

establishment of voluntary service contract guidelines” would be required to file minutes of meetings with the Commission. We believe this approach more efficiently captures the true nature of agreements’ activities.

## 2. Definition of Meeting

Section 535.706(a) currently defines the term “meetings” as including “any meeting of the parties to the agreement, including meetings of their agents, principals, owners, committees or sub-committees of the parties authorized to take final action on behalf of the parties.” Section 535.706(b) requires certain specified agreements to file “a report of each meeting \* \* \* describing all matters within the scope of the agreement which are discussed or considered at any such meeting \* \* \* and shall indicate the action taken.”

The Commission’s review of agreement minutes, discussions with filing counsel and agreement representatives, and recent fact findings and other investigative proceedings, all indicate that the current definition of “meeting” is ambiguous and causes confusion over which meetings or discussions held under an agreement are subject to the requirement to file minutes with the Commission. Further, differing interpretations of the regulations have resulted in minutes of meetings not being filed when such meetings covered substantive issues. Questions have arisen over whether the minutes filing requirement is based on the level of authority of the participants at a given meeting (*i.e.*, carrier representatives, committees, and subcommittees authorized to take final action on behalf of their respective lines or on behalf of the agreement, even if the discussions did not result in “final” decisions), or on whether “final action” was taken. Moreover, numerous documents obtained in Commission proceedings indicate that the Commission has not received minutes for communications for which we believe the regulations contemplate the filing of minutes.

Market-oriented regulatory reforms under the Shipping Act, and more recently under OSRA, especially those focused on liberalizing service contracting, encourage carriers to act more independently within discussion agreements, yet also challenge carriers to find effective ways to communicate and share information. Today, the Internet and agreement-administered email systems allow carriers to collect and share unlimited information on a more frequent and timely basis. Some agreements have comprehensive communications networks and

procedures to ensure and support transparency through the flow of information among carrier members and the agreement secretariat. As a result, major discussions are being conducted under circumstances that may not be viewed as a meeting.

Agreements structure their organizations in varied ways and utilize many methods for decision-making. Many conduct their business under multiple committees and sub-committees and file minutes of meetings held under some of those groups. Other agreements have a more streamlined structure and file few, if any, minutes for committees or sub-committees, even if major policy discussions are conducted at these levels. As a consequence, time-consuming staff follow-up with agreement representatives is often necessary to gain a clear understanding of the origins of and issues behind those discussions that are reported.

In order to address these issues, the Commission proposes to revise the current definition of meeting at redesignated subsection 535.704(b) to include “all discussions at which any agreement is reached among any number of parties to the agreement relating to the business of the agreement; and all other discussions among three or more members of the agreement (or all members if fewer than three) relating to the business of the agreement.” Further, the rule would specify that this definition is intended to encompass meetings of the members’ agents, principals, owners, officers, employees, representatives, committees or subcommittees. Thus, agreements authorized to engage in certain enumerated activities would be required to file minutes of all discussions among any number of members relating to the business of the agreement when an agreement is reached, and all discussions between three or more members relating to the business of the agreement regardless of whether an agreement is reached. Agreements with less than three members would submit minutes on all discussions relating to the business of the agreement. The proposal would also encompass discussions held via electronic means, and through agreement secretariats. The Commission considered eliminating completely the final action provision and proposing that minutes of all discussions among any number of members be filed. However, we believe that minutes of discussions between three or more members, whether or not agreement is reached, should provide the necessary coverage and details of relevant meetings enabling the

Commission to obtain a clear picture of the activities of the agreement.<sup>55</sup> Further, it is not the intent of the Commission to require the filing of minutes for such discussions as two-party electronic communications. Requiring the filing of minutes for discussions of this nature would put an undue burden on the industry and appears to be unnecessary.

We propose to retain the present waiver provision, currently at 46 CFR 535.709 (redesignated as § 535.705). Under that provision, a waiver from the minutes filing requirement may be granted in advance upon a showing of good cause.

## 3. Content of Minutes

The Commission’s current rules governing the content of minutes, at 46 CFR 535.706(b), provide that specified agreements shall file with the Commission “a report of each meeting \* \* \* describing all matters within the scope of the agreement which are discussed or considered at any such meeting \* \* \* and shall indicate the action taken.” The rules do not, however, specify the degree of detail such reports are expected to contain. As a result, the minutes currently being filed under this provision vary considerably in detail and scope. We are particularly concerned about the filing of vague and obscure minutes by some agreements. As a consequence, the minutes being filed by some agreements are not useful in assisting the Commission in its oversight of activities taking place under the authority of the filed agreement.

To that end, we are proposing to amend the minutes regulation, at redesignated subsection 535.704(c), to require that descriptions of agreement meetings be “detailed enough that a non-participant reading the minutes could reasonably gain a clear understanding of the nature and extent of the discussions, and where applicable any decisions reached \* \* \*.” We believe that this proposal more clearly enunciates our intention that the parties who are granted limited antitrust immunity to operate in concert under filed agreements must provide a sufficient degree of detail of the discussions permitted under these agreements. Further, we seek to make clear that full disclosure is required, and any efforts to obscure the true nature of discussions or actions taken is prohibited.

The Commission’s current rules, at 46 CFR 535.707, require agreements subject

<sup>55</sup> The term “final action” has been eliminated. See discussion, *infra*.