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FEDERAL MARITIME COMMISSION

46 CFR Part 514

[Docket No. 93-01]

ELECTRONIC FILING OF MILITARY RATES

AGENCY: Federal Maritime Commission.

ACTION: Proposed Rule.

SUMMARY: The Federal Maritime Commission ("Commission" or "FMC"), pursuant to section 16 of the Shipping Act of 1984 ("1984 Act") and section 35 of the Shipping Act, 1916 ("1916 Act") is proposing to exempt from the filing requirements of the 1984 Act and the 1916 Act and remove from the requirements of 46 CFR Part 514, on certain conditions, transportation of U.S. Department of Defense ("DOD") cargo moving under terms and conditions negotiated and approved by the Military Sealift Command ("MSC") and set forth in a rate guide or tender. In addition, the Commission proposes to allow any military rate filed in a commercial tariff of a carrier or conference to become effective upon filing.

DATE: Comments are due [Insert date 30 days after date of publication in the Federal Register.]

ADDRESS: Written comments (original and 15 copies) must be submitted to:

Joseph C. Polking, Secretary
Federal Maritime Commission
800 North Capitol Street, N.W.
Washington, DC 20573-0001

FOR FURTHER INFORMATION CONTACT:

John Robert Ewers, Deputy Managing Director
Office of the Managing Director
Federal Maritime Commission
800 North Capitol Street, N.W.
Washington, DC 20573-0001

SUPPLEMENTARY INFORMATION:

MSC is responsible for arranging ocean transportation services for all components of DOD. Although MSC can utilize commercial tariff rates and service contracts for the carriage of DOD cargo,

most DOD cargo moves pursuant to rates tendered to MSC in bid form, i.e., "tenders," which, if accepted, become special contractual arrangements which MSC enters into with the carriers. The development of such tenders, therefore, is quite different from the carrier generation of rates for commercial cargo in a tariff publication. While military tenders are required to be filed, they are subject to a continuing special permission, 46 CFR 580.1(d), which provides:

(d) The following services are subject to continuing special permission authority to deviate from the 30-day notice requirement of section 8 of the [1984] Act and the form and content requirements of this part: Transportation of U.S. Department of Defense cargo by American-flag common carriers under terms and conditions negotiated and approved by the Military Sealift Command (MSC), if all the following conditions are met:

(1) Exact copies of all common carrier quotations or tenders accepted by MSC are filed with the Commission as soon as possible after they are approved by MSC, but on not less than one day's filing notice prior to the effective date thereof;

(2) All tenders are filed in triplicate, one copy of which is signed and maintained at the Commission's Washington Office for public inspection;

(3) A letter of transmittal accompanies the filing stating that the documents are submitted in accordance with the requirements of the Shipping Act of 1984 and this section;

(4) Tenders submitted for filing are to be numbered by the respective common carriers as part of a distinct tariff series, with each common carrier's series to begin with the number "1" and run consecutively thereafter;

(5) Each tender which supersedes a prior tender must specifically cancel the prior tender by its series number; and

(6) Amendments or supplements to tenders must also be filed with the Commission upon not less than one day's

filing notice and contain an appropriate reference to the original tender being amended or supplemented.

In Docket No. 90-23, Tariffs and Service Contracts, the Commission is developing rules that will govern the electronic formatting and filing of all tariff data pursuant to the Automated Tariff Filing and Information ("ATFI") system. As a part of Docket No. 90-23, the Commission carried forward the continuing special permission pertaining to military rate tenders to ATFI. The proposed continuing special permission was set forth in section 514.3(b)(4)¹ of the proposed rules and comments thereon were requested. In response to comments, the continuing special permission was modified, resulting in the following provision which appeared in the interim rule of August 12, 1992:

[514.3(b)] (4) Department of Defense cargo in foreign commerce - certain requirements. Transportation in foreign commerce of U.S. Department of Defense cargo by American-flag common carriers, under terms and conditions negotiated and approved by the Military Sealift Command ("MSC"), is subject to continuing special permission authority to deviate from the 30-day notice requirement of section 8 of the 1984 Act, if all of the following conditions are met:

(i) All common carrier quotations or tenders, including amendments thereto, are filed with the Commission as soon as possible after they are accepted and approved by MSC, but no later than on the effective date;

(ii) MSC tenders are filed in the carrier's foreign commodity tariff(s) covering the trade route(s) applicable to the tender(s);

(iii) MSC tenders are filed for distinct commodities or as separate TLI's within a commodity, as

¹ See also the companion provisions at sections 514.9(b)(13) and 514.15(b)(32).

applicable, using the filing/amendment code "M" under section 514.9(b)(13);

(iv) The use of the filing/amendment code "M" is understood by the filer to mean that the tariff material filed is submitted in accordance with the requirements of the Shipping Act of 1984 and this part; and

(v) The terms and conditions governing the military rates, as set forth in the applicable MSC rate agreement(s), are included in Tariff Rule 32, section 514.15(b)(32), and assessorials are properly formatted and linked to the commodity description and/or TLI.

In the Supplementary Information to the August 12 interim rule, the Commission stated:

Even though MSC suggests consideration of parallel filing of tenders in paper form, the Commission does not think this is necessary or desirable. The purpose of ATFI is to do away with paper filing to the extent possible
* * *. [57 FR 36259.]

