FEDERAL MARITIME COMMISSION

46 CFR PARTS 514 AND 581

[DOCKET NO. 92-21]

AMENDMENTS TO SERVICE CONTRACTS

AGENCY: Federal Maritime Commission.

ACTION: Final Rule.

SUMMARY: The Federal Maritime Commission amends its regulations in parts 514 and 581 to allow the parties to a filed service contract to amend the contract's "essential terms." The intent of this amendment is to create a more flexible service contract system in order to benefit carriers, U.S. shippers and consumers. Similarly situated shippers who had previously accessed the contract have the option of either continuing under the original contract or accessing the amended terms. Similarly situated shippers who had not previously accessed the contract may access the amended contract, in which case the shippers' minimum cargo volume obligation must be pro-rated according to the duration of the amended contract.

EFFECTIVE DATE: [Insert date of publication in the Federal Register].

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SUPPLEMENTARY INFORMATION:

BACKGROUND

By a Notice of Proposed Rulemaking ("NPR") published in the Federal Register on May 4, 1992 (57 FR 19,102), the Federal Maritime Commission ("FMC" or "Commission") proposed to amend its regulations to allow the parties to a filed service contract to amend the contract's "essential terms." Section 3(21) of the Shipping Act of 1984 ("1984 Act") defines a service contract as . . .

> . . . a contract between a shipper and an ocean common carrier or conference in which the shipper makes a commitment to provide a certain minimum quantity of cargo over a fixed time period, and the ocean common carrier or conference commits to a certain rate or rate schedule as well as a defined service level - such as, assured space, transit time, port rotation, or similar service features; the contract may also specify provisions in the event of nonperformance on the part of either party.

46 U.S.C. app. 1702(21). Section 8(c) of the 1984 Act requires that . . .

> . . . each [service] contract * * * shall be filed confidentially with the Commission, and at the same time, a concise statement of its essential terms shall be filed with the Commission and made available to the general public in tariff format, and those essential terms shall be available to all shippers similarly situated. The essential terms shall include -
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> (1) the origin and destination port ranges in the case of port-to-port movements, and the origin and destination geographic areas in the case of through intermodal movements;
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> (2) the commodity or commodities involved;

(3) the minimum volume;
(4) the line-haul rate;
(5) the duration;
(6) service commitments; and
(7) the liquidated damages for nonperformance, if any.

Id. 1707(c).

The NPR noted that the Commission's service contract regulations already permit contract parties to change a contract's essential terms, once filed, in two ways. First, the parties may make retroactive corrections of clerical or administrative errors through a specified procedure: the request for permission to correct must be filed with the Commission within forty-five days of the contract's original filing; the filing party must submit an affidavit describing the circumstances that gave rise to the error; the other contract party must submit a statement concurring in the request for correction; and the access rights of similarly situated shippers are protected. 46 CFR 581.7(b). Second, contract signatories can provide for substantive modifications of the contract's essential terms through contingency clauses. Id. 581.5(a)(3)(viii). Similarly situated shippers have a right to access the contingency clauses as well as the basic essential terms, and the Commission has prescribed a procedure whereby similarly situated shippers are informed of changes in a service contract as a result of an activated contingency clause. Id. 581.6(b)(5).

Otherwise, however, the FMC's regulations presently provide that "[t]he essential terms originally set forth in a service contract may not be amended . . . ." 46 CFR 581.7(a). The NPR

recounted the history of this restriction as dating to November, 1984, when the Commission published final rules implementing the new service contract provisions of the 1984 Act. Service Contracts; Loyalty Contracts; and Publishing and Filing of Tariffs by Common Carriers in the Foreign Commerce of the United States, _ F.M.C. ___, 22 S.R.R. 1414 (1984). The Commission believed the restriction was necessary to prevent unfairness to similarly situated shippers. Id. at 1432. The prohibition was carried forward in subsequent rule revisions. Service Contracts, ___ F.M.C. ___, 24 S.R.R. 277, 300 (1987).

The NPR then pointed out that the Commission's concerns in 1984 about potential unfairness, when service contracts were a new concept in ocean transportation, may not have been borne out by actual shipper experience in subsequent years. It noted that when the FMC surveyed shippers about the new Shipping Act during the preparation of its report in 1989 to the Advisory Commission on Conferences and Ocean Shipping, permitting service contracts to be amendable was identified by shippers as the most important change they would like to see in the Commission's regulation of service contracts. Further, the NPR stated, the Commission's own experience with service contracts has been that very few contracts are "me-too'd" by outside shippers, which calls into question whether the benefits of the present no-amendment regulation justify removal of a right freely held by contract parties at common law. The NPR also acknowledged that the original concern that amending service contracts might leave shippers unable to take advantage of

an amended contract did not take into account the possibility that some shippers who had been unable to "me-too" an original contract might be able to "me-too" the contract as amended.

The NPR stated that the proposed rule was drafted to accommodate the desire for greater flexibility under service contracts with the statutory prerogatives of similarly situated shippers. Corresponding to the procedure already in place for corrections of administrative or clerical errors, shippers who have accessed a service contract would have the choice of continuing under their original "me-too" contracts or electing to amend their contracts in the same way as the basic contract parties. To protect shippers who were unable to meet the original essential terms of a service contract, but could meet the terms as modified, the proposed rule further provided that the essential terms of an "amended service contract" as well as an "initial service contract" would be made available to all other shippers or shippers' associations similarly situated. The proposed rule also made technical changes to reflect the redesignation of the former Bureau of Domestic Regulation as the Bureau of Tariffs, Certification and Licensing.

