DECISIONS OF THE

FEDERAL MARITIME COMMISSION

VOLUME 27

JULY 1984 TO JUNE 1985

U.S. GOVERNMENT PRINTING OFFICE
WASHINGTON, D.C., 1999

For sale by the U.S. Government Printing Office
Superintendent of Documents, Mail Stop: SSOP, Washington, DC 20402-9328
ISBN 0-16-049908-9

FEDERAL MARITIME COMMISSION

WASHINGTON, D.C.

June 30, 1985

James J. Carey, Member
Thomas F. Moakley, Member
Edward J. Philbin, Member
Robert Setrakian, Member

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FEDERAL MARITIME COMMISSION

DOCKET NO. 82–30
CONTRACT MARINE CARRIERS, INC.

ORDER

July 6, 1984

This proceeding is before the Commission upon a Motion to Dismiss filed by respondent Contract Marine Carriers, Inc. (CMC). CMC was granted leave to file its motion by the Commission in an order also suspending consideration of this proceeding. The Commission's Bureau of Hearing Counsel (Hearing Counsel) has filed a response in accordance with that order.

BACKGROUND

This proceeding was initiated by order served June 21, 1982, to determine whether CMC's practice of undertaking contract carriage at different rates than those published in its tariffs for the same trade and commodities violates sections 18(b)(3), 16 Second, 17 and 14 Fourth of the Shipping Act, 1916 (1916 Act) (46 U.S.C. §817(b)(3), 815 Second, 816, and 812 Fourth). By stipulation the matter was submitted for consideration by Administrative Law Judge William Beasley Harris (Presiding Officer) on a written record. The Presiding Officer issued an Initial Decision finding that the Commission had jurisdiction over the contract practices of CMC and that CMC had engaged in practices violative of the 1916 Act. Exceptions to the Initial Decision were filed by CMC; Replies to these Exceptions were filed by Hearing Counsel.

On March 6, 1984 CMC requested that the Commission suspend consideration of the proceeding to permit it time to file a motion to dismiss based on the imminent passage of the Shipping Act of 1984 (1984 Act) (46 U.S.C. app. §1701 *et seq.*).[1] The Commission granted the request and in so doing directed CMC to address the following specific issues in any motion filed: (1) whether the 1984 Act rendered this proceeding moot; (2) whether the rights of third parties will be affected by dismissal; and (3) whether section 20 of the 1984 Act (46 U.S.C. app. §1719) is relevant to a final disposition of this case. Hearing Counsel was also instructed to address these matters.

[1] The Shipping Act of 1984 was signed into law by the President on March 20, 1984 and by its terms became effective on June 18, 1984.

DISCUSSION

CMC argues that this proceeding should be discontinued as moot and because no regulatory purpose will be served by a disposition of the merits. It alleges that the inclusion of service contracts within the Commission's jurisdiction under the 1984 Act supports its position that they were not within the scope of the 1916 Act. Regulation of CMC's service contracts pursuant to this proceeding would allegedly be premature and contrary to the congressional intent underlying those provisions in the 1984 Act which address "service contracts."

CMC acknowledges the Commission's jurisdiction over its contract practices under the 1984 Act and states its intention to meet the publication requirements of that Act. CMC argues that, although conduct engaged in prior to the effective date of the 1984 Act is subject to the 1916 Act, the assessment of civil penalties is not an issue in this proceeding and there is no evidence that any third parties would be prejudiced or disadvantaged by a discontinuance of the proceeding.

Hearing Counsel opposes dismissal of this proceeding arguing that a regulatory purpose would be served by a decision on the jurisdictional issue presented in this case, *i.e.*, whether the Commission has jurisdiction over "contract carriage" services provided by common carriers. Hearing Counsel also contend that the rights of any unknown third parties would be effectively eliminated by a dismissal of this case.

For reasons stated below, the Commission will grant CMC's Motion to Dismiss. It should be pointed out here, however, that this dismissal is without prejudice to the rights of any third party interest that may have been injured by CMC's past conduct to seek redress for such injuries before the Commission. The discontinuance of this proceeding is in no way to be interpreted as a disposition on the merits of any issues presented in this proceeding or to otherwise limit the right of third parties to file complaints with the Commission based on the conduct at issue in the proceeding.

There is no doubt that certain aspects of this proceeding are moot, *i.e.* any *prospective* proscription of specific conduct by CMC with regards to violations of the 1916 Act. The statutory provisions which the Presiding Officer concluded that CMC had violated, sections 18(b)(3), 16 Second, 17 and 14 Fourth of the 1916 Act, have been superseded by section 10(b) (1–4, 6) of the 1984 Act (46 U.S.C. app. § 1709(b) (1–3, 6)).[2] Although the provisions of section 10(b) (1–4, 6) generally correspond to those of sections 18(b)(3), 16 Second, 17 and 14 Fourth of the 1916 Act, there are some important differences. Section 10(b) (1–3), which carries forward the prohibitions of section 18(b)(3) of the 1916 Act, specifically

[2] Section 20(a) of the 1984 Act repeals section 18(b) of the Shipping Act, 1916; section 20(b)(2) of the 1984 Act makes sections 14 and 16 applicable only to "common carriers by water in interstate commerce"; section 20(b)(8) of the 1984 Act strikes section 17, first paragraph from the Shipping Act, 1916.

refers to service contracts, thereby recognizing that a carrier may have both tariff rates and service contract rates. Section 10(b)(6), which is a substantial revision of section 14 Fourth, expressly exempts service contracts from the prohibition against unfair or unjustly discriminatory practices. A finding that CMC did not comply with the 1916 Act would clearly be of little value in interpreting the requirements of the 1984 Act.

Nor would any regulatory purpose be served by rendering an opinion on the legality of CMC's past conduct. First, the assessment of civil penalties is not at issue in this proceeding. Second, the record does not disclose any third parties adversely affected by CMC's conduct. Although it is possible that civil penalties could be assessed and that an injured third party come forward at this time, these matters could not be addressed in *this* proceeding unless it is essentially reconstituted.[3] Such theoretical contingencies do not appear to justify continued litigation in this case.[4]

There does not appear to be any dispute that contractual arrangements entered into by CMC after March 20, 1984 are subject to public disclosure under the requirements of the 1984 Act.[5] However, it is not at all clear that the Commission could require CMC to file its present contracts entered into prior to March 20, 1984.[6] Requiring CMC to undertake alternative

[3] *See National Steel & Shipbuilding Co. v. Director, Workers Comp. Pro.*, 616 F.2d 420 (9th Cir. 1980); *see also First Nat. Bank of Bellaire v. Comp. of Currency*, 697 F.2d 683 (5th Cir. 1983).

[4] CMC alleges that section 20(e)(2) of the 1984 Act applies to complaints filed with the Commission and allows a one-year period within which complaints alleging a violation of the 1916 Act may be filed after the effective date of the 1984 Act. Section 20(e)(2) provides:

> (2) This Act and the amendments made by it shall not affect any suit—
>
> (A) filed before the date of enactment of this Act; or
>
> (B) with respect to claims arising out of conduct engaged in before the date of enactment of this Act, filed within one year after the date of enactment of this Act.

While a full discussion of the legal effects of section 20(e)(2) is unnecessary for a proper disposition of CMC's Motion to Dismiss, it is our opinion that section 20(e)(2) was intended only to preserve court antitrust actions and has no application to cases pending before the Commission. H.R. Rep. No. 53, 98th Cong., 1st Sess. 39 (1983).

[5] CMC submits that its service contracts will eventually be subject to the service contract provisions of the 1984 Act, section 8(c) (46 U.S.C. app. §1707) which provides:

> (c) Service Contracts.—An ocean common carrier or conference may enter into a service contract with a shipper or shippers' association subject to the requirements of this Act. Except for service contracts dealing with bulk cargo, forest products, recycled metal scrap, waste paper, or paper waste, each contract entered into under this subsection 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—
>
> (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;
>
> (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.
>
> The exclusive remedy for a breach of contract entered into under this subsection shall be an action in an appropriate court, unless the parties otherwise agree.

[6] Section 20(e)(1) of the 1984 Act (46 U.S.C. app. §1719) provides:

Continued

remedial actions to preclude the possibility of continuing adverse effects from its *past* practices would be of limited value and would not appear to serve a regulatory purpose.

The only matter of continuing significance raised in this proceeding is the issue of the Commission's jurisdiction over the contract practices now (other than those involving service contracts) of carriers which are also operating as common carriers with tariffs on file. Although CMC has asserted that it will file its service contracts with the Commission in accordance with the 1984 Act, Hearing Counsel is correct in asserting that the 1984 Act does not clearly put to rest all the underlying jurisdictional uncertainties that essentially gave rise to this proceeding. However, as is the case with CMC's alleged violations of the substantive provisions of the 1916 Act, a jurisdictional decision in this case based on circumstances and the law existing prior to June 18, 1984 would be of little value in administering the 1984 Act. The Commission is of the opinion that a rulemaking proceeding, wherein all interested and affected parties may contribute their views, would be a better vehicle to address this remaining issue. It is our intention therefore to initiate such a proceeding by separate order.

THEREFORE, IT IS ORDERED, That the Motion to Dismiss filed by Contract Marine Carriers, Inc. is granted; and,

IT IS FURTHER ORDERED, That this proceeding is discontinued.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

Each service contract entered into by a shipper and an ocean common carrier or conference before the date of enactment of this Act may remain in full force and effect and need not comply with the requirements of section 8(c) of this Act until 15 months after the date of enactment of this Act.

CMC cites the following passage of the legislative history of the 1984 Act as explanatory of the Congressional intent underlying section 20(e)(1):

The Committee's intention in this, as well as other sections of the act is to institute changes in liner shipping regulations and practices without undue or unnecessary economic disruption. S. Rep. No. 3, 98th Cong., 1st Sess. 42 (1983).

FEDERAL MARITIME COMMISSION

DOCKET NO. 82–49
REEFER EXPRESS LINES, PTY., LTD.

v.

UITERWYK COLD STORAGE CORPORATION, ELLER AND COMPANY, INC. AND TAMPA PORT AUTHORITY

ORDER OF REMAND

JULY 27, 1984

This proceeding was initiated by the filing of a complaint by Reefer Express Lines, Pty. Ltd. (REL) against Uiterwyk Cold Storage Corporation (Uiterwyk), Eller and Company (Eller) and the Tampa Port Authority (Port Authority) alleging that: (1) a charge for "warehouse checking" is a charge for a service not actually performed and, therefore, is an unreasonable and unjust practice in violation of section 17 of the Shipping Act, 1916 (46 U.S.C. §816); (2) the charge is not reflected in the Uiterwyk and Harborside tariffs, but is based on cross-referencing in those tariffs to the Port Authority's tariff, in violation of section 17; and (3) the Port Authority's tariff represents an agreement among terminal operators which is not approved by the Commission in violation of section 15.[1] Complainant asks the Commission to disapprove the charge for warehouse checking and to direct Respondents to cease and desist from attempting to collect such charges.

A prehearing conference was held in February, 1983 and evidentiary hearings were held in June, 1983 for the purpose of receiving written direct testimony and live cross-examination of three witnesses, one each for REL and Respondents Eller and the Port Authority.[2] Simultaneous opening and reply briefs were filed by all parties.

Administrative Law Judge Charles E. Morgan (Presiding Officer) issued an Initial Decision finding that the physical activity of warehouse checking has been performed on cargo carried by REL, which service is of at least some benefit to the ocean carrier. The Presiding Officer also found that the charges for warehouse checking were not shown to be unjust and unreasonable in violation of section 17; the practice of Uiterwyk and

[1] REL also charged that the Port Authority's tariff had not been filed with the Commission, but admitted at the prehearing conference that this allegation was in error.

[2] No appearance was made by Uiterwyk. Its interest in the cold storage facility was purchased by Harborside Refrigerated Services, Inc. (Harborside). Uiterwyk is now in bankruptcy proceedings. Prehearing Conference Transcript, 6–7.

Eller of incorporating by reference in their tariffs the warehouse checking charge of the Port Authority was not an unjust or unreasonable practice; and that the Port Authority's tariff was not an unapproved agreement among terminal operators.

BACKGROUND

REL is a common carrier by water in the U.S. foreign commerce which serves the export trade from the Port of Tampa (Port) with refrigerated vessels. Uiterwyk was the operator of a cold storage terminal facility at the Port. Eller, through its wholly-owned subsidiary, Harborside, was the successor to Uiterwyk's operation at the Port. The Port Authority is a public body established by statute to prescribe rules, regulations and rates for the Port of Tampa. See Exhibit 6B, Appendix A.

The disputed charge is for warehouse checking, defined in the Port Authority's Tariff FMC No. 8; Item 285 as:

> The employment of warehouse clerks and checkers, as differentiated from shipside clerks and checkers, in delivery of inbound cargo upon commencement of discharge of cargo and the end of the Free Time allowance; or, in receipt of outbound cargo from the beginning of the Free Time allowance until completion of the loading aboard vessel of the cargo. "Warehouse Checking" is assessed against the carrying vessel based on total inbound and outbound cargo manifest weight.[3]

The complaint charged that no service describable as "warehouse checking" had been requested by REL or performed by Uiterwyk or Eller. The complaint further alleged that the charge was an "arbitrary charge imposed for no service."

The Presiding Officer found that warehouse checking is an actual service performed by terminal personnel, which consists of tallying cargo on receipt by the terminal from an overland carrier, and upon discharge from the cold storage facility to the vessel, and includes preparation of dock receipts and loading lists as well as acting as the interface of product/cargo information between the terminal and vessel's stevedore so that the cargo can be delivered to the vessel for loading in an efficient and reasonable manner. I.D., 4–6.

Warehouse checking was described by Eller's witness Francis S. Cunningham, General Manager of Harborside, on cross examination as

[3] At REL's urging, after the complaint herein was filed, the Port Authority's tariff was amended, effective October 1, 1982 to shift responsibility for the warehouse checking charge from the vessel in all cases to the "party responsible for stevedoring charges," and to add language permitting the party responsible for payment to request that warehouse checking not be performed. However, in the latter instance, the amended tariff provides that "the terminal operators will not be responsible for any overages and/or shortages." Port of Tampa Tariff FMC No. 8, Item 285. Since October, 1982, REL has requested that warehouse checking not be performed.

> "tallying upon receipt from trucks or railcars of cargo by mark or lot number, by count, at times by weight and condition before placement into the warehouse . . . to tallying, the checking of condition, marks, lot numbers upon presentation of that cargo to a stevedore for loading on board a vessel." Transcript 69.

REL's Director of Terminal Operations admitted in both his written direct testimony and at the hearing that he had seen warehouse employees, other than forklift operators, checking and tallying export cargo both upon arrival at the refrigerated terminal facility (Direct Testimony 2, Transcript, 13) and discharge from the warehouse to the vessel (Transcript, 16).

The Presiding Officer concluded that warehouse checking "is of some benefit" to the vessel "insofar as the terminal arranges to check out and deliver the cargoes by ports of discharge, by consignees, quantities, lots and weights . . . [which] enables a smooth flow of cargo from the terminal to the ship." I.D., 8.

REL contends that its tariff provides for "tackle-to-tackle" service which renders it inappropriate to charge the vessel for services rendered to the cargo before it reaches the place of rest beneath ship's tackle, citing *Terminal Rate Structures, Pacific Northwest Ports,* 5 FMB 53 (1956).[4] REL's argument that the warehouse checking service charge would fall upon the shipper under its "tackle-to-tackle" tariff was offset, in the Presiding Officer's view, by the charge's coverage of "other services of benefit to the ship, such as listing the cargo by lot and by various shippers and consignees, for segregated delivery by separate consignees, ports of discharges, and alongside different hatches of the vessel." *I.D.,* 8. Therefore, the Presiding Officer concluded that the charge for warehouse checking levied against the vessel or the party responsible for stevedoring was not an unjust and unreasonable practice in violation of section 17.

The Presiding Officer further concluded that, no evidence having been offered as to the level of the charges, the actual charges for warehouse checking had not been shown to be unjust and unreasonable. Noting that Agreement No. T–2291 among the terminal operators of the Port of Tampa provides that such operators will conform to the tariff of the Port Authority, except to the extent that the Port Authority's tariff is silent or inapplicable, the Presiding Officer found that incorporation by reference of the Port Authority's warehouse checking charges in the Uiterwyk and Eller tariffs was not an unjust or unreasonable practice.

Finally, the Presiding Officer concluded that the Port Authority's tariff had not been shown to be an agreement among the Port Authority and terminal operators in violation of section 15.

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[4] REL's Tariff FMC No. 4 contains the following Rule 2A:
"Except as otherwise provided, rates named herein . . . are applicable from end of ships tackle at loading port and include only the on-shore cost or on-lighter cost of hooking sling load to ships gear." Quoted in Complainant's Brief, 8.

DISCUSSION

Exceptions to the Initial Decision were filed by REL; Eller and the Port Authority replied to the Exceptions. REL's Exceptions generally reargue contentions advanced in its initial brief. These include the arguments that otherwise permissible terminal charges for checking do not fall on the vessel under a tackle-to-tackle tariff such as its own; that the checking function is performed as part of the general obligation of a terminal as bailee of the cargo, for its own convenience and protection, and may not be separately charged for; that the cross-references in the Uiterwyk and Harborside tariffs are misleading, confusing and unlawful; and that the Port Authority's tariff constitutes an unapproved section 15 agreement among the terminal operators and the Port Authority.[5] REL further excepts to the reasoning of the Initial Decision in that it permits assessment of the entire charge for checking against the vessel on the basis of incidental benefits, without explicitly rejecting REL's contentions regarding its tackle-to-tackle tariff.

Respondents argue on exceptions that REL has failed to meet its burden of proof and that its arguments on issues such as its tackle-to-tackle tariff and allocation of the charges were not encompassed by its complaint which alleged only that no physical service which could be identified as "warehouse checking" had been performed.[6]

Most of REL's Exceptions concern issues correctly decided by the Presiding Officer. Other issues raised, however, require further investigation. These include the question of who benefits from and should bear the charge for the warehouse checking function, and what effect REL's tackle-to-tackle tariff provision may have on the assessment of terminal charges.[7]

The Commission's cases indicate two separate bases for terminal charges assessed against a vessel: services performed for or benefits conferred upon the vessel, as distinct from those performed for cargo interests; and performance by the terminal of a function which the carrier is obliged to perform as part of the transportation function.

In holding that the charge for warehouse checking may be assessed solely against the vessel, the Presiding Officer characterizes the function as being of "some" benefit to the vessel, apparently recognizing that

[5] REL's argument with respect to the obligations of a terminal being analogous to those of a "common carrier" cites the Commission's cases concerning the general responsibilities of a common carrier for provision of terminal services for safe receipt and delivery of cargo. This argument ignores the difference between a common carrier by water and a terminal operator which underlies the Commission's terminal cases: the terminal operator performs services for more than one master and is therefore obliged to charge each proportionately for the services performed or the benefits conferred.

[6] Eller, however, in its brief below, characterized REL's complaint as being, *inter alia*, that the charge for warehouse checking was an arbitrary charge imposed for no actual service "and/or no actual physical service of any benefit to REL; * * *" Eller's Opening Brief, 2. This seems to be a fair reading of the issues raised by REL's complaint, without overreliance on strict rules of pleading. Such a reading also indicates that the issue of who benefits from the terminal service was understood to be raised by the complaint.

[7] REL's tariff was not introduced in evidence, but was identified and quoted in REL's opening brief. The Presiding Officer and the Commission may take judicial notice of any tariff on file.

there may be other beneficiaries of the service. He does not, however, address the issue of whether the charges should be split among such beneficiaries. While the record supports the Presiding Officer's findings with respect to benefits conferred upon the vessel—*i.e.* that warehouse checking enables the terminal to marshal the cargo in a particular manner, under orders from the vessel, to promote the greatest efficiency of vessel time in port—it also indicates that warehouse checking is of benefit to the shipper. Warehouse checking enables the terminal to aggregate cargo arriving at different times for shipment to a variety of consignees and for a variety of vessels, and to facilitate changes in ownership which frequently occur while the cargo is in the terminal facility. See Transcript, 90–95. In addition, we note REL's argument that the warehouse checking function is performed for the terminal's own benefit and protection while the cargo is in its custody.[8]

The Initial Decision makes no attempt to allocate the warehouse checking charges between the cargo interests and vessel interests or the terminal itself, based upon benefits conferred. As REL notes in its Exceptions, the issue under section 17 is "whether the charge reflects a fair allocation of terminal costs based on the comparative benefits derived by the charged party's actual use of the terminal facilities. *Pacific Northwest Tidewater Elevators Assoc.*, 11 F.M.C. 369 (1968)." *Baton Rouge Marine Contractors, Inc. v. Cargill.*, 521 F.2d 281 (D.C. Cir. 1975). *See also Volkswagenwerk A.G. v. FMC*, 390 U.S. 261, 282 (1968). Although, as indicated above, the record alludes to benefits conferred upon the cargo, the issue was not directly addressed in testimony, on brief, or in the Initial Decision. The record does not disclose the practice at other terminals: whether the charge for checking is usually a charge against the cargo or the vessel, particularly where the carrier has an explicit tackle-to-tackle provision in its tariff.

The Presiding Officer disposed of REL's argument regarding its tackle-to-tackle tariff by noting that warehouse checking "covers other services of benefit to the ship, such as listing the cargo by lot and by various shippers and consignees, for segregated delivery by separate consignees, ports of discharge, and alongside different hatches of the vessel." I.D., 8. This reasoning justifies the assessment of part of the charge for warehouse checking against the vessel on grounds that the vessel as well as the cargo benefits. REL argues, however that under a tackle-to-tackle tariff the charge should not be assessed against the vessel because warehouse checking is not a service which the terminal performs as agent for the carrier in performance of the carrier's obligation to provide facilities for the safe receipt and delivery of cargo.

[8] REL also contends that such benefits are separately charged by the terminal against the cargo under the tariff item defined as "through-put" and the shipper might thus be charged twice for the same services if warehouse checking is charged to the shipper on the basis of these benefits. The Presiding Officer may wish to consider this argument within the context of the issues remanded herein.

We believe that these arguments raise two issues which remain unresolved by the Initial Decision. These are: (1) whether the function of warehouse checking—*i.e.* checking the cargo for amount and condition as it arrives at the terminal, issuing receipts therefore, and keeping track of its destination, ownership and location in the terminal facility—is so closely associated with its receipt by the terminal for the carrier that it is appropriately to be considered part of the transportation service for which the carrier recovers in its rates, and; (2) if the function is not performed by the terminal operator as part of the carrier's transportation obligation, whether the service benefits the vessel, the shipper or owner of the cargo, or the terminal operator, or all or some of them, and should be assessed by the terminal against each in proportion to the benefits conferred. The Commission has not expressly addressed these *precise* issues in previous cases cited by the parties.

In *Boston Shipping Association, Inc.* v. *Port of Boston*, 10 F.M.C. 409 (1967), the Commission held that the carrier's obligation to "tender for delivery" includes the provision of adequate terminal facilities, including free time, and that charges for strike demurrage for cargo which was in free time at the beginning of the strike were properly assessed against the vessel. The case did not deal with the specific function of "checking" or with its relationship to the carrier's transportation obligation, and involved general cargo rates which were not tackle-to-tackle rates. It thus offers little guidance for the case at bar.

In *Terminal Rate Increases—Puget Sound Ports, supra*, the Commission indicated that a carrier who publishes tackle-to-tackle rates may not be liable for terminal charges for services rendered beyond the end of ship's tackle:

> "The carrier must furnish a convenient and safe place at which to receive cargo from the shipper and to deliver cargo to the consignee. If this can be done at end of ship's tackle, then it can be so stated and the contracts of carriage may be limited to such service." *Id.*, at 23.

However, the Commission also noted that "the carrier's obligations also include the receiving of cargo from shipper and the giving of a receipt therefore, . . . together with the handling of the necessary papers." *Id.* at 24.[9] Thus, while this case indicates that a tackle-to-tackle tariff may limit the liability of a vessel for some terminal services rendered to cargo, it also raises the possibility that the receipt of cargo, with which warehouse checking is closely associated, may not be among these.

The Commission in *Far East Conference Amended Tariff Rule*, 20 F.M.C. 772 (1978), held that the conference could not lawfully amend its tariff

[9] Here, REL contends that it fulfills this obligation itself by issuing a stevedore's receipt for the cargo to the terminal operator at the end of ship's tackle, and that any functions performed by the terminal prior to that point are for the benefit of the cargo alone.

to pass through to shippers terminal charges for wharfage and handling, holding that these charges had traditionally been absorbed by the FEC and were already reflected in the level of their tackle-to-tackle rates. The case turned, however, not on the relationship between the terminal charges and tackle-to-tackle rates, but on the relationship between section 15 and section 205 of the Merchant Marine Act of 1936, 46 U.S.C. 1115. The Commission specifically noted that an individual carrier might do that which the conference could not: establish tackle-to-tackle rates, and separately assess accessorial or terminal charges, resulting in different rates at adjoining ports. *Id.*, 1776. The case is, thus, not dispositive of the issue here.

The closest case in point is *Terminal Rate Structure—Pacific Northwest Ports*, 3 USMC 21 (1948), which specifically involved a terminal service charge of which the greatest proportion of cost was for checking of cargo on receipt. *Id.*, 5 F.M.B. at 55. The Commission held that "where the contract of affreightment involves a tackle-to-tackle rate, handling and service charges incurred between point of rest and ship's hook outbound and between ship's hook and point of rest inbound are incurred for the benefit of the shipper or consignee, and . . . such charges must be assessed against the shipper or consignee." *Id., on reconsid.*, 5 F.M.B. 326 (1957). The Commission recognized specifically that a "terminal may not assess charges for checking not performed for the carrier" and that "under tackle-to-tackle rates a carrier's duty to receive cargo does not arise until delivery to a point within reach of ship's tackle whether the actual delivery to that point is performed, in whole or in part, by the terminal or by the shipper himself." *Id.*, 58. The Commission there characterized its holding in *Intercoastal Steamship Freight Assoc. v. N.W. Marine Terminal Assoc.*, 4 F.M.B. 387 (1953), specifically involving tackle-to-tackle rates on lumber, as being that "under tackle-to-tackle rates the carrier did not assume the duty to provide these services (related to the checking, receiving and handling of cargo), and that such services were instead performed for the convenience of the shipper." *Id.* at 58. These cases did not, however, indicate that the checking function involved the sorting of cargo on ship's instructions for loading which the Presiding Officer found to benefit the vessel here.

The record in this case is somewhat unclear as to the actual operation of REL's tackle-to-tackle rates at Tampa. REL's tariff includes Rule 2A which states that its rates are tackle-to-tackle. REL argued on exception that Rule 2A is "fully operative in respect to its Tampa service." There was however, some discussion at the prehearing conference which suggests that some of REL's service at Tampa may be contract rather than common carriage, but this did not indicate whether any contract carriage by REL is done on tackle-to-tackle or other terms. There may thus be some question as to whether REL's port calls at Tampa, on which the charges for warehouse checking which are in dispute here were assessed, were performed on tackle-to-tackle terms. This question may have to be resolved if the

Presiding Officer determines on remand that the vessel may not be charged for warehouse checking under a tackle-to-tackle tariff.

Under the Port Authority's amended tariff, the party to be charged for warehouse checking is the "party responsible for stevedoring charges." [10] The record includes scant evidence as to REL's practice with regard to stevedoring charges. In its opening brief, REL states that under a tackle-to-tackle tariff, the party responsible for stevedoring charges "would be . . . the shipper to and from shipside and the carrier in and out of the ship." Complainant's opening brief, 10, Complainant's Exceptions, 10. However, REL also indicates that it hires the stevedores, (Brigante Testimony, 2, 3, & 6), and that its rates take into consideration the carrier's expense for stevedoring. (Complainant's opening brief, 11 and Complainant's Exceptions, 11.)

In view of the above-noted unresolved relevant issues regarding the operation of Complainant's tackle-to-tackle rates at Tampa, the Commission will remand the case to the Presiding Officer for determination, as necessary, of factual questions regarding the operation and effect of REL's tackle-to-tackle tariff on the allocation of terminal charges for warehouse checking as well as the legal issues previously discussed.

REL also alleged that the Port Authority's amended item for warehouse checking was unlawful in that it constituted an exculpatory clause which would protect the terminal operators from the consequences of their own negligence. Reply Brief, 7. The charge was not dealt with in the Initial Decision and was not specifically pressed by REL on exception. (Exceptions 14, n. 5.) The remand ordered here should also address this issue.

The Presiding Officer properly disposed of the remaining issues raised by REL. REL contends that the Port Authority and terminal tariffs contain duplicative, overlapping and confusing terms and cross-references. The Presiding Officer found that the cross-referencing is consistent with a Commission approved agreement among the terminal operators which requires them to conform to the Port Authority's tariff, except with respect to certain items. As additional grounds for the same result, we note that REL's arguments regarding confusing cross references between the Uiterwyk and Eller tariffs and the Port Authority tariff concern items other than the warehouse checking charge which is the basis of this dispute. REL is not the party charged under these other items, and its arguments as to any resulting confusion of shippers may be regarded as arguments made on behalf of others who have not themselves complained. The cross references to the warehouse checking charge in the Port Authority tariff appear to be clear, unambiguous, and not unlawful.

REL contends that the Port Authority's tariff constitutes an unapproved agreement among the terminal operators and Port Authority. The Presiding

[10] See note 3, *supra.*

Officer found that "there is no agreement." We agree with the Presiding Officer that there is no evidence of such an agreement.

THEREFORE, IT IS ORDERED, That Docket No. 82–49 is remanded to Presiding Officer for the purpose of determining whether:

(1) any of the charges for warehouse checking in the Port Authority's tariff may lawfully be charged for the account of the vessel in light of REL's tariff provision for tackle-to-tackle rates and the Commission's prior decisions;

(2) if such charges may be assessed against the vessel, whether the charges should be allocated among the vessel and the shipper/consignee in proportion to the benefits conferred on each by the service and whether any proportion of the costs should be borne by the terminal operator; and

(3) whether the amended Port Authority tariff definition of warehouse checking unlawfully exculpates the terminal operators from possible liability for their own negligence; and

IT IS FURTHER ORDERED, That the Initial Decision is adopted to the extent not inconsistent with this order.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 82–49
REEFER EXPRESS LINES PTY. LTD.

v.

UITERWYK COLD STORAGE CORPORATION, ELLER & COMPANY, INC., AND TAMPA PORT AUTHORITY

Warehouse checking charge at the Port of Tampa found not shown to be an arbitrary charge for no physical service, and the said charge found not shown to be unjust and unreasonable; practice of terminal operators, Uiterwyk and Eller, of incorporating by reference in their tariffs, the warehouse checking charge of the Port of Tampa found not shown to be unjust and unreasonable; and Port of Tampa's tariff found not shown to be an agreement among terminal operators not approved by the Commission. Complaint dismissed.

Joseph A. Klausner, Josiah K. Adams, and *Leslie S. Gallmeyer* for complainant, Reefer Express Lines Pty. Ltd.

David F. Pope for respondent, Eller & Company, Inc.

H.E. Welch for respondents, Tampa Port Authority.

INITIAL DECISION[1] OF CHARLES E. MORGAN, ADMINISTRATIVE LAW JUDGE

Partially Adopted July 27, 1984

By complaint, filed October 22, 1982, and served October 26, 1982, the complainant, Reefer Express Lines Pty. Ltd. (Reefer Express) alleges that the charges for "warehouse checking" at the Port of Tampa, Florida (the Port), made by Uiterwyk Cold Storage Corporation (Uiterwyk) and by Uiterwyk's successor, Eller & Company, Inc. (Eller), both Uiterwyk and Eller having been or being in the business of furnishing cold storage terminal facilities at the Port, were arbitrary charges for no physical service; and that exacting charges for warehouse checking is an unreasonable and unjust practice in violation of section 17 of the Shipping Act of 1916, as amended (the Act).

The complainant also alleges that the warehouse checking charge is published in the Port's tariff, that the Port acted as an agent for the terminal operators in the Port, and that the failure of Uiterwyk and Eller to incorporate the charge for warehouse checking in their own tariffs, while instead making cross-reference of the Port's tariff, is an unreasonable and unjust practice in violation of section 17 of the Act.

[1] This decision will become the decision of the Commission in the absence of review thereof by the Commission (Rule 227, Rules of Practice and Procedure, 46 CFR 502.227).

The complainant further alleges that the Port's tariff represented an agreement among terminal operators not approved by the Federal Maritime Commission in violation of section 15 of the Act.

The complainant also alleged in its complaint that the Port of Tampa's tariff was not filed with the Commission, but at the prehearing conference complainant admitted that it was in error in this respect, and that the Port had duly filed its tariff.

The complainant has not paid the charges on certain past shipments here in issue. Thus, the complainant asks the Commission to disapprove the charge for warehouse checking; and to direct all respondents to strike it from their tariffs and to cease and desist from collecting or attempting to collect such charge.

Effective October 1, 1982, item 285 of the Port's tariff changed the definition of warehouse checking, in part, by the addition of the following provision:

> Warehouse Checking will be performed on all inbound and outbound cargo and charges assessed as provided above, except in cases of direct discharge or direct load cargo and container cargo not stuffed or unstuffed in port, as described in Item 330, and when party responsible for payment specifically requests, in writing, that Warehouse Checking be not performed. When Warehouse Checking is requested not to be performed, terminal operators will not be responsible for any overages and/or shortages.

The complainant has requested that warehouse checking be not performed on its present and future shipments. Thus, only the warehouse checking charges on past shipments remain in issue.

Prior to the above change, effective October 1, 1982, of the Port's definition of warehouse checking, the Port Authority held a public hearing, at which counsel for the complainant agreed that complainant Reefer Express would accept responsibility for any cargo loss when the service of warehouse checking was requested by Reefer Express not to be performed.

The original definition in the Port's tariffs of warehouse checking was:

> The employment of warehouse clerks and checkers, as differentiated from shipside clerks and checkers, in delivery of inbound cargo upon commencement of discharge of cargo and the end of the Free Time allowance; or, in receipt of outbound cargo from the beginning of the Free Time allowance until completion of the loading aboard vessel of the cargo. "Warehouse Checking" is assessed against the carrying vessel based on total inbound and outbound cargo manifest weight.

Effective October 1, 1982, the definition of warehouse checking was changed to provide that, instead of being assessed *against the carrying vessel,* it is assessed *against the party responsible for stevedoring charges* based on inbound or outbound cargo manifest weight.

Also, as seen above, the 1982 definition provided that when the party responsible for payment of warehouse checking specifically requests in writing that warehouse checking be not performed then the terminal operators will not be responsible for any overages and/or shortages.

Generally, the ocean carrier is the party responsible for stevedoring charges.

WAREHOUSE CHECKING

Warehouse checking is a service performed by terminal personnel (of Uiterwyk or Eller), using tally clerks and checkers to:

(1) Tally, by count, lot, supplier, and/or mark the product/cargo into the cold storage terminal facility and record where, in the cold storage terminal facility, the various lots, marks, or shipper's product/cargo is stored;

(2) Tally and withdraw from the cold storage terminal facility, by count, lot, mark, and/or shipper the product/cargo to the vessel's side, or the overland carrier's equipment, to insure correct count and delivery by lot, mark, or shipper of the overall product/cargo furnished to the vessel or overland carrier; and

(3) Act as the interface of product/cargo information, both as to count and lot/mark/shipper information between the cold storage terminal facility and the contract stevedore for the vessel so that the vessel can be loaded and the product/cargo delivered to the vessel's side for loading in an efficient and reasonable manner.

While warehouse checking may relate to either export or import cargo, the refrigerated cargo in issue herein, and the warehouse checking charges sought to be collected, relate only to export cargoes shipped on the vessels of the complainant, Reefer Express.

Such export cargo arrives by train or truck at the overland loading and unloading dock of the Uiterwyk-Eller cold storage terminal on its landward side. The terminal on its water side is alongside a waterway which runs north and south.

A clerk (terminal employee) appears and checks the cargo to be delivered by the overland carrier to the terminal. The clerk issues a dock receipt, which states what the cargo is, for whom intended, by what shipper, and the total number of cartons and weights.

The dock receipt is prepared by an office employee of the terminal. The truck driver or trainman presents the dock receipt to the terminal's clerk who in turn designates the place for unloading the truck or rail car.

Two employees are assigned by the terminal to receive the cargo from the overland carrier. They are a checker and a fork lift operator. The fork lift operator moves the cargo out of the overland carrier to an area of the terminal adjacent to, but outside of, the freezer or cold storage area of the terminal, on the premises and the property of the terminal.

The checker ascertains that the cargo unloaded from the overland carrier is as stated on the dock receipt. The cargo is not necessarily weighed because the weight of a carton is stamped usually on the box or on the dock receipt, or on the delivery bill of lading from the rail carrier or truck.

Next, a second movement of the cargo occurs. Another fork lift driver transports the cargo from the initial discharge area into the freezer-cold storage area of the terminal. At times the same fork lift operator performs both movements, but they are separate movements and the cargo does not move directly from the overland carrier into the freezer-cold storage area. The cargo always is put down first, and by a second move, taken into the freezer-cold storage area of the terminal.

The cargo remains in the freezer-cold storage area until an ocean vessel arrives; and then the cargo is taken out of the freezer-cold storage area through the back doors (water-side doors) of the terminal, and the cargo is put on the wharf for acceptance by the stevedore assigned to deliver the cargo to the vessel. The stevedore employs longshoremen who move the cargo under the ship's hook or loading gear for eventual loading aboard the vessel.

The complainant's witness Brigante admitted on cross-examination that he had seen certain checking performed by warehouse (Uiterwyk-Eller terminal) personnel on this export cargo. Such personnel checked "as far as this lot goes to the ship, this one doesn't."

A lot is a commercial unit or block of cargo assigned to a specific consignee or shipper.

Reefer Express issues directions to the terminal as to how the cargo is to be delivered to a Reefer Express ship. These directions may include segregation of the cargo by port of discharge, by shipper or consignee, by quantity of cargo, and by weight.

It is normal to have several shipments for a given discharge port, and three or four consignees for a particular discharge port, with each consignee having separate lots or blocks of cargo to be delivered.

The ocean carrier, such as Reefer Express, generally gives a telex or telephone notice to the terminal of the impending arrival of its ship. The terminal also is advised about the number of longshoremen's gangs which will be on hand, and how much cargo from the terminal should be brought out.

A terminal (warehouse) employee prepares a loading list of the ship's cargo, or a summary of the dock receipts for all of the cargo designated to be exported on a particular ship. This loading list shows the quantity of cargo, nature—be it frozen, chilled or otherwise, weights, shippers and consignees, as well as the breakdown by discharge ports.

Quite often while the vessel is "working" or being loaded, other cargo is received at the terminal, or the terminal may have other cargo not originally destined for this particular ship, which other cargo now has

been released to go on this ship. In other words, the loading list may be updated from time to time, or it is supplemented by other cargo and events which occur while the vessel is being loaded. This updating may be done verbally or by the vessel's port captain or an other designated agent of the vessel.

In general the warehouse checking, including the preparation of a load list, is a procedure designed to provide for a smooth flow of cargo to the ship from the terminal on export movements.

When the stevedore gets the cargo from the terminal, the stevedore makes its own check as to the consist of the cargo. Also the ship's mate makes a check on receiving the cargo from the stevedore. Delivery to the stevedore is considered by the terminal as delivery to the vessel, since the stevedore is employed by the vessel.

The terminal for its protection receives a mate's receipt or other receipt that it has delivered the cargo to the vessel.

The complainant stresses that the warehouse checking done by the terminal's personnel is not a service to the ship inasmuch as the ship owner performs its own tally and count of cargoes received on its ship. Also, the complainant believes that warehouse checking is for the protection of the warehouseman and the shipper.

This reasoning overlooks that warehouse checking also benefits the ship, insofar as the terminal arranges to check out and deliver the cargoes by ports of discharge, by consignees, quantities, lots, and weights; that without warehouse checking there could be either overages or shortages in delivery of cargoes to the ship; and more importantly that warehouse checking enables a smooth flow of cargo from the terminal to the ship.

As seen, warehouse checking is an actual physical service of some benefit to the ship (ocean carrier, such as Reefer Express).

Under Reefer Express' tariff, the complainant argues that the charges to the shippers and consignees provide that the the cargo is booked "free alongside ship" (f.a.s.), and therefore the cargo has to be put alongside the ship by the shipper. The complainant also argues that the shipper pays the terminal to take the cargo from the overland carrier, place it into freezer or cold storage, remove it from same, and place it alongside the ship. This argument conveniently overlooks that the warehouse checking performed by the terminal covers other services of benefit to the ship, such as listing the cargo by lot and by various shippers and consignees, for segregated delivery by separate consignees, ports of discharge, and alongside different hatches of the vessel.

It is concluded and found that warehouse checking, at least in part, benefits the ocean carrier, as well as benefits the shipper, consignee, and the terminal. It is further concluded and found that warehouse checking is an actual physical service performed by terminal (warehouse) personnel. Therefore, it is concluded and found that the practice of levying a charge for warehouse checking on the ocean carrying vessel, or on the party

responsible for stevedoring charges, as provided, respectively, in the past and present, by the Port's tariffs, is not shown to be an unjust and unreasonable practice in violation of section 17 of the Act.

No evidence was introduced as to the reasonableness of the measure in dollars and cents of the charges for warehouse checking, and accordingly it is concluded and found that the actual charges for warehouse checking are not shown to be unjust and unreasonable in violation of section 17.

TARIFF INCORPORATION BY REFERENCE

The Uiterwyk Cold Storage Corp. tariff—F.M.C. No. 12, effective November 15, 1980, provided Item 76—Warehouse Checking:

> Charge to be billed for the account of the vessel. Tampa Port Authority Item 290.

The Harborside Refrigerated Services, Inc.[2] tariff—F.M.C. No. 14, effective November 15, 1982, provided Item 76—Warehouse Checking:

> Tampa Port Tariff—.

The terminal operators in the Port of Tampa have a Commission-approved Agreement No. T–2291. This agreement provides, among other things, that the parties, such as respondent Eller, will conform to the tariff of the Port Authority, but also allows the right of independent action in publishing tariffs to the extent that the Port's tariff is silent or inapplicable. The cross-referencing above to the Port's tariff is not only lawful, but also is consistent with the approved section 15 agreement.

It is concluded and found that the practice of the terminal operators, Uiterwyk and Eller, of incorporation by reference in their tariffs, the warehouse checking charge of the Port is not shown to be unjust and unreasonable.

PORT OF TAMPA'S TARIFF

The Tampa Port Authority is not a party to the section 15 agreement of the terminal operators. The Port publishes its rules, regulations and rates in the Port's tariffs under authority of Chapter 23338 of the laws of the State of Florida. There is no agreement between the Port Authority and the terminal operators whereby rates, rules and regulations are established.

It is concluded and found that the Port's tariff has not been shown to be an agreement among terminal operators, and therefore no violation of section 15 has been shown.

[2] Harborside is a wholly-owned subsidiary of Eller.

ULTIMATE CONCLUSION

It ultimately is concluded and found that the warehouse checking charges on certain past shipments of Reefer Express are lawful; and the complaint is dismissed.

(S) CHARLES E. MORGAN
Administrative Law Judge

FEDERAL MARITIME COMMISSION

DOCKET NO. 72–35

PACIFIC WESTBOUND CONFERENCE—INVESTIGATION OF RATES, RULES AND PRACTICES PERTAINING TO THE MOVEMENT OF WASTEPAPER AND WOODPULP FROM UNITED STATES WEST COAST PORTS TO PORTS IN JAPAN, THE PHILIPPINES, TAIWAN, KOREA, SOUTH VIETNAM AND THAILAND

ORDER DISCONTINUING PROCEEDING

August 8, 1984

This proceeding was instituted to determine whether the rate-making activities of the Pacific Westbound Conference (PWC) member lines with regard to their carriage of wastepaper and woodpulp violated sections 15, 16, 17 or 18(b)(5) of the Shipping Act, 1916 (1916 Act). On August 15, 1977, Administrative Law Judge Seymor Glanzer (Presiding Officer) issued an Initial Decision which found that certain PWC rates on wastepaper should be disapproved under section 18(b)(5) and that the Conference's ratemaking practices had violated section 15. In light of those findings, the Presiding Officer concluded that no useful regulatory purpose would be served by determining whether the wastepaper rates were unreasonably preferential or unjustly discriminatory under sections 16 or 17.

On March 9, 1979, the Commission reversed the Initial Decision and found PWC's rates to be lawful under sections 15 and 18(b)(5).[1] We also held *de novo* that no violation of sections 16 and 17 of the 1916 Act had been proven under established Commission precedent.[2]

The National Association of Recycling Industries (NARI), a trade association of wastepaper shippers, appealed the Commission's order to the United States Court of Appeals for the District of Columbia Circuit. On December 24, 1980, the court issued a decision finding that the Commission had misinterpreted the standard of section 18(b)(5). *National Association of Recycling Industries, Inc.*, v. *FMC*, 658 F.2d 816 (1980) (*NARI* v. *FMC*). The court held that the PWC wastepaper rates under review "may not be approved on the basis of the existing administrative record" (*id.* at 829), although "[t]he Commission is free to engage in any further administrative proceedings in this case not inconsistent with this opinion" (*id.*). The court specifically excluded sections 15, 16 and 17 of the 1916 Act from the scope of its decision.

[1] The Commission's decision is reported at 21 F.M.C. 834.
[2] *Id.* at 837–39.

Because the PWC rates in issue before the D.C. Court had long since been superseded by new rates when *NARI* v. *FMC* was decided, an order from the Commission on remand regarding the superseded rates was unnecessary.[3] After more than a year had passed without a request from NARI for further relief from the FMC, we solicited the parties' views by a notice served on January 11, 1982, as to whether any further proceedings in Docket No. 72–35 were necessary. NARI responded by stating that it was preparing to file an antitrust lawsuit against PWC and its member lines, that the controversy between itself and the Conference lines regarding wastepaper rates would be resolved through the lawsuit and that Docket No. 72–35 therefore should be terminated. For its part, PWC argued that the issues raised by NARI's antitrust complaint might fall within the Commission's primary jurisdiction and that the question of further action in Docket No. 72–35 should be held in abeyance pending clarification of NARI's intentions.

NARI proceeded to file its antitrust complaint in United States District Court in Los Angeles on February 23, 1982. Reduced to its essentials, the complaint alleged that the wastepaper rates set by the PWC lines from 1968 to the date of the complaint had been found to violate sections 15 and 18(b)(5) of the 1916 Act and that actions under a conference agreement are not immune from the antitrust laws if they result in rates unlawful under those provisions. PWC filed a motion to dismiss the complaint on the ground that it failed to state a claim upon which relief could be granted and, as alternative relief, to stay further proceedings before the District Court pending referral to the Commission of NARI's allegations concerning PWC's rates.

Given the potential impact of NARI's theory of relief on the FMC's authority under section 15 to approve conference rate agreements, the Commission determined to file an *amicus curiae* brief before the District Court in support of PWC's motion to dismiss. In the meantime, on June 15, 1982, we issued an order in Docket No. 72–35 directing that the proceeding remain open pending the District Court's disposition of PWC's motion.

The Commission filed its *amicus* brief on July 7, 1982. On December 3, 1982, the District Court granted PWC's motion to dismiss NARI's complaint. NARI appealed the court's order to the United States Court of Appeals for the Ninth Circuit. Because the appeal preserved the possibility that issues under the 1916 Act might be referred to the Commission for resolution, no further order in Docket No. 72–35 was issued. The Commission filed a second *amicus* brief before the Court of Appeals which, on November 14, 1983, affirmed the dismissal of NARI's complaint.[4] NARI

[3] Under section 18(b)(5), the Commission's powers were limited to disapproving rates in effect that it found to be so unreasonably high or low as to be detrimental to U.S. foreign commerce.

[4] *National Association of Recycling Industries, Inc.* v. *American Mail Line, Ltd.*, 720 F.2d 618 (9th Cir. 1983).

requested the Supreme Court to review the decision of the Court of Appeals; this request was denied on March 19, 1984.[5]

The conclusion of NARI's antitrust lawsuit removes the possibility that a court might request the Commission to make findings regarding PWC's wastepaper rates based on the record developed in Docket No. 72–35. There is no longer any reason to maintain this investigation as an open proceeding. It should also be noted that section 8 of the Shipping Act of 1984, Pub. L. 98–237, exempts tariffs and service contracts covering shipments of wastepaper (and certain other recyclable materials) from the requirement that they be filed with the Commission and kept open to public inspection. There is therefore little resemblance between the original statutory basis for this proceeding and the current regulation of liner carriage of wastepaper.[6]

THEREFORE, IT IS ORDERED, That this proceeding is hereby discontinued.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

[5] 466 U.S. 994 (1983).

[6] By notice served on May 15, 1984, 49 FR 21,798, the Commission stated that determinations of the applicability of the Shipping Act of 1984 to cases pending before the agency on June 18, 1984, the effective date of the 1984 Act, would be made on a case-by-case basis. No such determination is necessary in order to discontinue this proceeding.

FEDERAL MARITIME COMMISSION

[46 C.F.R. PART 508]

DOCKET NO. 83–45

ACTIONS TO ADJUST OR MEET CONDITIONS UNFAVORABLE TO SHIPPING IN THE UNITED STATES/REPUBLIC OF THE PHILIPPINES TRADE

AUGUST 21, 1984

ACTION: Notice of Discontinuance.

SUMMARY: The Federal Maritime Commission discontinues this rulemaking proceeding without prejudice to institute a new rulemaking proceeding, should there be indication of unfavorable conditions in this trade.

DATE: August 24, 1984.

SUPPLEMENTARY INFORMATION:

By a "Notice of Proposed Rulemaking" (Proposed Rule) published on October 7, 1983 (48 *Fed. Reg.* 45,800), the Commission instituted this proceeding under section 19 of the Merchant Marine Act, 1920 (46 U.S.C. § 876) in response to allegations by shippers, third-flag carriers and others that government enforcement of the cargo reservation laws of the Republic of the Philippines had created unfavorable conditions in the foreign ocean-borne trade between the United States and the Philippines. The Philippine laws in question require that all government cargo be reserved for transport by Philippine flag carriers, and that 80% of non-government cargo be reserved for flag carriers of the Philippines and of the bilateral trading partner with cross traders limited to the remaining unreserved 20% of non-government cargo.

The Proposed Rule set forth two options as remedies under section 19. Option A would suspend the tariffs of Philippine carriers operating in the United States/Republic of the Philippines trade. Option B would allow Philippine carriers to avoid tariff suspension by obtaining "authorized" status from the Commission. The effect of the Proposed Rule would be to adjust or meet any unfavorable trade conditions by imposing burdens on Philippine carriers equal to those imposed on non-Philippine carriers by Philippine laws and regulations.

A total of 13 comments were received in response to the Proposed Rule. Comments alleging the existence of unfavorable trade conditions or supporting some action under section 19 were received from the following persons: Maersk Line (Maersk); Barber Blue Sea Lines (BBSL); Port of Portland (Portland); Virginia Port Authority (VPA); The Port Authority of New York and New Jersey (New York); Philadelphia Port Corporation

(Philadelphia); Maryland Port Administration (Baltimore); the Council of European & Japanese National Shipowners' Associations (CENSA); the Chemical Manufacturers Association (CMA); P.L. Thomas Paper Co., Inc. (P.L. Thomas); and the New York Chamber of Commerce and Industry. Comments challenging the allegations of unfavorable trade conditions and opposing any action under section 19 were received from the following persons: National Galleon Shipping Corporation (Galleon) and the Maritime Company of the Philippines (MCP); and the U.S.-Flag Far East Discussion Agreement (Agreement No. 10050).

The Commission published on March 30, 1984 (49 *Fed. Reg.* 12,720) a "Notice of Request for Further Comment" (Request for Further Comment). The Request for Further Comment addressed the various legal, procedural and policy arguments raised in the comments on the Proposed Rule and invited additional comment limited to factual matters. The Request for Further Comment provided parties who might be adversely affected by the Proposed Rule with an opportunity to address factual allegations in other comments that were filed simultaneously with theirs. The Request for Further Comment also specifically invited the Executive Branch to file comment and indicated that information concerning the amount of cargo in the U.S./Philippines trade subject to U.S. cargo preference laws would be helpful to the Commission in its deliberations.

Eleven comments were received in response to the Request for Further Comment. Section 19 action continued to be supported in comments filed by Maersk, BBSL, CENSA, CMA, and P.L. Thomas, all of whom had previously filed comment. Additional comments supporting section 19 action were filed for the first time by: the United States Departments of Transportation, State, Justice, and Commerce and the Office of the United States Trade Representative (Executive Branch); the National Industrial Transportation League (League); Sta-Rite Industries Overseas Corporation (Sta-Rite); and Westinghouse Electric Corporation (Westinghouse). The Philippine-flag carriers (Galleon and MCP) and the U.S.-flag carrier members of Agreement No. 10050 filed further comments continuing their opposition to section 19 action.

Subsequently, by letter dated June 1, 1984, counsel for the Philippine-flag carriers informed the Commission that the Philippine Maritime Industry Authority (MARINA) had issued Memorandum Order No. 5 which revoked Memorandum Orders Nos. 3 and 4.[1] Memorandum Order No. 3 had implemented E.O. 769 by establishing a waiver program which applied to com-

[1] Memorandum Order No. 4, which excluded transshipped cargo from the coverage of E.O. 769, was not at any time in issue in this proceeding. The June 1, 1984 letter attached a photocopy of a telex from the Philippine Minister of Transportation and Communications to the Philippine Embassy in Washington which quoted in full the text of Memorandum Order No. 5. The Order was signed by the Administrator of MARINA and the Minister of Transportation and Communications. Previously, the Department of State in a letter dated May 29, 1984 had advised the Commission that Memorandum Order No. 3 was rescinded. Further communications confirming this fact were received in the form of letters from the State Department dated June 6, 1984 and June 28, 1984.

mercial export and import cargoes in the U.S./Philippines trades. Counsel for the Philippine carriers contends that this action by the Philippine government moots the controversy in this proceeding and requests that the proceeding be terminated and the rule withdrawn.

In response to the Philippine flag carriers' request, CMA, by letter of June 15, 1984, submits that it is too early to evaluate the impact of the revocation of Memorandum Order No. 3 on the Philippine waiver program with respect to non-government cargo (*i.e.*, cargo subject to E.O. 769). In addition, CMA states that some of its members report that waivers may still be required for government cargo (*i.e.*, cargo subject to P.D. 1466). CMA notes that "government cargo" is broadly defined under P.D. 1466 and that a significant amount of cargo may still be subject to anti-competitive conditions. CMA therefore believes that termination of this proceeding at this time would be premature.

The principal focus of the comments submitted in this proceeding urging action under section 19 was on the Philippine waiver program for commercial cargoes.[2] The various allegations of burden on access to the trade, inadequate service, non-competitive rates, and cargo diversion were, for the most part, related to the enforcement of the Philippine cargo reservation law through the waiver program. The revocation of Memorandum Order No. 3, on its face, removes the waiver program as it applied to commercial cargo. This action of the Philippine government would appear to eliminate the principal implementing mechanism of E.O. 769 in the U.S./Philippines trades.

Moreover, there is some confirmation from the shipper community that the revocation of the waiver program has, for the moment, removed the burden of the Philippine cargo reservation laws with regard to commercial cargoes.[3] There is also information in the record that the impact of the waiver program has, at the present time, been lifted from third-flag carriers. For example, trade data submitted in the second round of comments would appear to indicate that competitive conditions are returning to the trade.[4] Moreover, although all parties of record have been informed of the withdrawal of the waiver program, only CMA has suggested that this proceeding should be continued. Although the CMA letter raises certain concerns about Philippine cargo reservation laws, it does not present factual information that would indicate the presence of unfavorable trade conditions. With the removal of the specific gravamen of the various complaints (*i.e.*, the waiver program) and the apparent resumption of normal trade conditions, the Commission believes that the fundamental purpose in instituting this

[2] Memorandum Order No. 3 was put into effect by the Philippine government on July 22, 1982. It provided for a waiver of the requirement that non-government cargo be carried on Philippine or U.S.-flag carriers, provided that a proper application was submitted to Philippine authorities.

[3] By letter dated May 31, 1984, Pier 1 Imports commended the Commission for its successful efforts in this proceeding with regard to Philippine cargo sharing regulations.

[4] The record shows that, in the first quarter of 1984, third-flag carriers appear to be regaining their historical average share of the trade over the past six years.

proceeding, namely removing unfair burdens on shippers and preserving competitive access for non-national flag carriers, has been substantially accomplished. There does not therefore appear to be any need for further action or the imposition of sanctions at this time. The Commission therefore shall discontinue this proceeding.

In taking this action, however, the Commission wishes to make it clear that it continues to be concerned about shipping conditions in this trade. The revocation of Memorandum Order No. 3 withdraws only one element, albeit a critical one, from the panoply of Philippine cargo reservation laws and regulations. The basic laws and decrees, including E.O. 769 with respect to non-government cargo and P.D. 1466 with respect to government cargo, apparently remain in effect.[5] These laws reserve substantial portions of both commercial and government cargo to Philippine-flag carriers and their enforcement could create conditions unfavorable to shipping.

The Commission therefore intends to closely monitor this trade for any indication of renewed application of a waiver program or other means of enforcement of E.O. 769, or greater enforcement of P.D. 1466, and to act swiftly to protect the trade if the need arises.

THEREFORE, IT IS ORDERED, That this proceeding is discontinued.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

[5] There is nothing in the record to indicate the current status of the Central Bank Memorandum which further implemented the waiver program with respect to non-government cargo.

FEDERAL MARITIME COMMISSION

[46 CFR PART 510]
DOCKET NO. 84–19
LICENSING OF OCEAN FREIGHT FORWARDERS

August 24, 1984

ACTION: Final Rules.

SUMMARY: These rules finalize and/or revise the Commission's ocean freight forwarder interim regulations to implement the Shipping Act of 1984 which became effective June 18, 1984. Revisions included in these final rules relate to, among others, the reporting and noticing of shipper affiliations by forwarders, invoicing, certification requirements for compensation, anti-rebate policy declarations, accounting to principals, port-wide exemptions and sale/transfer of forwarder's stock. The revisions are intended to lessen the regulatory burden upon the forwarding industry.

DATES: Final rules effective October 15, 1984.

SUPPLEMENTARY INFORMATION:

On March 20, 1984, the Shipping Act of 1984 (the 1984 Act) (46 U.S.C. app. 1701–1720) was enacted. This legislation substantially altered the regulatory responsibilities of the Commission and directly impacted on the Commission's regulations pertaining to the ocean freight forwarding industry. A number of changes to the Commission's forwarder regulations, 46 CFR Part 510, were required by the new legislation.

On May 3, 1984, the Commission published in the FEDERAL REGISTER (49 FR 16839) Interim Rules concerning the licensing and operations of ocean freight forwarders which became effective on June 18, 1984 pursuant to section 17(b) of the 1984 Act (26 F.M.C. 621). The Interim Rules also addressed rule changes previously proposed and noticed in Docket No. 83–35, The Licensing of Independent Ocean Freight Forwarders. The Commission provided thirty days for comments on its Interim Rules. Comments were received from the following parties: The Marine Exchange of the San Francisco Bay Region; General Steamship Corporation Ltd.; NAVTRANS International Freight Forwarding, Inc.; The "8900" Lines, North Atlantic Israel Freight Conference, North Atlantic Mediterranean Freight Conference, U.S. Atlantic and Gulf/Australia-New Zealand Conference, and United States Atlantic Ports/Italy, France and Spain Freight Conference, collectively; American President Lines, Ltd; Hapag-Lloyd Agencies; Kerr Steamship Company, Inc.; Columbia River Customs Brokers

& Forwarders Association, Inc.; The Pacific Merchant Shipping Association; TMX Shipping, Inc.; J.E. Lowden & Company; Sea-Land Service, Inc.; The National Customs Brokers & Forwarders Association of America, Inc.; The National Council on International Trade Documentation; and Trans Freight Lines, Inc.

DISCUSSION OF COMMENTS

In view of the discussion in the Interim Rules of the previous comments submitted in Docket No. 83–35, we will limit our discussion to the comments to the Interim Rules.

The vast majority of the commenting parties, twelve of fifteen, limited their comments to the certification requirements for the payment of ocean freight forwarder compensation. The general view of these comments is that the current certification requirements contained in section 510.33 of the forwarder rules create substantial administrative expenses both on the part of the forwarder and the carrier which could be eliminated through use of efficient automated systems for the payment of compensation. It is pointed out that the 1984 Act specifically eliminates the language of the Shipping Act, 1916 (1916 Act) requiring certification *prior* to payment of compensation by the carrier. It is suggested that this change expresses Congress' intent to eliminate the current onerous and counterproductive paperwork procedures.

A number of these commenters recommend that forwarders be allowed to provide the required certification to carriers in various ways. It is suggested that the forwarder's certification be allowed to be placed on the bill of lading (the current requirement), or on a summary statement, or on a forwarder's compensation invoice to a carrier, or on a carrier's check. Other methods suggested included an annual written statement to a carrier that the forwarder is entitled to compensation on all shipments handled by it except as otherwise indicated on the bill of lading and a restrictive endorsement on the back of the carrier's compensation check.

It has been estimated by one commenter that with a revised rule, as recommended, the industry could realize a saving of three million dollars. The significant saving, it is suggested, would result from elimination of the need both for forwarders to submit the huge volume of certifications to carriers and for carriers to process and retain this paperwork in order to generate appropriate compensation checks. Payment of compensation, it is believed, could be better automated and less enmeshed in clerical procedures.

In view of the comments regarding the certification requirements contained in the forwarder regulations, the Final Rules will allow forwarders to provide the required certification on one copy of the bill of lading, or on a forwarder's summary statement, or on a forwarder's invoice for compensation, or as an endorsement on the back of a carrier's compensation check. Carriers will still be required to retain a copy of the forwarder's

certification. Forwarders will only be required to retain their shipment files evidence that the required services were performed on the particular shipments.

