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FEDERAL MARITIME COMMISSION

46 CFR PART 502

[DOCKET NO. 93-10]

AMENDMENTS TO RULES GOVERNING
RATE PROCEEDINGS IN THE DOMESTIC OFFSHORE TRADES

AGENCY: Federal Maritime Commission.

ACTION: Proposed Rule.

SUMMARY: The Federal Maritime Commission proposes to amend its rules of practice and procedure governing rate proceedings in the domestic offshore trades in order to enhance the Commission's ability to comply with the time constraints of the Intercoastal Shipping Act, 1933. This proposal also would clarify that the burden of proof in any hearing under section 3 of the 1933 Act is on the carrier whose rates are under investigation.

DATES: Comments due [insert date 60 days after date of publication in the Federal Register].

ADDRESS: Comments (original and 15 copies) are to be submitted to:

Joseph C. Polking, Secretary
Federal Maritime Commission
800 North Capitol Street, N.W.
Washington, D.C. 20573-0001
(202) 523-5725

FOR FURTHER INFORMATION CONTACT:

Seymour Glanzer, Director
Bureau of Hearing Counsel
Federal Maritime Commission
800 North Capitol Street, N.W.
Washington, D.C. 20573-0001
Phone (202) 523-5783
Fax (202) 523-5785

SUPPLEMENTARY INFORMATION:

In 1978, the Intercoastal Shipping Act, 1933, 46 U.S.C. app. 843 et. seq. ("1933 Act"), was amended to make various changes to the Federal Maritime Commission's ("Commission" or "FMC") authority to suspend and investigate rate changes in the domestic offshore trades. Included among those changes were time limits on Commission rate investigations and new definitions of general rate increase ("GRI") and general rate decrease ("GRD"). That legislation also enlarged the notice requirements and provided for other distinct treatment of such general rate changes.

The Commission published procedural rules in 1979 to implement these amendments to the 1933 Act.¹ Those rules are contained in 46 CFR Part 502. ("Part 502") and prescribe the method by which the Commission conducts rate proceedings in the domestic offshore trades within the time limits of the statute.

On January 9, 1992, the State of Hawaii ("Hawaii"), by its Attorney General, filed a petition ("Petition") seeking review of certain portions of Part 502 and recommending specific changes to those rules. A Notice of Filing of the Petition was published in

¹Part 502 - Rules of Practice and Procedure, Docket No. 78-47, 21 F.M.C. 739 (1979).

the Federal Register on January 23, 1992 (57 FR 2702), soliciting comments from interested persons. Five comments were received. Specific rulings on various recommendations contained in Hawaii's Petition which the Commission has determined to reject are the subject of a separate Commission order issued simultaneously herewith.

Having considered that Petition, the comments thereon, and the Commission's own experience under Part 502 since 1979, the Commission has determined to propose certain changes to those rules. In general, these proposed changes would adjust the procedures relating to all types of rate increases. Some reflect separate changes recently adopted by the Commission in Docket No. 92-36, Reduction of Notice Requirements for Tariff Increases in the Domestic Offshore Trades, 57 FR 44504 (September 28, 1992). Specific proposals are as follows:

1. Require Carriers To Respond To Protestants' Information Requests Within Seven Days After the Commission's Order Of Investigation.

The Commission's rules at section 502.67(b)(1) require protests to GRIs and GRDs to include seven specific items, among which are any requests for additional carrier data. In its Petition, Hawaii points out that the rules do not contain a time within which the carrier must respond to such requests for data and recommends the addition of such a requirement. The Commission believes that this is a constructive recommendation, which would serve to assist the administrative law judge ("ALJ") in completing a hearing within sixty days, as the 1993 Act requires. The absence

of any deadline for responses to requests for data has the potential to create uncertainty and delay, and to divert the ALJ's attention from the immediate task of structuring and timely completion of an appropriate hearing. Thus, the Commission is proposing to amend section 502.67(d)(1) to require carriers to respond to protestants' data requests not later than seven days after the Commission issues its order of investigation in a rate proceeding involving a GRI or GRD in the domestic offshore trades.