In addition, the NPR solicited comments on four other issues raised by the proposal to permit amendments to the essential terms of a service contract:

1. Should the ability to amend be limited to only certain essential terms (e.g., volume, origin and destination points) but not others (e.g., rates)?

2. Should the ability to amend a contract be limited in time, e.g., only during the first half of the

contract's period, or within 60 days of its filing with the Commission?

3. What term should the shipper accessing an amended contract receive: the full original contract term, or only the time remaining?

4. Could and should the Commission require that the filing of amendments to a service contract be accompanied by a statement of the reason for the amendments?

Commenters desiring a particular result in these or other related areas were requested to include suggested rule language.

SUMMARY OF COMMENTS

A. Supporting Comments

Comments in support of the proposed rule were filed by a number of shippers and shipper organizations -- the Agriculture Ocean Transport Coalition ("AgOTC"); the American Institute for Shippers Associations, Inc. ("AISA"); the American Paper Institute ("API"); Cargill, Incorporated; ConAgra, Inc.; Corning Incorporated; E. I. du Pont de Nemours and Company ("Du Pont"); Hiram Walker & Sons, Inc.; the National Industrial Traffic League ("NIT League"); Weyerhauser Paper Company; and Union Camp Corporation -- one carrier, Orient Overseas Container Line, Ltd. ("OOCL"), and the U.S. Department of Transportation ("DOT").

These commenters argue that the NPR's reference to the common law of contracts, whereby parties are free to amend a contract as long as it remains executory, was appropriate and should guide the Commission's regulation of service contracts. They cite in this regard the provision of section 8(c) of the 1984 Act that gives

exclusive jurisdiction over breach of service contract disputes to common law courts. In general, they argue that shippers should be able to restructure their service contracts when business conditions change or new opportunities arise.[1] DOT states:

> Within the confines of the Shipping Act of 1984, the Commission's proposal would allow contracting parties more of the freedom to modify their bargain that exists in other industries, while maintaining the statutory protection now mandated for similarly situated shippers. The new rule, in other words, embodies the approach to statutory administration that is most consistent with sound public policy: it implements ongoing legal requirements in a manner that minimizes regulatory burdens.

Comments at 2. Union Camp similarly views the proposed rule as giving service contract parties the maximum freedom possible under current law:

> Until such time as the proper contracting environment is created by Shipping Act amendments to limit conference antitrust immunity pertaining to service contracts and exempt contracts from FMC jurisdiction, the Proposed Rule would bring contracts as close as regulatory change can to that environment.

Comments at 3.[2] ConAgra argues that any concerns about discrimination are not well-founded:

> In the unlikely event that the freedom to amend service contracts is abused so as to discriminate against similarly situated shippers, that will become readily apparent and the Commission will be able to deal with it.

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[1] The same themes are sounded by OOCL, which states that service contracts should be brought "more into line as true contracts" and that "shippers and carriers should have greater commercial flexibility between themselves." Comments at 2.

[2] Union Camp is a leading manufacturer and exporter of paper packaging chemicals and building products. It states that in 1990 it shipped roughly 20,000 TEU's of containerized cargo to virtually all major world markets, and that over forty percent of its containerized exports move under service contracts. Comments at 1.

> However, the freedom to amend service contracts should not be denied to shippers and carriers on the basis of the mere supposition that it might result in abuse, particularly when the shippers who are the supposed beneficiaries of the present prohibition are so overwhelmingly in favor of the right to amend service contracts.

Comments at 4-5.[3]

On the four related issues posed by the NPR, these commenters all oppose any restrictions on the essential terms eligible for amendment. API argues that "the ability to amend should not be limited to only certain essential terms, but rather, should extend to any and all aspects of a contract to which the parties mutually agree should be changed." Comments at 3 (emphasis in original).[4] Du Pont asserts that "flexibility to meet customer demands is of utmost importance . . . ." Comments at 1. Similarly, this group opposes any limits on when an essential term can be amended, urging that the Commission simply follow the common law rule noted in the NPR, i.e., amendments should be permissible as long as the contract remains executory.

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[3] ConAgra states that it is "a diversified agribusiness enterprise operating across the entire food chain." Comments at 2. Its various divisions and subsidiaries conduct extensive trade in agricultural commodities and foodstuffs all over the world. Id. at 2-4.

[4] API states that it is the national organization of the pulp, paper and paper bond industry, consisting of approximately 175 manufacturers who are substantial users of ocean common carriers in international transportation.

The question of what term should be available to a shipper "me-tooing" an amended contract caused some division. AgOTC[5] and API argue that outside shippers should not have a right to access an amended contract at all, because this would discourage amendments; under this approach, the statutory "me-too" right would apply only to original contracts. AgOTC Comments at 4; API Comments at 5. A few others would leave this matter up to the accessing shipper and the carrier to settle as they see fit (Union Camp, Hiram Walker and AISA[6]). Most contend that allowing the accessing shipper only the term remaining on the contract is "the fair approach." Du Pont Comments at 2. NIT League submits that "[t]o provide a [me-too] party with a term equal to the full original contract term would be an impermissible extension of the original contract term." Comments at 5. The possibility that the contract term itself may be the amended essential term accessed by an outside shipper was recognized only by DOT:

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[5] AgOTC states that it is "a coalition comprised of individual companies, cooperatives, shipper associations and national and regional associations involved in the ocean transportation of farm, food, fiber and forest products." Comments at 1.

