TABLE 8 TO SUBPART PPP.—ROUTINE REPORTS REQUIRED BY THIS SUBPART

<table>
<thead>
<tr>
<th>Reference</th>
<th>Description of report</th>
<th>Due date</th>
</tr>
</thead>
<tbody>
<tr>
<td>§63.1439(b) and subpart A of this part</td>
<td>Refer to §63.1439(b), Table 1 of this subpart, and to subpart A of this part.</td>
<td>Refer to subpart A of this part.</td>
</tr>
<tr>
<td>§63.1439(e)(3)</td>
<td>Initial notification</td>
<td>New affected sources w/ initial start-up at least 90 days after June 1, 1999: submit the application for approval of construction or reconstruction in lieu of the initial notification report.</td>
</tr>
<tr>
<td>§63.1439(e)(4)</td>
<td>Precompliance Report</td>
<td>New affected sources w/ initial start-up prior to 90 days after June 1, 1999: by 90 days after June 1, 1999.</td>
</tr>
<tr>
<td>§63.1439(e)(5)</td>
<td>Notification of Compliance Status</td>
<td>Existing affected sources: 12 months prior to compliance date.</td>
</tr>
<tr>
<td>§63.1439(e)(6)</td>
<td>Periodic Reports</td>
<td>New affected sources: with the application for approval of construction or reconstruction.</td>
</tr>
<tr>
<td>§63.1439(e)(6)(iii)</td>
<td>Quarterly reports for sources with excursions (upon request of the Administrator)</td>
<td>Within 150 days after the compliance date.</td>
</tr>
<tr>
<td>§63.506(e)(7)(i)</td>
<td>Storage Vessels Notification of Inspection</td>
<td>Semiannually, no later than 60 days after the end of each 6-month period. See §63.1439(e)(6)(i) for the due date for this report.</td>
</tr>
<tr>
<td>§63.1439(b) and subpart A of this part</td>
<td>Refer to §63.1439(b), Table 1 of this subpart, and to subpart A of this part.</td>
<td>No later than 60 days after the end of each quarter.</td>
</tr>
<tr>
<td>§63.1439(e)(6)(i) for the due date for this report</td>
<td>No later than 60 days after the end of each quarter.</td>
<td>At least 30 days prior to the refilling of each storage vessel or the inspection of each storage vessel.</td>
</tr>
</tbody>
</table>

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BILLING CODE 6560–50–P

FEDERAL MARITIME COMMISSION
46 CFR Parts 515, 520, 530 and 535
[Docket No. 99–10]

Ocean Common Carriers Subject to the Shipping Act of 1984
AGENCY: Federal Maritime Commission.
ACTION: Final rule.

SUMMARY: The Federal Maritime Commission is amending its regulations implementing the Shipping Act of 1984 to clarify the definition of “ocean common carrier” to reflect the Commission’s interpretation of the term. As a result, only common carriers that operate vessels in at least one United States trade will be subject to these rules.

DATES: This rule becomes effective August 7, 2000.


SUPPLEMENTARY INFORMATION:

Background

The Federal Maritime Commission initiated this proceeding by Notice of Proposed Rule (“NPR”) published in the Federal Register on June 25, 1999. 64 FR 34183. The NPR noted that the Commission was proposing to amend several of its regulations to clarify the definition of “ocean common carrier” contained in section 3(16) of the Shipping Act of 1984 (“Shipping Act”), 46 U.S.C. app. § 1702(16), as amended by the Ocean Shipping Reform Act of 1998 (“OSRA”), P.L. 105–258, 112 Stat. 1902, to reflect the Commission’s then-inter pretation of that term. In essence, the proposed rule defined “ocean common carrier” to include only common carriers that operate vessels serving ports in at least one United States trade.

The NPR solicited comment on the proposed rule from the public, and the Commission received comments from: (1) The Ocean Carrier Working Group (“OCWG”); (2) Maersk, Inc.; (3) Samskip Hf (“Samskip”); (4) the Council of European & Japanese National Shipowners’ Associations (“CENSA”); (5) the Calcutta, East Coast of India and Bangladesh Conference and Waterman Steamship Corporation (“India Carriers”); (6) the National Industrial Transportation League (“NITL”); (7) the American International Freight Association & Transportation Intermediaries Association (“AIFA/ TIA”); and (8) Ocean World Lines, Inc. (“OWL”).

The NPR

The NPR noted that the Commission had previously proposed a new definition for the term “ocean common carrier” in the context of the rulemaking governing agreements which was undertaken to implement OSRA. Docket No. 98–26, Ocean Common Carrier and Marine Terminal Operator Agreements Subject to the Shipping Act of 1984, 64 FR 11236, March 8, 1999. However, the Commission received only two comments on that particular proposal and subsequently decided to provide the public an additional opportunity to comment through this proceeding. The NPR then stated that the heart of the matter was how to distinguish between ocean common carriers (“OCCs”) and non-vessel-operating common carriers (“NVOCCs”). The distinction is significant under the Shipping Act because only OCCs can enter into and file agreements with the Commission and receive antitrust immunity therefor. In addition, only OCCs can offer service contracts to shippers, although NVOCCs can enter into service contracts as shippers.