It is our belief that this change is consistent with the language of the 1984 Act, and it will afford the industry an opportunity to streamline procedures for the payment of ocean freight forwarder compensation to the benefit of all concerned. Moreover, under our Final Rule forwarders will no longer be required to check specific services performed on each shipment as the certification language is broad enough to cover any shipment. Appropriate amendments to the pertinent sections of the Final Rules have been made accordingly.

The National Customs Brokers and Forwarders Association of America, Inc. (the Association) submitted comments on a number of areas of the Interim Rules. The Association favors the shipper-affiliations notice requirement contained in section 510.31(b) of the Interim Rules. However, it believes that it does not go far enough to protect exporters in the United States. It believes that the requirement should be extended beyond affiliations with exporters from the United States to include exporters from foreign countries. It sees the potential for harm to U.S. exporters if forwarders affiliated with foreign exporters release information about their U.S. principals to their foreign affiliates which the foreign affiliate could use to attract business away from the U.S. exporter.

We see merit in the Association's suggestion and we have adopted the recommended language offered by the Association as part of the Final Rules.

The Association, although generally supporting the changes in the invoicing rule, does not feel the notice that is to appear on each invoice to a principal advising of potential markup of charges is necessary and results in more regulation than the previous rule. It urges that this notice requirement be deleted. Further, it suggests that the prior written quotation provisions of the previous rules be retained. It seeks also to retain the filing of fee schedules so that no further disclosure beyond the schedule is required.

The Association's comments regarding the invoicing rule are not persuasive. The intent of our Interim Rule on invoicing was, and still is, to interject the forces of the marketplace in the area of forwarder billing practices. We believe this will act as a self-policing mechanism compelling forwarders to account to their principals rather than to the Commission, to the extent possible.

We have amended, however, the language of the rule so as not to prescribe a specific format that forwarders must follow. The rule will allow a forwarder to bill its principal for services rendered by the forwarder in any manner the forwarder so chooses. We have retained the notice requirement, with some modification, which will advise a principal that, upon request, the forwarder shall provide a detailed breakout of the compo-

nents of charges assessed by the forwarder along with copies of any pertinent document.

The Association does not agree with the rule on requiring forwarders to place an anti-rebate policy declaration on each invoice to a principal. It believes that there is no statutory basis for the rule; thus the rule should be deleted.

For the reasons stated in our notice of Interim Rules, we are not disposed to change this rule and it will be adopted in the Final Rules.

Finally, the Association seeks modification to the rule on accounting to the principal for funds due the principal. It believes that the forwarder should be allowed to offset its receivables from any funds due the principal without the principal's consent. This is a matter which is best left to the parties involved to agree upon rather through government regulation. Thus, we have deleted the consent requirement in the Final Rules. The forwarder will still be required, however, to account to its principal for such funds.

NAVTRANS International Freight Forwarding, Inc. (NAVTRANS) generally supports the Interim Rules. It requests, however, that we reconsider its previous comments in Docket No. 83–35. Further to its previous comments, it questions the continued need for notification of the sale/transfer of a forwarder's stock in view of the deletion of the approval requirement.

NAVTRANS' previous comments were considered in drafting the Interim Rules; thus, we see no need to reconsider them here. Further, we do not agree that we need not be notified of stock sales/transfers. To properly discharge our regulatory responsibilities, it is essential that we know who are the owners of forwarders, especially in instances where the question of beneficial interest is present.

The "8900" Lines, *et al.* submitted comments on a single point. They oppose deletion of section 510.36 requiring the filing of agreements under section 15 of the 1916 Act. They argue that the 1984 Act in no way affects, much less eliminates, the requirement under section 15 of the 1916 Act, that agreements among ocean freight forwarders be filed with the Commission for approval. They state that persons carrying on the business of forwarding are still "other persons" subject to the 1916 Act and, therefore, are required to file agreements for approval by the Commission pursuant to section 15 of that Act. They urge that section 510.36 be retained in the forwarder rules.

The issue raised by the "8900" Lines, *et al.* will be the subject of a separate rulemaking proceeding. Therefore, no further comment in the context of the instant proceeding on the issue is necessary at this time.

Having addressed the comments submitted to our Interim Rules, we turn now to two areas which we wish to further amend for clarification purposes.

Under section 510.31(e), *Arrangements with unauthorized persons*, we have amended the last sentence by adding the word "also" after "licensee

shall." This change is to make it clear that when a third party is involved in a forwarding transaction, the license shall, in addition to providing the third party with an invoice, provide a copy of its invoice to the shipper. Thus, the last sentence is to read, in pertinent part:

> . . . the licensee shall also transmit to the person paying the forwarding charges a copy of its invoice for services rendered.

Under section 510.33(a), *Disclosure of principal*, we have added language specifying that the identity of the shipper must be shown "in the shipper identification box on the bill of lading" as opposed to just "on the bill of lading" as the rule currently reads.

The Interim Rules deleted several sections from the rules in effect prior to June 18, 1984 (prior rules). For the sake of clarity, we have redesignated a number of sections. The Interim Rules deleted paragraph (a) of section 510.32, *Forwarder and principal; fees*. Therefore, we have redesignated the remaining paragraphs, (b) through (k), as paragraphs (a) through (j) in the Final Rules.

Paragraphs (a) and (b) of section 510.35, *Reports required to be filed*, have been deleted and all that remains is paragraph (c). Thus, we have retitled section 510.35 as *Anti-rebate certification*, and deleted the paragraph designation.

The Interim Rules also deleted sections 510.12 and 510.21 from the prior rules. In view of this, we have redesignated sections 510.13 through 510.20 as sections 510.12 through 510.19 in the Final Rules. Similarly, sections 510.31 through 510.35 have been redesignated as sections 510.21 through 510.25 in the Final Rules. Conforming amendments to cross references that appear throughout the Final Rules have been made accordingly.

To correct an oversight regarding the appropriate OMB control numbers appearing in section 510.91, we have amended that section to reflect the correct OMB control number as 3072–0018 for all the sections indicated in the table appearing in the section.

Pursuant to 5 U.S.C. 601 *et seq.*, the Chairman of the Commission certifies that the Final Rules published herein will not have a significant economic impact on a substantial number of small entities. The Final Rules are intended to bring the Commission's regulations in line with new legislation. Further, they tend to lessen the regulatory burden upon the forwarding industry and they should have a cost-saving impact on the operations of forwarders.

List of subjects in 46 CFR 510: Exports; Freight forwarders; Maritime carriers; Rates; Reports and record-keeping requirements; Surety bonds.

THEREFORE, pursuant to 5 U.S.C. 553 and sections 3, 8, 10, 11, 13, 15, 17, and 19 of the Shipping Act of 1984 (46 U.S.C. app. 1702, 1707, 1709, 1710, 1712, 1714, 1716 and 1718), the Commission revises 46 CFR Part 510 to read as follows:

FEDERAL MARITIME COMMISSION

[46 CFR PART 510]

LICENSING OF OCEAN FREIGHT FORWARDERS

SUBPART A—GENERAL

Sec.

SUBPART B—ELIGIBILITY AND PROCEDURE FOR LICENSING; BOND REQUIREMENTS

SUBPART C—DUTIES AND RESPONSIBILITIES OF FREIGHT FORWARDERS; FORWARDING CHARGES; REPORTS TO COMMISSION

AUTHORITY: 5 U.S.C. 553; Secs. 3, 8, 10, 11, 13, 15, 17 and 19, Shipping Act, of 1984; 46 U.S.C. app. 1702, 1707, 1709, 1710, 1712, 1714, 1716 and 1718.

SUBPART A—GENERAL

§ 510.1 Scope.

(a) This part sets forth regulations providing for the licensing as ocean freight forwarders of persons, including individuals, corporations and partnerships, who wish to carry on the business of freight forwarding. This part also prescribes the bonding requirements and the duties and responsibilities of ocean freight forwarders, regulations concerning practices of freight forwarders and common carriers, and the grounds and procedures for revocation and suspension of licenses.

(b) Information obtained under this part is used to determine the qualifications of freight forwarders and their compliance with shipping statutes and regulations. Failure to follow the provisions of this part may result in denial, revocation or suspension of a freight forwarder license. Persons operating without the proper license may be subject to civil penalties not to exceed $5,000 for each such violation unless the violation is willfully and knowingly committed, in which case the amount of the civil penalty may not exceed $25,000 for each violation; for other violations of the provisions of this part, the civil penalties range from $5,000 to $25,000 for each violation (46 U.S.C. app. 1712). Each day of a continuing violation shall constitute a separate violation.

§ 510.2 Definitions.

The terms used in this part are defined as follows:

(a) "Act" means the Shipping Act of 1984 (46 U.S.C. app. 1701–1720).

(b) "Beneficial interest" includes a lien or interest in or right to use, enjoy, profit, benefit, or receive any advantage, either proprietary or financial, from the whole or any part of a shipment of cargo where such interest arises from the financing of the shipment or by operation of law, or by agreement, express or implied. The term "beneficial interest" shall not include any obligation in favor of a freight forwarder arising solely by reason of the advance of out-of-pocket expenses incurred in dispatching a shipment.

(c) "Branch office" means any office established by or maintained by or under the control of a licensee for the purpose of rendering freight forwarding services, which office is located at an address different from that of the licensee's designated home office. This term does not include a separately incorporated entity.

(d) "Brokerage" refers to payment by a common carrier to an ocean freight broker for the performance of services as specified in paragraph (m) of this section.

(e) "Common carrier" means any person holding itself out to the general public to provide transportation by water of passengers or cargo between the United States and a foreign country for compensation that:

(1) Assumes responsibility for the transportation from the port or point of receipt to the port or point of destination, and
(2) Utilizes, for all or part of that transportation, a vessel operating on the high seas or the Great Lakes between a port in the United States and a port in a foreign country.

(f) "Compensation" means payment by a common carrier to a freight forwarder for the performance of services as specified in § 510.23(c) of this part.

(g) "Freight forwarding fee" means charges billed by a freight forwarder to a shipper, consignee, seller, purchaser, or any agent thereof, for the performance of freight forwarding services.

(h) "Freight forwarding services" refers to the dispatching of shipments on behalf of others, in order to facilitate shipment by a common carrier, which may include, but is not limited to, the following:

(1) Ordering cargo to port;
(2) Preparing and/or processing export declarations;
(3) Booking, arranging for or confirming cargo space;
(4) Preparing or processing delivery orders or dock receipts;
(5) Preparing and/or processing ocean bills of lading;
(6) Preparing or processing consular documents or arranging for their certification;
(7) Arranging for warehouse storage;
(8) Arranging for cargo insurance;
(9) Clearing shipments in accordance with United States Government export regulations;
(10) Preparing and/or sending advance notifications of shipments or other documents to banks, shippers, or consignees, as required;
(11) Handling freight or other monies advanced by shippers, or remitting or advancing freight or other monies or credit in connection with the dispatching of shipments;
(12) Coordinating the movement of shipments from origin to vessel; and
(13) Giving expert advice to exporters concerning letters of credit, other documents, licenses or inspections, or on problems germane to the cargoes' dispatch.

(i) "From the United States" means oceanborne export commerce from the United States, its Territories, or possessions to foreign countries.

(j) "Licensee" is any person licensed by the Federal Maritime Commission as an ocean freight forwarder.

(k) "Non-vessel-operating common carrier" means a common carrier that does not operate the vessels by which the ocean transportation is provided, and is a shipper in its relationship with an ocean common carrier.

(l) "Ocean common carrier" means a vessel-operating common carrier but the term does not include one engaged in ocean transportation by ferry boat or ocean tramp.

(m) "Ocean freight broker" is an entity which is engaged by a carrier to secure cargo for such carrier and/or to sell or offer for sale ocean transportation services and which holds itself out to the public as one who negotiates between shipper or consignee and carrier for the purchase, sale, conditions and terms of transportation.

(n) "Ocean freight forwarder" means a person in the United States that:

(1) Dispatches shipments from the United States via common carriers and books or otherwise arranges space for those shipments on behalf of shippers; and

(2) Processes the documentation or performs related activities incident to those shipments.

(o) "Principal", except as used in Surety Bond Form FMC 59, Rev., refers to the shipper, consignee, seller, or purchaser of property, and to anyone acting on behalf of such shipper, consignee, seller, or purchaser of property, who employs the services of a licensee to facilitate the ocean transportation of such property.

(p) "Reduced forwarding fees" means charges to a principal for forwarding services that are below the licensee's usual charges for such services.

(q) "Shipment" means all of the cargo carried under the terms of a single bill of lading.

(r) "Shipper" means an owner or person for whose account the ocean transportation of cargo is provided or the person to whom delivery is to be made.

(s) "Small shipment" refers to a single shipment sent by one consignor to one consignee on one bill of lading which does not exceed the underlying common carrier's minimum charge rule.

(t) "Special contract" is a contract for freight forwarding services which provides for a periodic lump sum fee.

(u) "United States" includes the several States, the District of Columbia, the Commonwealth of Puerto Rico, the Commonwealth of the Northern Marianas, and all other United States territories and possessions.

§ 510.3 License; when required.

Except as otherwise provided in this part, a person must hold a valid ocean freight forwarder license in order to perform freight forwarding services and, except as provided in § 510.4 of this part, no person shall perform, or hold out to perform, such services unless such person holds a valid license issued by the Commission to engage in such business. A separate license is required for each branch office that is separately incorporated.

§ 510.4 License; when not required.

A license is not required in the following circumstances:

(a) *Shipper.* Any person whose primary business is the sale of merchandise may, without a license, dispatch and perform freight forwarding services on behalf of its own shipments, or on behalf of shipments or consolidated

shipments of a parent, subsidiary, affiliate, or associated company. Such person shall not receive compensation from the common carrier for any services rendered in connection with such shipments.

(b) *Employee or branch office of licensed forwarder.* An individual employee or unincorporated branch office of a licensed ocean freight forwarder is not required to be licensed in order to act solely for such licensee, but each licensed ocean freight forwarder will be held strictly responsible hereunder for the acts or omissions of any of its employees rendered in connection with the conduct of the business.

(c) *Common carrier.* A common carrier, or agent thereof, may perform ocean freight forwarding services without a license only with respect to cargo carried under such carrier's own bill of lading. Charges for such forwarding services shall be assessed in conformance with the carrier's published tariffs on file with the Commission.

(d) *Ocean freight brokers.* An ocean freight broker is not required to be licensed to perform those services specified in § 510.2(m).

SUBPART B—ELIGIBILITY AND PROCEDURE FOR LICENSING; BOND REQUIREMENTS

§ 510.11 Basic Requirements for licensing; eligibility.

(a) *Necessary qualifications.* To be eligible for an ocean freight forwarder's license, the applicant must demonstrate to the Commission that:

(1) It possesses the necessary experience, that is, its qualifying individual has a minimum of three (3) years experience in ocean freight forwarding duties in the United States, and the necessary character to render forwarding services; and

(2) It has obtained and filed with the Commission a valid surety bond in conformance with § 510.14.

(b) *Qualifying individual.* The following individuals must qualify the applicant for a license:

(1) *Sole proprietorship*—The applicant sole proprietor.

(2) *Partnership*—At least one of the active managing partners, but all partners must execute the application.

(3) *Corporation*—At least one of the active corporate officers.

(c) *Affiliates of forwarders.* An independently qualified applicant may be granted a separate license to carry on the business of forwarding even though it is associated with, under common control with, or otherwise related to another ocean freight forwarder through stock ownership or common directors or officers, if such applicant submits (1) a separate application and fee, and (2) a valid surety bond in the form and amount prescribed under § 510.14 of this part. The proprietor, partner or officer who is the qualifying individual of one active licensee shall not also be designated

the qualifying proprietor, partner or officer of an applicant for another ocean freight forwarder license.

(d) *Common carrier.* A common carrier or agent thereof which meets the requirements of this part may be licensed to dispatch shipments moving on other than such carrier's own bill of lading subject to the provisions of § 510.23(g) of this part.

§ 510.12 Application for license.

(a) *Application and forms.* Any person who wishes to obtain a license to carry on the business of forwarding shall submit, in duplicate, to the Director of the Commission's Bureau of Tariffs, a completed application Form FMC–18 Rev. ("Application for a License as an Ocean Freight Forwarder") and a completed anti-rebate certification in the format prescribed under § 510.25 of this part. Copies of Form FMC–18 Rev. may be obtained from the Director, Bureau of Tariffs, Federal Maritime Commission, Washington, D.C. 20573, or from any of the Commission's offices at other locations. Notice of filing of such application shall be published in the *Federal Register* and shall state the name and address of the applicant. If the applicant is a corporation or partnership, the names of the officers or partners thereof shall be published.

(b) *Fee.* The application shall be accompanied by a money order, certified check or cashier's check in the amount of $350 made payable to the "Federal Maritime Commission."

(c) *Rejection.* Any application which appears upon its face to be incomplete or to indicate that the applicant fails to meet the licensing requirements of the Shipping Act of 1984, or the Commission's regulations, shall be returned by certified U.S. mail to the applicant without further processing, together with an explanation of the reason(s) for rejection, and the application fee shall be refunded in full. All other applications will be assigned an application number, and each applicant will be notified of the number assigned to its application. Persons who have had their applications returned may reapply for a license at any time thereafter by submitting a new application, together with the full application fee.

(d) *Investigation.* Each applicant shall be investigated in accordance with § 510.13 of this part.

(e) *Changes in fact.* Each applicant and each licensee shall submit to the Commission, in duplicate, an amended Form FMC–18 Rev. advising of any changes in the facts submitted in the original application, within thirty (30) days after such change(s) occur. In the case of an application for a license, any unreported change may delay the processing and investigation of the application and may result in rejection or denial of the application. No fee is required when reporting changes to an application for initial license under this section.

§ 510.13 Investigation of applicants.

The Commission shall conduct an investigation of the applicant's qualifications for a license. Such investigations may address:

(a) The accuracy of the information submitted in the application;

(b) The integrity and financial responsibility of the applicant;

(c) The character of the applicant and its qualifying individual; and

(d) The length and nature of the qualifying individual's experience in handling freight forwarding duties.

§ 510.14 Surety bond requirements.

(a) *Form and amount.* No license shall be issued to an applicant who does not have a valid surety bond (FMC–59 Rev.) on file with the Commission in the amount of $30,000. The amount of such bond shall be increased by $10,000 for each of the applicant's unincorporated branch offices. Bonds must be issued by a surety company found acceptable by the Secretary of the Treasury. Surety Bond Form FMC–59 Rev. can be obtained in the same manner as Form FMC–18 Rev. under § 510.12(a) of this part.

(b) *Filing of bond.* Upon notification by the Commission by certified U.S. mail that the applicant has been approved for licensing, the applicant shall file with the Director of the Commission's Bureau of Tariffs, a surety bond in the form and amount prescribed in § 510.14(a) of this part. No license will be issued until the Commission is in receipt of a valid surety bond from the applicant. If more than six (6) months elapse between issuance of the notification of qualification and receipt of the surety bond, the Commission shall, at its discretion, undertake a supplementary investigation to determine the applicant's continued qualification. The fee for such supplementary investigation shall be $100 payable by money order, certified check or cashier's check to the "Federal Maritime Commission." Should the applicant not file the requisite surety bond within two years of notification, the Commission will consider the application to be invalid.

(c) *Branch offices.* A new surety bond, or rider to the existing bond, increasing the amount of the bond in accordance with § 510.14(a) of this part, shall be filed with the Commission prior to the date the licensee commences operation by any branch office. Failure to adhere to this requirement may result in revocation of the license.

(d) *Termination of bond.* No license shall remain in effect unless a valid surety bond is maintained on file with the Commission. Upon receipt of notice of termination of a surety bond, the Commission shall notify the concerned licensee by certified U.S. mail, at its last known address, that the Commission shall, without hearing or other proceeding, revoke the license as of the termination date of the bond unless the licensee shall have submitted a valid replacement surety bond before such termination date. Replacement surety bonds must bear an effective date no later than the termination date of the expiring bond.

§ 510.15 Denial of license.

If the Commission determines, as a result of its investigation, that the applicant:

(a) Does not possess the necessary experience or character to render forwarding services;

(b) Has failed to respond to any lawful inquiry of the Commission; or

(c) Has made any willfully false or misleading statement to the Commission in connection with its application,

a letter of intent to deny the application shall be sent to the applicant by certified U.S. mail, stating the reason(s) why the Commission intends to deny the application. If the applicant submits a written request for a hearing on the proposed denial within twenty (20) days after receipt of notification, such hearing shall be granted by the Commission pursuant to its Rules of Practice and Procedure contained in Part 502 of this chapter. Otherwise, denial of the application will become effective and the applicant shall be so notified by certified U.S. mail. Civil penalties for violations of the Act or any Commission order, rule or regulation may be assessed in accordance with Part 505 of this chapter in any proceeding on the proposed denial of a license or may be compromised for any such violation when a proceeding has not been instituted.

§ 510.16 Revocation or suspension of license.

(a) *Grounds for revocation.* Except for the automatic revocation for termination of a surety bond under § 510.14(d) of this part, or as provided in § 510.14(c) of this part, a license may be revoked or suspended after notice and hearing for any of the following reasons:

(1) Violation of any provision of the Act, or any other statute or Commission order or regulation related to carrying on the business of forwarding;

(2) Failure to respond to any lawful order or inquiry by the Commission;

(3) Making a willfully false or misleading statement to the Commission in connection with an application for a license or its continuance in effect;

(4) Where the Commission determines that the licensee is not qualified to render freight forwarding services; or

(5) Failure to honor the licensee's financial obligations to the Commission, such as for civil penalties assessed or agreed to in a settlement agreement under Part 505 of this chapter.

(b) *Civil penalties.* As provided for in Part 505 of this chapter, civil penalties for violations of the Act or any Commission order, rule, or regulation may be assessed in any proceeding to revoke or suspend a license and may be compromised when such a proceeding has not been instituted.

(c) *Notice of Revocation.* The Commission shall publish in the FEDERAL REGISTER a notice of each revocation.

§ 510.17 Application after revocation or denial.

Whenever a license has been revoked or an application has been denied because the Commission has found the licensee or applicant to be not qualified to render forwarding services, any further application within 3 years of the date of the most recent conduct on which the Commission's notice of revocation or denial was based, made by such former licensee or applicant or by another applicant employing the same qualifying individual or controlled by persons on whose conduct the Commission based its determination for revocation or denial, shall be reviewed directly by the Commission.

§ 510.18 Issuance and use of license.

(a) *Qualification necessary for issuance.* The Commission will issue a license if it determines, as a result of its investigation, that the applicant possesses the necessary experience and character to render forwarding services and has filed the required surety bond.

(b) *To whom issued.*The Commission will issue a license only in the name of the applicant whether the applicant be a sole proprietorship, a partnership, or a corporation, and the license will be issued to only one legal entity. A license issued to a sole proprietor doing business under a trade name shall be in the name of the sole proprietor, indicating the trade name under which the licensee will be conducting business. Only one license shall be issued to any applicant regardless of the number of names under which such applicant may be doing business.

(c) *Use limited to named licensee.* Except as otherwise provided in this part, such license is limited exclusively to use by the named licensee and shall not be transferred without approval to another person.

§ 510.19 Changes in organization.

(a) The following changes in an existing licensee's organization require prior approval of the Commission:

(1) Transfer of a corporate license to another person;

(2) Change in ownership of an individual proprietorship;

(3) Addition of one or more partners to a licensed partnership;

(4) Change in the business structure of a licensee from or to a sole proprietorship, partnership, or corporation, whether or not such change involves a change in ownership;

(5) Acquisition of one or more additional licensee, whether for the purposes of merger, consolidation, or control;

(6) Any change in a licensee's name; or

(7) Change in the identity or status of the designated qualifying individual, except as discussed in paragraphs (b) and (c) of this section.

(b) *Operation after death of sole proprietor.* In the event the owner of a licensed sole proprietorship dies, the licensee's executor, administrator, heir(s), or assign(s) may continue operation of such proprietorship solely

with respect to shipments for which the deceased sole proprietor had undertaken to act as an ocean freight forwarder pursuant to the existing license, if the death is reported within thirty (30) days to the Commission and to all principals for whom services on such shipments are to be rendered. The acceptance or solicitation of any other shipments is expressly prohibited until a new license has been issued. Applications for a new license by the said executor, administrator, heir(s), or assign(s) shall be made on Form FMC–18 Rev., and shall be accompanied by the transfer fee set forth in § 510.19(e) of this part.

(c) *Operation after retirement, resignation, or death of qualifying individual.* When a partnership or corporation has been licensed on the basis of the qualifications of one or more of the partners or officers thereof, and such qualifying individual(s) shall no longer serve in a full-time, active capacity with the firm, the licensee shall report such change to the Commission within thirty (30) days. Within the same 30-day period, the licensee shall furnish to the Commission the name(s) and detailed ocean freight forwarding experience of other active managing partner(s) or officer(s) who may qualify the licensee. Such qualifying individual(s) must meet the applicable requirements set forth in § 510.11(a) of this part. The licensee may continue to operate as an ocean freight forwarder while the Commission investigates the qualifications of the newly designated partner or officer.

(d) *Incorporation of branch office.* In the event a licensee's validly operating branch office undergoes incorporation as a separate entity, the licensee may continue to operate such office pending receipt of a separate license, provided that:

(1) The separately incorporated entity applies to the Commission for its own license within ten (10) days after incorporation, and

(2) The continued operation of the office is carried on as a *bona fide* branch office of the licensee, under its full control and responsibility, and not as an operation of the separately incorporated entity.

(e) *Application form and fee.* Applications for Commission approval of status changes or for license transfers under § 510.19(a) of this part shall be filed in duplicate with the Director, Bureau of Tariffs, Federal Maritime Commission, on Form FMC–18, Rev., together with a processing fee of $100, made payable by money order, certified check, or cashier's check to the "Federal Maritime Commission."

SUBPART C—DUTIES AND RESPONSIBILITIES OF FREIGHT FORWARDERS; FORWARDING CHARGES; REPORTS TO COMMISSION

§ 510.21 General duties.

(a) *License; name and number.* Each licensee shall carry on the business of forwarding only under the name in which its license is issued and

only under its license number as assigned by the Commission. Wherever the licensee's name appears on shipping documents, its FMC license number shall also be included.

(b) *Stationery and billing forms; notice of shipper affiliation.*

(1) The name and license number of each licensee shall be permanently imprinted on the licensee's office stationery and billing forms. The Commission may temporarily waive this requirement for good cause shown if the licensee rubber stamps or types its name and FMC license number on all papers and invoices concerned with any forwarding transaction.

(2) When a licensee is a shipper or seller of goods in international commerce or affiliated with such an entity, the licensee shall have the option of (i) identifying itself as such and/or, where applicable, listing its affiliates on its office stationery and billing forms, or (ii) including the following notice of such items:

> This company is a shipper or seller of goods in international commerce or is affiliated with such an entity. Upon request, a general statement of its business activities and those of its affiliates, along with a written list of the names of such affiliates, will be provided.

(c) *Use of license by others; prohibition.* No licensee shall permit its license or name to be used by any person who is not a *bona fide* individual employee of the licensee. Unincorporated branch offices of the licensee may use the license number and name of the licensee if such branch offices (1) have been reported to the Commission in writing; and (2) are covered by an increased bond in accordance with § 510.14(c) of this part.

(d) *Arrangements with forwarders whose licenses have been revoked.* Unless prior written approval from the Commission has been obtained, no licensee shall, directly or indirectly, (1) agree to perform forwarding services on export shipments as an associate, correspondent, officer, employee, agent, or sub-agent of any person whose license has been revoked or suspended pursuant to § 510.16 of this part; (2) assist in the furtherance of any forwarding business of such person; (3) share forwarding fees or freight compensation with any such person; or (4) permit any such person directly or indirectly to participate, through ownership or otherwise, in the control or direction of the freight forwarding business of the licensee.

(e) *Arrangements with unauthorized persons.* No licensee shall enter into an agreement or other arrangement (excluding sales agency arrangements not prohibited by law or this part) with an unlicensed person so that any resulting fee, compensation, or other benefit inures to the benefit of the unlicensed person. When a licensee is employed for the transaction of forwarding business by a person who is not the person responsible for paying the forwarding charges, the licensee shall also transmit to the

person paying the forwarding charges a copy of its invoice for services rendered.

(f) *False or fraudulent claims, false information.* No licensee shall prepare or file or assist in the preparation or filing of any claim, affidavit, letter of indemnity, or other paper or document concerning a forwarding transaction which it has reason to believe is false or fraudulent, nor shall any such licensee knowingly impart to a principal, common carrier or other person, false information relative to any forwarding transaction.

(g) *Response to requests of Commission.* Upon the request of any authorized representative of the Commission, a licensee shall make available promptly for inspection or reproduction all records and books of account in connection with its forwarding business, and shall respond promptly to any lawful inquiries by such representative.

(h) *Policy against rebates.* The following declaration shall appear on all invoices submitted to principals:

> (Name of firm) has a policy against payment, solicitation, or receipt of any rebate, directly or indirectly, which would be unlawful under the United States Shipping Act of 1984.

§ 510.22 Forwarder and principal; fees.

(a) *Compensation or fee sharing.* No licensee shall share, directly or indirectly, any compensation or freight forwarding fee with a shipper, consignee, seller, or purchaser, or an agent, affiliate, or employee thereof; nor with any person advancing the purchase price of the property or guaranteeing payment therefor; nor with any person having a beneficial interest in the shipment.

(b) *Withholding information.* No licensee shall withhold any information concerning a forwarding transaction from its principal.

(c) *Due diligence.* Each licensee shall exercise due diligence to ascertain the accuracy of any information it imparts to a principal concerning any forwarding transaction.

(d) *Errors and omissions.* Each licensee shall comply with the laws of the United States and any involved State, Territory, or possession thereof, and shall assure that to the best of its knowledge there exists no error, misrepresentation in, or omission from any export declaration, bill of lading, affidavit, or other document which the licensee executes in connection with a shipment. A licensee who has reason to believe that its principal has not, with respect to a shipment to be handled by such licensee, complied with the laws of the United States or any State, Commonwealth or Territory thereof, or has made any error or misrepresentation in, or omission from, any export declaration, bill of lading, affidavit, or other paper which the principal executes in connection with such shipment, shall advise its principal promptly of the suspected noncompliance, error, misrepresentation or omission, and shall decline to participate in any transaction involving such document until the matter is properly and lawfully resolved.

(e) *Express written authority.* No licensee shall endorse or negotiate any draft, check, or warrant drawn to the order of its principal without the express written authority of such principal.

(f) *Receipt for cargo.* Each receipt issued for cargo by a licensee shall be clearly identified as "Receipt for Cargo" and be readily distinguishable from a bill of lading.

(g) *Invoices; documents available upon request.* A licensee may charge its principal for services rendered. Upon request of its principal, each licensee shall provide a complete breakout of the components of its charges and a true copy of any underlying document or bill of charges pertaining to the licensee's invoice. The following notice shall appear on each invoice to a principal:

> Upon request, we shall provide a detailed breakout of the components of all charges assessed and a true copy of each pertinent document relating to these charges.

(h) *Special contracts.* To the extent that special arrangements or contracts are entered into by a licensee, the licensee shall not deny equal terms to other shippers similarly situated.

(i) *Reduced forwarding fees.* No licensee shall render, or offer to render, any freight forwarding service free of charge or at a reduced fee in consideration of receiving compensation from a common carrier or for any other reason. Exception: A licensee may perform freight forwarding services for recognized relief agencies or charitable organizations, which are designated as such in the tariff of the common carrier, free of charge or at reduced fees.

(j) *Accounting to principal.* Each licensee shall account to its principal(s) for overpayments, adjustments of charges, reductions in rates, insurance refunds, insurance monies received for claims, proceeds of c.o.d. shipments, drafts, letters of credit, and any other sums due such principal(s).

§ 510.23 Forwarder and carrier; compensation.

(a) *Disclosure of principal.* The identity of the shipper must always be disclosed in the shipper identification box on the bill of lading. The licensee's name may appear after the name of the shipper, but the licensee must be identified as the shipper's agent.

(b) *Certification required for compensation.* A common carrier may pay compensation to a licensee only pursuant to such common carrier's tariff provisions. Where a common carrier's tariff provides for the payment of compensation, such compensation shall be paid on any shipment forwarded on behalf of others where the licensee has provided a written certification as prescribed in § 510.23(c) of this part and the shipper has been disclosed on the bill of lading as provided for in § 510.23(a) of this part. The common carrier shall be entitled to rely on such certification unless it knows that the certification is incorrect. The common carrier shall retain such certification for a period of five (5) years.

(c) *Form of certification.* Where a licensee is entitled to compensation, the licensee shall provide the common carrier with a signed certification which indicates that the licensee has performed the required services that entitle it to compensation. The certification shall read as follows:

> The undersigned hereby certifies that neither it nor any holding company, subsidiary, affiliate, officer, director, agent or executive of the undersigned has a beneficial interest in this shipment; that it is the holder of valid FMC License No._____, issued by the Federal Maritime Commission and has performed the following services:
>
> (1) Engaged, booked, secured, reserved, or contracted directly with the carrier or its agent for space aboard a vessel or confirmed the availability of that space; and
>
> (2) Prepared and processed the ocean bill of lading, dock receipt, or other similar document with respect to the shipment.

The required certification may be placed on one copy of the relevant bill of lading, a summary statement from the licensee, the licensee's compensation invoice, or as an endorsement on the carrier's compensation check. Each licensee shall retain evidence in its shipment files that the licensee, in fact, has performed the required services enumerated on the certification.

(d) *Compensation pursuant to tariff provisions.* No licensee, or employee thereof, shall accept compensation from a common carrier which is different than that specifically provided for in the carrier's effective tariff(s) lawfully on file with the Commission. No conference or group of common carriers shall deny in the export commerce of the United States compensation to an ocean freight forwarder or limit that compensation to less than a reasonable amount.

(e) *Compensation; services performed by underlying carrier; exemptions.* No licensee shall charge or collect compensation in the event the underlying common carrier, or its agent, has, at the request of such licensee, performed any of the forwarding services set forth in §510.2(h) unless such carrier or agent is also a licensee, or unless no other licensee is willing and able to perform such services.

(f) *Duplicative compensation.* A common carrier shall not pay compensation for the services described in §510.23(c) more than once on the same shipment.

(g) *Licensed non-vessel-operating common carriers; compensation.*

> (1) A non-vessel-operating common carrier or person related thereto licensed under this part may collect compensation when, and only when, the following certification is made together with the certification required under paragraph (c) of this section:
>
> The undersigned certifies that neither it nor any related person has issued a bill of lading or otherwise undertaken common carrier responsibility as a non-vessel-operating common carrier

for the ocean transportation of the shipment covered by this bill of lading.

(2) Whenever a person acts in the capacity of a non-vessel-operating common carrier as to any shipment, such person shall not collect compensation, nor shall any underlying ocean common carrier pay compensation to such person for such shipment.

(h) A freight forwarder may not receive compensation from a common carrier with respect to any shipment in which the forwarder has a beneficial interest or with respect to any shipment in which any holding company, subsidiary, affiliate, officer, director, agent, or executive of such forwarder has a beneficial interest.

§ 510.24 Records required to be kept.

Each licensee shall maintain in an orderly and systematic manner, and keep current and correct, all records and books of account in connection with its business of forwarding. These records must be kept in the United States in such manner as to enable authorized Commission personnel to readily determine the licensee's cash position, accounts receivable and accounts payable. The licensee must maintain the following records for a period of five years:

(a) *General financial data.* A current running account of all receipts and disbursements, accounts receivable and payable, and daily cash balances, supported by appropriate books of account, bank deposit slips, canceled checks, and monthly reconciliation of bank statements.

(b) *Types of services by shipment.* A separate file shall be maintained for each shipment. Each file shall include a copy of each document prepared, processed, or obtained by the licensee, including each invoice for any service arranged by the licensee and performed by others, with respect to such shipment.

(c) *Receipts and disbursements by shipment.* A record of all sums received and/or disbursed by the licensee for services rendered and out-of-pocket expenses advanced in connection with each shipment, including specific dates and amounts.

(d) *Special contracts.* A true copy, or if oral, a true and complete memorandum, of every special arrangement or contract with a principal, or modification or cancellation thereof, to which it may be a party. Authorized Commission personnel and *bona fide* shippers shall have access to such records upon reasonable request.

§ 510.25 Anti-rebate certifications.

By March 1st of each year, the Chief Executive Officer of every licensee shall certify that it has a policy against rebates, that it has promulgated such policy to all appropriate individuals in the firm, that it has taken steps to prevent such illegal practices which measures must be fully described in detail, and, that it will cooperate with the Commission in any

investigation of suspected rebates. This certification shall be in accordance with the following format:

(Name of Filing Firm)

Certification of Policies and Efforts to Combat Rebating in the Foreign Commerce of the United States

Pursuant to the provisions of section 15(b) of the Shipping Act of 1984, and Federal Maritime Commission regulations promulgated pursuant thereto, 46 CFR Parts 510 and 582,

I, _____, Chief Executive Officer of (name of firm), holder of valid ocean freight forwarder license #_____, state under oath that:

1. It is the policy of (name of firm) to prohibit the participation of said freight forwarder in the payment, solicitation, or receipt of any rebate, directly or indirectly, to or by any carrier or shipper, which is unlawful under the provisions of the Shipping Act of 1984.
2. Each owner, officer, employee and agent of (name of firm) was notified or reminded of this policy on or before _____ of the present year.
3. (Set forth the details of measures instituted within the filing firm or otherwise to prohibit participation in the payment of illegal rebates in the foreign commerce of the United States.)
4. (Name of firm) affirms that it will fully cooperate with the Commission in its investigation of suspected rebating in United States foreign trades.

(S) _____

Subscribed to and sworn before me
this _____ day of _____, 19_____.

(S) _____.
Notary Public

§ 510.91 OMB control numbers assigned pursuant to the Paperwork Reduction Act.

This section displays the control numbers assigned to information collection requirements of the Commission in this part by the Office of Management and Budget pursuant to the Paperwork Reduction Act of 1980, Pub. L. 96–511. The Commission intends that this part comply with the requirements of section 3507(f) of the Paperwork Reduction Act, which requires that agencies display a current control number assigned by the Director of the Office of Management and Budget (OMB) for each agency information collection requirement:

Section	Current OMB Control No.
510.12 (Form FMC–18)	3072–0018
510.14	3072–0018
510.15	3072–0018
510.19 (Form FMC–18)	3072–0018
510.21 through 510.25	3072–0018

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

[46 CFR PARTS 515, 520, 525, 530, 540]

[DOCKET NO. 84–18]

INTERIM RULES TO IMPLEMENT THE SHIPPING ACT OF 1984

(SUBCHAPTER B—FINAL RULES FOR MARINE TERMINAL OPERATIONS AND PASSENGER VESSELS)

September 10, 1984

ACTION: Final Rules.

SUMMARY: On March 20, 1984, the President signed the Shipping Act of 1984, which became effective on June 18, 1984. The Commission hereby issues final rules to supersede previously issued interim rules to implement the Shipping Act of 1984. In addition, minor style and technical changes have been made. The parts which are included in this rulemaking are: Part 515 [filing of tariffs by marine terminal operators—old part 533]; Part 520 [filing of tariffs by terminal barge operators in Pacific Slope States—old part 550]; Part 525 [free time and demurrage—old part 526]; Part 530 [truck detention at New York—old part 551]; and Part 540 [security for the protection of the public on passenger vessels]. Along with the final rule on Part 510 (Ocean Freight Forwarders), published separately, all of Subchapter B is now final.

DATE: October 15, 1984.

SUPPLEMENTARY INFORMATION:

These final rules, together with the simultaneous but separately published final rule on Part 510 (Ocean Freight Forwarders) finalize Subchapter B of Chapter IV, Title 46 of the Code of Federal Regulations. The new Title for Subchapter B is:

REGULATIONS AFFECTING OCEAN FREIGHT FORWARDERS, MARINE TERMINAL OPERATIONS AND PASSENGER VESSELS

This proceeding was instituted by a Notice entitled "Interim Rules to Implement the Shipping Act of 1984", published in the *Federal Register* on May 3, 1984 (49 FR 18846) (26 F.M.C. 611), which cited the Federal Maritime Commission's interim rulemaking authority under section 17(b) of the Shipping Act of 1984 [46 U.S.C. app. 1716(b)] and the necessity,

under that statute, for publishing superseding, final rules by December 15, 1984. These rules are being published as such final, superseding rules, without prejudice, however, to the promulgation of any further rules that may be desirable, from time to time, before or after December 15, 1984.

The Interim Rules, finalized herein, restructure the Commission's Code of Federal Regulations' Part numbers for logic and convenience. The "new" numbers are effective as of June 18, 1984, while the "old" numbers appeared in the October 1, 1983, Title 46 (Shipping), Part 400 to End, edition of the CFR.

The major changes made by the Interim Rules to the old rules involved the Authority Citations, penalty provisions, and the exclusion of forest products, bulk cargo and recyclable metal scrap, waste paper and paper waste from the tariff-filing requirements—all to implement the Shipping Act of 1984. See 49 FR 18846.

The Supplementary Information to the interim rules also mentioned Docket No. 83–38, *Notice of Inquiry and Intent to Review Regulations of Ports and Marine Terminal Operators,* presided over by Commissioner Robert Setrakian. The issues in that proceeding may affect marine terminal operations and suggest further amendments to the rules in the parts published here. Such further rulemaking, if necessary may be outside the scope of the Interim Rules and, therefore, require a separate rulemaking. Accordingly, at this time, the Commission will not defer finalization of these marine-terminal-related rules.

The Interim Rules published on May 3, 1984, generated only two comments: one from the Maryland Port Administration which endorsed the language modifications to Part 515, "Filing of Tariffs by Terminal Operators"; and the other from the National Maritime Council which had no further comment other than recognizing that the Interim Rules were required for technical compliance with the 1984 Act. The Commission, therefore, sees no need to make any substantive changes in any of the Interim Rules, and is publishing them as final, superseding rules in this proceeding in their entirety.

In preparing the various parts for publication, certain other non-substantive changes suggested themselves. Most of such minor changes made here involve style (e.g., for OMB Control Numbers or exemptions under the Paperwork Reduction Act; changing "provided, however" to "except"; elimination of gender specific references, etc.), grammar, syntax, numbering, punctuation, correction of typographical errors, and removal of superfluous verbiage—all without affecting substance.

In addition, we are restoring to the "Authority Citation" in old Part 550 (new Part 520), reference to Sec. 3 of the Shipping Act, 1916 (46 U.S.C. app. 804); we are deleting obsolete, effective-date provisions appearing in (old) sections 533.4 and 540.4(b); a new map of the New York Port District is being provided for (new) Part 530; and we think a more

descriptive nomenclature is "Marine Terminal Operators" instead of merely "Terminal Operators."

The Federal Maritime Commission has determined that this rule 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 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 Chairman of the Federal Maritime Commission certifies 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 governmental jurisdictions.

List of Subjects:

46 CFR Parts 515, 520, 525, and 530

Barges; Cargo; Cargo vessels; Harbors; Imports; Maritime carriers; Motor carriers; Ports; Rates and fares; Reporting and recordkeeping requirements; Trucks, Water carriers; Waterfront facilities; Water transportation.

46 CFR Part 540

Rates and fares; Passenger vessels; Reporting and recordkeeping requirements; Surety bonds.

CORRECTIONS

These final rules are subject to review and editing of form before publication in the Code of Federal Regulations. Users are requested to notify the Commission of any omissions and typographical-type errors in order that corrections can be made before the Commission's CFR book goes to press in January, 1985.

Therefore, pursuant to 5 U.S.C. 552, 553; secs. 3, 17, 18(a), 21 and 43 of the Shipping Act, 1916 (46 U.S.C. app. 804, 816, 817(a), 820, and 841a); sec. 2 of the Intercoastal Shipping Act, 1993 (46 U.S.C. app. 844); secs. 8, 10, 15 and 17 of the Shipping Act of 1984 (46 U.S.C. app. 1707, 1709, 1714 and 1716), and secs. 2 and 3, Pub. L. 89–777, 80 Stat. 1356–1358 (46 U.S.C. app. 817d and 817e):

1. The Title to Subchapter B is revised to read as follows:

SUBCHAPTER B—REGULATIONS AFFECTING OCEAN FREIGHT FORWARDERS, MARINE TERMINAL OPERATIONS AND PASSENGER VESSELS

2. Title 36 Code of Federal Regulations, Parts 515, 520, 525, 530 and 540 are revised to read as follows:

FEDERAL MARITIME COMMISSION

[46 CFR PART 515]

FILING OF TARIFFS BY MARINE TERMINAL OPERATORS

Sec.

AUTHORITY: 5 U.S.C. 553; secs. 17, 21, 43 of the Shipping Act, 1916 (46 U.S.C. app. 816, 820, 841a); secs. 10, 15, 17 of the Shipping Act of 1984 (46 U.S.C. app. 1709, 1714, 1716).

§515.1 Scope.

This part sets forth rules and regulations for the filing of terminal tariffs by persons engaged in carrying on the business of furnishing wharfage, dock, warehouse or other terminal facilities within the United States or a commonwealth, territory, or possession thereof, in connection with a common carrier by water in the foreign or domestic offshore commerce of the United States.

§515.2 Purpose.

The purpose of this part is to enable the Commission to discharge its responsibilities under section 17 of the Shipping Act, 1916 and section 10 of the Shipping Act of 1984, by keeping informed of practices, rates and charges related thereto, instituted and to be instituted by marine terminals, and by keeping the public informed of such practices. Compliance is mandatory and failure to file the required tariffs may result in a peanlty of not more than $5,000 for each day such violation continues. Additionally, if willful and knowing, the Shipping Act of 1984 provides a civil penalty of not more than $25,000 for each day a violation continues.

§515.3 Persons who must file.

Except with regard to bulk cargo, forest products, recycled metal scrap, waste paper, and paper waste, every person other than the Department of Defense (including the military department and all agencies of the Department of Defense), carrying on the business of furnishing wharfage, dock, warehouse, or other terminal facilities as described in §515.1, including, but not limited to terminals owned or operated by States and their political subdivisions; railroads who perform port terminal services not covered by

their line haul rates; common carriers who perform port terminal services; and warehousemen who operate port terminal facilities, shall file in duplicate with the Bureau of Tariffs, Federal Maritime Commission, and shall keep open for inspection at all its places of business, a schedule or tariff showing all its rates, charges, rules, and regulations relating to or connected with the receiving, handling, storing, and/or delivering of property at its terminal facilities, except that rates and charges for terminal services performed for water carriers pursuant to negotiated contracts, and for storage of cargo and services incidental thereto by public warehousemen pursuant to storage agreements covered by issued warehouse receipts need not be filed for purposes of this part.

§ 515.4 Filing of tariffs and tariff changes.

Every tariff or tariff change shall be filed on or before its effective date, except as required by Commission Order or by agreements approved pursuant to section 15 of the Shipping Act, 1916 and/or effective under section 6 of the Shipping Act of 1984, and be kept open for public inspection as provided in § 515.3.

§ 515.5 Compliance with this part and other terminal tariff filing requirements.

Persons who file tariffs pursuant to requirements of Commission Orders or agreements, approved under section 15 of the Shipping Act, 1916 and/or effective under section 6 of the Shipping Act of 1984, and shall not be relieved of such requirements by this part. Marine Terminal Operators who file tariffs with the Interstate Commerce Commission pursuant to statute or rule of that Commission may satisfy the requirements of this part by filing with the Federal Maritime Commission a copy of any such tariff filed with the Interstate Commerce Commission.

§ 515.6 Definitions.

(a) The definitions of terminal services set forth in paragraph (d) of this section shall be set forth in tariffs filed pursuant to this part except that other definitions of terminal services may be used if they are correlated by footnote or other appropriate method to the definitions set forth herein. Any additional services which are offered shall be listed and charges therefor shall be shown in terminal tariffs.

(b) These definitions shall apply to "port terminal facilities" which are defined as one or more structures comprising a terminal unit, and include, but are not limited to wharves, warehouses, covered and/or open storage spaces, cold storage plants, grain elevators and/or bulk cargo loading and/or unloading structures, landings, and receiving stations, used for the transmission, care and convenience of cargo and/or passengers in the interchange of same between land and water carriers or between two water carriers.

(c) For the purpose of this section, "point of rest" means that area on the terminal facility which is assigned for the receipt of inbound cargo

from the ship and from which inbound cargo may be delivered to the consignee, and that area which is assigned for the receipt of outbound cargo from shippers for vessel loading.

(d) *Definitions of terminal services:*

(1) *"Dockage"* means the charge assessed against a vessel for berthing at a wharf, pier, bulkhead structure, or bank, or for mooring to a vessel so berthed.

(2) *"Wharfage"* means a charge assessed against the cargo or vessel on all cargo passing or conveyed over, onto, or under wharves or between vessels (to or from barge, lighter, or water), when berthed at wharf or when moored in slip adjacent to wharf. Wharfage is solely the charge for use of wharf and does not include charges for any other service.

(3) *"Free time"* means the specified period during which cargo may occupy space assigned to it on terminal property free of wharf demurrage or terminal storage charges immediately prior to the loading or subsequent to the discharge of such cargo on or off the vessel.

(4) *"Wharf demurrage"* means a charge assessed against cargo remaining in or on terminal facilities after the expiration of free time unless arrangements have been made for storage.

(5) *"Terminal storage"* means the service of providing warehouse or other terminal facilities for the storing of inbound or outbound cargo after the expiration of free time, including wharf storage, shipside storage, closed or covered storage, open or ground storage, bonded storage and refrigerated storage, after storage arrangements have been made.

(6) *"Handling"* means the service of physically moving cargo between point of rest and any place on the terminal facility, other than the end of ship's tackle.

(7) *"Loading and unloading"* means the service of loading or unloading cargo between any place on the terminal and railroad cars, trucks, lighters or barges or any other means of conveyance to or from the terminal facility.

(8) *"Usage"* means the use of terminal facility by any rail carrier, lighter operator, trucker, shipper or consignee, its agents, servants, and/or employees, when it performs its own car, lighter or truck loading or unloading, or the use of said facilities for any other gainful purpose for which a charge is not otherwise specified.

(9) *"Checking"* means the service of counting and checking cargo against appropriate documents for the account of the cargo or the vessel, or other person requesting same.

(10) *"Heavy lift"* means the service of providing heavy lift cranes and equipment for lifting cargo.

§ 515.91 OMB control numbers assigned pursuant to the Paperwork Reduction Act.

This section displays the control numbers assigned to information collection requirements of the Commission in this part by the Office of Manage-

ment and Budget pursuant to the Paperwork Reduction Act of 1980, Pub. L. 96–511. The Commission intends that this section comply with the requirements of section 3507(f) of the Paperwork Reduction Act, which requires that agencies display a current control number assigned by the Director of the Office of Management and Budget (OMB) for each agency information collection requirement:

Section	Current OMB Control No.
515.3 through 515.5	3072–0002

FEDERAL MARITIME COMMISSION

[46 CFR PART 520]

FILING OF TARIFFS BY TERMINAL BARGE OPERATORS IN PACIFIC SLOPE STATES

Sec.

AUTHORITY: 5 U.S.C. 553; secs. 3, 18(a) and 43 of the Shipping Act, 1916 (46 U.S.C. app. 804, 817(a) and 841(a)); sec. 2 of the Intercoastal Shipping Act, 1933 (46 U.S.C. app. 844); and secs. 8 and 17 of the Shipping Act of 1984 (46 U.S.C. app. 1707 and 1716).

§ 520.1 Scope.

(a) The rules and regulations set forth in this part cover the filing of tariffs by terminal barge operators in Pacific Slope States in the foreign and domestic commerce of the United States.

(b) Terminal barge operators moving containers or containerized cargo by barge between points in the Continental United States shall file a schedule of their rates, charges and services solely with the Federal Maritime Commission where:

(1) The cargo is moving between a point in a foreign country or a noncontiguous State, territory, or possession and a point in the United States.

(2) The transportation by barge between points in the United States is furnished by a terminal operator as a service substitute in lieu of a direct vessel call by the common carrier by water transporting the containers or containerized cargo under a through bill of lading.

(3) Such terminal operator is a Pacific Slope State municipality, or other public body or agency subject to the jurisdiction of the Federal Maritime Commission, and the only one furnishing the particular circumscribed barge service on January 2, 1975.

(4) Such terminal operator is in compliance with the rules and regulations of the Federal Maritime Commission for the operator of such barge service.

(c) The terminal operator providing such service shall be subject to the provisions of the Shipping Act, 1916 and/or the Shipping Act of 1984.

§ 520.2 Tariff filing requirements.

(a) Terminal barge operators subject to this part shall comply with the tariff filing requirements of Part 580 of this Chapter with respect to the publication of rates, charges and services for cargo moving in the foreign and/or domestic offshore commerce of the United States.

(b) Terminal barge operators, while exempt from the tariff filing form requirements of Part 550 of this Chapter with respect to their operations

as water carriers carrying cargo in the domestic offshore trades, shall comply with all other required regulations, where applicable.

(c) Tariff(s) filed pursuant to § 520.2(a) shall specifically provide that rates charged are based upon factors normally considered by a regular commercial operator in the same service.

NOTE: In accordance with 44 U.S.C. 3506(c)(5), any information request or requirement in this part is not subject to the requirements of section 3507(f) of the Paperwork Reduction Act, because there are nine or fewer respondents.

FEDERAL MARITIME COMMISSION

[46 CFR PART 525]

FREE TIME AND DEMURRAGE CHARGES ON IMPORT PROPERTY APPLICABLE TO ALL COMMON CARRIERS BY WATER

AUTHORITY: 5 U.S.C. 553; secs. 17 and 43 of the Shipping Act, 1916 (46 U.S.C. app. 816, 841a); secs. 10 and 17 of the Shipping Act of 1984 (46 U.S.C. app. 1709 and 1716).

§ 525.1 Free time and demurrage charges at the Port of New York.

(a) Free time of five days (exclusive of Saturdays, Sundays, and legal holidays), computed from the start of business on the first day after complete discharge of the vessel, is adequate free time on import property at New York under present conditions.

(b) Free time on import property at New York shall not be less than five days, except on property of such a special nature as to require earlier removal because of local ordinances or other governmental regulations, or because piers are not equipped to care for such property for such period, or except as the Commission may hereafter direct.

(c) Except as provided in §§ 530.3(e)(2), 530.4(e), and 530.4(g) of this Chapter, where a carrier is for any reason, unable, or refuses, to tender cargo for delivery during free time, free time must be extended for a period equal to the duration of the carrier's disability or refusal. If such condition arises after the expiration of free time, either no demurrage or first period demurrage, whichever is specified in the appropriate tariff, will be charged for a period equal to the duration of the carrier's inability or refusal.

(d) Where a consignee is prevented from removing its cargo by factors beyond its control (such as, but not limited to, longshoremen's strikes, trucking strikes or weather conditions) which affect an entire port area or a substantial portion thereof, and when a consignee is prevented from removing its cargo by a longshoremen's strike which affects only one pier or less than a substantial portion of the port area, carriers shall (after expiration of free time) assess demurrage against imports at the rate applicable to the first demurrage period, for such time as the inability to remove the cargo may continue. Every departure from the regular demurrage charges shall be reported to the Commission.

(e) The Commission makes no finding approving or disapproving demurrage rates presently effective as to import property at the port of New York.

(f) Following a longshoremen's strike of five (5) days or more:

(1) Free time shall be extended for a period not less than five (5) days (exclusive of Saturdays, Sundays, and legal holidays) beyond the

time at which it would normally terminate, for cargo which was in a free time period at the commencement of the longshoremen's strike.

(2) First period demurrage shall be extended for a period not less than five (5) calendar days beyond the time at which it would normally terminate, for cargo which was subject to first period demurrage at the commencement of the longshoremen's strike.

(g) The extensions set forth in paragraphs (f)(1) and (f)(2) of this section, shall apply only (1) if the cargo is actually picked up within such extended time or (2) if, pursuant to an appointment system adopted by both carriers and consignees, cargo is picked up within twenty-four (24) hours of advance notification that cargo is available for pickup and readily accessible, in which latter event, time shall not be extended more than twenty-four (24) hours beyond the additional free time or demurrage period.

Note: In accordance with 44 U.S.C. 3506(c)(5), any information request or requirement in this part is not subject to the requirements of section 3507(f) of the Paperwork Reduction Act, because there are nine or fewer respondents.

FEDERAL MARITIME COMMISSION

[46 CFR PART 530]

TRUCK DETENTION AT THE PORT OF NEW YORK

Sec.

AUTHORITY: 5 U.S.C. 553; secs. 17 and 43 of the Shipping Act, 1916 (46 U.S.C. app. 816 and 841a); secs. 10 and 17 of the Shipping Act of 1984 (46 U.S.C. app. 1709 and 1716).

§ 530.1 General provisions.

(a) The *"Port of New York"* is that area designated as "The Port District" on the map (Appendix A).

(b) For purposes of this part, a terminal operator is any person who receives cargo from motor carriers and/or delivers cargo to motor carriers in connection with transportation by common carrier by water, excluding persons who operate marine terminal facilities controlled by the Department of Defense including the military department and all agencies of the Department of Defense.

(c) Motor carriers (common, contract, or private), terminal operators, including steamship companies acting as terminal operators, and steamship companies whose action or inaction otherwise impedes expeditious pickup and delivery of cargo by motor carriers at marine terminal facilities within the Port of New York, shall be subject to the provisions established by terminal operators in accordance with this part, which provisions shall be reflected in the tariff of each such terminal operator.

(d) Importers and exporters, or motor carriers or other agents of importers or exporters, and terminal operators at marine terminal facilities in the Port of New York, shall be entitled to receive remuneration in accordance with the provisions of this part.

(e) The person responsible for operating each marine terminal facility within the Port of New York shall identify itself to the Federal Maritime Commission not more than 10 days after the effective date of this part

and shall thereafter promptly notify the Commission of any change in responsibility. Based thereon, the Federal Maritime Commission (Commission) will publish and maintain a current list identifying, as to each such marine terminal facility, the party responsible for receipt and settlement of claims arising under this part.

(f) All communications to the Federal Maritime Commission required by this part shall be directed to the Federal Maritime Commission, Office of the Secretary, 1100 L Street N.W., Washington, D.C. 20573.

(g)(1) Except as provided in paragraph (g)(2) of this section, no penalty shall be imposed upon a terminal operator under this part if receipt or delivery of cargo at a marine terminal facility is prevented or delayed by strike or work stoppage, act of God, fire, serious accident, or severe or unusual weather condition. The Commission shall be notified in writing by the party claiming the existence of the condition who shall specify the date and time of commencement and termination of any such strike, work stoppage, or severe or unusual weather or other condition.

(2) No terminal operator shall be absolved from liability under this part for delays resulting from inadequate or insufficient labor, and/or equipment, other than reasonable delays necessary to obtain special equipment required for handling unusual cargo on a non-appointment basis.

(h) Terminal operators shall not be liable for delays due to United States Government regulations; nor shall terminal operators be liable for time consumed by receipt or delivery of cargo by marks other than by bill of lading, provided at the request of the shipper, consignee or motor carrier.

(i) Steamship companies responsible for house-to-house movement of containers, i.e., containers moving as a unit from origin to destination, are responsible under this part for delay occasioned by lack of sufficient chassis, or unavailability, action or inaction of their container inspection personnel. For purposes of this part, "containers" shall include empty as well as stuffed containers.

(j) Disputes concerning liability under any provisions of this part shall be settled by an impartial Adjudicator selected by the Commission.

(k) Terminal operators are not required to deliver cargo to motor carriers prior to the time that the ocean vessel which transported said cargo is fully discharged. If a terminal operator exercises the option of delivering cargo to motor carriers prior to the time that the ocean carrier which transported said cargo is fully discharged, the terminal operator shall notify the consignee or its designated agent that the cargo is on the pier, at its place of rest, and segregated by bill of lading, and shall identify the terminal operator employee giving such notification.

(l) Marine terminal facilities in the Port of New York shall be operated in accordance with the appointment, non-appointment, or combination appointment/non-appointment procedures established by the terminal operator in accordance with this part. Each terminal operator shall identify in its

respective tariff whether its marine terminal facility will be operated on an appointment, non-appointment, or combination appointment/non-appointment basis. Said tariff shall incorporate the specific procedures applicable at each such marine terminal facility, which procedures shall comply with the provisions of this part, be prominently displayed at the marine facility, and shall be modified on not less than 30 days' notice.

(m) Compliance is mandatory and failure of terminal operators or motor carriers to follow the provisions of this part may result in the assessment of penalties as specified in § 530.7.

§ 530.2 Documentation.

(a)(1) Delivery orders shall not be mailed or delivered to terminal operators, not mailed or delivered to steamship companies for receipt on behalf of terminal operators, prior to arrival of motor carrier vehicles at marine terminal facilities. Dock receipts may be lodged with terminal operators or steamship companies for receipt on behalf of terminal operators prior to arrival of motor carrier vehicles at marine terminal facilities. Upon arrival at marine terminal facilities, motor carrier vehicle operators shall have physical possession of delivery orders required by this part, and shall either have physical possession of dock receipts required by this part or shall have had said dock receipts lodged with the terminal operator or steamship company in accordance with the above-described procedure. Motor carrier vehicles having physical possession of delivery orders or dock receipts immediately shall be issued a sequentially numbered and time-stamped gate pass by order of arrival. When dock receipts are lodged with the terminal operator or steamship company, the sequentially numbered and time-stamped gate pass immediately shall be issued upon tender of the dock receipt to the gateman by the motor carrier vehicle driver. The sequential number and all time stamps and notations recorded on the gate pass and any other arrival document shall be recorded on the copy of the delivery order or dock receipt retained by the motor carrier. Motor carrier vehicles not complying with the requirements of this paragraph shall be denied entry to the marine terminal facility.