[6] AISA interpreted the NPR as requesting comments on whether, once a service contract is amended, similarly situated shippers should be able to (1) access the contract for a new full original term commencing from the date the contract has been "me-too'd"; (2) access the contract retroactively for a full term commencing from the original commencement date; or (3) access the contract for whatever term is remaining. AISA favors both (2) and (3). Comments at 6-7. However, only (1) and (3) were contemplated by the NPR, which meant to avoid retroactive amendments. Another complication is that the NPR and most commenting parties, including AISA, overlooked the possibility that the contract term itself may be the subject of amendment. See discussion of DOT Comments in the text infra.

> * * * DOT submits that the time for performance should be treated identically to other contract terms, such as rates and service commitments. * * * Shippers who are similarly situated to the amended contract and who are not already participating in a "me too" arrangement would have their section 8(c) rights ensured if they are given the opportunity to avail themselves of the terms as subsequently modified, including the time allowed for performance by the amendments. In other words, regardless of whether new contracts expand, contract, or retain the time for performance contained in an original contract, it is that expanded, contracted, or continued amount of time to which these shippers are entitled.

Comments at 3.

Lastly, these commenters unanimously oppose any requirement that the filing of amendments to a service contract be accompanied by a statement of the reasons for the amendments. Union Camp argues:

> The reason an amendment is required could be the result of highly confidential corporate tactical or strategic planning. Requiring public disclosure of those plans could diminish the attractiveness of a business opportunity or investment. Trading off a contract amendment for confidentiality of reasoning would, in effect, produce the same result as no ability to amend at all.

Comments at 4. ConAgra makes a related point:

> As long as the terms of the amended contract are facially lawful, an explanation of the business reason for their adoption is unnecessary and, indeed, irrelevant to the Commission's exercise of its regulatory responsibilities. In the event that the terms of any particular contract should be so unusual as to warrant explanation, the Commission can request it informally or, if it should become necessary, by more formal means. However, the amendment process should not be burdened by a requirement for explanation of every amendment when such explanation will be totally unnecessary in almost every instance.

Comments at 6.

B. Opposing Comments

Commenters opposed to the proposed rule include the North Europe-USA Rate Agreement and the USA-North Europe Rate Agreement ("North Europe Conferences");[7] the Trans-Pacific Freight Conference of Japan and the Japan-Atlantic and Gulf Freight Conference ("Japan Conferences");[8] Crowley Maritime Corporation; and a large group of conferences headed by the Asia North America Eastbound Rate Agreement ("ANERA et al.").[9] The National Customs Brokers and Freight Forwarders Association of America ("NCBFFAA") also filed opposing comments.

In general, these commenters submit that the Commission's decision in 1984 not to permit prospective amendments to service contracts -- other than through the contingency clause procedure -- was correct and should not be reversed. The North Europe Conferences argue that the proposed rule is contrary to the letter and intent of section 8(c) of the 1984 Act and is therefore legally

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[7] Sea-Land Service, Inc., a member of these conferences, did not join in their comments. Sea-Land filed its own comments, which fall into the group suggesting an alternative final rule, infra.

[8] Again, except Sea-Land.

[9] The other conferences included the "8900 Lines"; Israel Trade Conference; Mediterranean North Pacific Coast Freight Conference; South Europe/U.S.A. Freight Conference; United States/East Africa Conference; United States/South Africa Conference; and the U.S. Atlantic & Gulf Western Mediterranean Conference.

Sea-Land, OOCL and American President Lines ("APL"), which are members of some of these conferences, did not participate in their comments. OOCL, as already described, offered general support of the proposed rule. APL submitted comments suggesting a rule similar to Sea-Land's.

impermissible. They point to the statute's references to the shipper's "commitment" to provide "a certain minimum quantity" of cargo "over a fixed time period," the "certain rate" promised in exchange by the carrier, and the right of similarly situated shippers to access "those essential terms." A free right to amend is characterized as inconsistent with this statutory scheme. Comments at 16-18. The opposing commenters also contend that the NPR was incorrect in suggesting that service contracts should be treated as common law contracts. Crowley argues:

> The rules of common carriage, not common law contract principles, form the touchstone of FMC regulation. Those rules impose restrictions on carriers and shippers to inhibit large shippers from turning their leverage over the market for transportation into a monopoly over the market for the goods they sell. Service contracts were not intended to create a path around basic common carrier requirements. The statute requires that essential shipping terms be published, as in regular tariff-based carriage, and that those terms be available to similarly situated shippers. This is a fundamental tenet of common carriage.

Comments at 3; see also Comments of North Europe Conferences at 18-20.

The opposing commenters further argue that allowing amendments would undermine the commercial stability provided by the service contract system, and would frustrate shippers' ability to "me-too" service contracts. ANERA et al. state:

> Shippers and carriers enter into service contracts to ensure a certain amount of stability with regard to rates, service and cargo levels. Once contracts are entered into, carriers are assured a certain amount of cargo on specified routes and shippers are assured a certain level of service at specified rates. This knowledge allows both carriers and shippers to plan their businesses more effectively and efficiently, thereby adding to stability in the marketplace. This stability,

> in turn, forms the cushion that continues to ensure the tremendous number of service and competitive options that exist in ocean commerce . . . .
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> Allowing amendments to service contracts would undermine that stability, thereby removing many of the benefits of service contracts. Frequent adjustments to minimum cargo quantity commitments, geographic scopes, rates or carrier service levels would be disruptive to carrier and shipper stability. If amendments were allowed, there would be constant pressure from one party or the other to amend the contract to adjust to the ebbs and flows which occur in the market.

