

other agreements, as the Commission would have notice of any action taken under such authority through a subsequent filing. *Id.* at 15–16. OCWGA objects to any requirement that an amendment to the original agreement also be filed when the parties exercise permissive authority. It asserts that such a requirement would serve no legitimate regulatory purpose and would be duplicative. It notes that there are 25 effective agreements currently on file with the Commission which contain this authority. *Id.* at 16. Finally, OCWGA recommends that the Commission allow permissive authority to include operational agreements, such as slot or space charters.<sup>4</sup>

PONL and CENSA contend that the term, “routine operational or administrative matters” used in section 535.407(c), lacks clarity. PONL at 6; CENSA at 1. CENSA suggests that the Commission identify and define those aspects of agreements which are relevant to its initial review and subsequent monitoring responsibilities, and establish specific rules with respect to them. CENSA at 2. OCWGA, however, recommends that the existing exemption for “routine operational or administrative matters” be retained in its current form. OCWGA at 10.

PONL contends that the Commission’s interpretations of the term “interstitial implementation”<sup>5</sup> in Docket No. 97–08 and Docket No. 96–14, *Compania Sud Americana de Vapores, S.A. v. Inter-American Freight Conference*, 28 S.R.R. 137 (1998) (“CSAV”), have made that term very unclear. PONL asserts that its attempts to use the term “interstitial” in agreements have met with objection from the Commission’s Bureau of Trade Analysis Office of Agreements. PONL at 5.

PONL asserts that if the Commission considers a conference’s implementation of its tariff rate agreement authority an “interstitial implementation,” as indicated in the example in 535.407(c), then it should similarly consider implementation of authority to agree on a joint approach to joining a conference to be a routine administrative matter and an interstitial

implementation of such authority. *Id.* PONL further asserts that the implementation of rates, terms, and conditions by an agreement with space charter authority should also be considered interstitial. *Id.* PONL suggests that an agreement that, for example, includes the authority for its members to enter into space charters, as well as other authorities, can enter into a space charter without any additional filings, as contemplated by 46 CFR 535.407(b). PONL asserts that little purpose would be served by requiring the public filing of agreements that involve interstitial implementation of express enabling authority contained in a filed and effective agreement. *Id.* at 8.

(b) The Commission posed the question, “if parties were required to file every arrangement or understanding that came within the scope of section 4, would they be subject to commercial harm or burden?” (NOI Question 2). Section 5(a) of the Shipping Act requires the filing of a “true copy of every agreement.” 46 U.S.C. app. § 1704(a). The Commission’s regulations currently require that the filed agreement be true, complete, detailed and specific. 46 CFR 535.103(g), 535.401(a)(1), 535.407(a). PONL, CENSA and OCWGA all assert that the Commission’s requirement that the “complete” agreement be filed cannot be interpreted literally. PONL asserts that a literal reading would create an internal conflict between the Shipping Act’s 45-day waiting period imposed on agreements before they become effective, and the fact that tariff rate reductions may become effective immediately. PONL at 7. Similarly, OCWGA believes that the 45-day waiting provision indicates that Congress did not intend to require every detail of coordinated carrier activity to be filed. OCWGA maintains that the Shipping Act’s use of the phrase “every agreement” should not be construed literally or else it would be impossible to file every detail of joint or group arrangements. OCWGA at 8, 19. OCWGA asserts that imposing such a requirement on service contracting agreements would subject them to an enormous and repetitive filing burden (because the service contracts themselves are filed) and, in the case of contracts with confidentiality clauses, might violate the terms of the service contract itself and the Shipping Act. *Id.* at 21. OCWGA believes that at some level of specificity, “agreements” cease to have any relevance to the Commission’s statutory duties. *Id.*

CENSA contends that the term “complete” is of little guidance to the industry. CENSA at 1. PONL objects to

the current regulation’s requirement that a “true and complete” agreement be filed, stating that the statutory requirement is only that a “true copy” of the agreement be filed. PONL at 2 (comparing section 5(a) of the Shipping Act with 46 CFR 535.407(a)). It notes that the Commission’s jurisdiction may not cover the “complete” agreement if, for example, it involves trade between foreign ports; and states that based on the Commission’s regulations, “complete” does not include “routine operational or administrative matters.” *Id.* at 2–3 (citing 46 CFR 535.407(c)).

PONL asserts that certain agreements, for example, cross space charters, vessel sharing, and alliance agreements, that are on their face subject to additional understandings have been accepted for filing and allowed to go into effect by the Commission. *Id.* at 3. It further asserts that, therefore, the Commission’s jurisdictional limitations, its current regulations, and its past practice of not objecting to the filing of agreements using permissive authority phrases indicate that the term “complete” does not literally mean complete. *Id.* at 4.

NITL urges that only those carrier agreements which are likely to have a significant impact on competition in a given market continue to require “complete” filing with the Commission. NITL at 4. NITL asserts that the Commission and the public need to have the ability to read and understand the scope and terms of agreements that are likely to result in a reduction in competition or otherwise artificially influence the supply of and demand for ocean transportation service. *Id.* at 3–4. NITL opines that detailed and complete information filed by the carrier parties to such agreements is required. However, NITL cautions that the requirement for the filing of a complete agreement should not be interpreted so as to restrict useful operational flexibility, particularly in non-conference type settings such as space/slot charter and sailing agreements. *Id.*

(c) The Commission asked whether it should adopt different standards for agreement content for different types of agreements. (NOI Question 3). OCWGA points out that the Commission already distinguishes between conference and other types of agreements in 46 CFR 535.404, but warns that developing further general standards for different types of agreements may create more confusion. OCWGA at 22. With respect to alliances and space/vessel sharing agreements, which do not easily fit into fixed categories however, OCWGA suggests that the Commission clarify the filing requirements through guidance stated in functional terms, as opposed to

<sup>4</sup> OCWGA’s position on operational agreements generally is discussed below.

<sup>5</sup> The terms “interstitial implementation” and “routine operational or administrative matters” are found in 46 CFR 535.407(c), which provides that:

[f]urther 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.