is more accurately represented by the entire geographic scope of the agreement, or by certain foreign port ranges (rather than foreign country), or by combinations of U.S. port ranges, the parties may provided market share on that basis. The geographic scope for which market share information is provided should be clearly defined.

Market share data may be provided in units that are ordinarily kept and used by the parties. The data is to be provided for the most recent twelve-month period for which data are available. Where estimates have been made, the filing party should so specify and indicate the basis of their derivation. Units of measurement should be clearly indicated for all data provided.

The Instructions and Explanation will also indicate that the definition of liner service and other liner terms is relevant only to the Information Form and does not affect the determination of persons subject to the Act based on the Act itself or the Final Rule.

Part IV—Market Competition

Part IV requires the filing party to provide the names of all non-party liner operators currently serving each sub-trade (Part IV(A)(1)), the names of all liner operators serving alternative liner routings competing for cargoes carried in each sub-trade (Part IV(A)(2)), and a description of the extent of competition offered by such liner operators (e.g., estimates of market share or underutilized capacity in alternative liner routings, Part IV(A)(3)). This part also requires the identification of all nonliner competitive substitutes (e.g., bulk or air freight, Part IV(B)(1)) and estimates of the percentage of liner cargo that is currently carried by nonliner operators (Part IV(B)(2)).

Eight comments address this part. Five comments argue that much of the data required in this part is not known and not readily obtainable, or if provided by the parties is not meaningful or accurate. These comments generally indicate that data provided in this part would be only an educated guess or a matter of judgment.

Several comments address the relevance of the information required. Comment 28 argues that non-party liner market share adds nothing to market share analysis. Comments 28 and 39 state that data on non-liner competition are not meaningful or helpful to the review of the agreement. However, Comment 38 maintains that such data for liner and non-liner competition would only be relevant to a market share analysis. Comment 34 contends that the need for such data is specified in the legislative history to the Shipping Act of 1984, but the Congressional intent is that such information would be better provided by third-party sources. Comment 27, in arguing that the required information is not readily available to carriers, states that the Commission should recognize the fact that liner and nonliner competition make liner freight rates reasonable.

Comments 23 and 34 recommend that Parts IV(A)(2), (3) and IV(B) should be optional because the data provided serve the parties' interests. Comments 27 and 36 recommend that Parts IV(A) and IV(A)(1) be deleted. Comment 36 requires the addition of certain qualifying terms that would make the data requirements less precise and more at the discretion of the parties.

The Commission recognizes the difficulty of providing precise data in response to the requirements of Part IV. The instructions to this part in the Interim Rule allow the use of estimates in the determination of percentages indicating the extent of liner and non-liner competition in Parts IV(A) and (B), respectively. Parties are expected to have some knowledge of the identity of their competitors and, at least approximately, the degree to which non-party liner operators and certain non-liner operators are competitive with the parties.

The Commission agrees with one comment that the presence of liner and non-liner competition should militate against unreasonably high rate levels. Moreover, the need and relevance of such information to the review

of agreements under the general standard is clearly indicated in the legislative history. The extent of liner and non-liner competition aids in the determination of the relevant market share and is necessary in order to determine the potential market power of parties to an agreement operating in that market. The specification of such liner and non-liner competition may tend to decrease the market share of the parties to their benefit in the analysis under the general standard.

The Commission is developing or acquiring data sources that should enable it to supplement the parties' data on the competitive conditions in most ocean trades. However, the Commission, in order to assist and expedite its preliminary review of agreements under the general standard, requires information that the parties could be expected to have concerning their competitors that would complete or support the Commission's data.

Because of the relevance of this information to the preliminary review of an agreement, the Commission continues to require in the Final Rule, parties with affirmative answers to Part II (A), (B) or (C) to complete Part IV. The Final Rule will indicate that the data required can be estimated. Parties should continue to identify the sources for such estimates. The units of measurement to be used in providing cargo data are at the discretion of the parties. However, all units of measurement must be clearly identified. The parties need not, for their responses to Part III or Part IV, utilize any data sources that they have not already acquired, or would not ordinarily acquire in the course of undertaking such commercial decisions embodied in their proposed agreement.

Part V—Service to the Shipping Public Under the Agreement

Part V requires the filing party to identify all U.S. ports expected to be served under the agreement (Part V(A)), to specify each party's reduction in frequency to each port within the scope of the agreement (Part V(B)), and to specify any elimination of service to any U.S. port within the scope of the agreement which occurs as a result of the implementation of the agreement (Part V(C)).

Six comments address Part V. The consensus of the comments is that information concerning the reduction or elimination of service should be required only of agreements that have the authority to reduce service. Ratemaking agreements that do not, according to Comment 32, "seek to control the fact or frequency of any member line's service" should not be required to complete Part V.

The intent of Part V is to obtain information, not otherwise available, that is essential to an analysis under the general standard of reductions in service resulting from the agreement. Clearly, agreements with no service authority cannot be construed as having the potential, through a reduction in competition, to unreasonably reduce service levels. Consequently, the completion of Part V will be required only for those agreements that have service authority. Service authority is defined as including either or

both of the following authorities allowing parties to agree between or among themselves: to allocate (or otherwise provide) tonnage or capacity between or among carriers serving the trade(s); to establish a schedule of ports or otherwise allocate ports which each carrier will serve and/or the frequency of each carrier's calls at those ports.

Comment 27 indicates that Part V is relevant, but Part V's emphasis on service to ports is contrary to the Act's intent, which is "to permit carriers to structure their own affairs and thereby provide more efficient service to shippers." Because it does not follow that a reduction in service to ports is a reduction in service to shippers, the Commission should, according to this comment, readjust its focus on ports to address the issue of service to shippers.

The frequency of port calls is used because it is a readily available index of service to shippers. There are, of course, other indices that indicate the service to shippers (including, for example, capacity, type of vessel, transit time, number of handlings). However, to require such data would likely present filing parties with an unduly burdensome data collection task. Moreover, such data would likely be of marginal use for the analysis of most agreements under the general standard. If reductions in frequency or the elimination of service to ports are indicated in Part V, which, when combined with the Commission's general knowledge of trade conditions, are sufficient enough to present questions under the general standard, the Commission may at that time seek additional information either informally or under the authority of section 6(d) of the Act in order to more specifically address the impact of the agreement on service to shippers. Consequently, in lieu of any specific suggestions in the comment as to how service to shippers could be more accurately and practicably determined and obtained, the Commission will continue to utilize port calls as one initial proxy for service to shippers.

Comment 23 maintains that the reference to indirect port calls via surface carriage in the instructions to Part V(A) implies that, for the purposes of responding to Part V(A), a "port" could include inland points and that port calls could include pick-up or delivery at such inland points by railcars and trucks. Comment 23 also recommends that port calls required by Part V(B) refer only to direct or indirect calls by vessels under the direct operational control of the parties.

The Commission is persuaded that potential problems may exist involving excessive data required in Part V for indirect intermodal service and for service by vessels not under the operational control of the parties. Consequently, the use of the term "port calls" in the Information Form and Instructions is changed to delete reference to surface carriage and to account only for port calls by vessels under the direct operational control of one or more parties to the agreement. For the purpose of the Information Form, the term "port" means the place with a harbor that an ocean carrier serves, either directly by oceangoing vessel or indirectly by feeder

service. The use of this information is applicable only to the Information Form and in no way changes the meaning of "port" as referenced elsewhere in the Final Rule. The identification of other forms of indirect service such as intermodal service (e.g., interior point or minilandbridge service) or transshipment may be provided on a voluntary basis by the parties where such data may assist and expedite the analysis of the agreement's impact on service, but it will not be required with the initial filing. The Commission may, however, request such data pursuant to its authority under section 6(d) of the Act where substantial reductions in service are indicated both by the agreement and by the analysis under the general standard of the agreement and the relevant trade(s).

Comment 36 recommends that Part V(A) be changed to require only the identification of those ports "expected" to be served, and that Part V(B) be amended to require an estimate of any change in the frequency of port calls, rather than reduced sailings.

With regard to the comment's concerns with Part V(B), the analysis of services under the general standard pertains to unreasonable reductions in the level of service. The Commission need only, therefore, require parties to provide reductions in service that will occur as a result of the implementation of the agreement. With regard to the suggestion that Part V(A) indicates those ports expected to be served, the instructions to Part V(A) already so state. Consequently, Part V(A) will be changed to conform to the instructions.

Comment 26 refers to Part V(B)(2) which specifies that the elimination of service to any port need only be indicated where it occurred "as a result of the implementation of the agreement." This comment urges that similar restrictive language be applied to Part V(B)(1) as well.

Part V(B) seeks information concerning the reduction or elimination of service at any port within the scope of the agreement for the purpose of analyzing the impact of an agreement under the general standard. Consequently, the Commission is only interested in Part V(B)(1), as it is in Part V(B)(2), insofar as the specified reduction of service is likely to occur as a result of the implementation of the agreement. The Final Rule will, therefore, reflect the change in language urged by Comment 26.

Part VI—Foreign Government Involvement in the Liner Market

Part VI requires the filing party to indicate whether or not the agreement was entered into as a direct or indirect response to any law, decree or other action promulgated or otherwise implemented by a foreign government (Part VI(A)). Where the filing party has so indicated, then all such governmental actions that have led to the agreement should be specified (Part VI(B)). The filing party is also required to indicate whether or not the governmental action limits access to the carriage of liner cargoes (Part VI(C)) and, if so, to explain how access is limited (Part VI(D)) and to

provide the percentage of liner cargo carried within the scope of the agreement to which access is limited (Part VI(E)).

Four comments address Part VI. Comment 22 has "no quarrel" with this part. Comment 26 states that the instructions to this Part should be clarified so that Parts VI(C), (D) and (E) are required only where Part VI(A) is answered in the affirmative. The concerns of Comment 26 can be alleviated by reference in the Information Form to Part VI(C) which clearly refers to Part VI(A), and to Parts VI(D) and (E), which clearly refer to Part VI(C).

Comment 34 argues that Part VI is not relevant with respect to ratemaking agreements and, therefore, should not be applicable. The Commission concurs that most conference agreements have not usually been established in direct or indirect response to government laws, decrees, etc. Nonetheless, certain laws of foreign governments do require that a carrier, in order to carry cargo in that country's oceanborne foreign commerce, be a conference member. The Commission will retain the requirement that parties filing conference agreements or significant amendments to such agreements answer the pertinent portions of Part VI.

Comment 38 states that government laws are not relevant to any standard pertaining to the rejection of an agreement under sections 6(b) or 6(g) of the Act. Moreover, even if such laws were relevant, no reason is given, according to this comment, as to why Part VI should apply to foreign government and not U.S. laws.

The inclusion of Part VI, as explained in the Interim Rule, is based on the premise that, given the contestability of the liner shipping industry, in all but the rarest cases, only the actions of governments can effectively restrict entry to a trade. In such cases where entry is so restricted, excessive market power is most likely to arise and present significant issues of potential competitive harm under the general standard. Thus, the Commission rejects the claim made by Comment 38 that information concerning foreign government involvement in the liner trades is not relevant to the preliminary review of an agreement under the general standard. The general authority to reject agreements under section 6(b) is addressed earlier in the discussion of Appendix A.

It may be helpful to reiterate and further clarify what is meant by an agreement that is a direct or indirect response to a governmental law, decree or other action. Where, for example, laws of a foreign government require that a carrier, in order to carry cargo in that country's oceanborne foreign commerce, must be a conference member, then an agreement that establishes a conference in order for the parties to enter that trade would be a direct response to such governmental laws and, thus, would be required to answer Part VI. Moreover, a commercial agreement that was in response to a governmental action that was itself in response to the concerted actions of other governments would also be required to complete Part VI. For example, any commercial space charter agreement that was filed in response

to laws promulgated by a government that sought to impose cargo sharing schemes through such space chartering agreements and, in such a fashion, implement the UNCTAD Code of Liner Conduct, would be required to complete Part VI.

In addition, the treatment of equal access agreements should be clarified in light of Comment 30, which states that equal access agreements may not be in response to the actions of governments. Such agreements, which facilitate access by certain carriers to cargoes subjected to government preference laws, decrees or other practices necessarily interject a foreign government into liner shipping and, therefore, require the completion of Part VI, which the instructions to the Information Form in the Final Rule will state.

An agreement that was an indirect response to a governmental action would be any agreement that facilitated the implementation of government laws, decrees, etc., or an agreement that flowed from such governmental action. An indirect response to the example stated above would be the creation of a pool that facilitates cargo sharing within the conference even though the pool was not *per se* required by such governmental action.

Only foreign government laws have been addressed in Part VI because the Commission is either familiar with or can easily obtain the information it requires concerning U.S. cargo preference laws. The involvement of foreign governments in liner markets is not necessarily so easily determined.

Part VII—Benefits of the Agreement

Part VII requests the filing party to indicate the benefits of the agreement that will accrue to the parties to the agreement (Part VII(A)) and to shippers and U.S. commerce generally (Part VII(B)). In response to emergency comments, the Information Form was amended to make the completion of Part VII voluntary.

Seven comments address this part. Three comments are generally supportive of this part's inclusion in the Form. Comments 22 and 34 assert that the provision of the agreements' benefits will generally bolster the parties' case. Comment 26 concurs with the amendment to the Interim Rule that makes the completion of Part VII voluntary.

The three comments that oppose Part VII (Comments 27, 32, 37) generally take the position that a statement of benefits and substantiating data is a request for an advance justification of the agreement, placing the burden of proof on the parties to an agreement. These comments believe that Part VII reinstitutes the *Svenska* standard and subverts the intent of the Act.

The Commission included Part VII in the Information Form in order to allow the parties to provide any information concerning increases in efficiency that may offset any reduction in competition resulting from the agreement. Such information would assist the Commission in its review of an agreement under the general standard, which, as outlined in the

legislative history, compels the consideration of efficiency benefits. Such benefits may offset any negative effects of an agreement that are found likely to result in a substantial reduction in competition. Part VII allows those persons filing the agreement who are likely to be most knowledgeable about the agreement's resulting efficiencies to demonstrate those benefits. The completion of Part VII should be to the advantage of the filing parties. Moreover, it is not a mandatory requirement.

The Commission will make no *a priori* judgments concerning the benefits of an agreement based on the completion or lack of completion of Part VII. In the absence of the completion of Part VII the Commission, where it is deemed necessary, will on its own undertake the determination of the agreement's benefits. Where Part VII has been completed, the Commission will determine the validity of the efficiencies claimed and enter, again where necessary, its assessment of the agreement's benefits into its analysis of the agreement under the general standard. The Commission does not, therefore, view Part VII as a reinstitution of any aspect of the Commission's agreement approval standards under the Shipping Act, 1916. Part VII will remain unchanged in the Final Rule.

Part VIII—Reports, Studies or Other Research

Part VIII requires the filing party to identify any reports, studies or other research that were prepared in order to determine the need for the proposed agreement.

Nine comments address this part. All oppose the requirement. These comments contend that it is: an unnecessary regulatory requirement; irrelevant to the general standard; so broad as to be incomprehensible; an invasion of confidential business information; a reinstitution of the *Svenska* test; the first leg of a fishing expedition that is arbitrary and capricious because of the absence of any exploration in the public record; an unnecessary processing delay; discoverable under 6(f) but not 6(b); and, finally, a return to existing law requiring the parties to show that less anticompetitive alternatives exist.

The Commission believes that a clarification of Part VIII may adequately respond to these comments' objections. The Commission's goal in requiring parties to identify any reports made in conjunction with the proposed agreement is to avail the Commission staff of information within the parties' grasp that would assist and expedite the preliminary review of the agreement under the general standard. The use of the word "need" in the phrase ". . . for the purpose of analyzing, formulating or assessing the *need* for the proposed agreement. . ." is perhaps unfortunate. The Commission does not desire nor does it view as a proper burden to be placed on filing parties an *a priori* justification for the agreement on the basis of the commercial need for the agreement, or on the basis that no less anticompetitive alternatives to the agreement exist. The Commission is interested in any data the parties have gathered relevant to the competitive conditions

in the relevant trade(s) and the competitive implications of the agreement. Specifically, this part is intended to solicit information on any studies commissioned or carried out by the parties pursuant to the agreement that examine rates, service levels and number and strength of competition in the relevant trades, or that forecast the effect of the agreement on such parameters.

In light of the comments and in order to clarify Commission intent with respect to Part VIII, the Commission is amending Part VIII and all references to this Part in the Instructions and Explanations to the Form to conform to the amended language. In order to minimize the burden on filing parties, only where the filing party has answered "yes" to Part II (A), (B), or (C) will Part VIII be required to be completed. The instructions to Part VIII will now read as follows:

> Part VIII requires a filing party that has answered "YES" to Part II (A), (B) or (C) to identify any reports, studies or other research that were prepared by or for any or all of the parties for the purpose of analyzing, formulating or assessing the competitive conditions in the relevant trade(s) affected by the agreement, or the competitive impact of the agreement on the relevant trade(s) affected by the agreement.

Part IX—Identification of Person(s) to Contact Regarding the Information Form and Certification of Authenticity

Part IX solicits the name(s) of the person(s) that the Commission may contact regarding any questions concerning the Information Form or a request for additional information. This part also requires a certification of the authenticity by the filing party of the information provided in the Form.

Three comments address Part IX. These comments generally oppose the certification requirement in Part IX(C) as burdensome and redundant. Comment 23 claims that the specific instructions for certification in Part IX(C) require an unreasonable confirmation of factual and legal conclusions regarding the accuracy and completeness of the Form. All comments refer to 18 U.S.C. § 1001, which is itself specifically referenced in section 572.902 of the Rules. These comments urge the elimination of Part IX or the modification of its text to allow the filing parties to draft the certifications.

The Commission is persuaded that the text of Part IX(C) may present the parties with burdensome certification requirements. The Commission views, however, that a separate certification of the accuracy and completeness of the Information Form is important to the enforcement of the general standard. In order to relieve the filing parties of burdensome requirements, the Commission is simplifying the certification oath and eliminating the notarization requirement. The certification oath will read as follows:

> This Information Form, together with any and all appendices and attachments thereto, was prepared and assembled in accordance

with the instructions issued by the Federal Maritime Commission. Subject to the recognition that, where so indicated, reasonable estimates have been made, the information is, to the best of my knowledge, true, correct and complete.

Name (please print or type) _____

Title _____

Relationship with parties to agreement _____

Signature _____

Date _____

III. *Conclusion*

This Final Rule, and the accompanying Information Form, are intended to implement the various agreements provisions of the Act in accordance with the 1984 Act's guiding policies. The changes made to the Interim Rule in response to the comments filed in Dockets Nos. 84–26 and 84–32 are intended further to facilitate the filing of agreements by parties and the review and monitoring of agreements by the Commission. These changes generally have reduced the regulatory burden on the ocean shipping industry and have retained only those requirements which are essential to the fulfillment of the Commission's regulatory responsibilities. The Commission believes that the Final Rule establishes a nondiscriminatory regulatory process with a minimum of government intervention and regulatory costs.

The Chairman of the Commission certifies pursuant to section 605(b) of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) that these rules will not have a significant economic impact on a substantial number of small entities, within the meaning of that Act. The primary economic impact of these rules would be on ocean common carriers which generally are not small entities. A secondary impact may fall on shippers, some of whom may be small entities, but that impact is not considered to be significant.

List of Comments and Pleadings Filed in Docket No. 84–26.

1. Hoppel, Mayer & Coleman. May 30, 1984.

2. Philadelphia Port Corporation. May 31, 1984.

3. Trans-Pacific Freight Conference of Japan/Korea; Japan/Korea Atlantic and Gulf Freight Conference. June 4, 1984.

4. Associated Latin American Freight Conferences; United States Atlantic & Gulf/Panama Freight Conference; Atlantic & Gulf/West Coast of South America Conference; East Coast Colombia Conference; United States Atlantic & Gulf/Southeastern Caribbean Conference; United States Atlantic & Gulf/Jamaica and Hispaniola Steamship Freight Association; United States Atlantic & Gulf/Ecuador Freight Conference; United States Florida/Ecuador

Steamship Conference; South Atlantic & Gulf/Panama & Costa Rica Rate Agreement; South Atlantic & Gulf/Guatemala El Salvador & Honduras Rate Agreement. June 1, 1984.

5. Inter-American Freight Conference; Inter-American Freight Conference River Plate/Puerto Rico and U.S. Virgin Islands/River Plate; Pacific Coast/River Plate Brazil Conference. June 1, 1984.

6. Australia/Eastern U.S.A. Freight Conference; The "8900" Lines; Greece/U.S. Atlantic Rate Agreement; Iberian/U.S. North Atlantic Westbound Freight Conference; Marseilles/North Atlantic U.S.A. Freight Conference; Israel/U.S. North Atlantic Ports Westbound Freight Conference; Med-Gulf Conference; Mediterranean-North Pacific Coast Freight Conference; North Atlantic Israel/Eastbound Freight Conference; North Atlantic Mediterranean Freight Conference; U.S. Atlantic & Gulf/Australia-New Zealand Conference; United States Atlantic Ports/Italy, France and Spain Freight Conference; West Coast of Italy, Sicilian and Adriatic Ports North Atlantic Range Conference. June 4, 1984.

7. Thailand Pacific Freight Conference. June 5, 1984.

8. Pacific Westbound Conference; Pacific Straits Conferences; Pacific/Indonesian Conference. June 1, 1984.

9. Graham & James. June 4, 1984.

10. Inter-American Freight Conference, Puerto Rico and U.S. Virgin Islands. June 5, 1984.

11. Chemical Manufacturers Association. June 6, 1984.

12. U.S.-Flag Far East Discussion Agreement. June 8, 1984.

13. North Atlantic/United Kingdom Freight Conference; North Atlantic/French Atlantic Freight Conference; North Atlantic Continental Freight Conference; North Atlantic/Baltic Freight Conference; Scandinavia Baltic/U.S. North Atlantic Westbound Freight Conference; Continental North Atlantic Westbound Freight Conference; North Atlantic Westbound Freight Association; United Kingdom & U.S.A. Gulf Westbound Rate Agreement; Continental U.S. Gulf Freight Association; Gulf United Kingdom Conference; Gulf European Freight Association. June 11, 1984.