Comments at 3-4. Other commenters are more specific about which party would be causing such "constant pressure." Crowley predicts that the practical effect of the proposed rule "would be to allow shippers to coerce ever increasing, after-the-fact discounts out of carriers. Initial contracts would become meaningless, illusory commitments on the shippers' part . . . ." Comments at 1.

These commenters offer examples intending to show how allowing amendments would work unfairness to original shippers, carriers and especially "me-too" shippers. The North Europe Conferences assume a service contract with a 500-TEU volume requirement and a duration of one calendar year. If the contract was amended on December 1 to provide for a 450-TEU volume requirement, they say, the original shipper . . .

> . . . and any similarly situated shippers accessing the original contract, would have 12 months in which to meet that commitment whereas similarly situated shippers who had not accessed the original commitment would have the right to access the amended one and, if so, be required to meet the new 450 TEU minimum volume requirement in one month. Likewise, were the contract amended on December 1st by extending its duration for one month, shipper parties to the contract originally filed would have 13 months in which to ship 500 TEUs and similarly situated shippers not having accessed that contract would have the

> right to access the amended version and, if so, be required to ship 500 TEUs in two months.'

Comments at 14.[10] ANERA et al. describe circumstances in which problems could be present even if the shipper's obligation was pro-rated:

> Assume Shipper A has a two year contract beginning January 1, 1992 and terminating December 31, 1993. Shipper A's [volume obligation] is 2400 [forty-foot equivalent units ("FEU's")]. Four months before the contract expires, Shipper A and the conference or carrier agree to amend the contract by reducing the rates to reflect changes in the market and increased efficiencies that have occurred over the last year and a half. Due to the amendment, during the last four months, Shipper A is able to ship its remaining cargo at rates which are $200 below the original rates. Shipper B accesses the contract for the remaining term, i.e., four months. The [volume obligation] is prorated, so Shipper B is obligated to ship 400 FEUs in four months at the reduced rate. This result is unfair to Shipper A because Shipper B never had the volume to justify Shipper A's original reduced rates. * * * The conference or carrier also suffers because it is forced to provide service at reduced rates to a shipper without sufficient volume to create economies of scale.

Comments at 10.

Two other arguments made by the opposing commenters are that the proposed rule is unnecessary, because the flexibility to make necessary changes in an existing contract is already provided by the present regulation allowing contingency clauses and because unforeseen changes can be accommodated by execution of a new contract, and that it would be extremely difficult for potential

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[10] The North Europe Conferences' comments above assume that a shipper accessing only the remaining term of an amended contract would not have its volume obligation pro-rated. The proposed rule did not explicitly cover that point.

"me-too" shippers to continually monitor the service contracts of interest to them.

C. Comments Offering Qualified Support

A third group of commenters indicates support for -- or at least acceptance of -- a right to amend service contracts, subject to certain qualifications. These include Sea-Land, APL, the American Import Shippers Association, the Transpacific Westbound Rate Agreement ("TWRA"),[11] Hanjin Shipping Co., Ltd., Tropical Shipping and Construction Co., Ltd., and a group of conferences serving South America, Central America and the Caribbean area ("Latin America Conferences").[12] These commenters oppose amendments to contract terms governing rates and volume. Most would also bar amendments to contract duration and liquidated damages. This group would support (or at least accept) a final rule allowing amendments to terms governing origin and destination port ranges or geographic areas and the commodities involved, although TWRA cautions that "core commodity coverage" (Comments at 1) should not be amended and that only insignificant changes to

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[11] Except Sea-Land.

[12] Venezuelan Maritime Association; Atlantic and Gulf/West Coast South America Conference; United States/Central America Liner Association; Central America Discussion Agreement; United States Atlantic & Gulf/Hispaniola Steamship Freight Association; Hispaniola Discussion Agreement; United States Atlantic Gulf/Southeastern Caribbean Steamship Freight Association; Southeastern Caribbean Discussion Agreement; Jamaica Discussion Agreement; United States/Panama Freight Association; PANAM Discussion Agreement; Puerto Rico/Caribbean Discussion Agreement; and the Caribbean and Central American Discussion Agreement.

Sea-Land does not participate in these comments either.

that term should be permitted. APL adds that "if shippers would like to have the option to effect an increase in service . . ., changes in service commitments should not be precluded." Comments at 5.

These commenters also argue that some limit be placed on when amendments can be made during the life of a contract. Their contention is that overlooked factors will usually become apparent during the early weeks or months of a contract, that bona fide changes in circumstances occurring later can always be handled through execution of a new contract, and that amendments in the last stages of a contract will lead to abuse and will undermine the statutory rights of similarly situated shippers. Hanjin Shipping contends that amendments should be permitted only during the first half of a contract's term.

On the question of what term the shipper accessing an amended contract should receive, APL and TWRA argue that the shipper should receive only the time remaining on the contract. The Latin America Conferences offer a more detailed suggestion -- similar to DOT's argument on this point -- to take into account a situation where the contract's term itself has been amended:

> If the contract has been extended, or is extended after the shipper "me toos", the accessing shipper should be entitled to the extra time. If the contract is not extended, the accessing shipper should only be entitled to the same term as the original shipper.