(2) Motor carriers shall be permitted to receive cargo on Open Delivery Orders, i.e., single delivery orders covering multiple truckloads or shipments, and deliver cargo on Open Dock Receipts, i.e., single dock receipts covering multiple truckloads or shipments, upon presenting to the terminal operator, subsequent to receipt or delivery of the initial load, satisfactory evidence of authorization to effect receipt or delivery of the remaining truckloads or shipments, as established by the terminal operator and published in its tariff.

(b) Dock receipts required as full and complete documentation for receipt of export cargo shall include the following information:

(1) Name of the motor carrier.

(2) Name of forwarding agent. (If none, insert "none").

(3) Shipper.

(4) Name of vessel.
(5) Pier, berth, or area designated for receipt of cargo.
(6) Port of discharge.
(7) Container identification and seal number. (On full container loads.)
(8) Booking number.
(9) Cargo to be held on dock should be so indicated in space provided for vessel name.
(10) Marks, number of packages, commodity, cube and weight.
(11) An original and three copies of the dock receipt authorized by the steamship line that is to receive the cargo must be tendered to the terminal operator, one copy of which shall be returned to and retained by the motor carrier in accordance with § 530.2(a)(1).

(c) Delivery order required as full and complete documentation for the delivery of import cargo shall provide the following information:
(1) Name and address of party issuing delivery order.
(2) Address of terminal.
(3) Name and address of motor carrier making pickup.
(4) Vessel name.
(5) Voyage number or estimated date of arrival.
(6) Bill of Lading number.
(7) Port of Lading.
(8) City of destination. (On full container loads.)
(9) Container identification number. (On full container loads.)
(10) Booking number. (On receipt of empty containers.)
(11) Marks, number of packages, commodity, cube and weight. When partial lots are to be delivered, they should be identified by marks.
(12) Date free time expires.
(13) Date through which demurrage is paid/guaranteed after free time has expired.
(14) An original and two copies of the delivery order, the original legibly signed in ink, with the name of the signer typed below the signature, shall be tendered to the terminal operator, one copy of which shall be returned to and retained by the motor carrier in accordance with § 530.2(a)(1).

(d)(1) Terminal operators shall not honor delivery orders with strikeouts or other changes to the original.

(2) If a motor carrier named in an original delivery order substitutes another motor carrier in its place, the motor carrier named in the original delivery order shall provide a turnover order to the second carrier containing all information required by the original delivery order. Both the original delivery order and the turnover order must be presented to the terminal operator by the motor carrier requesting delivery of cargo. Upon written request, in accordance with procedures established by the terminal operator and published in its tariff, special arrangements may be made to accommodate general agency situations.

(e) If a motor carrier presents documents to the terminal operator which do not contain all information required by this part, or which are complete but contain inaccurate information, said motor carrier shall be required to surrender its gate pass and shall be denied service; or, at the request of said motor carrier, the terminal operator may correct or complete the deficient document and service said motor carrier in accordance with this part.

(f) If documents are rejected by the terminal operator, or service is refused for any other reason, the terminal operator shall provide the motor carrier written explanation, time-stamped, of the deficiencies in documentation or other reason(s) for refusal of service, and shall attach thereto a copy of the deficient document, if any.

(g) Section 530.2(e) shall not be applicable if documents are incorrect because of substitution of one vessel for another, redocking of a vessel from a scheduled pier to another, or change in consignment of an export shipment from a scheduled vessel to another due to an early closeout of the scheduled vessel or other such rescheduling for the convenience of the steamship company or terminal operator. Delay occasioned in such circumstances shall be included in the computation of time for purposes of this rule and chargeable to the party responsible for such change.

§ 530.3 Terminals operating on appointment system.

Subject to the following provisions of this section, terminal operators shall establish the basis upon which appointments will be available and shall publish in their tariffs reasonable methods and procedures for booking appointments.

(a)(1) Except for good cause, all requests for appointments shall be granted. If a request for an appointment is not granted, the terminal operator shall record the request and reason for refusal.

(2) Appointments, when granted, shall be identified by sequentially assigned numbers. The terminal operator shall record the date and time of requests for appointments, the name of the person making the requests; the date, time and identification number of scheduled appointments; and shall identify the terminal operator employee granting the appointment.

(b) Appointments to receive delivery of cargo shall not be granted by terminal operators unless and until a freight release covering subject cargo has been provided by the steamship company. Appointments shall be granted only if the terminal operator is advised of the nature, type and quantity of cargo to be delivered or received. If, because of the size, weight or shape of the cargo, special equipment is required, the terminal operator shall so advise the motor carrier at the time the appointment is granted, and the motor carrier shall advise the terminal operator of the type of "rolling stock" which it will employ to effectuate the interchange of cargo.

(c)(1) Gate passes shall be issued to motor carriers by order of arrival at the marine terminal facility. Motor carriers arriving after the time of

a scheduled appointment shall be deemed to have missed the appointment and may be denied service.

(2) Except where a terminal operator has arranged for delivery of cargo on the last day of free time, or on the first or second day of demurrage, in accordance with paragraph (e)(2) of this section, motor carriers may cancel appointments (without penalty), provided the terminal operator is given three (3) working hours' notice of said cancellation.

(d)(1) Upon receipt of a gate pass issued pursuant to paragraph (c)(1) of this section, motor carrier personnel holding dock receipts or other satisfactory evidence of authorization to effect delivery or cargo shall proceed immediately to the receiving clerk of the terminal operator who shall immediately time-stamp the gate pass upon presentation of documents. After said documents are determined to be in proper order, the motor carrier shall be routed for unloading.

(2) Upon receipt of a gate pass issued pursuant to paragraph (c)(1) of this section, motor carrier personnel holding delivery orders or other satisfactory evidence of authorization to receive delivery of cargo shall proceed to the Bureau of Customs for completion of required procedures, and thereafter, shall immediately proceed to the delivery clerk of the terminal operator who shall immediately time-stamp the gate pass upon presentation of documents. After said documents are determined to be in proper order, the motor carrier shall be routed for loading.

(e)(1) See § 525.1(c) of this Chapter for provisions regarding extension of free time.

(2) At full-appointed terminals, if an appointment is not available as requested, an appointment shall be granted within 72 hours (three business days) of said request, except as provided by paragraphs (e)(2)(i) and (e)(2)(ii) of this section.

(i) *Cargo permitted 5 days' free time—Extension of free time.*

(A) If an appointment is requested at least 48 hours prior to the expiration of free time, the terminal operator shall arrange to deliver cargo prior to expiration of free time, or extend free time until an appointment is granted.

(B) If an appointment is requested less than 48 hours—but more than 24 hours—prior to expiration of free time, the terminal operator shall arrange for delivery of cargo prior to the close of business on the first working day of demurrage for which first demurrage day the cargo shall be liable, or, after said first demurrage day, cargo shall assume non-demurrage status until an appointment is granted.

(C) If an appointment is requested less than 24 hours prior to expiration of free time, the terminal operator shall arrange for delivery of cargo prior to the close of business on the second working day of demurrage for which two (2) demurrage days the cargo shall be liable, or, after said two (2) demurrage days, cargo shall assume non-demurrage status until an appointment is granted.

(ii) *Cargo permitted 2 or 3 days' free time—Extension of free time.*

(A) If an appointment is requested at least 24 hours prior to expiration of free time, the terminal operator shall arrange to deliver cargo prior to expiration of free time or extend free time until an appointment is granted.

(B) If an appointment is requested less than 24 hours prior to expiration of free time, the terminal operator shall arrange for delivery of cargo prior to the close of business on the first working day of demurrage for which first demurrage day the cargo shall be liable, or, after said first demurrage day, cargo shall assume non-demurrage status until an appointment is granted.

§ 530.4 Terminals operating a non-appointment system.

(a) Each business day shall be divided into a number of "service periods" (for example, periods commencing at 8 a.m., 10 a.m., 1 p.m., 3 p.m.) as scheduled by the terminal operator according to the nature and capabilities of the particular facility.

(b) Motor carriers arriving at marine terminal facilities shall be issued sequentially numbered time-stamped gate passes by order of arrival, valid for entry to the terminal facility at the time of commencement of the service period indicated thereon.

(c) Upon receipt of a gate pass issued pursuant to paragraph (b) of this section, motor carrier personnel holding dock receipts or other satisfactory evidence of authorization to effect delivery of cargo shall proceed immediately to the receiving clerk of the terminal operator who shall immediately time-stamp the gate pass upon presentation of documents. After said documents are determined to be in proper order, the motor carrier shall be routed for unloading.

(d) Upon receipt of a gate pass issued pursuant to paragraph (b) of this section, motor carrier personnel holding delivery orders or other satisfactory evidence of authorization to receive delivery of cargo shall proceed to the Bureau of Customs for completion of required procedures and thereafter immediately proceed to the delivery clerk of the terminal operator, who shall immediately time-stamp the gate pass upon presentation of documents. After said documents are determined to be in proper order, the motor carrier shall be routed for loading.

(e) A motor carrier entitled to a gate pass scheduling service for a later service period, but unwilling to wait for that service, may elect, not more than 30 minutes after issuance of said gate pass, to receive a preference slip (Appendix B), entitling said motor carrier to service on the next business day as specified thereon. However, free time will not be extended if cargo is on the last day of free time, nor will collection of demurrage charges be suspended.

(f) Motor carriers arriving at a marine terminal facility after the capacity of said facility has been reached may be turned away, but shall be given preference for service on the next business day according to the order

in which they arrived and were turned away. Motor carriers turned away under these circumstances shall be issued a preference slip (Appendix B), sequentially numbered, which shall assure preference for service on the next business day and, where cargo is on the last day of free time, create a one-day extension of free time, or suspend collection of demurrage charges for one day as to cargo already on demurrage. The preference slip shall be attached to the gate pass when said gate pass is issued and all notations recorded on the preference slip shall be duplicated on the motor carrier's copy of the delivery order or dock receipt.

(g) If, at the commencement of its scheduled service period, a motor carrier is not available to receive cargo which is on the last day of free time, and because of the unavailability of said motor carrier, the terminal operator is unable to provide service on that day, there shall be no extension of free time.

(h) If all vehicles scheduled for a service period are discharged prior to the end of that period, the motor carrier available and holding the next sequenced gate pass shall be served.

(i) It shall be the responsibility of the motor carrier to determine from the terminal operator whether cargo to be delivered to said motor carrier is on the pier, at its place of rest, and segregated by bill of lading.

§ 530.5 Combination non-appointment/appointment system.

(a) An express line or non-appointment line may be established in conjunction with an appointment system in such a manner as the terminal operator determines best suits the needs of the particular facility.

(b) All rules applicable to non-appointment facilities (§ 530.4) shall be applicable to the non-appointment portion of a combination non-appointment/appointment terminal operation.

(c) If a motor carrier attempts to make an appointment at a facility operating a combination system, and no appointment is available, and then said motor carrier seeks service as a non-appointment vehicle, said motor carrier shall be treated as a non-appointment vehicle for purposes of extension of free time.

§ 530.6 Computation of time.

(a) Validation time is (1) time of issuance of a gate pass upon a motor carrier's arrival at a marine terminal facility or (2) if, upon arrival, a motor carrier is scheduled for a later service period, the time of commencement of that scheduled service period, or (3) if a motor carrier is issued a preference slip pursuant to § 530.4(e) or § 530.4(f), the time scheduled thereon.

(b) Time for purposes of this part shall accrue from validation or appointment time. Delay demonstrated by the terminal operator to be due to United States Government regulations, action or inaction of motor carrier personnel, or other such cause, shall be excluded from computation of time. Time elapsed, if any, between appointment or validation time and

presentation of documents to the delivery or receiving clerk shall be presumed to be due to such cause.

§ 530.7 Penalties.

(a) A terminal operator who refuses to serve a motor carrier after rejecting, for lack of full and complete documentation, a delivery order or dock receipt which does contain the information required by this part, shall be subject to a penalty of $30.

(b) If a motor carrier fails to meet a scheduled appointment at a marine terminal facility, said motor carrier shall be subject to a charge of $15. If, pursuant to § 530.3(b) a motor carrier is advised that special equipment will be required and the motor carrier fails to meet said appointment, the motor carrier shall be subject to a charge of $30.

(c) If, pursuant to § 530.2(e), a terminal operator completes or corrects deficient documents presented by a motor carrier, a charge of $15 shall be assessed against said motor carrier.

(d) If, contrary to § 530.3(b) a freight release covering subject cargo has not been authorized prior to a scheduled appointment, the terminal operator that granted said appointment shall be assessed a penalty of $30.

(e) If, pursuant to § 530.1(k) or a request under § 530.4(i) a terminal operator notifies a motor carrier that cargo is on the pier, at its place of rest, and segregated by bill of lading, and cargo is not on the pier, at its place of rest, and segregated by bill of lading, when the motor carrier attempts to obtain said cargo, the terminal operator shall be subject to a penalty of $30.

(f) *Time allowances*

(1) *Containers handled as a single unit.* If service is not completed within the following times, penalty charges will accrue against the terminal operator at a rate of $4 per 15 minutes, or any fraction thereof, in excess of these times.

Appointment	75 minutes.
Non-appointment	120 minutes.

(2) *Non-containerized cargo.* When vehicles are loaded by the terminal operator, or unloaded by the terminal operator at the request of the motor carrier, within the time periods set forth below, there will be no penalty. If a vehicle is not loaded or unloaded within the following time periods, penalty charges will accrue against the terminal operator at a rate of $4.00 per 15 minutes, or any fraction thereof, in excess of these times.

(i) *Non-Appointment Vehicles:*

0 to 5,000 pounds	210 minutes.
5,001 to 10,000 pounds	240 minutes.
10,001 to 15,000 pounds	270 minutes.
15,001 to 30,000 pounds	285 minutes.

Over 30,000 pounds	300 minutes.
(ii) *Appointment Vehicles:*	
2,000 pounds or less	90 minutes.
2,001 to 5,000 pounds	120 minutes.
5,001 to 10,000 pounds	150 minutes.
10,001 to 15,000 pounds	180 minutes.
15,001 to 20,000 pounds	210 minutes.
20,001 to 25,000 pounds	240 minutes.
Over 25,000 pounds	270 minutes.

(g) When freight is unloaded by the driver or other personnel of the motor carrier and unloading is not completed within the times prescribed by paragraph (f) of this section, as computed from the time that the vehicle is spotted at a place convenient for unloading, the terminal operator shall be entitled to a penalty payment of $4 for each 15 minute period or any fraction thereof in excess of the specified time, unless the delay is demonstrated by the motor carrier to have been occasioned by the action or inaction of the terminal operator.

(h) A motor carrier admitted to a marine terminal facility for loading or unloading—or holding an appointment for loading or unloading—shall be completely loaded or unloaded prior to the close of that business day. If the motor carrier is not completely loaded or unloaded when the terminal closes on that business day, time for purposes of this part shall accrue only while the terminal is conducting operations. In addition:

(1) Motor carriers holding appointments shall be entitled to a penalty payment of $30 from the terminal operator whether the shutout of the vehicle was due to refusal of management to authorize overtime, or labor's refusal to work overtime.

(2) Non-appointment vehicles shall be entitled to a penalty payment of $30 from the terminal operator if the shutout of the vehicle was due to refusal of management to authorize overtime. If the shutout results from labor's refusal to work overtime, the terminal operator shall not be subject to a penalty.

(3) Management shall be presumed to have refused to authorize overtime, unless the terminal operator establishes otherwise.

§ 530.8 Submission of claims for penalties.

(a) All communication required by this section shall be via certified mail; return receipt requested.

(b) Any person claiming payments under this section shall file a written claim with the terminal operator or motor carrier against whom said claim is made.

(c)(1) Claims shall be filed within forty-five (45) calendar days from the date on which the claim arose or said claim shall be barred. The party against whom claim is made shall within twenty (20) calendar days from receipt of said claim make payment thereon or reject. In rejecting a claim, the terminal operator or motor carrier shall set forth the reason

or reasons for said rejection and shall provide available documentation substantiating said rejection. Claims rejected because they do not contain sufficient information may be resubmitted no later than twenty (20) days from receipt of rejection.

(2) Rejected claims may be submitted for review within twenty (20) days of receipt of rejection to the Adjudicator who will affirm or reverse the rejection of claims within 30 days of receipt of the request for review. All decisions of said adjudicator shall be final and binding.

(d)(1) Claims submitted by motor carriers, or importers or exporters on whose behalf motor carriers act, shall include the motor carrier's copy of the applicable delivery order or dock receipt, any other relevant document, a brief, but complete description of the facts giving rise to the claim, and a statement of the amount claimed.

(2) Claims filed by terminal operators shall include the terminal operator's copy of the applicable delivery order or dock receipt, a copy of the gate pass and any other arrival documents issued, copies of all other relevant documents, a brief explanation of the facts giving rise to the claim, and a statement of the amount claimed.

(e)(1) If the party identified as the terminal operator at a marine terminal facility under § 530.1(e) rejects a claim pursuant to § 530.1(e) or § 530.2(g), or otherwise denies a claim on the ground that the delay was caused by the steamship company, the original claim and a statement of the reasons for rejection shall be forwarded within seven days to the steamship company alleged by the terminal operator to be liable for the claim, copy to the claimant.

(2) The steamship company shall pay or reject the claim within twenty (20) calendar days from receipt thereof.

(3) If the claim is rejected by the steamship company, the claimant may submit both rejections to the Adjudicator who shall review the rejection of the claim by both parties and determine liability as between the two.

§ 530.91 OMB control numbers assigned pursuant to the Paperwork Reduction Act.

This section displays the control numbers assigned to information collection requirements of the Commission in this part by the Office of Management and Budget pursuant to the Paperwork Reduction Act of 1980, Pub. L. 96–511. The Commission intends that this section comply with the requirements of section 3507(f) of the Paperwork Reduction Act, which requires that agencies display a current control number assigned by the Director of the Office of Management and Budget (OMB) for each agency information collection requirement:

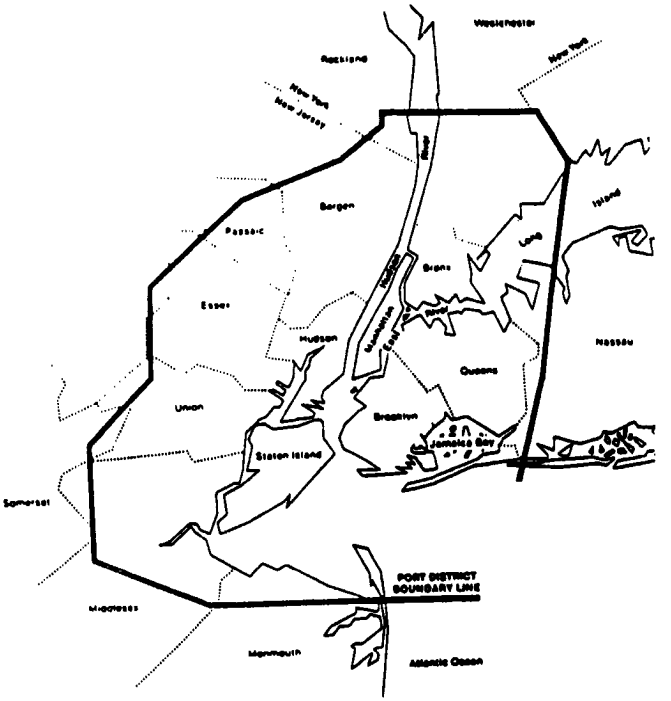
Section	Current OMB Control No.
530.1 through 530.3	3072–0010

Section	Current OMB Control No.
530.8	3072–0010

Appendix A to 46 CFR Part 530

(From 1981 "New York Port Handbook")

New York/New Jersey Port District



Appendix B to 46 CFR Part 530

Motor Carrier Preference Slip
(See § 530.4)

No. _____ TIME STAMP

STEVEDORING CO. INC.

LOCATION (Pier/Berth/Shed)_____

MOTOR CARRIER _____

The above indicated vehicle could not be serviced today. Preference for service will be given the next business day at _____ a.m./p.m.

D/R's_____ Pkgs./Pieces_____ WEIGHT _____

D/O's_____ Pkgs./Pieces_____ WEIGHT _____

CONTAINER # _____ GATEMAN _____

FEDERAL MARITIME COMMISSION

46 CFR PART 540

SECURITY FOR THE PROTECTION OF THE PUBLIC

SUBPART A—PROOF OF FINANCIAL RESPONSIBILITY, BONDING AND CERTIFICATION OF FINANCIAL RESPONSIBILITY FOR INDEMNIFICATION OF PASSENGERS FOR NONPERFORMANCE OF TRANSPORTATION

SUBPART B—PROOF OF FINANCIAL RESPONSIBILITY, BONDING AND CERTIFICATION OF FINANCIAL RESPONSIBILITY TO MEET LIABILITY INCURRED FOR DEATH OR INJURY TO PASSENGERS OR OTHER PERSONS ON VOYAGES

SUBPART C—ASSESSMENT, REMISSION, AND MITIGATION OF CIVIL PENALTIES

AUTHORITY: 5 U.S.C. 552, 553; Secs. 2 and 3, Pub. L. 89–777, 80 Stat. 1356–1358 (46 U.S.C. app. 817e, 817d); Sec. 43 of the Shipping Act, 1916 (46 U.S.C. app. 841a); Sec. 17 of the Shipping Act of 1984 (46 U.S.C. app. 1716).

SUBPART A—PROOF OF FINANCIAL RESPONSIBILITY, BONDING AND CERTIFICATION OF FINANCIAL RESPONSIBILITY FOR INDEMNIFICATION OF PASSENGERS FOR NONPERFORMACE OF TRANSPORTATION

§ 540.1 Scope.

(a) The regulations contained in this subpart set forth the procedures whereby persons in the United States who arrange, offer, advertise or provide passage on a vessel having berth or stateroom accommodations for 50 or more passengers and embarking passengers at U.S. ports shall establish their financial responsibility or, in lieu thereof, file a bond or other security for obligations under the terms of ticket contracts to indemnify passengers for nonperformance of transportation to which they would be entitled. Included also are the qualifications required by the Commission for issuance of a Certificate (Performance) and the basis for the denial, revocation, modification, or suspension of such Certificates.

(b) Failure to comply with this part may result in denial of an application for a certificate. Vessels operating without the proper certificate may be denied clearance and their owners may also be subject to a civil penalty of not more than $5,000 in addition to a civil penalty of $200 for each passage sold, such penalties to be assessed by the Federal Maritime Commission (46 U.S.C. app. 91, 817d and 817e).

§ 540.2 Definitions.

As used in this subpart, the following terms shall have the following meanings:

(a) *"Person"* includes individuals, corporations, partnerships, associations, and other legal entities existing under or authorized by the laws of the United States or any State thereof or the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands or any territory or possession of the United States, or the laws of any foreign country.

(b) *"Vessel"* means any commercial vessel having berth or stateroom accommodations for 50 or more passengers and embarking passengers at U.S. ports.

(c) *"Commission"* means the Federal Maritime Commission.

(d) *"United States"* includes the Commonwealth of Puerto Rico, the Virgin Islands or any territory or possession of the United States.

(e) *"Berth or stateroom accommodations"* or *"passenger accommodations"* includes all temporary and all permanent passenger sleeping facilities.

(f) *"Certificate (Performance)"* means a Certificate of Financial Responsibility for Indemnification of Passengers for Nonperformance of Transportation issued pursuant to this subpart.

(g) *"Passenger"* means any person who is to embark on a vessel at any U.S. port and who has paid any amount for a ticket contract entitling him to water transportation.

(h) *"Passenger revenue"* means those monies wherever paid by passengers who are to embark at any U.S. port for water transportation and all other accommodations, services and facilities relating thereto.

(i) *"Unearned passenger revenue"* means that passenger revenue received for water transportation and all other accommodations, services, and facilities relating thereto not yet performed.

(j) *"Insurer"* means any insurance company, underwriter, corporation, or association of underwriters, ship owners' protection and indemnity association, or other insurer acceptable to the Commission.

(k) *"Evidence of insurance"* means a policy, certificate of insurance, cover note, or other evidence of coverage acceptable to the Commission.

§ 540.3 Proof of financial responsibility, when required.

No person in the United States may arrange, offer, advertise or provide passage on a vessel unless a Certificate (Performance) has been issued to or covers such person.

§ 540.4 Procedure for establishing financial responsibility.

(a) In order to comply with section 3 of Pub. L. 89–777 (80 Stat. 1357, 1358) enacted November 6, 1966, there must be filed an application on Form FMC–131 for a Certificate of Financial Responsibility for Indemnification of Passengers for Nonperformance of Transportation. Copies of Form FMC–131 may be obtained from the Secretary, Federal Maritime Commission, Washington, D.C. 20573, or at the Commission's offices at New York, N.Y.; New Orleans, La.; San Francisco, Calif; Miami, Fla.; Los Angeles, Calif.; Hato Rey, P.R.; and Chicago, Ill.

(b) An application for a Certificate (Performance) shall be filed in duplicate with the Secretary, Federal Maritime Commission, by the vessel owner

or charterer at least 60 days in advance of the arranging, offering, advertising, or providing of any water transportation or tickets in connection therewith except that any person other than the owner or charterer who arranges, offers, advertises, or provides passage on a vessel may apply for a Certificate (Performance). Late filing of the application will be permitted only for good cause shown. All applications and evidence required to be filed with the Commission shall be in English, and any monetary terms shall be expressed in terms of U.S. currency. The Commission shall have the privilege of verifying any statements made or any evidence submitted under the rules of this subpart. An application for a Certificate (Performance) shall be accompanied by a filing fee remittance of $1,600.

(c) The application shall be signed by a duly authorized officer or representative of the applicant with a copy of evidence of his or her authority. In the event of any material change in the facts as reflected in the application, an amendment to the application shall be filed no later than five (5) days following such change. For the purpose of this subpart, a material change shall be one which (1) results in a decrease in the amount submitted to establish financial responsibility to a level below that required to be maintained under the rules of this subpart, or (2) requires that the amount to be maintained be increased above the amount submitted to establish financial responsibility. Notice of the application for, issuance, denial, revocation, suspension, or modification of any such Certificate shall be published in the *Federal Register.*

§ 540.5 Insurance, guaranties, escrow accounts, and self-insurance.

Except as provided in § 540.9(j), the amount of coverage required under this section and § 540.6(b) shall be in an amount determined by the Commission to be no less than 110 percent of the unearned passenger revenue of the applicant on the date within the 2 fiscal years immediately prior to the filing of the application which reflects the greatest amount of unearned passenger revenue, except that the Commission, for good cause shown, may consider a time period other than the previous 2-fiscal-year requirement in this section or other methods acceptable to the Commission to determine the amount of coverage required. Evidence of adequate financial responsibility for the purposes of this subpart may be established by one or a combination (including § 540.6 Surety Bonds) of the following methods:

(a) Filing with the Commission evidence of insurance, issued by an insurer, providing coverage for indemnification of passengers in the event of the nonperformance of water transportation.

(1) Termination or cancellation of the evidence of insurance, whether by the assured or by the insurer, and whether for nonpayment of premiums, calls or assessments or for other cause, shall not be effected (i) until notice in writing has been given to the assured or to the insurer and to the Secretary of the Commission at its office, in Washington, D.C. 20573, by certified mail, and (ii) until after 30 days expire from the

date notice is actually received by the Commission, or until after the Commission revokes the Certificate (Performance), whichever occurs first. Notice of termination or cancellation to the assured or insurer shall be simultaneous to such notice given to the Commission. The insurer shall remain liable for claims covered by said evidence of insurance arising by virtue of an event which had occurred prior to the effective date of said termination or cancellation. No such termination or cancellation shall become effective while a voyage is in progress.

(2) The insolvency or bankruptcy of the assured shall not constitute a defense to the insurer as to claims included in said evidence of insurance and in the event of said insolvency or bankruptcy, the insurer agrees to pay any unsatisfied final judgments obtained on such claims.

(3) No insurance shall be acceptable under these rules which restricts the liability of the insurer where privity of the owner or charterer has been shown to exist.

(4) Paragraphs (a)(1) through (a)(3) of this section shall apply to the guaranty as specified in paragraph (c) of this section.

(b) Filing with the Commission evidence of an escrow account, acceptable to the Commission, for indemnification of passengers in the event of nonperformance of water transportation.

(c) Filing with the Commission a guaranty on Form FMC–133A, by a guarantor acceptable to the Commission, for indemnification of passengers in the event of nonperformance of water transportation.

(d) Filing with the Commission for qualification as a self-insurer such evidence acceptable to the Commission as will demonstrate continued and stable passenger operations over an extended period of time in the foreign or domestic trade of the United States. In addition, applicant must demonstrate financial responsibility by maintenance of working capital and net worth, each in an amount calculated as in the introductory text of this section, except that the Commission, for good cause shown, may waive the requirement as to the amount of working capital. The Commission will take into consideration all current contractual requirements with respect to the maintenance of such working capital and/or net worth to which the applicant is bound. Evidence must be submitted that the working capital and net worth required above are physically located in the United States. This evidence of financial responsibility shall be supported by and subject to the following which are to be submitted on a continuing basis for each year or portion thereof while the Certificate (Performance) is in effect:

(1) A current quarterly balance sheet, except that the Commission, for good cause shown, may require only an annual balance sheet;

(2) A current quarterly statement of income and surplus, except that the Commission, for good cause shown, may require only an annual statement of income and surplus;

(3) An annual current balance sheet and an annual current statement of income and surplus to be certified by appropriate certified public accountants;

(4) An annual current statement of the book value or current market value of any assets physically located within the United States together with a certification as to the existence and amount of any encumbrances thereon;

(5) An annual current credit rating report by Dun and Bradstreet or any similar concern found acceptable to the Commission;

(6) A list of all contractual requirements or other encumbrances (and to whom the applicant is bound in this regard) relating to the maintenance of working capital and net worth;

(7) All financial statements required to be submitted under this section shall be due within a reasonable time after the close of each pertinent accounting period;

(8) Such additional evidence of financial responsibility as the Commission may deem necessary in appropriate cases.

§ 540.6 Surety bonds.

(a) Where financial responsibility is not established under § 540.5, a surety bond shall be filed on Form FMC–132A. Such surety bond shall be issued by a bonding company authorized to do business in the United States and acceptable to the Commission for indemnification of passengers in the event of nonperformance of water transportation.

(b) In the case of a surety bond which is to cover all passenger operations of the applicant subject to these rules, such bond shall be in an amount calculated as in the introductory text of § 540.5.

(c) In the case of a surety bond which is to cover an individual voyage, such bond shall be in an amount determined by the Commission to equal the gross passenger revenue for that voyage.

(d) The liability of the surety under the rules of this subpart to any passenger shall not exceed the amount paid by any such passenger, except that, no such bond shall be terminated while a voyage is in progress.

§ 540.7 Evidence of financial responsibility.

Where satisfactory proof of financial responsibility has been given or a satisfactory bond has been provided, a Certificate (Performance) covering specified vessels shall be issued evidencing the Commission's finding of adequate financial responsibility to indemnify passengers for nonperformance of water transportation. The period covered by the Certificate (Performance) shall be indeterminate, unless a termination date has been specified thereon.

§ 540.8 Denial, revocation, suspension, or modification.

(a) Prior to the denial, revocation, suspension, or modification of a Certificate (Performance), the Commission shall advise the applicant of its intention to deny, revoke, suspend, or modify and shall state the reasons therefor. If the applicant, within 20 days after the receipt of such advice, requests

a hearing to show that the evidence of financial responsibility filed with the Commission does meet the rules of this subpart, such hearing shall be granted by the Commission, except that a Certificate (Performance) shall become null and void upon cancellation or termination of the surety bond, evidence of insurance, guaranty, or escrow account.

(b) A Certificate (Performance) may be denied, revoked, suspended, or modified for any of the following reasons:

(1) Making any willfully false statement to the Commission in connection with an application for a Certificate (Performance);

(2) Circumstances whereby the party does not qualify as financially responsible in accordance with the requirements of the Commission;

(3) Failure to comply with or respond to lawful inquiries, rules, regulations or orders of the Commission pursuant to the rules of this subpart.

(c) If the applicant, within 20 days after notice of the proposed denial, revocation, suspension, or modification under paragraph (b) of this section, requests a hearing to show that such denial, revocation, suspension, or modification should not take place, such hearing shall be granted by the Commission.

§ 540.9 Miscellaneous.

(a) If any evidence filed with the application does not comply with the requirements of this subpart, or for any reason fails to provide adequate or satisfactory protection to the public, the Commission will notify the applicant stating the deficiencies thereof.

(b) Any financial evidence submitted to the Commission under the rules of this subpart shall be written in the full and correct name of the person to whom the Certificate (Performance) is to be issued, and in case of a partnership, all partners shall be named.

(c) The Commission's bond (Form FMC–132A), guaranty (Form FMC–133A), and application (Form FMC–131) forms are hereby incorporated as a part of the rules of this subpart. Any such forms filed with the Commission under this subpart must be in duplicate.

(d) Any securities or assets accepted by the Commission (from applicants, insurers, guarantors, escrow agents, or others) under the rules of this subpart must be physically located in the United States.

(e) Each applicant, insurer, escrow agent and guarantor shall furnish a written designation of a person in the United States as a legal agent for service of process for the purposes of the rules of this subpart. Such designation must be acknowledged, in writing, by the designee. In any instance in which the designated agent cannot be served because of its death, disability, or unavailability, the Secretary, Federal Maritime Commission, will be deemed to be the agent for service of process. A party serving the Secretary in accordance with the above provision must also serve the Certificant, insurer, escrow agent, or guarantor, as the case may be, by registered mail at its last known address on file with the Commission.

(f) [RESERVED]

(g) Financial data filed in connection with the rules of this subpart shall be confidential except in instances where information becomes relevant in connection with hearings which may be requested by applicant pursuant to § 540.8(a) or 540.8(b).

(h) Every person who has been issued a Certificate (Performance) must submit to the Commission a semiannual statement of any changes that have taken place with respect to the information contained in the application or documents submitted in support thereof. Negative statements are required to indicate no change. Such statements must cover every 6-month period of the fiscal year immediately subsequent to the date of the issuance of the Certificate (Performance). In addition, the statements will be due within 30 days after the close of every such 6-month period.

(i) [RESERVED]

(j) The amount of (1) insurance as specified in § 540.5(a), (2) the escrow account as specified in § 540.5(b), (3) the guaranty as specified in § 540.5(c), or (4) the surety bond as specified in § 540.6, shall not be required to exceed 10 million dollars (U.S.).

(k) Every person in whose name a Certificate (Performance) has been issued shall be deemed to be responsible for any unearned passage money or deposits in the hands of its agents or of any other person or organization authorized by the certificant to sell the certificant's tickets. Certificants shall promptly notify the Commission of any arrangements, including charters and subcharters, made by it or its agent with any person pursuant to which the certificant does not assume responsibility for all passenger fares and deposits collected by such person or organization and held by such person or organization as deposits or payment for services to be performed by the certificant. If responsibility is not assumed by the certificant, the certificant also must inform such person or organization of the certification requirements of Public Law 89–777 and not permit use of its name or tickets in any manner unless and until such person or organization has obtained the requisite Certificate (Performance) from the Commission.

Form FMC-131

FEDERAL MARITIME COMMISSION

WASHINGTON, D.C. 20573

APPLICATION FOR CERTIFICATE OF FINANCIAL RESPONSIBILITY

In compliance with the provisions of Public Law 89-777 and 46 CFR Part 540, application is hereby made for a Certificate of Financial Responsibility (check one or both as applicable):

[ ] for indemnification of passengers for nonperformance. [ ] Initial application [ ] Certificate has previously been applied for (if so, give date of application and action taken thereon).

[ ] to meet liability incurred for death or injury to passengers or other persons. [ ] Initial application [ ] Certificate has previously been applied for (if so, give date of application and action taken thereon).

INSTRUCTIONS

Submit two (2) typed copies of the application to the Secretary, Federal Maritime Commission, Washington, D.C. 20573. The application is in four parts: Part I—General; Part II—Performance; Part III—Casualty and Part IV—Declaration. Applicants must answer all questions in Part I and Part IV, then Parts II and/or Part III as appropriate. Instructions relating to Part II and Part III are contained at the beginning of the respective part. If the information required to be submitted under 46 CFR Part 540 has been previously submitted under other rules and regulations of the Commission, state when and for what reason such information was submitted. If previously submitted, it is not necessary to resubmit. If additional space is required, supplementary sheets may be attached.

PART I—GENERAL

ANSWER ALL QUESTIONS

1. (a) Legal business name:

(b) English equivalent of legal name if customarily written in language other than English:

(c) Trade name or names used:

2. (a) State applicant's legal form of organization, i.e., whether operating as an individual, corporation, partnership, association, joint stock company, business trust, or other organized group of persons (whether incorporated or not), or as a receiver, trustee, or other liquidating agent, and describe current business activities and length of time engaged therein.

(b) If a corporation, association, joint stock company, business trust, or other organization, give:

Name of State or country in which incorporated or organized.

Date of the incorporation or organization.

(c) If a partnership, give name and address of each partner:

3. Give following information regarding any person or company controlling, controlled by, or under common control with you (answer only if applying as a self-insurer under Part II or Part III).

Name	Address	Business and relationship to you

4. In relation to the passenger transportation engaged in by you to or from U.S. ports:

Do you own all the vessels? [ ] Yes [ ] No (If "No" indicate the nature of the arrangements under which those not owned by you are available to you (e.g., bareboat, time, voyage, or other charter, or arrangement).)

5. Name of each passenger vessel having accommodations for 50 or more passengers and embarking passengers at U.S. ports:

Name	Country of registry	Registration No.	Maximum number of berth or stateroom accommodations

6. Submit a copy of passenger ticket or other contract evidencing the sale of passenger transportation.

7. Name and address of applicant's U.S. agent or other person authorized to accept legal service in the United States.

PART II—PERFORMANCE

Answer items 8–15 if applying for Certificate of Financial Responsibility for Indemnification of Passengers for Nonperformance. If you are filing evidence of insurance, escrow account, guaranty or surety bond under Subpart A of 46 CFR Part 540 and providing at least ten (10) million dollars (U.S.) of coverage, you need not answer questions 10–15.

8. If you are providing at least ten (10) million dollars (U.S.) of coverage, state type of evidence and name and address of applicant's insurer, escrow agent, guarantor or surety (as appropriate).

9.* A Certificate (Performance) is desired for the following proposed passenger voyage or voyages: (Give itinerary and indicate whether the Certificate is for a single voyage, multiple voyages or all voyages scheduled annually.)

* The filing of sailing schedules will be acceptable in answers to this question.

Vessel	Vessel date	Voyage itinerary

10. Items 11–15 are optional methods; answer only the one item which is applicable to this application. Check the appropriate box below:

[ ] Insurance (item 11).
[ ] Escrow (item 12).
[ ] Surety bond (item 13).
[ ] Guaranty (item 14).
[ ] Self-insurer (item 15).

11. (a) Total amount of performance insurance which is to be computed in accordance with §540.5 of 46 CFR Part 540. (Evidence of insurance must be filed with the Federal Maritime Commission before a Certificate (Performance) may be issued.)

(b) Method by which insurance amount is determined (attach data substantiating that amount is not less than that prescribed in §540.5 of 46 CFR Part 540.)

(c) Name and address of applicant's insurer for performance policy.

12. (a) Name and address of applicant's escrow agent. (Applicants may pledge cash or U.S. Government securities, in lieu of a surety bond, to fulfill the indemnification provisions of Public Law 89–777.)

(b) Total escrow deposit which is to be computed in accordance with §540.5 of 46 CFR Part 540. (Escrow agreement must be filed with the Federal Maritime Commission before a Certificate (Performance) will be issued.) Cash $_____. U.S. Government Securities $_____.

(c) Method by which escrow amount is determined (attach data substantiating that amount is not less than that prescribed by §540.5 of 46 CFR Part 540).

13. (a) Total amount of surety bond in accordance with §540.6 of 46 CFR Part 540. (The bond must be filed with the Federal Maritime Commission before a Certificate (Performance) may be issued.)

(b) Method by which bond amount is determined (attach data substantiating that amount is not less than that prescribed in §540.6 of 46 CFR Part 540).

(c) Name and address of applicant's surety on performance bond.

14. (a) Total amount of guaranty which is to be computed in accordance with §540.5 of 46 CFR Part 540. (Guaranty must be filed with the Federal Maritime Commission before a Certificate (Performance) may be issued.)

(b) Method by which guaranty amount is determined (attach data substantiating that amount is not less than that prescribed in §540.5 of 46 CFR Part 540).

(c) Name and address of applicant's guarantor.

15. If applicant intends to qualify as a self-insurer for a Certificate (Performance) under § 540.5 of 46 CFR Part 540, attach all data, statements, and documentation required therein.

PART III—CASUALTY

ANSWER ITEMS 16–22 IF APPLYING FOR CERTIFICATE OF FINANCIAL RESPONSIBILITY TO MEET LIABILITY INCURRED FOR DEATH OR INJURY TO PASSENGERS OR OTHER PERSONS

16. Name of passenger vessel subject to section 2 of Public Law 89–777 operated by you to or from U.S. ports which has largest number of berth or stateroom accommodations. State the maximum number of berth or stateroom accommodations.

17. Amount of death or injury liability coverage based on number of accommodations aboard vessel named in item 16 above, calculated in accordance with § 540.24 of 46 CFR Part 540.

ITEMS 18–22 ARE OPTIONAL METHODS; ANSWER ONLY THE ONE ITEM WHICH IS APPLICABLE TO THIS APPLICATION

18. (a) Total amount of applicant's insurance. (Evidence of the insurance must be filed with the Federal Maritime Commission before a Certificate (Casualty) will be issued.)

(b) Name and address of applicant's insurer.

19. (a) Total amount of surety bond. (Bond must be filed with the Federal Maritime Commission before a Certificate (Casualty) will be issued.)

(b) Name and address of applicant's surety for death or injury bond.

20. (a) Total amount of escrow deposit. (Escrow agreement must be filed with the Federal Maritime Commission before a Certificate (Casualty) will be issued.)

(b) Name and address of applicant's escrow agent.

21. (a) Total amount of guaranty. (Guaranty must be filed with the Federal Maritime Commission before a Certificate (Casualty) will be issued.)

(b) Name and address of applicant's guarantor.

22. If applicant intends to qualify as a self-insurer for a Certificate (Casualty) under § 540.24(c) of 46 CFR Part 540, attach all data, statements and documentation required therein.

PART IV—DECLARATION

This application is submitted by or on behalf of

(a) Name.

(b) Name and title of official.

(c) Home office—Street and number.

(d) City.

(e) State or country.

(f) ZIP Code.

(g) Principal office in the United States—Street and number.
(h) City.
(i) State.

I declare that I have examined this application, including accompanying schedules and statements, and to the best of my knowledge and belief, it is true, correct and complete.

By_____
(Signature of official)

_____
(Date)

Comments:

Form FMC–132A

PASSENGER VESSEL SURETY BOND

[46 CFR PART 540]

Know all men by these presents, that We _____ (Name of applicant), of _____ (City), _____ (State and country), as Principal (hereinafter called Principal), and _____ (Name of surety), a company created and existing under the laws of _____ (State and country) and authorized to do business in the United States as Surety (hereinafter called Surety) are held and firmly bound unto the United States of America in the penal sum of _____, for which payment, well and truly to be made, we bind ourselves and our heirs, executors, administrators, successors, and assigns, jointly and severally, firmly by these presents.

Whereas the Principal intends to become a holder of a Certificate (Performance) pursuant to the provisions of Subpart A of Part 540 of Title 46, Code of Federal Regulations and has elected to file with the Federal Maritime Commission such a bond to insure financial responsibility and the supplying transportation and other services subject to Subpart A of Part 540 of Title 46, Code of Federal Regulations, in accordance with the ticket contract between the Principal and the passenger, and

Whereas this bond is written to assure compliance by the Principal as an authorized holder of a Certificate (Performance) pursuant to Subpart A of Part 540 of Title 46, Code of Federal Regulations, and shall insure to the benefit of any and all passengers to whom the Principal may be held legally liable for any of the damages herein described.

Now, therefore, the condition of this obligation is such that if the Principal shall pay or cause to be paid to passengers any sum or sums for which the Principal may be held legally liable by reason of the Principal's failure faithfully to provide such transportation and other accommodations and services in accordance with the ticket contract made by the Principal and the passenger while this bond is in effect for the supplying of transportation and other services pursuant to and in accordance with the provisions of Subpart A of Part 540 of Title 46, Code of Federal Regulations, then this obligation shall be void, otherwise, to remain in full force and effect.

The liability of the Surety with respect to any passenger shall not exceed the passage price paid by or on behalf of such passenger.

The liability of the Surety shall not be discharged by any payment or succession of payments hereunder, unless and until such payment or payments shall amount in the aggregate to the penalty of the bond, but in no event shall the Surety's obligation hereunder exceed the amount of said penalty. The Surety agrees to furnish written notice to the Federal Maritime Commission forthwith of all suits filed, judgments rendered, and payments made by said Surety under this bond.

This bond is effective the _____ day of _____, 19_____, 12:01 a.m., standard time at the address of the Principal as stated herein and shall continue in force until terminated as hereinafter provided. The Principal or the Surety may at any time terminate this bond by written notice sent by certified mail to the other and to the Federal Maritime Commission at its office in Washington, D.C., such termination to become effective thirty (30) days after actual receipt of said notice by the Commission, except that no such termination shall become effective while a voyage is in progress. The Surety shall not be liable hereunder for any refunds due under ticket contracts made by the Principal for the supplying of transportation and other services after the termination of this bond as herein provided, but such termination shall not affect the liability of the Surety hereunder for refunds arising from ticket contracts made by the Principal for the supplying of transportation and other services prior to the date such termination becomes effective.

In witness whereof, the said Principal and Surety have executed this instrument on _____ day of _____, 19_____

PRINCIPAL

Name _____

By _____
(Signature and title)

Witness _____

SURETY

[SEAL] Name _____

By _____
(Signature and title)

Witness _____

Only corporations or associations of individual insurers may qualify to act as surety, and they must establish to the satisfaction of the Federal Maritime Commission legal authority to assume the obligations of surety and financial ability to discharge them.

Form FMC–133A

GUARANTY IN RESPECT OF LIABILITY FOR NONPERFORMANCE, SECTION 3 OF THE ACT

1. Whereas _____ (Name of applicant) (Hereinafter referred to as the "Applicant") is the Owner or Charterer of the passenger Vessel(s) specified in the annexed Schedule ("the Vessels"), which are or may become engaged in voyages to or from United States ports, and the Applicant desires to establish its financial responsibility in accordance with Section 3 of Public Law 89–777, 89th Congress, approved November 6, 1966 ("the Act") then, provided that the Federal Maritime Commission ("FMC") shall have accepted, as sufficient for that purpose, the Applicant's application, supported by this Guaranty, and provided that FMC shall issue to the Applicant a Certificate (Performance) ("Certificate"), the undersigned Guarantor hereby guarantees to discharge the Applicant's legal liability to indemnify the passengers of the Vessels for nonperformance of transportation within the meaning of Section 3 of the Act, in the event that such legal liability has not been discharged by the Applicant within 21 days after any such passenger has obtained a final judgment (after appeal, if any) against the Applicant from a United States Federal or State Court of competent jurisdiction, or has become entitled to payment of a specified sum by virtue of a compromise settlement agreement made with the Applicant, with the approval of the Guarantor, whereby, upon payment of the agreed sum, the Applicant is to be fully, irrevocably and unconditionally discharged from all further liability to such passenger for such nonperformance.

2. The Guarantor's liability under this Guaranty in respect to any passenger shall not exceed the amount paid by such passenger; and the aggregate amount of the Guarantor's liability under this Guaranty shall not exceed $_____.

3. The Guarantor's liability under this Guaranty shall attach only in respect of events giving rise to a cause of action against the Applicant, in respect of any of the Vessels, for nonperformance of transportation within the meaning of Section 3 of the Act, occurring after the Certificate has been granted to the Applicant, and before the expiration date of this Guaranty, which shall be the earlier of the following dates:

(a) The date whereon the Certificate is withdrawn, or for any reason becomes invalid or ineffective; or

(b) The date 30 days after the date of receipt by FMC of notice in writing (including telex or cable) that the Guarantor has elected to terminate this Guaranty except that:

(i) If, on the date which would otherwise have been the expiration date under the foregoing provisions (a) or (b) of this Clause 3, any of the Vessels is on a voyage whereon passengers have been embarked at a United States port, then the expiration date of this Guaranty shall, in

respect of such Vessel, be postponed to the date on which the last passenger on such voyage shall have finally disembarked; and,

(ii) Such termination shall not affect the liability of the Guarantor for refunds arising from ticket contracts made by the Applicant for the supplying of transportation and other services prior to the date such termination becomes effective.

4. If, during the currency of this Guaranty, the Applicant requests that a vessel owned or operated by the Applicant, and not specified in the annexed Schedule, should become subject to this Guaranty, and if the Guarantor accedes to such request and so notifies FMC in writing (including telex or cable), then, provided that within 30 days of receipt of such notice, FMC shall have granted a Certificate, such Vessel shall thereupon be deemed to be one of the Vessels included in the said Schedule and subject to this Guaranty.

5. The Guarantor hereby designates _____, with offices at _____, as the Guarantor's legal agent for service of process for the purposes of the Rules of the Federal Maritime Commission, Subpart A of Part 540 of Title 46, Code of Federal Regulations, issued under Section 3 of Public Law 89–777 (80 Stat. 1357, 1358), entitled "Security for the Protection of the Public."

_____
(Place and Date of Execution)

_____
(Type Name of Guarantor)

_____
(Type Address of Guarantor)

By_____
(Signature and Title)

SCHEDULE OF VESSELS REFERRED TO IN CLAUSE 1

VESSELS ADDED TO THIS SCHEDULE IN ACCORDANCE WITH CLAUSE 4

SUBPART B—PROOF OF FINANCIAL RESPONSIBILITY, BONDING AND CERTIFICATION OF FINANCIAL RESPONSIBILITY TO MEET LIABILITY INCURRED FOR DEATH OR INJURY TO PASSENGERS OR OTHER PERSONS ON VOYAGES

§540.20 Scope.

The regulations contained in this subpart set forth the procedures whereby owners or charterers of vessels having berth or stateroom accommodations for 50 or more passengers and embarking passengers at U.S. ports shall establish their financial responsibility to meet any liability which may be incurred for death or injury to passengers or other persons on voyages

to or from U.S. ports. Included also are the qualifications required by the Commission for issuance of a Certificate (Casualty) and the basis for the denial, revocation, suspension, or modification of such Certificates.

§ 540.21 Definitions.

As used in this subpart, the following terms shall have the following meanings:

(a) "*Person*" includes individuals, corporations, partnerships, associations, and other legal entities existing under or authorized by the laws of the United States or any state thereof or the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands or any territory or possession of the United States, or the laws of any foreign country.

(b) "*Vessel*" means any commercial vessel having berth or stateroom accommodations for 50 or more passengers and embarking passengers at U.S. ports.

(c) "*Commission*" means the Federal Maritime Commission.

(d) "*United States*" includes the Commonwealth of Puerto Rico, the Virgin Islands or any territory or possession of the United States.

(e) "*Berth or stateroom accommodations*" or "*passenger accommodations*" includes all temporary and all permanent passenger sleeping facilities.

(f) "*Certificate (Casualty)*" means a Certificate of Financial Responsibility to Meet Liability Incurred for Death or Injury to Passengers or Other Persons on Voyages issued pursuant to this subpart.

(g) "*Voyage*" means voyage of a vessel to or from U.S. ports.

(h) "*Insurer*" means any insurance company, underwriter, corporation or association of underwriters, ship owners' protection and indemnity association, or other insurer acceptable to the Commission.

(i) "*Evidence of insurance*" means a policy, certificate of insurance, cover note, or other evidence of coverage acceptable to the Commission.

(j) For the purpose of determining compliance with § 540.22, "passengers embarking at United States ports" means any persons, not necessary to the business, operation, or navigation of a vessel, whether holding a ticket or not, who board a vessel at a port or place in the United States and are carried by the vessel on a voyage from that port or place.

§ 540.22 Proof of financial responsibility, when required.

No vessel shall embark passengers at U.S. ports unless a Certificate (Casualty) has been issued to or covers the owner or charterer of such vessel.

§ 540.23 Procedure for establishing financial responsibility.

(a) In order to comply with section 2 of Pub. L. 89–777 (80 Stat. 1357, 1358) enacted November 6, 1966, there must be filed an Application on Form FMC–131 for a Certificate of Financial Responsibility to Meet Liability Incurred for Death or Injury to Passengers or Other Persons on Voyages. Copies of Form FMC–131 may be obtained from the Secretary, Federal Maritime Commission, Washington, D.C. 20573, or at the Commis-

sion's offices at New York, N.Y.; New Orleans, La.; San Francisco, Calif.; Miami, Fla.; Los Angeles, Calif.; Hato Rey, P.R.; and Chicago, Ill.

(b) An application for a Certificate (Casualty) shall be filed in duplicate with the Secretary, Federal Maritime Commission, by the vessel owner or charterer at least 60 days in advance of the sailing. Late filing of the application will be permitted only for good cause shown. All applications and evidence required to be filed with the Commission shall be in English, and any monetary terms shall be expressed in terms of U.S. currency. The Commission shall have the privilege of verifying any statements made or any evidence submitted under the rules of this subpart. An application for a Certificate (Casualty) shall be accompanied by a filing fee remittance of $800.

(c) The application shall be signed by a duly authorized officer or representative of the applicant with a copy of evidence of his authority. In the event of any material change in the facts as reflected in the application, an amendment to the application shall be filed no later than five (5) days following such change. For the purpose of this subpart, a material change shall be one which (1) results in a decrease in the amount submitted to establish financial responsibility to a level below that required to be maintained under the rules of this subpart, or (2) requires that the amount to be maintained be increased above the amount submitted to establish financial responsibility. Notice of: the application for, issuance, denial, revocation, suspension, or modification of any such Certificate shall be published in the *Federal Register.*

§ 540.24 Insurance, surety bonds, self-insurance, guaranties, and escrow accounts.

Evidence of adequate financial responsibility for the purposes of this subpart may be established by one of the following methods:

(a) Filing with the Commission evidence of insurance issued by an insurer providing coverage for liability which may be incurred for death or injury to passengers or other persons on voyages in an amount based upon the number of passenger accommodations aboard the vessel, calculated as follows:

Twenty thousand dollars for each passenger accommodation up to and including 500; plus

Fifteen thousand dollars for each additional passenger accommodation between 501 and 1,000; plus

Ten thousand dollars for each additional passenger accommodation between 1,001 and 1,500; plus

Five thousand dollars for each passenger accommodation in excess of 1,500;

Except that, if the applicant is operating more than one vessel subject to this subpart, the amount prescribed by this paragraph shall be based upon the number of passenger accommodations on the vessel being so operated which has the largest number of passenger accommodations.

(1) Termination or cancellation of the evidence of insurance, whether by the assured or by the insurer, and whether for nonpayment of premiums, calls or assessments, or for other cause, shall not be effected (i) until notice in writing has been given to the assured or to the insurer and to the Secretary of the Commission at its office in Washington, D.C. 20573, by certified mail, and (ii) until after 30 days expire from the date notice is actually received by the Commission, or until after the Commission revokes the Certificate (Casualty), whichever occurs first. Notice of termination or cancellation to the assured or insurer shall be simultaneous to such notice given to the Commission. The insurer shall remain liable for claims covered by said evidence of insurance arising by virtue of an event which had occurred prior to the effective date of said termination or cancellation. No such termination or cancellation shall become effective while a voyage is in progress.

(2) The insolvency or bankruptcy of the assured shall not constitute a defense to the insurer as to claims included in said evidence of insurance and in the event of said insolvency or bankruptcy, the insurer agrees to pay any unsatisfied final judgments obtained on such claims.

(3) No insurance shall be acceptable under these rules which restricts the liability of the insurer where privity of the owner or charterer has been shown to exist.

(4) Paragraphs (a)(1) through (a)(3) of this section shall apply to the guaranty as specified in paragraph (d) of this section.

(b) Filing with the Commission a surety bond on Form FMC–132B issued by a bonding company authorized to do business in the United States and acceptable to the Commission. Such surety bond shall evidence coverage for liability which may be incurred for death or injury to passengers or other persons on voyages in an amount calculated as in paragraph (a) of this section, and shall not be terminated while a voyage is in progress.

(c) Filing with the Commission for qualification as a self-insurer such evidence acceptable to the Commission as will demonstrate continued and stable passenger operations over an extended period of time in the foreign or domestic trade of the United States. In addition, applicant must demonstrate financial responsibility by maintenance of working capital and net worth, each in an amount calculated as in paragraph (a) of this section. The Commission will take into consideration all current contractual requirements with respect to the maintenance of working capital and/or net worth to which the applicant is bound. Evidence must be submitted that the working capital and net worth required above are physically located in the United States. This evidence of financial responsibility shall be submitted on a continuing basis for each year or portion thereof while the Certificate (Casualty) is in effect:

(1) A current quarterly balance sheet, except that the Commission, for good cause shown, may require only an annual balance sheet;

(2) A current quarterly statement of income and surplus except that the Commission, for good cause shown, may require only an annual statement of income and surplus;

(3) An annual current balance sheet and an annual current statement of income and surplus to be certified by appropriate certified public accountants;

(4) An annual current statement of the book value or current market value of any assets physically located within the United States together with a certification as to the existence and amount of any encumbrances thereon;

(5) An annual current credit rating report by Dun and Bradstreet or any similar concern found acceptable to the Commission;

(6) A list of all contractual requirements or other encumbrances (and to whom the applicant is bound in this regard) relating to the maintenance of working capital and net worth;

(7) All financial statements required to be submitted under this section shall be due within a reasonable time after the close of each pertinent accounting period;

(8) Such additional evidence of financial responsibility as the Commission may deem necessary in appropriate cases.

(d) Filing with the Commission a guaranty on Form FMC–133B by a guarantor acceptable to the Commission. Any such guaranty shall be in an amount calculated as in paragraph (a) of this section.

(e) Filing with the Commission evidence of an escrow account, acceptable to the Commission, the amount of such account to be calculated as in paragraph (a) of this section.

(f) The Commission will, for good cause shown, consider any combination of the alternatives described in paragraphs (a) through (e) of this section for the purpose of establishing financial responsibility.

§ 540.25 Evidence of financial responsibility.

Where satisfactory proof of financial responsibility has been established, a Certificate (Casualty) covering specified vessels shall be issued evidencing the Commission's finding of adequate financial responsibility to meet any liability which may be incurred for death or injury to passengers or other persons on voyages. The period covered by the certificate shall be indeterminate unless a termination date has been specified therein.

§ 540.26 Denial, revocation, suspension, or modification.

(a) Prior to the denial, revocation, suspension, or modification of a Certificate (Casualty), the Commission shall advise the applicant of its intention to deny, revoke, suspend, or modify, and shall state the reasons therefor. If the applicant, within 20 days after the receipt of such advice, requests a hearing to show that the evidence of financial responsibility filed with the Commission does meet the rules of this subpart, such hearing shall be granted by the Commission, except that a Certificate (Casualty) shall

become null and void upon cancellation or termination of evidence of insurance, surety bond, guaranty, or escrow account.

(b) A Certificate (Casualty) may be denied, revoked, suspended, or modified for any of the following reasons:

(1) Making any willfully false statement to the Commission in connection with an application for a Certificate (Casualty);

(2) Circumstances whereby the party does not qualify as financially responsible in accordance with the requirements of the Commission;

(3) Failure to comply with or respond to lawful inquiries, rules, regulations, or orders of the Commission pursuant to the rules of this subpart.

(c) If the applicant, within 20 days after notice of the proposed denial, revocation, suspension, or modification under paragraph (b) of this section, request a hearing to show that such denial, revocation, suspension, or modification should not take place, such hearing shall be granted by the Commission.

§ 540.27 Miscellaneous.

(a) If any evidence filed with the application does not comply with the requirements of this subpart, or for any reason, fails to provide adequate or satisfactory protection to the public, the Commission will notify the applicant stating the deficiencies thereof.

(b) Any financial evidence submitted to the Commission under the rules of this subpart shall be written in the full and correct name of the person to whom the Certificate (Casualty) is to be issued, and in case of a partnership, all partners shall be named.

(c) The Commission's bond (Form FMC–132B), guaranty (Form FMC–133B), and application (Form FMC–131 as set forth in Subpart A of this part) forms are hereby incorporated as a part of the rules of this subpart. Any such forms filed with the Commission under this subpart must be in duplicate.

(d) Any securities or assets accepted by the Commission (from applicants, insurers, guarantors, escrow agents, or others) under the rules of this subpart must be physically located in the United States.

(e) Each applicant, insurer, escrow agent, and guarantor shall furnish a written designation of a person in the United States as legal agent for service of process for the purposes of the rules of this subpart. Such designation must be acknowledged, in writing, by the designee. In any instance in which the designated agent cannot be served because of death, disability, or unavailability, the Secretary, Federal Maritime Commission, will be deemed to be the agent for service of process. A party serving the Secretary in accordance with the above provision must also serve the certificant, insurer, escrow agent, or guarantor, as the case may be, by registered mail, at its last known address on file with the Commission.

(f) In case of any charter arrangements involving a vessel subject to the regulations of this subpart, the vessel owner (in the event of a subcharter,

the charterer shall file) must within 10 days file with the Secretary of the Commission evidence of any such arrangement.

(g) Financial data filed in connection with the rules of this subpart shall be confidential except in instances where information becomes relevant in connection with hearings which may be requested by applicant pursuant to § 540.26(a) § 540.26(b).

(h) Every person who has been issued a Certificate (Casualty) must submit to the Commission a semiannual statement of any changes that have taken place with respect to the information contained in the application or documents submitted in support thereof. Negative statements are required to indicate no change. Such statements must cover every 6-month period commencing with the first 6-month period of the fiscal year immediately subsequent to the date of the issuance of the Certificate (Casualty). In addition, the statements will be due within 30 days after the close of every such 6-month period.