14. U.S. Department of Justice. June 15, 1984.

15. National Maritime Council. July 24, 1984.

16. Australia/Eastern U.S.A. Freight Conference; The "8900" Lines; Greece/U.S. Atlantic Rate Agreement; Iberian/U.S. North Atlantic Westbound Freight Conference; Marseilles/North Atlantic U.S.A. Freight Conference; Med-Gulf Conference; Mediterranean-North Pacific Coast Freight Conference; New Zealand Rate Agreement; North Atlantic/Mediterranean Freight Conference; U.S. Atlantic & Gulf/Australia-New Zealand Conference; U.S. South Atlantic/Portuguese, Moroccan and Mediterranean Rate Agreement; United States Atlantic Ports/Italy, France and Spain Freight Conference; West Coast of Italy, Sicilian and Adriatic Ports North Atlantic Range Conference (WINAC). August 6, 1984.

17. North Atlantic/United Kingdom Freight Conference; North Atlantic/French Atlantic Freight Conference; North Atlantic Continental Freight Conference; North Atlantic/Baltic Freight Conference; Scandinavia Baltic/U.S. North Atlantic Westbound Freight Conference; Continental/North Atlantic Westbound Freight Conference; North Atlantic Westbound Freight Association; United Kingdom & U.S.A. Gulf Westbound Rate Agreement; Continental U.S. Gulf Freight Association; Gulf United Kingdom Conference; Gulf-European Freight Association; North Europe-South Atlantic Rate Agreement; U.S. South Atlantic-Europe Rate Agreement. August 10, 1984.

18. Johnson Scanstar. August 15, 1984.

19. City of Los Angeles Harbor Department. August 20, 1984.

20. Trans Freight Lines, Inc. August 23, 1984.

21. Port of Sacramento. August 24, 1984.

22. North Europe/U.S. Pacific Freight Conference; Pacific Coast European Conference; Latin America/Pacific Coast Steamship Conference; Pacific Coast River Plate Brazil Conference; Pacific/Australia-New Zealand Conference; and their respective member lines. August 27, 1984.

23. Australia/Eastern U.S.A. Freight Conference; The "8900" Lines; Greece/U.S. Atlantic Rate Agreement; Iberian/U.S. North Atlantic Westbound Freight Conference; Marseilles/North Atlantic U.S.A. Freight Conference; Med-Gulf Conference; Mediterranean North Pacific Coast Freight Conference; North Atlantic/Mediterranean Freight Conference; U.S. Atlantic & Gulf/Australia-New Zealand Conference; U.S. South Atlantic/Portuguese, Moroccan and Mediterranean Rate Agreement; United States Atlantic Ports/Italy, France and Spain Freight Conference; West Coast of Italy, Sicilian and Adriatic Ports North Atlantic Range Conference (WINAC). [Comment on Information Form]. August 27, 1984.

24. Australia/Eastern U.S.A. Freight Conference; The "8900" Lines; Greece/U.S. Atlantic Rate Agreement; Iberian/U.S. North Atlantic Westbound Freight Conference; Marseilles/North Atlantic U.S.A. Freight Conference; Med-Gulf Conference; Mediterranean North Pacific Coast Freight Conference; North Atlantic/Mediterranean Freight Conference; U.S. Atlantic & Gulf/Australia-New Zealand Conference; U.S. South Atlantic/Portuguese, Moroccan and Mediterranean Rate Agreement; United States Atlantic Ports/Italy, France and Spain Freight Conference; West Coast of Italy, Sicilian and Adriatic Ports North Atlantic Range Conference (WINAC). [Comment on Proposed Rule]. August 27, 1984.

25. U.S.-Flag Far East Discussion Agreement. August 27, 1984.

26. Malaysia/Pacific Rate Agreement; Pacific/Indonesian Conference; Pacific Straits Conference; Pacific Westbound Conference. August 27, 1984.

27. Council of European & Japanese National Shipowners' Associations. August 27, 1984.

28. American President Lines, Ltd. August 27, 1984.

29. U.S. Gulf/Brazil Pooling Agreement; U.S. Pacific/Brazil Pooling Agreement; Brazil/U.S. Pacific Pooling Agreement; U.S. Gulf/Argentina Pooling Agreement. August 27, 1984.

30. Chemical Manufacturers Association. August 27, 1984.

31. U.S. Department of Justice. August 27, 1984.

32. U.S. Department of Transportation. August 27, 1984.

33. American Institute For Shippers' Associations, Inc. August 28, 1984.

34. North Atlantic/United Kingdom Freight Conference; North Atlantic/French Atlantic Freight Conference; North Atlantic/Continental Freight Conference; North Atlantic/Baltic Freight Conference; Scandinavia Baltic/U.S. North Atlantic Westbound Freight Conference; Continental North Atlantic Westbound Freight Conference; North Atlantic Westbound Freight Association; United Kingdom & U.S.A. Gulf Westbound Rate Agreement; Continental U.S. Gulf Freight Association; Gulf-United Kingdom Conference; Gulf-European Freight Association; North Europe-U.S. South Atlantic Rate Agreement; U.S. South Atlantic-Europe Rate Agreement. August 28, 1984.

35. Agreement No. 10305. August 29, 1984.

36. Sea-Land Service, Inc. August 27, 1984.

37. American West African Freight Conference. August 30, 1984.

38. Inter-American Freight Conference; Inter-American Freight Conference-Puerto Rico and U.S. Virgin Islands; Inter-American Freight Conference River Plate/Puerto Rico and U.S. Virgin Island/River Plate. August 30, 1984.

39. Trans-Pacific Freight Conference of Japan/Korea; Japan/Korea-Atlantic and Gulf Freight Conference; TransPacific Freight Conference (Hong Kong); New York Freight Bureau; Philippines/North America Conference; and their member lines. August 30, 1984.

List of Comments and Pleadings Filed in Docket No. 84–32.

101. The "8900" Lines; Iberian/U.S. North Atlantic Westbound Freight Conference; Marseilles/North Atlantic U.S.A. Freight Conference; Italy, South France, South Spain, Portugal/U.S. Gulf and the Island of Puerto Rico (Med-Gulf) Conference; U.S. Atlantic & Gulf/Australia-New Zealand Conference; U.S. Atlantic Ports/Italy, France, and Spain Conference; The West Coast of Italy, Sicilian and Adriatic Ports/North Atlantic Range Conference (WINAC). October 17, 1984.

102. American President Lines, Ltd. October 17, 1984.

103. Council of European & Japanese National Shipowners Associations. October 17, 1984.

104. Far East Conference; Malaysia Pacific Rate Agreement; Pacific/Indonesia Conference; Pacific-Straits Conference. October 18, 1984.

105. The North European Conferences. October 18, 1984.

106. Trans-Pacific Freight Conference of Japan/Korea; Japan/Korea-Atlantic and Gulf Freight Conference; Trans Pacific Freight Conference (Hong Kong); New York Freight Bureau; Philippines/North America Conference. October 22, 1984.

107. Sea-Land Service, Inc. October 22, 1984.

108. Inter-American Freight Conference. October 22, 1984.

109. Atlantic & Gulf/West Coast South American Conference; East Coast/Colombia Conference; West Coast of South America Northbound Conference; United States Atlantic & Gulf/Ecuador Freight Conference; United States Florida/Ecuador Steamship Freight Association; United States Atlantic & Gulf/Venezuela Freight Association. October 22, 1984.

110. United States Atlantic & Gulf/Southeastern Caribbean Conference; United States Atlantic & Gulf/Jamaica and Hispaniola Steamship Freight Association; United States South Atlantic & Gulf/Panama & Costa Rica Rate Agreement; United States Atlantic Gulf/Guatemala, Honduras & El Salvador Rate Agreement. October 22, 1984.

List of Subjects in 46 CFR Part 572.

Antitrust, Contracts, Maritime carriers, Administrative practice and procedure, Rates and fares, Reporting and recordkeeping requirements.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

THEREFORE, pursuant 5 U.S.C. 553; and sections 2, 3, 4, 5, 6, 7, 8, 10, 11, 13, 15, 16, 17, and 18 of the Shipping Act of 1984 (46 U.S.C. app. 1701, 1702, 1703, 1704, 1705, 1706, 1707, 1709, 1710, 1712, 1714, 1715, 1716, and 1717) Part 572 of Title 46, Code of Federal Regulations, is revised to read as follows:

FEDERAL MARITIME COMMISSION

[46 CFR PART 572]

AGREEMENTS BY OCEAN COMMON CARRIERS AND OTHER PERSONS SUBJECT TO THE SHIPPING ACT OF 1984

SUBPART A—GENERAL PROVISIONS

Sec.

SUBPART B—SCOPE

SUBPART C—EXEMPTIONS

SUBPART D—FILING AND FORM OF AGREEMENTS

SUBPART E—CONTENT AND ORGANIZATION OF AGREEMENTS

SUBPART F—ACTION ON AGREEMENTS

AUTHORITY: Sections 2, 3, 4, 5, 6, 7, 8, 10, 11, 13, 15, 16, 17 and 18 of the Shipping Act of 1984 (46 U.S.C. app. 1701, 1702, 1703, 1704, 1705, 1706, 1707, 1709, 1710, 1712, 1714, 1715, 1716 and 1717).

SUBPART A—GENERAL PROVISIONS

§572.101 Authority.

The rules in this part are issued pursuant to the authority of section 4 of the Administrative Procedure Act (5 U.S.C. 553), and sections 2, 3, 4, 5, 6, 7, 8, 10, 11, 13, 15, 16, 17 and 18 of the Shipping Act of 1984 ("the Act").

§572.102 Purpose.

This part implements those provisions of the Act which govern agreements by or among ocean common carriers and agreements (to the extent

the agreements involve ocean transportation in the foreign commerce of the United States) among marine terminal operators and among one or more marine terminal operators and one or more ocean common carriers. This part also sets forth more specifically certain procedures provided for in the Act.

§ 572.103 Policies.

(a) The Act requires that agreements be processed and reviewed according to strict statutory deadlines. This part is intended to establish procedures for the orderly and expeditious review of filed agreements in accordance with the statutory requirements.

(b) The Act requires that agreements be reviewed in accordance with a general standard as set forth in section 6(g) of the Act and empowers the Commission to obtain certain information to conduct that review. This part sets forth the kind of information for particular types of agreements which the Commission believes relevant to that review. Only that information which is relevant to such a review is requested. It is the policy of the Commission to keep the costs of regulation to a minimum and at the same time obtain information needed to fulfill its statutory responsibility.

(c) In order to further the goal of expedited processing and review, agreements are required to meet certain minimum requirements as to form. These requirements are intended to ensure expedited review and should assist parties in preparing agreements. These requirements as to form do not affect the substance of an agreement and are intended to allow parties the freedom to develop innovative commercial relationships and provide efficient and economic transportation systems.

(d) The Act itself excludes certain agreements from filing requirements and authorizes the Commission to exempt other classes of agreements from any requirement of the Act or this part. In order to minimize delay in implementation of routine agreements and to avoid the private and public cost of unnecessary regulation, the Commission is exempting certain classes of agreements from the filing or information requirements of this part.

(e) Under the new regulatory framework established by the Act, the role of the Commission as a monitoring and surveillance agency has been enhanced. The Act favors greater freedom in allowing parties to form their commercial arrangements. This, however, requires greater monitoring of agreements after they have become effective. The Act empowers the Commission to impose certain recordkeeping and reporting requirements. This part identifies those classes of agreements which require specific record retention and reporting to the Commission and prescribes the applicable period of record retention, the form and content of such reporting, and the applicable time periods for filing with the Commission. These requirements assure that Commission monitoring responsibilities will be fulfilled.

(f) The Act requires that conference agreements must contain certain mandatory provisions. Each such agreement must: (1) state its purpose;

(2) provide reasonable and equal terms and conditions for admission and readmission to membership; (3) allow for withdrawal from membership upon reasonable notice without penalty; (4) require an independent neutral body to police the conference, if requested by a member; (5) prohibit conduct specified in section 10(c)(1) or 10(c)(3) of the Act; (6) provide for a consultation process; (7) establish procedures for considering shippers' requests and complaints; and (8) provide for independent action. Parties to conference agreements are free to develop their own mandatory provisions in accordance with the requirements of section 5(b) of the Act.

(g) An agreement filed under the Act must be clear and definite in its terms, must embody the complete understanding of the parties, and must set forth the specific authorities and conditions under which the parties to the agreement will conduct their present operations and regulate the relationships among the agreement members.

§ 572.104 Definitions.

When used in this part:

(a) "*Agreement*" means 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.

(b) "*Antitrust Laws*" means the Act of July 2, 1890 (ch. 647, 26 Stat. 209), 15 U.S.C. 1, as amended; the Act of October 15, 1914 (ch. 323, 38 Stat. 730), 15 U.S.C. 12, as amended; the Federal Trade Commission Act (38 Stat. 717), 15 U.S.C. 41, as amended; sections 73 and 74 of the Act of August 27, 1894 (28 Stat. 570), 15 U.S.C. 8, 9, as amended; the Act of June 19, 1936 (ch. 592, 49 Stat. 1526), 15 U.S.C. 13, as amended; the Antitrust Civil Process Act (76 Stat. 548), 15 U.S.C. 1311, note as amended; and amendments and Acts supplementary thereto.

(c) "*Appendix*" means a document containing additional material of limited application and appended to an agreement, distinctly differentiated from the main body of the basic agreement.

(d) "*Assessment agreement*" means an agreement, whether part of a collective bargaining agreement or negotiated separately, to the extent that it provides for the collectively bargained fringe benefit obligations on other than a uniform man-hour basis regardless of the cargo handled or type of vessel or equipment utilized.

(e) "*Common carrier*" means a person holding itself out to the general public to provide transportation by water of passengers or cargo between the United States and a foreign country for compensation that: (1) assumes responsibility for the transportation from the port or point of receipt to the port or point of destination; and (2) utilizes, for all or part of that transportation, a vessel operating on the high seas or the Great Lakes between a port in the United States and a port in a foreign country.

(f) "*Conference agreement*" means an agreement between or among two or more ocean common carriers or between or among two or more

marine terminal operators for the conduct or facilitation of ocean common carriage and which provides for: (1) the fixing of and adherence to uniform rates, charges, practices and conditions of service relating to the receipt, carriage, handling and/or delivery of passengers or cargo for all members; (2) the conduct of the collective administrative affairs of the group; and (3) may include the filing of a common tariff in the name of the group and in which all the members participate, or, in the event of multiple tariffs, each member must participate in at least one such tariff. The term does not include consortium, joint service, pooling, sailing or transshipment agreements.

(g) "*Consultation*" means a process whereby a conference and a shipper confer for the purpose of promoting the commercial resolution of disputes and/or the prevention and elimination of the occurrence of malpractices.

(h) "*Cooperative working agreement*" means an agreement which establishes exclusive, preferential, or cooperative working relationships which are subject to the Shipping Act of 1984, but which do not fall precisely within the arrangements of any specifically defined agreement.

(i) "*Effective agreement*" means an agreement approved pursuant to section 15 of the Shipping Act, 1916 or effective pursuant to an exemption under that act, or filed and/or effective under the Act.

(j) "*Equal access agreement*" means an agreement between ocean common carriers of different nationalities, as determined by the incorporation or domicile of the carriers' operating companies, whereby such common carriers associate for the purpose of gaining reciprocal access to cargo which is otherwise reserved by national decree, legislation, statute or regulation to carriage by the merchant marine of the carriers' respective nations.

(k) "*Independent neutral body*" means a disinterested third party, authorized by a conference and its members to review, examine and investigate alleged breaches or violations by any member of the conference agreement and/or the agreement's properly promulgated tariffs, rules or regulations.

(l) "*Information Form*" means the form containing economic information which must accompany the filing of certain kinds of agreements.

(m) "*Interconference agreement*" means an agreement between conferences.

(n) "*Joint service/consortium agreement*" means an agreement between ocean common carriers operating as a joint venture whereby a separate service is established which: (1) holds itself out in its own distinct operating name; (2) independently fixes its own rates, charges, practices and conditions of service or chooses to participate in its operating name in another agreement which is duly authorized to determine and implement such activities; (3) independently publishes its own tariff or chooses to participate in its operating name in an otherwise established tariff; (4) issues its own bills of lading; and (5) acts generally as a single carrier. The common use of facilities may occur and there is no competition between members for

traffic in the agreement trade; but they otherwise maintain their separate identities.

(o) "*Marine terminal facilites*" means one or more structures (and services connected therewith) comprising a terminal unit, including, but not limited to docks, berths, piers, aprons, wharves, warehouses, covered and/or open storage space, cold storage plants, grain elevators and/or bulk cargo loading and/or unloading structures, landings, and receiving stations, used for the transmission, care and convenience of cargo and/or passengers or the interchange of same between land and ocean common carriers or between two ocean common carriers. This term is not limited to waterfront or port facilities and includes so-called off-dock container freight stations at inland locations and any other facility from which inbound waterborne cargo may be tendered to the consignee or outbound cargo may be received from shippers for vessel or container loading.

(p) "*Marine terminal operator*" means 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. This term does not include shippers or consignees who exclusively furnish marine terminal facilities or services in connection with tendering or receiving proprietary cargo from a common carrier by water.

(q) "*Maritime labor agreement*" means a collective-bargaining agreement between an employer subject to the Act or group of such employers, and a labor organization representing employees in the maritime or stevedoring industry, or an agreement preparatory to such a collective-bargaining agreement among members of a multiemployer bargaining group, or an agreement specifically implementing provisions of such a collective-bargaining agreement or providing for the formation, financing or administration of a multipemployer bargaining group; but the term does not include an assessment agreement.

(r) "*Modification*" means any change, alteration, correction, addition, deletion, or revision of an existing effective agreement or to any appendix to such an agreement.

(s) "*Non-vessel-operating common carrier*" means a common carrier that does not operate the vessels by which the ocean transportation portion is provided and is a "shipper" in its relationship with an ocean common carrier.

(t) "*Ocean common carrier*" means a vessel-operating common carrier, but the term does not include one engaged in ocean transportation by ferry boat or an ocean tramp.

(u) "*Ocean freight forwarder*" means a person in the United States that (1) dispatches shipments from the United States via common carriers and books or otherwise arranges space for those shipments on behalf of shippers, and (2) processes the documentation or performs related activities incident to those shipments.

(v) "*Person*" means individuals, corporations, partnerships and associations existing under or authorized by the laws of the United States or of a foreign country.

(w) "*Pooling agreement*" means an agreement between ocean common carriers which provides for the division of cargo carryings, earnings, or revenue and/or losses between the members in accordance with an established formula or scheme.

(x) "*Port*" means the place at which an ocean common carrier originates or terminates (and/or transships) its actual ocean carriage of cargo or passengers as to any particular transportation movement.

(y) "*Sailing agreement*" means an agreement between ocean common carriers which provides for the rationalization of service by establishing a schedule of ports which each carrier will serve and/or the frequency of each carrier's calls at those ports.

(z) "*Service contract*" means a contract between a shipper or shippers' association and an ocean common carrier or conference in which the shipper or shippers' association makes a commitment to provide a certain minimum quantity of cargo over a fixed time period, and the ocean common carrier or conference commits to a certain rate or rate schedule as well as a defined service level—such as assured space, transit time, port rotation, or similar service features. The contract may also specify provisions in the event of nonperformance on the part of either party.

(aa) "*Shipper*" means an owner or other person for whose account the ocean transportation of cargo is provided or the person to whom delivery is to be made.

(bb) "*Shippers' association*" means a group of shippers that consolidates or distributes freight on a nonprofit basis for the members of the group in order to secure carload, truckload, or other volume rates or service contracts.

(cc) "*Shippers' requests and complaints*" means a communication from a shipper to a conference requesting a change in tariff rates, rules, regulations, or service; protesting or objecting to existing rates, rules, regulations or service; objecting to rate increases or other tariff changes; protesting allegedly erroneous service contract or tariff implementation or application, and/or requesting to enter into a service contract. Routine information requests are not included in the term.

(dd) "*Space charter agreement*" means an agreement between ocean common carriers whereby a carrier (or carriers) agrees to provide vessel capacity for the use of another carrier (or carriers) in exchange for compensation or services. The arrangement may include arrangements for equipment interchange and receipt/delivery of cargo.

(ee) "*Through transportation*" means continuous transportation between origin and destination for which a through rate is assessed and which is offered or performed by one or more carriers, at least one of which

is an ocean common carrier, between a United States point or port and a foreign point or port.

(ff) *"Transshipment agreement"* means an agreement between an ocean common carrier serving a port or point of origin and another such carrier serving a port or point of destination, whereby cargo is transferred from one carrier to another carrier at an intermediate port served by direct vessel call of both such carriers in the conduct of through transportation. Such an agreement does not provide for the concerted discussion, publication or otherwise fixing of rates for the account of the cargo interests, conditions of service or other tariff matters other than the tariff description of the transshipment service offered, the port of transshipment and the participation of the nonpublishing carrier.

SUBPART B—SCOPE

§ 572.201 Subject agreements.

(a) *Ocean common carrier agreements.* This part applies to agreements by or among ocean common carriers to:

(1) Discuss, fix, or regulate transportation rates, including through rates, cargo space accommodations, and other conditions of service;

(2) Pool or apportion traffic, revenues, earnings, or losses;

(3) Allot ports or restrict or otherwise regulate the number and character of sailings between ports;

(4) Limit or regulate the volume or character of cargo or passenger traffic to be carried;

(5) Engage in exclusive, preferential, or cooperative working arrangements among themselves or with one or more marine terminal operators or non-vessel-operating common carriers;

(6) Control, regulate, or prevent competition in international ocean transportation; and

(7) Regulate or prohibit their use of service contracts.