Comments at 4.

Sea-Land supports a regulation requiring that the filing of an amendment be accompanied by a statement of the reasons for the amendment, but TWRA opposes the idea as meaningless.

DISCUSSION

Upon consideration of the comments, the Commission has determined that, with clarifying amendments concerning the minimum volume obligation appropriate for a shipper accessing an amended contract (46 CFR 581.6(b)) and the form and manner of amendment filing (46 CFR 581.3(a)(2)(iv)(A) and 581.4(b)(1)(iii)), the proposed rule should be adopted as a final rule. We emphasize again that the current restriction at 46 CFR 581.7(a) against amendments to the essential terms of filed service contracts is not mandated by the language or legislative history of section 8(c) of the 1984 Act. Rather, it is a Commission-written increment to the statute that was designed to protect the rights of similarly situated shippers. After eight years of experience with service contracts and administration of section 8(c), the Commission wishes to adjust its policy in this area so that service contracts will be treated more like ordinary commercial contracts, which are freely amendable while executory. The present bar to amendments rests upon the assumption that the statutory right of similarly situated shippers to access a service contract will necessarily conflict with the common law right of the original contract parties to amend their agreement. Operating from that assumption, the current regulation protects the right to access at the expense of the right

to amend. The new approach undertaken here seeks instead to allow both similarly situated shippers and original contract parties to exercise their rights in a mutually consistent fashion.

Many of the opposing comments expressed concern that original shippers will renege freely on their contract commitments if amendments are permitted, and that similarly situated shippers will enjoy unfair advantages if they are allowed to "me-too" an amended contract. The solutions to these anticipated problems, should they actually occur, are already available to the parties and do not need reinforcement from FMC regulations.[13] A shipper cannot unilaterally amend a service contract; like the original contract, an amendment must be the product of a free meeting of the minds between both sides. A carrier, therefore, may withhold consent from a proposed amendment that it considers unfair or one-sided. A shipper may have more leverage in negotiating for an amendment if it generates large amounts of cargo, but that is true for service contracts in general; Congress accepted the fact that large shippers may be able to obtain relatively attractive bargains from carriers when it enacted the service contract provisions of section 8(c). H.R. Rep. No. 53 (Part 1), 98th Cong., 1st Sess. 17 (1983). Ultimately, the amount of leverage any shipper can bring to bear in proposing an amendment to a service contract will be controlled by the market forces of supply and demand for cargo space. The

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[13] However, in response to those commenters who expressed concern that permitting amendments will encourage abuse, the Commission intends to closely monitor amendment filings and will be prepared to take appropriate action should indications of such abuse develop.

Commission does not read section 8(c) as requiring us to shelter carriers from the market by maintenance of the no-amendment rule. Similarly, if an original shipper and a carrier are concerned that an amendment will trigger a "me-too" claim from another shipper, they have the option of simply foregoing the amendment.

In sum, the final rule does not limit the right to amend to only some essential terms or to only part of a contract's period.[14] The Commission is also persuaded that the rule should not require that a filed amendment be accompanied by a statement of explanation or justification.[15] With respect to the contract duration available to a shipper accessing an amended contract, although no changes to the proposed rule are necessary, we do wish to clarify that, as suggested by DOT, the duration term must be treated like any other essential term. A shipper accessing an amended service contract is entitled to whatever duration is stated in that contract, and the "me-too" contract must have the same expiration date as the basic contract. On a related matter, section 581.6(b)(1) is amended to clarify that, where a "me-too" shipper who had not accessed the original contract chooses to access the amended contract, the "me-too" shipper's minimum volume commitment

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[14] The final rule includes contracts already on file with the Commission, but, as previously stated, n.6 supra, retroactive amendments are not permissible. For example, in the case of a filed service contract that calls for quarterly minimum volumes over calendar 1992, the parties may not file an amendment in November that changes the January-March volume requirement.

[15] The Commission assumes, however, that any contract amendment will be supported by mutual and valid consideration, as is the case at common law.

must be pro-rated according to the fractional relation between the duration of the contract between the carrier and the original shipper and the duration of the contract between the carrier and the "me-too" shipper. Technical amendments have been made to 46 CFR 581.3(a)(2)(iv)(a) and 581.4(b)(1)(iii) regarding the form and manner of amendment filing.

After the May 4, 1992, publication of the NPR in this proceeding, an interim rule was published on August 12, 1992 (57 FR 36,248), in Docket No. 90-23, Tariffs and Service Contracts (46 CFR part 514), which implements the Commission's Automated Tariff Filing and Information System ("ATFI") and tracks part 581 in sections 514.7 and 514.17. Accordingly, even though the Commission has requested further comment on the proper format for essential terms electronically filed, which will probably generate some further changes, the appropriate provisions of part 514 are amended herein in a manner similar to the changes to part 581 made herein.

Although the Commission, as an independent regulatory agency, is not subject to Executive Order 12291, dated February 17, 1981, it has nonetheless reviewed the rule in terms of that Order and has determined that this rule is not a "major rule" as defined in Executive Order 12291 because it will not result in:

(1) annual effect on the economy of $100 million or more;

(2) a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; or

(3) significant adverse effects on competition, employment, investment, productivity, innovations, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic or export markets.