2. **Extend The Time For Protestants And Hearing Counsel To Serve Their Direct Cases In GRI/GRD Proceedings.**

Hawaii recommends in its Petition that section 502.67(d)(1) be amended to eliminate the requirement for all parties to serve their direct cases in GRI/GRD proceedings within seven days after the proposed effectiveness of the tariff change. This recommendation is based largely upon the alleged difficulty, if not impossibility, of compliance with this deadline by protestants and the FMC's Bureau of Hearing Counsel. While the ALJ has discretion to adjust this requirement as necessary, such ad hoc adjustments could consume time, place additional burdens upon the ALJ and leave the parties in an uncertain status until any motions addressing these matters are decided.

A carrier which files a GRI/GRD already is required by section 502.67(a)(2) to submit, concurrently with its tariff filing, testimony and exhibits which will serve as its direct case in the event the matter is set for formal investigation. Thus, the further requirement to serve such material, under oath, upon the parties and the ALJ, no later than seven days after the tariff

matter is scheduled to take effect, should place a minimal burden upon the carrier. Moreover, the justification offered by the carrier for its rate increase (or decrease) appears to be the logical starting point for any rate investigation. As discussed below, the carrier has the ultimate burden of demonstrating the reasonableness of its rates.

Therefore, in lieu of Hawaii's suggestion, the Commission is proposing to retain the requirement for carriers to serve their sworn direct testimony and exhibits, together with underlying workpapers, within seven days. However, the seven days would commence upon the issuance of the FMC's order of investigation so that adding a few extra days to the time limits for concluding rate proceedings may be possible in some cases. The 60-day, 120-day and 180-day statutory time limits for hearings, initial decisions and final decisions, respectively, commence on the date the tariff becomes effective, or would have taken effect, absent suspension. Issuance of the Commission order prior to such date may be possible in some cases and would add extra time to meet those statutory constraints.

For parties other than the filing carrier, the Commission is proposing to extend the time for filing direct cases from seven to fourteen days. The fourteen-day period also would commence on the date of issuance of the order of investigation. This is a tight, but more realistic deadline that should be met in most instances without impeding the ALJ. Pursuant to section 502.67(a)(2), protestants and the Bureau of Hearing Counsel will have had the

carrier's initial submission since sixty days before the tariff was scheduled to take effect. The carrier's sworn direct case should be essentially the same, and, along with the carrier's initial discovery responses, would be available one week prior to protestants' and Hearing Counsel's deadlines for filing their direct cases. The remainder of the procedural schedule will remain entirely in the discretion of the ALJ, to accommodate the wide variety of situations which may be encountered in GRI/GRD proceedings.

3. Remove the Restriction on Protestants' Use of Carrier Workpapers in Subsequent Commission Proceedings.

In order to obtain carrier workpapers underlying financial and operating data filed in connection with proposed rate changes, potential protestants must sign a certification, set forth at section 502.67(a)(3), which states, in pertinent part, that the workpapers will be used solely in connection with protests related to and proceedings resulting from the particular rate change for which the workpapers have been prepared. In its Petition, Hawaii argues for the amendment of this certification to permit the use of carrier workpapers in subsequent Commission proceedings. The Petition asserts that parties in possession of a carrier's prior years' workpapers must request and receive the same workpapers again before they can be used, thus prolonging Commission proceedings.

To the extent that prior workpapers may be relevant to current issues, the Commission shares Hawaii's concern about the inefficiency of requesting and producing the same documents for a

second time. Therefore, we are proposing an amendment to the certification which would permit the use of carrier workpapers in any Commission proceedings addressing the rates, in that same trade, of the carrier which prepared those workpapers. The use of such workpapers in any proceeding still would be subject to legitimate evidentiary objections, and the documents would remain protected from public disclosure unless authorized by the ALJ or the Commission.

4. Eliminate the Requirement for All Parties to File Prehearing Statements Seven Days After the Proposed Effective Date of Non-GRIs/GRDs.

Section 502.67(d)(2) currently requires all parties to a proceeding involving rate changes other than GRIs/GRDs to file detailed prehearing statements no later than seven days after the proposed effective date of the tariff matter under investigation. Hawaii recommends elimination of this requirement on the basis that the parties do not have sufficient information to file meaningful prehearing statements at this stage of a non-GRI/GRD proceeding.

