

(S E R V E D)
(JULY 5, 1990)
(FEDERAL MARITIME COMMISSION)

FEDERAL MARITIME COMMISSION

46 CFR PARTS 502, 587

[DOCKET NO. 89-24]

MISCELLANEOUS AMENDMENTS TO RULES OF PRACTICE AND PROCEDURE

AGENCY: Federal Maritime Commission.

ACTION: Final Rule.

SUMMARY: The Federal Maritime Commission is amending its Rules of Practice and Procedure governing matters before the Commission. The amendments clarify certain filing and service requirements, address facsimile filings, and add a provision governing the filing of confidential materials, and thereby correct current rule deficiencies.

DATE: Effective [Insert date 30 days from publication in the Federal Register.]

FOR FURTHER INFORMATION CONTACT:

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SUPPLEMENTARY INFORMATION:

The Commission's Rules of Practice and Procedure, 46 CFR Part 502, govern proceedings and other matters before the Commission. Experience under the rules suggests certain provisions are either unclear, conflicting or inadequate to achieve their desired purpose. In addition, the current rules do not have provisions governing facsimile ("fax") filings or filings containing confidential material. To remedy these deficiencies, to address

fax filings, and to provide for the handling of confidential materials, the Commission issued a Notice of Proposed Rulemaking, 54 FR 48649, November 24, 1989, to solicit comments on several proposed revisions to its rules.

DISCUSSION

Limited comments were received from Matson Navigation Company, Inc. ("Matson") and jointly from the Asia North America Eastbound Rate Agreement and the South Europe/U.S.A. Freight Conference ("the Conferences"). For the most part, the proposed amendments are unopposed and are adopted herein as published except as discussed below.

Matson comments that, in addition to the proposed changes, the Commission's rules should be amended to correct a so-called "serious deficiency" in the proscription against "replies to replies" found in section 502.74(a)(1). Matson is concerned about the ability of parties initiating pleadings to rebut what it terms "factual inaccuracies or requests for alternate legal relief" contained in replies, and cites two recent Matson petitions as examples of how the rule barring "replies to replies" can lengthen proceedings. Matson suggests amending section 502.74(a)(1) to allow filing of a "reply to a reply" by a party who initiates a proceeding ". . .to answer those matters. . .which require rebuttal in order to prevent undue hardship or manifest injustice, or where required to promote the expeditious conduct of business," noting that section 502.10 permits waiver of the rules for such reasons.

Matson's proposal is beyond the scope of this rulemaking. Moreover, the Commission fails to see how the proposed revision would generate more fairness or expedite Commission proceedings. As Matson itself notes, section 502.10 now allows the Commission to waive its rule for the reasons Matson proposes. It is not clear if Matson proposes that the rebutting party have the discretion to effect such a waiver or if it proposes

to allow surrebuttal in each case. Matson has failed to fully explain its proposal and the need for it. For the above reasons, Matson's proposal is not adopted.

Matson also commented on the proposed new section 502.119 regarding treatment of confidential material. Matson supports adoption of the proposed section, but urges that it be expanded to apply to confidential business and financial information submitted outside docketed proceedings, such as financial workpapers submitted in support of a general rate increase pursuant to section 502.67.

Proposed section 502.119 would apply to any filing submitted that has been designated as confidential by any Commission rule in Part 502. Section 502.67 makes underlying workpapers confidential and bars their disclosure, except to the extent authorized by an order of the Commission or a presiding officer. Therefore, it does not appear necessary to expand the proposed rule. To reduce the likelihood of misleading implications, however, the language in the first sentence of proposed section 502.119 has been modified to clarify that section 502.119 applies to "all filings" under Part 502. In addition, the proposed rule has been modified to require that such confidential materials be marked "confidential-restricted," so as to avoid confusion with national security information that is classified "confidential."

The Conferences support the proposed amendments, but ask for clarification of the proposed provision prohibiting the filing of fax transmission copies. The Conferences state that it is often necessary to file photocopies of faxed signature pages to meet Commission filing deadlines because conference headquarters are located overseas, even though deadlines may be met by placement in the mail or delivery to a courier under section 502.114. The conferences also ask for clarification whether the proposal would preclude use of photocopies of faxed documents in exhibits to Part 502 filings.

