

remains a required term in the Commission's rules,<sup>22</sup> geographic scope may be put forth in terms of ports or port ranges. This requirement has in the past provided adequate detail for Commission review purposes, while allowing changes in specific port calls or rotations to be made without filing a modification.<sup>23</sup> Therefore, OCWGA's concern that port calls cannot presently be changed on an emergency or "as-needed" basis without filing a modification of the agreement (entailing a 45-day waiting period) appears to be unfounded. Because the Commission's regulations currently provide that an agreement's scope may be defined in terms of port ranges, such a situation would only arise if the agreement were so specifically drafted as to contain each individual port. We agree that if within a port range, any changes would generally be acceptable with no need for further filing. We note OCWGA's assertion that the public generally is apprised of changes to port calls by the carriers themselves. While the Commission is sensitive to ILA's concern that allowing an agreement's specific port calls to be changed on an ad hoc basis may hamper its ability to anticipate where the cargo which its membership is entitled to handle will arrive or depart,<sup>24</sup> we believe that the current approach, reflected explicitly in the proposed exemption, is an adequate accommodation to the legitimate commercial needs of parties to agreements.

Third, OCWGA suggests that the Commission allow "permissive authority" to ensure flexibility as to how agreement parties would operate vis-a-vis another filed agreement. This appears to run afoul of NITL's concern that the public will not have adequate

notice of how an agreement will operate. Further, PONL's assertion that any implementation of such an agreement will be reflected in an agreement filing, does not take into consideration either an agreement that the parties participate only to a limited extent or in a particular concerted manner in another agreement. The Commission's ability to assess an agreement's potential impact on competition would be severely impaired if the relationship between facially "non-restrictive" agreements and other agreements which contain market or capacity restrictions were not revealed. The Commission therefore declines to adopt such an interpretation.

Fourth, the OCWGA recommends that the Commission allow agreements to implement "operational" agreements contemplated in, and pursuant to, authority within filed agreements without further filing. We note that NITL expresses no objections to permissive authority in agreements for "purely operational matters which are not likely to have impact on competition." The proposed language attempts to address these concerns, without creating an exemption so broad as to render other provisions of the regulations meaningless, by an exemption for terms and conditions of space allocation and slot sales, the establishment of space charter rates, and terms and conditions of charter parties, if contemplated by a filed agreement.

While we see nothing contradictory between the Commission's current rules requiring true, complete, and detailed agreements to be filed and those providing exemptions from filing certain agreements, the comments indicate that this position should be clarified. The Commission, therefore, proposes to revise sections 535.407(b) and sections 535.407(c). New section 535.408 provides that an agreement reached pursuant to general authority in a filed agreement is not considered part of the filed agreement unless it provides for one or more of the "technical or operational matters" specifically listed or is otherwise exempt from filing under the rules.

#### c. Exemptions

Subpart C of part 535 of the Commission's current rules contains exemptions (either partial or full) from the filing requirements of the Shipping Act for several types of agreements and modifications to agreements.<sup>25</sup> The

commenters suggest further vague categories of agreements the Commission might exempt from filing, such as: (a) Agreements that have little or no competitive effect (but do not suggest what those may be); (b) agreements for routine operations (be exempt or have a reduced waiting period for effectiveness); and (c) slot charter arrangements (be fully exempt from filing). The Commission has the authority and discretion to grant exemptions from all requirements, or to grant exemptions limited to one or more of the specific filing, notice, and waiting requirements of the Shipping Act and its regulations, consistent with the policies of Congress.<sup>26</sup> 46 U.S.C. app. § 1715. The Commission proposes one new exemption and several changes to existing exemptions, as discussed below.

#### i. Low Market Share Exemption and Definition of Capacity Rationalization (proposed §§ 535.311, 535.104(e))

The Shipping Act's general scheme is to enable filers to obtain immunity from prosecution for commercial collaborations that might otherwise be violative of the antitrust laws, in return for oversight of these collaborations by the Commission. 46 U.S.C. app. § 1706. If not filed with the Commission, in addition to being a violation of the Shipping Act itself, collaborations restraining competition are otherwise subject to the antitrust laws and the scrutiny of the agencies which administer those laws.

The Commission believes that exemption from the Shipping Act's waiting period requirement of certain types of agreements that fall under a market share threshold (or "safety zone") may fall within the criteria of section 16 and be a reasonable way to meet the purposes of the Shipping Act by reducing the regulatory burdens on the industry. This approach also appears consistent with current

(exempt from notice and waiting requirements); husbanding agreements (fully exempt from filing requirements); agency agreements (limited exemption from filing requirements); equipment interchange agreements (fully exempt from filing requirements); non-exclusive transshipment agreements (limited exemption from filing requirements); marine terminal agreements (exempt from waiting requirements); agreements between or among wholly-owned subsidiaries and/or their parent (fully exempt from filing requirements); miscellaneous modifications to agreements (if filed for informational purposes, exempt from notice and waiting); marine terminal service agreements (limited exemption from filing and waiting requirements, but no antitrust immunity unless the agreement is filed); and marine terminal facilities agreements (exempt from filing and waiting requirements). 46 CFR 535.302–311.

<sup>26</sup> S. Rep. No. 61, 105th Cong., 1st Sess. 30 (1997) ("Senate Report").

<sup>22</sup> Section 535.403(b) requires, in pertinent part, that the parties "[s]tate the ports or port ranges to which the agreement applies and any inland points or areas to which it also applies with respect to the collective activities contemplated and authorized in the agreement."

<sup>23</sup> The Commission is apprised of parties' past service levels and initial changes resulting from an agreement through the concurrently-filed Information Form. 46 CFR part 535 App. A (Information Form, parts V, VI, and VIII). Thereafter, changes to the port calls which expand the overall geographic scope of the agreement must be indicated by the filing of a modification and in some cases an accompanying Information Form. 46 CFR 535.503(b). The Commission does not require such a filing for changes to port calls which effectively reduce the scope of an agreement.

<sup>24</sup> It appears that ILA may have confused Shipping Act agreements (a term of art in Shipping Act context) with "agreements" used as a general term, and that their comments may more appropriately address issues which arise in a "service contract" context. It is unclear to which "electronic systems" ILA's comments refer—perhaps it is to the carriers' electronic container tracking systems or to electronic tariff publications.

<sup>25</sup> The Commission's current regulations contain various exemptions for the following types of agreements: non-substantive agreements and non-substantive modifications to existing agreements