(b) *Marine terminal operator agreements involving foreign commerce.* This part applies to agreements (to the extent the agreements involve ocean transportation in the foreign commerce of the United States) among marine terminal operators and among one or more marine terminal operators and one or more ocean common carriers to:

(1) Discuss, fix, or regulate rates or other conditions of service; and

(2) Engage in exclusive, preferential, or cooperative working arrangements.

§ 572.202 Non-subject agreements.

This part does not apply to the following agreements:

(a) Any acquisition by any person, directly or indirectly, of any voting security or assets of any other person;

(b) Any maritime labor agreement;

(c) Any agreement related to transportation to be performed within or between foreign countries;

(d) Any agreement among common carriers to establish, operate, or maintain a marine terminal in the United States;

(e) Any agreement among marine terminal operators which exclusively and solely involves transportation in the interstate commerce of the United States;

(f) Any agreement exclusively and solely among non-vessel-operating common carriers;

(g) Any agreement exclusively and solely among ocean freight forwarders.

SUBPART C—EXEMPTIONS

§ 572.301 Exemption procedures.

(a) *Authority.* The Commission, upon application or on its own motion, may by order or rule exempt for the future any class of agreements between persons subject to the Act from any requirement of the Act if it finds that the exemption will not substantially impair effective regulation by the Commission, be unjustly discriminatory, result in substantial reduction in competition, or be detrimental to commerce.

(b) *Optional filing.* Notwithstanding any exemption from filing, Information Form, or other requirements of the Act and this part, any party to an exempt agreement may file such an agreement with the Commission.

(c) *Application for exemption.* Any person may apply for an exemption or revocation of an exemption of any class of agreements or an individual agreement pursuant to section 16 of the Act and this subpart. An application for exemption shall state the particular requirement of the Act for which exemption is sought. The application shall also include a statement of the reasons why an exemption should be granted or revoked and shall provide information relevant to any finding required by the Act. Where an application for exemption of an individual agreement is made, the application shall include a copy of the agreement.

(d) *Participation by interested persons.* No order or rule of exemption or revocation of exemption may be issued unless opportunity for hearing has been afforded interested persons and departments and agencies of the United States.

(e) *Federal Register notice.* Notice of any proposed exemption or revocation of exemption, whether upon application or upon the Commission's own motion, shall be published in the *Federal Register.* The notice shall include:

(1) A short title for the proposed exemption or the title of the existing exemption;

(2) The identity of the party proposing the exemption or seeking revocation;

(3) A concise summary of the agreement or class of agreements for which exemption is sought, or the exemption which is to be revoked;

(4) A statement that the application and any accompanying information are available for inspection in the Commission's offices in Washington, D.C.; and

(5) The final date for filing comments regarding the application.

(f) *Retention of agreement by parties.* Any agreement which has been exempted by the Commission pursuant to section 16 of the Act shall be retained by the parties and shall be available upon request by the Bureau of Agreements and Trade Monitoring for inspection during the term of the agreement and for a period of three years after its termination.

§ 572.302 Non-substantive agreements and non-substantive modifications to existing agreements—exemption.

(a) A non-substantive agreement or a non-substantive modification to an existing agreement is an agreement between ocean common carriers and/or marine terminal operators, acting individually or through approved agreements, which:

(1) Concerns the procurement, maintenance, or sharing of office facilities, furnishings, equipment and supplies, the allocation and assessment of the costs thereof, or the provisions for the administration and management of such agreements by duly appointed individuals.

(2) Reflects changes in the name of any geographic locality stated therein; the name of the agreement or the name of a party to the agreement; the names and/or numbers of any other section 4 agreement or designated provisions thereof referred to in an agreement; the table of contents of an agreement; the date or amendment number through which agreements state they have been reprinted to incorporate prior revisions thereto or which corrects typographical and grammatical errors in the text of the agreement; or renumbers or reletters articles or subarticles of agreements and references thereto in the text.

(3) Reflects changes in the titles or persons or committees designated therein or transfers the functions of such persons or committees to other designated persons or committees or which merely establishes a committee.

(b) A copy of the non-substantive modification shall be submitted for information purposes in the proper format but is otherwise exempt from the Information Form, notice and waiting period requirements of this part.

(c) Parties to agreements may seek a determination from the Director, Bureau of Agreements and Trade Monitoring as to whether a particular modification is non-substantive.

§ 572.303 Husbanding agreements—exemption.

(a) A husbanding agreement is an agreement between a principal and an agent both of which are subject to the Act and which provides for the agent's handling of routine vessel operating activities in port, such as notifying port officials of vessel arrivals and departures; ordering pilots, tugs, and linehandlers; delivering mail; transmitting reports and requests from the Master to the owner/operator; dealing with passenger and crew matters; and providing similar services related to the above activities. The

term does *not* include an agreement which provides for the solicitation or booking of cargoes, signing contracts or bills of lading and other related matters, nor does it include an agreement that prohibits the agent from entering into similar agreements with other carriers.

(b) A husbanding agreement is exempt from the filing and Information Form requirements of the Act and of this part.

§ 572.304 Agency agreements—exemption.

(a) An agency agreement is an agreement between a principal and an agent both of which are subject to the Act, which provides for the agent's solicitation and booking of cargoes and signing contracts of affreightment and bills of lading on behalf of an ocean common carrier. Such an agreement may or may not also include husbanding service functions and other functions incidental to the performance of duties by agents, including processing of claims, maintenance of a container equipment inventory control system, collection and remittance of freight and reporting functions.

(b) An agency agreement between persons subject to the Act is exempt from the filing and Information Form requirements of the Act and of this part, except those: (1) where a common carrier is to be the agent for a competing carrier in the same trade; or (2) which permit an agent to enter into similar agreements with more than one carrier in a trade.

§ 572.305 Equipment interchange agreements—exemption.

(a) An equipment interchange agreement is an agreement between two or more ocean common carriers for (1) the exchange of empty containers, chassis, empty LASH/SEABEE barges, and related equipment; and (2) the transportation of the equipment as required, payment therefor, management of the logistics of transferring, handling and positioning equipment, its use by the receiving carrier, its repair and maintenance, damages thereto, and liability incidental to the interchange of equipment.

(b) An equipment interchange agreement is exempt from the filing and Information Form requirements of the Act and of this part.

§ 572.306 Nonexclusive transshipment agreements—exemption.

(a) A nonexclusive transshipment agreement is an agreement by which one ocean common carrier serving a port of origin by direct vessel call and another such carrier serving a port of destination by direct vessel call provide transportation between such ports via an intermediate port served by direct vessel call of both such carriers and at which cargo will be transferred from one to the other and which agreement does not: (1) prohibit either carrier from entering into similar agreements with other carriers; (2) guarantee any particular volume of traffic or available capacity; or (3) provide for the discussion or fixing of rates for the account of the cargo interests, conditions of service or other tariff matters other than the tariff description of the service offered as being by means of transshipment, the port of transshipment and the participation of the nonpublishing carrier.

(b) A nonexclusive transshipment agreement is exempt from the filing and Information Form requirements of the Act and of this part, provided that the tariff provisions set forth in paragraph (c) of this section and the content requirements of paragraph (d) of this section are met.

(c) The applicable tariff or tariffs shall provide:

(1) The through rate;

(2) The routings (origin, transshipment and destination ports); additional charges, if any (*i.e.* port arbitrary and/or additional transshipment charges); and participating carriers; and

(3) A tariff provisions substantially as follows:

> The rules, regulations, and rates in this tariff apply to all transshipment arrangements between the publishing carrier or carriers and the participating, connecting or feeder carrier. Every participating, connecting or feeder carrier which is a party to transshipment arrangements has agreed to observe the rules, regulations, rates, and routings established herein as evidenced by a connecting carrier agreement between the parties.

(d) Nonexclusive transshipment agreements must contain the entire arrangement between the parties, must contain a declaration of the nonexclusive character of the arrangement and may provide for:

(1) The identification of the parties and the specification of their respective roles in the arrangement;

(2) A specification of the governed cargo;

(3) The specification of responsibility for the issuance of bills of lading (and the assumption of common carriage-associated liabilities) to the cargo interests;

(4) The specification of the origin, transshipment and destination ports;

(5) The specification of the governing tariff(s) and provision for their succession;

(6) The specification of the particulars of the nonpublishing carrier's concurrence/participation in the tariff of the publishing carrier;

(7) The division of revenues earned as a consequence of the described carriage;

(8) The division of expenses incurred as a consequence of the described carriage;

(9) Termination and/or duration of the agreement;

(10) Intercarrier indemnification or provision for intercarrier liabilities consequential to the contemplated carriage and such documentation as may be necessary to evidence the involved obligations;

(11) The care, handling and liabilities for the interchange of such carrier equipment as may be consequential to the involved carriage;

(12) Such rationalization of services as may be necessary to ensure the cost effective performance of the contemplated carriage; and

(13) Such agency relationships as may be necessary to provide for the pickup and/or delivery of the cargo.

(e) No subject other than as listed in paragraph (d) of this section may be included in exempted nonexclusive transshipment agreements.

SUBPART D—FILING AND FORM OF AGREEMENTS

§ 572.401 Filing of Agreements.

(a) All agreements (including oral agreements reduced to writing in accordance with the Act) subject to this part and filed with the Commission for review and disposition pursuant to section 6 of the Act, shall be submitted during regular business hours to the Secretary, Federal Maritime Commission, Washington, D.C. 20573. Such filing shall consist of:

(1) A true copy and 15 additional copies of the filed agreement;

(2) Where required by these regulations, an original and two copies of the completed Information Form referenced at §§ 572.403(a) and 572.405 and Appendix A of this part; and

(3) A letter of transmittal as described in paragraph (b) of this section.

(b)(1) A filed agreement, to include such supporting documents as are submitted, shall be forwarded to the Commission via a letter of transmittal.

(2) The letter of transmittal shall: (i) identify all of the documents being transmitted including, in the instance of a modification to an effective agreement, the full name of the effective agreement, the Commission-assigned agreement number of the effective agreement and the revision, page and/or appendix number of the modification being filed; (ii) provide a concise, succinct summary of the filed agreement or modification separate and apart from any narrative intended to provide support for the acceptability of the agreement or modification; (iii) clearly provide the typewritten or otherwise imprinted name, position, business address and telephone number of the forwarding party; and, (iv) be signed in the original by the forwarding party or on the forwarding party's behalf by an authorized employee of agent of the forwarding party.

(3) To facilitate the timely and accurate publication of the *Federal Register* Notice, the letter of transmittal shall also provide a current list of the agreement's participants where such information is not provided elsewhere in the transmitted documents.

(c) Any agreement and accompanying Information Form which does not meet the filing requirements of this section shall be rejected in accordance with § 572.601.

(d) Assessment agreements shall be filed and shall become effective upon filing. Assessment agreements need not be accompanied by an Information Form.

(e)(1) Expiration dates to existing agreements or specific provisions thereof, shall remain in effect on and after June 18, 1984.

(2) Parties to agreements with expiration dates shall file any modification seeking renewal for a specific term or elimination of a termination date in sufficient time to accommodate the waiting period required under the Act.

§ 572.402 Form of Agreements.

The requirements of this section apply to all agreements except for cancellations, marine terminal agreements, and assessment agreements.

(a) Agreements shall be clearly and legibly typewritten on one side only of 8½ inch by 11 inch durable white loose-leaf paper, providing a margin of not less than three-quarters of an inch on all edges.

(b) The first page of every agreement or appendix shall be the Title Page and shall include:

(1) The name in which the agreement holds out service, or, in the absence of such a holding out, the full name of the agreement;

(2) Once assigned, the Commission-assigned agreement number;

(3) The generic classification of the agreement in conformity with the definitions in § 572.104;

(4) The date on which the entire agreement was last republished in accordance with § 572.403(g); and

(5) If applicable, the currently effective expiration date of the agreement and/or any specific provision thereof.

(c) Each agreement page (including modifications and appendices) shall be identified by printing the agreement name (as shown on the agreement Title Page) and, once assigned, the applicable Commission-assigned agreement number at the top of each page.

(d) Each agreement, appendix and/or modification filed will be accompanied by a separate signature page, appended as the last page of the item, which is signed in the original by each of the parties personally or by an authorized representative, indicating immediately below each such signature, the typewritten full name of the signing party and his or her position, including organizational affiliation.

(e) The body of the agreement shall contain:

(1) Immediately following the Title Page, a Table of Contents providing for the location of all agreement provisions.

(2) Following the Table of Contents, the body of the agreement setting forth the operative provisions of the agreement in the order prescribed by §§ 572.501 and 572.502. Any additional material/provisions shall be set forth as consecutively numbered articles.

(f) Any nonsubstantive provisions, as defined in § 572.302, may be separated from the main body of the agreement text by the inclusion of an Appendix to the agreement. Additional provisions which are permitted to be included in an Appendix are referred to in §§ 572.501(b)(3), 572.501(b)(6) and 572.502(a)(1). Such appendices must comply with the format requirements of paragraphs (a) and (c) of this section. Such appendices are to be serialized alphabetically with the first such Appendix being designated on its first page as "Appendix A."

(g) All pages subsequent to the Title Page shall be numbered in the upper right-hand corner. At the option of the parties, the numbering of the pages may start with the first page following the Title Page as Page

No. 1 and continue consecutively thereafter; or, in the alternative, the pages containing the Table of Contents may be discretely numbered using consecutive Roman numerals with all pages subsequent to the Table of Contents being consecutively numbered beginning with Page No. 1. In either event, the first edition of any one page shall be designated in the upper right-hand corner as "Original Page No. _____."

(h) All agreements shall conform to the format requirements of this section and § 572.403 and the organization and content requirements of §§ 572.501 and 572.502 according to the following schedule.

(1) Any new agreement shall conform when initially filed.

(2) Any restatement of a previously effective agreement filed subsequent to December 15, 1984, shall conform to the requirements.

(3) Any effective agreement which is modified subsequent to December 15, 1984, shall be restated in its entirety, including the modification, and shall conform to the requirements.

(4) Any other agreement not otherwise brought into conformity with these requirements shall be conformed and filed no later than October 1, 1985.

§ 572.403 Modification of agreements.

The requirements of this section apply to all agreements except for marine terminal agreements and assessment agreements.

(a)(1) Agreement modifications shall be: filed in accordance with the provisions of § 572.401; in the format specified in § 572.402 and this section; and accompanied by an Information Form.

(2) The Information Form shall be completed as it pertains to significant modifications of the agreement.

(3) Significant modifications, for the purposes of this section, are those that may result in a significant reduction in competition. Such modifications include but are not limited to: significant changes in the geographic scope of conference or pooling agreements which expand the scope to cover additional foreign countries or U.S. port ranges, including initial conference intermodal authority, or the extension of the scope of a joint service agreement to ports outside the scope of the existing joint service agreement currently served by two or more of the parties; additions to the number of parties in pooling or joint service agreements; significant reductions in service levels; significant changes in pool penalty provisions or carrying charges; and changes in cargo categories or descriptions that result in a significant increase in the amount of cargo subject to the pool, or changes in the allocation of cargo or revenue that significantly change the cargo or revenue shares of national or non-national flag lines.

(b) Agreement modifications shall be made by reprinting the entire page on which the matter being changed is published. Such modified pages shall be designated as "revised pages" and shall publish in the upper right-hand corner of the new page the consecutive denomination of the revision, e.g., "1st Revised Page 5."

(c) If a modification exceeds the page being modified and the parties do not wish to modify the entire agreement, the additional material may be published on an original page, designated with the same number as the page being modified and with an alphabetical suffix, i.e. "Original Page 5a."

(d) The language being modified shall be indicated on the page filed as follows:

(1) Language being deleted or superseded shall be struck through; and,

(2) New and initial or replacement language shall immediately follow the language being superseded and be underlined.

(3) As an alternative to publishing such indications of change on the filed page, the filed page may be submitted devoid of such indications if the filing is accompanied by a page, submitted for information/illustration only, setting forth the proposed modifications in accordance with the format prescribed in paragraphs (d) (1) and (2) of this section.

(e) When a revised or new page is revised, or the entire agreement is reissued, the change indications in paragraphs (d)(1) and (d)(2) of this section are to be deleted from the republished pages.

(f) If a modification requires the relocation of the provisions of the agreement, such modification shall be accompanied by a revised Table of Contents page which shall report the new location of the agreement's provisions.

(g) (1) In the instance of an agreement which publishes the indications of modifications, specified in paragraph (d) of this section on the filed agreement page itself, then, not later than two years after the last modification to the agreement, the entire agreement shall be republished incorporating such modifications as have been made and shall supersede the previous edition of the agreement.

(2) Such republished agreement will be filed with the Commission in accordance with the filing (except as provided in paragraph (g)(3) of this section), format and content requirements of this part and shall contain nothing other than the previously effective language and such nonsubstantive modifications as are necessary to accomplish the republication.

(3) It is not required that the filing of a republished agreement as described in paragraph (g)(2) of this section, be accompanied by the Information Form or that it be filed in more than an executed original true copy.

§ 572.404 Application for waiver.

(a) Upon a showing of good cause, the Commission may waive the form, organization and content requirements of §§ 572.401, 572.402, 572.403, 572.501 and 572.502.

(b) Requests for permission to depart from the form requirements of this subpart shall be submitted in advance of the filing or submission of the materials to which the requested waiver would apply and shall state: (1) the specific regulations from which relief is sought; (2) the

special circumstances requiring the requested relief; and, (3) the beneficial results anticipated to be obtained from the requested waiver.

§ 572.405 Information Form.

(a)(1) Except for marine terminal agreements and assessment agreements, the information required by the Commission for review of an agreement shall be provided in the Information Form set forth in Appendix A to this part.

(2) The filing party to an agreement subject to the Act shall complete and submit an original and two copies of the Information Form at the time that an agreement is filed. The Information Form shall be completed in accordance with this subpart, including the Instructions set forth in Appendix A. Copies of the form may be obtained in person at the Office of the Secretary or by writing to the Secretary of the Commission.

(b) A complete response in accordance with the instructions to the Information Form shall be supplied to each item on the Information Form that is required to be answered. Whenever the party answering a required part of the Information Form (other than Parts III and IV) is unable to supply a complete response, that party shall provide, for each item for which less than a complete response has been supplied, either estimated data (with an explanation of why precise data are not available) or a detailed statement of reasons for noncompliance and the efforts made to obtain the required information. Use of estimated data with Parts III and IV requires no explanation of why precise data are not available.

(c) Any party filing the Information Form may supplement that Form with any other information or documentary material.

(d) The Information Form and any additional information submitted by a filing party under this section shall not be disclosed except as provided in § 572.608.

§ 572.406 Complete and definite agreements.

(a) Any agreement required to be filed by the Act and this part shall be the complete agreement among the parties and shall specify in detail the substance of the understanding of the parties.

(b) Except as provided in paragraph (c) of this section, agreement clauses which contemplate a further agreement or give the parties authority to discuss and/or negotiate a further agreement, the terms of which are not fully set forth in the enabling agreement, will be permitted only if the enabling agreement indicates that any such further agreement cannot go into effect unless filed and effective under the Act.

(c) Further specific agreements or understandings which are established pursuant to express enabling authority in an agreement are considered interstitial implementation and are permitted without further filing under section 5 of the Act only if the further agreement concerns routine operational or administrative matters, including the establishment of tariff rates, rules, and regulations.

SUBPART E—CONTENT AND ORGANIZATION OF AGREEMENTS

§ 572.501 Agreement provisions—organization.

(a) All agreements, except for cancellations, marine terminal agreements, and assessment agreements, shall be organized and shall include the content as provided by this section. The "article" numbers hereinafter enumerated are reserved for their particular respective provision or authority as indicated in this section and § 572.502 and may not be used for any other subject or purpose nor may the specified subject matter appear elsewhere in the agreement except as herein provided. In the instance of a legitimately inapplicable provision, the article number and title are to be included in the text followed by the word, "None".

(b) All agreements shall organize and number the following articles in the following order and shall observe the guidelines as to content as provided in this section. Additional articles required to definitively express the complete understanding between the parties to the agreement and not otherwise incorporated in appendices to the agreement shall immediately follow the articles enumerated in this subpart (and, where applicable, in § 572.502) and shall be numbered consecutively, commencing with Article 14.

(1) *Article 1—Full name of the agreement.*

(2) *Article 2—Purpose of the agreement.*

(3) *Article 3—Parties to the agreement.* List the current parties to the agreement to include for each participant: (i) the full legal name of the party to include any FMC-assigned agreement number associated with that name; and (ii) the address of its principal office (to the exclusion of the address of any agent or representative not an employee of the participating carrier or association). In the alternative to publishing the membership of the agreement in Article 3, the membership may be published in a designated appendix to the agreement and the designated appendix indicated by cross reference in Article 3.

(4) *Article 4—Geographic scope of the agreement.* State the ports or port ranges to which the agreement applies and any inland points or areas to which it also applies with respect to the exercise of the collective activities contemplated and authorized in the agreement.

(5) *Article 5—Overview of Agreement Authority.* State the authorities, as set forth in § 572.201 of this part, intended to be collectively exercised under the auspices of the agreement. To the extent that the summary provided does not represent the full arrangement between the parties, additional articles or appendices of the parties' own designation and subsequent to these enumerated articles will be required to provide the specification of the authority to be exercised and the mechanics of that exercise.

Article 5 is not necessarily definitive of the authority that the parties may collectively exercise pursuant to the agreement and parties may rely on the contents of the entire agreement as authority for their activities.

(6) *Article 6—Officials of the agreement and delegations of authority.* Specify, by organizational title, the administrative and executive officials determined by the parties to the agreement to be responsible for designated affairs of the agreement and the respective duties and authorities delegated to those officials. At a minimum, specify: (i) the officials with authority to file agreements and agreement modifications and to submit associated supporting materials or with authority to delegate such authority; and, (ii) a statement as to any designated U.S. representative of the agreement required by this chapter. Where convenient, the contents of this article may be published in a designated appendix to the agreement and the designated appendix indicated by cross reference in Article 6.