The NPR conceded that at first glance the defining of an OCC as a “vessel operator” does not appear to be ambiguous. However, the Commission stated that its staff has encountered...
The OCWG submits that the proposed rule would require members of vessel sharing agreements (“VSAs”) to deploy vessels in the U.S. solely to meet regulatory requirements, something the Commission has indicated it wishes to avoid, citing the NPR at 5. The OCWG asserts that various types of VSAs have grown significantly, and offer more efficient and frequent service at lower cost. It contends that it is possible, for a variety of operational factors, that the parties may decide that all of the vessels of a member be deployed in non-U.S. trades and it will only serve the U.S. via the vessels of its fellow members. The OCWG concludes that such a carrier would not be considered an OCC and would have to withdraw from the U.S. portion of the agreement or restructure its service.

The OCWG therefore suggests a modified definition. It would allegedly preserve the ability of VSAs to function efficiently, while at the same time maintaining a distinction between carriers that commit assets to a service in U.S. trades and those that do not. Next, the OCWG argues that the proposed definition should not change the applicable law regarding transshipment agreements. It contends that for over 50 years the Commission has held that a person may be an OCC, within the meaning of the Shipping Act and its predecessor legislation, without having a vessel call directly at a U.S. port, citing Restrictions on Transshipment at Canal Zone, 2 U.S.M.C. 675 (1943). It notes further that Congress used the term “vessel operator” be one whose vessels call at U.S. ports and all other common carriers should be classified as NVOCs.

The NPR further stated that if the definition of OCC included carriers that operate vessels only in foreign-to-foreign trades it would expand the scope of antitrust immunity and also remove certain carriers from NVOC financial responsibility requirements in U.S. trades even though they have no vessels or assets in the U.S. Lastly, the NPR concluded, based on principles of statutory construction, that when Congress used the term “vessel” in the definition of OCC, it likely was referring to those vessels specified in the definition of “common carrier,” i.e., those that operate on the high seas between the U.S. and a foreign country.

Comments on Proposed Rule

A. OCWG

The OCWG agrees with the Commission that the distinction between OCCs and NVOCs is significant. It also supports continuation of the Commission’s past practice that a common carrier that operates a vessel in one U.S. trade is an OCC for all U.S. trades. It contends that this practice is consistent with the Shipping Act and, as a practical matter, has worked well in the past, presenting no problems.

The OCWG further notes that these carriers would be subject to tariff publication and other regulatory requirements of the Shipping Act and would maintain the distinction between carriers that commit assets to a service to or from the U.S. and those that do not. Lastly, the OCWG argues that the proposed approach would have the effect of removing all transshipment agreements from the scope of the Commission’s jurisdiction and require the Commission to repeal 46 C.F.R. § 535.306.

B. Maersk

Maersk observes that the Commission’s proposed definition would exclude feeder operators providing foreign-to-foreign transportation from the definition of OCC. It suggests that the final rule should accommodate such activity. In addition, Maersk believes that a carrier signatory to a vessel sharing agreement (“VSA”) should be considered an OCC when another carrier participating in the agreement contributes ships making U.S. port calls.

C. Samskip

Samskip, a self-defined vessel-operating common carrier, argues that the proposed rule overturns Commission precedent that carriers providing a portion of vessel service to or from the U.S. qualify as OCCs even though their vessels do not actually call at U.S. ports. It suggests, therefore, that the supplemental information to the final rule state that a common carrier which offers a through bill of lading and operates a vessel on which part of the service is provided is an OCC, even if the vessels it operates do not call directly at a U.S. port. Lastly, Samskip urges the Commission to adopt a definition of OCC that provides that a common carrier that becomes an OCC by virtue of carriage in a transshipment situation should be considered an OCC for purposes of entering into slot chartering and vessel space sharing agreements with other OCCs.

D. CENSA

CENSA supports that portion of the proposed rule that states that a carrier operating a vessel in one U.S. trade is an OCC for all U.S. trades. However, CENSA believes that the requirement that a carrier must have at least one vessel calling at a U.S. port may exclude two categories of carriers—those involved in VSAs and transshipment arrangements.

CENSA contends that most OCCs are parties to one or more forms of VSAs—space charters, slot charters, and alliances—many of which are global in...
The Shipping Act—contradicts the definition of NVOCC in NVOCC, if the vessels did not call at
proposed rule would classify a carrier
E. India Carriers
OSRA.
definition of “common carrier” in
Congress is presumed to have been
overrule this precedent and that
suggests that there is no need to
qualify as OCCs even though their
of vessel service to or from the U.S.
holds that carriers that provide a portion
including that they publish tariffs. They
administer the law in a manner that
objective of OSRA, particularly section
OWL thus suggests a bifurcated
public as an OCC in the trade lanes.

