

the rules' current use of classification terms. *Id.* at 22. OCWGA suggests as an example, that the Commission's rules direct that each "agreement that provides for the sharing of vessels or space on vessels shall state the maximum number and capacity of vessels that may be so employed." *Id.*

NITL believes that the level of detail for filings related to agreements that would not significantly alter competitive conditions in a given market should be relaxed. NITL at 5. CENSA simply urges that the Commission avoid unnecessary and burdensome requirements and provide carriers with a reasonable amount of operational flexibility. CENSA at 2.

(d) The Commission asked whether commenters could identify types of agreements currently filed which would be appropriate for exemption from filing under section 16 of the Shipping Act.<sup>6</sup> (NOI Question 4). OCWGA, PONL and CENSA maintain that agreements with little or no competitive effect, agreements concerning operations, and slot charter agreements should all be exempt from the filing requirements of the Shipping Act. OCWGA asserts that agreements which typically have little or no competitive effect (such as those that do not authorize discussion or agreement on rates, vessel operating costs, shared vessel usage, service contracts, or capacity) should be completely exempt from the filing requirements of the Shipping Act. OCWGA at 23. OCWGA contends that this exemption would serve the dual purposes of defining the applicability of the term "cooperative working arrangement" found in section 4(a)(5) of the Shipping Act<sup>7</sup> and providing certainty regarding the filing requirements. *Id.* It urges the Commission to retain the other existing exemptions. *Id.*

NITL suggests that the Commission consider further exemptions for other types of agreements that do not significantly affect competition. NITL at

6. NITL approves of the existing exemption from filing for interstitial implementation of routine operational or administrative matters found in section 535.407(c). Where full exemption for a certain type of agreement is not warranted, NITL believes that the Commission should consider a relaxation of other procedural requirements, such as the waiting period requirement. *Id.*

OCWGA observes that in late 1996 and early 1997, Commission staff began informally requiring space charter, slot charter, sailing and other forms of cooperative agreements among carriers (collectively referred to as "slot charter agreements") to contain a greater degree of detail than had been required at any time since 1984. OCWGA at 4–5. OCWGA contends that there is now considerable uncertainty stemming from recent Commission proceedings as to what must be set forth in such agreements. *Id.*

PONL suggests that the Commission adopt an exemption for simple space charter agreements where one carrier charters space to another, stating that this enhances, not reduces competition. PONL at 9. OCWGA opines that most slot charter agreements "resemble a joint venture or partnership in which on-going and extensive operational coordination is necessary to provide an efficient, competitive, and coordinated service." OCWGA at 5–6. OCWGA urges that the Commission resolve this uncertainty in the proposed rules bearing in mind such things as the purpose of agreement filing, what information is practical to include, the procedural requirements of the Shipping Act, and flexibility for the Commission and carriers to process amendments to agreements. *Id.* at 6.

OCWGA contends that the Shipping Act's replacement of the "public interest" standard (which required an affirmative showing of public benefit before an agreement could be approved) with the presumption that agreements are permissible, changed the Commission's need for certain information. *Id.* at 7. OCWGA states that, therefore, the information necessary to analyze whether an agreement is likely to result in an unreasonable increase in rates or unreasonable reduction in services is identifiable and limited to the nature of the coordinated activities, the identity and number of parties involved, and the trades in which the agreement will operate. *Id.* Beyond these basic points of information, OCWGA contends, there is a dispute over what should be filed. *Id.* at 7–8.

OCWGA further contends that operational arrangements arising from slot charter agreements that detail how the parties put into effect the authority set forth in the filed agreement should be exempted from filing, arguing the documents are "non-standard" and not "created to fulfill a regulatory purpose." *Id.* at 17. OCWGA also opines that filing operational arrangements arising from slot charter agreements would be unworkable, because of their excessive specificity, and impractical, because including such details would require the frequent filing of amendments. *Id.*

(e) The Commission asked whether the rates charged by one carrier to another for use of space and/or vessels should be exempt from filing or withheld from public disclosure. (NOI Question 5). PONL and OCWGA contend that for the last 15 years there has been a *de facto* exemption to the Shipping Act's filing requirements for slot charter costs. PONL at 9; OCWGA at 24. PONL states that requiring the filing and subsequent public disclosure of that information would harm carriers because other carriers would insist on getting the same rates, and competing carriers and shippers could use the price information in any further pricing and rate negotiation. PONL at 9. PONL believes that there would be no regulatory benefit to requiring that such rates be made public. *Id.* Similarly, OCWGA believes that these rates should be confidential and that the public has no legitimate interest in them. OCWGA at 24. OCWGA also maintains that such disclosure would be anticompetitive because it would "circumscribe the ability of carriers to negotiate different rates with different carriers." *Id.*

CENSA also asserts that the "industry needs some degree of confidentiality with respect to the commercial terms of their operational agreements." CENSA at 2. It claims that requiring carriers to disclose the amounts they pay for vessel space "could prove to be anticompetitive and contrary to the objectives of OSRA." *Id.*

(f) The Commission requested comments on whether public disclosure of filed agreements is useful to shippers, intermediaries, labor, non-party carriers, marine terminal operators or other interested persons. (NOI Question 6). PONL and OCWGA state that beneficial shippers and ocean transportation intermediaries ("OTIs") have shown little interest in filed agreements. PONL at 10; OCWGA at 24. OCWGA opines that on the rare occasions that shippers or OTIs do express such interest they usually request the information directly from the carrier or from the agreement rather than from the Commission.

<sup>6</sup> Section 16 provides, *inter alia*, that the Commission "may exempt for the future any class of agreements \* \* \* if it finds that the exemption will not result in substantial reduction in competition or be detrimental to commerce." 46 U.S.C. app. § 1715.

<sup>7</sup> Section 4(a)(5) of the Shipping Act reads, "This Act applies to agreements by or among ocean common carriers to—(5) engage in exclusive, preferential, or cooperative working arrangements among themselves or with one or more marine terminal operators \* \* \*." 46 U.S.C. app. § 1703(a)(5). The Commission's regulations define a "cooperative working arrangement" as 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. 46 CFR 535.104(i).