(7) *Article 7—Membership, withdrawal, readmission and expulsion.* Specify the terms and conditions for admission, withdrawal, readmission, and expulsion to or from membership in the agreement, including membership fees, refundable deposits and other fees or charges associated with membership. Two-party agreements which do not involve any form of rate, charge or tariff determination or publication authority and which do not otherwise have any conditions of agreement participation other than the commitment of the physical resources of the respective parties are relieved of the requirements of this subparagraph. In such a case, the article number and name shall be designated as provided in paragraphs (a) and (b)(1) of this section.

(8) *Article 8—Voting.* Specify the procedures, including quorum requirements, by which the agreement membership exercises its collective authority to choose, endorse, decide the disposition of, defeat, or authorize any particular matter, issue or activity.

(9) *Article 9—Duration and termination of the agreement.* Specify, where applicable, the date on which the agreement terminates and describe the procedures to be followed to terminate the agreement.

§ 572.502 Organization of conference and interconference agreements.

(a) Each conference agreement in addition to Articles 1 through 9 contained in § 572.501, and such other matters as may be necessary to express the full understanding of the parties, shall include the following articles organized and including the content as provided in this section:

(1) *Article 10—Neutral body policing.* State that, at the request of any member, the conference shall engage the services of an independent neutral body to fully police the obligations of the conference and its members. Include a description of any such neutral body authority and procedures related thereto. In the alternative to publishing the neutral body and procedures description in Article 10, the description may be published in a designated appendix to the agreement and the designated appendix indicated by cross reference in Article 10.

(2) *Article 11—Prohibited acts.* State affirmatively that the conference shall not engage in conduct prohibited by section 10(c)(1) or 10(c)(3) of the Act.

(3) *Article 12—Consultation: Shippers' requests and complaints.* Specify the procedures for consultation with shippers and for handling shippers' requests and complaints.

(4) *Article 13—Independent action.* Specify the independent action procedures of the conference. Such procedures shall provide that any conference member may take independent action on any rate or service item required to be filed in a tariff under section 8(a) of the Act upon not more than 10 calendar days' notice to the conference and shall otherwise be in conformance with section 5(b)(8) of the Act.

(b)(1) Each interconference agreement, in addition to Articles 1 through 9 contained in § 572.501, and Articles 10, 11, and 12 contained in paragraph (a) of this section, shall include the following article: *"Article 13—Independent Action"* which specifies the independent action procedures of the agreement.

(2) Each agreement between carriers not members of the same conference must provide the right of independent action for each carrier.

(3) Each agreement between conferences must provide the right of independent action for each conference.

Subpart F—Action on Agreements

§ 572.601 Preliminary review—rejection of agreements.

(a) The Commission shall make a preliminary review of each filed agreement to determine whether the agreement is in compliance with the filing requirements of the Act and this part and whether the Information Form is complete or where not complete, the deficiency is adequately explained.

(b)(1) The Commission shall reject any agreement that fails to comply with the filing and information requirements under the Act and of this part. The Commission shall notify in writing the person filing the agreement of the reason for rejection of the agreement. The entire filing, including the agreement, the Information Form and any other information or documents submitted, shall be returned to the filing party.

(2) Should the agreement be refiled, the full waiting period must be observed.

§ 572.602 *Federal Register* notice.

(a) A notice of any filed agreement which is not rejected pursuant to § 572.601 will be transmitted to the *Federal Register* within seven days of the date of filing.

(b) The notice will include:

(1) A short title for the agreement;

(2) The identity of the parties to the agreement and the filing party;

(3) The Federal Maritime Commission agreement number;

(4) A concise summary of the agreement's contents;

(5) A statement that the Agreement is available for inspection at the Commission's offices; and

(6) The final date for filing comments regarding the agreement.

§ 572.603 Comment.

(a) Persons may file with the Secretary written comments regarding a filed agreement. Such comments will be submitted in an original and fifteen (15) copies and are not subject to any limitations except the time limits provided in the *Federal Register* notice. Late-filed comments will be received only by leave of the Commission and only upon a showing of good cause. If requested, comments and any accompanying material shall be accorded confidential treatment to the fullest extent permitted by law. Such requests must include a statement of legal basis for confidential treatment including the citation of appropriate statutory authority. Where a determination is made to disclose all or a portion of a comment, notwithstanding a request for confidentiality, the party requesting confidentiality will be notified prior to disclosures.

(b) The filing of a comment does not entitle a person to: (1) reply to the comment by the Commission; (2) the institution of any Commission or court proceeding; (3) discussion of the comment in any Commission or court proceeding concerning the filed agreement; or (4) participation in any proceeding which may be instituted.

§ 572.604 Waiting period.

(a) The waiting period before an agreement becomes effective shall commence on the date that an agreement is filed with the Commission.

(b) Unless suspended by a request for additional information or extended by court order, the waiting period terminates and an agreement becomes effective on the latter of the 45th day after the filing of the agreement with the Commission or on the 30th day after publication of notice of the filing in the *Federal Register.*

(c) The waiting period is suspended on the date when the Commission, either orally or in writing, requests additional information or documentary materials pursuant to section 6(d) of the Act. The waiting period resumes on the date of receipt of the additional material or of a statement of the reasons for noncompliance, and the agreement becomes effective in 45 days unless the waiting period is further extended by court order.

§ 572.605 Requests for expedited approval.

(a) Upon written request of the filing party, the Commission may shorten the review period. Accompanying the request, the filing party should provide a full explanation, with reference to specific facts and circumstances, of the necessity for a shortened waiting period. If the Commission decides to approve an abbreviated waiting period, the term will be decided after consideration of the parties' needs and the Commission's ability to perform its review functions under a reduced time schedule. In no event, however, may the period be shortened to less than fourteen days after the publication of the notice of the filing of the agreement in the *Federal Register.* When a request for expedited approval is denied by the Commission, the normal

waiting period specified in § 572.604 will apply. Such expedition will not be granted routinely and will be granted only in exceptional circumstances which include but are not limited to: The impending expiration of the agreement; operational urgency; Federal or State imposed time limitations; or other reasons which, in the Commission's discretion, constitute grounds for granting the request.

(b) A request for expedited approval will be considered for an agreement whose waiting period has resumed after having been suspended by a request for additional information.

(c) Upon request of the filing party, cancellations of agreements and modifications to the following prescribed agreement provisions will be granted expedited approval fourteen days after publication of notice of filing in the *Federal Register*:

(1) Article 3—Parties to the agreement (limited to conference agreements).

(2) Article 6—Officials of the agreement and delegations of authority.

(3) Article 10—Neutral body policing (limited to the description of neutral body authority and procedures related thereto).

§ 572.606 Requests for additional information.

(a) The Commission may request from the filing party any additional information and documentary material necessary to complete the statutory review required by section 6 of the Act. The request shall be made prior to the expiration of the waiting period. All additional information and documentary material shall be submitted to the Director, Bureau of Agreements and Trade Monitoring, Federal Maritime Commission, Washington, DC 20573. If the request is not fully complied with, a statement of reasons for noncompliance shall be provided for each item or portion of such request which is not fully answered.

(b) Where the Commission has made a request for additional information material, the agreement's effective date is 45 days after receipt of the additional material. In the event all material is not submitted, the agreement's effective date will be 45 days after receipt of both the documents and information which are submitted, if any, and the statement indicating the reasons for noncompliance. The Commission may, upon notice to the Attorney General, and pursuant to sections 6(i) and 6(k) of the Act, request the United States District Court for the District of Columbia to further extend the agreement's effective date until there has been substantial compliance.

(c) A request for additional information may be made orally or in writing. In the case of an oral request, a written confirmation of the request shall be mailed to the filing party within seven days of the communication.

(d) The party upon whom a request for additional information is made will have a reasonable time to respond, as specified by the Commission. The test of reasonableness shall be based on the particular circumstances of the request and shall be determined on a case-by-case basis.

(e) Notice that a request for additional information has been made will be published by the Commission and served on commenting parties. Such notice will indicate only that a request has been made and will not specify what information is being sought. Within fifteen (15) days following service of the notice, further comments on the agreement may be filed.

§ 572.607 Failure to comply with requests for additional information.

(a) A failure to comply with a request for additional information results when a person filing an agreement, or an officer, director, partner, agent, or employee thereof fails to substantially respond to the request or does not file a satisfactory statement of reasons for noncompliance. An adequate response is one which directly addresses the Commission's request. When a response is not received by the Commission within a specified time, failure to comply will have occurred.

(b) The Commission may, pursuant to section 6(i) of the Act, request relief from the United States District Court for the District of Columbia when it considers that there has been a failure to substantially comply with a request for additional information. The Commission may request that the court:

(1) Order compliance with the request; and

(2) At its discretion, grant other equitable relief which under the circumstances seems necessary or appropriate.

(c) Where there has been a failure to substantially comply, section 6(i)(2) of the Act provides that the court shall extend the review period until there has been substantial compliance.

§ 572.608 Confidentiality of submitted material.

(a) Except for an agreement filed under section 5 of the Act, all information submitted to the Commission by the filing party will be exempt from disclosure under 5 U.S.C. 552. Included in this disclosure exemption is information provided in the Information Form, voluntary submission of additional information, reasons for noncompliance, and replies to requests for additional information.

(b) Information which is confidential pursuant to paragraph (a) of this section may be disclosed, however, to the extent:

(1) It is relevant to an administrative or judicial action or proceeding; or

(2) It is in response to a request from either body of Congress or to a duly authorized committee or subcommittee of Congress.

(c) Parties may voluntarily disclose or make information publicly available. If parties elect to disclose information they shall promptly inform the Commission.

§ 572.609 Negotiations.

At any time after the filing of an agreement and prior to the conclusion of judicial injunctive proceedings, the filing party or an authorized representative may submit additional factual or legal support for an agreement or

may propose modifications of an agreement. Such negotiations between Commission personnel and filing parties may continue during the pendency of injunctive proceedings. Shippers, other government departments or agencies, and other third parties may not participate in negotiations.

SUBPART G—REPORTING AND RECORD RETENTION REQUIREMENTS

§ 572.701 General requirements.

(a) *Address.* All reports required by this subpart should be addressed to the Commission as follows:

Director,
Bureau of Agreements and Trade Monitoring
Federal Maritime Commission
Washington, D.C. 20573

The lower, left-hand corner of the envelope in which each report is forwarded should indicate the subject of the report and the related agreement number. For example: "Minutes, Agreement 5000."

(b) *Serial numbers of reports.*

(1) Each report filed with the commission should be assigned a number for each subject. For example, a conference filing minutes of its first meeting upon the effective date of this rule should assign "Meeting No. 1" to its Minutes, the next meeting will be assigned "Meeting No. 2", and so on. The first Shippers' Request and Complaint report should be designated "Shippers' Request and Complaint Report No. 1", the next report would be "Shippers' Request and Complaint Report No. 2", and so on.

(2) Any conference or rate agreement which, for its own internal purposes, has a system for assigning sequential numbers to its reports in a manner which differs from that set forth in paragraph (b)(1) of this section may continue to utilize its own system in lieu thereof.

(c) *Retention of records.* Each agreement required to file an index of documents pursuant to this subpart shall retain a copy of each document listed for a minimum period of 3 years after the date the document is distributed to the members and shall make it available to the Commission upon written request.

(d) *Request for documents.* Documents may be requested by the Director, Bureau of Agreements and Trade Monitoring, in writing by reference to a specific minute or index, and shall indicate that the documents will be received in confidence. Requested documents shall be furnished by the parties within the time specified.

(e) *Time for filing.* Documents filed on an annual (calendar) year basis shall be filed by February 15 of the following year. Other documents shall be filed within 30 days of the end of a quarter-year, a meeting, or the receipt of a request for documents.

(f) *Confidentiality.* All information submitted to the Commission under this subpart shall be accorded confidential treatment to the fullest extent permitted by law.

§ 572.702 Filing of reports related to shippers' requests and complaints and consultations.

(a) *Shippers' requests and complaints.*

(1) Each conference shall file with the Commission an annual report setting forth under established shippers' request and complaint procedures and for each calendar year, a statistical summary separately showing: (i) the total number of shippers' and shippers' associations requests and complaints received; (ii) the total number which were fully granted; (iii) the total number which were partially granted; and (iv) the total number which were denied.

(2) Each report shall also show the total number of requests or complaints which were pending disposition at the start and at the end of the report period.

(3) Each of the totals which are reported to the Commission shall be divided into three categories: (i) those involving rates or charges; (ii) those involving transportation services; and (iii) those involving other matters.

(b) *Consultations.* Each conference shall file with the Commission an annual report setting forth a statistical summary showing separately the total number of shipper and shippers' associations requests for consultations and the total number of consultations during each calendar year under the established consultation procedures. Each of the totals which are reported to the Commission shall be divided into two categories: (1) consultations involving commercial disputes; and (2) consultations involving cooperation with shippers in preventing and eliminating malpractices.

§ 572.703 Filing of minutes.

(a) *Meetings.* For purposes of this subpart, the term "meeting" shall include any meeting of the parties to the agreement, including meetings of their agents, principals, owners, committees, or subcommittees of the parties authorized to take final action on behalf of the parties. Where the agreement so authorizes, this includes final action by telephonic or personal polls of the membership.

(b) *Content of minutes.* Except as provided in paragraph (c) of this section, conferences, interconference agreements, agreements between a conference and one or more ocean common carriers, pooling agreements, equal access agreements, discussion agreements, marine terminal conferences, and marine terminal rate fixing agreements shall, through a designated official, file with the Commission a report of each meeting defined in paragraph (a) of this section describing all matters within the scope of the agreement which are discussed or considered at any such meeting, and shall indicate the action taken. These reports need not disclose the identity of parties that participated in discussions or the votes taken.

(c) *Exemption.* No minutes need be filed under paragraph (b) of this section with respect to any discussion of or action taken with regard to:

(1) Rates that, if adopted, would be required to be published in the Commodity Rate Section, Class Rate Section, or Open Rate Section of the pertinent tariff on file with the Commission except that this exemption does not apply to discussions limited to general rate policy, general rate changes, the opening or closing of rates, or service or time/volume contracts; or

(2) Purely administrative matters.

§ 572.704 Index of documents.

(a) Each agreement required to file minutes pursuant to § 572.703 shall maintain an index of all reports, circulars, notices, statistics, analytical studies, or other documents, not otherwise filed with the Commission pursuant to this subpart, which are distributed to the member lines and are used to reach a final decision on any of the following matters.

(1) Revenue projections and plans. (This would exclude individual rate adjustments but would include general rate adjustments, surcharges and other items affecting shipper costs.)

(2) Studies regarding proposed changes to the conference agreement or its membership.

(3) Non-conference competition.

(4) Changes in the nature and type of transportation service generally and specifically at individual ports or points.

(5) Trade tonnaging requirements, vessel utilization and vessel replacement plans.

(6) Conference participation in trade (market share).

(7) The exercise of the right of independent action.

(8) Development of transportation technology and intermodal services.

(9) Malpractices.

(10) Use of service contracts, time volume rate schemes and loyalty contracts.

(11) Conference relationship with shippers and shipper groups.

(12) Governmental and other foreign requirements affecting the conference.

(b)(1) Each index required to be maintained by paragraph (a) of this section shall be filed with the Commission on a calendar-year quarterly basis.

(2) Each index must be certified by an official of the agreement as true and correct.

§ 572.705 Waiver of reporting and record retention.

Upon a showing of good cause, the Commission may waive any of the provisions of this subpart.

SUBPART H—[RESERVED]

SUBPART I—[PENALTIES]

§ 572.901 Failure to file.

Any person operating under an agreement involving activities subject to the Act pursuant to sections 4 and 5(a) of the Act and this part and not exempted pursuant to section 16 of the Act or excluded from filing by the Act, which has not been filed and has not become effective pursuant to the Act and this part is in violation of the Act and of this part and is subject to the civil penalties set forth in section 13(a) of the Act.

§ 572.902 Falsification of reports.

Knowing falsification of any report required by the Act or this part, including knowing falsification of any item on the Information Form, is a violation of the rules of this part and is subject to the civil penalties set forth in section 13(a) of the Act and may be subject to the criminal penalties provided for in 18 U.S.C. 1001.

SUBPART J—PAPERWORK REDUCTION

§ 572.991 OMB control numbers assigned pursuant to the Paperwork Reduction Act.

This section displays the control number assigned to information collection requirements of the Commission in this part by the Office of Management and Budget pursuant to the Paperwork Reduction Act of 1980, Pub. L 96–511. The Commission intends that this section comply with the requirements of section 3507(f) of the Paperwork Reduction Act, which requires that agencies display a current control number assigned by the Director of the Office of Management and Budget (OMB) for each agency information collection requirement:

Section	Current OMB Control No.
572.101 through 572.902	3072–0045

APPENDIX A TO PART 572

INFORMATION FORM AND INSTRUCTIONS

Explanation and Instructions for Information Form

The following explanation and instructions accompany the Information Form (Form) and are intended to facilitate the completion of the Form. The explanations and instructions should be read in conjunction with the Shipping Act of 1984 (Act) and with 46 CFR Part 572.

All agreements by or among ocean common carriers referenced in 46 CFR 572.201(a) (excluding assessment agreements, marine terminal agreements and those agreements exempted from the filing of the Information Form pursuant to Subpart C of Part 572) and significant modifications to agreements referenced in § 572.403 filed with the Commission must be accompanied by a completed Information Form, which in all cases necessitates the completion of Parts I, II, VI, and IX.

Part V, which requests information on proposed service and any proposed reduction or elimination of service, is required to be completed only by parties filing agreements with service authority.

Completion of Part VII is optional.

Because of their potential substantial anticompetitive implications, parties filing certain types of agreements, namely rate-fixing (including, for example, agreements authorizing conferences, interconference agreements, and agreements between a conference and one or more ocean common carriers), pooling, and joint-service and consortium agreements are required to complete Parts III, IV and VIII of the Form in addition to the above specified parts required to be completed by all filing parties.

Certain parts of the Form request information that may not be readily available to the filing party. Where precise information is not available, best estimates may be suppled. Where estimates are made, they should be identified by the use of the notation "est." Except for Parts III and IV, furnishing an estimate requires a clear explanation of why the precise information is not available. Where such an explanation is provided, the use of estimates will not ordinarily be regarded as a failure to supply a complete response as specified in 46 CFR 572.601, and does not require a separate statement of reasons for noncompliance.

In all parts of the Form where data are requested, the filing party is required to indicate all sources used to obtain such data. Sources should also be specified where estimates have been made by the filing party.

PART BY PART EXPLANATION

Part I

Part I requires the filing party to state the full name of the agreement as also provided under 46 CFR 572.501.

Part II(A)

Part II(A) requires the filing party to indicate whether or not the agreement authorizes the parties to collectively fix rates or significantly modifies an agreement with such authority. Rate-fixing may be authorized by a conference agreement, an interconference agreement, or an agreement between a conference and one or more ocean common carriers.

Part II(B)

Part II(B) requires the filing party to indicate whether or not the agreement authorizes the parties to pool cargoes or revenues, or significantly modifies an agreement with such authority.

Part II(C)

Part II(C) requires the filing party to indicate whether or not the agreement authorizes the parties to establish a new joint-service or consortium, or significantly modifies an agreement with such authority.

Background Information to Parts III and IV

If any question in Part II is answered "YES," the filing party is required to complete Parts III, IV and VIII (in addition to completing Parts I, II, VI and IX, which are required to be completed by all filing parties).

The *amount of cargo* is to be measured in appropriate units as determined by the parties (such as revenue tons, weight tons, measurement tons or TEUs). Specify the unit of measurement used.

The relevant trade(s) for the purpose of Parts III and IV is to be determined by the parties. The relevant trade(s) may encompass the entire geographic scope of the agreement, or any combination of U.S. and foreign ports or port ranges or sub-trades within the scope of the agreement as deemed appropriate by the parties. The filing party should clearly identify the relevant trade(s) used for the purposes of completing the Information Form.

Sub-trade is defined as the scope of all liner movements between *each* foreign country and *each* U.S. port range within the scope of the agreement. Each foreign country/U.S. port range pair should be shown separately. Where the agreement covers both U.S. inbound and outbound liner movements, inbound and outbound liner movements should be shown separately.

U.S. port ranges are defined by using the Bureau of Census classification of U.S. Coastal Districts. Thus, the U.S. port ranges are defined as follows:

North Atlantic—Includes ports along the eastern seaboard from the northern boundary of Maine to the southern boundary of Virginia.

South Atlantic—Includes ports along the eastern seaboard from the northern boundary of North Carolina to, but not including Key West, Florida. Also included are all ports in Puerto Rico and the U.S. Virgin Islands.

Gulf—Includes all ports along the Gulf of Mexico from Key West, Florida to Brownsville, Texas, inclusive.

South Pacific—Includes all ports in the States of California and Hawaii.

North Pacific—Includes all ports in the States of Oregon, Washington, and Alaska.

Great Lakes—Includes all ports bordering upon the Great Lakes and their connecting waterways as well as all ports in the State of New York on the St. Lawrence River.

Liner service refers to a definite, advertised schedule, giving relatively frequent sailings at regular intervals between specific U.S. ports or port ranges and designated foreign ports or port ranges. *Liner vessels* are defined as those vessels used in a liner service. *Liner cargoes* are cargoes carried on liner vessels in a liner service. A *liner operator* is a vessel operating ocean common carrier engaged in liner service. *Liner movement* is the carriage of liner cargo by liner operators. The above liner terms, definitions and descriptions are only to be used for the purpose of the Information Form.

Market share information should be provided using data for the most recent twelve (12) month period for which data are available. State the period used. Identify all units of measurement and all sources of the data. Data may be estimated. Indicate where estimates are made and describe the basis of their derivation.