Form FMC–132B
(5–67)

FEDERAL MARITIME COMMISSION

Surety Co. Bond No. _____

FMC Certificate No. _____

PASSENGER VESSEL SURETY BOND (46 CFR Part 540)

Know all men by these presents, that we _____ (Name of applicant), of _____ (City), _____ (State and country), as Principal (hereinafter called Principal), and _____ (name of surety), a company created and existing under the laws of _____ (State and country) and authorized to do business in the United States, as Surety (hereinafter called Surety) are held and firmly bound unto the United States of America in the penal sum of _____, for which payment, well and truly to be made, we bind ourselves and our heirs, executors, administrators, successors, and assigns, jointly and severally, firmly by these presents.

Whereas, the Principal intends to become a holder of a Certificate (Casualty) pursuant to the provisions of Subpart B of Part 540 of Title 46, Code of Federal Regulations, and has elected to file with the Federal Maritime Commission such a bond to insure financial responsibility to meet any liability it may incur for death or injury to passengers or other persons on voyages to or from U.S. ports, and

Whereas, this bond is written to assure compliance by the Principal as an authorized holder of a Certificate (Casualty) pursuant to Subpart B of Part 540 of Title 46, Code of Federal Regulations, and shall inure to the benefit of any and all passengers or other persons to whom the Principal may be held legally liable for any of the damages herein described.

Now, therefore, the condition of this obligation is such that if the Principal shall pay or cause to be paid to passengers or other persons any sum or sums for which the Principal may be held legally liable by reason of the Principal's failure faithfully to meet any liability the Principal may incur for death or injury to passengers or other persons on voyages to or from U.S. ports, while this bond is in effect pursuant to and in accordance with the provisions of Subpart B of Part 540 of Title 46, Code of Federal Regulations, then this obligation shall be void, otherwise, to remain in full force and effect.

The liability of the Surety with respect to any passenger or other persons shall in no event exceed the amount of the Principal's legal liability under any final judgment or settlement agreement, except that, if the aggregate amount of such judgments and settlements exceeds an amount computed in accordance with the formula contained in section 2(a) of Public Law 89–777, then the Surety's total liability under this surety bond shall be limited to an amount computed in accordance with such formula.

The Surety agrees to furnish written notice to the Federal Maritime Commission forthwith of all suits filed, judgments rendered, and payments made by said Surety under this bond.

This bond is effective the _____ day of _____, 19_____, 12:01 a.m., standard time, at the address of the Principal as stated herein and shall continue in force until terminated as hereinafter provided. The Principal or the Surety may at any time terminate this bond by written notice sent by certified mail to the other and to the Federal Maritime Commission at its office in Washington, D.C., such termination to become effective thirty (30) days after actual receipt of said notice by the Commission, except that no such termination shall become effective while a voyage is in progress. The Surety shall not be liable hereunder for any liability incurred for death or injury to passengers or other persons on voyages to or from U.S. ports after the termination of this bond as herein provided, but such termination shall not affect the liability of the Surety hereunder for such liability incurred for death or injury to passengers or other persons on voyages to or from U.S. ports prior to the date such termination becomes effective.

In witness whereof, the said Principal and Surety have executed this instrument on the _____ day of _____, 19_____.

Name _____ PRINCIPAL

By _____
(Signature and title)

Witness _____

Name _____ SURETY

By _____ [SEAL]
(Signature and title)

Witness _____

Only corporations or associations of individual insurers may qualify to act as Surety, and they must establish to the satisfaction of the Federal Maritime Commission legal authority to assume the obligations of surety and financial ability to discharge them.

Form FMC–133B
(5–67)

FEDERAL MARITIME COMMISSION

Guaranty No. _____

FMC Certificate No. _____

GUARANTY IN RESPECT OF LIABILITY FOR DEATH OR INJURY, SECTION 2 OF THE ACT

1. Whereas_____ (Name of Applicant) (Hereinafter referred to as the "Applicant") is the Owner or Charterer of the passenger Vessel(s) specified in the annexed Schedule ("the Vessels"), which are or may become engaged in voyages to or from U.S. ports, and the Applicant desires to establish its financial responsibility in accordance with section 2 of Public Law 89–777, 89th Congress, approved November 6, 1966 ("the Act") then, provided that the Federal Maritime Commission ("FMC") shall have accepted, as sufficient for that purpose, the Applicant's application, supported by this Guaranty, and provided that FMC shall issue to the Applicant a Certificate (Casualty) ("Certificate"), the undersigned Guarantor hereby guarantees to discharge the applicant's legal liability in respect of claims for damages for death or injury to passengers or other persons on voyages of the Vessels to or from U.S. ports, in the event that such legal liability has not been discharged by the Applicant within 21 days after any such passenger or other person, or, in the event of death, his or her personal representative, has obtained a final judgment (after appeal, if any) against the Applicant from a U.S. Federal or State Court of competent jurisdiction, or has become entitled to payment of a specified sum by virtue of a compromise settlement agreement made with the Applicant, with the approval of the Guarantor, whereby, upon payment of the agreed sum, the Applicant is to be fully, irrevocably and unconditionally discharged from all further liability to such passenger or other person, or to such personal representative, with respect to such claim.

2. The Guarantor's liability under this Guaranty shall in no event exceed the amount of the Applicant's legal liability under any such judgment or settlement agreement, except that, if the aggregate amount of such judgments and settlements exceeds an amount computed in accordance with the formula contained in section 2(a) of the Act, then the Guarantor's total liability under this Guaranty shall be limited to an amount computed in accordance with such formula.

3. The Guarantor's liability under this Guaranty shall attach only in respect of events giving rise to causes of action against the Applicant in respect of any of the Vessels for damages for death or injury within the meaning of section 2 of the Act, occurring after the Certificate has been granted to the Applicant and before the expiration date of this Guaranty, which shall be the earlier of the following dates:

(a) The date whereon the Certificate is withdrawn, or for any reason becomes invalid or ineffective; or

(b) The date 30 days after the date of receipt by FMC of notice in writing (including telex or cable) that the Guarantor has elected to terminate this Guaranty, except that if, on the date which would otherwise have been the expiration date of this Guaranty under the foregoing provisions of this Clause 3, any of the Vessels is on a voyage in respect of which such Vessel would not have received clearance in accordance with section 2(e) of the Act without the Certificate, then the expiration date of this Guaranty shall, in respect of such Vessel, be postponed to the date on which the last passenger on such voyage shall have fully disembarked.

4. If, during the currency of this Guaranty, the Applicant requests that a vessel owned or operated by the Applicant, and not specified in the annexed Schedule, should become subject to this Guaranty, and if the Guarantor accedes to such request and so notifies FMC in writing (including telex or cable), then provided that, within 30 days of receipt of such notice FMC shall have granted a Certificate, such vessel shall thereupon be deemed to be one of the Vessels included in the said Schedule and subject to this Guaranty.

5. The Guarantor hereby designates _____, with offices at _____, as the Guarantor's legal agent for service of process for the purposes of the Rules of the Federal Maritime Commission, Subpart B of Part 540 of Title 46, Code of Federal Regulations, issued under section 2 of the Public Law 89–777 (80 Stat. 1357, 1358), entitled "Security for the Protection of the Public."

_____
(Place and Date of Execution)

_____
(Name and Guarantor)

_____
(Address of Guarantor)

By _____
(Name and Title)

SCHEDULE OF VESSELS REFERRED TO IN CLAUSE 1

VESSELS ADDED TO THIS SCHEDULE IN ACCORDANCE WITH CLAUSE 4

SUBPART C—ASSESSMENT, REMISSION, AND MITIGATION OF CIVIL PENALTIES

§ 540.30 Scope.

Sections 2 and 3 of Pub. L. 89–777 subject any person who violates the provisions of those sections to a civil penalty of not more than $5,000 in addition to a civil penalty of $200 for each passage sold, such penalties to be assessed by the Federal Maritime Commission. These sections further provide that such penalties may be "remitted or mitigated" by the Commission "upon such terms as they in their discretion shall deem proper." This subpart sets forth regulations prescribing standards and procedures for the collection, mitigation, and remission of civil penalties incurred under sections 2 and 3 of Pub. L. 89–777, and the rules and regulations promulgated pursuant thereto.[1]

§ 540.31 Definitions.

As used in this subpart, the following terms shall have the following meanings:

(a) "*Person*" includes individuals, corporations, partnerships, associations, and other legal entities existing under or authorized by the laws of the United States or any State thereof or the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, or any territory or possession of the United States, or the laws of any foreign country.

(b) "*Commission*" means the Federal Maritime Commission.

(c) "*The Act*" means Public Law 89–777 (80 Stat. 1356, 1357, 1358).

(d) "*Offender*" means any person charged with a violation.

§ 540.32 Procedure.

(a) If it is adjudged or otherwise determined that a violation has occurred and it is decided to invoke a statutory penalty, a registered letter will be sent to the offender informing him of the nature of the violation, the statutory and factual basis of the penalty, and the amount of the penalty. This notification shall further advise the offender that, within 20 days, or such longer period as the Commission in its discretion may allow, he or she may either pay the penalty demanded or petition for the remission or mitigation of such penalty.

(b) All correspondence, petitions, forms, or other instruments regarding the collection, remission or mitigation of any penalty under this subpart should be addressed to the Bureau of Hearing Counsel, Federal Maritime Commission, Washington, D.C. 20573.

§ 540.33 Petition for remission or mitigation of penalty.

(a) An offender may submit any oral or written material or information in answer to the notification letter explaining, mitigating, showing extenuating circumstances, or, where there has been no formal proceeding on the

[1] Sections 2(d) and 3(d) of Pub. L. 89–777 authorize the Federal Maritime Commission to prescribe such regulations as may be necessary to carry out the provisions of secs. 2 and 3.

merits, denying the violation. Material or information so presented will be considered in making the final determination as to whether to mitigate the penalty and the amount for which it will be mitigated, or whether to remit it in full.

(b) When no penalty is invoked or the penalty is remitted, no further action by the offender will be necessary. When the penalty is mitigated, such mitigation will be made conditional upon the full payment within 15 days or such longer period as the Commission in its discretion may allow unless the offender within that time executes a promissory note as provided by § 540.36.

§ 540.34 Settlement; execution of agreement form.

When a statutory penalty is mitigated and the offender agrees to settle for that amount, he or she shall be provided with a Settlement Agreement Form (Appendix A), to be signed, in duplicate, and returned. This form, after reciting the nature of the violation, will contain a statement evidencing the offender's agreement to settlement of the Commission's penalty claim for the amount set forth in the agreement and shall also embody an "approval and acceptance" provision. Upon settlement of the penalty in the agreed amount, one copy of the Settlement Agreement shall be returned to the debtor with the "Approval and Acceptance" thereon signed by the Director, Bureau of Hearing Counsel.

§ 540.35 Referral to Department of Justice.

(a) The Commission will refer violations to the Department of Justice with the recommendation that action be taken to collect the full statutory penalty when:

(1) The offender, within the prescribed time, does not explain the violation, petition for mitigation or remission, or otherwise respond to letters or inquiries.

(2) The offender, having responded to such letters or inquiries, fails or refuses to pay the statutory or mitigated penalty, as determined by the Commission, within the prescribed time.

(b) No action looking to the remission or mitigation of a penalty shall be taken on any petition, irrespective of the amount involved, if the case has been referred to the Department of Justice for collection.

§ 540.36 Payment of penalties.

Payment of penalties by the offender shall be made by:

(a) A bank cashier's check or other instrument acceptable to the Commission.

(b) Regular installments by check after the execution of a promissory note containing a confess-judgment agreement (Appendix B).

(c) A combination of the alternatives described in paragraphs (a) and (b) of this section. All checks or other instruments submitted in payment of claims shall be made payable to "Federal Maritime Commission."

§ 540.91 OMB control numbers assigned pursuant to the Paperwork Reduction Act.

This section displays the control numbers assigned to information collection requirements of the Commission in this part by the Office of Management and Budget pursuant to the Paperwork Reduction Act of 1980, Pub. L. 96–511. The Commission intends that this section comply with the requirements of section 3507(f) of the Paperwork Reduction Act, which requires that agencies display a current control number assigned by the Director of the Office of Management and Budget (OMB) for each agency information collection requirement:

Section	Current OMB Control No.
540.4 (Form FMC–131)	3072–0012
540.5	3072–0011
540.6	3072–0011
540.8	3072–0011
540.9	3072–0011
540.23 (Form FMC–131)	3072–0012
540.24	3072–0011
540.26	3072–0011
540.27	3072–0011

APPENDIX A—EXAMPLE OF SETTLEMENT AGREEMENT TO BE USED UNDER 46 CFR §§ 540.30–540.36

SETTLEMENT AGREEMENT
FMC FILE NO. _____

This Agreement is entered into between: (1) the Federal Maritime Commission and, (2) _____ hereinafter referred to as Respondent.

WHEREAS, the Commission is considering the institution of an assessment proceeding against Respondent for the recovery of civil penalties provided under the _____ Act _____, for _____ alleged violations(s) of Section(s) _____ .

WHEREAS, this course of action is the result of practices believed by the Commission to have been engaged in by Respondent to wit;

_____

_____.

WHEREAS, the parties are desirous of expeditiously settling the matter according to the conditions and terms of this Agreement and wish to avoid the delays and expense which would accompany agency litigation concerning these penalty claims; and,

WHEREAS, Section _____ of the _____ Act _____ authorizes the Commission to collect and compromise civil penalties arising from the alleged violation(s) set forth and described above; and,

WHEREAS, the Respondent has terminated the practices which are the basis of the alleged violation(s) set forth herein, and has instituted and indicated its willingness to maintain measures designed to eliminate, discourage and prevent these practices by Respondent or its officers, employees and agents.

NOW THEREFORE, in consideration of the premises herein, and in compromise of all civil penalties arising from the violation(s) set forth and described herein that may have occurred between _____ (date) and _____ (date), the undersigned Respondent herewith tenders to the Federal Maritime Commission a bank cashier's check in the sum of $_____, upon the following terms of settlement:

1. Upon acceptance of this agreement of settlement in writing by the Director of the Bureau of Hearing Counsel of the Federal Maritime Commission, this instrument shall forever bar the commencement or institution of any assessment proceeding or other claims for recovery of civil penalties from Respondent arising from the alleged violations set forth and described herein, that have been disclosed by Respondent to the Commission and that occurred between _____ (date) and _____ (date).

2. The undersigned voluntarily signs this instrument and states that no promises or representations have been made to the Respondent other than the agreements and consideration herein expressed.

3. It is expressly understood and agreed that this Agreement is not to be construed as an admission of guilt by undersigned Respondent to the alleged violations set forth above.

4. Insofar as this agreement may be inconsistent with Commission procedures for compromise and settlement of violations as set out at 46 CFR Part 505, the parties hereby waive application of such procedures.

BY:_____

TITLE:_____

DATE:_____

Approval and Acceptance

The above Terms and Conditions and Amount of Consideration are hereby Approved and Accepted:

By the Federal Maritime Commission:

(S) _____
(Hearing Counsel)

(S) _____
Director, Bureau of Hearing Counsel

_____
Date

APPENDIX B—EXAMPLE OF PROMISSORY NOTE TO BE USED UNDER 46 CFR § 540.36

PROMISSORY NOTE CONTAINING AGREEMENT FOR JUDGMENT FMC FILE NO. _____

For value received, _____ promises to pay to the Federal Maritime Commission (the Commission) the principal sum of $_____ ($_____) to be paid at the offices of the Commission in Washington, D.C., by bank cashier's or certified check in the following installments:

$_____ ($_____) within _____ months of execution of the settlement agreement by the Director of the Bureau of Hearing Counsel;

$_____ ($_____) within _____ months of execution of the agreement;

$_____ ($_____) within _____ months of execution of the agreement;

[Further payments if necessary]

In addition to the principal amount payable hereunder, interest on the unpaid balance thereof shall be paid with each installment. Such interest shall accrue from the date of the execution of this Promissory Note by the Director of the Bureau of Hearing Counsel, and be computed at the rate of [_____ percent (_____%) per annum.]

If any payment of principal or interest shall remain unpaid for a period of ten (10) days after becoming due and payable, the entire unpaid principal amount of this Promissory Note, together with interest thereon, shall become immediately due and payable at the option of the Commission without demand or notice, said demand and notice being hereby expressly waived.

If a default shall occur in the payment of principal or interest under this Promissory Note, _____ (Respondent) does hereby authorize and empower any U.S. attorney, any of its assistants or any attorney of any court of record, Federal or State, to appear for him or her, and to enter and confess judgment against _____ (Respondent) for the entire unpaid principal amount of this Promissory Note, together with interest, in any court of record, Federal or State, to waive the issuance and service of process upon _____ (Respondent) in any suit on this Promissory Note; to waive any venue requirement in such suit; to release all errors which may intervene in entering up such judgment or in issuing any execution thereon; and to consent to immediate execution on said judgment.

_____ (Respondent) hereby ratifies and confirms all that said attorney may do by virtue thereof.

This Promissory Note may be prepaid in whole or in part by Respondent by bank cashier's or certified check at any time, provided that accrued

interest on the principal amount prepaid shall be paid at the time of the prepayment.

BY:_____

TITLE:_____

DATE:_____

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

[46 CFR PART 572]

DOCKET NO. 84–26

RULES GOVERNING AGREEMENTS BY OCEAN COMMON CARRIERS SUBJECT TO THE SHIPPING ACT OF 1984

SUSPENSION OF REPORTING REQUIREMENTS

September 11, 1984

ACTION: Interim Rules.

SUMMARY: The Commission amends its Interim Rules governing agreements by ocean common carriers and other persons subject to the Shipping Act of 1984. These amendments, issued pursuant to the interim rulemaking authority provided in the Act, defer implementation of the Interim Rule provisions requiring: (1) a conference or other agreement body to specify, in reports of meetings, what documents have been distributed to its members, and (2) the agreement body to maintain and file an index of documents with the Commission.

DATE: September 14, 1984.

SUPPLEMENTARY INFORMATION:

The Shipping Act of 1984 (1984 Act), Public Law 98–237, 98 Stat. 67, 46 U.S.C. app. 1701–1720 became effective on June 18, 1984. Section 17(b) of the 1984 Act authorizes the Commission to prescribe interim rules without adhering to the normal notice and comment procedures under the Administrative Procedure Act (5 U.S.C. 553). On May 29, 1984, the Commission published an Interim Rule and Request for Comments implementing those provisions of the Act which govern agreements by ocean common carriers and other persons subject to the 1984 Act (26 F.M.C. 681). This Interim Rule became effective on June 18, 1984. Interested persons were given 90 days from the date of publication in the *Federal Register* in which to comment on the interim rules.

The Commission has now been requested by certain conferences to immediately suspend the requirement in section 572.704 that conferences maintain and file with the Commission an index of documents, and the related requirement in section 572.703(b) that meeting reports:

> ". . . shall specify any documents distributed by the conference or other agreement to inform or assist the members on such matters. . . ."

occurring within the scope of the agreement and which are being discussed or considered by the membership.*

Section 704 of the Interim Rule provides:

> "(a) Each agreement required to file minutes pursuant to § 572.703 shall maintain an index of all reports, circulars, notices, statistics, analytical studies, or other documents, not otherwise filed with the Commission pursuant to this subpart, which are distributed to the member lines.
>
> "(b) Each index required by paragraph (a) of this section shall be filed with the Commission on a quarterly basis, the first to be filed for the period ending September 30, 1984, and for each succeeding quarterly period thereafter. Each index must be certified by an official of the agreement as true and correct."

Upon consideration of the emergency comments, we have determined to grant the interim relief requested, and defer implementation of these requirements pending issuance of a Final Rule. This action is not a determination on the ultimate merit of these comments which will be considered in connection with the issuance of a final rule. Accordingly, section 572.704 is being amended to provide that for the index of documents the first period to be reported is that ending "March 31, 1985" rather than "September 30, 1984." Also, section 572.703 is amended to provide that minutes need not specify documents which are distributed until January 1, 1985.

List of Subjects in 46 CFR Part 572.

> Antitrust, Contracts, Maritime carriers, Administrative practice and procedure, Rates and fares, Reporting and record keeping requirements.

Therefore, pursuant to 5 U.S.C. 553, and sections 5, 6, and 17 of the Shipping Act of 1984 (46 U.S.C. app. 1704, 1705 and 1716), the Commission amends Title 46, Code of Federal Regulations, Part 572, Subpart G, as follows:

1. In § 572.703 revise paragraph (b) to read as follows:

§ 572.703 Filing of minutes

* * * * *

(b) *Content of Minutes.* Conferences, interconference agreements, agreements between a conference and one or more ocean common carriers, pooling agreements, equal access agreements, discussion agreements, marine terminal conferences, and marine terminal rate fixing agreements shall, through a designated official, file with the Commission a report of each meeting describing all matters within the scope

* In addition to the comments seeking immediate relief, numerous other comments have been filed regarding the Interim Rule. These other comments require no immediate attention and are not addressed in this notice. They will be considered at a later date.

of the agreement which are discussed or considered at any such meeting, shall specify any documents distributed by the conference or other agreement to inform or assist the members on such matters, and shall indicate the action taken. These reports need not disclose the identity of parties that participated in discussions, or the votes taken. Reports of meetings filed with the Commission in accordance with this requirement need not specify documents that were distributed until January 1, 1985.

2. In § 572.704, *Index of Documents,* in paragraph (b), remove "September 30, 1984" and insert "March 31, 1985."

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

[46 CFR PART 582]

DOCKET NO. 84–25

CERTIFICATION OF COMPANY POLICIES AND EFFORTS TO COMBAT REBATING IN THE FOREIGN COMMERCE OF THE UNITED STATES

September 17, 1984

ACTION: Final Rules.

SUMMARY: These Final Rules modify the Commission's regulations requiring the filing of certifications of company practices to combat rebating in the foreign commerce of the United States to bring them into conformity with the Shipping Act of 1984 which expands the application of the annual certification requirement from vessel operating common carriers to all common carriers.

DATES: Final Rules effective October 22, 1984, except Section 582.3 which will become effective December 15, 1984.

SUPPLEMENTARY INFORMATION:

The Shipping Act of 1984 (1984 Act) (46 U.S.C. app. 1701–1720) was enacted on March 20, 1984 and became effective on June 18, 1984.

Section 15(b) of the 1984 Act (46 U.S.C. app. 1714(b)) makes substantive changes to the previous requirements of section 21(b) of the Shipping Act, 1916 (1916 Act) (46 U.S.C. app. 820(b)), regarding the certification of company policies and efforts to combat rebating in the foreign commerce of the United States. The fundamental change is the expansion of the certification requirements to all common carriers from the former limited application to vessel operating common carriers only.

On May 29, 1984, the Commission published in the *Federal Register*, 49 FR 22294 (26 F.M.C. 676) an Interim Rule and Request for Comments which implements the 1984 Act's certification requirements. The Interim Rule reflected changes in definitions and application contained in the 1984 Act, particularly the requirement that every non-vessel-operating common carrier (NVO), as well as every vessel operating common carrier, in the foreign commerce file an annual anti-rebating certification.

The Interim Rule also reflected the altered statutory scheme of the 1984 Act under section 15(b) which permits the Commission to require certification from "any shipper, shippers' association, marine terminal operator, ocean freight forwarder or broker." The Interim Rule did not require periodic certifications from entities other than those mandated by statute, but

provided that the Commission, "in its discretion", could make such requirements applicable to shippers, shippers' associations, marine terminal operators, freight forwarders and brokers.

Comments in response to the Interim Rule and Request For Comments were received from five parties. Sea-Land Service, Inc. and The National Maritime Council filed comments supporting adoption of the Interim Rule as a Final Rule.

NAVTRANS International Forwarding, Inc. (NAVTRANS), a licensed ocean freight forwarder and subsidiary of North American Van Lines, opposes the Interim Rule with respect to its discretionary application to ocean freight forwarders in 46 CFR 582.2. NAVTRANS points out that it is required to file an annual, anti-rebating certification on March 1 of each year under 46 CFR 510.35 of the Commission's current freight forwarder regulations, and maintains that the requirement of certification of the same basic information at the Commission's discretion under 46 CFR 582.2 would be "costly, unnecessary and administratively burdensome."

Section 582.5(b) of the Interim Rule makes clear that the certifications which may be required from persons enumerated in section 582.1 will be occasional rather than periodic, since they are to be submitted "on the date designated" and "thereafter, as the Commission may direct." The requirement for annual certifications from ocean freight forwarders is continued in Docket No. 84–19, *Licensing of Ocean Freight Forwarders.*, and the regulations at 46 CFR Part 510 promulgated therein 49 FR 36296, Sept. 14, 1984. In view of the continuing requirement for both annual certification and notification to shippers under those rules, we agree with NAVTRANS that the inclusion in this Rule of freight forwarders among those from whom the Commission may occasionally require certification under section 582.2 is unnecessary and duplicative. We therefore have deleted the reference to freight forwarders in section 582.2 of the Final Rule. We have, however, added a new paragraph (b) to section 581.1, *Scope*, cross-referencing the anti-rebating certification requirements for freight forwarders contained in 46 CFR Part 510.[1]

The Inter-American Freight Conference (IAFC) submitted comments suggesting several technical amendments to the Interim Rule and taking issue with the penalties established in section 582.1(b) and the requirement of section 582.4 that a new certificate be filed upon appointment of a new Chief Executive Officer (CEO) of a common carrier.

IAFC argues that, because the general penalty of no more than $25,000 per day for violations of the 1984 Act wilfully and knowingly committed is established for violations for which no other penalty is provided, it is inapplicable to section 15(b) which contains a specific penalty of no more than $5,000 per day for failure to file an anti-rebating certificate.

[1] The existing subsection (b) of 582.1 is being redesignated as subsection (c) without change.

We agree that the language "unless otherwise provided in this Act" would appear to preclude application of the $25,000 penalty for wilfull and knowing violations of sections specifying lesser penalties. We have, therefore, deleted the $25,000 penalty provision from the Final Rule, thereby limiting the penalty for failure to file the required reports to $5,000 for each day the violation continues.

In response to IAFC's comments, we have also deleted from the Final Rule section 582.4[2] which required that a certificate be filed each time a new CEO is appointed. While the rules in section 582.2 require that the CEO act as certifying official, the CEO's responsibility in this regard is to act as authorized spokesman for the corporation. Because the certification is filed on behalf of the company, not the individual officer, we see no need for renewal upon each change of personnel.[3] The technical wording changes suggested by IAFC to assure that the language of the regulations tracks the statute have also been adopted.

The North European Conferences (Conferences) filed joint comments generally supporting the Commission's Interim Rule and urging adoption as a Final Rule.[4] The Conferences, however, propose significant additional coverage and enforcement mechanisms. The Conferences urge the Commission to actively enforce the anti-rebating certification requirement and to issue and enforce a variety of new regulations against foreign-domiciled NVO's operating in the U.S. import trades, foreign-domiciled, as well as domestic, cargo brokers and freight forwarders, and shippers' associations. The thrust of these proposals is that the anti-rebating certification requirements should be applied equally to the U.S. import and export trades, and that various enforcement mechanisms are available to accomplish that end. While the Conferences' proposals appear to raise legitimate issues, they exceed those noticed in the Interim Rule, and therefore are beyond the scope of this proceeding. The Commission will consider making these proposals the subject of rules in a separate proceeding.

One additional item needs be addressed. Section 582.2 of the Interim Rule required that every common carrier submit an annual anti-rebating certificate by its Chief Executive Officer, and section 582.3 required that each common carrier file by September 18, 1984 a provision in each of its tariffs noting, *inter alia*, that "such [anti-rebating] policy has been certified to the Federal Maritime Commission in accordance with the Ship-

[2] Section 582.5 of the Interim Rule is hereby renumbered as section 582.4.

[3] In doing so, we reverse a decision we made in adopting the original anti-rebating certification rules issued under the 1916 Act, based on statutory language similar to that of the 1984 Act. We simply see no regulatory purpose to be served by continuation of this requirement; *CF.* Docket 79–65, 45 FR 12794, (1980).

[4] The North European Conferences are: North Atlantic United Kingdom Freight Conference, North Atlantic French Atlantic Freight Conference, North Atlantic Continental Freight Conference, North Atlantic Baltic Freight Conference, Scandinavia Baltic/U.S. North Atlantic Westbound Freight Conference, Continental North Atlantic Westbound Freight Conference, North Atlantic Westbound Freight Association, United Kingdom & U.S.A. Gulf Westbound Rate Agreement, Continental-U.S. Gulf Freight Association, Gulf-United Kingdom Conference, Gulf European Freight Association, North Europe-U.S. South Atlantic Rate Agreement and U.S. *South Atlantic-Europe* Rate Agreement.

ping Act of 1984 and the regulations of the Commission set forth in 46 CFR Part 582." No comment was received with respect to the interrelationship of these provisions, or their relationship to the certifications previously filed by vessel operating common carriers pursuant to the 1916 Act and the Commission's regulations which were codified at 46 CFR Part 552. We note, however, that the certification requirements of the two Acts being almost identical, it appears to be duplicative and unnecessary to require vessel operating common carriers who filed an anti-rebating certification on or before May 15, 1984 to file an additional certification before September 18, 1984 merely to comply with the recitation to be filed in their tariffs by that date that their compliance with the 1984 Act has been certified to the Commission. The Commission will, therefore, regard the anti-rebating certificate filed by each vessel operating common carrier on or before May 15, 1984 under the 1916 Act to constitute compliance with the requirement of the 1984 Act and section 582.2 for the 1984 annual certificate.

The NVO certification, being a new requirement, is a different matter. The Interim Rule required an NVO to file an anti-rebating policy statement in its tariff on or before September 18, 1984. Because that statement must make reference to the fact that a CEO certification has been filed with the Commission, it was our intention that the CEO certification also be filed on or before September 18, 1984. It now appears, however, that some confusion or uncertainty exists regarding what was actually required from NVO's by the Interim Rule. As a result and to allow NVO's adequate time to comply with the newly imposed certification requirement, the date by which NVO's must file the initial CEO certification and the date for all common carriers (including NVO's) to file the tariff provision under the 1984 Act shall be deferred until December 15, 1984. Further certifications will be required on May 15, 1985 and each subsequent May 15.

The Federal Maritime Commission has determined that this final rule 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 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 Chairman of the Federal Maritime Commission certifies that this final rule will not have a significant economic impact on a substantial number of small entities, including small businesses, small organizational units and small governmental jurisdictions.

List of Subjects in Part 582.

Cargo; Cargo vessels; Exports; Foreign relations; Freight forwarders; Imports; Maritime carriers; Rates and fares; Reporting and recordkeeping requirements; Water carriers; Water transportation.

These final rules are subject to review and editing of form before publication in the Code of Federal Regulations. Users are requested to notify the Commission of any omissions and typographical-type errors in order that corrections can be made before the Commission's CFR book goes to press in January, 1985.

For the reasons set out in the preamble, and pursuant to the authority set forth in the Authority Citation, Part 582 of Subchapter D, Chapter IV of Title 46, Code of Federal Regulations is revised to read as follows:

FEDERAL MARITIME COMMISSION

[46 CFR PART 582]

CERTIFICATION OF COMPANY POLICIES AND EFFORTS TO COMBAT REBATING IN THE FOREIGN COMMERCE OF THE UNITED STATES

Sec.

AUTHORITY: 5 U.S.C. 553; secs. 2, 3, 8, 10, 13, 15, 16 and 17 of the Shipping Act of 1984 (46 U.S.C. app. 1701, 1702, 1707, 1709, 1712, 1714, 1715, and 1716).

§ 582.1 Scope.

(a) The requirements set forth in this part are binding upon every common carrier by water in the foreign commerce of the United States and, at the discretion of the Commission, will be applicable to any shipper, shippers' association, marine terminal operator, or broker.

(b) Information obtained under this part will be used to maintain continuous surveillance over common carrier activities and to provide a deterrent against rebating practices. Failure to file the required reports may result in a civil penalty of not more than $5,000 for each day such violation continues.

NOTE: Ocean freight forwarders certify their anti-rebating policies and efforts pursuant to §§ 510.21 and 510.25 of this chapter.

§ 582.2 Form of Certification.

The Chief Executive Officer, *i.e.* the most senior officer within the company designated by the board of directors, owners, stockholders or controlling body as responsible for the direction and management of the company, of each common carrier and, when so ordered at the discretion of the Commission, the Chief Executive Officer of any shipper, shippers' association, marine terminal operator or broker, shall file with the Secretary, Federal Maritime Commission, a written certification, under oath, as set forth in the format Appendix A to this part attesting to the following:

(a) (1) That it is the stated policy of the filing company that the payment, solicitation or receipt of any rebate by the company, which is unlawful under the provisions of the Shipping Act of 1984, is prohibited; and

(2) That such company policy was promulgated recently (together with the date of such promulgation) to each owner, officer, employee, and agent thereof;

(b) The details of the efforts made within the company or otherwise to prevent or correct illegal rebating; and

(c) That the filing company will fully cooperate with the Commission in its efforts to end those illegal practices.

§ 582.3 Tariff Notification.

(a) Each common carrier shall file a provision in each of its tariffs that shall read substantially as follows:

> (Name of Company) has a policy against the payment of any rebate by the company or by any officer, employee, or agent thereof, which payment would be unlawful under the United States Shipping Act of 1984. Such policy has been certified to the Federal Maritime Commission in accordance with the Shipping Act of 1984 and the regulations of the Commission set forth in 46 CFR Part 582.

(b) When the common carrier's tariff is a conference or rate agreement tariff, the common carrier shall ensure that the conference or rate agreement publishes the common carrier's tariff provision set forth in paragraph (a) of this section in the tariff.

(c) The anti-rebate tariff provision, as set forth in paragraph (a) of this section, shall be effective upon filing.

§ 582.4 Reporting requirements.

(a) Every common carrier required by this part to file a written certification as provided for in § 582.2 shall file such certification on or before May 15 of each year.

(b) Every person other than a common carrier who is ordered by the Commission to file a written certification under § 582.2 shall file the initial certification on the date designated by the Commission and, thereafter, as the Commission may direct.

§ 582.91 OMB control numbers assigned pursuant to the Paperwork Reduction Act.

This section displays the control numbers assigned to information collection requirements of the Commission in this part by the Office of Management and Budget pursuant to the Paperwork Reduction Act of 1980, Pub. L. 96–511. The Commission intends that this section comply with the requirements of section 3507(f) of the Paperwork Reduction Act, which requires that agencies display a current control number assigned by the Director of the Office of Management and Budget (OMB) for each agency information collection requirement.

Section	Current OMB Control No.
582.2 through 582.4	3072–0028

APPENDIX A TO 46 CFR, PART 582

(Name of Filing Company)

Certification of Company Policies and Efforts to Combat Rebating in the Foreign Commerce of the United States.

Pursuant to the requirements of section 15(b) of the Shipping Act of 1984, and Federal Maritime Commission regulations promulgated pursuant thereto, (46 CFR Part 582), I _____, Chief Executive Officer of (name of company), state under oath that:

1. It is the policy of (name of company) that the payment, solicitation, or receipt of any rebate which is unlawful under the provisions of the Shipping Act of 1984 is prohibited.

2. On or before , 19 , such company policy was promulgated to each owner, officer, employee and agent of (name of company) who is directly or indirectly connected with commercial ocean shipping, import or export sales or purchasing.

3. [Set forth the details of measures instituted by the filing company otherwise to eliminate or prevent the payment of illegal rebates in the foreign commerce of the United States].

4. (Name of company) affirms it will fully cooperate with the Federal Maritime Commission in any investigation of illegal rebating and with the Commission's efforts to end such illegal practices.

(S)
Chief Executive Officer

Subscribed and sworn to before me this day of 19 .

Notary Public

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

[46 CFR PART 572]

DOCKET NO. 84–32

AMENDMENTS TO RULES GOVERNING AGREEMENTS BY OCEAN COMMON CARRIERS AND OTHER PERSONS SUBJECT TO THE SHIPPING ACT OF 1984

ACTION: Interim rule and request for comments.

SUMMARY: This rule adds sections to 46 CFR Part 572 to state Commission policy that an agreement filed pursuant to the Shipping Act of 1984 must be definite, complete and specific with regard to the authority contained therein. The rule establishes guidelines for distinguishing between impermissible open-ended authority and allowable interstitial authority. This statement of policy and rule is necessary to enable the Commission to evaluate the impact of an agreement, to monitor its operations, and to clarify the scope of the antitrust immunity contained therein.

DATE: Interim rule effective September 17, 1984. Comments on or before October 17, 1984.

SUPPLEMENTARY INFORMATION:

The Shipping Act of 1984 (46 U.S.C. app. 1701–1720) (hereinafter referred to as "the Act" or "the 1984 Act") requires the Commission to conduct both a technical and substantive review of agreements filed pursuant to section 5 of the Act (46 U.S.C. app. 1704). Section 5 requires that a true copy of every agreement within the scope of the Act be filed with the Commission. Under section 6(b) of the Act (46 U.S.C. app. 1705(b)), the Commission must conduct a preliminary review to determine whether an agreement meets the requirements of section 5. The Commission is authorized to reject agreements that do not meet these requirements. Under section 6(g) (46 U.S.C. app. 1705(g)), the Commission must review an agreement to determine whether it is substantially anticompetitive and is likely to result in an unreasonable reduction in transportation service or an unreasonable increase in transportation cost. In performing its review functions under section 6, the Commission must observe strict timeframes which are mandated by statute.

The 1984 Act also places an obligation on the Commission to monitor operations conducted pursuant to an agreement. In this regard, the Commission's responsibility to evaluate an agreement under section 6(g) continues *after an* agreement becomes effective. In addition, section 10 of the Act

(46 U.S.C. app. 1709) enumerates certain acts which are prohibited. Section 10(a)(2) prohibits a person from operating under an agreement required to be filed under section 5 that has not become effective under section 6. Section 10(a)(3) prohibits a person from operating under an agreement required to be filed under section 5 except in accordance with the terms of the agreement.

Section 7 of the Act (46 U.S.C. app. 1706) provides for an exemption from the antitrust laws for certain enumerated categories of agreements. Section 7(a)(2) states, in relevant part, that the antitrust laws do not apply to:

> . . . any activity or agreement within the scope of this Act, whether permitted under or prohibited by this Act, undertaken or entered into with a reasonable basis to conclude that (A) it is pursuant to an agreement on file with the Commission and in effect when the activity took place. . . .

In order to ensure that the Commission may adequately fulfill its responsibilities under the Act to review and monitor agreements and to ensure that agreements are stated with sufficient precision to determine the scope of the antitrust immunity conferred upon them, the Commission is amending its rules governing agreements by ocean common carriers and other persons subject to the Act (46 CFR Part 572).[1] These amendments consist of a new rule stating Commission policy regarding the clarity, completeness and specificity required of agreements and a new rule which distinguishes between impermissible open-ended authority and allowable interstitial authority.

I. ADDITION TO SUBPART A—GENERAL PROVISIONS

Section 572.103—Policies

The addition to Subpart A, § 572.103, adds a new paragraph (g) which states Commission policy regarding the clarity, completeness and specificity required in agreements. An agreement filed under the Shipping Act of 1984 must be clear and definite in its terms, must embody the complete present understanding of the parties and must set forth the specific authorities and conditions under which the members of the agreement will conduct

[1] On May 29, 1984, the Commission published Interim Rules which implement those provisions of the Shipping Act of 1984 which govern agreements by ocean common carriers and other persons subject to the Act (49 FR 22296). These rules were issued pursuant to authority contained in section 17(b) of the Act (46 U.S.C. app. 1716(b)) to issue interim rules without observing the normal notice and comment procedures required by the Administrative Procedure Act (5 U.S.C. 553). The preamble to these rules stated that persons could file emergency comments prior to the effective date for consideration by the Commission. A number of such comments were received, and on June 14, 1984, the Commission published amendments to its interim agreements' rules making certain modifications and corrections in these rules (49 FR 24697). These Interim Rules, as amended, went into effect on June 18, 1984. They are codified in Title 46 of the Code of Federal Regulations as Part 572.

their operations and regulate the relationships among the agreement members.

An agreement should be sufficiently clear and definite in its essential terms so as to apprise the Commission of the activities which will be undertaken pursuant to the agreement so that the Commission may evaluate its probable economic impact. At the same time, the Commission does not interpret the 1984 Act to require agreements to be drafted to a degree of exactitude that deprives the parties of a reasonable extent of commercial flexibility—within clearly defined parameters—to respond to changing trade conditions.

One purpose of this policy is to ensure that the Commission may fulfill its responsibility to review an agreement prior to its effectiveness. Under section 6(g) of the Act, the Commission is charged with making an analysis of the competitive impact of an agreement. This evaluation would be made difficult or impossible where an agreement is vague, incomplete or contains open-ended authority.

A second purpose of this policy is to enable the Commission to monitor operations under an agreement once it has gone into effect. The Commission's role as a monitoring agency has been heightened under the 1984 Act which generally allows most agreements to go into effect after a brief waiting period. Because of this shift in emphasis in the regulatory regime, it becomes even more important to have an agreement which is clear, complete and definite. In this regard, it should be noted that section 10(a)(2) prohibits any person from operating under an agreement that has not become effective and that section 10(a)(3) prohibits any person from operating under an agreement except in accordance with its terms. It is, therefore, also in the interest of the parties to an agreement to state their agreement with precision.

Finally, agreement authority should be stated completely and specifically in order to avoid, to the maximum degree possible, any ambiguity concerning antitrust immunity for any activity conducted under the agreement. Exemptions from the antitrust laws are generally strictly and narrowly construed. The 1984 Act, however, extends antitrust immunity to an activity undertaken or entered into "with a reasonable basis to conclude that it is pursuant to an agreement on file with the Commission and in effect when the activity took place." The risk of assuming that a particular activity is pursuant to a stated authority is one that is undertaken by the parties to an agreement. In order for the parties to avoid difficult issues regarding the scope of antitrust coverage, the Commission believes it is best that agreement activities and authorities be stated as clearly as possible.

The Shipping Act of 1984 does not affect previously established Commission policy regarding the clarity, completeness and specificity required in agreements. Accordingly, the new policy statement in § 572.103(g) merely represents a codification of that established policy. There is, however, a

greater need for such a restatement of policy under the 1984 Act to enable the Commission to carry out its review functions within strict statutory deadlines and adequately monitor subsequent operations.

II. ADDITION TO SUBPART D—FILING AND FORM OF AGREEMENTS

Section 572.406—Clear and Definite Agreements

The addition to Subpart D adds a new § 572.406 which establishes guidelines for the completeness required of agreements and distinguishes between impermissible open-ended authority and permitted interstitial authority.

Section 572.406(a) requires that an agreement reflect the full and complete *present* understanding of the parties as to its essential terms. The agreement must set forth in adequate detail the procedures and arrangements under which the activity permitted by the agreement is to take place once the agreement becomes effective. For example, an agreement which merely stated that the parties are authorized "to operate a joint service," without indicating the number, or range of vessels, committed to the service would not be deemed to reflect the full understanding of the parties. Such a deficiency would defeat any meaningful Commission review. Similarly, a statement in a joint service agreement which authorized the parties to "acquire substitute or additional tonnage" would result in a situation where the Commission would be unable to evaluate the economic impact of the agreement on the trade under section 6(g). Finally, a filed agreement which referred to or was governed by another agreement not filed with the Commission would be incomplete. It should be noted that operation under an agreement which is incomplete may constitute a violation of section 10(a)(3) of the Act.

Section 572.406(a) also requires that agreements be specific as to the understanding of the parties. Agreements should specify the authority of the agreement and the activities to be conducted under it. The rule does not contemplate that every activity be enumerated in detail. However, general grants of authority which do not specify the activities under the agreement are not favored. For example, an agreement which, as it authority, merely recited the statutory language of section 4(a)(1)–(7) of the Act would require some further clarification. Otherwise, review of such an agreement would be virtually meaningless. Such general statements of authority, even where clarified by subsequent refinement, should be avoided.

Section 572.406(b) proscribes the use of clauses in agreements which contain open-ended authority unless such provisions expressly state that any further such agreement cannot become operative unless filed and effective under the 1984 Act. A problem of open-ended authority arises where an agreement allow for *future* substantive modification of an agreement without specifically requiring filing under section 5. Such general authority to make future modifications without filing with the Commission would

subvert the Commission's ability to review and monitor an agreement. Because any such future modifications to an agreement would generally become effective within 45 days after the amendment is filed with the Commission, there is no undue burden or delay in gaining effectiveness of an agreement.

Section 572.406(c) provides that activities which may reasonably be viewed as interstitial to a stated agreement authority need not be expressly stated. For example, authority to establish OCP rates would be viewed as interstitial to general ratemaking authority. However, establishment of a tariffed contract rate system would not be interstitial. Changes in the terms and conditions of a charter party underlying a space charter agreement would generally be interstitial. However, changes in the number of vessels (or range of number of vessels) and definition of vessel capacity (or range of capacities) dedicated in a joint service or space charter agreement would not. The rule allows flexibility to make changes for tariff matters or routine operational and administrative matters having no anticompetitive effect.

The rule does not state how the Commission will treat an agreement that is not sufficiently specific, complete and definite. In most cases, such deficiencies could probably be corrected through informal discussions between the Commission's staff and the parties. An agreement which is severely deficient, however, may be rejected, investigated or subject to a formal request for additional information or to challenge in the court under section 11(h) of the Act.

III. CONCLUSION

This rule is being published as an interim rule, pursuant to section 17(b) of the Act, with opportunity for comment. It will become effective on publication and will serve as an interim rule until such time as a final rule supersedes it. All interested persons have been provided 30 days to comment on the interim rule. This interim rule and all comments filed within the 30-day period will be used as the basis for a final rule pursuant to the requirements of the Administrative Procedure Act (5 U.S.C. 553).

The Chairman of the Commission certifies, pursuant to section 605(b) of the Regulatory Flexibility Act (5 U.S.C. 601 *et. seq.*), that these rules will not have a significant economic impact on a substantial number of small entities, within the meaning of that Act.

OMB clearance for the interim rules in 46 CFR 572 has been granted under OMB Number 3072–0045. These interim amendments will also be submitted, and comments on the information collection aspects of the amendments may be made at the time the interim rules are formally submitted to OMB as Final Rules.

List of Subjects in 46 CFR Part 572.

Antitrust, Contracts, Maritime Carriers.

Therefore, pursuant to section 4 of the Administrative Procedure Act (5 U.S.C. 553) and sections 5, 6, 7, 10 and 17 of the Shipping Act

of 1984 (46 U.S.C. app. 1704, 1705, 1706, 1709, 1716), the Federal Maritime Commission hereby amends Title 46, Code of Federal Regulations, Part 572, Subchapter D as follows:

1. In Subpart A, § 572.103, add a new paragraph (g) to read as follows:

§ 572.103 Policies.

* * * * *

(g) An agreement filed under the Shipping Act of 1984 must be clear and definite in its terms, must embody the complete understanding of the parties, and must set forth the specific authorities and conditions under which the parties to the agreement will conduct their present operations and regulate the relationships among the agreement members.

2. In Subpart D, add a new § 572.406 to read as follows:

§ 572.406 Clear and Definite Agreements

(a) Any agreement required to be filed by the Act and the rules of this Part shall be the complete agreement among the parties and shall specify in detail the substance of the understanding of the parties.

(b) Except as provided in paragraph (c) of this section, open-ended or vague agreement which contemplate a further agreement or give the parties authority to discuss and/or negotiate a further agreement, the terms of which are not fully set forth in the enabling agreement, will be permitted only if the enabling agreement indicates that any such further agreement cannot go into effect unless filed and effective under the Act;

(c) Further specific agreements or understandings which are established pursuant to express enabling authority in an agreement are considered interstitial and are permitted without further filing under section 5 of the Act only when the further agreement concerns: (1) routine operational or administrative matters which will have no anticompetitive effect; or (2) establishment of tariff rates, rules, and regulations which are routine and ordinary.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 82–22

NOTICE TO RESCIND PORTWIDE EXEMPTIONS GRANTED TO THE PORTS OF PENSACOLA, PORT EVERGLADES AND TAMPA, FLORIDA, PURSUANT TO SECTION 510.33(e) OF GENERAL ORDER 4 AND DISCONTINUANCE OF PROCEEDING

September 19, 1984

By notice dated April 14, 1982, the Commission instituted Docket No. 82–22, *Notice of Intent to Review Certain Portwide Exemptions Granted Pursuant to Section 510.33(e) of General Order 4,* for the purpose of determining whether portwide exemptions granted by the Commission some seventeen years ago to the ports of Pensacola, Port Everglades and Tampa, Florida, were still justified.

The proceeding in Docket No. 82–22 has been held in abeyance pending final action by the Commission on proposed revisions to 46 CFR Part 510 in Docket No. 83–35, *Licensing of Independent Ocean Freight Forwarders.* The proposed revisions under review in Docket No. 83–35 subsequently were incorporated into an interim rule proceeding, Docket No. 84–19, *Licensing of Ocean Freight Forwarders,* which proposed rules to implement the Shipping Act of 1984 (46 U.S.C. app. 1701–1720). The proceeding in Docket No. 83–35 was discontinued by notice served April 24, 1984.

On August 15, 1984, the Commission adopted Final Rules in Docket No. 84–19. One of the revisions adopted modified 46 CFR 510.33(e), redesignated as 46 CFR 510.23(e) in the Final Rules, to allow compensation to be paid to a forwarder who requests a carrier or its agent to perform forwarding functions if such carrier or agent is a licensed ocean freight forwarder. With this allowance, the portwide exemption provision contained in the rules became unnecessary and it was deleted in the Final Rules.

The issue of whether to continue the portwide exemptions in three Florida ports which is the subject of Docket No. 82–22 has thus become moot. Moreover, with the deletion of the exemption provision from the rules, the exemptions granted to the three Florida ports, identified above, have no force and effect. Accordingly, these exemptions will be rescinded.

By a separate notice, all other outstanding exemptions granted by the Commission will be rescinded also.

THEREFORE, IT IS ORDERED, that the portwide exemptions granted to the ports of Pensacola, Port Everglades and Tampa, Florida, are hereby rescinded;

IT IS FURTHER ORDERED, that Docket No. 82–22 is hereby discontinued;

IT IS FURTHER ORDERED, that a notice of these actions be published in the *Federal Register*.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

[46 CFR PARTS 502, 512 AND 531]

GENERAL ORDERS 11, 16 AND 38; DOCKET NO. 84–2

AMENDMENT OF CERTAIN REGULATIONS GOVERNING COMMON CARRIERS BY WATER IN THE DOMESTIC OFFSHORE COMMERCE OF U.S.

September 25, 1984

ACTION: Notice of Discontinuance.

SUMMARY: The Federal Maritime Commission discontinues this rulemaking proceeding on the basis that the proposed regulation amendments cannot be adopted given existing statutory requirements. This discontinuance will result in no modifications to current regulatory requirements.

DATE: This action is effective September 28, 1984.

SUPPLEMENTARY INFORMATION:

PROCEEDING

On January 26, 1984, the Federal Maritime Commission[1] (Commission or FMC) issued a notice of proposed rulemaking (January Notice) in the above-captioned proceeding proposing amendments to its regulations implementing the Intercoastal Shipping Act, 1933 (ISA) (46 U.S.C. app. 843 *et seq.*). Essentially, these amendments would exempt carriers serving the Puerto Rico/Virgin Islands domestic offshore trade from the otherwise applicable financial data reporting requirements and 60-day advance notice requirement for the implementation of general rate increases and decreases.

The January Notice was issued in response to a Petition for Rulemaking filed by Sea-Land Service, Inc. (Sea-Land Petition) on September 12, 1983, requesting the same relief. A notice of filing of the Sea-Land Petition was published in the *Federal Register*, 48 FR 44091 of Sep. 27, 1983, and comments of interested parties were solicited.

Although twenty-two parties responded to the Sea-Land Petition, the responses failed to provide sufficient information for assessing the impact of the proposal on Commission programs. This rulemaking was instituted to provide interested parties with that opportunity.

The January Notice requested commentators to specifically address the following matters:

[1] Commissioner Moakley dissented to the issuance of the Notice of Proposed Rulemaking on the basis that the relief sought is beyond the Commission's statutory authority to grant.

1. If no financial data are submitted by carriers in the Puerto Rico/Virgin Islands trade, how can the Commission effectively review the reasonableness of a general rate increase prior to its effective date?

a. If this proposed rule is adopted, how will interested persons effectively exercise their statutory right to protest general rate increases?

2. If the proposed rule were adopted, can an adequate system of general rate increase review operate within 60 days as required by the statute?

a. Assuming authority exists to establish a thirty-day review period as Sea-land has proposed, can the requisite rate review be accomplished within thirty days?

3. If the Commission should order an investigation of a proposed general rate increase, can such an investigation be completed within 180 days as required by the statute in the absence of pre-filed financial data and supporting evidentiary materials by the carrier?

4. To what extent is port-to-port service competitive with intermodal service by carries in the Puerto Rico/Virgin Islands trades?

a. What are the regulatory requirements imposed on carriers subject to ICC jurisdiction in these trades?

b. What specific differences between ICC and FMC regulatory requirements impose a competitive disadvantage on FMC regulated carriers?

c. Can the needs of shippers in this trade the adequately served if carriers offer only intermodal service subject to ICC jurisdiction.

This request, however, was without prejudice to the commentators addressing any other matters which they viewed as warranting consideration. The Commission's Bureau of Hearing Counsel was directed to participate in the proceeding.

Sixteen parties filed comments in response to the January Notice. Ten parties generally supported the rulemaking proposal,[2] while seven opposed it.[3]

The threshold issue addressed by most parties is whether section 35 of the Shipping Act, 1916 (46 U.S.C. app. 833a) gives the Commission the authority to grant the relief requested by Sea-Land. Those supporting the proposal argue an interpretation of section 35 that would allow the

[2] Comments in support of the rulemaking proposal were filed by Sea-Land Service, Inc., the U.S. Department of Transportation, The Transportation Institute, Houston Port Bureau, Inc., Jacksonville Port Authority, Delaware River Port Authority, E.I. DuPont DeNemours & Co., R.J. Reynolds Tobacco Co., Lubrizol Corporation and PPG Industries, Inc.

[3] Comments in opposition to the rulemaking proposal were filed by the Government of the Virgin Islands, the Legislature of the Virgin Islands, Hawaii Department of Commerce and Consumer Affairs, U.S. Military Sealift Command, Puerto Rico Manufacturer Association, IBP, Inc., and Hearing Counsel.

Commission substantial authority, while those opposing the proposal argue an interpretation which would allow exemptions that have only a *de minimis* effect on commerce. While Hearing Counsel states that section 35 gives the Commission sufficient authority to implement the proposed amendments, it also is of the opinion that such amendments are "contrary to the intent of Congress" and "would leave the Commission in a position of being unable to meaningfully review the propriety of rate increase applications within the required statutory time frame." DOT urges an *ad hoc* carrier-by-carrier approach rather than a trade-wide approach.

With regard to the Commission's specific questions concerning pre-effective date review and the 180-day investigation limitation, opinions were divided along similar lines. Parties supporting the proposed amendments argue that there should be no problem in meeting the deadlines or that the deadlines are irrelevant because competition in the trade supplemented by shipper complaint proceedings are sufficient in themselves to regulate rates. Those opposing the amendments argue that adequate review would be impossible, that competition in the trade is inadequate to regulate rates and that the statutory right to protest rate increases would be effectively abrogated by this rulemaking. Hearing Counsel takes the position that the Commission's staff could not properly evaluate rate increases under the proposed amendments, but did not express an opinion on the general need for rate of return regulation in the domestic offshore trades.

The Commission's questions in the January Notice concerning the relationship between port-to-port and intermodal services in these trades also prompted a similar division of opinions. Those supporting the rulemaking are generally of the opinion that Interstate Commerce Commission (ICC) regulatory requirements are very minimal, that Sea-Land as the only port-to-port service offeror in the trade is at a competitive disadvantage, and that the Commission should reduce its regulatory requirements to the level of the ICC. Those opposing the rulemaking generally argue that the services are not directly in competition with each other, that while there are differences between ICC and FMC regulation, they impose no competitive disadvantage on any one carrier in the trade, and that rather than reduce its regulatory requirements, the FMC should seek more effective jurisdiction in the trade to strengthen its regulatory control over rates. The only matter the parties agree upon here is that there is a clear and continuing need for port-to-port service in the trade.

Few alternatives to the proposed amendments were offered. One suggestion advanced is that the Commission should utilize a data-base computer model to establish reasonable rate levels in the trade on the basis of industry-average cost, revenue and financial data. Hearing Counsel proposed that, in lieu of the proposed amendments, consideration should be given to alternative avenues of regulatory relief including: (1) increasing the threshold level of trade revenue for financial data filing requirements; (2) increasing the threshold level of individual and annual aggregate general

rate increases for financial data filing requirements from 3% and 9% to 15% and 25%, respectively; and (3) eliminating the requirement that carriers file historical data with general rate increases.

DISCUSSION

The Commission has determined that it could not adopt the amendments proposed in this rulemaking and still carry out the statutory duties and responsibilities imposed by sections 3 and 4 of the Intercoastal Shipping Act, 1933, particularly as amended in 1978 by P.L. 95–475.[4]

Contrary to the assertions of the parties supporting this proposal, the effect of this rulemaking would not be the removal of "unnecessary regulations." Obtaining financial data from a carrier and giving interested parties as well as the Commission adequate time to review such materials prior to the effective date of a general rate increase would, in the context of other requirements and limitations of the Act, appear necessary to determining "what constitutes a just and reasonable rate of return or profit for common carriers" serving this trade. 46 U.S.C. §845(a). *See* S. Rep. No. 1240, 95th Cong., 2d Sess. 9–10 (1978).

In this regard, we agree with the position taken by Hearing Counsel and others that both elements of the Commission's regulatory activity which Sea-Land wishes abandoned, *i.e.* advance 60-day notice and financial information reporting requirements, are critical and complementary to the statutory scheme contemplated by the ISA. It does not appear economically or practically possible for the Commission's staff and interested third parties to review and respond to a proposed general revenue rate increase prior to its effective date without the benefit of some advance on-going carrier financial data of the kind provided in the periodic reports and without an adequate notice period. Without the data and the time to analyze it, the Commission would be without the means to make an assessment of the reasonableness of the rate increase as contemplated by the statute.

Nor does the suggested "investigate and refund" alternative advanced by Sea-Land appear viable under the circumstances. Section 3 of the ISA imposes certain statutory conditions and requirements on the initiation and conduct of rate investigations instituted pursuant to that section. One of these mandates that:

The Commission shall not order a hearing . . . unless the Commission publishes in the *Federal Register the reasons, in detail, why it considers*

[4]The 1978 amendments to the ISA are the source of many of the Commission regulations which Sea-Land and this rulemaking proposed to change or eliminate. The features of the 1978 amendments most relevant here are those which: (1) require that the Commission, "by regulation," prescribe guidelines for the determination of what constitutes a just and reasonable rate of return; (2) require the Commission to give reasons for any rate hearing instituted and strictly delineate the issues to be resolved in that hearing; and (3) impose restrictive time limits on the completion of the various phases of the hearing. Many of the specific regulations put at issue in this rulemaking were promulgated in direct fulfillment of these amendments; most as a means of enabling the Commission to meet the strict statutory scheduling deadlines established.

such a hearing to be necessary and the specific issues to be resolved by such hearing. (Emphasis added).

The lack of advance carrier supplied financial data would, in our opinion, render the Commission unable to meet this threshold statutory requirement that the Commission indicate up front the scope of any rate investigation. Without the necessary data, the Commission would not be in a position to give reasons for the investigation, specify "in detail" the issues to be investigated, or fashion an appropriate hearing order. Accordingly, Sea-Land's recommendation that the Commission, in lieu of requiring advance notice and pre-filed financial data, could investigate all general rate increases and utilize the refund authority of the Act to compensate shippers if the rates are found too high is not an acceptable alternative.

Moreover, even if the Commission were somehow able to specify the investigation issues without the benefit of pre-filed carrier data, it is not likely that the Commission could obtain the data during the course of the investigation and complete that investigation within the 180-day limit imposed by the statute.

Therefore, the proposed amendments to the advance notice and reporting requirements taken together would, if adopted, generally render section 3 of the ISA unenforceable as it applies to the Puerto Rico/Virgin Islands trades. The ultimate effect would be to discontinue FMC review functions and shift the burden of proof in all general revenue rate proceedings to shippers and the domestic offshore governments in complaint cases. This would be contrary to the regulatory scheme contemplated by the ISA and the legislative determinations made in connection with the 1978 amendments to the ISA. *See* S. Rep. No. 1240, 95th Cong., 2d Sess. 6–7 (1978).

To the extent the Intercoastal Shipping Act, 1933 prescribes a clear and definite statutory scheme of regulation which the Commission is charged with enforcing, neither the exemption provision of section 35 nor the rule-making provision of section 43 of the Shipping Act, 1916 (46 U.S.C. app. 841a) provides the authority to repeal or substantially amend that scheme. The legislative history of section 35 indicates that the exemption authority was to be used to exempt requirements "which are *not of significance* in the overall design of regulation contemplated" (emphasis added). *See* H. Rep. No. 2248, 89th Cong., 2d Sess. 1, 4 (1966). Therefore, any "deregulation" initiatives must still comport with the legislative intent underlying the Act, be harmonized with the statutory scheme, and rely upon a rational factual basis. *See generally, Motor Vehicle Man. Assn. of U.S., Inc. v. State Farm Mut. Automobile Ins. Co.*, 103 S. Ct. 2856, 51 U.S.L.W. 4945, 4956–4957 (1983); *U.S. v. Vogel Fertilizer Co.*, 455 U.S. 16, 26 (1982). That standard could not be met on the basis of the record established in this proceeding.

