

1. Proposed Changes To Address Concerns for Certainty

Section 5(a) of the Shipping Act requires that a true copy of every agreement entered into with respect to an activity described in section 4(a) or (b) of this Act shall be filed with the Commission, except agreements related to transportation to be performed within or between foreign countries and agreements among common carriers to establish, operate, or maintain a marine terminal in the United States. 46 U.S.C. app. § 1704.

Many commenters assert that it is simply not reasonable to require the filing of a true copy of every agreement because there are some details which cannot reasonably be expected to be specifically reflected, and also for the following reasons:

- Doing so would subject sensitive commercial information to disclosure, due to the notice requirement of section 6(a) of the Shipping Act;
 - The parties need more flexibility than the 45-day waiting period would provide;
 - There are details which have not yet been agreed upon when the agreement is filed;
 - Some details have no anticompetitive potential; and/or
 - The details are not reflected in standardized documents, so drafting them would be burdensome for the filer and reviewing them would be burdensome for the Commission.
- Therefore, they argue that the text of the Shipping Act cannot be interpreted to literally mean a copy of the commercial agreement.

The present text of the Commission's policy, stated at section 535.103(g), was originally added in rulemakings in 1984.⁹ It represented a codification of the Commission's then-existing policy. Early on in its administration of the Shipping Act, the Commission had received agreements with unacceptably vague, incomplete or indefinite statements of authority. *See*, Docket Nos. 84–26 and 84–32 (final rule). Therefore, the Commission created this rule to ensure that “a complete agreement is filed in sufficient detail to conduct a meaningful review.” *Id.*

Such review, based on the requirements of section 6 of the Shipping Act, includes: (1) A preliminary review of the section 5 requirements; (2) a review for section

6(g) compliance; and (3) a general review of the agreement to ensure that it does not facially contravene other sections of the Shipping Act (e.g., acts prohibited by section 10). Section 535.103(g) reflects the Commission's need for specificity in order that it may: (1) Evaluate the probable impact of an agreement; (2) conduct ongoing monitoring of agreement operations (especially for section 10(a)(2) and (3) prohibitions); and (3) avoid ambiguities concerning antitrust immunity granted to agreements.¹⁰

The policy presently stated at section 535.103(g) is carried out through section 535.407(a)¹¹ which requires an agreement to “reflect the full and complete present understanding of the parties as to its essential terms.” Docket No. 84–32, *Rules Governing Agreements by Ocean Common Carriers and Other Persons*, 49 FR 36371 (Interim Rule and Request for Comments) (“1984 Interim Agreement Rule”). The 1984 Interim Agreement Rule also described the reach of section 535.407(a) as follows:

The rule does not contemplate that every activity be enumerated in detail. However, general grants of authority which do not specify the activities under the agreement are not favored. For example, an agreement which, as its authority, merely recited the language of section 4(a)(1)–(7) of the Act would require some further clarification. Otherwise, review of such an agreement would be virtually meaningless. Such general statements of authority, even where clarified by subsequent refinement, should be avoided. *Id.* at 36372.

Some commenters claim that the industry does not have a clear understanding of the significance of the term “true and complete,” and argue that the phrase cannot be interpreted literally if it is read concurrently with the exemption allowing routine operational or administrative matters interstitial to a filed agreement without further filing. Some commenters also point out that matters which may be part of the commercial arrangement but which are outside the scope of the Commission's jurisdiction necessarily must not be included in the filed agreement.

The Commission's rules (as well as past Commission case law) are not more extensive than its jurisdiction: section

535.103(g) refers to an “agreement filed under the Act” and section 535.407(a) refers to “any agreement required to be filed by the Act.” These jurisdictional limitations, also discussed in *Transpacific Westbound Rate Agreement*, 951 F.2d 950 (9th Cir. 1991) (“TWRA”), provide boundaries to the information required in a filed agreement. Nevertheless, these concerns appear to be addressed to the limits of the Commission's subject matter jurisdiction over agreements, as opposed to the completeness with which matters within that jurisdiction must be reflected.

The Commission has consistently interpreted 46 U.S.C. app. § 1704(a) to require filed agreements to be complete, specific, detailed reflections of the present understanding of the parties. 46 CFR 535.103(g) and 535.407(a). The commenters point to no legislative history to demonstrate that the subject matter jurisdictional limitations of the Shipping Act indicate that its drafters did not intend the phrase “true copy” to be interpreted literally. A general definition of the term indicates “[a] true copy does not mean an absolute exact copy but means that the copy shall be so true that anybody can understand it.” *Black's Law Dictionary* (1995 ed.).¹² For oral agreements, the Shipping Act requires that “a complete memorandum specifying in detail the substance of the agreement” be filed. 46 U.S.C. app. § 1704(a). The Commission finds no indication that Congress intended the Commission to subject oral agreements to greater requirements than those which are written. Therefore, we disagree with the commenters' assertion that the text of the Shipping Act cannot be interpreted literally.

Nevertheless, we recognize that there may be some legitimate confusion as to what the Commission expects a filed agreement to contain. This confusion may have arisen from the Commission's historical usage of suggested language for form and manner, especially for filed agreements' “authority” clauses. We believe confusion may also arise when the policy reflected in sections 535.103(g) and 535.407(a) is read in tandem with the allowances of sections 535.407(b) and (c) for further agreements on certain routine matters. However, we find no precedent to support the proposition that the term “true and complete” means only those

⁹ 46 CFR 535.103(g) states:
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.

¹⁰ In Docket Nos. 84–26 and 84–32 (final rule), the Commission stated, “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 [Shipping] Act.” 49 FR at 45332.
¹¹ Section 535.407(a) provides:
(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.

¹² *See also*, *Associated-Banning Co. v. Matson Nav. Co.*, 5 F.M.B. 336, 342 (1957), interpreting the “true and complete” standard under the 1916 Act (“when parties file an agreement for approval they must include all understandings and arrangements of the character covered by section 15 which exist between them at the time.”)