Alternative liner routing is defined as liner service between the foreign country specified in the sub-trade and any North American port(s) other than those located within the port range covered by the sub-trade. The alternative liner routing may serve the sub-trade's port(s) and interior point(s) by way of feeder service, transshipment, surface carriage (such as mini-landbridge), or some other form of substituted transport. Alternative liner routing includes only those liner services which compete for cargoes carried in the sub-trade.

Part III(A)

Part III(A) requires the filing party to provide the total amount of cargo carried on *all parties'* liner vessels in each relevant trade within the scope of the agreement over the most recent twelve (12) month period for which data are available.

Part III(B)

Part III(B) requires the filing party to provide the total amount of cargo carried on *all* liner vessels (i.e., both party and non-party carriers) operating in each trade identified in (A) within the scope of the agreement for the most recent twelve (12) month period for which data are available.

Part III(C)

Part III(C) requires the filing party to provide the combined market share of all parties operating in each relevant trade within the scope of the agreement. The market share provided in Part III(C) is the quotient (multiplied by 100) of the total derived in Part III(A) divided by the total derived in Part III(B). The *formula for calculating market share* is as follows:

> The total amount of cargo carried on all parties' liner vessels in each relevant trade within the scope of the agreement over the most recent twelve-month period for which data are available divided by the total amount of cargo carried on all liner vessels in each relevant trade within the scope of the agreement over the same twelve-month period; which quotient is multiplied by 100.

The relevant trade(s) identified in III(A) should be clearly identified. Each market share calculation should be based on cargo data for identical relevant trades. The most recent twelve-month period for which data are available is to be the same period of time used both in the calculation of the parties' total liner cargo movements [Part III(A)] and in the calculation of the total sub-trade liner cargo movements for all liner operators [Part III(B)].

Part IV(A)

Part IV(A)(1) requires the filing party to provide, for each relevant trade within the scope of the agreement, the names of all liner operators who are not parties to the agreement, and who were offering liner service in that trade at the time the agreement was filed with the Commission.

Part IV(A)(2) requires the filing party to provide, for each relevant trade, the names of all liner operators serving alternative liner routings who compete for the cargoes carried by the parties.

Part IV(A)(3) requires the filing party to describe the extent of the competition offered by all non-party liner operators, including liner operators directly serving the relevant trade(s) *and* liner operators serving alternative liner routings. A description of the extent of competition should include estimates (or precise information where available) of non-party liner operator market share (shown either for each individual operator or for all operators collectively). Any evidence of underutilized capacity in the alternative liner routings may also be provided. Explain how the non-party market share was derived. Specify the units of measurement used in the calculations. Indicate the source(s) used to provide data or estimates.

Part IV(B)

Part IV(B)(1) requires the filing party to identify to the extent known all significant non-liner competitive substitutes that are available to shippers of commodities historically transported by liner service within the scope of the agreement. Non-liner competitive substitutes may include carriage on a charter or contract basis or on an infrequent, irregular basis by bulk, mix container/bulk, breakbulk or other vessel-type operators. Such substitutes may also include carriage by air freight operators or air passenger operators with available "belly space" for air freight. Such substitutes may provide service to a trade through some form of substituted service (e.g., minilandbridge, transshipment or feeder service) by way of ports within an alternative North American port range(s).

Part IV(B)(2) requires the filing party to estimate the percentage of the total amount of the total amount of cargo, historically carried in the trade on liner vessels, that has been carried by non-liner competitive substitutes over the most recent twelve (12) month period for which data are available. The intent of Part IV(B)(2) is to determine the amount of liner cargo historically carried in the trade that has been "lost" to non-liner operators. Identify all units of measurement and describe how the percentage was derived. Identify the sources used.

Part V

Part V is required to be completed only by filing parties whose agreements contain service authority, which is defined as including either or both of the following authorities allowing parties to agree between or among themselves: to allocate (or otherwise provide) tonnage or capacity between or among carriers in the relevant trade(s); to establish a schedule of ports which each carrier will serve and/or the frequency of each carrier's calls at those ports. For the singular purpose of the Information Form, "port" means the place with a harbor that an ocean carrier serves either directly by oceangoing vessel or indirectly by feeder service. Port calls are direct or indirect calls at a port by vessels under the direct operational control of one or more parties to the agreement.

Part V(A)

Part V(A) requires the filing party to identify all U.S. ports expected to be served under this agreement. Include all U.S. ports expected to receive direct liner service (port calls by a party) and indirect liner service (port calls by way of some form of substituted service such as feeder service) where those vessels are under the direct operational control of one or more of the parties to the agreement. The identification of other forms of indirect service under the agreement, such as intermodal service (e.g., interior point or minilandbridge) or transshipment may be provided

if the parties believe that such information will assist and expedite the Commission's analysis of the agreement's impact on service.

Part V(B)

Part V(B)(1) requires the filing party to specify any party's reduction in frequency of service to any U.S. port within the scope of the agreement where the reduction of service to that port occurs as a result of the implementation of the agreement. Reductions in frequency are determined as follows: (1) for each party and for each U.S. port within the scope of the agreement served by that party, determine total number of port calls over the most recent twelve (12) month period for which data are available (historical port call calculation); (2) for each party and for each U.S. port within the scope of the agreement served by that party, estimate the total number of port calls for the twelve (12) month period immediately following implementation of the agreement (expected port call calculation); (3) calculate the difference between the "historical port call calculation" and the "expected port call calculation." Provide, for each party and for each U.S. port, the following calculations: the "historical port call calculation"; the "expected port call calculation"; and the difference between those calculations.

Part V(B)(2) requires the filing party to specify any elimination of service to any U.S. port within the scope of the agreement that is currently (at the time the agreement is filed) receiving liner service from any party to the agreement, where the elimination of that port occurs as a result of the implementation of the agreement. The term "service to any U.S. port" includes direct service by the parties and indirect service by way of feeder service.

Part VI(A)

Part VI(A) requires the filing party to indicate whether or not the agreement was entered into as a direct or indirect response to any law, decree, rule, regulation or any other governmental action promulgated or otherwise implemented by a foreign government. The agreement may, for example, operate in a context where a foreign government has promulgated or implemented certain cargo reservation, cargo preference or other cargo sharing schemes that favor national flag lines and that require these national lines to be members of a conference. A *direct* response to such governmental action would be the creation of a conference agreement. An *indirect* response to such governmental action would be the creation of a pool that facilitates cargo sharing within a conference even though the pool was not *per se* required by such governmental action. Moreover, a commercial agreement that is in response to a governmental action that was itself in response to the concerted actions of other governments (for example, the UNCTAD Code of Liner Conduct) would be in direct response to

a governmental action and so require the completion of Part VI. In addition, an equal access agreement necessarily entails the involvement of a foreign government in liner shipping, thus requiring the completion of Part VI.

Part VI(B)

Part VI(B) requires the filing party to identify all such laws, decrees, rules, regulations or any other foreign governmental actions that have led to the agreement. All such governmental actions should be identified by the type of governmental action (e.g., a law, decree, memorandum order, etc.), the full legal title of the governmental action, the date that the governmental action became (or will become) effective, and the date (if specified) the governmental action will terminate. Part VI(B) also requires a detailed description of the purpose and the nature of the governmental action, including all requirements imposed on the parties by the governmental action, and the specification of each provision in the agreement that is a direct or indirect response to each such governmental action.

Part VI(C)

Part VI(C) requires the filing party to indicate whether or not any law, decree, rule, regulation or any other foreign governmental action identified in Part II(B) limits access to the carriage of liner cargoes within the scope of the agreement. Limited access to the carriage of liner cargoes may be effected by excluding certain liner operators or classes of liner operators (e.g., by national flag or carrier nationality) from the trade entirely, or by reserving certain cargoes for carriage by certain liner operators or classes of liner operators (e.g., by national flag or carrier nationality), or by limiting the ports at which liner operators may call, or by restricting the frequency of scheduled port calls, or by other such measures that restrict the open competition for liner cargoes within the scope of the agreement by liner operators.

Part VI(D)

Part VI(D) requires the filing party to explain how access to cargoes carried by liner operators is limited by the actions of a foreign government as identified in Part VI(B). See Part VI(C) for examples of how access to cargoes can be limited by the actions of a government.

Part VI(E)

Part VI(E) requires the filing party to provide the percentage of the total amount of cargo carried on all liner vessels in the trade to which access is limited by a foreign government. The percentage is derived by dividing the amount of cargo in the trade to which access is limited by a foreign government, by the total amount of cargo carried on all

liner vessels in the trade and multiplying the quotient by 100. The *trade* is defined as the scope of the agreement, that is, all foreign and domestic ports or port ranges served under the agreement. The amount of cargo can be measured in revenue tons, weight tons, measurement tons or TEU's. Specify which unit of measurement is used. The amount of cargo should be provided on the basis of the most recent twelve (12) month period for which data are available. Where precise information is not available, best estimates may be supplied. Identify estimates by the use of the notation "est." Indicate the sources of such estimates.

Part VII

The completion of Part VII (A) and (B) is optional.

Part VII(A)

Part VII(A) permits the filing party to indicate all benefits resulting from the agreement that will accrue principally to the parties as a result of the operation of the agreement. Such benefits may include increased operational efficiencies or other reductions in costs that result from the implementation of the agreement. Data that are necessary to substantiate the specified benefits should be submitted.

Part VII(B)

Part VII(B) permits the filing party to indicate all benefits resulting from the agreement that will accrue to shippers and to U.S. commerce generally. Such benefits may include reduced rate levels or improved quality or frequency of service that result from the operation of the agreement. Data that are necessary to substantiate the specified benefits should be submitted.

Part VIII

Part VIII requires a filing party that has answered "yes" to Part II (A), (B) or (C) to identify any reports, studies or other research that were prepared by or for any or all of the parties for the purpose of analyzing, formulating or assessing the competitive conditions in the relevant trade(s) affected by the agreement or the competitive impact of the agreement on the relevant trade(s) affected by the agreement.

Part IX(A)

Part IX(A) requires the filing party to provide the name, title, address, telephone number and cable address of a person the Commission may contact regarding the Information Form and any information provided therein.

Part IX(B)

Part IX(B) requires the filing party to provide the name, title, address, telephone number and cable address of a person the Commission may contact regarding a request for additional information or documents.

Part IX(C)

Part IX(C) requires generally that the filing party sign and certify that the information in the Form and all attachments and appendices are, to the best of the filing party's knowledge, true, correct and complete. The filing party is also required to indicate his or her relationship with the parties to the agreement.

FEDERAL MARITIME COMMISSION

INFORMATION FORM
For Certain Agreements By or Among Ocean Common Carriers

Agreement Number _____
(Assigned by FMC)

PART I *Agreement Name:* _____

_____

PART II *Agreement Type*

	YES	NO
(A) *Rate-Fixing Agreements* Does the agreement authorize the parties to collectively fix rates or significantly modify an agreement with such authority?	[ ]	[ ]
(B) *Pooling Agreements* Does the agreement authorize the parties to pool cargoes or revenues or significantly modify an agreement with such authority?	[ ]	[ ]
(C) *Joint Service or Consortium Agreements* Does the agreement authorize a joint service/consortium arrangement or significantly modify an agreement with such authority?	[ ]	[ ]

If any question in PART II is answered "YES," complete PARTS III, IV, and VIII (in addition to PARTS I, II, VI, and IX that are required to be completed by all filing parties.)

PART III *Market Share Information*

(A) Provide the total amount of cargo carried on all parties' liner vessels in each relevant trade within the scope of the agreement over the most recent twelve (12) month period for which data are available.

(B) Provide the total amount of cargo carried on all liner vessels in each relevant trade within the scope of the agreement over the most recent twelve (12) month period for which data are available.

(C) Provide the market share of all parties in each relevant trade within the scope of the agreement over the most recent twelve (12) month period for which data are available.

PART IV *Market Competition*

(A) *Liner Competition*

(1) For each relevant trade within the scope of the agreement, provide the names of all liner operators *not* parties to the agreement, currently offering service in that trade.

(2) Provide the names of all liner operators serving alternative liner routings where those operators compete for cargoes carried by the parties in the relevant trade.

(3) Describe the nature and extent of the competition from the liner operators listed in (A)(1) and (A)(2) above.

(B) *Non-Liner Competition*

(1) Identify all competitive substitute forms of transport, other than liner service, that are available to shippers of commodities historically transported by liner service in each relevant trade (including, for example, bulk carriers, charter operators, or air freight carriers).

(2) Estimate the percentage of the total amount of liner cargoes in each relevant trade, traditionally carried on liner vessels, that has been carried by non-liner substitute forms of transport over the most recent twelve (12) month period for which data are available.

PART V *Service to the Shipping Public Under the Agreement*

(To be completed only for those agreements which have service authority.)

(A) *Proposed Service*

Identity all U.S. ports expected to be served by the parties under this agreement.

(b) *Reduced Sailings*

(1) Estimate the parties' reductions in frequency of calls at each U.S. port within the scope of the agreement.

(2) Specify the parties' elimination of service to any U.S. port within the scope of the agreement currently served by any party.

PART VI *Foreign Government Involvement in the Liner Market*

	YES	NO
(A) Was this agreement entered into as a direct or indirect response to any law, decree, rule, regulation, or other governmental action promulgated or implemented by a foreign government?	[ ]	[ ]
(B) If the answer to (A) is "YES," identify all such laws, decrees, rules, regulations or other governmental actions and specify all provisions in the agreement that stem from these factors.		
(C) If the answer to (A) is "YES," do any of the above identified governmental actions limit access to the carriage of liner cargoes within the scope of the agreement?	[ ]	[ ]
(D) If the answer to (C) is "YES," explain how access to liner cargoes is limited by the foreign government.		
(E) If the answer to (C) is "YES," provide the percentage of the total liner cargo in the trade to which access is limited by a foreign government. Explain the method by which the percentage was derived.		

PART VII *Benefits of the Agreement* (Optional)

(A) Indicate any benefits (such as improved efficiencies or other reductions in transportation costs) that will accrue principally to the parties as a result of the operation of the agreement. Provide the data necessary to substantiate the above specified benefits.

(B) Indicate any benefits (such as lower rate levels or improved service levels) that will accrue to shippers and to U.S. commerce generally as a result of the operation of the agreement. Provide the data necessary to substantiate the above specified benefits.

PART VIII *Reports, Studies or Other Research*

Identify any reports, studies or other research that were prepared by or for any or all of the parties for the purpose of analyzing, formulating or assessing the competitive conditions in the relevant trade(s) affected by the agreement, or the competitive impact of the agreement on the relevant trade(s) affected by the agreement.

PART IX *Identification of Person(s) to Contact Regarding the Information Form and Certification of Authenticity*

(A) Identification of Contact Person.

(1) Name of Contact Person _____

(2) Title of Contact Person _____

(3) Firm Name and Business _____

(4) Business Telephone Number _____

(5) Cable Address _____

(B) Identification of an Individual Located in the United States Designated for the Limited Purpose of Receiving Notice of an Issuance of a Request for Additional Information or Documents (see 46 CFR 572.606).

(1) Name _____

(2) Title _____

(3) Address _____

(4) Telephone _____

(5) Cable Address _____

(C) Certification.

This Information Form, together with any and all appendices and attachments thereto, was prepared and assembled in accordance with instructions issued by the Federal Maritime Commission. Subject to the recognition that, where so indicated, reasonable estimates have been made, the information is, to the best of my knowledge, true, correct, and complete.

Name (please print or type) _____

Title _____

Relationship with parties to agreement _____

_____

_____

_____

Signature _____

Date _____

FEDERAL MARITIME COMMISSION

[46 CFR PART 510]
DOCKET NO. 84–29
LICENSING OF OCEAN FREIGHT FORWARDERS

November 16, 1984

ACTION: Discontinuance of Proceeding.

SUMMARY: The Federal Maritime Commission has determined to discontinue this proceeding in light of the recent enactment of certain amendments to the Shipping Act, 1916, which renders the proceeding unnecessary. Freight forwarder agreements relating to the foreign commerce of the United States are no longer subject to the requirements of that Act.

DATES: Effective November 23, 1984.

SUPPLEMENTARY INFORMATION:

By Notice published in the *Federal Register* on August 29, 1984 (49 FR 34253), the Commission proposed to reinstate the requirement provided for in 46 CFR 510.36 (1983) to require ocean freight forwarders operating in the foreign commerce of the United States to file their agreements with the Commission pursuant to section 15, Shipping Act, 1916, 46 U.S.C. 814. The comment period on this proposal is scheduled to expire on December 29, 1984.

H.R. 5833, Pub. L. No. 98–595, 98 Stat. 3130 (1984) which was recently enacted into law, amends the Shipping Act, 1916 to remove such freight forwarder agreements from the filing and approval requirements of that Act. That action renders this proceeding unnecessary. Accordingly, the proceeding is discontinued.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 84–11
INGERSOLL RAND COMPANY

v.

U.S. LINES, S.A. (FORMERLY MOORE McCORMACK LINES, INC.)

NOTICE

November 27, 1984

Notice is given that no exceptions were filed to the October 17, 1984, initial decision in this proceeding and the time within which the Commission could determine to review that decision has expired. No such determination has been made and accordingly, that decision has become administratively final.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 84–11

INGERSOLL RAND COMPANY

v.

U.S. LINES, S.A. (FORMERLY MOORE McCORMACK LINES, INC.)

Shipment of air compressor kits found properly classified. Case dismissed.

Frank J. Hathaway for Ingersoll Rand Company.

A.C. Hidalgo for U.S. Lines, S.A.

INITIAL DECISION [1] OF JOHN E. COGRAVE, ADMINISTRATIVE LAW JUDGE

Finalized November 27, 1984

This case involves a shipment of portable air compressor kits which complainant say were improperly classified by respondent under Southbound Freight Tariff No. 6 of the United States/South and East Africa Conference.

On the bill of lading the shipment is described as:

ROADBUILDING MACHINERY

3 House to House Containers Said To Contain:

Below this heading the contents of the three containers were listed as 46 Boxes air compressor kits, 3 boxes of batteries, 2 bundles of wool and 1 box of parts for air compressor kits.

The arguments of the parties revolve around two tariff items and a rule of general application. Item 4310 reads:

ROADMAKING, EARTHMOVING OR CONSTRUCTION EQUIPMENT AND PARTS, VIZ.:

(Listed under this heading are various pieces of equipment ranging from "Angle Dozers" to Wagon, Tank Motorized.)

ROADMAKING, EARTHMOVING OR CONSTRUCTION EQUIPMENT AND PARTS, VIZ.:

Completely boxed

Unboxed (other than completely boxed must be assessed the unboxed rate)

[1] This decision will become the decision of the Commission in the absence of review thereof by the Commission (Rule 227, Rules of Practice and Procedure, 46 CFR 502.227).

Item 1190 reads:

> COMPRESSORS, Air:
>
> Completely boxed or completely boxed except for Traction Treads or Wheels with or without controls exposed.
>
> Unboxed (other than boxed or completely boxed except for Traction Treads or Wheels must be assessed the unboxed rate)

The rule of general applicability, Rule 2(G) reads:

> (G) RATE APPLICATION FOR PARTS
>
> Whenever rates are provided for an article named herein, the same rate will also be applicable on named parts of such articles, when so described on ocean bills of lading, except where specific rates are provided herein for such parts.

It is complainant's contention that the shipment should have been rated under Item 4310, instead of Item 1190. Complainant says that its portable air compressor kits are "parts" for Roadbuilding Machinery because "a roadbuilding air compressor is not a self-propelled unit and, therefore, must be pulled by other motorized equipment, i.e. Equipment Highway Pavement Marking."[2] Moreover, says complainant, the air compressor kits are "less engines" and are not complete air compressors ready for use. "They are *kits* or *parts* for roadmaking (roadbuilding) equipment of which air compressors are considered a part."

Finally, complainant contends that respondent's classification of the kits was improper because Item 1190 has no provision for "parts." In other words Item 1190 does not read COMPRESSOR, AIR *and PARTS*, nor does it list beneath the heading specific parts which would take the item rate. Since the words "and Parts" do not appear in the description of the articles covered by Item 1190 and there are no parts listed in the item, it can cover only complete air compressors, according to complainant. The air compressor kits in issue are less engines. Therefore they are not complete compressors and cannot be properly classified under Item 1190. This argument follows from complainant's reading of Rule 2(G).

Complainant reads that part of Rule 2(G) which says the rate applies to "name parts of such articles" as requiring either that the tariff item itself contain specific references to the "named" parts of the articles covered by the item or that the words "and Parts" appear in the item as they do in Item 4310.

On the other hand, the respondent reads Rule 2(G) as requiring the shipper to specifically name the articles shipped as "parts" of a specific machine on the bill of lading. In the case here, respondent's position is that the complainant should have described the compressor kits as "parts" for a "specific viz.," i.e. air compressor kit, parts for Equipment Highway

[2] Item 4310 lists after the "viz." "Equipment Highway, Pavement Marking."

Pavement Marking in order to comply with the first part of Rule 2(G). However, respondent argues that rule 2(G) is clear that "where specific rates are provided [in the tariff] for such parts," those rates shall apply. Here, says the respondent, there was a specific rate for air compressors so it was the proper rate to apply to the portable air compressor kits even if it is admitted that the compressor kits were parts for the Highway Pavement, Marking Equipment.

"Where a question of tariff interpretation is in issue, any indefiniteness and ambiguity in the tariff provisions, which in reasonableness permit of misunderstanding and doubt by shippers, require interpretation of such provisions against the carrier." *The Gelfand Manufacturing Co.* v. *Bull S.S. Line, Inc.*, 1 U.S.S.B. 169, 170–171 (1929). However, shippers may not avail themselves of a strained or unnatural construction to create an ambiguity. *Buckley Dunton Overseas S.A.* v. *Blue Star Shipping Corp.*, 8 F.M.C. 137 (1964). And where two classifications are applicable to a commodity, the one which more specifically describes the article is the proper one. *Corn Products Co.* v. *Hamburg American Lines*, 10 F.M.C. 388 (1967).