The major focus of many of the comments submitted in support of the proposed amendments has been to argue the virtues of deregulation

generally, or specifically in the U.S./Puerto Rico-Virgin Islands trades,[5] and the alleged disadvantage that Sea-Land's FMC regulated services are experiencing vis-a-vis those regulated by the ICC. Whatever the merits of these arguments, and the commentators offer differing and opposing views, they do not address the central issue raised by the rulemaking or the more critical questions posed by the Commission in its January Notice. The issue here is not whether existing rate regulation is good or bad or having an adverse impact on carriers subject to it, but rather *whether the "deregulation" contemplated by the Sea-Land proposals can properly be effected within the framework of the current statutorily mandated scheme.* It is on this point that the record in this proceeding fails to provide critical information. The comments favoring the rulemaking generally consist of little more than broad conclusory statements of position on the desirability of the Sea/Land proposals. None of these comments is informative or responsive to the January Notice to the extent that they explain how the Commission could adopt the Sea-Land proposals and still make a meaningful assessment of general rate increases consistent with statutory requirements. *See generally, Farmers Union Cent. Exchange v. F.E.R.C.*, 734 F.2d 1486 (D.C. Cir 1984); *Cross-Sound Ferry Services, Inc., v. I.C.C.* No. 83–2155 (D.C. Cir. July 6, 1984).

The Commission, notwithstanding its efforts to give interested parties every opportunity to do so, has simply not been provided with the manner or method by which it can accommodate Sea-Land's proposals and at the same time carry out its statutory duty to oversee the validity of general rate increases. The proposals would simply leave the Commission in the position of being unable to review, and make reasoned decisions with respect to, these rate increases within the required statutory time frame.

CONCLUSION

The record of this proceeding does not demonstrate any legal or factual basis upon which the Commission could properly adopt the proposals under consideration.

THEREFORE, IT IS ORDERED, That this proceeding is discontinued.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

[5] The level of competition in the U.S.-Puerto Rico/Virgin Islands trades is offered as a reason for reducing or eliminating existing rate regulation. While the Commission recognizes the competitive realities of this trade it must also be recognized that Congress was aware of the extent of such competition when if formulated the 1978 amendments to the ISA which established the substance of the present regulatory approach. *See* S. Rep. No. 1240, 95th Cong., 2d Sess. 2–3 (1978).

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 1102

APPLICATION OF UNITED STATES ATLANTIC & GULF-JAMAICA AND HISPANIOLA STEAMSHIP FREIGHT ASSOCIATION AND SEA-LAND SERVICE, INC. FOR THE BENEFIT OF UNITED BRANDS FOR CHIQUITA INTERNATIONAL TRADING CO.

ORDER DENYING PETITION FOR RECONSIDERATION

October 12, 1984

On June 15, 1984, the Commission served an Order Partially Adopting Initial Decision in this proceeding 26 F.M.C. 605 (1984). The Order affirmed the Initial Decision's grant of permission to Sea-Land Service, Inc, (Sea-Land), as a member of the United States Atlantic and Gulf/Jamaica and Hispaniola Steamship Freight Association (the Freight Association), to refund freight charges on certain shipments of pineapple pursuant to section 18(b)(3) of the Shipping Act, 1916 (46 U.S.C. §817(b)(3)). However, we reversed the Initial Decision to the extent it permitted such refunds on shipments that occurred more than 180 days prior to the filing of Sea-Land's application, because section 18(b)(3) explicitly requires that an application for refund or waiver of freight charges "must be filed within one hundred and eighty days from the date of shipment."

Sea-Land and the Freight Association filed on July 16, 1984 a Petition for Reconsideration of the Commission's Order. The Petition alleges errors of fact and law by the Commission.[1] The arguments of law have primary importance, concerning as they do the extent of our "special docket" jurisdiction under section 18(b)(3).

The Commission is well aware that *Nepera Chemical Inc. v. FMC*, 662 F.2d 18 (D.C. Cir. 1981) (*Nepera*), instructs us to administer the provisions of section 18(b)(3) with the goal of effectuating, whenever possible, the statute's remedial purposes. *Nepera* holds that the corrective tariff that is one of the statute's four jurisdictional requirements need not state with mathematical exactitude the refund or waiver rate, so long as it fairly reflects the original intentions of the carrier and the shipper. The Petition would have the Commission apply a similar liberal construction of the jurisdictional requirement at issue here. However, unlike the statutory language involved in *Nepera*—"the rate upon which such refund or waiver

[1] To the extent the Petition alleges errors of law, it is subject to summary rejection. Rule 261 of the Commission's Rules of Practice and Procedure governing petitions for reconsideration, 46 C.F.R. §502.261, does not permit such allegations. *Filing of Petitions for Reconsideration and Stay*, 22 F.M.C. 351 (1979). However, the Commission will waive the requirements of Rule 261 and consider the Petition on its merits.

would be based''—180 days is a precise term that is not amenable to a variety of interpretations.[2] The Congress had to choose a cut-off date beyond which the Commission would not be authorized to consider refund or waiver applications, in order to eliminate stale or dated claims. To a certain extent, such a date or time period will always be somewhat arbitrary and can lead to arbitrary results. Nevertheless, Congress has expressed its will by specifying a deadline of 180 days and the Commission does not believe the holding or rationale of *Nepera* would support a result in this case that evades or ignores that requirement.[3]

The Petition contends that a ''waiver'' of the 180-day requirement is supported by *Pacific Westbound Conference for the Benefit of Minnesota Mining & Manufacturing Co., 21 S.R.R. 793 (1982) and Pacific Westbound Conference for the Benefit of Mitsui and Co. (U.S.A.), Inc.*, 25 F.M.C. 350, 21 S.R.R. 1275 (1982). To the extent those decisions conflict in part with the result in this case, they are overruled. Finally, the ''factual error'' alleged by the Petition, *i.e.*, that there may have been other shippers shipping pineapple before the 180-day deadline who would benefit from an extension of that deadline, is actually dependent upon a favorable resolution of the legal issue, *i.e.*, that the Commission has the power to grant such an extension. However, the Commission has concluded that we have no such power.

THEREFORE, IT IS ORDERED, That the Petition for Reconsideration is hereby denied.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

[2] It should be noted that, while the Commission in other cases has calculated the 180 days liberally in order to grant relief to shippers, *e.g., Sea-Land Service, Inc. for the Benefit of G.F. Tujague, Inc.*, 22 S.R.R. 619 (1984), there is no dispute or uncertainty over that calculation here.

[3] Even if it is assumed *arguendo* that *Nepera* does apply to the 180-day requirement, that would not change the result here. If Sea-Land's application had involved shipments that had departed only one or two days beyond the deadline and if the carrier had furnished a satisfactory explanation why its application had been delayed, a Commission order granting the application as it applied to such shipments might be consistent with *Nepera*. But the facts in this case are quite different. Sea-Land's application was filed on November 9, 1983. The 180-day perlod mandated by section 18(b)(3) extended back to May 13, 1983. Of the 38 shipments of pineapple listed on the application, only five that sailed on May 14 were within the deadline. The other shipments were dated May 7, April 30 and April 9, 1983, *i.e.*, 186, 193 and 214 days before the filing of the carrier's application. Granting the application as it applies to those shipments would stretch the 180-day requirement beyond recognition, particularly where the carrier has furnished no explanation why the filing of its application was delayed for so long (Sea-Land and the other members of the Freight Association corrected the erroneous rate on May 5, 1983 and the new rate took effect ten days later).

FEDERAL MARITIME COMMISSION

DOCKET NO. 83–48
ALASKA MARITIME AGENCIES, INC., ET AL.

v.

PORT OF ANACORTES, ET AL.

NOTICE

October 15, 1984

Notice is given that no exceptions have been filed to the September 4, 1984, initial decision in this proceeding and the time within which the Commission could determine to review that decision has expired. No such determination has been made and accordingly, that decision has become administratively final.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 83–48
ALASKA MARITIME AGENCIES, INC., ET AL.

v.

PORT OF ANACORTES, ET AL.

F. Conger Fawcett for complainants.

Frederick L. Shreves, II for port of Hueneme, Port of Long Beach, Port of Los Angeles, Port of Oakland, Port of Richmond, Port of San Diego, Port of San Francisco, and Encinal Terminals, respondents.

John W. Angus, III for Port of Anacortes, Port of Astoria, Port of Bellingham, Port of Everett, Port of Grays Harbor, Port of Longview, Port of Olympia, Port of Port Angeles, Port of Portland, Port of Seattle, Port of Tacoma, and Port of Vancouver, respondents.

Perrin Love for the Port of Anchorage, respondent.

Edward J. Sheppard, IV for Port of Sacramento, respondent.

Dennis Lindsay for Bunge Corporation, Cargill, Inc., Columbia Grain, Inc., Continental Grain Company, and United Grain Corporation, respondents.

W. Martin Tellegan for the Port of Benicia, respondent.

David E. Schricker for the Port of Redwood City, respondent.

Bruce H. Jackson for the Port of Stockton, respondent.

Cyrus C. Guidry for the Board of Commissioners of the Port of New Orleans, intervenor.

Carl S. Parker, Jr., for the Board of Trustees of the Galveston Wharves, intervenor.

J. Alton Boyer for the Association of Ship Brokers and Agents (U.S.A.), Inc., intervenor.

Aaron W. Reese, as Hearing Counsel, intervenor.

INITIAL DECISION [1] AND ORDER APPROVING SETTLEMENT OF JOSEPH N. INGOLIA, ADMINISTRATIVE LAW JUDGE

Finalized October 15, 1984

This proceeding began as a complaint initially filed by twenty-four steamship agencies against thirty-two public or quasi-public port and terminal facilities located on the West Coast of the United States.[2] The complaint

[1] This decision will become the decision of the Commission in the absence of review thereof by the Commission (Rule 227, Rules of Practice and Procedure, 46 CFR 502.227).

[2] The complainants named were Alaska Maritime Agencies, Inc.; Cascade Shipping Co.; Dodwell of Washington; Fred F. Noonan Company, Inc.; Freighters Company; Fritz Maritime Agencies; General Steamship Corporation, Ltd.; Green Ocean Agencies; Hapag-Lloyd Agencies; International Shipping Company, Inc.; Interocean Steamship Corporation; Kerr Steamship Company, Inc.; Lilly Shipping Agencies; Matson Agencies, Inc.; Monitor Steamship Agency, Inc.; Murphy Shipping Co., Inc., North Star Terminal & Stevedoring Co.; Norton, Lilly & Co., Olympic Steamship Company, Inc.; Seaspray Steamship Agency, Inc.; Sunrise Shipping Agency, Inc.; Transmarine Navigation Corporation; Transpacific Transportation Company; and Williams, Dimond & Co.

alleges that, "the Respondents' tariff provisions and practices . . . purporting to hold agents liable, as principals, for port/terminal charges" constituted a violation of sections 16 and 17 of the Shipping Act, 1916. It also alleges that section 15 of the Shipping Act was violated because the "Respondents' tariff provisions and practices . . . (were) adopted and enforced by collective action . . . (which) operate to the detriment of the commerce of the United States (and) are contrary to public policy and therefore contrary to the public interest. . . . " (Parentheses supplied.) In the Answer to the Complaint all of the respondents denied that there was any violation of sections 15, 16 and 17 of the Shipping Act, 1916, and the case proceeded with initial discovery requests. There were also several petitions to intervene which were acted upon.[3]

Due to the number of parties involved as well as the number of counsel, this proceeding was well monitored from its inception and several prehearing conferences were held. Through the efforts of the parties and their counsel it become apparent early that there was a possible basis of settlement, and that the settlement should be explored before large expenditures of time and money were made in discovery. Several meetings were held and ultimately all of the parties generally agreed to settlement of these cases on the following basis:

(1) The tariffs involved will be rewritten and filed in accordance with the agreements made between the parties, upon final approval by the Commission.

(2) On the effective date of the tariffs the Complainants will file a motion to withdraw the complaints and dismiss this proceeding, with prejudice, in accordance with the terms of the settlement agreement.

(3) If in good faith, after using its best efforts to implement and operate under the provisions of the agreements any party wishes to withdraw and cancel the agreement, as to that party only, it may do so upon 60 days written notice delivered by certified mail to all parties.

In our view the agreements here should be approved. In essence, the parties, rather than elect the long and costly legal process that might be

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The respondents named were Port of Anacortes; Port of Anchorage; Port of Astoria; Port of Bellingham; Benicia Port Terminal Co.; Port of Everett; Port of Greys Harbor; Hueneme, Port of Oxnard Harbor; Port of Long Beach; Port of Longview; Port of Los Angeles; Port of Oakland; Port of Olympia; Port of Port Angeles; Port of Portland; Port of Redwood City; Port of Richmond; Port of Sacramento; Port of San Diego; Port of San Francisco; Port of Seattle; Port of Stockton; Port of Tacoma; Port of Vancouver (Washington); Encinal Terminals; Bunge Grain Terminal; Cargill, Incorporated; Columbia Grain, Inc.; Continental Grain Company; Los Angeles Harbor Grain Terminal; Stockton Elevators; and United Grain Corporation.

[3] Petitions to Intervene were filed by Hearing Counsel; the Port of New Orleans; Galveston Wharves; and the Association of Shipbrokers and Agents. All the petitions were acted upon in various ways as disclosed in the record. Their disposition is not material to this Decision and Order.

involved,[4] have first chosen to be innovative by filing new tariffs. While there is no assurance that the provisions in the new tariffs will resolve all the issues involved, it is our view that if the parties approach the problems which might arise reasonably and in good faith, where they have control over each set of circumstances, the results may be much better than they would be under some inflexible, legal "rule of thumb." Whatever the ultimate result we compliment all the parties and their counsel in this proceeding for their effort in effecting a viable settlement of which we approve. Wherefore, it is,

Ordered, that the agreements entered into by the parties are hereby approved and, after final Commission approval, shall be implemented within the time periods set forth in the agreements themselves.[5] It is,

Further Ordered, that the record does not now indicate that there are either any issues remaining in this proceeding that need to be decided or that any party desires any further trial. Therefore, there is no need to set down a date for hearing. Should any party disagree, he is hereby ordered to file a trial brief no later than September 17, 1984, indicating the precise issue to be tried, the law upon which he relies, the number and identity of witnesses, the estimated time the trial will take, and any other matter he deems pertinent. If any further trial is necessary it will not affect or delay the approval of the settlements herein involved.

(S) JOSEPH N. INGOLIA
Administrative Law Judge

[4] At the time of settlement the parties to the proceeding had changed due to various circumstances. There were then twenty-six complainants and thirty-two respondents. Beaufort Navigation, Inc. and Overseas Shipping Company were added to the original complainants. Of the original respondents, Stockton Elevators is no longer in business under that name and has been taken over by one of the five remaining grain elevators who have agreed to this settlement. Los Angeles Harbor Grain Terminal never appeared in the proceeding and since the complainants will withdraw their complaint as to all respondents, their absence as a party in settlement is immaterial.

[5] Each of the agreements is made a part of this Initial Decision and Order Approving Settlement by reference. Copies of the agreements are attached to those copies of this Decision and Order which are being distributed to the Commission. Those copies of this Decision and Order which are being served on the parties do not have copies of the agreements attached since they are already in the possession of the parties and/or are part of the public record of this proceeding.

FEDERAL MARITIME COMMISSION

DOCKET NO. 84–14
FIL-AMERICAN TRADING CO., INC.

v.

THE MAERSK LINE STEAMSHIP COMPANY

NOTICE

October 17, 1984

Notice is given that no exceptions have been filed to the September 11, 1984, initial decision in this proceeding and the time within which the Commission could determine to review that decision has expired. No such determination has been made and accordingly, that decision has become administratively final.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

NO. 84–14

FIL-AMERICAN TRADING CO., INC.

v.

THE MAERSK LINE STEAMSHIP COMPANY

Complainant did not comply with the provisions of tariff Rule 36 of the Pacific Westbound Conference Local and Overland Freight Tariff No. FMC–23 so cannot take advantage of the tariff unitization allowance.

The Statute of Limitations set forth in section 22 of the Shipping Act, 1916, cannot and should not be waived.

Claims for damages with respect to shipments dated prior to March 26, 1982, unless payment of freight charges brings the claim into good standing, are barred by the two year statute of limitations of the Shipping Act, 1916.

Complainant's willingness to re-evaluate its claim as well as restate it comes too late. The litigation should come to an end.

Complainant cannot recover from respondent on the basis of a moral obligation—it is not recognized by the law as adequate to set in motion the machinery of justice.

Robert V. LoForti, President, Fil-American Trading Co., Inc., for Complainant.

Karen S. Ostrow and *Marc J. Fink,* Billig, Sher & Jones, P.C., for Respondent.

INITIAL DECISION[1] OF WILLIAM BEASLEY HARRIS, ADMINISTRATIVE LAW JUDGE

Finalized October 17, 1984

This complaint case was brought by the Fil-American Trading Co., Inc., against the Maersk Line Steamship Company alleging that the Fil-American Trading Co., Inc., has been subjected to the payment of rates for transportation by the respondent which were, when exacted, unjust and unreasonable in violation of section 18(b)(3) of the Shipping Act, 1916.

The complainant asserts the failure of Maersk Line to class shipments per the Unitized Rule during the period ending August 5, 1983, has resulted in overcharges. The complainant alleges that he has been damaged in the sum of $10,256.15 and seeks reparation of that sum or such other sum as the Commission may determine to be proper. He seeks also an order commanding the respondent to cease and desist from the alleged violations of the Act and to establish and put in force and apply in future such other rates as the Commission may determine to be lawful. In addition,

[1] This decision will become the decision of the Commission in the absence of review thereof by the Commission (Rule 227, Rules of Practice and Procedure, 46 CFR 502.227).

the complainant asks the Commission to waive the two-year Statute of Limitations.

Respondent, in its answer and affirmative defense to the complaint, filed May 14, 1984, denied the averments of the complaint, except admitted that it was subject to the Act and that the Unitized Rule was not applied, and pointed out the complainant had failed to attach the bills of lading.

BACKGROUND

The complaint in this case, on the stationery of Fil-American Trading Co., Inc., dated February 15, 1984, was received in the Office of the Secretary of this Commission on February 21, 1984. Under date of March 5, 1984, the Secretary sent the following:

Mr. Robert V. LoForti

> Returned herewith is your complaint against Maersk Line Steamship Company. The following defects are noted:
>
> (1) The complaint should be submitted in an original and 15 copies.
>
> (2) A $50.00 filing fee should accompany the complaint.
>
> (3) Many of the overcharge claims are clearly barred by the two-year statute of limitations; this limitation cannot be waived.
>
> In addition, it would be to your advantage to explain more fully the nature of the complaint. The mere allegation set forth in Paragraph IV does not fully outline the violation alleged against the carrier.

The complaint, with addendums to Paragraph IV, was received in the Office of the Secretary March 26, 1984. On April 9, 1984, the complaint was served upon the respondent Maersk Line Steamship Company. Notice of the filing of the complaint and assignment of the Presiding Administrative Law Judge was served April 11, 1984, published in the *Federal Register*, Vol. 49, No. 75, Tuesday, April 17, 1984, page 15134.

The Commission's Office of Energy and Environmental Impact, under date of April 24, 1984, issued a categorical exclusion for this Docket No. 84–14, having examined the subject proceedings and determined that no environmental analysis need be undertaken nor environmental documents prepared in connection with this docket.

Attorney Ostrow telephoned the Presiding Administrative Law Judge on April 24, 1984, and advised she had just been retained by respondent, wanted enlargement of time to answer complaint. She was directed to put request in writing.

On April 24, 1984, the respondent, through its counsel, filed a motion for an enlargement of time of three weeks from April 30, 1984 to May 21, 1984, in which to file its response to the complaint. By notice served April 25, 1984, the time for filing a response to the complaint was extended from April 30, 1984 to May 14, 1984.

Respondent Maersk Line's Answer and Affirmative Defense was filed May 14, 1984. At the same time the respondent filed a motion to dismiss the complaint for failure to state a claim upon which relief can be granted. Said motion was denied May 31, 1984, because the hearing which will be represented in writing had not been received and there was still the possibility of amendment of the pleadings.

By notice served May 15, 1984, a prehearing conference was announced pursuant to Rule 94 of the Commission's Rules of Practice and Procedure, 46 CFR 502.94 to be held on Tuesday, June 12, 1984, in Washington, D.C. In a letter dated May 23, 1984 (received May 29, 1984), the complainant stated, among other things, that regretfully, the company has neither the personnel nor the resources to permit attending either a prehearing conference or a formal hearing in Washington, and requested that any hearings be conducted in San Francisco. The prehearing conference scheduled for June 12, 1984, was cancelled by notice served May 31, 1984.

Upon review of the record herein up to above noted points, the Presiding Administrative Law Judge *found* and *concluded* and served notice May 31, 1984, that this proceeding can and should be conducted without oral testimony and cross-examination. The procedural schedule to be followed enunciated: Complainant's case to be submitted in writing on or before June 22, 1984; respondent to submit its case in opposition on or before July 16, 1984; the complainant to submit its closing brief on or before July 26, 1984.

Complainant telephoned the Presiding Administrative Law Judge on June 5, 1984, requesting an extension of time—he was directed that he put the request in writing.

In a letter dated June 5, 1984, the complainant requested a week's extension to June 29, 1984, to submit its case in writing.

Complainant's case in writing dated June 19, 1984, received June 20, 1984.

Respondent's attorney telephoned the President Administrative Law Judge on July 10, 1984, requesting extension of time to write brief. She was instructed to reduce the request to writing. Respondent, on July 10, 1984, filed a motion for enlargement of time of two weeks, from July 16 to July 30, 1984, in which to reply to complainant's reply to respondent's motion to dismiss. This motion was denied as the respondent's motion to dismiss had been denied by notice served May 31, 1984 (reiterated in notice served July 11, 1984). In the notice served July 11, 1984, each party was granted additional time because of apparent misunderstanding, as follows: Respondent to submit its case in opposition to complainant's case on or before July 23, 1984; complainant to submit its closing brief on or before August 3, 1984.

In a letter dated July 16, 1984 (received July 19, 1984), the complainant wrote among other things, he did not understand "closing brief." Answer

to this procedural query was supplied by the Presiding Administrative Law Judge served July 20, 1984.

Respondent filed Opposition to Complainant's Claim for Overcharges July 23, 1984.

Complainant in a letter dated July 26, 1984 (received July 30, 1984), made its last pleading in the case, stating, among other things, "Fil-American Trading Co., Inc., readily concedes that the Bills of Lading submitted in support of our claim were not prepared properly for (the then) application of the Unitized Rule. This was error."

The July 26, 1984, letter of complainant also stated, "This is a restatement of our case, and we again call to your attention that we deem Maersk Line morally responsible to have discovered this error, rather than ourselves."

From exhibits, together with all papers and requests filed in this proceeding, the Presiding Administrative Law Judge finds the following:

Facts

The complaint is an exporter of books and magazines from San Francisco, California, to Bangkok, Thailand.

The respondent is a common carrier by water, engaged in transportation between San Francisco and Bangkok, and as such is subject to the provisions of the Shipping Act, 1916, as amended (admitted by respondent in its answer to the complaint).

The Conference's Unitized Rule was not applied. (Complaint and Answer to Complaint; Complainant wrote in his letter of July 26, 1984 "Fil-American Trading Co., Inc. readily concedes that the Bills of Lading submitted in support of our claim were not prepared properly for (the then) application of the Unitized Rule.")

Discussion, Reasons, Findings and Conclusions

The complaint filed in this case contains a prayer that the Commission will waive the two-year State of Limitations. The respondent in its Answer denied that the Statute of Limitations set forth in section 22 of the Shipping Act, 1916, can or should be waived. And, respondent added as an affirmative defense the complaint is barred by the Statute of Limitations set forth in section 22 of the Shipping Act, 1916.

Respondent's opposition to claim for overcharges (received July 23, 1984) points out that the complaint herein was filed March 26, 1984. Accordingly, any claim for damages with respect to shipments dated prior to March 26, 1982, is barred and must be denied. (The Presiding Judge adds, unless payments is later and precludes the tolling of the statute.) In support of its position the respondent cites *Fiat-Allis France Materiels* v. *Atlantic Container Line,* Docket No. 79–64, 22 F.M.C. 544 (1980), which states that under the Shipping Act, 1916, the statute of limitations is "jurisdic-

tional." Failure to comply with section 22 leaves the Commission without power to order a respondent to pay reparation. And, to show the statute of limitations is tolled only by a filing of the complaint with the Commission, cites *Kelco, Division of Merck & Co.* v. *Johnson ScanStar,* Docket No. 80–73, 23 F.M.C. 849 (1981).

The complainant, other than making the prayer in the complaint that the Commission waive the two-year statute of limitations set forth in section 22 of the Shipping Act, 1916, apparently has accepted that the prayer cannot be granted. The Presiding Administrative Law Judge agrees with and accepts the position of the respondent. Any shipments not paid for subsequent to March 26, 1982, are barred by the statute of limitations under the two-year statute of limitations of the Shipping act, 1916.

Among matters stated in the complainant's letter of June 19, 1984, is, "Enclosed please find copies of all the bills of lading applicable to our complaint against Maersk Line. Each one bears our notation of payment, by date and check number."

The bills of lading submitted with the June 19, 1984, letter total 103.

The latter also says, "All of these bills of lading are listed by date and number on a separate sheet, noting the quantity of skids. These are then regrouped by date, at prevailing rates, with the applicable quantity of skids, multiplied by .189M3, and then totaled. This constitutes the overcharge . . . In order to prove our claim, we are submitting 2 examples of bills of lading, after corrections had been made . . . we are attempting to offer proof of our claim, by contrasting overcharged bills of lading with one referring to the unitized rule.

Respondent in its opposition to claim for overcharges filed July 23, 1984, argues that the complainant has submitted two bills of lading which pertain to shipments subsequent to the period for which it is claiming overcharges. Since the unitization allowance was applied to those shipments, Fil-American apparently believes that these documents support its claim. The complainant is clearly mistaken in this regard however. Indeed those bills prove that no unitization allowance should be applied to the shipments herein at issue.

Respondent says further, in order to take advantage of the unitization allowance (or discount) a shipper is obligated to comply with the provisions of Tariff Rule 36 of the Pacific Westbound Conference Local and Overland Freight Tariff No. FMC–23; that Fil-American did not comply with the provisions of Rule 36.

The respondent further asserts, even if Rule 36 did not preclude recovery herein, it is quite clear that Fil-American has erroneously calculated any alleged overcharges, pointing out that Rule 36.5 provides that the actual weight or measurement of the pallet (as defined in this Rule) shall be excluded when computing freight charges and terminal receiving charges, but such exclusion shall not exceed ten percent (10%) of the total gross weight (when cargo is freighted on a weight basis) or the total gross

measurement of the unit (when cargo is freighted on a measurement basis). Fil-American totally disregarded this 10% cap in calculating its claim for overcharges.

As examples, the respondent referred to Bills of Lading Nos.:

	No. of skids	10% of Total Meas.	No. of Skids x .189
SFO–F–60930 dated July 8, 1983	2	.2469	.378
SFO–F–61401 dated July 15, 1983	2	.2710	.378
SFO–F–62051 dated July 30, 1983	2	.2993	.378

Respondent says that in all three instances, the measurement of the pallets in the shipment (2 pallets x .189 = .378) exceeds 10% of the measurement of the shipment. Pursuant to Rule 36.5 the allowance in each of those instances would be limited to that 10% cap. Thus, says the respondent, the complainant has grossly misstated the amount of any overcharges.

Fil-American in its July 26, 1984, letter states it is willing and able to re-evaluate the claim; and also readily concedes that the Bills of Lading submitted in support of its claim were not prepared properly for (the then) application of the Unitized Rule. This was error.

Complainant is too late to make further amendments to its complaint or restate its case. It cannot be allowed because it would be unfair to the respondent and would ignore that litigation after a reasonable time should be completed. That is the situation here. The Presiding Administrative Law Judge, upon review of Rule 36 of Tariff No. FMC–23 and the record herein *finds* and *concludes* that the respondent's position is well taken and adopts it.

In an addendum to Paragraph IV of the complaint the complainant wrote, "It is presumed that an established and experienced carrier, such as Maersk Line, was aware that shipments were being delivered incorrectly classed, and therefore had the obligation to cause corrections to be instituted. This was not done. This failure on the part of Maersk Line is the direct cause of the overcharges, payments for which, Maersk Line accepted right along."

Fil-American claimed in its letter of June 19, 1984, "This company has been a loyal client of Maersk Line for over thirty years, and has delivered skids for shipment in proper form for application of the unitized rule for many years . . . Maersk Line is under as much obligation to correct overcharges as undercharges. We find it difficult to envision that the line would accept a bill of lading with the application of the unitized rule, if the skids were not in proper condition." And, in its letter of July 26, 1984, the complainant submitted that, ". . . Maersk Line accepted the incorrectly classed skids over a long period of time without initiating any corrective or suggestive measures . . . We deem Maersk Line morally responsible to have discovered this error, rather than ourselves."

The 103 bills of lading submitted by the complainant contain the name of the forwarding agent, and on each bill of lading the forwarding agent is the same. Query, does the claimant deem that forwarding agent to have any responsibility or as much responsibility as complainant would place on the respondent in such a situation as here presented?

A moral obligation has been defined as a duty which one owes, and which he ought to perform, but which he is not legally bound to fulfill. *Black's Law Dictionary* defines moral obligation as "a duty which is valid and binding in conscience and according to natural justice, but is not recognized by the law as adequate to set in motion the machinery of justice; that is, one which rests upon ethical considerations alone, and is not imposed or enforced by positive law. A duty which would be enforceable by law, were it not for some positive rule, which, with a view to general benefit, exempts the party in that particular instance from legal liability." Thus, it is clear that the complainant cannot be served by the claim of moral obligation.

Fil-American in its July 26, 1984 letter announced it is willing and able to re-evaluate the claim applying 10% reduction or reduction on the basis of .189M3 as pertinent. And, called its July 26, 1984 letter a restatement of its case. However, it did not change its basic case. Today, amendments to complaints are rather freely permitted. Complainant did amend the complaint once, but further amendment under the circumstances is not to be entertained.

Upon consideration of the above and the record herein, the Presiding Administrative Law Judge *finds* and *concludes*, in addition to the *findings* and *conclusions* hereinabove, that the complainant has not proved by a preponderence of the evidence that he should recover in this case.

Wherefore, it is *ordered*:

(A) Recovery is denied.

(B) Proceeding is discontinued.

(S) WILLIAM BEASLEY HARRIS
Administrative Law Judge

FEDERAL MARITIME COMMISSION

DOCKET NO. 83–50

JACKSONVILLE MARITIME ASSOCIATION, INC., AMOCO TRANSPORT COMPANY, AND McGIFFIN & COMPANY, INC.

v.

THE CITY OF JACKSONVILLE

ORDER DISMISSING COMPLAINT

October 31, 1984

By complaint filed against the City of Jacksonville, Florida (Respondent), Jacksonville Maritime Association, Inc., Amoco Transport Company, and McGiffin & Company, Inc. (Complainants) alleged that the establishment of an ordinance providing for a "User Fee" on vessels anchored in storage on the Saint John's River and the assessment of that Fee on five tankers laid up in storage in the Saint John's River violated section 17 of the Shipping Act, 1916 (the Act), 46 U.S.C. §816.[1] The Commission's Bureau of Hearing Counsel, Delta Steamship Lines, Inc., Trailer Marine Transport Corporation, and Crowley Towing and Transportation Co., intervened in the proceeding.

Administrative Law Judge Charles E. Morgan issued an Initial Decision in which he dismissed the complaint with respect to the five tankers, but retained jurisdiction over the Respondent under sections 1 and 17 of the Act until Respondent amended its "User Fee" ordinance to preclude its application on common carriers by water anchored in the river while engaged in the transportation of property.

The proceeding is before the Commission on Exceptions of Hearing Counsel.

BACKGROUND

Five tankers, the AMOCO MILFORD HAVEN—owned by Complainant Amoco Transport Company, Inc., the OLYMPIC GATE, the OLYMPIC GAMES, the OLYMPIC GRACE, and the OLYMPIC DESTINY—the owners of which were represented by Complainant McGiffin & Company, were

[1] Section 17 provides in relevant part that:

> [E]very other person subject to this Act shall establish, observe, and enforce just and reasonable regulations and practices relating to or connected with the receiving, handling, storing, or delivering of property . . . . 46 U.S.C. §816.

The Shipping Act of 1984 (46 U.S.C. app. §1701) generally superseded the Shipping Act, 1916 (46 U.S.C. §801), as it applies to the ocean foreign commerce. Section 10(d)(1) of the 1984 Act (46 U.S.C. app. §1709(d)(1)) contains substantially the same provisions as section 17 of the 1916 Act.

anchored and resting on the bottom in ballast in the Saint John's River from about December 3, 1981 through December 15, 1983.

In May 1982, Respondent enacted an ordinance providing for the assessment of a "User Fee" on vessels of more than 100 feet primarily used for the transportation of goods and passengers, anchored in storage in the Saint John's River for more than 48 hours. Excluded are ships anchored for repairs or being repaired at a shipyard. The fee amounts to fifty cents per foot per day with a maximum charge of two hundred and fifty dollars per day. A fine of five hundred dollars per day is provided for non-payment after collection is attempted.[2] Respondent collected approximately five hundred thousand dollars in User Fees from the owners of the five tankers in question.

The Jacksonville Maritime Association, Inc., and others challenged the reasonableness of the ordinance in a civil action filed in the United States District Court for the Middle District of Florida. The Court deferred the matter to the primary jurisdiction of the Commission and dismissed the case without prejudice.[3] Thereupon, on October 13, 1983, Complainants filed their complaint with the Commission.

DISCUSSION

The threshold issue to be determined in this proceeding is whether Respondent, the City of Jacksonville, through its "User Fee" ordinance, is furnishing terminal facilities to common carriers by water so as to be subject to regulation as an "other person" subject to the Act within the meaning of section 1 thereof. Section 1 defines the term "other person" as "any person not included in the term 'common carrier by water,' carrying on the business of . . . furnishing . . . terminal facilities in connection with a common carrier by water." 46 U.S.C. § 801.

No party to this proceeding argues that anchorage in the river is of itself a terminal operation, or that the lay-up of vessels in the river is the form of storage recognized to be a terminal facility.[4] The Commission has by rule defined a "terminal facility" as:

> . . . one or more structures comprising a terminal unit, and include . . . wharves, warehouses, covered and/or open storage-spaces, cold storage plants, grain elevators and/or bulk cargo loading and/or unloading structures, landings, and receiving stations, used for

[2] Ordinance No. 82–419–162 amending Chapter 310, Ordinance Code of the City of Jacksonville, effective May 19, 1982.

[3] *Jacksonville Maritime Association, Inc., et al. v. City of Jacksonville*, 551 F.Supp. 1130 (M.D. Fla. 1982). Complainants also filed suit in the Circuit Court of Duval County, Florida, challenging the ordinance as an invalid tax under the laws of the State of Florida.

[4] Furnishing of warehouse "or other terminal facility" has been described as:

> [receipt of] custody of property from a common carrier by water or its agent after unloading at a dock or pier, and keeping custody thereof within the geographic confines of an ocean terminal facility, such as a warehouse adjacent to the dock or pier, until custody of the property is relinquished to an inland carrier or to the consignee. *Investigation of Storage Practices*, 6 F.M.B. 301 at 313–314. (1961).

> the transmission, care and convenience of cargo and/or passengers in the interchange of the same between land and water carriers or between two water carriers. 46 C.F.R. § 515.6.[5]

The Presiding Officer based his finding of jurisdiction over the Respondent on the premise that the language of the ordinance was susceptible of being interpreted to include common carriers by water anchored in the river in the regular course of their business of receiving or delivering property at terminal facilities. This conclusion was reached by a strict construction of the ordinance requiring that any ambiguity be construed against the drafter.

However, the ordinance appears to be more specific than given credit by the Presiding Officer. Although it does not specifically exclude from its coverage common carriers anchored in the river while awaiting servicing at a terminal facility, the User Fee is applicable not to every vessel anchored in the river for more than 48 hours but only those "anchored in storage." Unless the plain meaning produces unreasonable results, ordinary words ought to be given their conventional meaning, especially when such interpretation reflects the stated purpose of the statute or ordinance involved. In its ordinary meaning the term "anchored in storage" refers to vessels laid-up and out of navigation rather than to ships actively engaged in the transportation of property. This interpretation reflects the stated purpose of the ordinance here, that is, discouraging the laying-up of vessels in storage in the Saint John's River.

Moreover, there also is no evidence showing that Respondent used the ordinance as a means of controlling access to terminal facilities. Intervenors Delta Steamship Lines, Inc., Trailer Marine Transport Corporation, and Crowley Towing and Transportation Co. concede that none of their vessels which called at the Port of Jacksonville was assessed the User Fee. Further, it is noted that the penalty for failure to pay the "User Fee" is a fine, and not a prohibition against the use of the port's terminal facilities.[6] This would distinguish the "User Fee" here from the matter at issue in *Louis Dreyfus Corp. v. Plaquemines Port, Harbor and Terminal District*, 25 F.M.C. 59 (1982), a decision relied upon by both Complainants and Intervenors.[7]

Therefore, there is no evidence to support a conclusion that Respondent is furnishing terminal facilities in connection with common carriers by water engaged in the transportation of property within the meaning of section 1 of the Act, and, consequently, no basis on this record for asserting

[5] *See also* 46 C.F.R. 572.104(o).

[6] The authority to collect the fee is conferred upon the City of Jacksonville's Parking Officer, rather than upon the Jacksonville Port Authority.

[7] In the *Louis Dreyfus Corp.* decision, the Commission held that an entity which conditions access to terminal facilities upon the payment of a fee is itself deemed to be furnishing terminal facilities.

jurisdiction over the City of Jacksonville.[8] The complaint in this proceeding will therefore be dismissed for lack of jurisdiction.

THEREFORE, IT IS ORDERED, That the complaint filed in this proceeding is dismissed.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

[8] Subsequent to the Commission's meeting of October 3, 1984 in this matter, the City of Jacksonville by letter dated October 2, 1984, submitted a copy of Ordinance 84-994-503 which makes the User Fee inapplicable to common carriers "engaged in the normal course of business of receiving or delivering commercial cargoes at terminal facilities of the Port of Jacksonville." This removes any doubt as to the present intended scope of Respondent's "User Fee" ordinance.

FEDERAL MARITIME COMMISSION

[46 CFR PARTS 500–505]

DOCKET NO. 84–20 FOR PART 505

FINAL RULES IN SUBCHAPTER A GENERAL AND ADMINISTRATIVE PROVISIONS

November 5, 1984

ACTION: Final Rules.

SUMMARY: The Federal Maritime Commission is making substantive changes to its standards of conduct for employees in Part 500 and in section 502.32 and purely technical, non-substantive changes to the rest of Subchapter A involving general and administrative rules of the agency. The parts affected by this rulemaking are Part 500 [Employee Responsibilities and Conduct]; Part 501 [Official Seal]; Part 502 [Rules of Practice and Procedure]; Part 503 [Public Information]; Part 504 [Procedures for Environmental Policy Analysis]; and Part 505 [Compromise, Assessment and Settlement of Civil Penalties]. The new Part 505 finalizes a previously published proposed rule. Except for Part 507, a new proposed rule involving handicapped persons employed by the agency, and which will not become final until 1985, the revision of all of Subchapter A is now completed.

DATE: Effective December 6, 1984.

SUPPLEMENTARY INFORMATION:

Revisions to all of Subchapter A were previously made by publication of a final rule on April 23, 1984 [49 FR 16994] and a proposed rule completely revising Part 505 [compromise of penalties] was published on May 3, 1984 [49 FR 18874] with a correction on June 1, 1984 [49 FR 22837].

In addition to making necessary, substantive changes to Part 500 [standards of conduct], as well as to parallel provisions in section 502.32, and finalizing the proposed rule on Part 505, a further review of all regulations in conjunction with the passage of the Shipping Act of 1984 on March 20, 1984, has revealed the necessity for further technical changes. These rules, therefore, finalize all of subchapter A under the revision program, i.e., Parts 500–505, inclusive, and are being set forth here in their entirety. [New Part 507, now a proposed rule dealing with handicapped employees, will become final in 1985.]

Accordingly, extensive changes in form beyond those made in the previous final rules are being made to improve style, readability and understandability. No changes in substance, however, are included, except in Part 500 and its counterpart in section 502.32. Because most of the parts affected involve purely internal agency matters and/or the changes are merely technical or stylistic, the rules are promulgated as final, without the need for comments, although their effective date will be 30 days after publication in the *Federal Register*.

The technical and style changes to all the rules reflect changes in nomenclature and Commission organization, correction of typographical errors and removal of superfluous verbiage. Outdated and obsolete provisions have also been deleted. To assist the user, various subdivisions of sections have been restructured and renumbered to facilitate citation. Also changed, where feasible, are citations to other laws required by recodifications and other statutory changes; references to the obsolete General Order system; "Provided, howevers"; and gender specific terms.

A part-by-part analysis of other changes follows:

PART 500

EMPLOYEE RESPONSIBILITIES AND CONDUCT

The revisions to Part 500 are being made in order to clarify the Commission's general Standards of Conduct. Prior to this revision, the Commission's regulations reflected almost word for word the language used in President Johnson's Executive Order 11222 of May 8, 1965 and the implementing regulations of the Office of Personnel Management at 5 CFR Part 735. The precise application of some of these regulations to the Commission has not always been clear. Thus, this revision constitutes a clarification of existing policy, and, in some respects, substantive changes. It also implements certain requirements of the Ethics in Government Act.

The revisions of Part 500 are deemed necessary in order to ensure the integrity of the agency and its individual employees, to conform to the spirit of the Executive Order, and to provide maximum guidance to Commission employees.

PART 501

OFFICIAL SEAL OF THE FEDERAL MARITIME COMMISSION

The only changes made to this part are statutory citations to reflect changes in law.

PART 502

RULES OF PRACTICE AND PROCEDURE

The major changes to this part reflect the changes to Part 500 involving practice by former Commission employees before the F.M.C. in section 502.32 which tracks the new restrictions in section 500.12, as well as

structural changes to, among others, Subparts S and T, to accommodate the policy of the Shipping Act of 1984 to allow claims or complaints against any person who may have violated the provisions of the new statute.

Otherwise, changes to this part clarify existing regulations, as well as, reflect new provisions of the Shipping Act of 1984 and style and technical changes referred to above. Some forms have been revised to reflect some of the changes in procedure occasioned by the Shipping Act of 1984.

PART 503

PUBLIC INFORMATION

In addition to style and technical changes described above, section 503.91, containing a table of OMB control numbers under the Paperwork Reduction Act for all parts in Chapter IV, is being deleted because such numbers will now appear in the final section for each, individual part affected.

PART 504 [PREVIOUSLY PART 547]

PROCEDURES FOR ENVIRONMENTAL POLICY ANALYSIS

In this part, no changes other than technical and style changes described above are being made.

PART 505

COMPROMISE, ASSESSMENT, SETTLEMENT AND COLLECTION OF CIVIL PENALTIES

This part was the subject of proposed rulemaking in Docket No. 84–20, published in the *Federal Register* on May 3, 1984 (49 FR 18874) with comments invited. The only comment received was from the National Maritime Council which stated that the proposed rule, if finalized, "* * * should allow a more expeditious and fair handling of penalty claims." Accordingly, no substantive changes are being made. A note has been added at the end of the rule indicating that the part is not subject to review by the Office of Management and Budget under the Paperwork Reduction Act.

The Federal Maritime Commission has determined that these rules are not "major rules" as defined in Executive Order 12291 dated February 17, 1981, because none of them will 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 Chairman of the Federal Maritime Commission certifies that none of these rules will have a significant economic impact on a substantial number of small entities, including small businesses, small organizational units and small governmental jurisdictions.

List of subjects in Subchapter A, "General and Administrative Provisions":

46 CFR Part 500
Conduct standards; Government employees.

46 CFR Part 501
Seals and insignias.

46 CFR Part 502
Administrative practice and procedure; Reporting and recordkeeping requirements.

46 CFR Part 503
Classified information; Freedom of Information; Privacy; Sunshine Act.

46 CFR Part 504
Energy conservation; Environmental protection; Reporting and recordkeeping requirements.

46 CFR Part 505
Fines and penalties.

CORRECTIONS

These final rules are subject to review and editing of form before publication in the Code of Federal Regulations. Users are requested to notify the Commission of any omissions and typographical-type errors in order that corrections can be made before the Commission's CFR book goes to press in January, 1985.

Therefore, for the reasons discussed in the preamble and pursuant to the authority set forth in the Authority Citation for each part, Title 46, Code of Federal Regulations, Parts 500, 501, 502, 503, 504 and 505 are revised to read as follows:

FEDERAL MARITIME COMMISSION

[46 CFR PART 500]

EMPLOYEE RESPONSIBILITIES AND CONDUCT

SUBPART A—GENERAL PROVISIONS

SUBPART B—GENERAL STANDARDS OF CONDUCT

SUBPART C—SPECIAL GOVERNMENT EMPLOYEES STANDARDS OF CONDUCT

SUBPART D—STATEMENTS OF EMPLOYMENT AND FINANCIAL INTERESTS; EXECUTIVE PERSONNEL FINANCIAL DISCLOSURE REPORTS

Sec.

AUTHORITY: 46 U.S.C. app. 1111; 18 U.S.C. 207, 208; 5 CFR Part 735; E.O. 11222 of May 8, 1965, 30 FR 6469, (3 CFR, 1965 Supp.).

SUBPART A—GENERAL PROVISIONS

§ 500.101 Purpose.

The maintenance of unusually high standards of honesty, integrity, impartiality, and conduct by Government employees and special Government employees is essential to assure the proper performance of the Government business and the maintenance of confidence by citizens in their Government. The avoidance of misconduct and conflicts of interest on the part of Government employees and special Government employees through informed judgment is indispensable to the maintenance of these standards. Reorganization Plan No. 7 of 1961, which established the Federal Maritime Commission, and section 201(b) of the Merchant Marine Act of 1936 (46 U.S.C. app. 1111(b)), provide that officials or employees of the Commission are prohibited from employment with, or to have any pecuniary interest in, or hold any official relationship with, carriers by water, shipbuilder contractors, or other persons, firms, associations or corporations with whom the Commission may have business relations. The following sections of this part are in accordance with the requirements of the Office of Personnel Management's regulations (5 CFR Part 735) under Executive Order 11222, dated May 8, 1965.

§ 500.102 Definitions.

For the purposes of this part:

(a) "*Commission*" means the Federal Maritime Commission unless otherwise designated.

(b) "*Employee*" means an employee of the Commission but does not include a special Government employee.

(c) "*Executive Order*" means Executive Order 11222 of May 8, 1965.

(d) "*OPM*" means the United States Office of Personnel Management.

(e) "*Person*" means an individual, a corporation, a company, an association, a firm, a partnership, a society, a joint stock company, a foreign government or any other organization or institution.

(f) "*Special Government employee*" means a "special Government employee" as defined in section 202 of Title 18, United States Code, who is employed in the executive branch, but does not include a member of the uniformed services as defined in section 2101 of Title 5, United States Code.

§ 500.103 [Reserved.]

§ 500.104 [Reserved.]

§ 500.105 Interpretation and advisory service.

(a) The Chairman of the Commission shall designate an employee with the appropriate legal experience and in whom he or she has complete personal confidence to be the Counselor for the Commission on matters in connection with the regulations in this part. The Counselor shall also serve as the Commission's designee to OPM on matters covered by the regulations in this part. The Counselor shall exercise responsibility for effectuation and coordination of the Commission's regulations and provide counseling and interpretations on questions of conflicts of interest and other matters covered by the regulations in this part.

(b) The Chairman of the Commission shall designate one or more Deputy Counselors who shall be qualified and in a position to give authoritative advice and guidance on questions of conflicts of interest and on other matters covered by this part.

(c) Employees and special Government employees shall be notified of the availability of counseling services and of how and where these services are available. This notification shall be made within ninety (90) days after approval of the regulations in this part and periodically thereafter. In the case of a new employee or special Government employee appointed after this notification, notification shall be made at the time of his or her entrance on duty.

§ 500.106 Reviewing statements and reporting conflicts of interest.

(a) There is hereby established a system for the review of Statements of Employment and Financial Interests, Annual Statements, and Executive Personnel Financial Disclosure Reports submitted under Subpart D of this part. This system of review is designed to disclose conflicts of interest or apparent conflicts of interest on the part of employees or special Government employees.

(b) The Counselor or Deputy Counselor shall review each such Statement and Report. Whenever it appears to the Counselor that a Statement or Report contains evidence of a conflict of interest, he or she shall notify the person signing that statement and shall discuss with him or her the information which gives rise to the apparent or real conflict and offer him or her an opportunity to explain the conflict or appearance of conflict. If the conflict or appearance of conflict is not resolved after this discussion, the information concerning the conflict or appearance of conflict shall be reported to the Chairman of the Commission by the Counselor.

§ 500.107 Disciplinary and other remedial action.

(a) A violation of the regulations in this part by an employee or special Government employee may be cause for an appropriate disciplinary action which may be in addition to any penalty prescribed by law.

(b) If after consideration of the explanation of the employee as provided in § 500.106, and the Chairman decides that remedial action is required, the Chairman shall take immediate action to end the conflicts or appearance of conflicts of interest. Remedial action, whether disciplinary or otherwise, shall be effected in accordance with any applicable laws, executive orders, and regulations and may include, but is not limited to:

(1) Changes in assigned duties;

(2) Divestment by the employee or special Government employee of his or her conflicting interest;

(3) Disciplinary action; or

(4) Disqualification for a particular assignment.

§ 500.108 Conflicts of interest.

A Commission employee's or special Government employee's financial or pecuniary interest in an entity regulated by the Commission [such as, e.g., ocean common carriers, ocean freight forwarders and marine terminal operators (including their parent companies)], shall be deemed to create a conflict of interest. A Commission employee or special Government employee shall also be deemed to have a conflict of interest if a member of his or her immediate household is employed by an entity regulated by the Commission and his or her professional duties or assignments relate to or involve that family member's employer.

§ 500.109 Rereading the Standards of Conduct.

It is the responsibility of every Commission employee and special Government employee to become familiar with the Commission's Standards of Conduct and to reread them at least once a year.

SUBPART B—GENERAL STANDARDS OF CONDUCT

§ 500.201 Proscribed actions.

An employee shall avoid any action, whether or not specifically prohibited by this subpart, which might result in, or create the appearance of:

(a) Using public office for private gain;

(b) Giving preferential treatment to any person;
(c) Impeding Government efficiency or economy;
(d) Losing complete independence or impartiality;
(e) Making a Government decision outside official channels; or
(f) Affecting adversely the confidence of the public in the integrity of the Government.

§ 500.202 Gifts, entertainment, and favors.

(a) Except as provided in paragraphs (b) and (e) of this section, an employee shall not solicit or accept, directly or indirectly, any gift, gratuity, favor, entertainment, loan, or any other thing of monetary value, from a person who:

(1) Has, or is seeking to obtain, contractual or other business or financial relations with the Commission;

(2) Conducts operations or activities that are regulated by the Commission; or

(3) Has interests that may be substantially affected by the performance or nonperformance of the employee's official duty.

(b) Exceptions to paragraph (a) of this section are as follows:

(1) This section shall not be construed to proscribe conduct involving obvious family or personal relationships (such as those between the parents, children, or spouse of the employee and the employee) when the circumstances make it clear that it is those relationships rather than the business of the persons concerned which are the motivating factors.

(2) Under this section, Commission employees are permitted to accept food and refreshments of nominal value on infrequent occasions in the ordinary course of a luncheon or dinner meeting or other meeting or on an inspection tour where an employee may properly be in attendance.

(3) Under this section, employees are permitted to accept loans from banks or other financial institutions on customary terms to finance proper and usual activities of employees, such as home mortgage loans.

(4) Under this section employees shall be permitted to accept unsolicited advertising or promotional material, such as pens, pencils, note pads, calendars and other items of nominal intrinsic value.

(c) An employee shall not solicit contributions from another employee for a gift to an official superior, make a donation as a gift to an official supervisor, or accept a gift from an employee receiving less pay than himself or herself (5 U.S.C. 7351), except that this paragraph does not prohibit the use of a completely voluntary gift of nominal value or donation in a nominal amount made on a special occasion such as marriage, illness, or retirement.

(d) An employee shall not accept a gift, present, decoration, or other thing from a foreign government unless authorized by Congress as provided by the Constitution and by section 7342 of Title 5, United States Code.

(e) Neither this section or § 500.203 precludes an employee from receipt of bona fide reimbursement, unless prohibited by law, for expenses of

travel and such other necessary subsistence as is compatible with this part for which no Government payment or reimbursement is made. However, this paragraph does not allow an employee to be reimbursed, or payment to be made on his behalf, for excessive personal living expenses, gifts, entertainment or other personal benefits, nor does it allow an employee to be reimbursed by a person for travel on official business under agency orders when reimbursement is proscribed by Decision B–128527 of the Comptroller General, dated March 7, 1967 (46 Comp. Gen. 689).

§ 500.203 Outside employment and other activity.

(a) An employee shall not engage in outside employment or other outside activity not compatible with the full and proper discharge of the duties and responsibilities of his or her Government employment. Incompatible activities include but are not limited to:

(1) Acceptance of a fee, compensation, gift, payment of expenses, or any other thing of monetary value in circumstances in which acceptance may result in, or create the appearance of, conflicts of interest; or

(2) Outside employment which tends to impair the employee's mental or physical capacity to perform his or her Government duties and responsibilities in an acceptable manner.

(b) An employee shall not receive any salary or anything of monetary value from a private source as compensation for his or her services to the Government (18 U.S.C. 209). This paragraph does not apply to special Government employees.

(c) Employees are encouraged to engage in teaching, lecturing, and writing that is not prohibited by law, the Executive Order, or the regulations in this part. However, an employee shall not, either for or without compensation, engage in teaching, lecturing, and writing (including teaching, lecturing, or writing for the purpose of the special preparation of a person or class of persons for an examination of OPM or Board of Examiners for the Foreign Service), that is dependent on information obtained as a result of the employee's Government employment, except when that information has been made available to the general public or will be made available on request, or when the Chairman gives written authorization for the use of nonpublic information on the basis that the use is in the public interest. In addition, an employee who is a Presidential appointee covered by section 401(a) of the Executive Order shall not receive compensation or anything of monetary value for any consultation, lecture, discussion, writing, or appearance, the subject matter of which is devoted substantially to the responsibilities, programs, or operations of the Commission, or which draws substantially on official data or ideas which have not become part of the body of public information.

(d) [Reserved]

(e) This section does not preclude an employee from:

(1) Participation in the activities of national or State political parties not proscribed by law; or

(2) Participation in the affairs of or acceptance of an award for a meritorious public contribution or achievement given by a charitable, religious, professional, social, fraternal, nonprofit educational and recreational, public service, or civic organization.

§ 500.204 Financial interests.

(a) An employee shall not:

(1) Have a direct or indirect financial interest in an entity regulated by the Commission as set forth in § 500.108;

(2) Have a direct or indirect financial interest that conflicts substantially, or appears to conflict substantially, with his or her Government duties and responsibilities; or

(3) Engage in, directly or indirectly, a financial transaction as a result of, or primarily relying on, information obtained through his or her Government employment.

(b) This section does not preclude an employee from having a financial interest or engaging in financial transactions to the same extent as a private citizen not employed by the Government, so long as it is not prohibited by law, the Executive Order, the regulations contained in 5 CFR Part 735, or the regulations in this part.

§ 500.205 Use of Government property.

An employee shall not directly or indirectly use, or allow the use of, Government property of any kind, including property leased to the Government, for other than officially approved activities. An employee has a positive duty to protect and conserve Government property, including equipment, supplies, and other property entrusted or issued to him or her.

§ 500.206 Misuse of information.

For the purpose of furthering a private interest, an employee shall not, except as provided in § 500.203(c), directly or indirectly use, or allow the use of, official information obtained through or in connection with his or her Government employment which has not been made available to the general public.

§ 500.207 Indebtedness.

An employee shall pay each just financial obligation in a proper and timely manner, especially one imposed by law such as Federal, State, or local taxes. For the purpose of this section, a "just financial obligation" means one acknowledged by the employee, or reduced to judgment by a court, or one imposed by law, such as Federal, State or local taxes; and "in a proper and timely manner" means in a manner which the Commission determines does not, under the circumstances, reflect adversely on the Government as his or her employer. In the event of dispute between an employee and an alleged creditor, this section does not require the Commission to determine the validity or amount of the disputed debt.

§ 500.208 Gambling, betting, and lotteries.

An employee shall not participate, while on Government-owned or leased property or while on duty for the Government, in any gambling activity including the operation of a gambling device, in conducting a lottery or pool, in a game for money or property, or in selling or purchasing a numbers slip or ticket. However, this section does not preclude activities:

(a) Necessitated by an employee's law enforcement duties; or

(b) Under section 3 of Executive Order 10927 or similar Commission approved activities.

§ 500.209 General conduct prejudicial to the Government.

An employee shall not engage in criminal, infamous, dishonest, immoral, or notoriously disgraceful conduct, or other conduct prejudicial to the Government.

§ 500.210 Miscellaneous statutory provisions.

Each employee shall acquaint himself or herself with each statute that relates to his or her ethical and other conduct as an employee of this Commission and of the Government. The attention of Commission employees, is directed to the outside employment restriction in 46 U.S.C. app. 1111(b) and the following statutory provisions relating to ethical and other conduct.

(a) House Concurrent Resolution 175, 85th Congress, 2d Session, 72A Stat. B12 "Code of Ethics for Government Service."

(b) Chapter 11 of title 18, United States Code, relating to bribery, graft, and conflicts of interest, as appropriate to the employees concerned.

(c) The prohibition against lobbying with appropriated funds (18 U.S.C. 1913).

(d) The prohibitions against disloyalty and striking (5 U.S.C. 7311, 18 U.S.C. 1918).

(e) The prohibition against the employment of a member of a Communist organization (50 U.S.C. 784).

(f) The prohibition against (1) the disclosure of classified information (18 U.S.C. 798, 50 U.S.C. 783); and (2) the disclosure of confidential information (18 U.S.C. 1905).

(g) The provision relating to the habitual use of intoxicants to excess (5 U.S.C. 7352).

(h) The prohibition against the misuse of a Government vehicle (31 U.S.C. 638a(c)).

(i) The prohibition against the misuse of the franking privilege (18 U.S.C. 1719).

(j) The prohibition against the use of deceit in an examination or personnel action in connection with Government employment (18 U.S.C. 1917).

(k) The prohibition against fraud or false statements in a Government matter (18 U.S.C. 1001).

(l) The prohibition against mutilating or destroying a public record (18 U.S.C. 2071).

(m) The prohibition against counterfeiting and forging transportation requests (18 U.S.C. 508).

(n) The prohibition against (1) embezzlement of Government money or property (18 U.S.C. 641); (2) failing to account for public money (18 U.S.C. 643); and (3) embezzlement of the money or property of another person in the possession of an employee by reason of his or her employment (18 U.S.C. 654).

(o) The prohibition against unauthorized use of documents relating to claims from or by the Government (18 U.S.C. 285).

(p) The prohibition against certain political activities in Subchapter III of Chapter 73 of Title 5 U.S.C., and 18 U.S.C. 602, 603, 607, and 608.

(q) The prohibition against an employee acting as the agent of a foreign principal registered under the Foreign Agents Registration Act (18 U.S.C. 219).

§ 500.211 Release of confidential or nonpublic information.

An employee shall not divulge to any unauthorized person any nonpublic or confidential Commission document or information, including the results of portions of Commission meetings closed to the public pursuant to 46 CFR 503, Subpart H, and comments made, information divulged or memoranda prepared incidental to such closed meetings, except pursuant to the procedure of 5 U.S.C. 552, 552a and 552b and 46 CFR 503 or as specifically directed by the Commission. Employees are also reminded of the provisions of §§ 555.5 and 555.6 of this Chapter, which relate to confidentiality of information obtained in the course of official Commission audits, and which provide for penalties for disclosure of confidential information.

§ 500.212 Post employment conflict of interest; restriction of activities of certain Federal employees; procedures.

Title V of the Ethics in Government Act proscribes certain activities by certain former federal employees (18 U.S.C. 207). The full text of the statute, OPM regulations and examples of how the restrictions and basic procedures apply are available from the Ethics Counselor. In summary, as applied to former Commission employees, the restrictions and basic procedures are as follows:

(a) *Restrictions.*

(1) No former Commission employee may represent in any formal or informal appearance or make any oral or written communication with intent to influence a U.S. Government agency in a particular matter involving a specific party or parties in which the employee participated personally and substantially while with the Commission.

(2) No former Commission employee may, within two years of terminating Commission employment, act as a representative in the manner described in paragraph (a) of this section, as to a particular matter which was actually pending under the employee's official responsibility within one year prior to termination of the employment.

(3) Former senior Commission employees (defined as Commissioners and members of the Senior Executive Service as designated by the Office of Government Ethics under 18 U.S.C. 207(d)(1)) may not, for two years after terminating Commission employment, assist in representing a person by personal presence at an appearance before the Government on a matter in which the former employee had participated personally and substantially while at the Commission.

(4) Former senior Commission employees, as defined in paragraph (c) of this section, are barred for one year from representing parties before the Commission or communicating with intent to influence the Commission, regardless of prior involvement in the particular proceeding.

(b) *Prior consent for appearance.*

(1) Prior to making any appearance, representation or communication described in paragraph (a) of this section, and, in addition to the requirements of Subpart B of the Commission's Rules of Practice (§§ 502.21–502.32 of this chapter), every former employee must apply for and obtain prior written consent of the Commission for each proceeding or matter in which such appearance, representation or communication is contemplated. Such consent will be given only if the Commission determines that the appearance, representation or communication is not prohibited by the Act, this section or other provisions of this chapter.

