

details which the Commission had positively required to be filed in its prior form and manner regulations.

For the sake of clarity, the Commission now proposes to remove current sections 535.103(g) and 535.407(a) and replace them with a newly created section 535.402 to serve as one concise and clearly controlling rule. The new section is intended to reassert the Commission's original interpretation requiring the filing of the commercial document as agreed to by the parties, in contrast to the filing of a document drafted solely to meet U.S. regulatory requirements.

2. Proposed Changes to Address Concerns for Future Commercial Flexibility

a. Requirement to File Every Agreement (46 CFR 535.402)

In promulgating what is now section 535.407(a), the Commission asserted that the statute and the new rule required that an agreement "reflect the * * * present understanding of the parties as to its essential terms."¹³ 1984 Interim Agreements Rule at 36372. Thus, the Shipping Act does not require or allow for the filing of proposed, draft or preliminary agreements. In addition, the Commission's rules positively prohibit clauses in agreements which contemplate a further agreement, sometimes called "agreements to agree." 46 CFR 535.407(b).¹⁴ Allowing vague authority clauses to be filed in agreements appears to conflict somewhat with the Commission's policy requiring that the agreement "set forth the specific authorities and conditions under which the parties to the agreement will conduct their present operations" (46 CFR 535.103(g)). However, forward-looking clauses have been permitted when there is an indication that any further contemplated agreements will not be carried out unless and until filed and effective under the Shipping Act. 46 CFR 407(b).

In order to address parties' needs to maintain future flexibility in agreements

describing their collaborative arrangements, the Commission generally has permitted the filing of agreements containing statements of authority which must be amended when the parties have reached the details of their agreement. The Commission has also crafted an exemption for certain day-to-day details, thereby removing the filing requirement for "interstitial implementation of routine operational and administrative matters." 46 CFR 535.407(c). However, the comments appear to suggest that this approach has proved unsatisfactory.

In suggesting that the statute be read broadly enough to accommodate the future needs of parties, the commenters use a term that appears neither in the Shipping Act nor in the Commission's regulations: "permissive authority." This term apparently refers to: (1) Authority that may never actually be exercised (e.g., "the parties may discuss rates" or "the parties are authorized to discuss rates"); (2) broad statements of authority (e.g., "the parties are authorized to exchange slots on such terms as they may from time to time agree"); or (3) an agreement to act "within a range," for example, of capacity or ports served. Such forward-looking statements frequently appear in filed agreements. Indeed, the Commission itself may have encouraged their use by referring in its rules to agreement "authority," a term that itself implies future implementing agreements.

Moreover, we recognize that parties may not wish to file details of their collaboration for at least two reasons. For example, this may be because: (1) agreement on the details has not yet been reached and the parties are still in negotiation, but wish to file and thereby commence the 45-day waiting period; or (2) the parties have reached a final and specific agreement, but anticipate changes to those understandings and wish to build flexibility into the document they file. No commenter has cited nor has the Commission found any legislative history of the Shipping Act which would support the suggestion that Congress intended that parties may file a "preliminary draft" of an agreement, which would commence the running of the 45-day review period. Therefore, the proposed regulations clarify that the Commission will not accept any such "preliminary draft" agreements.

This determination is reflected in the revised section 535.402, which retains the Commission's core interpretation of the Shipping Act's requirement that a "true copy of every agreement" be filed. The proposed rule also clarifies this by

rephrasing it as a positive requirement in section 535.402 rather than as a policy statement.

b. Modifications to Effective Agreements (46 CFR 535.407)

While the Commission interprets the Shipping Act to generally require that parties file their final, detailed agreement, rather than a general agreement to collaborate, the Commission has also historically recognized certain exceptions to that general standard. The first of these exceptions is explicit in the Shipping Act: section 4 necessarily contemplates certain agreements which cannot contain implementing details because they are by their very nature agreements to discuss future collaboration. These are the rate agreements authorized by section 4(a)(1), 4(a)(7) and 4(b)(1). 46 U.S.C. app. §§ 1703(a)(1), (a)(7), (b)(1).

We believe that the most logical interpretation of section 4 is that certain matters may not be discussed in detail unless and until the parties have a filed and effective agreement. Therefore, the parties cannot be required to file a detailed, complete or specific agreement for those types of agreements. We believe this view is supported by the Commission's historical treatment of conference and other rate-setting agreements in its rulemakings.

The use of authority that might (or might not) be exercised pursuant to a filed agreement but would not require further filings, was first recognized by the Commission in "suggested agreement language" published in Docket No. 67-55 (General Order 24), *Filing of Agreements Between Common Carriers of Freight by Water in the Foreign Commerce of the United States*, 33 FR 11655 (1968). Those rules were intended to "establish guidelines for the filing, format and content of agreements" to "encourage uniformity of agreements" and expedite their review by the Commission. 46 CFR 522.1 (1968). To that end, the regulations suggested language to be used by conference and rate agreements.¹⁵ Although the 1968 "guidelines" for agreements included some suggested language for agreements other than conference and rate agreements, the suggested terms did not include "authority" clauses.¹⁶

¹⁵ For conference agreements, the Commission's rules included the following suggested language:

¹⁶ Pooling, joint service, sailing, transshipment and cooperative working agreements did not include the "authority" provisions which were suggested for conference and rate agreements. 46 CFR 521.6(c)-(g)(1970).

Authority Under This Agreement

¹³ See also, *Isbrandtsen Co. v. States Marine*, 6 F.M.B. 422, 434 (1961) ("There is no filing requirement until there is an agreement or a meeting of minds * * * regarding activities described in Sec. 15."). The issue in this case concerned unacceptably vague authority statements in agreements that were being filed at the time.

¹⁴ This prohibition might appear to be inconsistent with the Shipping Act's specific provision for agreements "to discuss and agree on any matter related to service contracts." 46 U.S.C. app. § 1703(a)(7). However, we believe the statute provides consistent treatment by providing that any resulting agreement with respect to service contracts be reflected in confidentially filed "voluntary guidelines." 46 U.S.C. app. § 1704(c)(3).