The first question to be answered is whether there is an ambiguity in the tariff which must be construed against the respondent. Although the complainant does not specifically urge such an ambiguity, his argument seems to create one or at least to create the appearance of one. When Rule 2(G) says that "named parts" of an article shall take the same rate as the article itself, just where are the names of the named parts to appear? Complainant reads the rule so as to require that the parts be "named" in the tariff, or at least that the tariff item under which the parts are to be classified carry the "and Parts" designation. Respondent on the other hand reads Rule 2(G) as requiring that the parts be named in the bill of lading.

A moment's thought is all that is needed to see that complainant's interpretation would result in truly "humongous" tariffs. There are just too many parts to even relatively "simple" machines to read Rule 2(G) as requiring the individual parts to be named in the tariff if the part is to take the same rate as the machine. Moreover, the language of the rule itself seems to me reasonably clear. The rule simply requires that where a shipper is seeking to apply the rate of an article to parts for that article, then he must so designate the parts on the bill of lading. Then if the shipment consists of axles for tractors they would be described as such on the bill of lading and would take the tractor rate. If the complainant's reading of the rule were accepted there would be no need for the general rule since all of the parts on which the article rate would apply would already be listed in the same item as the article.

The question now becomes whether the compressor kits are parts for Equipment Highway Pavement Marking or Compressors or parts for Compressors. Complainant's sole ground for the conclusion that the compressor kits are parts for roadbuilding machinery is that even when the kit is

assembled, this particular compressor has no motive power of its own and must be pulled behind or by other motorized equipment, namely the Highway Pavement Marker. This clearly stretches the commonly understood meaning of the word "part" as "a constituent member of a machine or other apparatus." (*Webster's Third New International Dictionary*) or "and extra piece for replacing worn-out parts" (*The American College Dictionary*). Complainant's air compressor if towed by a Mercedes Benz would, by complainant's reasoning, be a part of that Mercedes Benz. The presence or absence of motive power does not determine whether a thing is a "part."

Finally, even if complainant's argument that its compressor kits could be considered as parts of roadbuilding machinery, Rule 2(G) would still require their classification under Item 1190 under the rule's proviso ". . . except where specific rates are provided for such parts."

For the foregoing reasons, I conclude that the shipment in question was properly classified under Item 1190. The complaint is dismissed.

(S) JOHN E. COGRAVE
Administrative Law Judge

FEDERAL MARITIME COMMISSION

DOCKET NO. 84–7

TARIFF COMPLIANCE INTERNATIONAL (ACTING ON BEHALF OF A & A INTERNATIONAL, A DIVISION OF TANDY CORPORATION

v.

KAWASAKI KISEN KAISHA, LTD. STEAMSHIP COMPANY

ORDER OF REMAND

November 28, 1984

This proceeding arose from a complaint filed on February 22, 1984, by Tariff Compliance International (Complainant), acting as agent for A & A International, A Division of Tandy Corporation against Kawasaki Kisen Kaisha, Ltd. Steamship Company (K Line) (Respondent). Respondent is a common carrier engaged in transportation by water from Japan and Korea to the West Coast of the United States and is a member of the Trans Pacific Freight Conference of Japan/Korea.

Complainant alleges that it was assessed rates and charges on 39 shipments (bills of lading) during the period January 12, 1982 to March 28, 1983, which were greater than those specified in Respondent's tariff in violation of section 18(b)(3) of the Shipping Act, 1916 (1916 Act) (46 U.S.C. § 817) and has been subjected to unfair, unjust and discriminatory treatment in the adjustment and settlement of claims in violation of section 14 Fourth of the 1916 Act (46 U.S.C. § 813).

Reparations in the amount of $73,863.27 are sought for the alleged tariff violations. In addition, Complainant seeks an unspecified amount as reparations for the alleged violation of section 14 Fourth.

Complainant sought to have the case heard pursuant to the shortened procedure of Subpart K, Rule 181 of the Commission's Rules of Practice and Procedure, 46 C.F.R. § 502.181. Respondent in its answering memorandum to the complaint consented to the shortened procedure.

On May 9, 1984, the Presiding Administrative Law Judge served a notice in which he rejected the "shortened procedure" request on the ground that Complainant had failed to comply with the requirements of Rule 182 of the Rules of Practice and Procedure (46 U.S.C. § 502.182). That notice further directed the parties to submit on or before May 21, 1984 a prehearing statement pursuant to Rule 95 of the Commission's Rules of Practice and Procedure (46 C.F.R. 502.95).

On May 21, 1984, the parties filed a Joint Prehearing Statement which identified the issues which remained in dispute. As to the following items,

the only issue in dispute is whether Complainant has met its burden of proof of showing that the alleged commodity was actually shipped:

Commodity	Amount
Printing Mechanism Parts/Accessories	$4,443.18
Thermal Paper	334.46
Disk Drives	1,861.94
Speaker Parts	581.87
Printing Mechanisms-FOB	346.90
Copy Machine Parts	91.60
P.A. Systems-Megaphones	61.70
Maximum Per-Container Rates	356.69
	$8,078.34

As to the following items, in addition to the issue of sufficiency of proof of commodity shipped, there existed disputes of tariff interpretation and application:

Commodity	Amount
Keyboards	$54,520.35
Joystick Control Assemblies	1,764.11
Programmable Calculators	708.63
Hand-Held Electronic Games/Parts	255.87
Audio Cassette Tape Cases	1,574.40
Electronic Telephone Directories	222.49
Audio Goods	6,739.08
	$65,784.93

The parties advised that they intended to call one or more expert witnesses to testify as to the nature and use of the commodities in dispute. In addition, they advised that they would introduce copies of all documents attached to the complaint, all relevant tariffs and tariff pages, all correspondence relevant to the handling of Complainant's overcharge claims, and descriptive literature relating to commodities shipped. The parties also indicated that in some cases actual physical production and demonstration of the commodity itself was contemplated.

On May 23, 1984, the Presiding Officer served a notice which stated that the proceeding would be conducted under the shortened procedure provided for in Subpart K of the Commission's Rules of Practice and Procedure. The parties were given until June 4, 1984 to submit any supplemental evidence.

In response to the notice of May 23, 1984, Complainant provided an affidavit relating to the nature and use of "keyboards" and submitted copies of payment vouchers relating to the subject shipments. The other evidence and testimony which Complainant indicated in the Joint Prehearing Statement that it would adduce at hearing was not included in Complainant's submission. In its response, Respondent noted that "the change in the

procedural schedule has not permitted Respondent the opportunity to fully explore the evidence which might have been offered." Respondent thus relied largely on its previously filed pleadings.

On July 25, 1984, the Presiding Officer issued an Initial Decision in which he concluded that Complainant had failed to prove what was actually shipped and that there was not sufficient information upon which to establish the validity of the claim. Complainant filed Exceptions to the Initial Decision which argue the merits of its case in regard to the commodities shipped and except to the procedure followed by the Presiding Officer. Respondent filed a Reply to Exceptions supporting the Initial Decision.

DISCUSSION

We believe that many of the Presiding Officer's difficulties with the material submitted could have been resolved by the testimony of an appropriate sponsoring witness. Accordingly, rather than proceeding under Subpart K, it would have been more appropriate to conduct an oral evidentiary hearing on the issues identified in the Joint Prehearing Statement. The Presiding Officer's abrupt reversal on the hearing procedure and the particularly short period allowed the parties to adjust to the change would appear to have denied the parties the opportunity to fully present their cases. The Commission is therefore remanding this proceeding to afford the parties that opportunity.

THEREFORE, IT IS ORDERED, THAT this proceeding is hereby remanded to the Office of Administrative Law Judges for an oral evidentiary hearing on the issues identified in the Joint Prehearing Statement filed May 21, 1984.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 1441(I)
UNION CARBIDE CORP.—BATTERY DIVISION

v.

WATERMAN STEAMSHIP CORP.

ORDER

November 30, 1984

This proceeding was initiated upon the complaint of Union Carbide Corporation—Battery Division against Waterman Steamship Corporation pursuant to section 11 of the Shipping Act of 1984 (the Act), (46 U.S.C. app. § 1710). Carbide alleges that it was overcharged $5,205.03 on a shipment of dry cell battery bottom covers from New York, N.Y. to the Port of Sudan, Egypt. Settlement Officer Donald F. Norris dismissed the complaint, without prejudice, on the ground that Waterman is presently undergoing a reorganization under Chapter XI of the Bankruptcy Act, 11 U.S.C.A. § 1101 *et seq.* The Commission is reviewing the dismissal upon the request of Commissioner Thomas F. Moakley pursuant to Rule 304 of the Commission's Rules of Practice and Procedure (46 C.F.R. § 502.304 (1983)).

Carbide's complaint was served on Waterman on August 17, 1984. In response, Waterman's Senior Vice President, George H. Hearn, advised the Settlement Officer that:

> "Waterman filed a Petition for a Reorganization under Chapter XI in the United States Bankruptcy Court . . . on December 1, 1983. . . . We are advised by Counsel that [Carbide's] claim is automatically stayed pursuant to the Bankruptcy Act. Accordingly, Waterman can neither proceed, nor consent to adjudication . . . under the Commission's informal procedure."

The Settlement Officer, therefore, dismissed Carbide's complaint without prejudice to refiling by March 19, 1985.[1] He found that after that date

[1] The Settlement Officer explained that his dismissal was consistent with the "result in two other proceedings involving a carrier involved in a bankruptcy reorganization submitted to the Informal Docket Activity in the past." *See* Informal Docket Nos. 1094(I) and 1132(I), *Keyes Fibre An Arcata Co.* v. *Seatrain International* and *Dow Corning Corp.* v. *Seatrain International.*

The Commission believes that this proceeding is distinguishable from the authorities relied upon by the settlement Officer. In Docket No. 1132(I) the complainant requested dismissal when it was advised that the respondent was in bankruptcy. Docket No. 1094(I) did not concern a claim for reparations *against* a bankrupt. Rather, the complainant shipper was attempting to avoid the carrier's civil claim for underpaying the applicable freight charges.

"all claims against common carriers . . . predicated upon alleged violations of the Shipping Act, 1916 (46 U.S.C. app. 801 *et seq.*) will be barred statutorily by section 20(e)(2)(B) of the Shipping Act of 1984, 46 U.S.C. app. § 1719".[2]

DISCUSSION

For reasons stated below, we find that the Settlement Officer improperly dismissed Carbide's complaint.

Section 362(a)(1) of the Bankruptcy Code (11 U.S.C. 362(a)(1)), provides in pertinent part, that:

> [A] petition filed under section 301, 302, or 303 of this title operates as a stay applicable to all entities of—
> (1) the commencement or continuation, including the issuance or employment of process, of a judicial, *administrative,* or other proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title (Emphasis added).

The language of section 362(a)(1) is clear and unequivocal. It requires an automatic stay, in the nature of an injunction,[3] of all proceedings, judicial or administrative, against the bankrupt debtor in order to avoid a chaotic and uncontrolled scramble for the debtor's assets in a variety of uncoordinated proceedings.[4] Although the stay provisions are designed to protect the debtor,[5] these provisions were not intended to work a hardship on claimants by requiring tribunals to dismiss their claims.[6] Accordingly, the Commission will vacate the Settlement Officer's Order of Dismissal. The proceedings will be stayed, however, in accordance with section 362 of the Bankruptcy Code, until the bankruptcy proceeding is completed or until Carbide has obtained a waiver from the Bankruptcy Court.[7]

THEREFORE, IT IS ORDERED, That the Settlement Officer's October 9, 1984 Order of Dismissal in this proceeding is vacated.

---

[2] The Settlement Officer misinterpreted the limitation provided for in section 20(e)(2)(b). That section provides:

> This Act and the amendments made by it shall not affect any suit—
> * * *
> (B) with respect to claims arising out of conduct engaged in before the date of enactment of this Act, filed within 1 year after the date of enactment of this Act.

In its Notice of May 15, 1984—*Application of Shipping Act of 1984 to Formal Proceedings Pending before the Federal Maritime Commission on June 18, 1984,* the Commission advised that the term "suits" in section 20(e)(2) was intended only to preserve antitrust actions and had no application to cases pending before the Commission.

[3] *See In Re Decker,* 465 F.2d 294 (3rd Cir. 1972); *Thacker* v. *Etter,* 24 B.R. 835 (U.S. Bkrtcy Court S.D. Ohio W.D.).

[4] *Matter of Holtkamp,* 669 F.2d 505 (7th Cir., 1982).

[5] *Ibid.*

[6] *Perkins Dry Goods Co.* v. *Dennis,* 54 S.W. 2d 1078. 22 Am Bankr Rep. N.S. 291.

[7] Carbide may petition the Bankruptcy Court for relief from the stay provisions (*See* 11 U.S.C.A. § 362(d)).

IT IS FURTHER ORDERED, That this proceeding be stayed, pursuant to 11 U.S.C.A. §362, until the Waterman bankruptcy proceeding is completed or until Carbide has obtained relief of the stay provisions from the Bankruptcy Court.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 84–15
DR. ETHEL M. HEPNER

v.

THE PENINSULAR AND ORIENTAL STEAM NAVIGATION COMPANY

ORDER OF ADOPTION

December 20, 1984

This proceeding arose from a complaint filed by Dr. Ethel M. Hepner against the Peninsular and Oriental Steam Navigation Company (P&O) alleging violations of sections 14, 15, 16 and 20 of the Shipping Act, 1916 (1916 Act) (46 U.S.C. app. §§813, 814, 815, 819).

In December, 1976, Dr. Hepner was a passenger aboard the P&O liner M/V SUN PRINCESS. As a result of an incident occurring on that voyage, Dr. Hepner brought suit in the Superior Court of the State of California, County of Los Angeles, alleging that she had suffered injuries due to the negligent and willful misconduct of an employee of P&O. In settlement of that suit, P&O and Dr. Hepner entered into an agreement dated February 27, 1982. P&O agreed to pay Dr. Hepner $40,000 in settlement of the claim and Dr. Hepner agreed that "at no time in the future" would she board or attempt to board any vessel owned by P&O nor would she attempt to book passage on any vessel owned by P&O. She further agreed that if she attempted to board any P&O vessel in contravention of the settlement agreement, P&O would have the right to eject her forcibly from the ship without incurring liability for any injuries which she might sustain. The agreement went on to state that it was the "entire agreement among the parties thereto." In a second agreement, P&O stated that it would not publicly disclose the terms of the settlement agreement.

In the instant proceeding, Dr. Hepner claims that the provisions of the settlement agreement which bar her from boarding or booking passage on any vessel owned by P&O are contrary to sections 14, 15 and 16 of the 1916 Act. In addition, she claims that P&O violated the provisions of the second agreement and section 20 of the 1916 Act by disclosing the contents of the settlement agreement to third parties. In this connection, it is also alleged that representatives of P&O orally represented that Dr. Hepner would only be barred from P&O ships for a period of six months.

P&O filed a Motion for Summary Disposition of the complaint on the grounds that Complainant failed to state a cause of action for which relief

can be granted by the Commission. The Commission's Bureau of Hearing Counsel, the only intervenor in the proceeding, supported dismissal. Dr. Hepner filed a reply in opposition. Chief Administrative Law Judge John E. Cograve granted the Motion and dismissed the proceeding in an order dated September 27, 1994.

The Presiding Officer's dismissal order concluded that "the complaint fails to state a cause of action for which relief may be granted by the Commission." The section 14 Third allegation was rejected on the grounds that the essential element of any violation of that section is the *retaliation* by a carrier against a *shipper* and that Dr. Hepner's only relationship with P&O prior to entering into the agreement was that of a *passenger*. The Presiding Officer noted that Dr. Hepner has never claimed that she is or ever was a "shipper." He also found that the term retaliation as used in sections 14 Third contemplates a "unilateral" act on the part of a carrier and not a contractual arrangement between carrier and shipper. He therefore concluded that section 14 Third was not intended to cover the sort of situation presented in this proceeding.

The Presiding Officer further found no agreement between two persons subject to the 1916 Act and therefore no jurisdiction under section 15 of the Act. The Presiding Officer also rejected the allegation of a violation of section 16 on the basis that it suffers from the same infirmity as does the section 14 allegation, *i.e.*, section 16 First contemplates a "unilateral act" which subjects someone to undue or unreasonable prejudice. Finally, he determined that there is nothing in section 20 of the 1916 Act that would prevent P&O from disclosing the terms of the settlement agreement.

The Complainant, Dr. Hepner, has filed an appeal from the order of dismissal to which P&O and Hearing Counsel have replied. Complainant argues that sections 14 Third and 16 First of the 1916 Act are intended to protect passengers as well as shippers. In addition, Dr. Hepner claims that she was coerced into signing the settlement agreement (Appeal at 17) and was denied an opportunity to conduct the necessary discovery to establish that fact (Appeal at 17–18). The replies of P&O and Hearing Counsel rely on the arguments originally made in support of P&O's Motion for Summary Disposition.[1]

[1] Subsequently, Complainant filed a Motion for Leave to File Closing Brief and for Delay of Decision by Commission. The grounds for the Motion are that Complainant's attorney did not receive a transcript of a prehearing conference to which P&O refers in its reply to the appeal. A transcript of the prehearing conference in question, which the Commission received on August 29, 1984, could have been obtained by Complainant upon payment to the reporting firm. Complainant's failure to obtain a transcript appears to be due to a lack of diligence. In any event, the failure to obtain the transcript of the prehearing conference does not prejudice the Complainant. The statements of counsel made in a prehearing conference are not part of the evidentiary record in this proceeding. The Presiding Officer did not base his order of dismissal on such statements and the Commission does not in any way rely on them in adopting the order of dismissal.

DISCUSSION

Upon consideration of the full record in this proceeding, we find that the Presiding Officer's dismissal of the complaint is supportable both in law and in fact. The Commission is therefore adopting the Order of Dismissal.

While Complainant's Exceptions constitute reargument of contentions already advanced before the Presiding Officer and correctly disposed of by him, certain points raised warrant further discussion. First, Complainant contends that the Presiding Officer erred in failing to find section 14 Third can be applied for the protection of passengers as well as shippers. The preamble to section 14 states that the section applies to "the transportation by water of passengers," however, the term "passenger" does not appear anywhere else in the section.[2] Section 14 Third only refers to "any shipper." Although an argument can be made that the preamble to section 14 indicates that section 14 Third was intended to protect passengers as well as shippers, the Presiding Officer's conclusion to the contrary is consistent with the language of section 14 Third itself. However, even assuming *arguendo* that section 14 Third is intended to cover passengers as well as shippers, the Presiding Officer's dismissal of the proceeding can be supported on the grounds that neither section 14 Third nor section 16 First is intended to reach a voluntary arrangement of the type presented here.

Second, Dr. Hepner's contention that the settlement agreement was not voluntary has no merit. Complainant's appeal from the order of dismissal states that there were two settlement conferences between the attorneys and the Superior Court judges and as a result of a recommendation made by those judges, the parties entered into the settlement agreement (Appeal at 13–14). At the time Dr. Hepner entered into the settlement agreement with P&O she was represented by the same attorney that now represents her in this proceeding before the Commission. He signed the following statement at the bottom of the settlement agreement:

> I, Bruce A. Friedman, attorney for Ethel Hepner, have read and approved this release and compromise settlement effective thereby, and further represent that I have advised her to enter into said compromise settlement and to sign this release.

---

[2] Section 14 states in pertinent part:

That no common carrier by water shall directly or indirectly, in respect to the transportation by water of passengers or property between a port of a State, Territory, District, or possession of the United States and any other such port or a port of a foreign country—

* * *

Third. Retaliate against any shipper by refusing, or threatening to refuse, space accommodations when such are available, or resort to other discriminating or unfair methods, because such shipper has patronized any other carrier or has filed a complaint charging unfair treatment, or for any other reason.

The Commission believes that the Presiding Officer had a sound basis upon which he could conclude that Dr. Hepner was not coerced into signing the agreement.

THEREFORE, IT IS ORDERED, That the Dismissal of Proceeding order served September 27, 1984 in this proceeding is adopted and made a part hereof;

IT IS FURTHER ORDERED, That Complainant's Motion for Leave to File Closing Brief and for Delay of Decision by Commission is denied;

IT IS FURTHER ORDERED, That this proceeding is discontinued.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 84–15

DR. ETHEL M. HEPNER

v.

THE PENINSULAR AND ORIENTAL STEAM NAVIGATION COMPANY

DISMISSAL OF PROCEEDING

Adopted December 20, 1984

The respondent has filed a "Motion for Summary Disposition" of this proceeding on the grounds that the complaint fails to state a cause of action for which relief may be granted by the Commission.

In February of 1982, complainant, Dr. Ethel M. Hepner, entered into an agreement with the respondent, Peninsular and Oriental Steam Navigation Company (P&O). P&O paid Dr. Hepner $40,000 and in return, she dismissed a lawsuit then pending in the Superior Court of California, County of Los Angeles,[1] and agreed:

> (2) . . . that at no time in the future will she (a) board or attempt to board any vessel owned or operated by the Peninsular and Oriental Steam Navigation Company under its own name or any fictitious name including, but not limited to, "Princess Cruises," or (b) book or attempt to book, either directly or indirectly whether in her own or another name, passage on any vessel owned or operated by the Peninsular and Oriental Steam Navigation Company under its own name or any fictitious name including, but not limited to, "Princess Cruises";
>
> (3) Expressly consent and agree that if, in violation of her agreement herein, she boards or attempts to board any vessel hereinabove described or referred to, the Peninsular and oriental Steam Navigation Company, its officers, agents employees, officers and crew members of any such vessel may exercise any and all means to prevent her boarding, or if already aboard to cause her to leave such vessel, including, but not limited to, the use of reasonable force, if necessary (but specifically excluding the right to use deadly force or kill her), and that in such event she hereby releases, acquits, and forever discharges and agrees to hold harmless said vessel and its officers and crew, and Peninsular and Oriental Steam Navigation Company and all its officers, agents, employees of and from all claims, etc. . . .

[1] In the lawsuit complainant alleged that she had received or suffered injuries while aboard a vessel operated by respondent.