F. NITL
NITL supports the interpretation that
a carrier that operates a vessel in a
single trade is an OCC in all trades. It
maintains that the plain language of the
statute does not require a trade-by-trade
analysis and to do so would lead to inefficiencies. NITL is concerned,
however, about the exclusion of carriers
that do not offer direct port calls but
instead offer indirect ocean
transportation by way of VSAs or
similar arrangements.

NITL asserts that the proposed
definition is narrower than the statutory
definition, which simply defines an
OCC as a “vessel-operating common
carrier” and does not restrict the trade
lanes in which the vessel can operate.
NITL contends that there is no support
for the Commission’s assertion that the
“vessel” in the definition of OCC was
likely the vessels specified in the
definition of “common carrier.” NITL
further states that under that definition
a common carrier does not need to
operate a vessel; it must merely
“utilize” a vessel in U.S. trades for part
or all of the transportation. It concludes
that the “other part” of the
transportation can be wholly outside the
U.S., i.e., foreign-to-foreign. It further
concludes that the plain language of the
statute, unchanged by the passage of
OSRA, does not restrict the provision of
OCC service to only those carriers that
make direct calls at U.S. ports.

NITL also finds the proposed
definition inconsistent with the policy
objective of OSRA, particularly section
2(4), which requires the FMC to
administer the law in a manner that
promotes competitive and efficient
ocean transportation services and relies
to a greater extent on the marketplace.
It notes that carriers may decide that the
U.S. market is more efficiently and
economically served through a VSA and
claims that the Commission’s narrow
definition of OCC would prevent some
NVOCCs from offering such services to
shippers through service contracts.

Ultimately, NITL believes the FMC
should maintain the existing statutory
definition of OCC in its regulations and
should broadly construe it. It contends
that there is nothing in the Shipping Act
or OSRA that indicates that Congress
intended a more narrow definition.

G. AIFA/TIA
AIFA/TIA supports the proposed
definition as providing necessary, clear,
and precise guidance to the ocean
transportation industry. It notes that the
definition of “common carrier” in
section 3(6) of the Shipping Act refers
to a person who provides transportation
by water and utilizes a vessel for all or
part of that transportation, and that an
OCC is defined simply as “a vessel-
operating common carrier.” AIFA/TIA
submits that the Commission should put
two of these definitions together and issue
a statement that an entity that otherwise
meets the definition of common carrier
and operates a single vessel on a single
route between a single U.S. port and a
single foreign port, over either the high
seas or the Great Lakes, must be treated
as an OCC for all of its operations in
U.S. trades. This interpretation would
allegedly extend the status of OCC to the
largest possible universe of operators.

AIFA/TIA also does not object to
proposals that carriers involved in
nonexclusive transportation agreements
also should be accorded OCC status
even if they have no operations directly
between a U.S. and foreign port.

H. OWL
OWL, one of the largest NVOCCs in
the world, proposes a significant change
in the traditional carrier/shipper
relationship between VOCC and
NVOCC. Instead of obtaining space from
a vessel owner by a service contract,
OWL presents a scenario in which an
NVOCC would obtain space via a slot
charter with a VOCC. Under such
circumstances, OWL argues that the
NVOCC would no longer be a shipper,
vis-a-vis the VOCC, and would instead
be a co-venturer, who should likewise
be permitted to hold itself out to the
public as an OCC in the trade lanes.

OWL thus suggests a bifurcated
approach to the definition of OCC: (1)
The Commission’s multi-trade approach
for vessel operators in one or more trade
lanes; and (2) a trade-by-trade approach
for NVOCCs slot chartering with
VOCCs.

OWL’s proposal is premised on the
assumption that a slot charter between
a VOCC and an NVOCC provides the
NVOCC with sufficient operational
interest or nexus in the voyages to
warrant classification as an OCC in that
trade. If the Commission decides
otherwise, then OWL asserts that the
Commission should not allow a VOCC
in one trade to become a VOCC in
another by virtue of a slot charter. At the
very least, OWL submits that the FMC
should set out guidelines similar to
those recently adopted by the U.S.
Customs Service (“Customs”) which
require a slot or time-chartering
common carrier to have significant
responsibility or involvement in the
actual operation of the vessels before
being considered a VOCC.
OWL concedes that slot charters would be inherently risky for NVOCCs, but it is willing to face those risks in order to be able to offer service guarantees (i.e., service contracts) to its underlying shipper clients. It contends further that the enhanced competition of new entrants would outweigh any possible adverse impact of possibly broadening the scope of antitrust immunity. OWL also believes that the Commission’s concerns about its and shippers’ ability to arrest or attach a vessel are unfounded. It suggests that the best way to protect shippers is by requiring adequate insurance or a surety bond, such as it already possesses.