The Federal Maritime Commission certifies, pursuant to section 605(b) of the Regulatory Flexibility Act, 5 U.S.C. 605(b), that this rule will not have a significant economic impact on a substantial number of small entities, including small businesses, small organizational units and small government jurisdictions, because it does not increase business costs or prices for consumers and does not impose substantive restrictions on commercial activity.

The collection of information requirements contained in this regulation have been approved by the Office of Management and Budget under the provisions of the Paperwork Reduction Act of 1980, as amended, and have been assigned OMB control number 3072-0044. Public reporting burden for this amendment to allow the parties to a filed service contract to amend the contract's "essential terms" is estimated to average 13.64 hours per response. This includes the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate, including suggestions for reducing this burden, to Norman W. Littlejohn, Director, Bureau of Administration, Federal Maritime Commission, Washington, D.C. 20573, and to the Office of Information and Regulatory Affairs,

Attention: Desk Officer for the Federal Maritime Commission, Office of Management and Budget, Washington, D.C. 20503.

List of Subjects:

46 CFR Part 514

Barges, Cargo, Cargo vessels, Exports, Fees and user charges, Freight, Harbors, Imports, Maritime carriers, Motor carriers, Ports, Rates and fares, Reporting and record keeping requirements, Surety bonds, Trucks, Water carriers, Waterfront facilities, Water transportation.

46 CFR Part 581

Administrative practice and procedure; Contracts; Maritime carriers; Rates and fares.

Therefore, pursuant to 5 U.S.C. 552 and 553; 31 U.S.C. 9701; 46 U.S.C. app. 804, 812, 814-817(a), 820, 833a, 841a, 843, 844, 845, 845a, 845b, 847, 1702-1712, 1714-1716, 1718, 1721 and 1722; and sec. 2(b) of Pub.L. 101-92, 103 Stat. 601, parts 514 and 581 of Title 46, Code of Federal Regulations, are amended as follows:

Part 514 - [AMENDED]

1. The authority citation for Part 514 continues to read as follows:

Authority: 5 U.S.C. 552 and 553; 31 U.S.C. 9701; 46 U.S.C. app. 804, 812, 814-817(a), 820, 833a, 841a, 843, 844, 845, 845a, 845b, 847, 1702-1712, 1714-1716, 1718, 1721 and 1722; and sec. 2(b) of Pub.L. 101-92, 103 Stat. 601.

2. In section 514.2, the definition of "File or filing" (of service contracts) is revised to read as follows:

File or filing (of service contracts or amendments thereto) means actual receipt at the Commission's Washington, DC offices. See § 514.7.

3. Section 514.7 is amended by revising paragraphs (a), (b), (f) introductory text, (f)(1), (f)(2)(i), (g)(2)(i), (h)(1)(i), (j)(1)(i), (j)(1)(ii), (j)(2) introductory text, (j)(2)(i), (j)(3)(i), (j)(3)(ii) introductory text, (j)(4) and (k), to read as follows:

§ 514.7 Service contracts in foreign commerce.

(a) Scope and applicability. Service contracts shall apply only to transportation of cargo moving from, to or through a United States port in the foreign commerce of the United States. While tariffs and the essential terms of service contracts are required to be filed electronically and made available to the public under subpart C of this part, service contracts themselves and amendments thereto (incorporating mandatory essential terms as described in § 514.17 and confidential names of shippers, etc.), as well as certain related notices, shall be filed in paper, hard copy format under this subpart and section.

(b) Confidentiality. All service contracts and amendments to service contracts filed with the Commission shall, to the full extent permitted by law, be held in confidence.

* * * * *

(f) Availability of essential terms. A statement of the essential terms of each initial and amended service contract, as set forth in tariff format, shall be made available for inspection by the general public pursuant to the requirements of this section and § 514.17.

(1) Availability of terms. The essential terms of an initial or amended service contract shall be made available for use in a contract to all other shippers or shippers' associations similarly situated, under the same terms and conditions, for a specified period of no less than thirty (30) days from the date of filing of the essential terms of the service contract or amendment thereto under § 514.17, as may be adjusted under paragraph (j)(4) of this section, except that, where a shipper or shippers' association not a party to the original contract exercises its right to access the amended contract, the minimum volume obligation for the accessing shipper or shippers' association shall be pro-rated according to the relation between the duration of the original (now amended) contract and the duration of the access contract. The conference or carrier may specify in the Essential Terms Publication the information which must accompany a me-too request and the procedures for submitting same.

(2) * * *

(i) Whenever a shipper or shippers' association desires to enter into an initial or amended service contract with the same essential terms as in another existing service contract, a request shall be submitted to the carrier or conference in writing.

* * * * *

(g) * * *

* * * * *

(2) * * *

(i) The making available of contingent or amended essential terms to similarly situated shippers under paragraphs (f)(1) or (f)(4) of this section;

* * * * *

(h) * * *

(1) * * *

(i) A unique service contract number, and consecutively numbered amendment number, if any, bearing the prefix "SC" (see § 514.17(d)(2));

* * * * *

(j) * * *

(1) * * *

(i) Within 20 days after the initial filing of an initial or amended service contract, the Commission may reject, or notify the filing party of the Commission's intent to reject, a service contract and/or statement of essential terms that does not conform to the form, content and filing requirements of the 1984 Act or this part. The Commission will provide an explanation of the reasons for such rejection or intent to reject.

