

105–258 (“OSRA”). Docket No. 98–26, *Ocean Common Carrier and Marine Terminal Operator Agreements Subject to the Shipping Act of 1984*, 64 FR 11236, March 8, 1999, (“Docket No. 98–26”).

Pursuant to changes mandated by OSRA, Docket No. 98–26 eliminated most of the “form and manner” rules describing the procedural rules for filing these agreements, but left unchanged the substantive “content” requirements, which were not affected by OSRA. 64 FR 11238. Comments submitted in the course of Docket No. 98–26 revealed concerns and uncertainties about the Commission’s substantive requirements for agreements, and requested further clarifications, enhancements or new rules on agreements. In response to these concerns, the Commission initiated Docket No. 99–13, *The Content of Ocean Common Carrier and Marine Terminal Operator Agreements Subject to the Shipping Act of 1984*, by the publication of a Notice of Inquiry (“NOI”) on August 3, 1999, requesting comment on the specific manner in which the Commission’s agreement content rules should be updated or refined. 64 FR 42057.¹ The Commission asked commenters to include concrete examples and to quantify their answers in response to the NOI. *Id.*

The Commission received five comments in response to the NOI, all of which requested that the Commission’s rules on content standards for agreement filings be updated or refined in a further rulemaking and identified three main concerns: certainty, flexibility, and confidentiality. These comments are summarized below.

2. Summary of the Comments

The Commission received comments from the National Industrial Transportation League (“NITL”), the Council of European & Japanese National Shipowners’ Associations (“CENSA”), the International Longshoreman’s Association (“ILA”) P&O Nedlloyd, Ltd. (“PONL”), and the Ocean Carrier Working Group Agreement (“OCWGA”).²

¹ Docket No. 99–13, *The Content of Ocean Common Carrier and Marine Terminal Operators Agreements Subject to the Shipping Act of 1984*, has been discontinued by separate order. The instant proceeding, Docket No. 03–15, *Ocean Common Carrier and Marine Terminal Operator Agreements Subject to the Shipping Act of 1984*, encompasses former Docket No. 99–13 and expands it to cover additional matters. As indicated below, the five comments submitted to the Commission in Docket No. 99–13 are incorporated by reference into the record of the instant proceeding and have been considered by the Commission.

² Members of OCWGA at the time of this submission were: the Latin America Agreement; Israel Trade Conference; Trans-Atlantic Conference

In addition to responses directed at particular questions posed by the Commission in the NOI, summarized below, there were some general comments in response to the Commission’s initial inquiry. OCWGA recommends that the Commission revise the rules by affirmatively defining what must be included in the filed agreement, rather than enumerating what need not be filed. OCWGA at 11. It states that this approach would allow for incremental adjustments to the regulations and clarify any uncertainty in the rule. *Id.* at 11–12.

OCWGA and PONL both assert that the Commission should determine the level of specificity it requires for such filings to be meaningful, and balance that need against the burden on filers. OCWGA at 19; PONL at 8. OCWGA suggests that the Commission seek to alleviate commercial harm arising from the disclosure of sensitive business information and the administrative costs associated with filing agreements so specific that they require constant amendments which also must be filed. OCWGA at 19.

A summary of comments addressed to the specific questions contained in the NOI follows. (a) The Commission asked whether the current filing exemption for routine operational or administrative matters should be eliminated, retained in its current form, or modified (NOI Question 1). Although the current regulations provide that filed agreements be “the complete agreement among the parties and * * * specify in detail the substance of the understanding of the parties” (46 CFR 535.407(a)), as summarized below, several comments generally remark that there are exceptions to this requirement. The comments cite the Commission’s rules allowing “permissive authority” at 46 CFR 535.407(b)³ and the exemption

Agreement; Transpacific Stabilization Agreement; United States/Australia-New Zealand Association; United States/South Europe Conference; United States/Southern Africa Conference; Westbound Transpacific Stabilization Agreement; Mediterranean-North Pacific Coast Freight Conference; A.P. Moller-Maersk Line; Contship Containerlines, Ltd.; Crowley American Transport, Inc.; Evergreen Marine Corporation (Taiwan) Ltd.; King Ocean Service de Venezuela, S.A.; Sea-Land Service, Inc.; Star Shipping A/S; Tropical Shipping & Construction Company, Ltd.; Wallenius Wilhelmsen Lines AS; Zim-Israel Navigation Company; and Hapag-Lloyd Container Linie GmbH.

³ That provision states:

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 Shipping Act and that

from additional filing for interstitial implementation of routine operational or administrative matters at 46 CFR 407(c). OCWGA contends that the Commission has never required the parties to a filed agreement to actually exercise all the authority in an agreement. It also alleges that the Commission’s proceedings in Docket No. 97–07, *Possible Unfiled Agreement between Hyundai Merchant Marine Co., Ltd. and Mediterranean Shipping Co., S.A.*, 28 S.R.R. 1428 (2000) and Docket No. 97–08, *Possible Unfiled Agreement Among A.P. Moller-Maersk Line, P&O Nedlloyd Limited and Sea-Land Service, Inc.*, 28 S.R.R. 1431 (2000) (“Docket No. 97–08”), deviate from that position. OCWGA at 12–13. OCWGA asserts that allowing permissive authority benefits both the Commission and the carriers because it allows the Commission to consider both the immediate and potential future effects of the agreement, while providing carriers essential operational and commercial flexibility. *Id.* at 13. OCWGA suggests that not allowing such permissive authority would be impossibly burdensome for both carriers and the Commission. *Id.*

OCWGA gives four instances in which permissive authority could promote flexibility. *Id.* at 14–17. First, with regard to the requirement that an agreement provide information as to the number of vessels and vessel capacity/slots it intends to utilize, OCWGA asserts it would be useful for the Commission to formalize the current policy that an agreement may set forth a maximum number (or range) of vessels and capacity, or maximum number of slots, that may be used without amendment to the agreement. *Id.* at 14.

Second, OCWGA states that the Commission’s practice allowing agreements to describe their geographic scope in terms of port ranges rather than the specific ports served is beneficial because operational and commercial considerations may require diversions on short notice. *Id.* at 15. OCWGA further asserts that there is no regulatory purpose in requiring that an agreement name the specific ports it intends to serve rather than port ranges, because such information is provided to the Commission in the information forms and monitoring reports, and typically is also provided to the public through published sailing schedules. *Id.*

Third, OCWGA recommends that agreements continue to have the ability to contain permissive authority for their members to discuss and agree on joining

interstitial implementation of routine operational or administrative matters is permitted without requiring further filings.