OWL contends that there is no statute, code or policy that would prohibit it from obtaining space on vessels by means of space charters, and the fact that such space charters are not within the scope of the Shipping Act does not mean they are prohibited. In this regard, OWL references a decision of the European Commission (‘EC’) relating to the Trans-Atlantic Conference Agreement (‘TACA’). Commission Decision of 16 September 1998 Relating to a Proceeding Pursuant to Articles 85 and 86 of the EC Treaty. (Case No. I/35.134) (‘EC Decision’). That decision discussed two types of NVOCCs—(1) those that operate vessels in another trade, and (2) those that do not operate vessels anywhere. The EC stated that neither type competes with VOCCs in terms of quality of service, but the first is able to compete on price. OWL further asserts that the EC Decision recognizes three types of common carriers: (1) A VOCC in the trade; (2) VOCCs in another trade; and (3) NVOCCs. It submits that the critical distinction is not that the second owns vessel in another trade, but that it has the ability to compete with VOCCs on price through its space charter arrangements. OWL seeks this ability to compete on price by means of space charters and be deemed an OCC.

OWL further contends that the term “vessel operator” is growing increasingly ambiguous in light of vessel sharing and consortia agreements. It submits that the Commission has not faced the difficult question of what degree of involvement is required to be considered a vessel operator and has instead taken a rudimentary approach of defining a VOCC as a common carrier that operates a vessel somewhere in the U.S.

OWL notes that Customs has struggled with the definition of VOCC for the past 25 years in the context of the Sixth Report to the Jones Act, 46 U.S.C. app. 883, that exempts coastwise movements of empty containers owned or leased by the “owner or operator” of a vessel transport those containers for its own use in the foreign commerce of the U.S. In this regard, Customs has issued several rulings dealing with carriers involved in slot charter agreements. In 1977, Customs purportedly issued a ruling holding that a time charterer was not a vessel operator and, in 1983, expanded this position to slot charterers. In that case, Customs allegedly looked at one trade lane without reference to status in other lanes. In 1999, Customs reviewed a joint service agreement between Italian Line and d’Amico Line. It determined that both were VOCCs because they shared operational control under the agreement.

The Final Rule
General Discussion

For the reasons set forth below, and in full consideration of all of the comments, the Commission has decided to adopt the proposed rule as the final rule. As a result, the term “ocean common carrier” will include only those common carriers who actually operate a vessel in at least one United States trade. In addition, if a common carrier is an ocean common carrier in one U.S. trade, it can act as an ocean common carrier in all U.S. trades. This decision is fully supported by a straightforward reading of the relevant definitions contained in the Shipping Act. Section 3(16) of the Shipping Act defines an “ocean common carrier” as “a vessel-operating common carrier.” And, section 3(6) of the Shipping Act defines a “common carrier”, in part, as: * * * a person holding itself out to the public as having the legal right or the power to transport goods; (B) utilizes, for all or part of that transportation, a vessel operating on the high seas or the Great Lakes between a port in the United States and a port in a foreign country. * * *

When these two definitions are read together, it is logical to conclude that the vessels operated by an ocean common carrier are those referenced in the common carrier definition, i.e., those “operating on the high seas or the Great Lakes between a port in the United States and a port in a foreign country.” The Commission recognizes that the definition of common carrier refers to one who “utilizes, for all or part of that transportation” a vessel operating between the U.S. and a foreign country. Congress used the word “utilize” so that the definition of common carrier could encompass both ocean common carriers and NVOCCs; the very definition of ocean common carrier as “vessel-operating common carrier” indicates that Congress intended ocean common carriers actually to operate, not merely utilize, vessels. The reference to “all or a part of the transportation” simply reflects the fact that a common carrier can offer port-to-port transportation or point-to-point through transportation, using inland carriers for the latter.

The final rule is also consistent with Congress’ intent to delineate between ocean common carriers and NVOCCs. In adopting the Shipping Act, Congress clearly wanted to distinguish between those common carriers that operate vessels and those that do not. The former are ocean common carriers and the latter are NVOCCs. As the House Committee on Merchant Marine and Fisheries noted with respect to H.R. 1878:

The Shipping Act does not contain a definition of “non-vessel-operating common carrier.” One is added to this bill so that the distinction may be made between those carriers that operate vessels and those that do not. Both types are included in the term “common carrier.”

The term “ocean common carrier” is based on the definition of “common carrier by water in foreign commerce” in section 1 of the Shipping Act with the added provision that the carrier must operate the vessel providing the transportation by water.


As noted in the preamble to the NPR, Congress viewed vessel operators as those whose vessels call at U.S. ports and classified all other common carriers in U.S. commerce as non-vessel-operating common carriers. For example, in its report on the Shipping Act, the Senate Commerce, Science, and Transportation Committee observed:
The Committee strongly believes that it is in our national interest to permit cooperation among carriers serving our foreign trades to permit efficient and reliable service. * * * Our carriers need; a stable, predictable, and profitable trade with a rate of return that warrants reinvestment and a commitment to serve the trade; greater security in investment. * * *

Senate Report at 9. We continue to believe that Congress intended to provide antitrust immunity and other special privileges and protections only to those carriers that have made the financial commitment to provide vessel service in United States trades.