(ii) Except for rejection on the ground that the service contract or amendment thereto was not filed within ten days of its essential terms, or other major deficiencies, such as not

containing an essential term, the parties will have 20 days after the date appearing on the notice of intent to reject to resubmit the contract (in paper form under paragraph (g) of this section) and/or statement of essential terms (in electronic form under § 514.17), modified to satisfy the Commission's concerns.

(2) Rejection. The Commission may reject an initial or amended contract and/or statement of essential terms if:

(i) The initial or amended service contract is not filed within 10 days of the electronic filing of its associated essential terms;

* * * * *

(3) * * *

(i) Performance under a service contract or amendment thereto may begin without prior Commission authorization on the day its associated statement of essential terms is electronically filed, except for rejection under paragraph (j)(3)(ii) of this section;

(ii) When the filing parties receive notice that an initial or amended service contract or statement of essential terms has been rejected under paragraph (j)(2) of this section:

* * * * *

(4) Period of availability. The minimum 30-day period of availability of essential terms required by paragraph (f)(1) of this section shall be suspended on the date of the notice of intent to reject an initial or amended service contract and/or statement of essential terms under paragraph (j)(1)(i) of this section, or on the date of rejection under paragraphs (j)(1)(i) and (j)(2) of this

section, whichever occurs first, and a new 30-day period shall commence upon the resubmission thereof under paragraph (j)(1)(ii) of this section.

(k) Modification, correction and cancellation of service contract terms.

(1) Modifications.

(i) The essential terms originally set forth in a service contract may be amended by mutual agreement of the parties to the contract and shall be electronically filed with the Commission under § 514.17.

(ii) Amended service contracts shall be filed with the Commission pursuant to paragraph (g) of this section.

(iii) Any shipper or shippers' association that has previously entered into a service contract which is amended pursuant to this paragraph may elect to continue under that contract or adopt the modified essential terms as an amendment to its contract.

(2) Corrections. Either party to a filed service contract may request permission to correct clerical or administrative errors in the essential terms of a filed contract. Requests shall be filed, in duplicate, with the Commission's Office of the Secretary within 45 days of the contract's filing with the Commission and shall include:

(i) A letter of transmittal explaining the purpose of the submission, and providing specific information to identify the initial or amended service contract to be corrected.

(ii) A paper copy of the proposed correct essential terms. Corrections shall be indicated as follows:

(A) Matter being deleted shall be struck through; and

(B) Matter to be added shall immediately follow the language being deleted and be underscored;

(iii) An affidavit from the filing party attesting with specificity to the factual circumstances surrounding the clerical or administrative error, with reference to any supporting documentation;

(iv) Documents supporting the clerical or administrative error; and

(v) A brief statement from the other party to the contract concurring in the request for correction.

(3) Filing and availability of corrected materials.

(i) If the request for correction is granted, the carrier or conference shall file the corrected contract provisions under this section and/or a corrected statement of essential terms under § 514.17, using a special case number under § 514.9(b)(19). Corrected essential terms shall be made available to all other shippers or shippers' associations similarly situated for a specified period of no less than fifteen (15) days from the date of the filing of the corrected essential terms. The provisions of paragraphs (f)(1) to (f)(3) of this section shall otherwise apply.

(ii) The provisions of paragraph (k)(3)(i) of this section do not apply to clerical or administrative errors that appear only in

a confidentially filed service contract but not also in the relevant essential terms.

(iii) Any shipper or shippers' association that has previously entered into a service contract that is corrected pursuant to this paragraph may elect to continue under that contract with or without the corrected essential terms.

(4) Cancellation. See paragraph (l) of this section and § 514.4(e)(2).

4. In section 514.8, paragraph (n)(1)(iii)(G)(3) is deleted.

5. Section 514.17 is amended by revising paragraphs (d)(2) and (d)(3), and the first sentence of paragraph (a)(1), to read as follows:

§ 514.17 Essential terms of service contracts in foreign commerce.

(a) * * *

(1) A concise statement of the essential terms (ETs) of every initial service contract (which is filed in paper form under § 514.7), or appropriate amendments to ETs resulting from any amendment of the filed service contract, shall be filed with the Commission by authorized persons (see § 514.4(d)(5)) and made available to the general public in electronic tariff format under this section. * * *

* * * * *

(d) * * *

* * * * *

(2) ET (statement of essential terms) and SC (service contract and amendment) numbers. The "ET Num" and "SC Num" (consecutive for amendments) are defined by the filer and shall be entered in the appropriate fields.

(3) Period of availability. The period of availability of the essential terms to similarly situated shippers shall be no less than thirty (30) days, i.e., from the "Filing date" (automatically entered by ATFI for initial or amendment filings under § 514.10(a)(2)) to the "Available until" date (automatically defaulted to 30 days from the filing date, but the filer can enter a later date, making the availability period longer).

* * * * *

6. In section 514.18, in paragraphs (b) and (c)(3) introductory text, remove the citation "§ 514.7(k)(1)," and add in its place, the citation "§ 514.7(k)(2)."

Part 581 - [AMENDED]

7. The authority citation for Part 581 continues to read as follows:

AUTHORITY: 5 U.S.C. 553; 46 U.S.C. app. 1702, 1706, 1707, 1709, 1712, 1714-1716, 1718 and 1722.