(2) To facilitate the Commission's determination that the intended activity is not prohibited, applications for written consent shall:

(i) Be directed to the Commission, state the former connection of the applicant with the Commission and date of termination of employment, and identify the matter in which the applicant desires to appear; and

(ii) Be accompanied by an affidavit to the effect that the matter for which consent is requested is not a matter in which the applicant participated personally and substantially while at the Commission and, as made applicable by paragraph (a) of this section, that the particular matter as to which consent is requested was not pending under the applicant's official responsibility within one year prior to termination of employment and that the matter was not one in which the former employee had participated personally and substantially while at the Commission. The statements contained in the affidavit shall not be sufficient if disproved by an examination of the files and records of the case.

(3) The applicant shall be promptly advised as to his or her privilege to appear, represent or communicate in the particular matter, and the application, affidavit and consent, or refusal to consent, shall be filed by the Commission in its records relative thereto.

(c) *Basic procedures for possible violations.* The following basic guidelines for administrative enforcement of restrictions on post employment activities are designed to expedite consultation with the Director of the Office of Government Ethics as required pursuant to section 207(j) of Title 18, United States Code.

(1) *Delegation.* The Chairman may delegate his or her authority under this subpart.

(2) *Initiation of administrative disciplinary hearing.*

(i) On receipt of information regarding a possible violation of 18 U.S.C. 207, and after determining that such information appears substantiated, the Chairman shall expeditiously provide such information, along with any comments or agency regulations, to the Director of the Office of Government Ethics and to the Criminal Division, Department of Justice. The Commission shall coordinate any investigation or administrative action with the Department of Justice to avoid prejudicing criminal proceedings, unless the Department of Justice communicates to the Commission that it does not intend to initiate criminal prosecution.

(ii) Whenever the Commission has determined after appropriate review that there is reasonable cause to believe that a former Commission employee has violated any provision of paragraph (a) of this section or 18 U.S.C. 207(a), (b), or (c), it may initiate an administrative disciplinary proceeding by providing the former Commission employee with notice as defined in paragraph (c)(3) of this section.

(3) *Adequate notice.*

(i) The Commission shall provide a former Commission employee with adequate notice of an intention to institute a proceeding and an opportunity for a hearing.

(ii) Notice to the former Commission employee must include:

(A) A statement of allegations (and the basis thereof) sufficiently detailed to enable the former Commission employee to prepare an adequate defense;

(B) Notification of the right to a hearing; and

(C) An explanation of the method by which a hearing may be requested.

(4) *Presiding official.*

(i) The presiding official at a proceeding under this section shall be an individual to whom the Chairman has delegated authority to make an initial decision (hereinafter referred to as "examiner").

(ii) The examiner must be a Commissioner (other than the Chairman), an administrative law judge, or an attorney employed by the Commission and shall be provided with appropriate administrative and secretarial support by the Commission.

(iii) The presiding official shall be impartial. No individual who has participated in any manner in the decision to initiate a proceeding may serve as an examiner in that proceeding.

(5) *Time, date and place.*

(i) The hearing shall be conducted at a reasonable time, date, and place.

(ii) In setting a hearing date, the presiding official shall give due regard to the former Commission employee's need for:

(A) Adequate time to prepare a defense properly, and

(B) An expeditious resolution of allegations that may be damaging to his or her reputation.

(6) *Hearing rights.* A hearing shall include, at a minimum, the following rights:

(i) To represent oneself or to be represented by counsel;

(ii) To introduce and examine witnesses and to submit physical evidence;

(iii) To confront and cross-examine adverse witnesses;

(iv) To present oral argument; and

(v) To receive a transcript or recording of the proceedings, on request.

(7) *Burden of proof.* In any hearing under this subpart, the Commission has the burden of proof and must establish substantial evidence of a violation.

(8) *Initial decision.*

(i) The examiner shall make a determination on matters exclusively of record in the proceeding, and shall set forth in the decision all findings of fact and conclusions of law relevant to the matters at issue.

(ii) Within a reasonable period of the date of an initial decision, as set by the Commission, either party may appeal the decision solely on the record to the Chairman. The Chairman shall base his or her decision solely on the record of the proceedings or those portions thereof cited by the parties to limit the issues.

(iii) If the Chairman modifies or reverses the initial decision, he or she shall specify such findings of fact and conclusions of law as are different from those of the examiner.

(9) *Administrative sanctions.* The Chairman may take appropriate action in the case of any individual who was found in violation of 18 U.S.C. 207 (a), (b), or (c) or the provisions of paragraph (a) of this section after a final administrative decision or who failed to request a hearing after receiving adequate notice, by:

(i) Prohibiting the individual from making, on behalf of any other person except the United States, any formal or informal appearance before, or, with the intent to influence, any oral or written communication to, the Commission on any matter of business for a period not to exceed five (5) years, which may be accomplished by directing Commission employees to refuse to participate in any such appearance or to accept any such communication; or

(ii) Taking other appropriate disciplinary action.

(10) *Judicial review.* Any person found to have participated in a violation of 18 U.S.C. 207 (a), (b), or (c) or the provisions of paragraph (a) of this section may seek judicial review of the administrative determination.

(11) *Consultation and review.* The procedures for administrative enforcement set forth in this section have been reviewed by the Director of the Office of Government Ethics.

SUBPART C—SPECIAL GOVERNMENT EMPLOYEES STANDARDS OF CONDUCT

§ 500.301 Application to special Government employees.

Unless specifically excepted by rule or by the Chairman of the Commission, the General Standards of Conduct contained in subpart B hereof (§§ 500.201 to 500.212), apply to special Government employees. Each special Government employee shall acquaint himself or herself with the General Standards, with each statute that relates to his or her ethical and other conduct as a special Government employee of the Commission and the Government, and with the following, minimum standards of this subpart governing the ethical and other conduct of special Government employees.

§ 500.302 Special Government employees—Use of Government employment.

A special Government employee shall not use his or her Government employment for a purpose that is, or gives the appearance of being, motivated by the desire for private gain for himself, herself or another person, particularly one with whom he or she has family, business, or financial ties.

§ 500.303 Special Government employees—Use of inside information.

Except as provided in § 500.203(c), a special Government employee shall not use inside information obtained as a result of his or her Government employment for private gain for himself, herself or another person, either by direct action on his or her part or by counsel, recommendation, or suggestion to another person, particularly one with whom he or she has family, business or financial ties. For the purpose of this paragraph, "inside information" means information obtained under Government authority which has not become part of the body of the public information.

§ 500.304 Special Government employees—Coercion.

A special Government employee shall not use his or her Government employment to coerce, or give the appearance of coercing, a person to provide financial benefit to himself, herself or another person, particularly one with whom he or she has family, business, or financial ties.

§ 500.305 Special Government employees—Gifts.

Except as provided in § 500.203(b), a special Government employee, while so employed or in connection with his or her employment, shall not receive or solicit from a person having business with the Commission, anything of value as a gift, gratuity, loan, entertainment, or favor for himself, herself or another person, particularly one with whom he or she has family, business, or financial ties.

SUBPART D—STATEMENTS OF EMPLOYMENT AND FINANCIAL INTERESTS; EXECUTIVE PERSONNEL FINANCIAL DISCLOSURE REPORTS.

§ 500.401 [Reserved.]
§ 500.402 [Reserved.]
§ 500.403 Persons required to submit Statement of Employment and Financial Interests.

(a) The Chairman, the Commissioners, and all employees and special Government employees of the Commission, without exception, shall file Statements of Employment and Financial Interests and Annual Statements.

(b) Any employee or special Government employee who thinks his or her position has been improperly included under these regulations as one requiring the submission of a Statement of Employment and Financial Interests and Annual Statements is entitled to a review of this determination.

§ 500.404 [Reserved.]
§ 500.405 Time and place for submission of Statements of Employment and Financial Interests.

All Statements of Employment and Financial Interests shall be submitted to the Counselor designated under § 500.105 within thirty (30) days of the effective date of the employee's appointment, except that special Government employees shall submit such Statements on or prior to the effective date of their appointment.

§ 500.406 Annual Statements and Termination Reports.

(a) Changes in, or additions to, employment and financial interests shall be reported in an Annual Statement to be filed no later than May 15 of each year, the reporting period being the previous calendar year, except that special Government employees shall submit such Annual Statements no later than fifteen (15) calendar days following any change in, or addition to, their employment or financial interests.

(b) Notwithstanding the filing of the Annual Statement required by this section, each employee and special Government employee shall at all times avoid acquiring a financial interest that could result, or taking an action that would result, in a violation of the conflict-of-interest provisions of section 208 of Title 18, United States Code, or Subpart B of this part.

(c) A Termination Report must also be filed upon an employee's termination of employment, the reporting period being the time which has not been covered by the previous initial or supplementary statement.

§ 500.407 Interests to be reported in Statements of Financial Interests and Annual Statements.

Each Statement of Employment and Financial Interests and each Annual Statement shall include all the employment and financial interests of the person reporting, as well as all employment and financial interests of such person's spouse, minor child, or other member of the immediate household. For the purpose of this section, "members of the immediate household"

means those blood relatives of the person reporting who are residents of the person's household. With respect to each position or financial interest reported in the Statement of Employment and Financial Interests and the Annual Statements, the person reporting shall specify whether such position or financial interest is held by (a) the person reporting, (b) the spouse, (c) a minor child, or (d) a blood relative residing in the household.

§ 500.408 Information not known by the person reporting.

If any information required to be included in a Statement of Employment and Financial Interests or an Annual Statement, including holdings placed in trust, is not known to the person reporting, but is known to another person, the person reporting shall request such other person to submit information on his or her behalf.

§ 500.409 Information exempted.

The regulations in this subpart do not require a person to submit any information in an Annual Statement of Employment and Financial Interests or in an Annual Statement relating to any connection with, or interest in, a professional society or a charitable, religious, social, fraternal, recreational, public service, civic, or political organization not conducted as a business enterprise. For the purpose of this section, education and other institutions doing research and development or related work involving grants of money from, or contracts with, the Government are deemed "business enterprises" and are required to be included in a person's Statement of Employment and Financial Interests and in the Annual Statement.

§ 500.410 Confidentiality of Statements.

The Commission shall hold each Statement of Employment and Financial Interests, and each Annual Statement, in the strictest confidence. The Commission shall not disclose any information contained in such Statements, except as provided by law. To ensure confidentiality, the Counselor authorized in § 500.105 to retain and review the Statements, shall be the sole custodian of the Statements and shall not disclose or authorize disclosure of information contained therein, except to carry out the purposes of this part.

§ 500.411 Conduct, employment or holdings otherwise prohibited and reporting otherwise required by law.

The submission of a Statement of Employment and Financial Interests or Annual Statement, as required by this subpart, does not in any way excuse the person submitting such Statement, from violations of the criminal provisions of section 208 of Title 18, United States Code, the provisions of section 201(b) of the Merchant Marine Act, 1936, (46 U.S.C. 1111(b)) or the provisions of Subpart B of this Part. Moreover, the submission of any such Statement is in addition to, and not in substitution for, or in derogation of, any similar reporting requirement imposed by law, order, or regulation.

§ 500.412 Executive Personnel Financial Disclosure Reports (SF 278).

(a) *Background.* The Ethics in Government Act of 1978 (P.L. 95–521) (the "Act") prescribes a public financial disclosure reporting requirement for certain officers and employees in addition to other requirements of this subpart. The requirements and procedures are set forth in detail in the Act as well as in implementing regulations of the Office of Government Ethics (5 CFR Part 734). This section will not reiterate these detailed requirements nor the instructions for filing that are contained in the Executive Personnel Financial Disclosure Report (SF 278).

(b) *Employees Required to File.* The following Commission employees are required to file the Executive Personnel Financial Disclosure Report:

(1) The five Commissioners;

(2) Officers and employees (including special Government employees) who have served in their position for sixty-one (61) days or more during the preceding calendar year, whose positions are classified and paid at GS–16 or above of the General Schedule, or whose basic rate of pay under other pay schedules is equal to or greater than the rate for GS–16. This category includes employees of the Senior Executive Service as designated by the Office of Government Ethics under 18 U.S.C. 207(d)(1).

(3) Officers or employees in any other position determined by the Director of the Office of Government Ethics to be of equal classification to GS–16;

(4) Administrative law judges;

(5) Employees in the excepted service in positions which are of a confidential or policymaking character including confidential assistants to the Commissioners, unless their positions have been excluded by the Director of the Office of Government Ethics;

(6) The Designated Agency Ethics Counselor.

(c) *Time of Filing.*

(1) Initial appointment—Within five (5) days after transmittal by the President to the Senate of the nomination to a position described in paragraph (b)(1) of this section or within thirty (30) days after first assuming a position described in paragraphs (b)(2), (b)(3), (b)(4), (b)(5), or (b)(6) of this section, a SF 278 must be filed.

(2) Incumbents. No later than May 15 annually, a SF 278 must be filed by incumbents of any of the positions listed in Paragraph (b) of this section.

(3) Terminations. No later than thirty (30) days after an incumbent of a position listed in Paragraph (b) of this section terminates that position, the individual shall file a SF 278.

(d) *Place of Filing.* All reports required to be filed by this section shall be submitted on or before the due date to the designated Agency Ethics Counselor.

(e) *Where to Seek Help.* To seek assistance in completing the Executive Personnel Financial Disclosure Report, an employee may contact the Commission Ethics Counselor or the Deputy Ethics Counselor.

(f) *Failure to Submit Report.* Falsification of, or knowing or willful failure to file or report information required to be reported by section 202 of the Act may subject the individual to a civil penalty and to internal disciplinary action, as well as criminal penalties under 18 U.S.C. 1001.

FEDERAL MARITIME COMMISSION

[46 CFR PART 501]

OFFICIAL SEAL OF THE FEDERAL MARITIME COMMISSION

Sec.

AUTHORITY: 46 U.S.C. app. 1111 and 1114; Reorganization Plan No. 7 of 1961, 26 FR 7315, August 12, 1961.

§ 501.1 Purpose.

To prescribe and give notice of the official seal of the Federal Maritime Commission.

§ 501.2 Description.

(a) Pursuant to section 201(c) of the Merchant Marine Act, 1936, as amended (46 U.S.C. app. 1111(c)), the Federal Maritime Commission hereby prescribes its official seal, as adopted by the Commission on August 14, 1961, the design of which is illustrated below and described as follows:

(1) A shield argent paly of six gules, a chief azure charged with a fouled anchor or; shield and anchor outlined of the third; on a wreath argent and gules, an eagle displayed proper; all on a gold disc within a blue border, encircled by a gold rope outlined in blue, and bearing in white letters the inscription "Federal Maritime Commission" in upper portion and "1961" in lower portion.

(2) The shield and eagle above it are associated with the United States of America and denote the national scope of maritime affairs. The outer rope and fouled anchor are symbolic of seamen and waterborne transportation. The date "1961" has historical significance, indicating the year in which the Federal Maritime Commission was created.

§ 501.3 Design.

FEDERAL MARITIME COMMISSION

[46 CFR PART 502]
RULES OF PRACTICE AND PROCEDURE

SUBPART A—GENERAL INFORMATION

Sec.

SUBPART B—APPEARANCE AND PRACTICE BEFORE THE COMMISSION

SUBPART C—PARTIES

SUBPART D—RULEMAKING

SUBPART E—PROCEEDINGS; PLEADINGS; MOTIONS; REPLIES

SUBPART F—SETTLEMENT; PREHEARING PROCEDURE

SUBPART G—TIME

SUBPART H—FORM, EXECUTION, AND SERVICE OF DOCUMENTS

SUBPART I—SUBPENAS

SUBPART J—HEARINGS; PRESIDING OFFICERS; EVIDENCE

SUBPART K—SHORTENED PROCEDURE

SUBPART L—DEPOSITIONS, WRITTEN INTERROGATORIES, AND DISCOVERY

SUBPART M—BRIEFS; REQUESTS FOR FINDINGS; DECISIONS; EXCEPTIONS

SUBPART N—ORAL ARGUMENT; SUBMISSION FOR FINAL DECISION

SUBPART O—REPARATION

SUBPART P—RECONSIDERATION OF PROCEEDINGS

SUBPART Q—SCHEDULES AND FORMS

SUBPART R—NONADJUDICATORY INVESTIGATIONS

SUBPART V—PAPERWORK REDUCTION ACT

AUTHORITY: 5 U.S.C. 552, 553, 559; 18 U.S.C. 207; secs. 18, 20, 22, 27 and 43 of the Shipping Act, 1916 (46 U.S.C. app. 817, 820, 821, 826, 841(a)); secs. 6, 8, 9, 10, 11, 12, 14, 15, 16 and 17 of the Shipping Act of 1984 (46 U.S.C. app. 1705, 1707–1711, 1713–1716); sec. 204(b) of the Merchant Marine Act, 1936 (46 U.S.C. app. 1114(b)); and E.O. 11222 of May 8, 1965 (30 FR 6469).

SUBPART A—GENERAL INFORMATION

§ 502.1 Scope of rules in this part.

The rules in this part govern procedure before the Federal Maritime Commission, hereinafter referred to as the "Commission," under the Shipping Act, 1916, Merchant Marine Act, 1920, Intercoastal Shipping Act, 1933, Merchant Marine Act, 1936, Shipping Act of 1984, Administrative Procedure Act, and related acts, except that Subpart R of this part does not apply to proceedings subject to sections 7 and 8 of the Administrative Procedure Act, which are to be governed only by Subparts A to Q inclusive, of this part. They shall be construed to secure the just, speedy, and inexpensive determination of every proceeding. [Rule 1.]

§ 502.2 Mailing address; hours; filing of documents.

(a) Documents required to be filed in, and correspondence relating to, proceedings governed by this part should be addressed to "Federal Maritime Commission, Washington, D.C. 20573." The hours of the Commission are from 8:30 a.m. to 5 p.m., Monday to Friday, inclusive, unless otherwise provided by statute or executive order.

(b) Documents relating to matters pending before the Commission are to be filed with the Office of the Secretary, unless otherwise required by § 502.118(b)(4), in the case of exhibits in formal proceedings. Pleadings, correspondence or other documents relating to pending matters should not be submitted to the offices of individual Commissioners. Distribution to Commissioners and other agency personnel is handled by the Office of the Secretary, to ensure that persons in decision-making and advisory positions receive in a uniform and impersonal manner identical copies of submissions, and to avoid the possibility of ex parte communications within the meaning of § 502.11(b). These considerations apply to informal and oral communications as well, such as requests for expedited consideration. [Rule 2.]

§ 502.3 Compliance with rules or orders of Commission.

Persons named in a rule or order shall notify the Commission during business hours on or before the day on which such rule or order becomes effective whether they have complied therewith, and if so, the manner in which compliance has been made. If a change in rates is required, the notification shall specify the tariffs which effect the changes. [Rule 3.]

§ 502.4 Authentication of rules or orders of Commission.

All rules or orders issued by the Commission, in any proceeding covered by this part shall, unless otherwise specifically provided, be signed and authenticated by seal by the Secretary of the Commission in the name of the Commission. [Rule 4.]

§ 502.5 [Reserved.]

§ 502.6 [Reserved.]

§ 502.7 Documents in foreign languages.

Every document, exhibit, or other paper written in a language other than English and filed with the Commission or offered in evidence in any proceeding before the Commission under this part or in response to any rule or order of the Commission pursuant to this part, shall be filed or offered in the language in which it is written and shall be accompanied by an English translation thereof duly verified under oath to be an accurate translation. [Rule 7.]

§ 502.8 Denial of applications and notice thereof.

Except in affirming a prior denial or where the denial is self-explanatory, prompt written notice will be given of the denial in whole or in part of any written application, petition, or other request made in connection with any proceeding under this part, such notice to be accompanied by a simple statement of procedural or other grounds for the denial, and of any other or further administrative remedies or recourse applicant may have where the denial is based on procedural grounds. [Rule 8.]

§ 502.9 Suspension, amendment, etc., of rules in this part.

The rules in this part may, from time to time, be suspended, amended, or revoked, in whole or in part. Notice of any such action will be published in the *Federal Register*. [Rule 9.]

§ 502.10 Waiver of rules in this part.

Except to the extent that such waiver would be inconsistent with any statute, any of the rules in this part, except § 502.11 and § 502.153, may be waived by the Commission or the presiding officer in any particular case to prevent undue hardship, manifest injustice, or if the expeditious conduct of business so requires. [Rule 10.]

§ 502.11 Disposition of improperly filed documents and ex parte communications.

(a) *Documents not conforming to rules.* Any pleading, document, writing or other paper submitted for filing which is rejected because it does not conform to the rules in this part shall be returned to the sender;

(b) *Ex parte communications.*

(1) No person who is a party to or an agent of a party to any proceeding as defined in § 502.61 or who directly participates in any such proceeding and no interested person outside the Commission shall make or knowingly cause to be made to any Commission member, administrative law judge, or Commission employee who is or may reasonably be expected to be involved in the decisional process of any such proceeding, an ex parte communication relevant to the merits of the proceedings;

(2) No Commission member, administrative law judge, or Commission employee who is or may reasonably be expected to be involved in the decisional process of any agency proceeding, shall make or knowingly cause to be made to any interested person outside the Commission or to any party to the proceeding or its agent or to any direct participant in a proceeding, an ex parte communication relevant to the merits of the proceeding. This prohibition shall not be construed to prevent any action authorized by paragraphs (b)(5), (b)(6) and (b)(7) of this section;

(3) "Ex parte communication" means an oral or written communication not on the public record with respect to which reasonable prior notice to all parties is not given, but it shall not include requests for status reports or communications regarding purely procedural matters or matters which the Commission or member thereof, administrative law judge, or Commission employee is authorized by law or these rules to dispose of on an ex parte basis;

(4) Any Commission member, administrative law judge, or Commission employee who is or may reasonably be expected to be involved in the decisional process of any proceeding who receives, or who makes or knowingly causes to be made, an ex parte communication shall promptly transmit to the Secretary of the Commission:

(i) All such written communications;

(ii) Memoranda stating the substance of all such oral communications; and

(iii) All written responses and memoranda stating the substance of all oral responses to the materials described in paragraphs (b)(4)(i) and (b)(4)(ii) of this section;

(5) The Secretary shall place the materials described in subparagraph (4) of this paragraph in the correspondence part of the public docket of the proceeding and may take such other action as may be appropriate under the circumstances;

(6) Upon receipt of an ex parte communication knowingly made or knowingly caused to be made by a party to a proceeding, the Commission or the presiding officer may, to the extent consistent with the interests of justice and the policy of the statutes administered by the Commission,

require the party to show cause why his or her claim or interest in the proceeding should not be dismissed, denied, disregarded, or otherwise adversely affected on account of the making of such communication;

(7) An ex parte communication shall not constitute a part of the record for decision. The Commission or the presiding officer may, to the extent consistent with the interests of justice and the policy of the statutes administered by the Commission, consider a violation of paragraph (b) of this section sufficient grounds for a decision adverse to a party who has knowingly caused such violation to occur and may take such other action as may be appropriate under the circumstances. [Rule 11.]

SUBPART B—APPEARANCE AND PRACTICE BEFORE THE COMMISSION

§ 502.21 Appearance.

(a) *Parties.* A party may appear in person or by an officer, partner, or regular employee of the party, or by or with counsel or other duly qualified representative, in any proceeding under the rules in this part. Any party or his or her representative may testify, produce and examine witnesses, and be heard upon brief and at oral argument if oral argument is granted.

(b) *Persons not parties.* One who appears in person before the Commission or a representative thereof, either by compulsion from, or request or permission of the Commission, shall be accorded the right to be accompanied, represented, and advised by counsel.

(c) *Special Requirement.* An appearance may be either general, that is, without reservation, or it may be special, that is, confined to a particular issue or question. If a person desires to appear specially, he or she must expressly so state when entering the appearance and, at that time, shall also state the questions or issues to which he or she is confining the appearance; otherwise, his or her appearance will be considered as general. [Rule 21.]

§ 502.22 Authority for representation.

Any individual acting in a representative capacity in any proceeding before the Commission may be required to show his or her authority to act in such capacity. [Rule 22.]

§ 502.23 Notice of appearance; written appearance; substitutions.

(a) Within twenty (20) days after service of an order or complaint instituting a proceeding, complainants, respondents, and/or petitioners named therein shall notify the Commission of the name(s) and address(es) of the person or persons who will represent them in the pending proceeding. Each person who appears at a hearing shall deliver a written notice of appearance to the reporter, stating for whom the appearance is made. All appearances shall be noted in the record. Petitions for leave to intervene shall indicate the name(s) and address(es) of the person or persons who

will represent the intervenor in the pending proceeding if the petition is granted. If an attorney or other representative of record is superseded, there shall be filed a stipulation of substitution signed both by the attorney(s) or representative(s) and by the party, or a written notice from the client to the Commission.

(b) A form of Notice of Appearance is set forth in Exhibit No. 1 to this subpart. This form also contains a request and authorization for counsel to be notified immediately of the service of decisions of the presiding officer and the Commission by collect telephone call or telegram. Copies of this form may be obtained from the Office of the Secretary. [Rule 23.]

§ 502.24 Practice before the Commission defined.

(a) Practice before the Commission shall be deemed to comprehend all matters connected with the presentation of any matter to the Commission, including the preparation and filing of necessary documents, and correspondence with and communications to the Commission, on one's own behalf or representing another. (See § 503.32).

(b) The term "Commission" as used in this subpart includes any bureau, division, office, branch, section, unit, or field office of the Federal Maritime Commission and any officer or employee of such bureau, division, office, branch, section, unit, or field office. [Rule 24.]

§ 502.25 Presiding officer defined.

"Presiding officer" means and shall include (a) any one or more of the members of the Commission (not including the Commission when sitting as such), (b) one or more administrative law judges or (c) one or more officers authorized by the Commission to conduct nonadjudicatory proceedings when duly designated to preside at such proceedings. (See Subpart J of this part.) [Rule 25.]

§ 502.26 Attorneys at law.

Attorneys at laws who are admitted to practice before the Federal courts or before the courts of any State or Territory of the United States may practice before the Commission. An attorney's own representation that he is such in good standing before any of the courts herein referred to will be sufficient proof thereof, if made in writing and filed with the Secretary. [Rule 26.]

§ 502.27 Persons not attorneys at law.

(a) Any person who is not an attorney at law may be admitted to practice before the Commission if he or she is a citizen of the United States and files proof to the satisfaction of the Commission that he or she possesses the necessary legal, technical, or other qualifications to render valuable service before the Commission and is otherwise competent to advise and assist in the presentation of matters before the Commission. Applications by persons not attorneys at law for admission to practice before the Commission shall be made on the forms prescribed therefor,

which may be obtained from the Secretary of the Commission, and shall be addressed to the Federal Maritime Commission, Washington, D.C. 20573, and shall be accompanied by a fee as required by §503.43(h) of this chapter.

(b) No person who is not a attorney at law and whose application has not been approved shall be permitted to practice before the Commission.

(c) Paragraph (b) of this section and the provisions of §§502.28, 502.29 and 502.30 shall not apply, however, to any person who appears before the Commission on his or her own behalf or on behalf of any corporation, partnership, or association of which he or she is a partner, officer, or regular employee. [Rule 27.]

§502.28 Firms and corporations.

Practice before the Commission by firms or corporations on behalf of others shall not be permitted. [Rule 28.]

§502.29 Hearings.

The Commission, in its discretion, may call upon the applicant for a full statement of the nature and extent of his or her qualifications. If the Commission is not satisfied as to the sufficiency of the applicant's qualifications, it will so notify him or her by registered mail, whereupon he or she shall be granted a hearing upon request for the purpose of showing his or her qualifications. If the applicant presents to the Commission no request for such hearing within twenty (20) days after receiving the notification above referred to, his or her application shall be acted upon without further notice. [Rule 29.]

§502.30 Suspension of disbarment.

The Commission may deny admission to, suspend, or disbar any person from practice before the Commission who it finds does not possess the requisite qualifications to represent others or is lacking in character, integrity, or proper professional conduct. Any person who has been admitted to practice before the Commission may be disbarred from such practice only after being afforded an opportunity to be heard. [Rule 30.]

§502.31 Statement of interest.

The Commission may call upon any practitioner for a full statement of the nature and extent of his or her interest in the subject matter presented by him or her before the Commission. [Rule 31.]

§502.32 Former employees.

Title V of the Ethics in Government Act proscribes certain activities by certain former federal employees (18 U.S.C. 207). In summary, as applied to former Commission employees, the restrictions and basic procedures are as follows:

(a) *Restrictions.*

(1) No former Commission employee may represent in any formal or informal appearance or make any oral or written communication with intent

to influence a U.S. Government agency in a particular matter involving a specific party or parties in which the employee participated personally and substantially while with the Commission.

(2) No former Commission employee may, within two years of terminating Commission employment, act as a representative in the manner described in paragraph (a)(1) of this section, as to a particular matter which was actually pending under the employee's official responsibility within one year prior to termination of the employment.

(3) Former senior Commission employees (defined as Commissioners and members of the Senior Executive Service as designated by the Office of Government Ethics under 18 U.S.C. 207(d)(1)) may not, for two years after terminating Commission employment, assist in representing a person by personal presence at an appearance before the Government on a matter in which the former employee had participated personally and substantially while at the Commission.

(4) Former senior Commission employees, as defined in paragraph (a)(3) of this section, are barred for one year from representing parties before the Commission or communicating with intent to influence the Commission, regardless of prior involvement in the particular proceeding.

(b) *Prior consent for appearance.*

(1) Prior to making any appearance, representation or communication described in paragraph (a) of this section, and, in addition to other requirements of this subpart, every former employee must apply for and obtain prior written consent of the Commission for each proceeding or matter in which such appearance, representation, or communication is contemplated. Such consent will be given only if the Commission determines that the appearance, representation or communication is not prohibited by the Act, this section or other provisions of this chapter.

(2) To facilitate the Commission's determination that the intended activity is not prohibited, applications for written consent shall:

(i) Be directed to the Commission, state the former connection of the applicant with the Commission and date of termination of employment, and identify the matter in which the applicant desires to appear; and

(ii) Be accompanied by an affidavit to the effect that the matter for which consent is requested is not a matter in which the applicant participated personally and substantially while at the Commission and, as made applicable by paragraph (a) of this section, that the particular matter as to which consent is requested was not pending under the applicant's official responsibility within one year prior to termination of employment and that the matter was not one in which the former employee had participated personally and substantially while at the Commission. The statements contained in the affidavit shall not be sufficient if disproved by an examination of the files and records of the case.

(3) The applicant shall be promptly advised as to his or her privilege to appear, represent or communicate in the particular matter, and the applica-

tion, affidavit and consent, or refusal to consent, shall be filed by the Commission in its records relative thereto.

(c) *Basic procedures for possible violations.* The following basic guidelines for administrative enforcement restrictions on post employment activities are designed to expedite consultation with the Director of the Office of Government Ethics as required pursuant to section 207(j) of Title 18, United States Code.

(1) *Delegation.* The Chairman may delegate his or her authority under this subpart.

(2) *Initiation of administrative disciplinary hearing.*

(i) On receipt of information regarding a possible violation of 18 U.S.C. 207, and after determining that such information appears substantiated, the Chairman shall expeditiously provide such information, along with any comments or agency regulations, to the Director of the Office of Government Ethics and to the Criminal Division, Department of Justice. The Commission shall coordinate any investigation or administrative action with the Department of Justice to avoid prejudicing criminal proceedings, unless the Department of Justice communicates to the Commission that it does not intend to initiate criminal prosecution.

(ii) Whenever the Commission has determined after appropriate review that there is reasonable cause to believe that a former Commission employee has violated any provision of paragraph (a) of this section or 18 U.S.C. 207(a), (b), or (c), it may initiate an administrative disciplinary proceeding by providing the former Commission employee with notice as defined in paragraph (c)(3) of this section.

(3) *Adequate notice.*

(i) The Commission shall provide a former Commission employee with adequate notice of an intention to institute a proceeding and an opportunity for a hearing.

(ii) Notice to the former Commission employee must include:

(A) A statement of allegations (and the basis thereof) sufficiently detailed to enable the former Commission employee to prepare an adequate defense;

(B) Notification of the right to a hearing; and

(C) An explanation of the method by which a hearing may be requested.

(4) *Presiding official.*

(i) The presiding official at a proceeding under this section shall be an individual to whom the Chairman has delegated authority to make an initial decision (hereinafter referred to as "examiner").

(ii) The examiner must be a Commissioner (other than the Chairman), an administrative law judge, or an attorney employed by the Commission and shall be provided with appropriate administrative and secretarial support by the Commission.

(iii) The presiding official shall be impartial. No individual who has participated in any manner in the decision to initiate a proceeding may serve as an examiner in that proceeding.

(5) *Time, date and place.*

(i) the hearing shall be conducted at a reasonable time, date and place.

(ii) In setting a hearing date, the presiding official shall give due regard to the former Commission employee's need for:

(A) Adequate time to prepare a defense properly, and

(B) An expeditious resolution of allegations that may be damaging to his or her reputation.

(6) *Hearing rights.* A hearing shall include, at a minimum, the following rights:

(i) To represent oneself or to be represented by counsel;

(ii) To introduce and examine witnesses and to submit physical evidence;

(iii) To confront and cross-examine adverse witnesses;

(iv) To receive a transcript or recording of the proceedings, on request.

(7) *Burden of proof.* In any hearing under this subpart, the Commission has the burden of proof and must establish substantial evidence of a violation.

(8) *Initial decision.*

(i) The examiner shall make a determination on matters exclusively of record in a proceeding, and shall set forth in the decision all findings of fact and conclusions of law relevant to the matters at issue.

(ii) Within a reasonable period of the date of an initial decision, as set by the Commission, either party may appeal the decision solely on the record to the Chairman. The Chairman shall base his or her decision solely on the record of the proceedings or those portions thereof cited by the parties to limit the issues.

(iii) If the Chairman modifies or reverses the initial decision, he or she shall specify such findings of fact and conclusions of law as are different from those of the examiner.

(9) *Administrative sanctions.* The Chairman may take appropriate action in the case of any individual who was found in violation of 18 U.S. 207 (a), (b), or (c) or the provisions of paragraph (a) of this section after a final administrative decision or who failed to request a hearing after receiving adequate notice, by:

(i) Prohibiting the individual from making, on behalf of any other person except the United States, any formal or informal appearance before, or, with the intent to influence, any oral or written communication to, the Commission on any matter of business for a period not to exceed five (5) years, which may be accomplished by directing Commission employees to refuse to participate in any such appearance or to accept any such communication; or

(ii) Taking other appropriate disciplinary action.

(10) *Judicial review.* Any person found to have participated in a violation of 18 U.S.C. 207 (a), (b), or (c) or the provisions of paragraph (a) of this section may seek judicial review of the administrative determination.

(11) *Consultation and review.* The procedures for administrative enforcement set forth in paragraphs (a), (b), and (c) of this section have been reviewed by the Director of the Office of Government Ethics.

(d) *Partners or associates.*

(1) In any case in which a former member, officer, or employee of the Commission is prohibited under this section from practicing, appearing, or representing anyone before the Commission in a particular Commission matter, any partner or legal or business associate of such former member, officer, or employee shall be prohibited from (i) utilizing the services of the disqualified former member, officer, or employee in connection with the matter, (ii) discussing the matter in any manner with the disqualified former member, officer, or employee, and (iii) sharing directly or indirectly with the disqualified former member, officer, or employee in any fees or revenues received for services rendered in connection with such matter.

(2) The Commission may require any practitioner or applicant to become a practitioner to file an affidavit to the effect that the practitioner or applicant will not: (i) utilize the service of, (ii) discuss the particular matter with, or (iii) share directly or indirectly any fees or revenues received for services provided in the particular matter, with a partner, fellow employee, or legal or business associate who is a former member, officer or employee of the Commission and who is either permanently or temporarily precluded from practicing, appearing or representing anyone before the Commission in connection with the particular matter; and that the applicant's employment is not prohibited by any law of the United States or by the regulations of the Commission. [Rule 32.]

Exhibit No. 1 to Subpart B [§§ 502.23, 502.26, 502.27]

Notice of Appearance

FEDERAL MARITIME COMMISSION

Notice of Appearance

Docket No. _____: _____

Please enter my appearance in this proceeding as counsel for:

☐ I request to be informed by telephone or telegram of service of the administrative law judge's initial or recommended decision and of the Commission's decision in this proceeding. In the event I am not available when you call, appropriate advice left with my office will suffice.

Washington area: I understand I will be informed by telephone.
Outside Washington area: I authorize ☐ collect telephone call
☐ collect telegram

☐ I do not desire the above notice.

(S) _____
(Name)

_____
(Address)

_____
(Telephone No.)

NOTE.—Must be signed by attorney at law admitted to practice before the Federal Courts or before the courts of any State or Territory of the United States or by a person not an attorney at law who has been admitted to practice before the Commission or by a person appearing on his or her own behalf or on behalf of any corporation, partnership, or association of which he or she is a partner, officer, or regular employee.

SUBPART C—PARTIES

§ 502.41 Parties; how designated.

The term "party", whenever used in the rules in this part, shall include any natural person, corporation, association, firm, partnership, trustee, receiver, agency, public or private organization, or governmental agency. A party who seeks relief or other affirmative action under § 502.62 shall be designated as "complainant." A party against whom relief or other affirmative action is sought in any proceeding commenced under §§ 502.62, 502.66, or 502.67, or a party named in an order of investigation issued by the Commission, shall be designated as "respondent," except that in investigations instituted under section 15 of the Shipping Act, 1916 or section 11(c) of the Shipping Act of 1984, the parties to the agreement shall be designated as "proponents" and the parties protesting the agreement shall be designated as "protestants." A person who has been permitted to intervene under § 502.72 shall be designated as "intervenor." All persons or parties designated in this section shall become parties to the proceeding involved without further pleadings, and no person other than a party or its representative may introduce evidence or examine witnesses at hearings. [Rule 41.]

§ 502.42 Hearing Counsel.

The Director, Bureau of Hearing Counsel, shall be a party to all proceedings governed by the rules in this part, except that in complaint proceedings under § 502.62, the Director may become a party only upon leave to intervene granted pursuant to § 502.72, and in rulemaking proceedings, the Director may become a party by designation, if the Commission determines that the circumstances of the proceeding warrant such participation. The Director or the Director's representative shall be designated as "Hearing Counsel" and shall be served with copies of all papers, pleadings, and documents in every proceeding in which Hearing Counsel is a party. Hearing Counsel shall actively participate in any proceeding to which the Director is a party, to the extent required in the public interest, subject to the separation of functions required by section 5(c) of the Administrative Procedure Act. (See § 502.224.) [Rule 42.]

§ 502.43 Substitution of parties.

In appropriate circumstances, the Commission or presiding officer may order an appropriate substitution of parties. [Rule 43.]

§ 502.44 Necessary and proper parties in certain complaint proceedings.

(a) If a complaint relates to through transportation by continuous carriage or transshipment, all carriers participating in such through transportation shall be joined as respondents.

(b) If the complaint related to more than one carrier or other person subject to the shipping acts, all carriers or other persons against whom a rule or order is sought shall be made respondents.

(c) If complaint is made with respect to an agreement filed under section 15 of the Shipping Act, 1916 or section 5(a) of the Shipping Act of 1984, the parties to the agreement shall be made respondents. [Rule 44.]

SUBPART D—RULEMAKING

§ 502.51 Petition for issuance, amendment, or repeal of rule.

Any interested party may file with the Commission a petition for the issuance, amendment, or repeal of a rule designed to implement, interpret, or prescribe law, policy, organization, procedure, or practice requirements of the Commission. The petition shall set forth the interest of petitioner and the nature of the relief desired, shall include any facts, views, arguments, and data deemed relevant by petitioner, and shall be verified. If such petition is for the amendment or repeal of a rule, it shall be accompanied by proof of service on all persons, if any, specifically named in such rule, and shall conform in other aspects to Subpart H of this part. Replies to such petition shall conform to the requirements of § 502.74. [Rule 51.]

§ 502.52 Notice of proposed rulemaking.

(a) General notice of proposed rulemaking, including the information specified in § 502.143, shall be published in the *Federal Register*, unless all persons subject thereto are named and, either are personally served, or otherwise have actual notice thereof in accordance with law.

(b) Except where notice of hearing is required by statute, this section shall not apply to interpretative rules, general statements of policy, organization rules, procedure, or practice of the Commission, or any situation in which the Commission for good cause finds (and incorporates such findings in such rule) that notice and public procedure are impracticable, unnecessary, or contrary to the public interest. [Rule 52.]

§ 502.53 Participation in rulemaking.

(a) Interested persons will be afforded an opportunity to participate in rulemaking through submission of written data, views, or arguments, with or without opportunity to present the same orally in any manner. No replies to the written submissions will be allowed unless, because of the nature of the proceeding, the Commission indicates that replies would be necessary or desirable for the formulation of a just and reasonable rule, except that, where the proposed rules are such as are required by statute to be made on the record after opportunity for a hearing, such hearing shall be conducted pursuant to 5 U.S.C. 556 and 557, and the procedure shall be the same as stated in Subpart J of this part.

(b) In those proceedings in which respondents are named, interested persons who wish to participate shall file a petition to intervene in accordance with the provisions of § 502.72. [Rule 53.]

§ 502.54 Contents of rules.

The Commission will incorporate in any rules adopted a concise general statement of their basis and purpose. [Rule 54.]

§ 502.55 Effective date of rules.

The publication or service of any substantive rule shall be made not less than thirty (30) days prior to its effective date except (a) as otherwise provided by the Commission for good cause found and published in the *Federal Register* or (b) in the case of rules granting or recognizing exemption or relieving restriction; interpretative rules; or statements of policy. [Rule 55.]

SUBPART E—PROCEEDINGS; PLEADINGS; MOTIONS; REPLIES

§ 502.61 Proceedings.

(a) Proceedings are commenced by the filing of a complaint, or by order of the Commission upon petition or upon its own motion, or by reference by the Commission to the formal docket of a petition for a declaratory order.

(b) In proceedings referred to the Office of Administrative Law Judges, the Commission shall specify a date on or before which hearing shall commence, which date shall be no more than six months from the date of publication in the *Federal Register* of the Commission's order instituting the proceedings or notice of complaint filed. Hearing dates may be deferred by the presiding judge only to prevent substantial delay, expense, detriment to the public interest or undue prejudice to a party.

(c) In the order instituting a proceeding or in the notice of filing of complaint and assignment, the Commission shall establish dates by which the initial decision and the final Commission decision will be issued. These dates may be extended by order of the Commission for good cause shown. [Rule 61.]

§ 502.62 Complaints and fee.

(a) The complaint 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.

(b) Where reparation is sought and the nature of the proceeding so requires, the complaint shall set forth: the ports of origin and destination of the shipments; consignees, or real parties in interest, where shipments are on "order" bill of lading; consignors; date of receipt by carrier or tender of delivery to carrier; names of vessels; bill of lading number (and other identifying reference); description of commodities; weights; measurement; rates; charges made or collected; when, where, by whom and to whom rates and charges were paid; by whom the rates and charges were borne; the amount of damage; and the relief sought. Except under unusual circumstances and for good cause shown, reparation will not be awarded upon a complaint in which it is not specifically asked for, nor upon a

new complaint by or for the same complainant which is based upon a finding in the original proceeding. Wherever a rate, fare, charge, rule, regulation, classification, or practice is involved, appropriate reference to the tariff should be made, if possible.

(c) If the complaint fails to indicate the sections of the acts alleged to have been violated or clearly to state facts which support the allegations, the Commission may, on its own initiative, require the complaint to be amended to supply such further particulars as it deems necessary.

(d) The complaint should designate the place at which hearing is desired.

(e) A form of complaint is set forth in Exhibit No. 1 to this subpart.

(f) The complaint shall be accompanied by remittance of a $50 filing fee.

(g) For special types of cases, see § 502.92 in Subpart F (Special Docket applications for refund or waiver); Subpart K (Shortened Procedure); and Subpart S (Small Claims). [Rule 62.]

§ 502.63 Reparation, statute of limitations.

(a) Complaints seeking reparation pursuant to section 22 of the Shipping Act, 1916 shall be filed within two (2) years after the cause of action accrues.

(b) Complaints seeking reparation pursuant to section 11 of the Shipping Act of 1984 shall be filed within three years after the cause of action accrues.

(c) The Commission will consider as in substantial compliance with a statute of limitations a complaint in which complainant alleges that the matters complained of, if continued in the future, will constitute violations of the shipping acts in the particulars and to the extent indicated and in which complainant prays for reparation accordingly for injuries which may be sustained as a result of such violations. (See §§ 502.251–502.253 and Exhibit No. 1 to Subpart O).

(d) Notification to the Commission that a complaint may or will be filed for the recovery of reparation will not constitute a filing within the applicable statutory period.

(e) A complaint is deemed filed on the date it is received by the Commission. [Rule 63.]

§ 502.64 Answer to complaint.

(a) Respondent shall file with the Commission an answer to the complaint and shall serve it on complainant as provided in Subpart H of this part within twenty (20) days after the date of service of the complaint by the Commission or within thirty (30) days if such respondent resides in Alaska or beyond the Continental United States, unless such periods have been extended under § 502.71 or § 502.102, or reduced under § 502.103, or unless motion is filed to withdraw or dismiss the complaint, in which latter case, answer shall be made within ten (10) days after service of an order denying such motion. Such answer shall give notice of issues controverted in fact or law. Recitals of material and relevant facts in a

complaint, amended complaint, or bill of particulars, unless specifically denied in the answer thereto, shall be deemed admitted as true, but if request is seasonably made, a competent witness shall be made available for cross-examination on such evidence.

(b) In the event that respondent should fail to file and serve the answer within the time provided, the presiding officer may enter such rule or order as may be just, or may in any case require such proof as he or she may deem proper, except that the presiding officer may permit the filing of a delayed answer after the time for filing the answer has expired, for good cause shown.

(c) A form of answer to complaint is set forth in Exhibit No. 2 to this subpart. [Rule 64.]

§ 502.65 Replies to answers not permitted.

Replies to answers will not be permitted. New matters set forth in respondent's answer will be deemed to be controverted. [Rule 65.]

§ 502.66 Order to show cause.

The Commission may institute a proceeding by order to show cause. The order shall be served upon all persons named therein, shall include the information specified in § 502.143, may require the person named therein to answer, and shall require such person to appear at a specified time and place and present evidence upon the matters specified. [Rule 66.]

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

(a)(1)(i) The term "general rate increase" means any change in rates, fares, or charges which will (A) result in an increase in not less than 50 per centum of the total rate, fare, or charge items in the tariffs per trade of any common carrier by water in intercoastal commerce; and (B) directly result in an increase in gross revenue of such carrier for the particular trade of not less than 3 per centum.

(ii) The term "general rate decrease" means any change in rates, fares, or charges which will (A) result in a decrease in not less than 50 per centum of the total rate, fare, or charge items in tariffs per trade of any common carrier by water in the intercoastal commerce; and (B) directly result in a decrease in gross revenue of such carrier for the particular trade of not less than 3 per centum.

(2) No general rate increase or decrease shall take effect before the close of the sixtieth day after the day it is posted and filed with the Commission. A vessel operating common carrier (VOCC) shall file, under oath, concurrently with any general rate increase or decrease, testimony and exhibits of such composition, scope and format that they will serve as the VOCC's entire direct case in the event the matter is set for formal investigation, together with all underlying workpapers used in the preparation of the testimony and exhibits. The VOCC shall also certify that copies of testimony and exhibits and underlying workpapers have been filed simul-

taneously with the attorney general of every noncontiguous State, Commonwealth, possession or Territory having ports in the relevant trade that are served by the VOCC. The contents of underlying workpapers served on attorneys general pursuant to this paragraph are to be considered confidential and are not to be disclosed to members of the public except to the extent specifically authorized by an order of the Commission or a presiding officer. A copy of the testimony and exhibits shall be made available at every port in the trade at the offices of the VOCC or its agent during usual business hours for inspection and copying by any person.

(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 rate (increase) (decrease) scheduled to become effective (Date) _____ 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.

(S) _____.

Date: _____.

Signed and Sworn to before me this _____ day of _____, 19_____.

_____

Notary Public
My Commission expires:

(4) Where a protest contains information obtained in confidence, it will be set out in a separate document, clearly marked on the cover page "Contains Confidential Information." Failure to observe this procedure will subject the protest to rejection.

(5) Failure by the VOCC to meet the service and filing requirements of paragraph (a)(2) of this section may result in rejection of the tariff

matter. Such rejection will take place within three work days after the defect is discovered.

(b)(1) Any protest against a proposed general rate increase or decrease made pursuant to section 3 of the Intercoastal Shipping Act, 1933, may be made by letter and shall be filed with the Director, Bureau of Tariffs, and served upon the tariff publishing officer of the carrier pursuant to Subpart H of this part no later than thirty (30) days prior to the proposed changes, except that, if the due date for protests falls on a Saturday, Sunday or national legal holiday, such protest must be filed no later than the last business day preceding the weekend or holiday. Persons filing protests pursuant to this section shall be made parties to any docketed proceeding involving the matter protested, provided that the issues raised in the protest are pertinent to the issues set forth in the order of investigation. Protests shall include:

(i) Identification of the tariff in question;

(ii) Grounds for opposition to the change;

(iii) Identification of any specific areas of the VOCC's testimony, exhibits, or underlying data that are in dispute and a statement of position on each area in dispute (VOCC general rate increases or decreases only);

(iv) Specific reasons why a hearing is necessary to resolve the issues in dispute;

(v) Any requests for additional carrier data;

(vi) Identification of any witnesses that protestant would produce at a hearing, a summary of their testimony and identification of documents that protestant would offer in evidence; and

(vii) A subscription and verification.

(2) Protests against other proposed changes in tariffs made pursuant to section 3 of the Intercoastal Shipping Act, 1933, shall be filed and served no later than twenty (20) days prior to the proposed effective date of the change. The provision of paragraph (b)(1) of this section relating to the form, place and manner of filing protests against a proposed general rate increase or decrease shall be applicable to protests against other proposed tariff changes. A protest is deemed filed on the date it is received by the Commission.

(c) Replies to protests shall conform to the requirements of § 502.74.

(d)(1) In the event the general rate increase or decrease of a VOCC is made subject to a docketed proceeding, Hearing Counsel, the VOCC and all protestants shall serve, under oath, testimony and exhibits constituting their direct case, together with underlying workpapers on all parties pursuant to Subpart H of this part and lodge copies of testimony and exhibits with the presiding officer no later than seven (7) days after the tariff matter takes effect or, in the case of suspended matter, seven (7) days after the matter would have otherwise gone into effect.

(2) If other proposed tariff changes made pursuant to section 3 of the Intercoastal Shipping Act, 1933 are made subject to a docketed proceeding,

the carrier, Hearing Counsel and all protestants will simultaneously serve pursuant to Subpart H of this part on all parties and lodge with the presiding officer prehearing statements as specified in paragraph (f)(1) of this section no later than seven (7) days after the tariff matter takes effect, or in the case of suspended matter, seven (7) days after the matter would have otherwise gone into effect.

(e)(1) Subsequent to the exchange of prehearing statements by all parties, the presiding officer shall, at his or her discretion, direct all parties to attend a prehearing conference to consider:

(i) Simplification of issues;

(ii) Identification of issues which can be resolved readily on the basis of documents, admissions of fact, or stipulations;

(iii) Identification of any issues which require evidentiary hearing;

(iv) Limitation of witnesses and areas of cross-examination, should an evidentiary hearing be necessary;

(v) Requests for subpoenas; and

(vi) Other matters which may aid in the disposition of the hearing, including but not limited to the exchange of written testimony and exhibits.

(2) After considering the procedural recommendations of the parties, the presiding officer shall limit the issues to the extent possible and establish a procedure for their resolution.

(3) The presiding officer shall, whenever feasible, rule orally upon the record on matters presented before him or her.

(f)(1) It shall be the duty of every party to file and serve a prehearing statement on a date specified by the presiding officer, but in any event no later than the date of the prehearing conference.

(2) A prehearing statement shall state the name of the party or parties on whose behalf it is presented and briefly set forth:

(i) Identification of issues which can be resolved readily on the basis of documents, admissions of fact, or stipulations;

(ii) Identification of any issues which require evidentiary hearing, together with the reasons why these issues cannot be resolved readily on the basis of documents, admissions of facts, stipulations or an alternative procedure;

(iii) Requests for cross-examination of the direct written testimony of specified witnesses, the subjects of such cross-examination and the reasons why alternatives to cross-examination are not feasible;

(iv) Requests for additional, specified witnesses and documents, together with the reasons why the record would be deficient in the absence of this evidence; and

(v) Procedural suggestions that would aid in the timely disposition to the proceeding.

(g) The provisions of this section are designed to enable the presiding officer to complete a hearing within sixty (60) days after the proposed effective date of the tariff changes and submit an initial decision to the Commission within one hundred twenty (120) days pursuant to section

3(b) of the Intercoastal Shipping Act, 1933. The presiding officer may employ any other provision of the Commission's Rules of Practice and Procedure, not inconsistent with this section, in order to meet this objective. Exceptions to the decision of the presiding officer, filed pursuant to § 502.227 shall be served no later than fifteen (15) days after date of service of the initial decision. Replies thereto shall be served no later than ten (10) days after the date of service of exceptions. In the absence of exceptions, the decision of the presiding officer shall be final within 30 days from the date of service, unless within that period, a determination to review is made in accordance with the procedures outlined in § 502.227.

(h) Intervention by persons other than protestants ordinarily shall not be granted. In the event intervention of such persons is granted, the presiding officer of the Commission may attach such conditions or limitations as are deemed necessary to effectuate the purpose of this section. [Rule 67].

§ 502.68 Declaratory orders and fee.

(a)(1) The Commission may, in its discretion, issue a declaratory order to terminate a controversy or to remove uncertainty.

(2) Petitions for the issuance thereof shall: state clearly and concisely the controversy or uncertainty; name the persons and cite the statutory authority involved; include a complete statement of the facts and grounds prompting the petition, together with full disclosure of petitioner's interest; be served upon all parties named therein; and conform to the requirements of Subpart H of this part.

(3) Petitions shall be accompanied by remittance of a $50 filing fee.

(b) Petitions under this section shall be limited to matters involving conduct or activity regulated by the Commission under statutes administered by the Commission. The procedures of this section shall be invoked solely for the purpose of obtaining declaratory rulings which will allow persons to act without peril upon their own view. Controversies involving an allegation of violation by another person of statutes administered by the Commission, for which coercive rulings such as payment of reparation or cease and desist orders are sought, are not proper subjects of petitions under this section. Such matters must be adjudicated either by filing of a complaint under section 22 of the Shipping Act, 1916 or section 11 of the Shipping Act of 1984 and § 502.62, or by filing of a petition for investigation under § 502.69.

(c) Petitions under this section shall be accompanied by the complete factual and legal presentation of petitioner as to the desired resolution of the controversy or uncertainty, or a detailed explanation why such can only be developed through discovery or evidentiary hearing.

(d) Replies to the petition shall contain the complete factual and legal presentation of the replying party as to the desired resolution, or a detailed explanation why such can only be developed through discovery or evidentiary hearing. Replies shall conform to the requirements of § 502.74 and shall be served pursuant to Subpart H of this part.

(e) No additional submissions will be permitted unless ordered or requested by the Commission or the presiding officer. If discovery or evidentiary hearing on the petition is deemed necessary by the parties, such must be requested in the petition or replies. Requests shall state in detail the facts to be developed, their relevance to the issues, and why discovery or hearing procedures are necessary to develop such facts.

(f)(1) A notice of filing of any petition which meets the requirements of this section shall be published in the *Federal Register.* The notice will indicate the time for filing of replies to the petition. If the controversy or uncertainty is one of general public interest, and not limited to specifically named persons, opportunity for reply will be given to all interested persons including the Commission's Bureau of Hearing Counsel.

(2) In the case of petitions involving a matter limited to specifically named persons, participation by persons not named therein will be permitted only upon grant of intervention by the Commission pursuant to § 502.72.

(3) Petitions for leave to intervene shall be submitted on or before the reply date and shall be accompanied by intervenor's complete reply including its factual and legal presentation in the matter.

(g) Petitions for declaratory order which conform to the requirements of this section will be referred to a formal docket. Referral to a formal docket is not to be construed as the exercise by the Commission of its discretion to issue an order on the merits of the petition. [Rule 68.]

§ 502.69 Petitions—general and fee.

(a) Except when submitted in connection with a formal proceeding, all claims for relief or other affirmative action by the Commission, except as otherwise provided herein, shall be by written petition, which shall state clearly and concisely the petitioner's grounds of interests in the subject matter, the facts relied upon and the relief sought, shall cite by appropriate reference the statutory provisions or other authority relied upon for relief, shall be served upon all parties named therein, and shall conform otherwise to the requirements of Subpart H of this part. Replies thereto shall conform to the requirements of § 502.74.

(b) Petitions shall be accompanied by remittance of a $50 filing fee. [Rule 69.]

§ 502.70 Amendments or supplements to pleadings.

(a) Amendments or supplements to any pleadings will be permitted or rejected, either in the discretion of the Commission if the case has not been assigned to a presiding officer for hearing, or otherwise, in the discretion of the officer designated to conduct the hearing, except that after a case is assigned for hearing, no amendment shall be allowed which would broaden the issues, without opportunity to reply to such amended pleading and to prepare for the broadened issues. The presiding officer may direct a party to state its case more fully and in more detail by way of amendment.

(b) A response to an amended pleading must be filed and served in conformity with the requirements of Subpart H of this part and § 502.74, unless the Commission or the presiding officer directs otherwise. Amendments or supplements allowed prior to hearing will be served in the same manner as the original pleading.

(c) Whenever by the rules in this part a pleading is required to be verified, the amendment or supplement shall also be verified. [Rule 70.]

§ 502.71 Bill of particulars.

Within fifteen (15) days after date of service of the complaint, respondent may file with the Commission and serve upon complainant pursuant to Subpart H of this part a motion for a bill of particulars. Within ten (10) days after date of service of such motion, complainant shall file with the Commission and serve upon respondent either (a) the bill of particulars or (b) a reply to such motion, made in conformity with the requirements of § 502.74 setting forth the particular matters contained in the motion which are objected to and the reasons for the objections. If the motion is granted in whole or in part, the order granting same shall specify the date by which the particulars must be furnished. A motion may be filed relative to incomplete compliance with such order. In the event of inexcusable default in furnishing particulars, the party in default shall be precluded from making proof upon the issues with respect to which it has defaulted in furnishing particulars. The time for filing an answer to the complaint shall be extended to a date ten (10) days after the date of service of the bill of particulars or of notice of disallowance of the motion thereof. For good case shown, motion for a bill of particulars also may be filed after answer is made and within a reasonable time prior to hearing. [Rule 71.]

§ 502.72 Petition for leave to intervene.

(a) A petition for leave to intervene may be filed in any proceeding and shall be served on existing parties by the petitioner pursuant to Subpart H of this part. An additional fifteen (15) copies of the petition shall be filed with the Secretary for the use of the Commission. Upon request, the Commission will furnish a service list to any member of the public pursuant to Part 503 of this chapter. The petition shall set forth the grounds for the proposed intervention and the interest and position of the petitioner in the proceeding and shall comply with the other applicable provisions of Subpart H of this part, and if affirmative relief is sought, the basis for such relief. Such petition shall also indicate the nature and extent of the participation sought, e.g., the use of discovery, presentation of evidence and examination of witnesses.

(b)(1) Petitions for leave to intervene as a matter of right will only be granted upon a clear and convincing showing that:

(i) The petitioner has a substantial interest relating to the matter which is the subject of the proceeding warranting intervention; and

(ii) The proceeding may, as a practical matter, materially affect the petitioner's interest; and

(iii) The interest is not adequately represented by existing parties to the proceeding.

(2) Petitions for intervention as a matter of Commission discretion may be granted only upon a showing that:

(i) A common issue of law or fact exists between the petitioner's interests and the subject matter of the proceeding; and

(ii) Petitioner's intervention shall not unduly delay or broaden the scope of the proceeding, prejudice the adjudication of the rights of or be duplicative of positions of any existing party; and

(iii) The petitioner's participation may reasonably be expected to assist in the development of a sound record.

(3) The timeliness of the petition will also be considered in determining whether a petition will be granted under paragraphs (b)(1) or (b)(2) of this section. If filed after hearings have been closed, a petition will not ordinarily be granted.

(c) In the interests of: (1) restricting irrelevant, duplicative, or repetitive discovery, evidence or arguments; (2) having common interests represented by a spokesperson; and (3) retaining authority to determine priorities and control the course of the proceeding, the presiding officer, in his or her discretion, may impose reasonable limitations on an intervenor's participation, e.g., the filing of amicus briefs, presentation of evidence on selected factual issues, or oral argument on some or all of the issues.

(d) Absent good cause shown, any intervenor desiring to utilize the procedures provided by Subpart L must commence doing so no later than fifteen (15) days after its petition for leave to intervene has been granted. If the petition is filed later than thirty (30) days after the date of publication in the *Federal Register* of the Commission's Order instituting the proceeding or notice of complaint filed, petitioner will be deemed to have waived its right to utilize such procedures, unless good cause is shown for the failure to file the petition within the 30-day period. The use of Subpart L procedures by an intervenor whose petition was filed beyond such 30-day period will in no event be allowed, if, in the opinion of the presiding officer, such use will result in delaying the proceeding unduly.

(e) If intervention is granted before or at a prehearing conference convened for the purpose of considering matters relating to discovery, the intervenor's discovery matters may also be considered at that time, and may be limited under the provisions of paragraph (c) of this section.

(f) A form of petition for leave to intervene is set forth in Exhibit No. 3 to this subpart. [Rule 72.]

§ 502.73 Motions.

(a) In any docketed proceeding, an application or request for an order or ruling not otherwise specifically provided for in this part shall be by motion. After the assignment of a presiding officer to a proceeding and

before the issuance of his or her recommended or initial decision, all motions shall be addressed to and ruled upon by the presiding officer unless the subject matter of the motion is beyond his or her authority, in which event the matter shall be referred to the Commission. If the proceeding is not before the presiding officer, motions shall be designated as "petitions" and shall be addressed to and passed upon by the Commission.