The importance of the distinction between OCC and NVOCC was noted in the preamble to the proposed rule: an OCC can be a party to agreements filed with the Commission and receive antitrust immunity therefor, and can enter into service contracts with shippers. An NVOCC can do neither. Moreover, NVOCCs are subject to a financial responsibility requirement, with foreign NVOCCs subject to higher amounts under the scale promulgated by Commission regulation. Thus, there is ample incentive for NVOCCs to characterize themselves as OCCs, and this could inure to the detriment of their shipper customers who would otherwise have been protected by an NVOCC's financial responsibility.

The Commission continues to be concerned about the effect of the definition of ocean common carrier on the scope of antitrust immunity envisioned by Congress under the Shipping Act. If the definition of OCC somehow included carriers that operated vessels only in foreign-to-foreign trades, this could substantially expand the scope of antitrust immunity beyond that contemplated by Congress. In this regard, we note the longstanding judicial policy of narrowly construing antitrust exemptions. See, Federal Maritime Commission v. Seatrain Lines, Inc., 411 U.S. 726, 733 (1973).

Vessel Sharing Arrangements

Several of the commenters (Maersk, CENSA, OCGW, India Carriers and NITL) suggest that the definition of OCC should be extended to include shipping lines who are parties to VSAs serving U.S. ports but who themselves do not call at U.S. ports. While the term VSA is undefined by the commenters, they suggest it is virtually any cooperative arrangement among OCCs. These commenters note that VSAs have grown over the years and are likely to continue to grow. These arrangements often permit carriers to offer more efficient and frequent service to the shipping public and at a lower cost. The OCGW further contends that a variety of operational and other factors will dictate how a member of a VSA will deploy its vessels in non-U.S. trades and that such a carrier may choose to serve U.S. trades solely with vessel space obtained on its partners' ships.

Some commenters suggest that the proposed definition could discourage the formation of VSAs or prevent the parties from maximizing the benefits of such cooperation by redeploying vessels out of U.S. trades. Maersk, CENSA and the OCGW thus propose an exception to the proposed definition for a vessel operating common carrier that contributes vessels to a VSA that serves the U.S. NITL likewise believes that VSAs should be encouraged, but suggests that this could be accomplished simply by maintaining the existing statutory definition and by broadly construing it. Lastly, OWL argues that if the Commission does not adopt its proposal concerning NVOCC space chartering, then parties to VSAs should be considered OCCs only if they have significant responsibility or involvement in the actual day-to-day operations of the vessels.

While the intended benefit of the exception urged by some of the commenters is to facilitate formation and operation of efficient VSAs, there are several problems with this approach. First, it appears to address a mostly theoretical concern. Commenters do not identify, nor is the Commission aware of, any instances where entities are planning to operate major VSAs with parties who are not in the U.S. trades, or where current, vessel-operating members of VSAs are contemplating withdrawing vessel service from U.S. trades and proposing to serve the U.S. only through space-sharing arrangements with fellow VSA members. In addition, this type of arrangement would expand the reach of antitrust immunity well beyond that envisioned by Congress when it recently passed OSRA. Since 1994, the only carriers that could enter into agreements subject to the Act and receive antitrust immunity were “ocean common carriers.” The inclusion of VSA participants in the OCC definition would effectively confer antitrust immunity to carriers who do not make a commitment to serve the U.S. trades by operating their own vessels.

In addition to these very serious policy-based concerns, the carriers’ proposal raises other technical or legal problems, and may generate further confusion or ambiguity. Since the term VSA is undefined, it seems to include an almost unlimited range of carrier relationships, the proposed exemption would appear to encompass a broad and indefinite class of foreign companies. Also, it refers to a vessel sharing agreement that “operates” vessels. However, VSAs do not collectively operate vessels—their individual carrier members do so. Moreover, if the members are subject to an arrangement that covers more than the U.S. trades, those non-U.S. portions of the arrangement would not be in the VSA and filed with the Commission. The Commission could be left unable to determine the full extent of any such arrangement or ascertain whether the carrier involved is a vessel operator in some non-U.S. trade, and not an NVOCC or some other entity unlawfully seeking VCC status. Lastly, this proposal provides no protection to the shipping public who might use the services of such a carrier in its U.S. service. The carrier would have no attachable assets in the U.S. and might not have an agent for service of process in the U.S. to receive the claims of injured parties. This too would appear to contravene OSRA’s general objective of providing more, not fewer, protections to U.S. interests utilizing foreign entities, as reflected in the strengthened ocean transportation intermediary (“OTT”) and controlled carrier provisions, for example.