8. Section 581.3 is amended by revising paragraphs (a) introductory text, (a)(1)(i), (a)(2)(iv)(A), (a)(2)(iv)(B) and (a)(3)(i) to read as follows:

§ 581.3 Filing and maintenance of service contract materials.

(a) Filing. There shall be filed with the "Director, Bureau of Tariffs, Certification and Licensing," the following:

(1) * * *

(i) The outer envelope shall be addressed to the "Director, Bureau of Tariffs, Certification and Licensing, Federal Maritime Commission, Washington, DC 20573."

* * * * *

(2) * * *

(iv)(A) With an accompanying transmittal letter in an envelope which contains only matter relating to essential terms. In filing service contract amendments, the transmittal shall include the effective date and/or filing date of the original service contract;

(B) The envelope and the inside address on the transmittal letter are to be addressed to the "Director, Bureau of Tariffs, Certification and Licensing, Federal Maritime Commission, Washington, DC 20573."

(3) * * *

(i) The making available of contingent or amended essential terms to similarly situated shippers under section 581.6(b)(5) or section 581.6(b)(1);

* * * * *

9. Section 581.4 is amended by revising paragraphs (a)(1)(i), (b)(1)(iii) and the first sentence after the form in paragraph (b)(2)(iii)(A) to read as follows:

§ 581.4 Form and manner.

(a) * * *

(1) * * *

(i) A unique service contract number, and consecutively numbered amendment number, if any, bearing the prefix "SC";

* * * * *

(b) * * *

(1) * * *

(iii) Be identified by an essential-terms number bearing the prefix "ET No.," which shall be located on the top of each page of the statement of essential terms. In the case of amended essential terms, only the changed pages shall be filed and each affected amended page shall be likewise identified by the essential-terms "ET No." and a consecutively numbered amendment suffix, e.g., ET No. 86, Amendment No. 1; and

(iv) * * *

(2) * * *

(iii)(A) * * *

The Index shall include for every statement of essential terms, the ET number and consecutively numbered ET amendment number, if any, as provided in paragraph (b)(1)(iii) of this section, the effective duration, as provided in section 581.5(a)(3)(i), the page and section number(s) [where used], and a column for cancellation dates which shall be used as an alternative to cancelling each individual page of the Essential Terms Publication; and

* * * * *

10. Section 581.6 is amended by revising paragraphs (a) and (b)(1) and (2) to read as follows:

§ 581.6 Availability of essential terms.

(a) Availability of statement. A statement of the essential terms of each initial or amended service contract as set forth in tariff format shall be made available to the general public pursuant to the requirements of this section and sections 581.3, 581.4(b) and 581.5.

(b) Availability of terms. (1) the essential terms of an initial or amended service contract shall be made available to all other shippers or shippers' associations similarly situated under the same terms and conditions for a specified period of no less than thirty (30) days from the date of filing of the initial or amended service contract as may be adjusted under section 581.8(d); provided that, where a shipper or shippers' association accesses an amended service contract with an unchanged termination date, the minimum volume obligation for the accessing shipper or shippers' association must be pro-rated according to the relation between the original contract duration and the duration of the access contract.

(2) Whenever a shipper or shippers' association desires to enter into an initial or amended service contract with the same essential terms, a request shall be submitted to the carrier or conference in writing.

* * * * *

11. Section 581.7 paragraph (a) is revised to read as follows: § 581.7 Modification, termination or breach not covered by the contract.

For purposes of this part:

(a) Modifications. (1) The essential terms originally set forth in a service contract may be amended by mutual agreement of the parties to the contract.

(2) Amended service contracts shall be filed with the Commission pursuant to section 581.3(a) of this part.

(3) Any shipper or shippers' association that has previously entered into a service contract which is amended pursuant to this paragraph may elect to continue under that contract or adopt the modified essential terms as an amendment to its contract.

* * * * *

12. Section 581.8 is amended by revising paragraphs (a)(1), (b) introductory text, (c)(1), (c)(2) introductory text and (d) to read as follows:

§ 581.8 Contract rejection and notice; implementation.

(a) Initial filing and notice of intent to reject. (1) Within 20 days after the initial filing of an initial or amended service contract and statement of essential terms, the Commission may notify the filing party of the Commission's intent to reject a service contract and/or statement of essential terms that does not conform to the form, content and filing requirements of the Act or this part. The Commission will provide an explanation of the reasons for such intent to reject.

* * * * *

(b) Rejection. The Commission may reject an initial or amended contract and/or statement of essential terms if the objectionable contract or statement:

* * * * *

(c) Implementation; prohibition and rerating. (1) Performance under a service contract or amendment thereto may begin without prior Commission authorization on the day both the initial or amended contract and statement of essential terms are on file with the Commission, except as provided in paragraph (c)(2) of this section;

(2) When the filing parties receive notice that an initial or amended service contract, or statement of essential terms, has been rejected under paragraph (b) of this section:

* * * * *

(d) Period of availability. The minimum 30-day period of availability of essential terms required by section 581.6(b) shall be suspended on the date of the notice of intent to reject an initial or amended service contract and/or statement of essential terms under paragraph (a)(1) of this section and a new 30-day period shall commence upon the resubmission thereof under paragraph (a)(2) of this section.

13. Section 581.9 is revised to read as follows:

§ 581.9 Confidentiality.

All service contracts and amendments to service contracts filed with the Commission shall, to the full extent permitted by law, be held in confidence.

By the Commission.

Joseph C. Polking
Secretary