With one limited exception, carriers are not required to file supporting data for rate changes other than GRIs/GRDs.² Unless a carrier voluntarily files such data,³ other parties to a proceeding cannot be expected to explain how they plan to challenge the

²Section 552.2(f) requires supporting data when the aggregate of non-GRI increases affecting more than 50 percent of a carrier's rates results in an increase in gross revenues of 9 percent or more in a twelve month period.

³In the Pacific Coast/Hawaii Trade, Matson Navigation Company voluntarily has filed supporting data with several non-GRI tariff changes since 1985.

carrier's justification. Therefore, the Commission is proposing to eliminate the requirement for detailed prehearing statements.

5. Require Carriers to File Direct Cases in Support of Non-GRIs/GRDs Within Fourteen Days After an Order of Investigation.

As discussed above, rate changes other than GRIs/GRDs normally are filed without supporting financial or operating data. A formal investigation of any such changes must, therefore, commence without the same factual basis and analysis that accompanies a GRI/GRD. In addition, the Commission recently has reduced the notice period for filing most increases other than GRIs from thirty days to seven workdays.⁴ Under these amended rules, protests to such increases (other than across-the-board increases) would be permitted until 9:00 a.m. of the last day prior to the effectiveness of the tariff change.

To complete an investigation of an increase filed under these circumstances within the statutory time frame would require the carrier to file its direct case as quickly as possible after the order is issued. Unless this requirement is prescribed by rule, valuable time likely will be lost while an ALJ is assigned to the

⁴Docket No. 92-36, supra. Across-the-board increases would continue to be filed on thirty days' notice, and are defined by the new rule, at 46 CFR 550.2(a), as:

any change in rates, fares, or charges which will:

- (1) Result in an increase in not less than 50 percent of the total rate, fare or charge items in the tariffs per trade of any carrier; and

- (2) Directly result in an increase in gross revenues of said carrier for the particular trade of less than 3 percent.

proceeding and can establish a procedural schedule. Therefore, the Commission is proposing to amend section 502.67(d)(2) to require a carrier to file its direct case within fourteen days after the issuance of an order of investigation into rate changes other than GRIs/GRDs. The ALJ would continue to have the discretionary authority to adjust this date as particular circumstances may necessitate.

6. Clarify the Rule Assigning Burden of Proof in Commission Proceedings.

Section 502.155 currently reads as follows:

§ 502.155 Burden of Proof.

At any hearing in a suspension proceeding under section 3 of the Intercoastal Shipping Act, 1933 (§ 502.67), the burden of proof to show that the suspended rate, fare, charge, classification, regulation, or practice is just and reasonable shall be upon the respondent carrier or carriers. In all other cases, the burden shall be on the proponent of the rule or order. [Rule 155.]

In its Petition, Hawaii states that the statute and case law place the burden of proof on a carrier to establish the reasonableness of its rates in any hearing under section 3 of the 1933 Act, regardless of whether the rates have been suspended. Thus, the rule is said to be unclear, at best.

All but one of the carriers responding to the Petition agree with Hawaii's interpretation of the law relating to burden of proof, but see no need to clarify the rule, asserting that there

has been no misunderstanding on this issue since 1972.⁵ However, one of the carriers argues in its comments that the rule is literally correct and that non-carrier parties have the burden of proof in proceedings where rates have not been suspended. In view of this misunderstanding, the Commission takes this opportunity to state, by way of clarification, that the burden of proof in rate proceedings brought under section 3 of the 1933 Act is always on the carrier, regardless of whether the rates are suspended. Section 502.155 is proposed to be revised, accordingly.

In addition to these changes, technical amendments also are proposed in this notice to add section 3 of the 1933 Act to the authority cited for Part 502, and to revise section 502.67(e) to reflect deletion of the requirement to file prehearing statements within seven days of commencement of non-GRI/GRD proceedings.

Although the Commission, as an independent regulatory agency, is not subject to Executive Order 12291, dated February 17, 1981, it nonetheless has reviewed the 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

⁵Hawaii and the carriers commenting on the Petition cite Commonwealth of Puerto Rico v. Federal Maritime Commission, 468.F.2d 872 (D.C. Cir. 1972), for the proposition that the burden is clearly on the carriers in any proceeding under section 3 of the 1933 Act.

government agencies, or geographic 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 Commission certifies, pursuant to section 605(b) of the Regulatory Flexibility Act, 5 U.S.C. 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. The rule is procedural only and will result in a slight easing of the burdens imposed upon protestants to rate proceedings under section 3 of the 1933 Act.