For the reasons stated above, the Commission is not adopting the carrier proposal concerning VSAs. This does not mean that a VSA member without ships calling at a U.S. port would be precluded from offering a common carriage service to the U.S. However, it would simply have to offer its service as an NVOCC. It could then enter into service contracts with OCCs but could not offer its own service contracts or fix rates with other vessel operators in a trade.

The Commission is fully cognizant of the new policy objective added to the Shipping Act by OSRA—i.e., promoting the growth and development of United States exports through competitive and efficient ocean transportation and by placing a greater reliance on the marketplace. The Commission further believes that there may be arrangements between common carriers that offer more efficient and rationalized services, while at the same time providing shippers with more service options and lower costs for their ocean

1 In Transpacific Westbound Rate Agreement v. Federal Maritime Comm’n, 951 F.2d 950 (9th Cir. 1991), the court upheld the Commission’s decision that it did not have jurisdiction over foreign-to-foreign portions of agreements that also had U.S.-to-foreign portions. As a result, foreign-to-foreign portions of agreements are generally not filed with the Commission, even for informational purposes.
transportation, and that some of these arrangements may be precluded by the final rule as a result of specific statutory constraints limiting the Commission’s flexibility in interpreting the Shipping Act. We appreciate commenters’ arguments regarding efficient operations. We fully support and wish to encourage arrangements and operations that enhance efficiency and competition. However, we do not think it appropriate to adopt an overly broad exception to address what, to date, is only a hypothetical problem. We would remind the carriers that the Commission would, as always, give serious consideration to any petition for reconsideration of this rule, or an exemption.

Transshipment Arrangements

Transshipment agreements are arrangements between ocean common carriers by which one carrier serving a port of origin and the other carrier serving a port of destination provide transportation between such ports via an intermediate port at which the cargo is transferred from one carrier to the other. See 46 CFR 535.306(a).

Nonexclusive transshipment agreements are exempt from the filing requirements of the Shipping Act, 46 CFR 535.306(b),2 but exclusive transshipment agreements must still be filed with the Commission.

Several commenters have raised concerns about the effect of the proposed rule on the status of vessel operator parties to transshipment agreements who do not directly serve the United States. They contend that the rule would overrule longstanding Commission precedent that such carriers are considered to be OCCs. As a result, Maersk has proposed an additional exception to include feeder operators in the rule, while Samskip and the OCWG suggest that the Commission can address the issue in the supplemental information to the final rule without further amending the actual definition.

Beginning in 1943, in the Canal Zone case, the Commission’s predecessor found that ocean carriers moving cargo from Colombia or Ecuador to the Canal Zone and then transferring that cargo to carriers moving it to the U.S., under through bills of lading, were “engaged in” transporting cargo by water from a foreign country to the United States.

10 F.M.C. at 191. The Commission reached a similar conclusion in the second Transshipment case, 10 F.M.C. 201 (1966), where carriers moving cargo from Thailand to Singapore were also held to be subject to the 1916 Act.

The Commission does not believe that these cases are controlling today. The Transshipment cases were decided under the 1916 Act, which defined “common carrier by water in foreign commerce” to mean “a common carrier engaged in the transportation by water of passengers or property between the United States * * * and a foreign country.” When Congress enacted the Shipping Act it chose different language to define “common carrier” in section 3(6), 46 U.S.C. app. 1702(6), and separately defined “ocean common carrier” and “non-vessel-operating common carrier.” In light of the fact that the Commission decided the Transshipment cases prior to the statutory distinction being drawn between NVOCCs and OCCs, the Commission finds that the Transshipment cases are non-controlling as to these issues and declines to adopt the commenters’ recommendations with regard thereto.

As noted in the House Report, the difference between a “common carrier by water” and an “ocean common carrier” is that the latter has “the added provision that the carrier must operate the vessel,” a significant distinction. Thus, the Transshipment cases are probably controlling as to whether someone is a “common carrier,” but irrelevant to “ocean common carrier” status.

Avoidance of OTI Responsibilities

The NPR raised concerns about permitting vessel operators in foreign-to-foreign trades to be considered OCCs in U.S. trades by virtue of VSA or transshipment arrangements. In particular, it noted that this could remove certain companies from the scope of the NVOCC bonding requirement even though they have no vessels or assets in the U.S. that can be attached to satisfy a Commission or U.S. court judgment. NPR at 6. As noted earlier, there is a very strong incentive under the Shipping Act, as modified by OSRA, for NVOCCs to want to be considered OCCs. They can then offer confidential service contracts to their shipper customers and avoid the costs of maintaining a bond as required by the Act and the Commission’s regulations.

Some NVOCCs are likely to engage in complex machinations to be considered OCCs under some of the proposals suggested by certain commenters. This is not some idle threat or hypothetical fear—even before passage of OSRA many NVOCCs were simply holding themselves out as OCCs.4 Now, post-OSRA, a review of the carriers holding themselves out as VOCCs on the Commission’s web page reveals that many of these carriers may well be NVOCCs, a matter for probable enforcement action. In addition, it appears that some carriers that may have at one time served U.S. ports with their own vessels are continuing to hold themselves out as OCCs even though they have withdrawn these vessels from service.