Pursuant to the interim rule's invitation for further comment in Docket No. 90-23, comments on the electronic filing of military rates were filed by MSC, as well as by two ocean carriers, Farrell Lines, Inc. and Sea-Land Service, Inc. ("Carriers"). Because these comments raised issues not originally within the scope of proposed Part 514, or requested reconsideration of actions previously taken, they cannot be implemented in the interim amendments in Docket No. 90-23. Accordingly, these issues have been severed from Docket No. 90-23, and are being considered in this proceeding.²

The Carriers argue that section 514.3(b)(4) has "reregulated" the filing of U.S. military rates, thereby eviscerating the tariff filing exemption now found in 46 CFR section 580.1(d). Under the

² A proposed rule and an interim (final) rule cannot be contained in the same document for Federal Register publication.

interim rule, the Carriers point out that each filing carrier will be required to take all the rates accepted by MSC, enter them into ATFI, and draft algorithms for assessorial charges. The Carriers further point out that these rates are used by only one shipper, i.e., MSC, and conclude that there is no interest served by filing MSC rates in ATFI format. Hence, according to the Carriers, section 514.3(b)(4) is "unwarranted and unworkable."

The comments of the Carriers appear to have merit. Accordingly, the Commission proposes to exempt the transportation of DOD cargo moving under terms and conditions negotiated and approved by MSC from the tariff filing requirements of the 1916 and 1984 Acts and remove such transportation from the rules of this part, provided a copy of the applicable military rate guide or tender is filed with the FMC. The result of this proposed rule would be, in essence, to preserve the status quo with respect to the treatment of rates contained in military rate guides or tenders.³

Section 514.15(b)(32), which requires Tariff Rule 32 to contain all terms and conditions pertaining to MSC tenders, is proposed to be deleted as unnecessary. However, section 514.9(b)(13), which prescribes the symbol "M" for military rates, is retained, but amended for situations where the military rates

³ MSC filed comments which sought to make the exemption from the 30-day filing requirement available to all carriers, not simply American-flag vessels. The exemption proposed herein is considerably broader than the exemption from the 30-day filing requirement and is available to all carriers regardless of flag.

may be filed by the carrier itself in the carrier's commercial tariff.

The exemption proposed here will be under section 16 of the 1984 Act, 46 USC app. section 1715, and section 35 of the 1916 Act, 46 USC app. section 833a, which require findings that the exemption will not substantially impair effective regulation, be unjustly discriminatory, result in a substantial reduction in competition (1984 Act only), or be detrimental to commerce.

It appears that:

1. The exemption will not substantially impair effective regulation by the Commission. It is unnecessary for military rates to be converted to a commercial tariff format in order for the Commission to carry out its regulatory responsibilities. For rate analyses, and for the purpose of investigation, surveillance and enforcement, the rate guides and tenders in their present format should be sufficient.

2. The exemption will not be unjustly discriminatory, result in substantial reduction in competition,⁴ or be detrimental to commerce. In essence, the proposed exemption would preserve the status quo with respect to the treatment of rates contained in military rate guides or tenders.

⁴ The requirement that the exemption not result in a substantial reduction in competition does not appear in section 35 of the 1916 Act. In any event, the Commission fails to see how preservation of the status quo with respect to military rate tenders would result in a substantial reduction in competition.

Accordingly, the Commission believes that an exemption under section 16 of the 1984 Act and section 35 of the 1916 Act is warranted.

Although the Commission, as an independent regulatory agency, is not subject to Executive Order 12291, dated February 17, 1981, it nonetheless has reviewed the proposed rule in terms of this 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) 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 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. section 605(n), 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. To the extent that rates on military cargo may be filed by a small entity, the proposed rule, if adopted, will decrease filing burdens by reverting to the status quo ante, whereby military rates will be filed by the Military Sealift Command, rather than by the small-entity carriers, as required by current Part 514.

The collection of information requirements contained in 46 CFR Part 514 (and Exhibit 1 to Part 514) have been approved by the Office of Management and Budget (OMB) in accordance with 44 U.S.C. chapter 35 and have been assigned OMB control number 3072-0055. The proposed amendments to Part 514 contained in this rulemaking contain no information collection requirements additional to those already approved.

List of Subjects in 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 recordkeeping requirements, Surety bonds, Trucks, Water carriers, Waterfront facilities, Water transportation.

Therefore, for the reasons set forth in the preamble, and 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; section 2(b) of Public Law 101-92, and section 502 of Public Law 102-582; Part 514 of Title 46, Code of Federal Regulations, is proposed to be amended as follows:

PART 514 -- TARIFFS AND SERVICE CONTRACTS

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 514.3, paragraph (b)(4) is revised to read as follows:

§ 514.3 Exemptions and exclusions.

* * * * *

(b) * * *

(4) Department of Defense cargo - Transportation of U.S. Department of Defense cargo moving under terms and conditions negotiated and approved by the Military Sealift Command ("MSC") and published in a rate guide or tender is exempt from the tariff filing requirements of the 1916, 1933 and 1984 Acts and the rules of this part if an exact copy of the rate guide or tender, including any amendments thereto, is filed with the Commission prior to the effective date of the rate guide or tender.

* * * * *

3. In section 514.9, paragraph (b)(13) is revised to read as follows:

§ 514.9 Filing/Amendment codes and required notice periods.

* * * * *


(b) * * *

(13) Where a rate for military cargo is incorporated as a separate TLI in the commercial tariff of a carrier or conference the filing/amendment code "M" shall be used to identify the TLI. Any such military rate shall be effective upon filing.

* * * * *

4. In section 514.15, paragraph (b) (32) is removed and marked
"RESERVED."

By the Commission.


Joseph C. Polking
Secretary