(b) Motions shall be in writing, except that a motion made at a hearing shall be sufficient if stated orally upon the record, unless the presiding officer directs that it be reduced to writing.

(c) All written motions shall state clearly and concisely the purpose of and the relief sought by the motion, the statutory or principal authority relied upon, and the facts claimed to constitute the grounds requiring the relief requested; and shall conform with the requirements of Subpart H of this part.

(d) Oral argument upon a written motion may be permitted at the discretion of the presiding officer or the Commission, as the case may be.

(e) A repetitious motion will not be entertained. [Rule 73.]

§ 502.74 Replies to pleadings, motions, applications, etc.

(a)(1) A reply to a reply is not permitted.

(2) Except as otherwise provided respecting answers (§ 502.64), shortened procedure (Subpart K of this part), briefs (§ 502.221), exceptions (§ 502.227), and the documents specified in paragraph (b) of this section, any party may file and serve a reply to any written motion, pleading, petition, application, etc., permitted under this part within fifteen (15) days after date of service thereof, unless a shorter period is fixed under § 502.103.

(b) When time permits, replies also may be filed to protests seeking suspension of tariffs (§ 502.67), applications for enlargement of time and postponement of hearing (Subpart G of this part), and motions to take depositions (§ 502.201).

(c) Replies shall be in writing, shall be verified if verification of original pleading is required, shall be so drawn as to fully and completely advise the parties and the Commission as to the nature of the defense, shall admit or deny specifically and in detail each material allegation of the pleading answered, shall state clearly and concisely the facts and matters of law relied upon, and shall conform to the requirements of Subpart H of this part. [Rule 74.]

§ 502.75 Proceedings involving assessment agreements.

(a) In complaint proceedings involving assessment agreements filed under the fifth paragraph of Section 15 of the Shipping Act, 1916 or section 5(d) of the Shipping Act of 1984, the Notice of Filing of Complaint and Assignment will specify a date before which the initial decision will be issued, which date will be not more than eight months from the date the complaint was filed.

(b) Any party to a proceeding conducted under this section who desires to utilize the prehearing discovery procedures provided by Subpart L of this part shall commence doing so at the time it files its initial pleading, i.e., complaint, answer or petition for leave to intervene. Discovery matters accompanying complaints shall be filed with the Secretary of the Commission for service pursuant to § 502.113. Answers or objections to discovery requests shall be subject to the normal provisions set forth in Subpart L.

(c) Exceptions to the decision of the presiding officer, filed pursuant to § 502.227, shall be filed and served no later than fifteen (15) days after date of service of the initial decision. Replies thereto shall be filed and served no later than fifteen (15) days after date of service of exceptions. In the absence of exceptions, the decision of the presiding officer shall be final within thirty (30) days from the date of service, unless within that period, a determination to review is made in accordance with the procedures outlined in § 502.227. [Rule 75.]

Exhibit No. 1 to Subpart E [§ 502.62]

Complaint Form and Information Checklist

BEFORE THE FEDERAL MARITIME COMMISSION

Complaint

_____ v. _____ [Insert without abbreviation exact and complete name of party or parties respondent].

I. The complainant is [State in this paragraph whether complainant is an association, a corporation, firm, or partnership and the names of the individuals composing the same. State also the nature and principal place of business].

II. The respondent is [State in this paragraph whether respondent is an association, a corporation, firm, or partnership and the names of the individuals composing the same. State also the nature and principal place of business].

III. Allegation of jurisdiction. [State in this paragraph a synopsis of the statutory basis for claim(s)].

IV. That [State in this or subsequent paragraphs to be lettered "A", "B", etc., the matter or matters complained of. If rates are involved, name each rate, fare, charge, classification, regulation, or practice, the lawfulness of which is challenged].

V. That by reason of the facts stated in the foregoing paragraphs, complainant has been (and is being) subject to injury as a direct result of the violations by respondent of sections _____ [State in this paragraph the casual connection between the alleged illegal acts of respondent and the claimed injury to complainant, with all necessary statutory sections relief upon].

VI. That complainant has been injured in the following manner: To its damages in the sum of $_____.

VII. Wherefore complainant prays that respondent be required to answer the charges herein; that after due hearing, an order be made commanding said respondent (and each of them): to cease and desist from the aforesaid violations of said act(s); to establish and put in force such practices as the Commission determines to be lawful and reasonable; to pay to said complainant by way of reparations for the unlawful conduct hereinabove described the sum of $_____, with interest and attorney's fees or such sum as the Commission may determine to be proper as an award of reparation; and that such other and further order or orders be made as the Commission determines to be proper in the premises.

Dated at _____, this _____ day of _____, 19_____.

(S) _____
(Complainant's signature)

_____
(Office and post office address)

(S) _____
(Signature or agent or attorney of complainant)

_____
(Post office address)

VERIFICATION [See § 502.112]

State of _____, County of _____, ss:_____, being first duly sworn on oath deposes and says that he (she) is _____ [The complainant, or, if a firm, association, or corporation, state the capacity of the affiant] and is the person who signed the foregoing complaint; that he (she) has read the complaint and that the facts stated therein, upon information received from others, affiant believes to be true.

Subscribed and sworn to before me, a notary public in and for the State of _____, County of _____ this _____ day _____, A.D. 19_____.

(S) _____
(Notary Public)

My Commission expires _____.

INFORMATION TO ASSIST IN FILING FORMAL COMPLAINT

GENERAL

Formal Docket Complaint procedures usually involve an evidentiary hearing on disputed facts. Where no evidentiary hearing on disputed facts is necessary and where all parties agree to the use of different procedures, a complaint may be processed under Subpart K [Shortened Procedure] or Subpart S [Informal Docket for a claim of $10,000 or less]. An application for refund or waiver of collection of freight charges due to tariff error should be filed pursuant to § 502.92 and Exhibit No. 1 to Subpart F. Consider also the feasibility of filing a Petition for Declaratory Order under § 502.68.

Under the Shipping Act of 1984 [foreign commerce], the complaint must be filed within three (3) years from the time the cause of action accrues and may be brought against any person alleged to have violated the 1984 Act to the injury of complainant.

Under the Shipping Act, 1916 and the Intercoastal Shipping Act, 1933 [domestic commerce], the complaint must be filed within two (2) years from the time the cause of action accrues and may be brought only against a "person subject to the Act", e.g., a common carrier, terminal operator or freight forwarder.

Because of the limitation periods, a complaint is deemed to be filed only when it is physically received at the Commission. [See § 502.114]

The format of Exhibit No. 1 to Subpart E must be followed and a *verification must be included* where the complainant is not represented by an attorney or other person qualified to practice before the Commission. [See § § 502.21–502.32 and 502.112]. The complaint must also fully describe the alleged violations of the specific section(s) of the shipping statute(s) involved and how complainant is or was directly injured as a result. An original and fifteen copies, plus a further number of copies sufficient for service upon each named respondent must be filed and the Commission will serve the other parties. [See § § 502.113 and 502.118]

In addition to Subpart E, some other important rules are: § 502.2 (mailing address; hours); § 502.7 (documents in foreign language); § 502.23 (Notice of Appearance); § 502.41 (parties; how designated); § 502.44 (necessary and proper parties to certain complaint proceedings); and Subpart H (form, execution and service of documents).

Checklist of Specific Information

The following checklist sets forth items of information which are pertinent in cases submitted to the Commission pursuant to the regulatory provisions of the shipping statutes. The list is not intended to be inclusive, nor does it indicate all of the essential allegations which may be material in specific cases.

1. Identify of complainant; if an individual, complainant's residence; if a partnership, name of partners, business and principal place thereof; if a corporation, name, state of incorporation, and principal place of business. The same information with respect to respondents, interveners, or others who become parties is necessary.

2. Description of commodity involved, with port of origin, destination port, weight, consignor and consignee of shipment(s), date shipped from loading port, and date received at discharge port.

3. Rate charged, with tariff authority for same, and any rule or regulation applicable thereto; the charges collected and from whom.

4. Route of shipment, including any transshipment; bill of lading reference.

5. Date of delivery or tender of delivery of each shipment.

6. Where the rate is challenged and comparisons are made with rates on other commodities, the form, packing, density, susceptibility to damage, tendency to contaminate other freight, value, volume of movement, competitive situation, and all matters relating to the cost of loading, unloading, and otherwise handling of respective commodities.

7. If comparisons are made between the challenged rates and rates on other routes, the allegation showing similarity of service should include at least respective distances, volumes of movement, cost of handling, and competitive conditions.

8. History of rate with reasons for previous increases or decreases of same.

9. When the complaint alleges undue prejudice or preference, the complaint should indicate what manner of undue prejudice or preference is involved, and whether to a particular person, locality, or description of traffic; how the preference or discrimination resulted and the manner in which the respondents are responsible for the same; and how complainant is damaged by the prejudice or preference, in loss of sales or otherwise.

10. Care should be exercised to differentiate between the measure of damages required in cases where prejudice or preference is charged, where the illegality of rates is charged and other situations.

11. Where a filed agreement or conduct under the agreement is challenged, all necessary provisions of the shipping statute involved must be specifically cited, showing in detail how a section was violated and how the conduct or agreement injuries complainant. The complaint should be thorough and clear as to all relief complainant is requesting.

Exhibit No. 2 to Subpart E [§ 502.64]

Answer to Complaint

BEFORE THE FEDERAL MARITIME COMMISSION

Answer

_____ (Complainant) v.
_____ (Respondent)

Docket No. _____

The above-named respondent, for answer to the complaint in this proceeding, states:

I. [State in this and subsequent paragraphs to be numbered II, III, etc., appropriate and responsive admissions, denials, and averments, specifically answering the complaint, paragraph by paragraph.]

Wherefore respondent prays that the complaint in this proceeding be dismissed.

(S) _____
(Name of respondent)

BY: _____

_____
(Title of Officer)

_____
(Office and post office address)

(S) _____
(Signature of attorney or agent)

_____
(Post office address)

Date _____, 19_____.

VERIFICATION

[See form for verification of complaint in Exhibit No. 1 to this Subpart and § 502.112].

CERTIFICATE OF SERVICE
[See § 502.114.]

Exhibit No. 3 to Subpart E [§ 502.72] --

Petition for Leave to Intervene

Before the Federal Maritime Commission

Petition for Leave To Intervene

_____ v. _____

Docket No. _____

Your petitioner, _____, respectfully represents that he (she) has an interest in the matters in controversy in the above-entitled proceeding and desires to intervene in and become a party to said proceeding, and for grounds of the proposed intervention says:

I. That petitioner is [State whether an association, corporation, firm, or partnership, etc., as in Exhibit No. 1 to this subpart, and nature and principal place of business].

II. [Here set out specifically position and interest of petitioner in the above-entitled proceeding and other essential averments in accordance with Rule 72 (46 CFR 502.72).]

Wherefore said _____ requests leave to intervene and be treated as a party hereto with the right to have notice of and appear at the taking of testimony, produce and cross-examine witnesses, and be heard in person or by counsel upon brief and at the oral argument, if oral argument is granted.

[If affirmative relief is sought, insert appropriate request here.]

Dated at _____, this ___ day of _____, 19 __.

_____

[Petitioner's signature]

_____

[Office and post office address]

_____

[Signature of agent or attorney of petitioner]

_____

[Post office address]

Verification and Certificate of Service

[See Exhibits Nos. 1 and 2 to this subpart.]

SUBPART F—SETTLEMENT; PREHEARING PROCEDURE

§ 502.91 Opportunity for informal settlement.

(a) Where time, the nature of the proceeding, and the public interest permit, all interested parties shall have the opportunity for the submission and consideration of facts, argument, offers of settlement, or proposal of adjustment, without prejudice to the rights of the parties.

(b) No stipulation, offer, or proposal shall be admissible in evidence over the objection of any party in any hearing on the matter. [Rule 91.]

§ 502.92 Special docket applications and fee.

(a)(1) A common carrier by water in foreign commerce which publishes its own tariff or, if the common carrier does not publish its own tariff, the carrier and the conference to which it belongs, or a shipper, may file an application for permission to refund or waive collection of a portion of freight charges where it appears that there is (i) an error in a tariff of a clerical or administrative nature or (ii) an error due to inadvertence in failing to file a new tariff. Such refund or waiver must not result in discrimination among shippers.

(2) The Commission must have received an effective tariff setting forth the rate on which refund or waiver would be based prior to the filing of the application.

(3)(i) The application for refund or waiver must be filed with the Commission within one hundred eighty (180) days from the date of shipment and served upon other persons involved pursuant to Subpart H of this part. An application is filed when it is placed in the mail, delivered to a courier, or, if delivered by another method, when it is received by the Commission. Filings by mail or courier must include a certification as to date of mailing or delivery to the courier.

(ii) The application for refund or waiver must be accompanied by remittance of a $25 filing fee.

(iii) Date of shipment shall mean the date of sailing of the vessel from the port at which the cargo was loaded.

(4) By filing, the applicant(s) agrees that:

(i) If permission is granted by the Commission:

(A) An appropriate notice will be published in the tariff; or

(B) Other steps will be taken as the Commission may require which give notice of the rate on which such refund or waiver would be based; and

(C) Additional refunds or waivers shall be made with respect to other shipments in the manner prescribed by the Commission's order approving the application.

(ii) If the application is denied, other steps will be taken as the Commission may require.

(5)(a) Application for refund or waiver shall be made in accordance with Exhibit 1 to this subpart. Any application which does not furnish

the information required by the prescribed form or otherwise comply with this rule may be returned to the applicant by the Secretary without prejudice to resubmission within the 180-day limitation period.

(b) Common carriers by water in interstate or intercoastal commerce, or conferences of such carriers, may file application for permission to refund a portion of freight charges collected from a shipper or waive collection of a portion of freight charges from a shipper. All such applications shall be filed within the 2-year statutory period referred to in § 502.63, and shall be made in accordance with Exhibit No. 1 to this subpart. Such applications will be considered the equivalent of a complaint and answer thereto admitting the facts complained of. If allowed, an order for payment or waiver will be issued by the Commission.

(c) Applications under paragraphs (a) and (b) of this section shall be submitted in an original and three (3) copies to the Office of the Secretary, Federal Maritime Commission, Washington, D.C. 20573. Each application shall be acknowledged with a reference to the assigned docket number and referred to the Office of Administrative Law Judges. The presiding officer may, in his or her discretion, require the submission of additional information or oral testimony. Formal proceedings as described in other rules of this part need not be conducted. The presiding officer shall issue an initial decision to which the provisions of § 502.227 shall be applicable. [Rule 92.]

§ 502.93 Satisfaction of complaint.

If a respondent satisfies a complaint either before its answer thereto is due or after answering, a statement to that effect, setting forth when and how the complaint has been satisfied and signed and verified by the opposing parties shall be filed with the Commission and served upon all parties of record. Such a statement, which may be by letter, shall show the amount of reparation agreed upon; shall contain the data called for by Exhibit No. 1 to Subpart D, insofar as said form is applicable; and shall state that a like adjustment has been or will be made by respondent with other persons similarly situated. Satisfied complaints will be dismissed in the discretion of the Commission. [Rule 93.]

§ 502.94 Prehearing conference.

(a)(1) Prior to any hearing, the Commission or presiding officer may direct all interested parties, by written notice, to attend one or more prehearing conferences for the purpose of considering any settlement under § 502.91, formulating the issues in the proceeding and determining other matters to aid in its disposition. In addition to any offers of settlement or proposals of adjustment, there may be considered the following:

(i) Simplification of the issues;

(ii) The necessity or desirability of amendments to the pleadings;

(iii) The possibility of obtaining admissions of fact and of documents which will avoid unnecessary proof;

(iv) Limitation on the number of witnesses;

(v) The procedure at the hearing;

(vi) The distribution to the parties prior to the hearing of written testimony and exhibits;

(vii) Consolidation of the examination of witnesses by counsel;

(viii) Such other matters as may aid in the disposition of the proceeding.

(2) The presiding officer may require, prior to the hearing, exchange of exhibits and any other material which may expedite the hearing. He or she shall assume the responsibility of accomplishing the purposes of the notice of prehearing conference so far as this may be possible without prejudice to the rights of any party.

(3) The presiding officer shall rule upon all matters presented for decision, orally upon the record when feasible, or by subsequent ruling in writing. If a party determines that a ruling made orally does not cover fully the issue presented, or is unclear, such party may petition for a further ruling thereon within ten (10) days after receipt of the transcript.

(b) In any proceeding under the rules in this part, the presiding officer may call the parties together for an informal conference prior to the taking of testimony, or may recess the hearing for such a conference, with a view to carrying out the purposes of this section. [Rule 94.]

§ 502.95 Prehearing statements.

(a) Unless waiver is granted by the presiding officer, it shall be the duty of all parties to a proceeding to prepare a statement or statements at a time and in the manner to be established by the presiding officer provided that there has been reasonable opportunity for discovery. To the extent possible, joint statements should be prepared.

(b) A prehearing statement shall state the name of the party or parties on whose behalf it is presented and briefly set forth the following matters, unless otherwise ordered by the presiding officer:

(1) Issues involved in the proceeding.

(2) Facts stipulated pursuant to the procedures together with a statement that the party or parties have communicated or conferred in a good faith effort to reach stipulation to the fullest extent possible.

(3) Facts in dispute.

(4) Witnesses and exhibits by which disputed facts will be litigated.

(5) A brief statement of applicable law.

(6) The conclusion to be drawn.

(7) Suggested time and location of hearing and estimated time required for presentation of the party's or parties' case.

(8) Any appropriate comments, suggestions or information which might assist the parties in preparing for the hearing or otherwise aid in the disposition of the proceeding.

(c) The presiding officer may, for good cause shown, permit a party to introduce facts or argue points of law outside the scope of the facts and law outlined in the prehearing statement. Failure to file a prehearing statement, unless waiver has been granted by the presiding officer, may

result in dismissal of a party from the proceeding, dismissal of a complaint, judgment against respondents, or imposition of such other sanctions as may be appropriate under the circumstances.

(d) Following the submission of prehearing statements, the presiding officer may, upon motion or otherwise, convene a prehearing conference for the purpose of further narrowing issues and limiting the scope of the hearing if, in his or her opinion, the prehearing statements indicate lack of dispute of material fact not previously acknowledged by the parties or lack of legitimate need for cross-examination and is authorized to issue appropriate orders consistent with the purposes stated in this section. [Rule 95.]

Exhibit No. 1 to Subpart F [§ 502.92]

APPLICATION FOR REFUND OF OR WAIVER FOR FREIGHT CHARGES DUE TO TARIFF ERROR

Federal Maritime Commission Special Docket No. _____.

Amount of Freight Charges involved in request _____.

Application of [Name of carrier, conference or (if under the 1984 Act) shipper] for the benefit of [Name of person who paid or is responsible for payment of freight charges].

1. SHIPMENT(S). Here fully describe:

(a) Commodity [According to tariff description].

(b) Number of shipments.

(c) Weight or measurement of individual shipment, as well as, all shipments.

(d) Date(s) of shipment(s), i.e., sailing(s) [furnish supporting evidence] and Date(s) of Delivery.

(e) Shipper and Place of Origin.

(f) Consignee, Place of Destination and Routing of Shipment(s).

(g) Name of Carrier and Date shown on Bill of Lading [furnish legible copies of bill(s) of lading].

(h) Names of Participating Ocean Carrier(s).

(i) Name(s) of Vessel(s) involved in carriage.

(j) Amount of Freight Charges actually collected [furnish legible copies of rated bill(s) of lading or freight bill(s), as appropriate] broken down (i) per shipment, (ii) in the aggregate, (iii) by whom paid, (iv) who is responsible for payment if different, and (v) date(s) of collection.

(k) Rate applicable at time of shipment [furnish legible copies of tariff page(s)].

(l) Rate sought to be applied [furnish legible copies of tariff page(s)].

(m) Amount of freight charges at rate sought to be applied, per shipment and in the aggregate.

(n) Amount of freight charges sought to be (refunded) (waived), per shipment and in the aggregate.

2. Furnish docket numbers of other special docket applications or decided or pending formal proceedings involving the same rate situations.

3. Furnish any information or evidence as to whether grant of the application will result in discrimination among ports or carriers.

4. State whether there are shipments of other shippers of the same or similar commodity which (i) moved via the carrier(s) or conference involved in this application during the period of time beginning on the day the bill(s) of lading was issued and ending on the day before the effective date of the conforming tariff, and (ii) moved on the same voyage(s) of the vessel(s) carrying the shipment(s) described in Number 1, above.

5. Fully explain the basis for the application, i.e., the clerical or administrative error or error due to inadvertence, or reasons why freight charges collected are thought to be unlawful (domestic commerce) showing why the application should be granted. Furnish affidavits, if appropriate, and legible copies of all supporting documents. If the error is due to inadvertence, specify the date when the carrier and/or conference intended or agreed to file a new tariff.

[Here set forth Name of Applicant, Signature of Authorized Person, Typed or Printed Name of Person, Title of Person and Date]

State of _____, County of _____ss:

I, _____, on oath declare that I am _____ of the above-named applicant, that I have read this application and know its contents, and that they are true.

Subscribed and sworn to before me, a notary public in and for the State of _____, County of _____, this _____ day of _____, A.D. 19_____.

(SEAL)

(S)_____
Notary Public

My Commission expires _____.

AFFIDAVIT OF CARRIER(S) and/or CONFERENCE

[Here, as applicable, set forth same type of affidavit(s) and notarization(s) as set forth on page 2 of this exhibit for carrier, for any other water carrier participating in the transportation under a joint through rate and/or for a conference, if a conference rate is involved.]

CERTIFICATE OF MAILING

I certify that the date shown below is the date of mailing [or date of delivery to courier] of the original and three (3) copies of this application to the Secretary, Federal Maritime Commission, Washington, D.C., 20573.

Dated at _____, this _____ day of_____, 19_____.

(S)_____

For_____

SUBPART G—TIME

§ 502.101 Computation.

In computing any period of time under the rules in this part, the time begins with the day following the act, event, or default, and includes the last day of the period, unless it is a Saturday, Sunday, or national legal holiday, in which event the period runs until the end of the next day which is not a Saturday, Sunday, or national legal holiday. When the period of time prescribed or allowed is less than seven (7) days, intermediate Saturdays, Sundays, or national legal holidays shall be excluded from the computation. [Rule 101.]

§ 502.102 Enlargement of time to file documents.

Motions for enlargement of time for the filing of any pleading or other document, or in connection with the procedures of Subpart L of this part, shall set forth the reasons for the motion. Such motions will be granted only under exceptional circumstances duly demonstrated in the request. Such motions shall conform to the requirements of Subpart H of this part, except as to service if they show that the parties have received actual notice of the motion; and in relation to briefs, exceptions, and replies to exceptions, such motions shall conform to the further provisions of §§ 502.222 and 502.227. Upon motion made after the expiration of the specified period, the filing may be permitted where reasonable grounds are found for the failure to file. Replies to such motions shall conform to the requirements of § 502.74. [Rule 102.]

§ 502.103 Reduction of time to file documents.

Except as otherwise provided by law and for good cause, the Commission, with respect to matters pending before it, and the presiding officer, with respect to matters pending before him or her, may reduce any time limit prescribed in the rules in this part. [Rule 103.]

§ 502.104 Postponement of hearing.

Motions for postponement of any hearing date shall set forth the reasons for the motion, and shall conform to the requirements of Subpart H of this part, except as to service if they show that parties have received such actual notice of motion. Such motions will be granted only if found necessary to prevent substantial delay, expense, detriment to the public interest or undue prejudice to a party. Replies to such motions shall conform to the requirements of § 502.74. [Rule 104.]

§ 502.105 Waiver of rules governing enlargements of time and postponements of hearings.

The Commission, the presiding officer, or the Chief Administrative Law Judge may waive the requirements of §§ 502.102 and 502.104, as to replies to pleadings, etc., to motions for enlargement of time or motions to postpone a hearing, and may rule ex parte on such requests. Requests for enlargement of time or motions to postpone or cancel a prehearing conference or hearing

must be received, whether orally or in writing, at least five (5) days before the scheduled date. Except for good cause shown, failure to meet this requirement may result in summary rejection of the request. [Rule 105.]

SUBPART H—FORM, EXECUTION, AND SERVICE OF DOCUMENTS

§ 502.111 Form and appearance of documents filed with Commission.

All papers to be filed under the rules in this part may be reproduced by printing or by any other process, provided the copies are clear and legible, shall be dated, the original signed in ink, show the docket description and title of the proceeding, and show the title, if any, and address of the signer. If typewritten, the impression shall be on only one side of the paper and shall be double spaced except that quotations shall be single spaced and indented. Documents not printed, except correspondence and exhibits, should be on strong, durable paper and shall be not more than 8½ inches wide and 12 inches long, with a left hand margin 1½ inches wide. Printed documents shall be printed in clear type (never smaller than small pica or 11-point type) adequately leaded, and the paper shall be opaque and unglazed. [Rule 111.]

§ 502.112 Subscription and verification of documents.

(a) If a party is represented by an attorney or other person qualified to practice before the Commission under the rules in this part, each pleading, document or other paper of such party filed with the Commission shall be signed by at least one person of record admitted to practice before the Commission in his or her individual name, whose address shall be stated. Except when otherwise specifically provided by rule or statute, such pleading, document or paper need not be verified or accompanied by affidavit. The signature of a person admitted or qualified to practice before the Commission constitutes a certificate by him or her that he or she has read the pleading, document or paper; that he or she is authorized to file it; that to the best of his or her knowledge, information, and belief there is good ground to support it; and that it is not interposed for delay. For a willful violation of this section, a person admitted or qualified to practice before the Commission may be subjected to appropriate disciplinary action.

(b) If a party is not represented by a person admitted or qualified to practice before the Commission, each pleading, document or other paper of such party filed with the Commission shall be signed and verified under oath by the party or by a duly authorized officer or agent of the party, whose address and title shall be stated. The form of verification shall be substantially as set forth in Exhibit No. 1 to Subpart E. Where the signature is that of an officer or agent (unless, in the case of a corporate party, it is signed by the president or a vice president and attested by the secretary or an assistant secretary under the seal of the corporation),

there shall be filed with the Commission an original or certified copy of the power of attorney or other document authorizing the person to sign. [Rule 112.]

§ 502.113 Service by the Commission.

Complaints filed pursuant to § 502.62, amendments to complaints, and complainant's memoranda filed in shortened procedure cases will be served by the Commission. In addition to and accompanying the original of every document filed with the Commission for service by the Commission, there shall be a sufficient number of copies for use of the Commission (see § 502.118) and for service on each party to the proceeding. [Rule 113.]

§ 502.114 Service and filing by parties.

(a) Except as otherwise specifically provided by the rules in this part, all pleadings, documents, and papers of every kind (except requests for subpenas) in proceedings before the Commission under the rules in this part (other than documents served by the Commission under § 502.113 and documents submitted at a hearing or prehearing conference) shall, when tendered to the Commission or the presiding officer for filing, show that service has been made upon all parties to the proceeding and upon any other persons required by the rules in this part to be served. Such service shall be made by delivering one copy to each party: by hand delivering in person; by mail, properly addressed with postage prepaid; or by courier.

(b) Except with respect to filing of complaints pursuant to §§ 502.62 and 502.63, protests pursuant to § 502.67 and claims pursuant to § 502.302, the date of filing shall be either the date on which the pleading, document, or paper is physically lodged with the Commission by a party or the date which a party certifies it to have been deposited in the mail or delivered to a courier. [Rule 114.]

§ 502.115 Service on attorney or other representative.

When a party has appeared by attorney or other representative, service upon each attorney or other representative of record will be deemed service upon the party, except that, if two or more attorneys of record are partners or associates of the same firm, only one of them need be served. [Rule 115.]

§ 502.116 Date of service.

The date of service of documents served by the Commission shall be the date shown in the service stamp thereon. The date of service of documents served by parties shall be the day when matter served is deposited in the United States mail, delivered to a courier, or is delivered in person, as the case may be. In computing the time from such dates, the provisions of § 502.101 shall apply. [Rule 116.]

§ 502.117 Certificate of service.

The original of every document filed with the Commission and required to be served upon all parties to a proceeding shall be accompanied by

a certificate of service signed by the party making service, stating that such service has been made upon each party to the proceeding. Certificates of service may be in substantially the following form:

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon [all parties of record or name of person(s)] by [mailing, delivering to courier or delivering in person] a copy to each such person. Dated at, _____ this _____ day of _____ 19 _____.

(S) _____

(For) _____

[Rule 117.]

§ 502.118 Copies of documents for use of the Commission.

(a) Except as otherwise provided in the rules in this part, the original and fifteen (15) copies of every document filed and served in proceedings before the Commission shall be furnished for the Commission's use. If a certificate of service accompanied the original document, a copy of such certificate shall be attached to each such copy of the document.

(b) In matters pending before an administrative law judge the following copy requirements apply.

(1) An original and fifteen copies shall be filed with the Secretary of:

(i) Appeals and replies thereto filed pursuant to § 502.153;

(ii) Memoranda submitted under shortened procedures of Subpart K of this part;

(iii) Briefs submitted pursuant to § 502.211;

(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.

(2) An original and four copies shall be filed with the Secretary of prehearing statements required by § 502.95, stipulations under § 502.162, and all other motions, petitions, or other written communications seeking a ruling from the presiding administrative law judge.

(3)(i) A single copy shall be filed with the Secretary of requests for discovery, answers, or objections exchanged among the parties under procedures of subpart L of this part. Such materials will not be part of the record for decision unless admitted by the presiding officer or Commission.

(ii) Motions filed pursuant to § 502.201 are governed by the requirements of paragraph (b)(2) of this section and motions involving persons and documents located in a foreign country are governed by the requirements of paragraph (b)(1)(iv) of this section.

(4) One copy of each exhibit shall be furnished to the official reporter, to each of the parties present at the hearing and to the Presiding Officer unless he or she directs otherwise. If submitted other than at a hearing, the "reporter's" copy of an exhibit shall be furnished to the administrative law judge for later inclusion in the record if and when admitted.

(5) Copies of prepared testimony submitted pursuant to §§ 502.67(d) and 502.157 are governed by the requirements for exhibits in paragraph (b)(4) of this section. [Rule 118.]

SUBPART I—SUBPENAS

§ 502.131 Requests; issuance.

Subpenas for the attendance of witnesses or the production of evidence shall be issued upon request of any party, without notice to any other party. Requests for subpenas for the attendance of witnesses may be made orally or in writing; requests for subpenas for the production of evidence shall be in writing. The party requesting the subpena shall tender to the presiding officer an original and at least two copies of such subpena. Where it appears to the presiding officer that the subpena sought may be unreasonable, oppressive, excessive in scope, or unduly burdensome, he or she may in his or her discretion, as a condition precedent to the issuance of the subpena, require the person seeking the subpena to show the general relevance and reasonable scope of the testimony or other evidence sought. [Rule 131.]

§ 502.132 Motions to quash or modify.

(a) Except when issued at a hearing, or in connection with the taking of a deposition, within ten (10) days after service of a subpena for attendance of a witness or a subpena for production of evidence, but in any event at or before the time specified in the subpena for compliance therewith, the person to whom the subpena is directed may, by motion with notice to the party requesting the subpena, petition the presiding officer to quash or modify the subpena.

(b) If served at the hearing, the person to whom the subpena is directed may, by oral application at the hearing, within a reasonable time fixed by the presiding officer, petition the presiding officer to revoke or modify the subpena.

(c) If served in connection with the taking of a deposition pursuant to § 502.203 unless otherwise agreed to by all parties or otherwise ordered by the presiding officer, the party who has requested the subpena shall arrange that it be served at least twenty (20) days prior to the date specified in the subpena for compliance therewith, the person to whom the subpena

is directed may move to quash or modify the subpena within ten (10) days after service of the subpena, and a reply to such motion shall be served within five (5) days thereafter. [Rule 132.]

§ 502.133 Attendance and mileage fees.

Witnesses summoned by subpena to a hearing are entitled to the same fees and mileage that are paid to witnesses in courts of the United States. Fees and mileage shall be paid, upon request, by the party at whose instance the witness appears. [Rule 133.]

§ 502.134 Service of subpenas.

If service of a subpena is made by a United States marshal, or his or her deputy, or an employee of the Commission, such service shall be evidenced by his or her return thereon. If made by any other person, such person shall make affidavit thereto, describing the manner in which service is made, and return such affidavit on or with the original subpena. In case of failure to make service, the reasons for the failure shall be stated on the original subpena. In making service, the original subpena shall be exhibited to the person served, shall be read to him or her if he or she is unable to read, and a copy thereof shall be left with him or her. The original subpena, bearing or accompanied by required return, affidavit, or statement, shall be returned without delay to the Commission, or if so directed on the subpena, to the presiding officer before whom the person named in the subpena is required to appear. [Rule 134.]

§ 502.135 Subpena of Commission staff personnel, documents or things.

(a) A subpena for the attendance of Commission staff personnel or for the production of documentary materials in the possession of the Commission shall be served upon the Secretary. If the subpena is returnable at hearing, a motion to quash may be filed within five (5) days of service and attendance shall not be required until the presiding officer rules on said motion. If the subpena is served in connection with prehearing depositions, the procedure to be followed with respect to motions to quash and replies thereto will correspond to the procedures established with respect to motions and replies in § 502.132(c).

(b) The General Counsel shall designate an attorney to represent any Commission staff personnel subpenaed under this section. The attorney so designated shall not thereafter participate in the Commission's decision-making process concerning any issue in the proceeding.

(c) Rulings of the presiding officer issued under § 502.135(a) shall become final rulings of the Commission unless an appeal is filed within ten (10) days after date of issuance of such rulings or unless the Commission, on its own motion, reverses, modifies, or stays such rulings within twenty (20) days of their issuance. Replies to appeals may be filed within ten (10) days. No ruling of the presiding officer shall be effective until twenty (20) days from date of issuance unless the Commission otherwise directs. [Rule 135.]

§ 502.136 Enforcement.

In the event of failure to comply with any subpena or order issued in connection therewith, the Commission may seek enforcement as provided in § 502.210(b). [Rule 136.]

SUBPART J—HEARINGS; PRESIDING OFFICERS; EVIDENCE

§ 502.141 Hearings not required by statute.

The Commission may call informal public hearings, not required by statute, to be conducted under the rules in this part where applicable, for the purpose of rulemaking or to obtain information necessary or helpful in the determination of its policies or the carrying out of its duties, and may require the attendance of witnesses and the production of evidence to the extent permitted by law. [Rule 141.]

§ 502.142 Hearings required by statute.

In complaint and answer cases, investigations on the Commission's own motion, and in other rulemaking and adjudication proceedings in which a hearing is required by statute, formal hearings shall be conducted pursuant to 5 U.S.C. 554. [Rule 142.]

§ 502.143 Notice of nature of hearing, jurisdiction and issues.

Persons entitled to notice of hearings, except those notified by complaint served under § 502.133, will be duly and timely informed of (a) the nature of the proceeding, (b) the legal authority and jurisdiction under which the proceeding is conducted, and (c) the terms, substance, and issues involved, or the matters of fact and law asserted, as the case may be. Such notice shall be published in the *Federal Register* unless all persons subject thereto are named and either are personally served or otherwise have actual notice thereof in accordance with law. [Rule 143.]

§ 502.144 Notice of time and place of hearing.

Notice of hearing will designate the time and place thereof, the person or persons who will preside, and the kind of decision to be issued. The date or place of a hearing for which notice has been issued may be changed when warranted. Reasonable notice will be given to the parties or their representatives of the time and place of the change thereof, due regard being had for the public interest and the convenience and necessity of the parties or their representatives. Notice may be served by mail or telegraph. [Rule 144.]

§ 502.145 Presiding officer.

(a) *Definition.* "Presiding officer" includes, where applicable, a member of the Commission or an administrative law judge. (See § 502.25.)

(b) *Designation of administrative law judge.* An administrative law judge will be designated by the Chief of the Commission's Office of Administrative Law Judges to preside at hearings required by statute, in rotation so far as practicable, unless the Commission or one or more members

thereof shall preside, and will also preside at hearings not required by statute when designated to do so by the Commission.

(c) *Unavailability.* If the presiding officer assigned to a proceeding becomes unavailable to the Commission, the Commission, or Chief Judge (if such presiding officer was an administrative law judge), shall designate a qualified officer to take his or her place. Any motion predicated upon the substitution of a new presiding officer for one originally designated shall be made within ten (10) days after notice of such substitution. [Rule 145.]

§ 502.146 Commencement of functions of Office of Administrative Law Judges.

In proceedings handled by the Office of Administrative Law judges, its functions shall attach:

(a) Upon the service by the Commission of a complaint filed pursuant to § 502.62; or

(b) Upon reference by the Commission of a petition for a declaratory order pursuant to § 502.68; or

(c) Upon forwarding for assignment by the Office of the Secretary of a special docket application pursuant to § 502.92; or

(d) Upon the initiation of a proceeding and ordering of hearing before an administrative law judge. [Rule 146.]

§ 502.147 Functions and powers.

(a) *Of presiding officer.* The officer designated to hear a case shall have authority to arrange and give notice of hearing; sign and issue subpoenas authorized by law; take or cause depositions to be taken; rule upon proposed amendments or supplements to pleadings; delineate the scope of a proceeding instituted by order of the Commission by amending, modifying, clarifying or interpreting said order, except with regard to that portion of any order involving the Commission's suspension authority set forth in Section 3, Intercoastal Shipping Act, 1933; hold conferences for the settlement or simplification of issues by consent of the parties; regulate the course of the hearing; prescribe the order in which evidence shall be presented; dispose of procedural requests or similar matters; hear and rule upon motions, administer oaths and affirmations; examine witnesses; direct witnesses to testify or produce evidence available to them which will aid in the determination of any question of fact in issue; rule upon offers of proof and receive relevant, material, reliable and probative evidence; act upon petitions to intervene; permit submission of facts, arguments, offers of settlement, and proposals of adjustment; hear oral argument at the close of testimony; fix the time for filing briefs, motions, and other documents to be filed in connection with hearings and the administrative law judge's decision thereon, except as otherwise provided by the rules in this part; act upon petitions for enlargement of time to file such documents, including answers to formal complaints; and dispose of any other matter that normally and properly arises in the course of proceedings.

The presiding officer or the Commission may exclude any person from a hearing for disrespectful, disorderly, or contumacious language or conduct.

(b) All of the functions delegated in Subparts A to Q of this part, inclusive, to the Chief Judge, presiding officer, or administrative law judge include the functions with respect to hearing, determining, ordering, certifying, reporting, or otherwise acting as to any work, business, or matter, pursuant to the provisions of section 105 of Reorganization Plan No. 7 of 1961. [Rule 147.]

§ 502.148 Consolidation of proceedings.

The Commission or the Chief Judge (or designee) may order two or more proceedings which involve substantially the same issues consolidated and heard together. [Rule 148.]

§ 502.149 Disqualification of presiding or participating Officer.

Any presiding or participating officer may at any time withdraw if he or she deems himself or herself disqualified, in which case there will be designated another presiding officer. If a party to a proceeding, or its representative, files a timely and sufficient affidavit of personal bias or disqualification of a presiding or participating officer, the Commission will determine the matter as a part of the record and decision in the case. [Rule 149.]

§ 502.150 Further evidence required by presiding officer during hearing.

At any time during the hearing, the presiding officer may call for further evidence upon any issue, and require such evidence where available to be presented by the party or parties concerned, either at the hearing or adjournment thereof. [Rule 150.]

§ 502.151 Exceptions to rulings of presiding officer unnecessary.

Formal exceptions to rulings of the presiding officer are unnecessary. It is sufficient that a party, at the time the ruling of the presiding officer is made or sought, makes known the action which it desires the presiding officer to take or its objection to an action taken, and its grounds therefor. [Rule 151.]

§ 502.152 Offer of proof.

An offer of proof made in connection with an objection taken to any ruling of the presiding officer rejecting or excluding proffered oral testimony shall consist of a statement of the substance of the evidence which counsel contends would be adduced by such testimony; and, if the excluded evidence consists of evidence in documentary or written form or of reference to documents or records, a copy of such evidence shall be marked for identification and shall constitute the offer of proof. [Rule 152.]

§ 502.153 Appeal from ruling of presiding officer other than orders of dismissal in whole or in part.

(a) Rulings of the presiding officer may not be appealed prior to or during the course of the hearing, or subsequent thereto, if the proceeding

is still before him or her, except where the presiding officer shall find it necessary to allow an appeal to the Commission to prevent substantial delay, expense, or detriment to the public interest, or undue prejudice to a party.

(b) Any part seeking to appeal must file a motion for leave to appeal no later than fifteen (15) days after written service or oral notice of the ruling in question, unless the presiding officer, for good cause shown, enlarges or shortens the time. Any such motion shall contain not only the grounds for leave to appeal but the appeal itself.

(c) Replies to the motion for leave to appeal and the appeal may be filed within fifteen (15) days after date of service thereof, unless the presiding officer, for good cause shown, enlarges or shortens the time. If the motion is granted, the presiding officer shall certify the appeal to the Commission.

(d) Unless otherwise provided, the certification of the appeal shall not operate as a stay of the proceeding before the presiding officer.

(e) The provisions of § 502.10 shall not apply to this section. [Rule 153.]

§ 502.154 Rights of parties as to presentation of evidence.

Every party shall have the right to present its case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. The presiding officer shall, however, have the right and duty to limit the introduction of evidence and the examination and cross-examination of witnesses when in his or her judgment, such evidence or examination is cumulative or is productive of undue delay in the conduct of the hearing. [Rule 154.]

§ 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.]

§ 502.156 Evidence admissible.

In any proceeding under the rules in this part, all evidence which is relevant, material, reliable and probative, and not unduly repetitious or cumulative, shall be admissible. All other evidence shall be excluded. Unless inconsistent with the requirements of the Administrative Procedure Act and these Rules, the Federal Rules of Evidence, P.L. 93–595, effective July 1, 1975, will also be applicable. [Rule 156.]

§ 502.157 Written evidence.

(a) The use of written statements in lieu of oral testimony shall be resorted to where the presiding officer in his or her discretion rules that

such procedure is appropriate. The statements shall be numbered in paragraphs, and each party in its rebuttal shall be required to list the paragraphs to which it objects, giving an indication of its reasons for objecting. Statistical exhibits shall contain a short commentary explaining the conclusions which the offeror draws from the data. Any portion of such testimony which is argumentative shall be excluded. Where written statements are used, copies of the statement and any rebuttal statement shall be furnished to all parties, as shall copies of exhibits. The presiding officer shall fix respective dates for the exchange of such written rebuttal statements and exhibits in advance of the hearing to enable study by the parties of such testimony. Thereafter, the parties shall endeavor to stipulate as many of the facts set forth in the written testimony as they may be able to agree upon. Oral examination of witnesses shall thereafter be confined to facts which remain in controversy, and a reading of the written statements at the hearing will be dispensed with unless the presiding officer otherwise directs.

(b) Where a formal hearing is held in a rulemaking proceeding, interested persons will be afforded an opportunity to participate through submission of relevant, material, reliable and probative written evidence properly verified, except that such evidence submitted by persons not present at the hearing will not be made a part of the record if objected to by any party on the ground that the person who submits the evidence is not present for cross-examination. [Rule 157.]

§ 502.158 Documents containing matter not material.

Where written matter offered in evidence is embraced in a document containing other matter which is not intended to be offered in evidence, the offering party shall present the original document to all parties at the hearing for their inspection, and shall offer a true copy of the matter which is to be introduced, unless the presiding officer determines that the matter is short enough to be read into the record. Opposing parties shall be afforded an opportunity to introduce in evidence, in like manner, other portions of the original document which are material and relevant. [Rule 158.]

§ 502.159 [Reserved.]

§ 502.160 Records in other proceedings.

When any portion of the record before the Commission in any proceeding other than the one being heard is offered in evidence, a true copy of such portion shall be presented for the record in the form of an exhibit unless the parties represented at the hearing stipulate upon the record that such portion may be incorporated by reference. [Rule 160.]

§ 502.161 Commission's files.

Where any matter contained in a tariff, report, or other document on file with the Commission is offered in evidence, such document need not be produced or marked for identification, but the matter so offered shall be specified in its particularity, giving tariff number and page number

of tariff, report, or document in such manner as to be readily identified, and may be received in evidence by reference, subject to comparison with the original document on file. [Rule 161.]

§ 502.162 Stipulations.

The parties may, by stipulation, agree upon any facts involved in the proceeding and include them in the record with the consent of the presiding officer. It is desirable that facts be thus agreed upon whenever practicable. Written stipulations shall be subscribed and shall be served upon all parties of record unless presented at the hearing or prehearing conference. A stipulation may be proposed even if not subscribed by all parties without prejudice to any nonsubscribing party's right to cross-examine and offer rebuttal evidence. [Rule 162.]

§ 502.163 Receipt of documents after hearing.

Documents or other writings to be submitted for the record after the close of the hearing will not be received in evidence except upon permission of the presiding officer. Such documents or other writings when submitted shall be accompanied by a statement that copies have been served upon all parties, and shall be received, except for good cause shown, not later than ten (10) days after the close of the hearing and not less than ten (10) days prior to the date set for filing briefs. Exhibit numbers will not be assigned until such documents are actually received and incorporated in the record. [Rule 163.]

§ 502.164 Oral argument at hearings.

Oral argument at the close of testimony may be ordered by the presiding officer in his or her discretion. [Rule 164.]

§ 502.165 Official transcript.

(a) The Commission will designate the official reporter for all hearings. The official transcript of testimony taken, together with any exhibits and any briefs or memoranda of law filed therewith, shall be filed with the Commission. Transcripts of testimony will be available in any proceeding under the rules in this part, and will be supplied by the official reporter to the parties and to the public, except when required for good cause to be held confidential, at rates not to exceed the maximum rates fixed by contract between the Commission and the reporter.

(b)(1) Section 11 of the Federal Advisory Committee Act provides that, except where prohibited by contractual agreements entered into prior to the effective date of this Act, agencies and advisory committees shall make available to any person, at actual cost of duplication, copies of transcripts of agency proceedings or advisory committee meetings. As used in this section, "agency proceeding" means any proceeding as defined in 5 U.S.C. 551(12).

(2) The Office of Management and Budget has interpreted this provision as being applicable to proceedings before the Commission and its administrative law judges. (Guidelines, 38 FR 12851, May 16, 1973).

(3) The Commission interprets section 11 and the OMB guidelines as follows:

(i) Future contracts between the Commission and the successfully bidding recording firm will provide that any party to a Commission proceeding or other interested person (hereinafter included within the meaning of "party") shall be able to obtain a copy of the transcript of the proceeding in which it is involved at the actual cost of duplication of the original transcript, which includes a reasonable amount for overhead and profit, except where it requests delivery of copies in a shorter period of time than is required for delivery by the Commission.

(ii) The Commission will bear the full expense of transcribing all of its administrative proceedings where it requests regular delivery service (as set forth in the Contract). In cases where the Commission requests daily delivery of transcript copies (as set forth in the Contract), any party may receive daily delivery service at the actual cost of duplication.

(iii)(A) Where the Commission does not request daily copy service, any party requesting such service must bear the incremental cost of transcription above the regular copy transcription cost borne by the Commission, in addition to the actual cost of duplication, except that where the party applies for and properly shows that the furnishing of daily copy is indispensible to the protection of a vital right or interest in achieving a fair hearing, the presiding officer in the proceeding in which the application is made shall order that daily copy service be provided the applying party at the actual cost of duplication, with the full cost of transcription being borne by the Commission.

(B) In the event a request for daily copy is denied by the presiding officer, the requesting party, in order to obtain daily copy, must pay the cost of transcription over and above that borne by the Commission, i.e., the incremental cost between that paid by the Commission when it requests regular copy and when it requests daily copy.

(C) The decision of the presiding officer in this situation is interpreted as falling within the scope of the functions and powers of the presiding officer, as defined in § 502.147(a). [Rule 165.]

§ 502.166 Corrections of transcript.

Motions made at the hearing to correct the record will be acted upon by the presiding officer. Motions made after the hearing to correct the record shall be filed with the presiding officer within twenty-five (25) days after the last day of hearing or any session thereof, unless otherwise directed by the presiding officer, and shall be served on all parties. Such motions may be in the form of a letter. If no objections are received within ten (10) days after date of service, the transcript will, upon approval of the presiding officer, be changed to reflect such corrections. If objections are received, the motion will be acted upon with due consideration of the stenographic record of the hearing. [Rule 166.]

§ 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. Within five (5) days after such testimony is given, the objecting party shall file with the presiding officer a verified written motion to withhold such information from public disclosure, setting forth sufficient identification of same and the basis upon which public disclosure should not be made. Copies of said transcript and motion 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 they deem it necessary to a correct decision in the proceeding. [Rule 167.]

§ 502.168 Copies of data or evidence.

Every person compelled to submit data or evidence shall be entitled to retain or, on payment of proper costs, procure a copy of transcript thereof. [Rule 168.]

§ 502.169 Record of decision.

The transcript of testimony and exhibits, together with all papers and requests filed in the proceeding, shall constitute the exclusive record for decision. [Rule 169.]

SUBPART E—SHORTENED PROCEDURE

§ 502.181 Selection of cases for shortened procedure; consent required.

By consent of the parties and with approval of the Commission or presiding officer, a complaint proceeding may be conducted under shortened procedure without oral hearing, except that a hearing may be ordered by the presiding officer at the request of any party or in his or her discretion. [Rule 181.]

§ 502.182 Complaint and memorandum of facts and arguments and filing fee.

A complaint filed with the Commission under this subpart shall have attached a memorandum of the facts, subscribed and verified according to § 502.112, and of arguments separately stated, upon which it relies. The original of each complaint with memorandum shall be accompanied by copies for the Commission's use. The complaint shall be accompanied by remittance of a $50 filing fee. [Rule 182.]

§ 502.183 Respondent's answering memorandum.

Within twenty-five (25) days after date of service of the complaint, unless a shorter period is fixed, each respondent shall, if it consents to

the shortened procedure provided in this subpart, serve upon complainant pursuant to subpart H of this part an answering memorandum of the facts, subscribed and verified according to § 502.112, and of arguments, separately stated, upon which it relies. The original of the answering memorandum shall be accompanied by a certificate of service as provided in § 502.114 and shall be accompanied by copies for the Commission's use. If the respondent does not consent to the proceeding being conducted under the shortened procedure provided in this subpart, the matter will be governed by subpart E of this part and the respondent shall file an answer under § 502.64. [Rule 183.]

§ 502.184 Complainant's memorandum in reply.

Within fifteen (15) days after the date of service of the answering memorandum prescribed in § 502.183, unless a shorter period is fixed, each complainant may file a memorandum in reply, subscribed and verified according to § 502.112, served as provided in § 502.114, and accompanied by copies for the Commission's use. This will close the record for decision unless the presiding officer determines that the record is insufficient and orders the submission of additional evidentiary materials. [Rule 184.]

§ 502.185 Service of memoranda upon and by interveners.

Service of all memoranda shall be made upon any interveners. Interveners shall file and serve memoranda in conformity with the provisions relating to the parties on whose behalf they intervene. [Rule 185.]

§ 502.186 Contents of memoranda.

The memorandum should contain concise arguments and fact, the same as would be offered if a formal hearing were held and briefs filed. If reparation is sought, paid freight bills should accompany complainant's original memorandum. [Rule 186.]

§ 502.187 Procedure after filing of memoranda.

An initial, recommended, or tentative decision will be served upon the parties in the same manner as is provided under § 502.225. Thereafter, the procedure will be the same as that in respect to proceedings after formal hearing. [Rule 187.]

SUBPART L—DEPOSITIONS, WRITTEN INTERROGATORIES, AND DISCOVERY

§ 502.201 General provisions governing discovery.

(a) *Applicability.* The procedures described in this subpart are available in all adjudicatory proceedings under section 22 of the Shipping Act, 1916 and the Shipping Act of 1984. Unless otherwise ordered by the presiding officer, the copy requirements of § 502.118(b)(3)(i) shall be observed.

(b) *Schedule of use.*

(1) *Complaint proceedings.* Any party desiring to use the procedures provided in this subpart shall commence doing so at the time it files

its initial pleading, e.g., complaint, answer or petition for leave to intervene. Discovery matters accompanying complaints shall be filed with the Secretary of the Commission for service pursuant to § 502.113.

(2) *Commission instituted proceedings.* All parties desiring to use the procedures provided in this subpart shall commence to do so within 30 days of the service of the Commission's order initiating the proceeding.

(3) *Commencement of discovery.* The requirement to commence discovery under paragraphs (b)(1) and (b)(2) of this section shall be deemed satisfied when a party serves any discovery request under this subpart upon a party or person from whom a response is deemed necessary by the party commencing discovery. A schedule for further discovery pursuant to this subpart shall, be established at the conference of the parties pursuant to paragraph (d) of this section.

(c) *Completion of discovery.* Discovery shall be completed within 120 days of the service of the complaint or the Commission's order initiating the proceeding.

(d) *Duty of the Parties.* In all proceedings in which the procedures of this subpart are used, it shall be the duty of the parties to meet or confer within fifteen (15) days after service of the answer to a complaint or after service of the discovery requests in a Commission-instituted proceeding in order to: establish a schedule for the completion of discovery within the 120-day period prescribed in paragraph (c) of this section; resolve to the fullest extent possible disputes relating to discovery matters; and expedite, limit, or eliminate discovery by use of admissions, stipulations and other techniques. The schedule shall be submitted to the presiding officer not later than five (5) days after the conference. Nothing in this rule should be construed to preclude the parties from meeting or conferring at an earlier date.

(e) *Submission of status reports and requests to alter schedule.* The parties shall submit a status report concerning their progress under the discovery schedule established pursuant to paragraph (d) of this section not later than thirty (30) days after submission of such schedule to the presiding officer and at 30-day intervals thereafter, concluding on the final day of the discovery schedule, unless the presiding officer otherwise directs. Requests to alter such schedule beyond the 120-day period shall set forth clearly and in detail the reasons why the schedule cannot be met. Such requests may be submitted with the status reports unless an event occurs which makes adherence to the schedule appear to be impossible, in which case the requests shall be submitted promptly after occurrence of such event.

(f) *Conferences.* The presiding officer may at any time order the parties or their attorneys to participate in a conference at which the presiding officer may direct the proper use of the procedures of this subpart or make such orders as may be necessary to resolve disputes with respect to discovery and to prevent delay or undue inconvenience. When a reporter

is not present and oral rulings are made at a conference held pursuant to this paragraph or paragraph (g) of this section, the parties shall submit to the presiding officer as soon as possible but within three (3) work days, unless the presiding officer grants additional time, a joint memorandum setting forth their mutual understanding as to each ruling on which they agree and, as to each ruling on which their understandings differ, the individual understandings of each party. Thereafter, the presiding officer shall issue a written order setting forth such rulings.

(g) *Resolution of disputes.* After making every reasonable effort to resolve discovery disputes, a party may request a conference or rulings from the presiding officer on such disputes. Such rulings shall be made orally upon the record when feasible and/or by subsequent ruling in writing. If necessary to prevent undue delay or otherwise facilitate conclusion of the proceeding, the presiding officer may order a hearing to commence before the completion of discovery.

(h) *Scope of examination.* Persons and parties may be examined regarding any matter, not privileged, which is relevant to the subject matter involved in the proceeding, whether it relates to the claim or defense of the examining party or to the claim or defense of any other party, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things, and the identity and location of persons having knowledge of relevant facts. It is not ground for objection that the testimony will be inadmissible at the hearing if the testimony sought appears reasonably calculated to lead to the discovery of admissible evidence.

(i) *Protective Orders.*

(1) Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the presiding officer may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense including one or more of the following: (i) that the discovery not be had; (ii) that the discovery may be had only on specified terms and conditions, including a designation of the time or place; (iii) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery; (iv) that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters; (v) that discovery may be conducted with no one present except persons designated by the presiding officer; (vi) that a deposition after being sealed be opened only by order of the presiding officer; (vii) that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way; (viii) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the presiding officer.

(2) If the motion for a protective order is denied in whole or in part, the presiding officer may, on such terms and conditions as are just, order

that any party or person provide or permit discovery. Rulings under this paragraph shall be issued by the presiding officer at a discovery conference called under § 502.201(f) or, if circumstances warrant, under such other procedure as the presiding officer may establish.

(j) *Supplementation of responses.* A party who has responded to a request for discovery with a response that was complete when made is under no duty to supplement the party's responses to include information thereafter acquired, except as follows:

(1) A party is under a duty seasonably to supplement responses with respect to any question directly addressed to (i) the identity and location of persons having knowledge of discoverable matters, and (ii) the identity of each person expected to be called as an expert witness at a hearing, the subject matter on which such person is expected to testify, and the substance of the testimony.

(2) A party is under a duty seasonably to amend a prior response if the party obtains information upon the basis of which (i) the party knows that the response was incorrect when made, or (ii) the party knows that the response though correct when made is no longer true and the circumstances are such that a failure to amend the response is in substance a knowing concealment.

(3) A duty to supplement responses may be imposed by order of the presiding officer or by agreement of the parties, subject to the time limitations set forth in paragraph (c) of this section or established under paragraph (e) of this section. [Rule 201.]

§ 502.202 Persons before whom depositions may be taken.

(a) *Within the United States.* Within the United States or within a territory or insular possession subject to the jurisdiction of the United States, depositions shall be taken before an officer authorized to administer oaths under the laws of the United States or of the place where the examination is held.

(b) *In foreign countries.* In a foreign country, depositions may be taken (1) on notice, before a person authorized to administer oaths in the place in which the examination is held, either under the law thereof or under the law of the United States, or (2) before a person commissioned by the Commission, and a person so commissioned shall have the power by virtue of his or her commission to administer any necessary oath and take testimony, or (3) pursuant to a letter rogatory. A commission or a letter rogatory shall be issued on application and notice and on terms that are just and appropriate. It is not requisite to the issuance of a commission or a letter rogatory that the taking of the deposition in any other manner is impracticable or inconvenient; and both a commission and a letter rogatory may be issued in proper cases. A notice or commission may designate the person before whom the deposition is to be taken either by name or descriptive title. A letter rogatory may be addressed "To the Appropriate Authority in [here name the country]." Evidence obtained

in response to a letter rogatory need not be excluded merely for the reason that it is not a verbatim transcript or that the testimony was not taken under oath or for any similar departure from the requirements for depositions taken within the United States under the rules in this subpart. (See 22 CFR 92.49–92.66.)

(c) *Disqualification for interest.* No deposition shall be taken before a person who is a relative or employee or attorney or counsel of any of the parties, or is a relative or employee of such attorney or counsel, or is financially interested in the action.

(d) *Waiver of objection.* Objection to taking a deposition because of disqualification of the officer before whom it is to be taken is waived unless made before the deposition begins or as soon thereafter as the disqualification becomes known or could be discovered with reasonable diligence.

(e) *Stipulations.* If the parties so stipulate in writing, depositions may be taken before any person, at any time or place, upon any notice, and in any manner and when so taken may be used like other depositions. [Rule 202.]

§ 502.203 Depositions upon oral examination.

(a) *Notice of examination.*

(1) A party desiring to take the deposition of any person upon oral examination shall give reasonable notice in writing to such person and to every other party to the action, pursuant to subpart H of this part. The notice shall state the time and place for the taking of the deposition sufficient to identify the person or the particular class or group to which the person belongs. The notice shall also contain a statement of the matters concerning which each witness will testify.

(2) The attendance of witnesses may be compelled by subpoena as provided in Subpart I of this part. If a subpoena duces tecum is to be served on the person to be examined, the designation of the materials to be produced as set forth in the subpoena shall be attached to or included in the notice.

(3) All errors and irregularities in the notice of subpoena for taking of a deposition are waived unless written objection is promptly served upon the party giving the notice.

(4) Examination and cross-examination of deponents may proceed as permitted at the hearing under the provisions of § 502.154.

(b) *Record of examination; oath; objections.*

(1) The officer before whom the deposition is to be taken shall put the witness on oath and shall personally, or by someone acting under the direction and in his or her presence, record the testimony of the witness. The testimony shall be taken stenographically and transcribed unless the parties agree otherwise. All objections made at the time of the examination to the qualifications of the officer taking it, or to the evidence presented, or to the conduct of any party, and any other objection to the proceedings,

shall be noted by the officer upon the deposition. Evidence objected to shall be taken subject to the objections. Objections shall be resolved at a discovery conference called under § 502.201(f) or, if circumstances warrant, by such other procedure as the presiding officer may establish.

(2) In lieu of participating in the oral examination, parties served with notice of taking a deposition may transmit written interrogatories to the officer, who shall propound them to the witness and record the answers verbatim.

(3) The parties may stipulate or the presiding officer may upon motion order that a deposition be taken by telephone or other reliable device.

(c) *Motion to terminate or limit examination.* At any time during the taking of the deposition, on motion of any party or of the deponent and upon a showing that the examination is being conducted in bad faith or in such manner as unreasonably to annoy, embarrass, or oppress the deponent or party, the presiding officer may order the officer conducting the examination to cease forthwith from taking the deposition, or may limit the scope and manner of the taking of the deposition as provided in paragraph (b) of this section. If the order made terminates the examination, it shall be resumed thereafter only upon the order of the presiding officer. Upon demand of the objecting party or deponent, the taking of the deposition shall be suspended for the time necessary to make a motion for an order. Rulings under this paragraph shall be issued by the presiding officer at a discovery conference called under § 502.201(f) or, if circumstances warrant, by such other procedure as the presiding officer may establish.

(d) *Submission to witness; changes; signing.* When the testimony is fully transcribed, the deposition shall be submitted to the witness for examination and shall be read to or by the witness, unless such examination and reading are waived by the witness and by the parties. Any changes in form or substance which the witness desires to make shall be entered upon the deposition by the officer with a statement of the reasons given by the witness for making them. The deposition shall then be signed by the witness unless the parties by stipulation waive the signing or the witness is ill or cannot be found or refuses to sign. If the deposition is not signed by the witness, the officer shall sign it and state on the record the fact of the waiver or of the illness or absence of the witness or the fact of the refusal to sign, together with the reason, if any, given therefor, and the deposition may then be used as fully as though signed, unless upon objection, the presiding officer holds that the reasons given for the refusal to sign require rejection of the deposition in whole or in part.