In a separate agreement respondent agreed to keep confidential the provisions of the settlement agreement and all matters pertaining to the court case mentioned above.

Although it is less than clear from the complaint itself, the position of the complainant seems to be simply that the "banishment provisions of the Settlement Agreement are void, in that they are illegal under the Shipping Act [1916]." This "banishment" is said to violate sections 14, 15, 16 and 20 of the Act.

Of the four provisions of section 14 only the Third can be argued to apply here. It provides:

> That no common carrier by water shall directly or indirectly, in respect to the transportation of passenger or property . . .
> Third, Retaliate against any shipper by refusing, or threatening to refuse, space accommodations when such are available, or resort to other discriminating or unfair methods because such shipper has patronized any other carrier or has filed a complaint charging unfair treatment, or for any other reason.[2]

The essential element of any violation of section 14 Third is the *retaliation* by a carrier against a *shipper*. Since the proscribed action by a carrier must be against a shipper the question then becomes can the complainant by any reasonable interpretation be brought within the meaning of the term "shipper." Generally a "shipper" is "The person for whom the owners of the ship agree to carry goods, called 'freight,' to a specified destination and at a specified price."[3] Complainant's only relationship with P&O prior to entering into the agreement was that of a passenger aboard respondent's cruise vessels. There is no claim by the complainant that she is or ever was a "shipper." Complainant, however, seems to be saying that the "preamble" to section 14 renders the prohibitions of section 14 Third applicable to passengers even if they lack status as shippers. Thus complainant would have the statute read that "no common carrier by water shall in respect to the transportation by water . . ." refuse or threaten to refuse space accommodations. Unfortunately for complainant, section 14 Third cannot be read that way.

The specific act prohibited is the retaliation by a common carrier against a "shipper" because that "shipper has patronized another carrier or has filed a complaint charging unfair treatment, or for any other reason." Among the acts of retaliation specifically prohibited to a carrier is the refusal or threat of refusal of "space accommodations when such are available." An example would be where a shipper is contemplating giving his business to another carrier and the carrier with whom he has been

[2] Section 14 First applies to deferred rebates, section 14 Second applies to fighting ships, and section 14 Fourth speaks only to contracts made with shippers.

[3] De Kerchove, *International Maritime Dictionary*, 2d Ed. 1961, p. 724. Similarly, *Black's Law Dictionary*, 4th Ed. 1951 at p. 1546, defines a shipper as "One who ships goods; one who puts goods on board a vessel, for carriage to another place during her voyage and for delivery there, by charter party or otherwise."

dealing says he will not give the shipper any space in the future no matter how desperate the need if he ships with anyone else. The section is clearly restricted to retaliation by a carrier against a shipper and is not applicable here where there is no shipper involved.

Here the respondent's "refusal" of passage aboard its ships is in the form of an agreement with the complainant. In return for $40,000 complainant dropped a lawsuit against the respondent and agreed that she would not at any time in the future attempt to sail aboard any of respondent's vessels. This is not, it seems to me, the kind of situation contemplated by the statute.

The language and context of section 14 Third contemplates a unilateral act on the part of the carrier. The terms "retaliate," "refusing," and "threatening" are not compatible with the concept of an agreement in which the allegedly harmed party agrees to the very conduct which is said to cause the harm and who in return for that agreement receives a sum of money.[4] Thus, even if the language of the section was less specific in its restrictions to shippers, I would have great difficulty in concluding that it applied to the kind of agreement at issue here.

Respondent argues that there is yet another reason why section 14 Third does not apply here. It maintains that the "space accommodations" referred to in the section are limited to cargo space and accommodations and do not apply to passenger accommodations. As evidence of this, respondent cites the recently enacted Shipping Act, 1984 (P.L. 98–237) in which the prohibitions of section 14 Third were carried over with the clarifying addition of the word "cargo" so that the prohibited act is the refusal of "cargo space accommodations" (P.L. 98–237 Sec. 10(b)(5)). While I might agree that no substantive change was intended, no specific reference to the legislative history of the 1984 Act has been provided. However even if we accept for the moment the idea that section 14 Third did include "passenger" space accommodations, the section does not apply to the agreement presented here because the complainant is not a shipper against whom the carrier has retaliated in any way and is thus not covered by the specific prohibitions of the section.

Without any explanation, complainant alleges that section 15 of the 1916 Act has been violated "by the conduct" of respondent. Section 15 only covers "agreements" between "common carriers by water and/or other persons" subject to the Shipping Act, 1916.[5] The Settlement Agreement, the only possible connection here with section 15, is between P&O, a common carrier, and complainant who is not and does not claim to be

[4] Counsel for the complainant at the Prehearing Conference conceded that respondent would not have executed the agreement and paid the $40,000 if the complainant had not agreed that she would stay away from respondent's vessels in the future.

[5] The Act defines other person as "any person . . . carrying on the business of forwarding or furnishing wharfage, dock, warehouse or other terminal facilities in connection with a common carrier by water."

another person subject to the Act or a common carrier by water. Therefore section 15 does not apply.

The complaint also alleges a violation of section 16 of the Shipping Act, 1916. The only portion of section 16 which could arguably apply to the complaint is section 16 First which provides:

> That it shall be unlawful for any common carrier by water . . . either alone or in conjunction with any other person, directly or indirectly:
>
> First. To make or give any undue or unreasonable preference or advantage to any particular person, locality or description of traffic in any respect whatsoever, or to subject any particular person, locality, or description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever. . . .

Here again, as in section 14 Third the language and context of section 16 First contemplates a unilateral act which subjects someone to undue or unreasonable prejudice. It does not, in my view, extend to an agreement where, as here, the party seeking relief agreed to the very conduct which is supposed to constitute the prejudice. In return for $40,000 she dropped the lawsuit and agreed to refrain from taking cruises on respondent's vessels. So just what is the act of respondent that has prejudiced complainant? All that respondent has done was sign the agreement and pay complainant $40,000. Viewed in its proper light, the relief which complainant seeks is not the removal of "prejudice" but a declaration that she is relieved of an obligation which she freely undertook and for which she received consideration. Looked at this way, it is difficult to find "prejudice" in its commonly understood sense, i.e. a disadvantage resulting from some judgment or action of another.[6] Certainly at the time the agreement was executed no one thought that respondent had prejudiced the complainant. It was not until two years later that the complaint was filed with the Commission.[7] The complainant may now feel prejudiced but the restriction was self-imposed. Complainant is not the victim of prejudice so much as she is the dissatisfied party to a bargain she no longer wishes to honor. As such she cannot now claim unlawful prejudice under section 16.[8]

Finally complainant alleges that respondent has violated section 20 of the Shipping Act, 1916, by disclosing the terms of the Settlement Agreement to third parties. Section 20 forbids common carriers by water to disclose, without the consent of the shipper or consignee concerned any information

[6] See *The American Collegiate Dictionary*, Random House, 1970.

[7] The complainant alleges that when the agreement was signed, respondent said it would only remain in effect for "six months," i.e. that Dr. Hepner would only be barred from respondent's vessels for that period. The respondent denies this. Of course all evidence on this point is barred by the parole evidence rule. But even if complainant waited to see if respondent would abrogate the agreement after six months, it still was another 18 months before the complaint was filed here.

[8] I do not mean to imply that an agreement can never give rise to prejudice against one of the parties to an agreement. See e.g. *Inter American Freight Conference*, 14 F.M.C. 58 (1970). Indeed if duress or some form of coercion is present, any agreement could later be found prejudicial.

concerning "the nature, kind, quantity, destination, consignee, or routing of any property tendered or delivered by such common carrier . . ." when the information could be used to the detriment of the shipper or consignee. This section does not apply to the situation here so that even if respondent has made the disclosures alleged, the remedy of complainant lies elsewhere.[9]

The proceeding is dismissed.

(S) JOHN E. COGRAVE
Administrative Law Judge

[9] If there is something wrong with the agreement, then complainant's remedy would appear to lie in the local forum under the jurisdiction of which the agreement was executed.

FEDERAL MARITIME COMMISSION

DOCKET NO. 83–27
PASCOE BUILDING SYSTEMS

v.

PACIFIC WESTBOUND CONFERENCE AND AMERICAN PRESIDENT LINES, LTD.

NOTICE

DECEMBER 31, 1984

Notice is given that no exceptions were filed to the November 6, 1984, initial decision in this proceeding and the time within which the Commission could determine to review that decision has expired. No such determination has been made and accordingly that decision has become administratively final.

Pursuant to 46 CFR 502.253, respondent American President Lines, Ltd. shall pay complainant interest in the amount of $15,769.19, resulting in total reparation of $58,320.60, to be paid to complainant by January 15, 1985. Respondent shall also furnish the Secretary with evidence of payment within five days thereof.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 83–27
PASCOE BUILDING SYSTEMS

v.

PACIFIC WESTBOUND CONFERENCE AND AMERICAN PRESIDENT LINES, LTD.

1. Where a tariff provides in pertinent part that:

> Cargo freighted on a measurement basis shall be assessed rates on the gross or overall measurement of individual pieces or packages in cubic meters.

and further that:

> The three dimensions in centimeters . . . are to be multiplied together to produce the cube of one package or piece in cubic meters.

and *does not* provide that the outside measurement of the dimensions should be used, the tariff is clear and definite that the actual cubic measurement of each individual steel shape is the basis on which rates shall be assessed.

2. Where three dimensions, i.e., length x height x width are used to measure the number of cubic feet, the use of two measurements along an irregular (generally triangular) width so as to arrive at an average width, does not represent the use of a fourth "dimension" within the meaning of the tariff.

3. The "averaging" of the width measurement by the complainant, by generally using the widest and narrowest measurement along the width dimension and dividing by two, is a reasonably accurate measurement of the width of the steel shapes involved in this proceeding and comports with the tariff requirement that the rate shall be assessed on the gross or overall measurement of individual pieces in cubic meters. Further, the measurement of the steel shapes involved by using the "outside" or widest measurement and then multiplying that figure by the length x height does not result in the gross or overall measurement of individual pieces as the tariff requires. Rather, it results in a measurement of the smallest rectangular container into which the piece or package would fit.

4. The record in this proceeding does not support a finding that the practice in the industry *under the pertinent tariff for measuring the steel shapes involved here* is to use the measurement of width at its widest point so as to ultimately arrive at the number of cubic meters involved.

5. This holding is limited to the measurement of the steel shapes involved here. However, if the respondents wish to use the "outside" measurement

of the three dimensions to arrive at the number of cubic feet involved in the future, the tariff should so specifically provide.

Edward D. Greenberg for Pascoe Building Systems, complainant.
R. Frederic Fisher and *Charles L. Coleman, III* for Pacific Westbound Conference and American President Lines, Ltd., respondents.

INITIAL DECISION [1] OF JOSEPH N. INGOLIA, ADMINISTRATIVE LAW JUDGE

Finalized December 31, 1984

This case involves the question of whether or not a portion of section 18(b)(3) of the Shipping Act, 1916, was violated because fabricated steel structures were mismeasured. The complainant alleges that four shipments are involved and that it is entitled to reparations totalling $42,551.41, with interest under the authority of section 22 of the Shipping Act, 1916.[2] It argues that the mismeasurement contravenes the provisions of the pertinent tariff.

FINDINGS OF FACT

The parties have stipulated certain facts in this proceeding. Reference to that stipulation is "S.F."

1. The complainant Pascoe Building Systems (Pascoe) is a division of Amcord, Inc., a Delaware corporation, and is generally engaged in the manufacture and sale of prefabricated steel structures used for building and construction purposes. S.F., par. 1.

2. The respondent, American President Lines, Ltd. (APL) is a common carrier by water in the foreign commerce of the United States, and has been a member of the respondent, Pacific Westbound Conference (PWC), at all times relevant to this proceeding. The respondent, PWC is a conference of carriers with various members, one of whom is American President Lines, Ltd. S.F., par. 2; Entire Record.

3. During the period of time involved in this proceeding PWC established special project rates to Hong Kong for the carriage of "machinery, equipment, materials, supplies and parts thereof.," in connection with the China Cement Company (Hong Kong) Ltd. cement plant project. The applicable project rate from December 17, 1980, through October 31, 1981, was $105.00 W/M, and the applicable rate from November 1, 1981, to February 1, 1982, was $116.00 W/M. The pertinent tariff pages publishing this rate appeared in PWC Local and Overland Tariff No. 11–FMC–19, Item

[1] This decision will become the decision of the Commission in the absence of review thereof by the Commission (Rule 227, Rules of Practice and Procedure, 46 CFR 502.227).

[2] Section (10)(b) of the Shipping Act, 1984, generally corresponds to section 18(b)(3) of the 1916 Act. Section 11 of the new act corresponds to section 22 of the old act. The pertinent law regarding the alleged violation is the same under either act.

982.3001.00, on page 774. The pertinent rates set forth in the tariff are contract rates and are available only to shippers signing the PWC dual rate contract. Pascoe became a signatory to such contact so that the rates applied to Pascoe's cargo movements which are here in issue. S.F., par. 3.

4. In addition to specific rates the tariff contained other pertinent provisions as follows:

(At page 81):

RULE NUMBER 39.0—METHOD OF COMPUTING FREIGHT (Except as otherwise provided, the following will apply.)

39.2 Measurement Cargo

> Cargo freighted on a measurement basis shall be assessed rates on the gross or overall measurement of individual pieces or packages in cubic meters * * *.

and further:

39.2.6 The Three dimensions in centimeters (rounded off according to the above) are to be multiplied together to produce the cube of one package or piece in cubic meters to six (6) decimal places.

and further:

39.4 Freight Charges are Subject to Revision

> Adjustments shall be made by the Carrier if shipment are found to be improperly described or if billed weight or measurement is found to be incorrect. For the purpose of this Rule, except as otherwise provided, the Pacific Cargo Inspection Bureau is designated as authorized representative of the Carriers.

(Entire Record.)

5. During the relevant time period involved in this proceeding Pascoe was a subcontractor for the China Cement Company (Hong Kong) Ltd. cement plant project. Pascoe contracted with Del Mar Shipping Corporation (Del Mar), an ocean freight forwarder, to arrange for the actual transportation from Pascoe's facility in Pamona, California, to the pier, book cargo aboard the PWC vessels, and pay the ocean carrier. S.F., par. 4.

6. There are four cargo movements of fabricated steel structures involved in this proceeding. They took place on June 14, 1981 (the *President Adams*); August 11, 1981 (the *President Grant*); November 19, 1981 (the *President Cleveland*); and January 22, 1982 (the *President Tyler*). The cargo involved in each of the shipments was freighted on a measurement basis in accordance with the pertinent tariff. S.F., par. 5.

7. When Pascoe tendered each of its shipments to APL, it furnished a packing list prepared by its engineering department setting forth the

dimensions which it believed were applicable to its cargo. In measuring the width of its steel shapes Pascoe arrived at a width measurement by generally taking the widest and the narrowest measurement (allowing for flanges) along the width and dividing by two. S.F., par. 5; Entire Record.

8. The Pacific Cargo Inspection Bureau (PCIB) rejected the width dimensions submitted by Pascoe and substituted its own measurement. The PCIB measured the width of Pascoe's steel shapes at their widest points and used that measurement to arrive at the number of cubic meters involved by multiplying the length x height x width. S.F., par. 9.

9. Using the width measurement submitted by Pascoe, the freight charges due by Pascoe were as follows:

Shipment	Charges
June 14, 1981	$94,721.37
August 11, 1981	76,402.42
November 19, 1981	283,514.38
January 22, 1982	83,715.69
Total	$538,353.86

S.F., par. 13.

10. Using the width measurement submitted by the PCIB, the freight charges due by Pascoe were as follows:

Shipment	Charges
June 14, 1981	$103,576.95
August 11, 1981	78,162.19
November 19, 1981	305,477.71
January 22, 1982	93,033.42
Total	$580,250.27

S.F., par. 13.

11. The PCIB did not remeasure the steel shapes for the August 11, 1981, shipment. Instead, the steel shapes were measured in Hong Kong after devanning by an independent marine surveyor, Sworn Measurers and Weighers (Hong Kong) Ltd., at a cost of $655.00. S.F., par. 10.

12. Pascoe has paid all the freight charges relating to the four shipments in issue on the basis of the measurements made by PCIB. In addition, it has paid the $655.00 referred to in paragraph 11, above. It now seeks to recover, with interest, the difference in the freight charges due under its measurements and those charges it has paid, including the $655.00. The total amount is $42,551.41. S.F., par. 6.

13. During the period from 1976 through 1982 Pascoe entered into numerous contracts to manufacture and ship cargoes of steel shapes, many of which were handled by the Del Mar Shipping Corporation, which acted as freight forwarder. The shipments were as follows:

Year	Number of Contracts
1976	34
1977	47
1978	64
1979	35
1980	22
1981	30
1982	47

Rebuttal Statements, Banuelos and Little, pars. 7 and 5, respectively.

14. The contracts referred to in paragraph 13, above, in each instance, included triangular steel shapes which formed a sizeable part of the cargo that was shipped. The cubed measurements of those shapes were arrived at by Pascoe in the same manner as were the cubed measurements for the shipments herein involved. The accuracy of those measurements was never questioned until this proceeding. Rebuttal Statements, Banuelos and Little; pars. 7 and 5, respectively.

ULTIMATE FINDINGS OF FACT

15. The tariff involved in this proceeding clearly provides that cargo freighted on a measurement basis "shall be assessed rates on the gross or overall measurement of individual pieces or packages in cubic meters" and the measurement used by Pascoe satisfies that requirement while the measurement used by PCIB does not. Entire Record.

16. The "averaging" of the width measurement employed by Pascoe by using the widest and narrowest measurement along the width and dividing by two, is a reasonably accurate measurement of the width of the steel shapes involved, and comports with the tariff requirement that the rate shall be assessed on the gross or overall measurement of individual pieces in cubic meters. The averaging of the width does not add a fourth "dimension" since the cubic meters are still arrived at by using three dimensions, i.e., length × height × width. Entire Record.

17. The measurement of the width of the steel shapes involved by using the "outside" or widest measurement and then multiplying that figure by the length × height does not result in "the gross or overall measurement of individual pieces or packages in cubic meters" as the tariff requires. Rather, it results in a measurement of the smallest rectangular container into which the piece or package would fit. Entire Record.

18. The record in this proceeding does not support a finding that the practice in the industry under the pertinent tariff for measuring the steel shapes involved here is to use the measurement of width at the widest point to arrive at the number of cubic meters involved. Entire Record.

19. Pascoe was overcharged $42,551.41, by APL for the four shipments involved here and is entitled to recover that amount, plus the appropriate interest. Entire Record.

ARGUMENT AND CONCLUSIONS

This case is one involving the proper measurement of steel shapes. There is no dispute as to the surrounding facts concerning the applicable monetary rate, the shipments involved or the description of the pertinent cargo. Indeed, there is no real dispute either as to how the complainants and respondents measured the steel shapes, or as to the accuracy of the numerical figures that were used. What is in controversy is which measurement in cubic meters satisfies the terms of the pertinent tariff.

With respect to the shipments involved here, Pascoe arrived at the dimensions of the tapered columns, which appear to be triangular in shape but are actually four sided,[3] from engineering specifications determined by its engineering department. From those specifications Pascoe prepared and gave packing lists to the respondents in advance of sailing. Pascoe arrived at the cargo measurement by, in effect "averaging" the width measurement of each tapered column. It argues that its measurement process results in the most accurate measurement of the overall or gross cubic dimensions of the tapered columns since the measurements "are based on precise engineering calculations (which are correct to the thousandth of a foot)." It argues further that Pascoe has been using this method to derive the cubic dimensions of its tapered columns for at least twenty years, and that in the last seven years made a large number of ocean shipments based on such measurements which were never questioned by any carrier.

Pascoe asserts that the respondents' method of measurement is to determine "the smallest rectangular container into which the piece or package would fit." Pascoe argues that in so doing the respondents violated the terms of the tariff because the tariff does not speak in terms of calculating the dimensions of such a hypothetical, rectangular container.

On the other hand, the respondents argue that Pascoe's method of measurement was wrong because Pascoe used four dimensions instead of the three "called for by the PWC tariff"; because Pascoe's method was not in accordance with standard industry practice; because Pascoe's argument that the PWC's tariff is ambiguous is an error; and, because Pascoe's measurement system is "arbitrary and unworkable."

Section 18(b)(3) of the Shipping Act, 1916, provides in part that:

> No common carrier by water in foreign commerce shall charge or demand or collect or receive a greater or less or different compensation for the transportation of property or for any service in connection therewith than the rates or charges which are specified in its tariffs on file with the Commission. . . .

Given this statutory mandate it is clear that we must begin any examination of the issue involved here by determining just what the tariff says. In

[3] See complainant's Opening Statement of Facts, Exhibits 7 and 15 which contain drawings of the tapered columns.

so doing we find that its language is unequivocal. The basic tariff language says that:

> Cargo freighted on a measurement basis shall be assessed rates on the gross or overall measurement of individual pieces or packages in cubic meters.

That language, when applied to the steel shapes (tapered columns) which moved here, clearly requires that the measurement involved be of the individual pieces themselves and there is no provision that any "outside" measurement shall govern. Further, there is nothing in the tariff, either specifically or by implication which would measure the individual pieces by computing the smallest rectangular container into which the individual pieces would fit.

The tariff also states that:

> The three dimensions in centimeters . . . are to be multiplied together to produce the cube of one package or pieces in cubic meters.

This language, standing alone, does not change the basic tariff language by requiring an "outside" measurement of the three basic dimensions, i.e., length, height and width.[4] Further, we have also found as a fact that the use of two measurements along one dimension so as to "average" the dimensions is a reasonably accurate measurement of the width dimension involved here and comports with the basic tariff requirement. We have also found as a fact that the use of two measurements of width so as to arrive at the overall dimension does not add a "fourth dimension." Rather, the measurement of cubic meters, under the tariff, is still arrived at by the use of the three dimensions of length, height and width.