Currently, fax filings are deficient since they do not comply with the requirements of section 502.111 for a signed original and multiple copies. The Commission has experienced difficulty obtaining properly signed and verified originals as well as the required number of copies when filings have been submitted by fax. Additionally, fax filings do not appear to provide the quality or permanency of copy needed for long term recordkeeping purposes. Moreover, the Commission does not believe fax filings are necessary in view of the provision in section 502.114 which permits most filing deadlines to be met by mailing or delivery to a courier. Conferences with overseas headquarters almost always manage to meet filing deadlines. Most do not use fax for that purpose.

Nevertheless, the Commission is cognizant of the convenience and widespread use of fax, and therefore will allow the tentative filing of photocopies of signature pages, provided that the originals are received by the Commission within seven workdays, and will allow use of photocopies of faxed documents in exhibits to Part 502 filings. Also, since the filing date of protests under section 502.67 is determined by date of receipt and such proceedings involve a compressed time period, fax transmissions in those matters will be accepted provided the original and appropriate copies are mailed or delivered to a courier that same day.

SYNOPSIS OF FINAL RULE

Proposed rule changes not discussed above generated no comments. Those proposed amendments are adopted essentially as published. A section by section explanation of the final amendments follows.

Section 502.51 is amended to make clear that the \$50 filing fee required by §502.69(b) for petitions generally is also applicable to petitions for rulemaking.

Section 502.53 is amended to clarify that when replies or succeeding rounds of comments are permitted in rulemaking proceedings, they must be served on all parties who have previously submitted comments in the proceeding.

Section 502.62 is amended to make clear that complaints filed thereunder must be verified. This requirement is in keeping with section 11(a) of the Shipping Act of 1984, 46 U.S.C. app. §1710(a), which authorizes the filing of "sworn complaints." Similarly, the general information on filing formal complaints, contained at Subpart E, Exhibit 1, is amended to specify that verification of a complaint is required whether or not the complainant is represented by an attorney or other person qualified to practice before the Commission. The small claim form at Subpart S, Exhibit 1, is changed in the same manner, and for the same purpose.

Section 502.111 is amended to provide that fax filings are not acceptable, except in the case of protests under section 502.67 which have been certified as having been mailed or delivered to a courier. Photocopies of faxed signature pages will be tentatively accepted pending receipt of the original within seven workdays. Photocopies of faxed documents will be allowed to be included in exhibits to Part 502 filings.

Section 502.114 is revised to make clear that service must be effected on all prior participants when submitting comments or replies beyond the initial round, or when submitting post-decisional pleadings such as petitions for reconsideration, for stay or to reopen (including replies thereto) in all general notice proceedings. This requirement will apply in proceedings involving disposition of petitions for rulemaking (Rule 51), petitions for declaratory order (Rule 68), petitions general (Rule 69), and notices of proposed rulemaking (Rule 53), including proceedings under section 19 of the Merchant Marine Act, 1920, 46 U.S.C. app. §876(1)(b) (Part 585), and proceedings under section 13(b)(5) of the

Shipping Act of 1984, 46 U.S.C. app. §1712(b)(5) (Part 587). Section 587.1 is amended to conform that rule with this requirement.

Section 502.118 is amended to clarify that the Commission requires fifteen (15) copies of answers to complaints filed pursuant to §502.64 and of filings on which it appears that the Commission may ultimately rule on review, even when the matter is to be initially determined by the administrative law judge. Motions to dismiss and petitions to intervene are examples of filings governed by this rule.

A new section 502.119 outlining requirements for submitting filings containing confidential material is being added. It is intended to fill a void in the existing rules. The new rule provides that all confidential filings be clearly marked "confidential-restricted" on the cover page and identified as such in a transmittal letter which describes the nature and extent of confidentiality sought, and that the public portions of such filings be clearly separated from the confidential portions and identify where confidential materials are excluded.