List of Subjects in 46 CFR Part 502

Administrative practice and procedure, Claims, Equal access to justice, Investigations, Lawyers, Reporting and recordkeeping requirements.

Therefore, pursuant to 5 U.S.C. 553, sections 18 and 43 of the Shipping Act, 1916, 46 U.S.C. app. 817 and 841a, and section 3 of the Intercoastal Shipping Act, 1933, 46 U.S.C. app. 845, Part 502 of Title 46, Code of Federal Regulations is proposed to be amended as follows:

PART 502 -- RULES OF PRACTICE AND PROCEDURE

1. The authority citation for Part 502 is amended 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, 845, 1114(b), 1705,
1707-1711, 1713-1716; E.O. 11222 of May 8,
1965 (30 FR 6569); and 21 U.S.C. 853a.

2. In section 502.67, paragraphs (a)(3), (d)(1), (d)(2),
and the introductory text of paragraph (e)(1) are revised to read
as follows:

§502.67 Proceedings under section 3(a) of the
Intercoastal Shipping Act, 1933.

(a) * * *

(3) Workpapers underlying financial and operating data
filed in connection with proposed rate changes shall be made
available promptly by the carrier to all persons requesting them
for inspection and copying upon the submission of the following
certification, under oath, to the carrier:

CERTIFICATION

I, (Name and title if applicable) _____,
of (Full name of company or entity) _____
_____, having been duly sworn, certify
that the underlying workpapers requested from
(Name of carrier) _____, will be used
solely in connection with protests related to
and proceedings resulting from (Name of
carrier) _____'s rates, fares or
charges in the _____ trade
and that their contents will not be disclosed
to any person who has not signed, under oath,

a certification in the form prescribed, which has been filed with the Carrier, unless public disclosure is specifically authorized by an order of the Commission or the presiding officer.

Signature: _____

Date: _____

Signed and Sworn to before me this _____ day of _____ (month), _____ (year).

Notary Public: _____

My Commission expires: _____

* * * * *

(d) (1) In the event the general rate increase or decrease of a VOCC is made subject to a docketed proceeding:

(i) the VOCC shall serve, under oath, testimony and exhibits constituting its direct case, together with underlying workpapers and responses to protestants' requests for additional carrier data, on all parties pursuant to subpart H of this part, and lodge copies of such testimony and exhibits with the presiding officer, no later than seven (7) days after the Commission issues its order of investigation in the docketed proceeding; and

(ii) Hearing Counsel and all Protestants shall serve, under oath, testimony and exhibits constituting their direct cases on all parties pursuant to subpart H of this part, and lodge copies with the presiding officer, no later than fourteen (14) days after the

Commission issues its order of investigation in the docketed proceeding.

(2) If other proposed tariff changes are made subject to a docketed proceeding pursuant to section 3 of the Intercoastal Shipping Act, 1933, the carrier shall serve, under oath, testimony and exhibits constituting its direct case, together with underlying workpapers, on all parties pursuant to subpart H of this part, and lodge copies of such testimony and exhibits with the presiding officer, no later than fourteen (14) days after the Commission issues its order of investigation. Further procedural dates in such proceeding shall be established by the presiding officer.

(e)(1) Subsequent to the issuance of an order of investigation, the presiding officer may direct all parties to participate in a prehearing conference to consider:

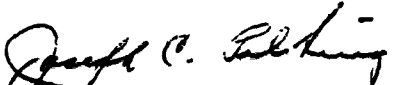
* * * * *

3. Section 502.155 is revised to read as follows:

§502.155. Burden of Proof

At any hearing under section 3 of the Intercoastal Shipping Act, 1933 (§502.67), the burden of proof to show that the rate, fare, charge, classification, regulation, or practice is just and reasonable shall be upon the respondent carrier or carriers. In all other cases, the burden shall be on the proponent of the rule or order. [Rule 155.]

By the Commission.


Joseph C. Polking
Secretary