Multi-trade Approach

Almost all of the commenters support the Commission’s multi-trade approach to determining OCC status—if a carrier is an OCC in one U.S. trade, it will be considered an OCC for all U.S. trades. NITL suggests that this approach is supported by the plain language of the statute. The OCWG notes that this is simply a continuation of past Commission practice and avoids having to make status determinations on a trade-by-trade basis. It further argues that making such determinations on a trade-by-trade basis would be impractical and inefficient. As reflected by the endorsement of the commenters, the Commission’s position in this regard is a sound one, and the Commission will continue the multi-trade approach to determining OCC status in the final rule.

OWL’s Proposal

OWL’s proposal to consider NVOCCs who space charter from VOCCs to be considered OCCs on a trade-by-trade basis is most problematic. At the very

2Nonexclusive transshipment agreements do not prohibit either carrier from entering into similar agreements with other carriers.
least, such a proposal is outside the scope of the proposed rule and would require additional notice and comment were the Commission inclined to pursue such an approach. But, more importantly, OWL’s proposal does not appear to be a proper matter for a rulemaking proceeding. OWL is not asking that the Commission explicate some statutory or regulatory provision. Instead, it is asking the Commission to rewrite the Shipping Act to give certain NVOCCs the ability to offer service contracts to their shipper customers. Regardless of whether this is sound policy, Congress recently and very consciously chose not to permit such activity when it enacted OSRA. The Commission will not now do what Congress declined to do.

**Effective Date**

It appears that there may be some vessel operators currently holding themselves out as ocean common carriers even though they do not operate vessels that directly serve U.S. ports. The Commission understands that these carriers may have been confused about the legitimacy of such services, in light of the Commission’s pre-1984 policies implementing the 1916 Shipping Act. Regardless of the validity of this position, the Commission appreciates the situation these carriers are in and desires to give them sufficient time to restructure their services in accordance with the final rule. As a result, the final rule will not become effective for 90 days. And, of course, the rule will not be enforced retroactively as to such carriers.

It is also possible that some of these carriers operating as OCCs may have entered into service contracts with shippers that may still be effective. At the very least, our decision here should operate as the type of force majeure situation that would warrant the termination of such contracts without any penalty to the shipper. If the parties to such contracts wish to continue operating under them, the Commission believes that this would not be possible since the carrier would no longer be considered an ocean common carrier, but rather would be an NVOCC. However, a similar arrangement might possibly be reflected in the common carrier’s tariff rates or perhaps as a time/volume rate.

**Amendment to Part 515**

In the final rule of Docket No. 98–28, Licensing, Financial Responsibility Requirements, and General Duties for Ocean Transportation Intermediaries, adding section 515 to part 46 CFR, the Commission stated in the supplementary information section that payment against financial responsibility should only be made on “final” judgments; however, it mistakenly failed to add the word “final” in the actual language of § 515.23(b)(2). In response to petitions for reconsideration of the final rule in 46 CFR 515, the Commission ordered the correction of this oversight to be made in the instant rulemaking proceeding in order to preserve resources. Therefore, in accordance with the Commission’s decision in Docket No. 98–28, we are amending 46 CFR 515.23(b)(2) to add the word “final.”

In accordance with the Regulatory Flexibility Act, 5 U.S.C. 601 et seq., the Chairman of the Federal Maritime Commission has certified to the Chief Counsel for Advocacy, Small Business Administration, that the rule will not have a significant impact on a substantial number of small entities. In its Notice of Proposed Rulemaking, the Commission stated its intention to certify this rulemaking because the proposed changes affect only ocean common carriers and passenger vessel operators, entities the Commission has determined do not come under the programs and policies mandated by the Small Business Regulatory Enforcement Fairness Act. As no commenter refuted this determination, the certification remains unchanged.

**List of Subjects**

46 CFR Part 515
Exports; Freight forwarders; Non-vessel-operating common carriers; Ocean transportation intermediaries; Licensing requirements; Financial responsibility requirements; Reporting and recordkeeping requirements.

46 CFR Part 520
Common carrier; Freight; Intermodal transportation; Maritime carriers; Reporting and recordkeeping requirements.