Finally, section 502.167 is amended to delete the requirement that a written motion be filed in connection with testimony which has been ordered at a hearing not to be disclosed to the public pursuant to objection. In practice, the requirement to file a written motion is often waived by the administrative law judge. Of course, the presiding administrative law judge retains the discretion of ordering such a written motion.

The Commission has determined that this is not a "major rule" as defined in Executive Order 12291, dated February 17, 1981, because it will not result in:

- (1) An 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 geographical regions; or 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, if adopted, will not have a significant economic impact on a substantial number of small entities, including small businesses, small organizational units or small governmental organizations.

The Paperwork Reduction Act, 44 U.S.C. §3501-3520, does not apply to this Notice of Proposed Rulemaking because the amendments to Part 502 of Title 46, Code of Federal Regulations, do not impose any additional reporting or recordkeeping requirements or change the collection of information from members of the public which require the approval of the Office of Management and Budget.

List of Subjects in 46 CFR Part 502:

Administrative Practice and Procedure

PART 502 - [AMENDED]

Part 502 of Title 46, Code of Federal Regulations, is amended as follows:

1. The authority citation for Part 502 continues to read as follows:

AUTHORITY: 5 U.S.C. 504, 551, 552, 553, 559; 12 U.S.C. 1141j(a); 18 U.S.C. 207; 26 U.S.C. 501(c)(3); 28 U.S.C. 2112(a); 46 U.S.C. app. 817, 820, 821, 826, 841a, 1114(b), 1705, 1707-1711, 1713-1716; and E.O. 11222 of May 8, 1965 (30 FR 6469).

§502.51 [Amended]

2. Section 502.51, Petition for issuance, amendment, or repeal of rule, is amended by adding a new sentence immediately before the last sentence, to read as follows:

* * * Petitions shall be accompanied by remittance of a \$50 filing fee.* * *

§502.53 [Amended]

3. Section 502.53, Participation in Rulemaking, is amended by adding the following sentences to the end of paragraph (a):

(a) * * * In the event that replies or succeeding rounds of comments are permitted, copies shall be served on all prior participants in the proceeding. A list of participants may be obtained from the Secretary of the Commission.

* * * * *

4. In Section 502.62, paragraph (a) is amended to read as follows:

§502.62 Complaints and fee.

(a) The complaint must be verified and shall contain the name and address of each complainant, the name and address of each complainant's attorney or agent, the name and address of each person against whom complaint is made, a concise statement of the cause of action, and a request for the relief or other affirmative action sought.

* * * * *

Subpart E, Exhibit 1 - [Amended]

5. The first sentence of the fifth paragraph of Subpart E, Exhibit 1, "Information to Assist in Filing Formal Complaint," is amended to read as follows:

* * * * *

The format of Exhibit No. 1 to Subpart E must be followed and a verification must be included. (See §§502.21-502.32, 502.62 and 502.112.) * * *

Subpart S, Exhibit 1 [Amended]

6. The first sentence of the fifth paragraph of Subpart S, Exhibit 1, "Information to Assist in Filing Informal Complaints," is amended to read as follows:

* * * * *

The format of Exhibit No. 1 must be followed and a verification must be included. (See §§502.21-502.32, 502.112, and 502.304.) * * *

7. Section 502.111 is amended by designating the current text of §502.111 as paragraph (a) and adding a new paragraph (b) to read as follows:

§502.111 Form and appearance of documents filed with Commission.

* * * * *

(b) Filings by facsimile will not be accepted, except for the purpose of meeting filing deadlines of protests filed pursuant to §502.67 or replies thereto, in which case the original and required copies must also be certified as being deposited in the mail or delivered to a courier on or before the deadline. Photocopies of facsimile transmissions of signature pages on other filings will be tentatively accepted for the purpose of meeting filing deadlines pending receipt of the original within seven working days. Use of photocopies of facsimile transmissions in exhibits to Part 502 filings is permitted.