As we have noted, we think the tariff is clear so there is no need to go beyond its terms, at least not insofar as the steel shapes involved here are concerned. But even if we look beyond the terms of the tariff, as the respondents would have us do, in order to determine whether or not the complainant's method of measurement of steel shapes is contrary to the practice in the industry, we hold that the facts of record do not support any such finding.[5] While the respondents' witnesses talk generally of such a practice there is no real delineation between a tariff which requires an "outside measurement" to be used respecting irregular shapes and a tariff, like the one in issue here, that does not contain such a requirement. Further, there is no attempt by the respondents to deal specifically with the particular commodity involved here and instead, it is discussed generally along with automobiles and other similar commodities not in

[4] This statement also applies to the use of Tweed's Accurate Metric Cubic Tables, for which the tariff provides.

[5] This holding makes unnecessary any determination as to the extent to which an "industry wide practice" affects the clear and unequivocal language of a tariff.

issue. This, despite the fact that the complainant established, and we have found as uncontroverted fact, that from 1976 through 1982, it shipped tapered steel shapes which were measured in the same manner as were the steel shapes involved here. The characterization advanced by the respondents that in making such shipments Pascoe simply "got away with it in the past," meaning at least the past seven years, is a subjective, self-serving argument having no factual basis in this record.

When we turn from the facts to the case law we find that generally, the cases hold that strict adherence to filed tariffs is mandatory *Mueller* v. *Peralta Shipping Corp.*, 8 F.M.C. 361, 364 (1965), and that demanding and collecting greater compensation than specified in the tariff on file with the Commission violates section 18(b)(3) of the Shipping Act, 1916. *Bratti* v. *Prudential, et al.*, 8 F.M.C. 375, 380 (1965). The case law further provides that tariffs should be specific and plain, *Gelfand Mfg. Co.* v. *Bull SS Lines*, 1 U.S.S.B. 169, 170 (1929), and that if no specific commercial meaning has been engrafted on to a term, that term must be construed according to its ordinary meaning. *European Trade Specialists, Inc. and Kunzle & Tasin*, v. *Prudential-Grace Lines Inc. and the Hipage Co., Inc.*, 21 F.M.C. 888, 890 (1979), citing *Nix* v. *Hedden*, 149 U.S. 304 (1983).

In their brief the respondents make several arguments, one of which can be disposed of in summary fashion. The brief refers to Pascoe's "shifting" contentions and its abandoned "nesting" argument. Pascoe denies that its case rested on the "nesting" argument, and asserts that it is relying solely on the provisions and language of the tariff. This being so we have disregarded those portions of the record which relate to "nesting"[6] and have limited our consideration of the issue to which the tariff provisions require.

As we have noted, the respondents' primary argument, which is really three arguments, states:

> Pascoe seeks to impose a system of measurement which is contrary to the tariff, contrary to uniform industry practice and completely unworkable.

As to being contrary to the tariff, the language of the tariff, standing alone, does not allow the use of an "outside" measurement of width, even if all were to accept the idea that the use of three dimensions precludes the use of two measurements along one irregular dimension.[7] The only way the respondents can reach such a result is to establish that uniform industry practice, *as to the tapered steel shapes involved here,* requires that the "three dimensions" set forth in the tariff means the three "outside"

[6] The "nesting" argument rests on the assertion that since the irregular steel shapes could be "nested" or bundled together so as to conserve cargo space, the carrier ought not to use the outside measurement of width as to each tapered column in computing the number of cubic feet involved.

[7] As has been noted previously, we have held as a fact that the tariff does not preclude the use of two measurements along the width dimension.

dimensions. We have already held that the facts of record do not support the view that the tapered steel shapes involved here were historically measured as the respondents measure them. In their brief the respondents cite language from *Orleans Materials and Equipment Co.* v. *Matson Navigation Co.*, 8 F.M.C. 160 (1964) (*Orleans*). They state, and we agree, that the Commission rejected the argument that the measurement of cargo may be reduced to take into account the possibility of "nesting" the cargo so as to conserve stowage space. Further, the Commission's reasons for its decision, that is, that the cargo must be measured as it is received at the dock and that the possibility of "nesting" must be disregarded, are equally valid. However, that language does not support the respondents' case here.

In *Orleans, supra*, the complainant sought to have the Commission hold that because the cargo could be "nested" the measurement of the cube should not be based on the outside measurement of the dimensions, *even though, unlike the instant case, the applicable tariff provided that the outside measurement would govern.* The Commission correctly followed the terms of the tariff which specifically provided for the outside measurement. Likewise, here we would follow the terms of the tariff, and the fact that the tariff in *Orleans* specifically provides for the use of the outside measurement in arriving at the cube and the tariff here does not, calls into question the respondent's assertion that since the tariff here provides for the measurement of cube by using three dimensions it also requires use of the outside measurement. The problem is brought into focus by consideration of *Ocean Shipment of Associated Factories, Inc., 26 F.M.C. 144, (FMC Docket No. 83–33, 1983) (Associated)*, which is cited by the respondents. That case came to the Commission on referral from the United States District Court for the Southern District of Georgia. The issue presented was whether or not shipments of carpet were properly measured in calculating the cubic measurement by using the greatest dimensions of the role (rectangularization), where the tariff provided that:

> All cargo shall be measured on the overall measurements of the individual packages, unless otherwise specified.

The Commission decided that the measurement was improper and that the shipper was right in using a geometric measurement to find the volume of the cylinder (rug). The Commission stated:

> Rule 21(A) states that all cargo shall be measured on the "*overall measurements*" of the individual packages. What is meant by the "overall measurements" of a package is not defined or explained. Nor does Rule 21 specify what method is to be used to calculate the "overall measurements" of a package. In this regard, it is unlike those tariffs which state that the cubic measurement shall be the product of the three greatest dimensions. Specifying that the cubic measurement of the cargo shall be based on

the depth, width and length of the cargo precludes the use of the geometric formula for calculating the cubic volume of a cylinder. In contrast, nothing in Rule 21 precludes the use of the geometric formula in determining the "overall measurements" of the carpet rolls.* By this decision we are in no way overruling the general rule stated in *Orleans Material and Equipment Co., Inc.* v. *Matson Navigation Co.*, 8 FMC 160 [3 SRR 1055] (1964). Where rectangularization is clearly indicated, it continues to be a valid and essential means of rating cargo. Our holding here is based on our judgment that Rule 21(A) is sufficiently ambiguous to lead us to rule in favor of Associated.

In the absence of a tariff rule which clearly specifies the method to be used in order to determine the "overall measurements" of cargo, we conclude that in this instance Associated may have the benefit of the geometric formula. Ambiguous tariff provisions are construed against the maker, i.e., the carrier, and in a manner most favorable to the shipper in terms of yielding the lowest rate. *Bratti* v. *Prudential et al.*, 8 FMC 375, 379 [5 SRR 611] (1964); *Sacramento-Yolo Port Dist.* v. *Fred F. Noonan Co., Inc.*, 9 FMC 551, 558 [7 SRR 387] (1966); *United Nations Children's Fund* v. *Blue Sea Line*, 15 FMC 206, 209 [12 SRR 1067] (1972).

---

*The Commission may look to matters outside the express language of the tariff to aid in its construction if there exists a custom or usage of a trade or course of dealing of the parties which, although not in the tariff, is such that it should be applied. *Great Northern Ry.* v. *Merchants Elev. Co.*, 259 US 285, 291, 292 (1922); *Sacramento-Yolo Port Dist.* v. *Fred F. Noonan Co., Inc.*, 9 FMC 551, 560 [7 SRR 387] (1966). Although many tariffs specifically require "rectangularization" of cargo in calculating the cubic measurement for rating purposes, this does not establish that "rectangularization" is such a universal custom or usage in this trade and with this commodity so that it must be applied even though it is not specifically required by the tariff.

In the case before us the tariff contains precise language as to how cargo should be measured. There is no ambiguity within its terms. It does not specifically provide for the use of the "outside" measurement or rectangularization, as do other tariffs which the Commission refers to in *Associated, supra.* Given the clear language of the tariff and the failure of the record to establish that the use of the outside measurement is such a universal custom or usage in this trade, with this commodity and under the language of this tariff, we hold that it cannot be applied here and the complainant's method of measurement is proper.

In so holding we note that this case is not one where the definition of a commodity is in question. In those cases one can understand the inability of a tariff to cover every commodity within every description

so that it often becomes necessary to look outside the terms of the tariff itself. Here, all that is involved is how cargo is measured and the tariff contains language as to how this is to be accomplished in rather precise terms. Yet, unaccountably the tariff simply fails to specify that the "outside" or "greatest" dimension should be used. It seems obvious that if the tariff is to be clear and unequivocal as it is required to be, the intent that the "outside" dimension be used ought to be expressly stated and not left to a reliance on standard industry custom or practice. Otherwise, we are sometimes left with what we have here—a record that does not support a holding that in measuring this specific cargo outside measurements are always used.

Further, it is difficult to understand the respondents' assertion, through its witnesses that "a ruling in Pascoe's favor here would have catastrophic, industry-wide consequences." In advancing this premise the arguments made that there needs to be a uniform method for measuring cargo and a series of questions is propounded as the "How would we determine how many measurements to use?"; and, "if a package is hour-glassed shaped how do we determine the 'mean' width?" Then, these and similar questions are applied to different types of irregular shapes to show that the measurement is not feasible as to those shapes and that therefore, it should not be allowed as to the steel shapes involved here.

Of course, the answer to the above is that uniformity in a tariff is desirable, and it could have and can be achieved here by simply inserting a sentence in the tariff that makes clear that all irregular shaped objects will be measured by multiplying the three dimensions and that the measurement used for each dimension will be the "outside" measurement of that dimension. If the tariff were so clarified there would be no need to rely on extrinsic evidence as to what is meant, no agonizing over how to measure different irregular shapes and no possible lack of uniformity which might lead to "catastrophic industry-wide consequences."

So here, we hold that the specific language of the tariff is clear and that the measurement used by the complainant reasonably complies with the requirements of that language. We hold further, that the record in this proceeding does not support a finding that *under the language of this tariff and with respect to this commodity* the industry-wide practice is to use the "outside" measurement of width, so as to arrive at a hypothetical rectangle. Such rectangularization is not clearly indicated in this tariff as the Commission's decision in *Orleans, supra,* requires.

Finally, PWC in its brief states that "Pascoe's complaint against the PWC must be dismissed for failure to state a claim under the Shipping Act. See *Nepera Chemical Inc.* v. *Sea-Land Service, Inc.,* 527 F.Supp. 136 (D.D.C. 1981)." Given the facts of this case where the tariff involved is a conference tariff, and the measurements made by PCIB were made under the specific terms of the tariff, as well as other facts, it is clear

that the PWC is a proper party to this proceeding, even though it may not be liable insofar as reparations are concerned.

In view of the above the respondent, American President Lines Ltd., is hereby ordered to pay Pascoe the sum of $42,551.41, with appropriate interest.[8] It is further ordered that if the respondents want to measure all irregularly shaped cargo by using the "outside" measurement of each dimension so that the measurement achieves rectangularization, it be so specifically provided for in the appropriate tariff.

This proceeding is hereby discontinued.

(S) JOSEPH N. INGOLIA
Administrative Law Judge

[8] See 46 CFR 502.253 for the proper interest computation.

FEDERAL MARITIME COMMISSION

DOCKET NO. 84–5
SOUTH CAROLINA STATE PORTS AUTHORITY

v.

GEORGIA PORTS AUTHORITY

NOTICE

January 9, 1985

Notice is given that no appeal has been taken to the December 4, 1984, dismissal of the complaint in this proceeding and the time within which the Commission could determine to review has expired. No such determination has been made and accordingly, the dismissal has become administratively final.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 84–5
SOUTH CAROLINA STATE PORTS AUTHORITY

v.

GEORGIA PORTS AUTHORITY

ORDER DISMISSING COMPLAINT

Finalized January 9, 1985

This order summarizes some events which transpired at the hearing on Friday, November 30, 1984, and the speaking order issued at that time.

Counsel for complainant and counsel for respondent requested that the following statement be read into the record:

> The respondent Georgia Ports Authority acknowledges that it now recognizes that there are certain errors in Booz-Allen & Hamilton, Inc., report described in the complaint and that it agrees that the report will not be further distributed or circulated by the Georgia Ports Authority.
>
> In consideration of the above rapproachment the South Carolina State Ports Authority having achieved the primary purpose of this action now agrees to withdraw the complaint pending before the Federal Maritime Commission.

After the statement was read the complaint was ordered dismissed, with prejudice, and the proceeding was closed.

(S) SEYMOUR GLANZER
Administrative Law Judge

FEDERAL MARITIME COMMISSION

DOCKET NO. 83–38
NOTICE OF INQUIRY AND INTENT TO REVIEW REGULATION OF PORTS AND MARINE TERMINAL OPERATORS

January 18, 1985

ACTION: Discontinuance of Proceeding.

SUMMARY: The Federal Maritime Commission has determined to discontinue this proceeding having reviewed and adopted the Final Report of the Inquiry Officer.

DATE: Effective January 24, 1985.

SUPPLEMENTARY INFORMATION:

By Notice published in the *Federal Register* on September 14, 1983 (48 FR 41199), the Commission initiated this proceeding to accomplish a general review of its regulation of the marine terminal industry. The Commission proposed to review the continued need to require terminal tariffs to be filed and marine terminal agreements to be filed and approved, and the general area of antitrust immunity for marine terminal operators. Comments were solicited from the public, and Commissioner Robert Setrakian was appointed Inquiry Officer authorized to review written comments and solicit any other comments necessary to further the objectives of the Inquiry.

Numerous comments were submitted from various components of the ocean shipping industry and other interested parties, and hearings were held in certain U.S. port cities. The Inquiry Officer issued an initial report dealing with terminal tariffs and agreements, and has now issued a Final Report covering the area of antitrust immunity. Both reports, which have been reviewed and adopted by the Commission, are available from the Commission's Secretary. The Commission has now determined that the purposes of the proceeding have been accomplished and that it should be discontinued.

Accordingly, this proceeding is discontinued.

By the Commission.

(S) BRUCE A. DOMBROWSKI
Assistant Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 84–10
THE COCA-COLA EXPORT CORPORATION

v.

PERUVIAN AMAZON LINE

ORDER OF REMAND

JANUARY 24, 1985

This proceeding was initiated by complaint filed by Coca Cola Export Corporation (Coke) against Peruvian Amazon Line (PAL) for alleged overcharges of $9,824.52 on the shipment of 14,366 cases of canned sodas from Miami, Florida to Iquitos, Peru.[1] Chief Administrative Law Judge John E. Cograve issued an Initial Decision denying reparations to which Coke has filed Exception.

BACKGROUND

The essential facts are not in dispute. Coke's contract of sale called for shipment of 14,336 cases of Coca-Cola and Sprite, and the Peruvian letter of credit precluded "partial shipment." Coke booked space for the shipment with PAL, and requested that eight containers be furnished. The cases of Coca-Cola and Sprite are automatically palletized as they come off the plant's production lines. However, the number of cases ordered could not be neatly divided into standard pallet loads. Coke therefore made up the requisite number of cases by providing the maximum number on pallets and the remainder in loose cases. Coke shipped the entire amount in containers, because the letter of credit prohibited "partial shipment"[2] and to avoid damage from excessive handling, exposure to the elements and pilferage. PAL was not informed, either at time of booking or shipment, that the greater portion of the cargo was palletized. The containers, provided by PAL, were loaded by Coke at its Miami plant.

At the time of shipment, the PAL's tariff contained the following rates:

Canned Goods & Beverages Palletized W/M $120
Canned Goods & Beverages in Boxes W/M $160

[1] The matter was tried under the "shortened procedure" of Subpart K of the Commission's Rules of Practice and Procedure, 46 C.F.R. §502.181.

[2] No explanation is given for Coke's belief that shipment on the same vessel for cargo that is partly on pallets and partly containerized or in loose cartons would constitute "partial shipment" under the terms of the letter of credit.

The bill of lading, prepared by Coke, did not reflect that some of the cargo was Palletized, and PAL rated the shipment at the higher rate, for cargo "in boxes." The complaint alleged that the lower rate for "palletized" cargo should have been charged and claimed reparations in the amount of $9,824.52.

In denying reparations, the Presiding Officer found that "[q]uite literally both rates for 'Beverages Palletized' and 'Beverages Boxed' would apply: The shipment was palletized and it was loaded into containers." He characterized the problem presented as not being the usual problem of tariff ambiguity but rather a case of ambiguity "created by the actions of the shipper, who first palletized at least part of the cargo and then placed those pallets inside a container (box)." The Presiding Officer concluded that Coke had elected to use containers in order to obtain certain benefits and that the higher container or "box" rate was appropriately charged as compensation for the higher costs incurred by PAL to supply the containers.

Coke argues on exception that the Initial Decision erroneously interprets the tariff description "in boxes" to mean "in containers," thus imputing container rates to a tariff which then contained none. Coke points out that the word "container" did not appear anywhere in PAL's tariff at the time of shipment and that the first reference to "containers or containerized cargo" was not made in the tariff until a number of months after the claim for overcharge was made.[3] Coke therefore concludes that a reading of PAL's tariff "leads to the inescapable conclusion that it is a typical, traditional breakbulk tariff, one which offers a lower rate for palletizing cargo as opposed to shipping 'boxes'."[4] While arguing that "a fair and reasonable construction must be given to the term 'in boxes,'" Coke does not allege that the tariff is ambiguous. To the contrary, Coke states that: "There is no ambiguity in the tariff."

In its Reply to Exception, PAL takes the position that the Presiding Officer's conclusions are correct and that Coke seeks to avoid compensating it for the additional costs of containerization while reaping its benefits by "concealing the packaging of the cargo from the carrier."

DISCUSSION

The Presiding Officer erred, in equating "boxes" and "containers." The Commission does not read the tariff term "in boxes" as describing

[3] In reply, Respondent explains that the later amendment was intended to "make perfectly clear what was already clear enough." Both parties are referring to Peruvian Amazon's Tariff FMC No. 3, original page 5A, effective March 18, 1983, which provides per container rates for "shipper owned" 20 and 40 foot containers, including separately stated charges for return of the empty containers. Because the shipment in question was not made in "shipper owned" containers, it appears that these rates would have been inapplicable to the shipments in question and provide no guidance for the question raised herein.

[4] Coke concedes on exception that the higher "box" rate should be applied to that portion of the cargo which was not palletized but moved in loose cartons within the containers and that PAL's "computation of the maximum overcharge of $8,128.92 based on a mix of 'palletized' and 'in Boxes' rate is more accurate" than the $9,824.52 amount sought in the complaint.

containers. Nor do we consider "box" synonymous with "container" in the context of a tariff setting forth the terms and conditions of, as well as the rates and charges for, transportation by water in foreign commerce.

PAL's tariff reflected two rates for canned beverages, "in boxes" or "palletized." As the Presiding Officer found, both rates were literally applicable. Neither referred to containerized shipment, and no other reference to containers was made in PAL's tariff effective at the time of shipment.

We cannot determine on this record whether the rate for cargo "in boxes" was the appropriate rate to apply in this case without examining factors which are not apparent from the existing limited record. Although there is some evidence of PAL's general past practice in handling cargo tendered to it in boxes, the record is devoid of any showing as to past dealings between Coke and PAL which might have led Coke to expect container service.[5] Nor is there any evidence in the record regarding the manner in which Coke's overseas shipments are usually made, whether by this carrier or other. Such evidence of past practice by a shipper might clarify the basis for its expectations of the rate to be charged. Evidence of a shipper's past practices and dealings may thus indicate its prior knowledge of the meaning and interpretation of tariff terms. While such knowledge by one shipper would not of itself generally make an ambiguous tariff unambiguous, it does serve to put the matter into proper perspective. *Cummin's Engine Co.* v. *United States Line,* 21 F.M.C. 944 (1979).

THEREFORE, IT IS ORDERED, That the Initial Decision served in this proceeding is set aside and that the proceeding is remanded for further hearing consistent with this Order.

By the Commission.

(S) BRUCE A. DOMBROWSKI
Assistant Secretary

Commissioner Moakley, dissenting in part.

I would not remand this proceeding to the Administrative Law Judge because I believe there are no relevant facts in dispute.

The majority have concluded that the term "in boxes" as used in the tariff in question does not mean "in containers." I agree. Having disposed of that issue, the resolution of the case is clear. There is one tariff rate which applies to the cargo that was shipped in pallets and another, higher rate applicable to the remainder of the cargo that was shipped in loose cartons, or "boxes." No other tariff rates are at issue. The parties agree that application of these two rates to the cargo in question results in an overcharge of $8,128.92 to the shipper in this case.

[5] PAL stated in its pleadings that the higher rate for cargo "in boxes" is based upon its regular practice of providing containers, at additional cost to itself, for cargo which is shipped loose in cartons or boxes. The higher rate also allegedly compensates for the loss of vessel cubic capacity resulting from use of the containers. PAL further advised that it offers a lower rate for palletized cargo because it requires no further handling or packaging for protective purposes.

The majority would remand the proceeding to examine factors unrelated to whether the cargo moved in pallets or boxes. The issue they want the ALJ to pursue relates to past dealings between the shipper and carrier which might have led the shipper to expect container service. The theory seems to be (although it is not clearly stated) that if the shipper received the "benefit" of container service, it should have to pay for that "benefit," even though there is no such charge in the tariff.

Unlike the facts in the informal docket case cited by the majority,[1] there is no tariff ambiguity to resolve here. The only possibility of such an ambiguity—whether "in boxes" meant "in containers"—was resolved in favor of the shipper. Thus, past dealings between the shipper and carrier are totally irrelevant. The terms of a tariff cannot be amended or ignored on the basis of equitable principles.

I would discontinue this proceeding and award reparation of $8,128.92 plus appropriate interest to the complainant.

[1] *Cummins Engine Co.*, v. *United States Lines, et al*, 21 F.M.C. 944 (1979).