46 CFR Part 530
Freight; Maritime carriers; Reporting and recordkeeping requirements.

46 CFR Part 535
Administrative practice and procedure; Maritime carriers; Reporting and recordkeeping requirements.

**PART 515—LICENSING, FINANCIAL RESPONSIBILITY REQUIREMENTS, AND GENERAL DUTIES FOR OCEAN TRANSPORTATION INTERMEDIARIES**

1. The authority citation continues to read as follows:


2. In § 515.2 revise paragraph (m) to read as follows:

   § 515.2 Definitions
   * * * * *

   (m) Ocean common carrier means a common carrier that operates, for all or part of its common carrier service, a vessel on the high seas or the Great Lakes between a port in the United States and a port in a foreign country, except that the term does not include a common carrier engaged in ocean transportation by ferry boat, ocean tramp, or chemical parcel-tanker.
   * * * * *

3. Revise § 515.23(b)(2) to read as follows:

   § 515.23 Claims against an ocean transportation intermediary.
   * * * * *

   (b) * * *

   (2) If the parties fail to reach an agreement in accordance with paragraph (b)(1) of this section within ninety (90) days of the date of the initial notification of the claim, the bond, insurance, or other surety shall be available to pay any final judgment for damages obtained from an appropriate court. The financial responsibility provider shall pay such judgment for damages only to the extent they arise from the transportation-related activities of the ocean transportation intermediary ordinarily within 30 days, without requiring further evidence related to the validity of the claim; it may, however, inquire into the extent to which the judgment for damages arises from the ocean transportation intermediary’s transportation-related activities.
   * * * * *

**PART 520—CARRIER AUTOMATED TARIFF SYSTEMS**

1. The authority citation for part 520 continues to read as follows:


2. In § 520.2 revise the definition of ocean common carrier to read as follows:
§ 520.2 Definitions

Ocean common carrier means a common carrier that operates, for all or part of its common carrier service, a vessel on the high seas or the Great Lakes between a port in the United States and a port in a foreign country, except that the term does not include a common carrier engaged in ocean transportation by ferry boat, ocean tramp, or chemical parcel-tanker.

PART 530—SERVICE CONTRACTS

1. The authority citation for part 530 continues to read as follows:


2. In § 530.3 revise paragraph (n) to read as follows:

§ 530.3 Definitions.

(n) Ocean common carrier means a common carrier that operates, for all or part of its common carrier service, a vessel on the high seas or the Great Lakes between a port in the United States and a port in a foreign country, except that the term does not include a common carrier engaged in ocean transportation by ferry boat, ocean tramp, or chemical parcel-tanker.

PART 535—AGREEMENTS BY OCEAN COMMON CARRIERS AND OTHERS SUBJECT TO THE SHIPPING ACT OF 1984

1. The authority citation for part 535 is amended to read as follows:


2. Revise § 535.101 to read as follows:

§ 535.101 Authority.


3. In § 535.104 revise paragraph (u) to read as follows:

§ 535.104 Definitions.

(u) Ocean common carrier means a common carrier that operates, for all or part of its common carrier service, a vessel on the high seas or the Great Lakes between a port in the United States and a port in a foreign country, except that the term does not include a common carrier engaged in ocean transportation by ferry boat, ocean tramp, or chemical parcel-tanker.

By the Commission.

Bryant L. VanBrakle,
Secretary.

[FR Doc. 00–11338 Filed 5–5–00; 8:45 am]
BILLING CODE 6730–01–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 54

[CC Docket No. 96–45; FCC 00–126]

Federal-State Joint Board on Universal Service

AGENCY: Federal Communications Commission.

ACTION: Final rule; petition for reconsideration.

SUMMARY: This document concerning the Federal-State Joint Board on Universal Service clarifies the method by which quarterly line count data will be incorporated in the new high-cost mechanism for purposes of calculating and targeting support amounts. It also clarifies that, until the Commission adopts new line count input values, forward-looking costs of providing supported services shall be estimated using the line count input values adopted in the Tenth Report and Order, 64 FR 67372 (December 1, 1999).

This clarification does not alter the methodology adopted in the Ninth Report and Order except to account for line growth when the wire center line count data reported quarterly by the carriers differs from the input values used to estimate forward-looking cost. Finally, we clarify that high-cost support shall be available on a regular quarterly basis for competitive eligible telecommunications carriers serving lines in areas served by non-rural incumbent local exchange carriers.

II. Discussion

2. In general, there are four stages in the forward-looking high-cost mechanism for non-rural carriers where line count information is required: (1) To estimate forward-looking costs of providing supported services; (2) to determine statewide support amounts; (3) to target those statewide support amounts to individual wire centers; and (4) to determine the per-line support amounts in individual wire centers.

In addition, the interim hold-harmless provision uses line counts to target carrier-by-carrier hold-harmless support amounts to individual wire centers. The interim hold-harmless provision also uses line counts to determine the per-line support amounts in individual wire centers. As discussed, we provide specific guidance on how these line counts are used in the four stages of the forward-looking mechanism and the interim hold-harmless provision.


We clarify that the line counts used in the model to estimate forward-looking economic costs shall be used to calculate average forward-looking costs in all the cost calculations in the methodology adopted in the Ninth Report and Order for determining support. This approach is consistent with the Commission’s and the Federal-State Joint Board’s decision to use a cost model. The model estimates the forward-looking costs of providing the supported services in a wire center served by non-rural carriers. We clarify that model lines shall be used in