* * * * *

8. Section 502.114 is amended by redesignating paragraph (b) as paragraph (c) and adding a new paragraph (b) reading as follows:

§502.114 Service and filing by parties.

* * * * *

(b) Service on all prior participants shall be shown when submitting comments or replies beyond the initial round, or when submitting post-decisional pleadings and replies such as petitions for reconsideration, or for stay under Rule 261 or to reopen under Rule 230 in all general notice proceedings, including those involving disposition of petitions for rulemaking (Rule 51), petitions for declaratory order (Rule 68), petitions general (Rule 69), notices of proposed rulemaking (Rule 53), proceedings under section 19 of the Merchant Marine Act, 1920, 46 U.S.C. app. §876(1)(b) (Part 585), and proceedings under section 13(b)(5) of the Shipping Act of 1984, 46 U.S.C. app. §1712(b)(5) (Part 587). A list of all participants may be obtained from the Secretary of the Commission.

* * * * *

9. Section 502.118 is amended by revising paragraph (b)(1)(iv) and adding a new paragraph (b)(1)(v) to read as follows:

§502.118 Copies of documents for use of Commission.

* * * * *

(b) * * *

(1) * * *

(iv) All motions, replies and other filings for which a request is made of the administrative law judge for certification to the Commission or on which it otherwise appears it will be necessary for the Commission to rule either directly or upon review of the administrative law judge's disposition thereof, pursuant to §502.227;

(v) Answers to complaints filed pursuant to §502.64.

* * * * *

10. A new section 502.119 is added to read:

§502.119 Documents containing confidential materials.

Except as otherwise provided in the rules of this part, all filings which contain information previously designated as confidential pursuant to §§502.167, 502.201(i)(1)(vii), or any other rules of this part or for which a request for protective order pursuant to §502.201(i)(1)(vii) is pending, are subject to the following requirements:

(a) Filings shall be accompanied by a transmittal letter which identifies the filing as confidential and describes the nature and extent of the authority for requesting confidential treatment.

(b) Such filings shall consist of public and confidential copies. The public copies shall exclude confidential materials and shall indicate on the cover page and on each affected page "confidential materials excluded." The confidential copies shall consist of the complete filing and shall include a cover page marked "confidential-restricted," with the confidential materials likewise clearly marked on each page.

(c) Confidential treatment afforded by this section is subject to the proviso that any information designated as confidential may be used by the administrative law judge or the Commission if deemed necessary to a correct decision in the proceeding. [Rule 119.]

11. Section 502.167 is amended to read as follows:

§502.167 Objection to public disclosure of information.

Upon objection to public disclosure of any information sought to be elicited during a hearing, the presiding officer may in his or her discretion order that the witness shall disclose such information only in the presence of those designated and sworn to secrecy by the presiding officer. The transcript of testimony shall be held confidential. Copies of said transcript need be served only upon the parties to whose representatives the information

has been disclosed and upon such other parties as the presiding officer may designate. This rule is subject to the proviso that any information given pursuant thereto, may be used by the presiding officer or the Commission if deemed necessary to a correct decision in the proceeding. [Rule 167.]

PART 587 - [AMENDED]

Part 587 of Title 46, Code of Federal Regulations is amended as follows:

1. The authority citation of Part 587 continues to read:

AUTHORITY: 5 U.S.C. 533; secs. 13(b)(5), 15 and 17 of the Shipping Act of 1984 (46 U.S.C. app. 1712(b)(5), 1714, and 1716).

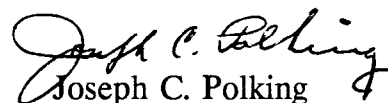
2. In Section 587.1, paragraph (b)(2) is revised to read as follows:

§587.1 Purpose; general provisions.

* * * * *

(b) * * *

(2) The provisions of Part 502 of this chapter (Rules of Practice and Procedure) shall not apply to this part except for those provisions governing ex parte contacts (§502.11 of this chapter) and service of documents and copies of documents (§§502.114(b) and 502.118 of this chapter), and except as the Commission may otherwise determine by order.


Joseph C. Polking
Secretary