(e) *Certification and filing by officer; copies, notice of filing.*

(1) The officer taking the deposition shall certify on the deposition that the witness was duly sworn by the officer and that the deposition is a true record of the testimony given by the witness. The officer shall then securely seal the deposition in an envelope endorsed with the title

of the action and marked "Deposition of [here insert name of witness]" and shall promptly file it with the Secretary of the Commission by hand or registered or certified mail.

(2) Interested parties shall make their own arrangements with the officer taking the deposition for copies of the testimony and the exhibits.

(3) The party taking the deposition shall give prompt notice of its filing to all other parties.

(f) *Effect of errors and irregularities.* Errors and irregularities in the manner in which the testimony is transcribed or the deposition is prepared, signed, certified, sealed, endorsed, transmitted, filed, or otherwise dealt with by the officer under this section and § 502.204 are waived unless a motion to suppress the deposition or some part thereof is made within ten (10) days of filing. [Rule 203.]

§ 502.204 Depositions upon written interrogatories.

(a) *Serving interrogatories; notice.* A party desiring to take the deposition of any person upon written interrogatories shall serve them upon every other party pursuant to subpart H of this part with a notice stating the name and address of the person who is to answer them and the name or descriptive title and address of the officer before whom the deposition is to be taken. Within ten (10) days thereafter, a party so served may serve cross interrogatories upon the party proposing to take the deposition. All errors and irregularities in the notice are waived unless written objection is promptly served upon the party giving the notice.

(b) *Officer to take responses and prepare record.* A copy of the notice and copies of all interrogatories served shall be delivered by the party taking the deposition to the officer designated in the notice, who shall proceed promptly in the manner provided by paragraphs (b), (d) and (e) of § 502.203 to take the testimony of the witness in response to the interrogatories and to prepare, certify, and file or mail the deposition, attaching thereto the copy of the notice and the interrogatories received by him or her.

(c) *Notice of filing.* When the deposition is filed, the party taking it shall promptly give notice thereof to all other parties. [Rule 204.]

§ 502.205 Interrogatories to parties.

(a) *Service, answers.*

(1) Any party may serve, pursuant to Subpart H of this part, upon any other party written interrogatories to be answered by the party served or, if the party served is a public or private corporation or a partnership or association, by any officer or agent, who shall furnish such information as is available to the party. Any party desiring to serve interrogatories as provided by this section must comply with the applicable provisions of § 502.201 and make service thereof on all parties to the proceeding.

(2) Each interrogatory shall be answered separately and fully in writing under oath, unless it is objected to, in which event the reasons for objection shall be stated in lieu of an answer. The answers are to be signed by

the person making them, and the objections signed by the attorney making them.

(3) The party upon whom the interrogatories have been served shall serve a copy of the answers, and objections if any, on all parties to the proceeding under the schedule established pursuant to § 502.201. The presiding officer, for good cause, may limit service of answers.

(b) *Objections to interrogatories.* All objections to interrogatories shall be resolved at the conference or meeting provided for under § 502.201(f) or, if circumstances warrant, by such other procedure as the presiding officer may establish. Written replies to objections to interrogatories shall be permitted only to the extent that the discovery schedule previously established under § 502.201(d) is not delayed.

(c) *Scope, time, number and use.*

(1) Interrogatories may relate to any matters which can be inquired into under § 502.201(h), and the answers may be used to the same extent as provided in § 502.209 for the use of the deposition of a party.

(2) Interrogatories may be sought after interrogatories have been answered, but the presiding officer, on motion of the deponent or the party interrogated, may make such protective order as justice may require.

(3) The number of interrogatories or of sets of interrogatories to be served is not limited except as justice requires to protect the party from annoyance, expense, embarrassment, or oppression.

(4) An interrogatory otherwise proper is not necessarily objectionable merely because an answer to the interrogatory involves an opinion or contention that relates to fact or the application of law to fact, but the presiding officer may order that such an interrogatory need not be answered until after designated discovery has been completed or until a prehearing conference or other later time.

(d) *Option to produce business records.* Where the answer to an interrogatory may be derived or ascertained from the business records of the party upon whom the interrogatory has been served or from an examination, audit or inspection of such business records, or from a compilation, abstract or summary based thereon, and the burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as for the party served, it is a sufficient answer to such interrogatory to specify the records from which the answer may be derived or ascertained and to afford to the party serving the interrogatory reasonable opportunity to examine, audit or inspect such records and to make copies, compilations, abstracts or summaries. [Rule 205.]

§ 502.206 Production of documents and things and entry upon land for inspection and other purposes.

(a) *Scope.* Any party may serve, pursuant to Subpart H of this part, on any other party a request (1) to produce and permit the party making the request, or someone acting on its behalf, to inspect and copy any designated documents (including writings, drawings, graphs, charts, photo-

graphs, sound or video recordings, and other data compilations from which information can be obtained, translated, if necessary, by the respondent through detection devices into reasonably usable form), or to inspect and copy, test, or sample any tangible things which constitute or contain matters within the scope of § 502.203(a) and which are in the possession, custody or control of the party upon whom the request is served; or (2) to permit entry upon designated land or other property in the possession or control of the party upon whom the request is served for the purpose of inspection and measuring, surveying, photographing, testing, or sampling the property of any designated object or operation thereon, within the scope of § 502.203(a).

(b) *Procedure.* The request shall set forth the items to be inspected either by individual item or by category, and describe each item and category with reasonable particularity. The request shall specify a reasonable time, place, and manner of making the inspection and performing the related acts. Responses shall be served under the schedule established pursuant to § 502.201. The response shall state, with respect to each item or category, that inspection and related activities will be permitted as requested, unless the request is objected to, in which event the reasons for objection shall be stated. Objections to requests for production of documents shall be resolved at the conference or meeting required under § 502.201(f) or, if circumstances warrant, by such other procedure as the presiding officer may establish. Written replies to objections to requests for production of documents shall be permitted only to the extent that the discovery schedule previously established under § 502.201(d) is not delayed. [Rule 206.]

§ 502.207 Requests for admission.

(a)(1) A party may serve, pursuant to Subpart H of this part, upon any other party a written request for the admission, for purposes of the pending action only, of the truth of any matters within the scope of § 502.203(a) set forth in the request that relate to statements or opinions of fact or of the application of law to fact, including the genuineness of any documents described in the request. Copies of documents shall be served with the request unless they have been or are otherwise furnished or made available for inspection and copying. Any party desiring to serve a request as provided by this section must comply with the applicable provisions of § 502.201.

(2)(i) Each matter of which an admission is requested shall be separately set forth.

(ii) The matter is admitted unless, within thirty (30) days after service of the request, or within such shorter or longer time as the presiding officer may allow pursuant to § 502.201, the party to whom the request is directed serves upon the party requesting the admission a written answer or objection addressed to the matter, signed by the party or the party's attorney. If objection is made, the reasons therefor shall be stated. The answer shall specifically deny the matter or set forth in detail the reasons

why the answering party cannot truthfully admit or deny the matter. A denial shall fairly meet the substance of the requested admission, and when good faith requires that a party qualify the answer or deny only a part of the matter of which an admission is requested, the party shall specify so much of it as is true and qualify or deny the remainder.

(iii) An answering party may not give lack of information or knowledge as a reason for failure to admit or deny unless the party states that reasonable inquiry has been made and that the information known or readily obtainable is insufficient to enable the party to admit or deny. A party who considers that a matter of which an admission has been requested presents a genuine issue for trial may not, on that ground alone, object to the request; a party may, subject to the provisions of § 502.207(c) deny the matter or set forth reasons why it cannot be admitted or denied.

(3) The party who has requested admissions may request rulings on the sufficiency of the answers or objections. Rulings on such requests shall be issued at a conference called under § 502.201(f) or, if circumstances warrant, by such other procedure as the presiding officer may establish. Unless the presiding officer determines that an objection is justified, the presiding officer shall order that an answer be served. If the presiding officer determines that an answer does not comply with the requirements of this rule, the presiding officer may order either that the matter is admitted or that an amended answer be served. The presiding officer may, in lieu of these orders, determine that final disposition of the request be made at a prehearing conference or at a designated time prior to hearing.

(b) *Effect of admission.* Any matter admitted under this rule is conclusively established unless the presiding officer on motion permits withdrawal or amendment when the presentation of the merits of the action will be subserved thereby and the party who obtained the admission fails to satisfy the presiding officer that withdrawal or amendment will be prejudicial in maintaining the party's action or defense on the merits. Any admission made by a party under this rule is for the purpose of the pending proceeding only and is not an admission for any other purpose, nor may it be used against the party in any other proceeding.

(c) *Expenses on failure to admit.* If a party fails to admit the genuineness of any document or the truth of any matter as requested under paragraph (a) of this section, and if the party requesting the admission thereafter proves the genuineness of the document or the truth of the matter, that party may apply to the presiding officer for an order requiring the other party to pay the reasonable expenses incurred in making that proof, including reasonable attorney's fees. Such application must be made to the presiding officer before issuance of the initial decision in the proceeding. The presiding officer shall make the order unless it is found that (1) the request was held objectionable pursuant to paragraph (a) of this section, or (2) the admission sought was of no substantial importance, or (3) the party failing to admit had reasonable ground to believe that it might prevail

on the matter, or (4) there was other good reason for the failure to admit. [Rule 207.]

§ 502.208 Use of discovery procedures directed to Commission staff personnel.

(a) Discovery procedures described in §§ 502.202, 502.203, 502.204, 502.205, 502.206, and 502.207, directed to Commission staff personnel shall be permitted and shall be governed by the procedures set forth in those sections except as modified by paragraphs (b) and (c) of this section. All notices to take depositions, written interrogatories, requests for production of documents and other things, requests for admissions, and any motions in connection with the foregoing, shall be served on the Secretary of the Commission.

(b) The General Counsel shall designate an attorney to represent any Commission staff personnel to whom any discovery requests or motions are directed. The attorney so designated shall not thereafter participate in the Commission's decision-making process concerning any issue in the proceeding.

(c) Rulings of the presiding officer issued under paragraph (a) of this section shall become final rulings of the Commission unless an appeal is filed within ten (10) days after date of issuance of such rulings or unless the Commission on its own motion reverses, modifies, or stays such rulings within twenty (20) days of their issuance. Replies to appeals may be filed within ten (10) days. No motion for leave to appeal is necessary in such instances and no ruling of the presiding officer shall be effective until twenty (20) days from date of issuance unless the Commission otherwise directs. [Rule 208.]

§ 502.209 Use of depositions at hearings.

(a) *General.* At the hearing, any part or all of a deposition, so far as admissible under the rules of evidence, may be used against any party who was present or represented at the taking of the deposition or who had due notice thereof in accordance with any one of the following provisions:

(1) Any deposition may be used by any party for the purpose of contradicting or impeaching the testimony of deponent as a witness.

(2) The deposition of a party or of anyone who at the time of taking the deposition was an officer, director, or duly authorized agent of a public or private corporation, partnership, or association which is a party, may be used by any other party for any purpose.

(3) The deposition of a witness, whether or not a party, may be used by any party for any purpose if the presiding officer finds: (i) that the witness is dead; or (ii) that the witness is out of the United States unless it appears that the absence of the witness was procured by the party offering the depositions; or (iii) that the witness is unable to attend or testify because of age, sickness, infirmity, or imprisonment; or (iv) that the party offering the deposition has been unable to procure the attendance

of the witness by subpoena; or (v) upon application and notice, that such exceptional circumstances exist as to make it desirable, in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally in open hearing, to allow the deposition to be used.

(4) If only part of a deposition is offered in evidence by a party, any other party may require introduction of all of it which is relevant to the part introduced, and any party may introduce any other parts.

(5) Substitution of parties does not affect the right to use depositions previously taken; and, when a proceeding in any hearing has been dismissed and another proceeding involving the same subject matter is afterward brought between the same parties or their representatives or successors in interest, all depositions lawfully taken and duly filed in the former proceeding may be used in the latter as if originally taken therefor.

(b) *Objections to admissibility.*

(1) Except as otherwise provided in this paragraph, objection may be made at the hearing to receiving in evidence any deposition or part thereof for any reason which would require the exclusion of the evidence if the witness were then present and testifying.

(2) Objections to the competency of a witness or to the competency, relevancy, or materiality of testimony are not waived by failure to make them before or during the taking of the deposition, unless the ground of the objection is one which might have been obviated or removed if presented at the time.

(3) Errors and irregularities occurring at the oral examination in the manner of taking the deposition, in the form of the questions or answers, in the oath or affirmation, or in the conduct of parties and errors of any kind which might be obviated, removed, or cured if promptly presented, are waived unless reasonable objection thereto is made at the taking of the deposition.

(4) Objections to the form of written interrogatories submitted under § 502.204 are waived unless served in writing upon the party propounding them within the time allowed for serving the succeeding cross interrogatories.

(c) *Effect of taking or using depositions.* A party shall not be deemed to make a person its own witness for any purpose by taking such person's deposition. The introduction in evidence of the deposition or any part thereof for any purpose other than that of contradicting or impeaching the deponent makes the deponent the witness of the party introducing the deposition, but this shall not apply to the use by any other party of a deposition as described in paragraph (a)(3) of this section. At the hearing, any party may rebut any relevant evidence contained in a deposition whether introduced by it or by any other party. [Rule 209.]

§ 502.210 Refusal to comply with orders to answer or produce documents; sanctions; enforcement.

(a) *Sanctions for failure to comply with order.* If a party or an officer or duly authorized agent of a party refuses to obey an order requiring such party to answer designated questions or to produce any document or other thing for inspection, copying or photographing or to permit it to be done, the presiding officer may make such orders in regard to the refusal as are just, and among others, the following:

(1) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

(2) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting the disobedient party from introducing designated matters in evidence or an order that with respect to matters regarding which the order was made or any other designated fact, inferences will be drawn adverse to the person or party refusing to obey such order;

(3) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any party thereto, or rendering a judgment by default against the disobedient party.

(b) *Enforcement of orders and subpenas.* In the event of refusal to obey an order or failure to comply with a subpena, the Attorney General at the request of the Commission, or any party injured thereby may seek enforcement by a United States district court having jurisdiction over the parties. Any action with respect to enforcement of subpenas or orders relating to depositions, written interrogatories, or other discovery matters shall be taken within twenty (20) days of the date of refusal to obey or failure to comply. A private party shall advise the Commission five (5) days (excluding Saturdays, Sundays and legal holidays) before applying to the court of its intent to seek enforcement of such subpenas and discovery orders.

(c) *Persons and documents located in a foreign country.* Orders of the presiding officer directed to persons or documents located in a foreign country shall become final orders of the Commission unless an appeal to the Commission is filed within ten (10) days after date of issuance of such orders or unless the Commission on its own motion reverses, modifies, or stays such rulings within twenty (20) days of their issuance. Replies to appeals may be filed within ten (10) days. No motion for leave to appeal is necessary in such instances and no orders of the presiding officer shall be effective until twenty (20) days from date of issuance unless the Commission otherwise directs. [Rule 210.]

SUBPARTS M—BRIEFS; REQUESTS FOR FINDINGS; DECISIONS; EXCEPTIONS

§ 502.221 Briefs; requests for findings.

(a) The presiding officer shall fix the time and manner of filing briefs and any enlargement of time. The period of time allowed shall be the same for all parties unless the presiding officer, for good cause shown, directs otherwise.

(b) Briefs shall be served upon all parties pursuant to Subpart H of this part.

(c) In investigations instituted on the Commission's own motion, the presiding officer may require Hearing Counsel to file a request for findings of fact and conclusions within a reasonable time prior to the filing of briefs. Service of the request shall be in accordance with the provisions of Subpart H of this part.

(d) Unless otherwise ordered by the presiding officer, opening or initial briefs shall contain the following matters in separately captioned sections: (1) introductory section describing the nature and background of the case, (2) proposed findings of fact in serially numbered paragraphs with reference to exhibit numbers and pages of the transcript, (3) argument based upon principles of law with appropriate citations of the authorities relied upon, and (4) conclusions.

(e) All briefs shall contain a subject index or table of contents with page references and a list of authorities cited.

(f) The presiding officer may limit the number of pages to be contained in a brief. [Rule 221.]

§ 502.222 Requests for enlargement of time for filing briefs.

Requests for enlargement of time within which to file briefs shall conform to the requirements of § 502.102. Except for good cause shown, such requests shall be filed and served pursuant to Subpart H of this part not later than five (5) days before the expiration of the time fixed for the filing of the briefs. [Rule 222.]

§ 502.223 Decisions—administrative law judges.

To the administrative law judges is delegated the authority to make and serve initial or recommended decisions. [Rules 223.]

§ 502.224 Separation of functions.

The separation of functions as required by 5 U.S.C. 554(d) shall be observed in proceedings under Subparts A to Q inclusive, of this part. [Rule 224.]

§ 502.225 Decisions—contents and service.

All initial, recommended, and final decisions will include a statement of findings and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact, law, or discretion presented on the record, and the appropriate rule, order, sanction, relief, or denial thereof. A copy of each decision when issued shall be served on the parties to the proceeding. In proceedings involving overcharge claims, the presiding officer may, where appropriate, require that the carrier publish notice in its tariff of

the substance of the decision. This provision shall also apply to decisions issued pursuant to Subpart T of this part. [Rule 225.]

§ 502.226 Decision based on official notice; public documents.

(a) Official notice may be taken of such matters as might be judicially noticed by the courts, or of technical or scientific facts within the general knowledge of the Commission as an expert body, provided, that where a decision or part thereof rests on the official notice of a material fact not appearing in the evidence in the record, the fact of official notice shall be so stated in the decision, and any party, upon timely request, shall be afforded an opportunity to show the contrary.

(b) Whenever there is offered in evidence (in whole or in part) a public document, such as an official report, decision, opinion, or published scientific or economic statistical data issued by any of the executive departments (or their subdivisions), legislative agencies or committees, or administrative agencies of the Federal Government (including Government-owned corporations), or a similar document issued by a state or its agencies, and such document (or part thereof) has been shown by the offeror to be reasonably available to the public, such document need not be produced or marked for identification, but may be offered in evidence as a public document by specifying the document or relevant part thereof. [Rule 226.]

§ 502.227 Exceptions to decisions or orders of dismissal of administrative law judges; replies thereto; and review of decisions or orders of dismissal by Commission.

(a)(1) Within twenty-two (22) days after date of service of the initial decision, unless a shorter period is fixed under § 502.103, any party may file a memorandum excepting to any conclusions, findings, or statements contained in such decision, and a brief in support of such memorandum. Such exceptions and brief shall constitute one document, shall indicate with particularity alleged errors, shall indicate transcript page and exhibit number when referring to the record, and shall be served on all parties pursuant to Subpart H of this part.

(2) Any adverse party may file and serve a reply to such exceptions within twenty-two (22) days after the date of service thereof, which shall contain appropriate transcript and exhibit references.

(3) Whenever the officer who presided at the reception of the evidence, or other qualified officer, makes an initial decision, such decision shall become the decision of the Commission thirty (30) days after date of service thereof (and the Secretary shall so notify the parties), unless within such 30-day period, or greater time as enlarged by the Commission for good cause shown, request for review is made in exceptions filed or a determination to review is made by the Commission on its own initiative.

(4) Upon the filing of exceptions to, or review of, an initial decision, such decision shall become inoperative until the Commission determines the matter.

(5) Where exceptions are filed to, or the Commission reviews, an initial decision, the Commission, except as it may limit the issues upon notice or by rule, will have all the powers which it would have in making the initial decision. Whenever the Commission shall determine to review an initial decision on its own initiative, notice of such intention shall be served upon the parties.

(6) The time periods for filing exceptions and replies to exceptions, prescribed by this section, shall not apply to proceedings conducted under §§ 502.67 and 502.75.

(b)(1) If an administrative law judge has granted a motion for dismissal of the proceeding in whole or in part, any party desiring to appeal must file such appeal no later than twenty-two (22) days after service of the ruling on the motion in question.

(2) Any adverse party may file and serve a reply to an appeal under this paragraph within fifteen (15) days after the date the appeal is served.

(3) The denial of a petition to intervene or withdrawal of a grant of intervention shall be deemed to be a dismissal within the meaning of this paragraph.

(c) Whenever an administrative law judge orders dismissal of a proceeding in whole or in part, such order, in the absence of appeal, shall become the order of the Commission thirty (30) days after date of service of such order (and the Secretary shall so notify the parties), unless within such 30-day period the Commission decides to review such order on its own motion, in which case notice of such intention shall be served upon the parties.

(d) The Commission shall not, on its own initiative, review any initial decision or order of dismissal unless such review is requested by an individual Commissioner. Any such request must be transmitted to the Secretary within thirty (30) days after date of service of the decision or order. Such request shall be sufficient to bring the matter before the Commission for review. [Rule 227.]

§ 502.228 Request for enlargement of time for filing exceptions and replies thereto.

Requests for enlargement of time within which to file exceptions, and briefs in support thereof, or replies to exceptions shall conform to the applicable provisions of § 502.102. Requests for extensions of these periods will be granted only under exceptional circumstances duly demonstrated in the request. Except for good cause shown, such requests shall be filed and served not later than five (5) days before the expiration of the time fixed for the filing of such documents. Any enlargement of time granted will automatically extend by the same period the date for the filing of notice of review by the Commission. [Rule 228.]

§ 502.229 Certification of record by presiding or other officer.

The presiding or other officer shall certify and transmit the entire record to the Commission when (a) exceptions are filed or the time therefor

has expired, (b) notice is given by the Commission that the initial decision will be reviewed on its own initiative, or (c) the Commission requires the case to be certified to it for initial decision. [Rule 229.]

§ 502.230 Reopening by presiding officer or Commission.

(a) *Motion to reopen.* At any time after the conclusion of a hearing in a proceeding, but before issuance by the presiding officer of a recommended or initial decision, any party to the proceeding may file with the presiding officer a motion to reopen the proceeding for the purpose of receiving additional evidence. A motion to reopen shall be served in conformity with the requirements of Subpart H and shall set forth the grounds requiring reopening of the proceeding, including material changes of fact or of law alleged to have occurred since the conclusion of the hearing.

(b) *Reply.* Within ten (10) days following service of a motion to reopen, any party may reply to such motion.

(c) *Reopening by presiding officer.* At any time prior to filing his or her decision, the presiding officer upon his or her own motion may reopen a proceeding for the reception of further evidence.

(d) *Reopening by the Commission.* Where a decision has been issued by the presiding officer or where a decision by the presiding officer has been omitted, but before issuance of a Commission decision, the Commission may, after petition and reply in conformity with paragraphs (a) and (b) of this section, or upon its own motion, reopen a proceeding for the purpose of taking further evidence.

(e) *Remand by the Commission.* Nothing contained in this rule shall preclude the Commission from remanding a proceeding to the presiding officer for the taking of additional evidence or determining points of law. [Rule 230.]

SUBPART N—ORAL ARGUMENT; SUBMISSION FOR FINAL DECISION

§ 502.241 Oral Argument.

(a) If oral argument before the Commission is desired on exceptions to an initial or recommended decision, or on a motion, petition, or application, a request therefor shall be made in writing. Any party may make such request irrespective of its filing exceptions under § 502.227. If a brief on exceptions is filed, the request for oral argument shall be incorporated in such brief. Requests for oral argument on any motion, petition, or application shall be made in the motion, petition or application, or in the reply thereto.

(b) Applications for oral argument will be granted or denied in the discretion of the Commission, and, if granted; the notice of oral argument will set forth the order of presentation. Upon request, the Commission will notify any party of the amount of time which will be allowed it.

(c) Those who appear before the Commission for oral argument shall confine their argument to points of controlling importance raised on exceptions or replies thereto. Where the facts of a case are adequately and accurately dealt with in the initial or recommended decision, parties should, as far as possible, address themselves in argument to the conclusions.

(d) Effort should be made by parties taking the same position to agree in advance of the argument upon those persons who are to present their side of the case, and the names of such persons and the amount of time requested should be received by the Commission not later than ten (10) days before the date set for the argument. The fewer the number of persons making the argument the more effectively can the parties' interests be presented in the time allotted. [Rule 241.]

§ 502.242 Submission to Commission for final decision.

A proceeding will be deemed submitted to the Commission for final decision as follows: (a) If oral argument is had, the date of completion thereof, or if memoranda on points of law are permitted to be filed after argument, the last date of such filing; (b) if oral argument is not had, the last date when exceptions or replies thereto are filed, or if exceptions are not filed, the expiration date for such exceptions; (c) in the case of an initial decision, the date of notice of the Commission's intention to review the decision, if such notice is given. [Rule 242.]

§ 502.243 Participation of absent Commissioner.

Any Commissioner who is not present at oral argument and who is otherwise authorized to participate in a decision shall participate in making that decision after reading the transcript of oral argument unless he or she files in writing an election not to participate. [Rule 243.]

SUBPART O—REPARATION

§ 502.251 Proof on award of reparation.

If many shipments or points of origin or destination are involved in a proceeding in which reparation is sought (See § 502.63), the Commission will determine in its decision the issues as to violations, injury to complainant, and right to reparation. If complainant is found entitled to reparation, the parties thereafter will be given an opportunity to agree or make proof respecting the shipments and pecuniary amount of reparation due before the order of the Commission awarding reparation is entered. In such cases, freight bills and other exhibits bearing on the details of all shipments, and the amount of reparation on each, need not be produced at the original hearing unless called for or needed to develop other pertinent facts. [Rule 251.]

§ 502.252 Reparation statements.

When the Commission finds that reparation is due, but that the amount cannot be ascertained upon the record before it, the complainant shall immediately prepare a statement in accordance with the approved reparation

statement in Exhibit No. 1 to this subpart, showing details of the shipments on which reparation is claimed. This statement shall not include any shipments not covered by the findings of the Commission. Complainant shall forward the statement, together with the paid freight bills on the shipments, or true copies thereof, to the respondent or other person who collected the charges for checking and certification as to accuracy. Statements so prepared and certified shall be filed with the Commission for consideration in determining the amount of reparation due. Disputes concerning the accuracy of amounts may be assigned for conference by the Commission, or in its discretion referred for further hearing. [Rule 252.]

§ 502.253 Interest and attorney's fees in reparation proceedings.

(a) Except as to applications for refund or waiver of freight charges under § 502.92 and claims which are settled by agreement of the parties, and absent fraud or misconduct of a party, interest will be granted on awards of reparation in cases involving the misrating of cargo and arising under section 10(b) of the Shipping Act of 1984 and section 2 of the Intercoastal Shipping Act, 1933. Interest awarded in reparation proceedings will accrue from the date of injury to the date specified in the Commission order awarding reparations. Normally, the date specified within which payment must be made will be fifteen 15 days subsequent to the date of service of the Commission Order. The rate of interest will be derived from the average monthly rates on six-month U.S. Treasury bills commencing with the rate for the month that the injury occurred and concluding with the latest available monthly Treasury bill rate at the date of the Commission Order awarding reparations. Compounding will be daily from the date of injury to the date specified in the Commission Order awarding reparations. The monthly rates on six-month U.S. Treasury bills for the reparation period will be summed and divided by the number of months for which interest rates are available in the reparation period to determine the average interest rate applicable during the period.

(b) The Commission shall also award reasonable attorney's fees in reparation proceedings. [Rule 253.]

EXHIBIT NO. 1 TO SUBPART O

[§ 502.252]

REPARATION STATEMENT TO BE FILED PURSUANT TO RULE 252

Claim of _____ under the decision of the Federal Maritime Commission in Docket No. _____.

Date of B/L	Date of delivery or tender of delivery	Date charges paid	Vessel	Voyage No.	Port of origin	Destination port	Route	Commodity	Weight or measurement	As charged		Should be		Reparation	Charges paid by *
										Rate	Amount	Rate	Amount		

* Here insert name of person paying charges in the first instance, and state whether as consignor, consignee, or in what other capacity.

Total amount of reparation $ _____.

The undersigned hereby certifies that this statement has been checked against the records of this company and found correct.

Date _____

_____ Steamship Company, Collecting Carrier Respondent,

By _____, *Auditor*

By _____, *Claimant*

_____, *Attorney*

(address and date)

SUBPART P—RECONSIDERATION OF PROCEEDINGS

§ 502.261 Petitions for reconsideration and stay.

(a) Within thirty (30) days after issuance of a final decision or order by the Commission, any party may file a petition for reconsideration. Such petition shall be served in conformity with the requirements of Subpart H of this part. A petition will be subject to summary rejection unless it:

(1) Specifies that there has been a change in material fact or in applicable law, which change has occurred after issuance of the decision or order;

(2) Identifies a substantive error in material fact contained in the decision or order; or

(3) Addresses a finding, conclusion or other matter upon which the party has not previously had the opportunity to comment or which was not addressed in the briefs or arguments of any party. Petitions which merely elaborate upon or repeat arguments made prior to the decision or order will not be received. A petition shall be verified if verification of the original pleading is required and shall not operate as a stay of any rule or order of the Commission.

(b) A petition for stay of a Commission order which directs the discontinuance of statutory violations will not be received.

(c) The provisions of this section are not applicable to decisions issued pursuant to Subpart S of this part. [Rule 261.]

§ 502.262 Reply.

Any party may file a reply to a petition for reconsideration within fifteen (15) days after the date of service of the petition in accordance with § 502.74. The reply shall be served in conformity with Subpart H. [Rule 262.]

SUBPART Q—SCHEDULES AND FORMS

§ 502.271 Schedule of information for presentation in regulatory cases.

The following approved forms and illustrative wording for use in Commission proceedings appear in this part as follows:

(a) *Notice of Appearance.* Exhibit No. 1 to Subpart B [following § 502.32].

(b) *Certification.* Certification of non-disclosure by persons requesting underlying data from carriers filing general rate increase or decrease [502.67(a)(3)].

(c) *Complaint.* Exhibit No. 1 to Subpart E [following § 502.75].

(d) *Verification.* See complaint form in Exhibit No. 1 to Subpart E [following § 502.75].

(e) *Answer to Complaint.* Exhibit No. 2 to Subpart E [following § 502.75].

(f) *Petition for Leave to Intervene.* Exhibit No. 3 to Subpart E [following § 502.75].

(g) *Special Docket Application.* Exhibit No. 1 to Subpart F [following § 502.95].

(h) *Certificate of Service.* § 502.117 [Subpart H]. See also § 502.320 for small claims.

(i) *Reparation Statement.* Where the Commission finds reparation is due but that the amount cannot be ascertained: Exhibit No. 1 to Subpart O [following § 502.253].

(j) *Small Claim Form for Informal Adjudication.* Exhibit No. 1 to Subpart S [following § 502.305].

(k) *Respondent's Consent Form for Informal Adjudication.* Exhibit No. 2 to Subpart S [following § 502.305]. [Rule 271.]

SUBPART R—NONADJUDICATORY INVESTIGATIONS

§ 502.281 Investigational policy.

The Commission has extensive regulatory duties under the various acts it is charged with administering. The conduct of investigations is essential to the proper exercise of the Commission's regulatory duties. It is the purpose of this subpart to establish procedures for the conduct of such investigations which will insure protection of the public interest in the proper and effective administration of the law. The Commission encourages voluntary cooperation in its investigations where such can be effected without delay or without prejudice to the public interest. The Commission may, in any matter under investigation, invoke any or all of the compulsory processes authorized by law. [Rule 281.]

§ 502.282 Initiation of investigations.

Commission inquiries and nonadjudicatory investigations are originated by the Commission upon its own motion when in its discretion the Commission determines that information is required for the purposes of rulemaking or is necessary or helpful in the determination of its policies or the carrying out of its duties, including whether to institute formal proceedings directed toward determining whether any of the laws which the Commission administers have been violated. [Rule 282.]

§ 502.283 Order of investigation.

When the Commission has determined that an investigation is necessary, an Order of Investigation shall be issued. [Rule 283.]

§ 502.284 By whom conducted.

Investigations are conducted by Commission representatives designated and duly authorized for the purpose. (See § 502.25.) Such representatives are authorized to exercise the duties of their office in accordance with the laws of the United States and the regulations of the Commission, including the resort to all compulsory processes authorized by law, and the administration of oaths and affirmances in any matters under investigation by the Commission. [Rule 284.]

§ 502.285 Investigational hearings.

(a) Investigational hearings, as distinguished from hearings in adjudicatory proceedings, may be conducted in the course of any investigation undertaken by the Commission, including inquiries initiated for the purpose of determining whether or not a person is complying with an order of the Commission.

(b) Investigational hearings may be held before the Commission, one or more of its members, or a duly designated representative, for the purpose of hearing the testimony of witnesses and receiving documents and other data relating to any subject under investigation. Such hearings shall be stenographically reported and a transcript thereof shall be made a part of the record of investigation. [Rule 285.]

§ 502.286 Compulsory process.

The Commission, or its designated representative may issue orders or subpenas directing the person named therein to appear before a designated representative at a designated time and place to testify or to produce documentary evidence relating to any matter under investigation, or both. Such orders and subpenas shall be served in the manner provided in § 502.134. [Rule 286.]

§ 502.287 Depositions.

The Commission, or its duly authorized representative, may order testimony to be taken by deposition in any investigation at any stage of such investigation. Such depositions may be taken before any person designated by the Commission having the power to administer oaths. Such testimony shall be reduced to writing by the person taking the deposition or under his or her direction, and shall then be subscribed by the deponent. Any person may be compelled to appear and be deposed and to produce evidence in the same manner as witnesses may be compelled to appear and testify and produce documentary evidence as provided in § 502.131. [Rule 287.]

§ 502.288 Reports.

The Commission may issue an order requiring a person to file a report or answers in writing to specific questions relating to any matter under investigation. [Rule 288.]

§ 502.289 Noncompliance with investigational process.

In case of failure to comply with Commission investigational processes, appropriate action may be initiated by the Commission, including actions for enforcement by the Commission or the Attorney General and forfeiture of penalties or criminal actions by the Attorney General. [Rule 289.]

§ 502.290 Rights of witness.

Any person required to testify or to submit documentary evidence shall be entitled to retain or, on payment of lawfully prescribed cost, procure a copy of any document produced by such person and of his or her own testimony as stenographically reported or, in the depositions, as reduced to writing by or under the direction of the person taking the deposition.

Any party compelled to testify or to produce documentary evidence may be accompanied and advised by counsel, but counsel may not, as a matter or right, otherwise participate in the investigation. [Rule 290.]

§ 502.291 Nonpublic proceedings.

Unless otherwise ordered by the Commission, all investigatory proceedings shall be nonpublic. [Rule 291.]

SUBPART S—INFORMAL PROCEDURE FOR ADJUDICATION OF SMALL CLAIMS

§ 502.301 Statement of Policy.

(a) Section 11(a) of the Shipping Act of 1984 permits any person to file a complaint with the Commission claiming a violation occurring in connection with the foreign commerce of the United States and to seek reparation for any injury caused by that violation.

(b) Section 22 of the Shipping Act, 1916, permits any person to file a complaint against any common carrier by water in interstate and offshore domestic commerce or against any other person subject to the Shipping Act, 1916 or the Intercoastal Shipping Act, 1933, claiming a violation of those statutes and to seek reparation for that violation.

(c) With the consent of both parties, claims filed under this subpart in the amount of $10,000 or less will be referred to the Commission's Informal Dockets Activity for adjudication and decision by its Settlement Officers without the necessity of formal proceedings under the rules of this part.

(d) Determination of claims under this subpart shall be administratively final and conclusive. [Rule 301.]

§ 502.302 Limitations of Actions.

(a) Claims alleging violations of the Shipping Act of 1984 must be filed within three years from the time the cause of action accrues.

(b) Claims alleging violations of the Shipping Act, 1916 or Intercoastal Shipping Act, 1933, must be filed within two years from the time the cause of action arises.

(c) A claim is deemed filed on the date it is received by the Commission. [Rule 302.]

§ 502.303 [Reserved.]

§ 502.304 Procedure and filing fee.

(a) A sworn claim under this subpart shall be filed in the form prescribed in Exhibit No. 1 to this subpart. Three (3) copies of the claim must be filed, together with the same number of copies of such supporting documents as may be deemed necessary to establish the claim. Copies of tariff pages need not be filed; reference to such tariffs or to pertinent parts thereof will be sufficient. Supporting documents may consist of affidavits, correspondence, bills of lading, paid freight bills, export declarations, dock or wharf receipts, or of such other documents as, in the judgment

of the claimant, tend to establish the claim. The Settlement Officer may, if deemed necessary, request additional documents or information from claimants. Claimant may attach a memorandum, brief or other document containing discussion, argument, or legal authority in support of its claim. If a claim filed under this subpart involves any shipment which has been the subject of a previous claim filed with the Commission, formally or informally, full reference to such previous claim must be given.

(b) Claims under this subpart shall be addressed to the Office of the Secretary, Federal Maritime Commission, Washington, D.C. 20573. Such claims shall be accompanied by remittance of a $25 filing fee.

(c) Each claim under this subpart will be acknowledged with a reference to the Informal Docket Number assigned. The number shall consist of a numeral(s) followed by capital "I" in parentheses. All further correspondence pertaining to such claims must refer to the assigned Informal Docket Number. If the documents filed fail to establish a claim for which relief may be granted, the parties affected will be so notified in writing. The claimant may thereafter, but only if the period of limitation has not run, resubmit its claim with such additional proof as may be necessary to establish the claim. In the event a complaint has been amended because it failed to state a claim upon which relief may be granted, it will be considered as a new complaint.

(d) A copy of each claim filed under this subpart, with attachments, shall be served by the Settlement Officer on the respondent involved.

(e) Within twenty-five (25) days from the date of service of the claim, the respondent shall serve upon the claimant and file with the Commission its response to the claim, together with an indication, in the form prescribed in Exhibit No. 2 to this subpart, as to whether the informal procedure provided in this subpart is consented to. Failure of the respondent to indicate refusal or consent in its response will be conclusively deemed to indicate such consent. The response shall consist of documents, arguments, legal authorities, or precedents, or any other matters considered by the respondent to be a defense to the claim. The Settlement Officer may request the respondent to furnish such further documents or information as deemed necessary, or he or she may require the claimant to reply to the defenses raised by the respondent.

(f) If the respondent refuses to consent to the claim being informally adjudicated pursuant to this subpart, the claim will be considered a complaint under § 502.311 and will be adjudicated under Subpart T of this part.

(g) Both parties shall promptly be served with the Settlement Officer's decision which shall state the basis upon which the decision was made. Where appropriate, the Settlement Officer may require that the respondent publish notice in its tariff of the substance of the decision. This decision shall be final, unless, within thirty (30) days from the date of service of the decision, the Commission exercises its discretionary right to review

the decision. The Commission shall not, on its own initiative, review any decision or order of dismissal unless such review is requested by an individual Commissioner. Any such request must be transmitted to the Secretary within thirty (30) days after date of service of the decision or order. Such request shall be sufficient to bring the matter before the Commission for review.

(h) Within thirty (30) days after service of a final decision by a Settlement Officer, any party may file a petition for reconsideration. Such petition shall be directed to the Settlement Officer and shall act as a stay of the review period prescribed in paragraph (g) of this section. A petition will be subject to summary rejection unless it: (1) specifies that there has been a change in material fact or in applicable law, which change has occurred after issuance of the decision or order; (2) identifies a substantive error in material fact contained in the decision or order; (3) addresses a material matter in the Settlement Officer's decision upon which the petitioner has not previously had the opportunity to comment. Petitions which merely elaborate upon or repeat arguments made prior to the decision or order will not be received. Upon issuance of a decision or order on reconsideration by the Settlement Officer, the review period prescribed in paragraph (g) of this section will recommence. [Rule 304.]

§ 502.305 Applicability of other rules of this part.

Except as specifically provided in this subpart, the Rules in Subparts A through Q, inclusive, of this part do not apply to situations covered by this subpart. [Rule 305.]

EXHIBIT NO. 1 to SUBPART S

[§ 502.304(a)]

Small Claim Form For Informal Adjudication And Information Checklist

FEDERAL MARITIME COMMISSION

WASHINGTON, D.C.

INFORMAL DOCKET NO. _____

_____ (Claimant) vs. _____ (Respondent)

I. The claimant is [state in this paragraph whether claimant is an association, corporation, firm or partnership, and if a firm or partnership, the names of the individuals composing the same. State the nature and principal place of business.]

II. The respondent named above is [state in this paragraph whether respondent is an association, corporation, firm or partnership, and if a firm or partnership, the names of the individuals composing the same. State the nature and principal place of business.]

III. That [state in this and subsequent paragraphs to be lettered A, B, etc., the matters that gave rise to the claim. Name specifically each rate, charge, classification, regulation or practice which is challenged. Refer to tariffs, tariff items or rules, or agreement numbers, if known. If claim is based on the fact that a firm is a common carrier, state where it is engaged in transportation by water and which statute(s) it is subject to under the jurisdiction of the Federal Maritime Commission].

IV. If claim is for overcharges, state commodity, weight and cube, origin, destination, bill of lading description, bill of lading number and date, rate and/or charges assessed, date of delivery, date of payment, by whom paid, rate or charge claimed to be correct and amount claimed as overcharges. [Specify tariff item for rate or charge claimed to be proper].

V. State section of statute claimed to have been violated. (Not required if claim is for overcharges).

VI. State how claimant was injured and amount of damages requested.

VII. The undersigned authorizes the Settlement Officer to determine the above-stated claim pursuant to the informal procedure outlined in Subpart S (46 CFR 502.301–592.305) of the Commission's informal procedure for adjudication of small claims subject to discretionary Commission review.

Attach memorandum or brief in support of claim. Also attach bill of lading, copies of correspondence or other documents in support of claim.

_____
(Date)

(S)_____
(Claimant's signature)

_____
(Claimant's address)

(S)_____
(Signature of agent or attorney)

_____
(Agent's or attorney's address)

VERIFICATION

State of _____, County of _____, ss: _____, being first duly sworn on oath deposes and says that he or she is _____
The claimant [or if a firm, association, or corporation, state the capacity of the affiant] and is the person who signed the foregoing claim, that he or she has read the foregoing and that the facts set forth without qualification are true and that the facts stated therein upon information received from others, affiant believes to be true.

Subscribed and sworn to before me, a notary public in and for the State of _____, County of _____, this _____ day of _____ 19_____.

(SEAL)

(S) _____
(Notary Public)

My Commission expires, _____

INFORMATION TO ASSIST IN FILING INFORMAL COMPLAINTS

Informal Docket procedures are limited to claims of $10,000 or less and are appropriate only in instances when an evidentiary hearing on disputed facts is not necessary. Where, however, a respondent elects not to consent to the informal procedures [See Exhibit No. 2 to Subpart S], the claim will be adjudicated by an administrative law judge under Subpart T of Part 502.

Under the Shipping Act of 1984 [for foreign commerce], the claim must be filed within three (3) years from the time the cause of action accrues and may be brought against any person alleged to have violated the 1984 Act to the injury of claimant.

Under the Shipping Act, 1916 and the Intercoastal Shipping Act, 1933 [domestic commerce], the claim must be filed within two (2) years from the time the cause of action accrues and may only be brought against a "person subject to the Act", e.g., a common carrier, terminal operator or freight forwarder.

A violation of a specific section of a particular shipping statute must be alleged.

The format of Exhibit No. 1 must be followed and a *verification must be included* where the claimant is not represented by an attorney or other person qualified to practice before the Commission. [See §§ 502.21–502.32 and § 502.112.] An original and two (2) copies of the claim *and all attachments*, including a brief in support of the claim, must be submitted.

EXHIBIT NO. 2 TO SUBPART S

[§ 502.304(e)]
Respondent's Consent Form for Informal Adjudication

FEDERAL MARITIME COMMISSION

WASHINGTON, D.C.

INFORMAL DOCKET NO. _____

RESPONDENT'S AFFIDAVIT

I authorize the Settlement Officer to determine the above-numbered claim in accordance with Subpart S (46 CFR 502) of the Commission's informal procedure for adjudication of small claims subject to discretionary Commission Review.

_____
(Date)

(S)_____

_____
(Capacity)

VERIFICATION

State of _____, County of _____, ss: _____, being first duly sworn on oath deposes and says that he or she is _____, (Title or Position) and is the person who signed the foregoing and agrees without qualification to its truth.

_____

Subscribed and sworn to before me, a notary public in and for the State of _____, County of _____, this _____ day of _____, 19_____.

(SEAL)

(S)_____

(Notary Public)

My Commission expires _____.

CERTIFICATE OF SERVICE
[SEE § 502.320]

SUBPART T—FORMAL PROCEDURE FOR ADJUDICATION OF SMALL CLAIMS

§ 502.311 Applicability.

In the event the respondent elects not to consent to determination of the claim under Subpart S of this part, it shall be adjudicated by the administrative law judges of the Commission under procedures set forth in this subpart, if timely filed under § 502.302. The previously assigned Docket Number shall be used except that it shall now be followed by capital "F" instead of "I" in parenthesis (See § 502.304(c)). The complaint shall consist of the documents submitted by the claimant under Subpart S of this part. [Rule 311.]

§ 502.312 Answer to complaint.

The respondent shall file with the Commission an answer within twenty-five (25) days of service of the complaint and shall serve a copy of said answer upon complainant. The answer shall admit or deny each matter set forth in the complaint. Matters not specifically denied will be deemed admitted. Where matters are urged in defense, the answer shall be accomplished by appropriate affidavits, other documents, and memoranda. [Rule 312.]

§ 502.313 Reply to complainant.

Complainant may, within twenty (20) days of service of the answer filed by respondent, file with the Commission and serve upon the respondent a reply memorandum accompanied by appropriate affidavits and supporting documents. [Rule 313.]

§ 502.314 Additional information.

The administrative law judge may require submission of additional affidavits, documents, or memoranda from complainant or respondent. [Rule 314.]

§ 503.315 Request for oral hearing.

In the usual course of disposition of complaints filed under this subpart, no oral hearing will be held, but, the administrative law judge, in his or her discretion, may order such hearing. A request for oral hearing may be incorporated in the answer or in complainant's reply to the answer. Requests for oral hearing will not be entertained unless they set forth in detail the reasons why the filing of affidavits or other documents will not permit the fair and expeditious disposition of the claim, and the precise nature of the facts sought to be proved at such oral hearing. The administrative law judge shall rule upon a request for oral hearing within ten (10) days of its receipt. In the event an oral hearing is ordered, it will be held in accordance with the rules applicable to other formal proceedings, as set forth in Subparts A through Q of this part. [Rule 315.]

§ 503.316 Intervention.

Intervention will ordinarily not be permitted. [Rule 316.]

§ 502.317 Oral argument.

No oral argument will be held, unless otherwise directed by the administrative law judge. [Rule 317.]

§ 502.318 Decision.

The decision of the administrative law judge shall be final, unless, within twenty-two (22) days from the date of service of the decision, either party requests review of the decision by the Commission, asserting as grounds therefore that a material finding of fact or a necessary legal conclusion is erroneous or that prejudicial error has occurred, or unless, within thirty (30) days from the date of service of the decision, the Commission exercises its discretionary right to review the decision. The Commission shall not, on its own initiative, review any decision or order of dismissal unless such review is requested by an individual Commissioner. Any such request must be transmitted to the Secretary within thirty (30) days after date of service of the decision or order. Such request shall be sufficient to bring the matter before the Commission for review. [Rule 318.]

§ 502.319 Date of service and computation of time.

The date of service of documents served by the Commission shall be that which is shown in the service stamp thereon. The date of service of documents served by parties shall be the date when the matter served is mailed or delivered in person, as the case may be. When the period of time prescribed or allowed is ten (10) days or less, intermediate Saturdays, Sundays, and holidays shall be excluded from the computation. [Rule 319.]

§ 502.320 Service.

All claims, resubmitted claims, petitions to intervene and rulings thereon, notices or oral hearings, notices of oral arguments (if necessary), decisions of the administrative law judge, notices of review, and Commission decisions shall be served by the administrative law judge or the Commission. All other pleadings, documents and filings shall, when tendered to the Commission, evidence service upon all parties to the proceeding. Such certificate shall be in substantially the following form:

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon all parties of record in this proceeding by [mailing, delivering to courier, or delivering in person], a copy to each such person in sufficient time to reach such person on the date the document is due to be filed with the Commission.

Dated at _____ this _____ day of _____, 19_____.

(S) _____

(For) _____

[Rule 320.]

§ 502.321 Applicability of other rules of this part.

Except as specifically provided in this subpart, rules in Subparts A through Q, inclusive, of this part do not apply to situations covered by this subpart. [Rule 321.]

SUBPART U—CONCILIATION SERVICE

§ 502.401 Definitions.

For purposes of this subpart:

(a) "*Disputes*" means disagreements between two or more parties arising from the transportation of goods or the performance of services in connection with such transportation in the domestic offshore commerce or the foreign commerce of the United States; a difference of opinion regarding the interpretation of any tariff, rate, rule, or regulation; a disagreement regarding the performance of any service in connection with such transportation; a disagreement with respect to an alleged violation of the shipping statutes; and other disagreement or opposing opinion regarding any matter connected with transportation of cargoes in the waterborne commerce of the United States. This definition is limited to those disputes which fall within the jurisdiction of the Federal Maritime Commission.

(b) "*Shipping statutes*" means the Shipping Act of 1984, 46 U.S.C. app. 1701–1720; Shipping Act, 1916, 46 U.S.C. app. 801 et seq.; Merchant Marine Act 1936, 46 U.S.C. app. 1101 et seq.; Merchant Marine Act, 1920, 46 U.S.C. app. 861 et seq., the Intercoastal Shipping Act, 1933, 46 U.S.C. app. 843 et seq.; and amendments of and Acts relating to the foregoing, to the extent of the Federal Maritime Commission's jurisdiction under such Acts.

(c) "*Advisory opinions*" means non-binding conclusions reached by a conciliator on the basis of oral presentation and/or documentary authority.

(d) "*Domestic offshore commerce*" means waterborne common carriage between:

(1) The Continental United States and Alaska or Hawaii;

(2) Alaska and Hawaii;

(3) The United States or the District of Columbia and any territory, commonwealth, possession or district (excluding the District of Columbia);

(4) Any territory, commonwealth, possession or district (excluding the District of Columbia) and any other such territory, commonwealth, possession or district; and

(5) Places in the same district, territory; commonwealth or possession (excluding the District of Columbia); and which are not solely engaged in transportation subject to the jurisdiction of the Interstate Commerce Commission under 49 U.S.C. Chapter 105.

(e) *"Foreign commerce"* means waterborne common carriage between the United States or any of its territories, commonwealths, districts or possessions, and foreign country. [Rule 401.]

§ 502.402 Policy.

It is the policy of the Federal Maritime Commission:

(a) To offer its good offices and expertise to parties to disputes involving matters within its jurisdiction, so as to permit resolution of such disputes with dispatch and without the necessity of costly and time-consuming formal proceedings;

(b) To facilitate and promote the resolution of problems and disputes by encouraging affected parties to resolve differences through their own resources;

(c) To create a forum in which grievances, interpretations, problems, and questions involving the waterborne commerce of the United States may be aired, discussed and, hopefully, resolved to the mutual advantage of all concerned parties. [Rule 402.]

§ 502.403 Persons eligible for service.

Request for conciliation service may be made by any shipper, shippers' association, merchant, carrier, conference of carriers, freight forwarder, marine terminal operator, Government agency, or any other person affected by or involved in the transportation of goods by common carrier in the waterborne domestic offshore or foreign commerce of the United States. [Rule 403.]

§ 502.404 Procedure and fee.

(a) The request for conciliation should be addressed to the Federal Maritime Commission Conciliation Service, Washington, D.C. 20573, and should contain the details of the dispute, names and addresses of all involved parties, the contentions of each party or parties, and copies of any documents that are relevant to the disposition of the issues. If the request is made by any one party to the dispute, the party requesting conciliation should mail or deliver to the other party or parties to the dispute a copy of the letter of request, with attachments, if any. The request shall be accompanied by remittance of a $25 service fee.

(b) Each matter will be assigned a number prefixed by the letters FMCCS and assigned to a conciliator for disposition and the involved parties will be informed of the case number and the name of the conciliator.

(c) While it is preferable that all parties involved in a dispute request a service jointly, a request by a single party for the service will be acted upon, provided all parties agree that the dispute should be conciliated. In the event that the request is made by only one party, the conciliator will contact the other party or parties to the dispute and be advised as to whether such parties agree to participate in the conciliation. If the other party or parties to the dispute do not agree to the Conciliation Service,

no further action will be taken by the conciliator and the conciliation ceases.

(d) The parties will be free to determine the best procedures to be used with the qualification that the conciliator may disapprove procedures that would in his or her opinion be either too time-consuming or involve inordinate expense to the Federal Maritime Commission. The parties may agree to (1) fix a time and place for the oral presentation of each party's contention; and (2) request affidavits, documents, or other materials that could help resolve the dispute. The conciliator will be in a strictly advisory capacity. There will be no written record of the conciliation discussions.

(e) Participation in the conciliation of a dispute is purely voluntary at all stages and the parties involved may withdraw at any time without prejudice. [Rule 404.]

§ 502.405 Assignment of conciliator.

The Secretary of the Commission, giving due regard to the type and complexity of the problem presented and the degree of expertise required, will assign a conciliator to each dispute. [Rule 405.]

§ 502.406 Advisory opinion.

(a) The conciliator will write an advisory opinion that must meet the approval of all parties. If the advisory opinion, or revision thereof requested by one or more of the parties, is not unanimously agreed upon, then the conciliation will cease, without prejudice to any of the parties involved. If unanimity is not reached, the conciliator will note in a report to the Commission, which shall be served on all parties, that the parties failed to reach agreement. Only if unanimity is reached will the informal advisory opinion, although not binding, be sent to all interested parties and be made available to the public.

(b) There will be no appeal from, or review of, such opinions and any party may pursue any further course of action under any other rule or statute that it deems advisable. [Rule 406.]

SUBPART V—PAPERWORK REDUCTION ACT

§ 502.991 OMB control numbers assigned pursuant to the Paperwork Reduction Act.

This section displays the control numbers assigned to information collection requirements of the Commission in this part by the Office of Management and Budget (OMB) pursuant to the Paperwork Reduction Act of 1980, Pub. L. 96–511. The Commission intends that this part comply with the Act, which requires that agencies display a current control number assigned by the Director of OMB for each agency information collection requirement:

Section	Current OMB Control No.
502.27 (Form FMC.12)	3072–0001

FEDERAL MARITIME COMMISSION

[46 CFR PART 503]
PUBLIC INFORMATION

SUBPART A—GENERAL

Sec.

SUBPART B—PUBLICATION IN THE "FEDERAL REGISTER"

SUBPART C—COMMISSION OPINIONS AND ORDERS

SUBPART D—PROCEDURE GOVERNING AVAILABILITY OF COMMISSION RECORDS

SUBPART E—FEES

SUBPART F—INFORMATION SECURITY PROGRAM

Sec.
503.86 Public access to records.
503.87 Effect of provisions of this subpart on other subparts.

AUTHORITY: 5 U.S.C. 552, 552a, 552b, 553; E.O. 12356, 47 FR 14874, 15557, 3 CFR 1982 Comp., p. 167.

SUBPART A—GENERAL

§ 503.1 Statement of policy.

(a) The Chairman of the Federal Maritime Commission is responsible for the effective administration of the provisions of Pub. L. 89–487, as amended. The Chairman shall carry out this responsibility through the program and the officials as hereinafter provided in this part.

(b) In addition, the Chairman, pursuant to his responsibility, hereby directs that every effort be expended to facilitate the maximum expedited service to the public with respect to the obtaining of information and records. Accordingly, members of the public may make requests for information, records, decisions or submittals in accordance with the provisions of § 503.31.

SUBPART B—PUBLICATION IN THE "FEDERAL REGISTER"

§ 503.11 Materials to be published.

(a) The Commission shall separately state and concurrently publish the following materials in the *Federal Register* for the guidance of the public:

(1) Descriptions of its central and field organization and the established places at which the officers from whom, and the methods whereby, the public may secure information, make submittals or requests, or obtain decisions.

(2) Statements of the general course and method by which its functions are channeled and determined, including the nature and requirement of all formal and informal procedures available.

(3) Rules of procedure, descriptions of forms available, or the places at which forms may be obtained, and instructions as to the scope and contents of all papers, reports, or examinations.

(4) Substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency.

(5) Every amendment, revision, or repeal of the foregoing.

(b) The Commission's publication with respect to paragraph (a)(1) of this section has been and shall continue to be by publication in the *Federal Register* of the Rules and Regulations, Commission Order No. 1 (Amended), and amendment and supplements thereto.

(c) The Commission's publications with respect to paragraphs (a)(2), (a)(3), and (a)(4) of this section, including amendments, revisions, and repeals, have been and shall continue to be by publication in the *Federal*

Register as part of the Code of Federal Regulations, Title 46, Chapter IV.

§ 503.12 Effect of nonpublication.

Except to the extent that a person has actual and timely notice of the terms thereof, no person shall in any manner be required to resort to, or be adversely affected by any matter required to be published in the *Federal Register* and not so published.

§ 503.13 Incorporation by reference.

For purposes of this subpart, matter which is reasonably available to the class of persons affected hereby shall be deemed published in the *Federal Register* when incorporated by reference therein with the approval of the Director of the Office of the *Federal Register.*

SUBPART C—COMMISSION OPINIONS AND ORDERS

§ 503.21 Public records.

(a) The Commission shall, in accordance with this part, make the following materials available for public inspection and copying:

(1) Final opinions (including concurring and dissenting opinions) and all orders made in the adjudication of cases.

(2) Those statements of policy and interpretations which have been adopted by the Commission.

(3) Administrative staff manuals and instructions to staff that affect any member of the public.

(b) To prevent unwarranted invasion of personal privacy, the Commission may delete identifying details when it makes available or publishes an opinion, statement of policy, interpretation, or staff manual or instruction, and shall, in each case, explain in writing the justification for the deletion.

§ 503.22 Current index.

The Commission shall maintain and make available for public inspection and copying a current index providing identifying information for the public as to any matter which is issued, adopted, or promulgated, and which is required by Subpart B of this part to be made available or published. The index shall be available at the Office of the Secretary, Washington, D.C. 20573. Publication of such indices has been determined by the Commission to be unnecessary and impracticable. The indices shall, nonetheless, be provided to any member of the public at a cost not in excess of the direct cost of duplication of any such index upon request therefor made in accordance with Subpart D of this part.

§ 503.23 Effect of noncompliance.

No final order, opinion, statement of policy, interpretation, or staff manual or instruction that affects any member of the public will be relied upon, used, or cited, as precedent by the Commission against any private party unless it has been indexed and either made available or published as pro-

vided by this subpart, or unless that private party shall have actual and timely notice of the terms thereof.

§ 503.24 Documents available at the Communications Center.

The following documents have been promulgated by the Commission and are available for inspection and copying at the Commission's Communications Center, 1100 L Street, N.W., Washington, D.C. 20573:

(a) Rules and regulations of the Commission including general substantive rules.

(b) Rules of Practice and Procedure.

(c) Annual reports of the Commission.

(d) Shipping Act, 1916, Shipping Act of 1984, and related acts.

§ 503.25 Documents available at the Office of the Secretary.

The following documents are available for inspection and copying at the Federal Maritime Commission, Office of the Secretary, Washington, D.C. 20573:

(a) Proposed rules.

(b) Final rules.

(c) Reports of decisions (including concurring and dissenting opinions), orders and notices in all formal proceedings and pertinent correspondence.

(d) Press releases, biographies, etc.

(e) Pamphlets.

(f) Official docket files (transcripts, exhibits, briefs, etc.) in all formal proceedings.[1]

(g) Approved minutes showing final votes.

(h) Correspondence to or from the Commission or Administrative Law Judges concerning docketed proceedings.

SUBPART D—PROCEDURE GOVERNING AVAILABILITY OF COMMISSION RECORDS

§ 503.31 Identification of records.

A member of the public who requests permission to inspect, copy or be provided with any records described in §§ 503.11, 503.21, 503.24 and 503.25 shall:

(a) Reasonably describe the record or records sought; and

(b) Submit such request in writing to the Secretary, Federal Maritime Commission, Washington, D.C. 20573. Any such request shall be clearly marked on the exterior with the letters FOIA.

§ 503.32 Records generally available.

The following records are available for inspection and copying upon request in writing addressed to the Office of the Secretary:

[1] Copies of transcripts may be purchased from the reporting company contracted for by the Commission. Contact the Office of the Secretary for the name and address of this company.

(a) Agreements filed and in effect pursuant to section 15 of the Shipping Act, 1916 and sections 5 and 6 of the Shipping Act of 1984.

(b) Agreements filed under section 15 of the Shipping Act, 1916 and section 5 of the Shipping Act of 1984 which have been noticed in the *Federal Register*.

(c) Tariffs filed under the provisions of the Shipping Act, 1916, the Intercoastal Shipping Act, 1933, and the Shipping Act of 1984.

(d) Terminal tariffs filed pursuant to Part 515 of this chapter.

(e) List of certifications of financial responsibility pertaining to Public Law 89–777.

(f) List of licensed ocean freight forwarders.

§ 503.33 Other records available upon written request.

Any written request to the Office of the Secretary, Federal Maritime Commission, Washington, D.C. 20573, for records listed in paragraphs (a) through (e), inclusive, of this section, shall identify the record as provided in § 503.31. The Secretary shall evaluate each request in conjunction with the official having responsibility for the subject matter area, and the General Counsel, and the Secretary shall determine whether or not to grant the request in accordance with the provisions of § 503.34. There follows the categories of records subject to this provision:

(a) Correspondence:

(1) General correspondence.

(2) Correspondence regarding interpretation or applicability of a statute or rule.

(3) Correspondence regarding methods of compliance with rules and regulations.

(4) Correspondence and reports on legislation if made public by the Office Management and Budget and the appropriate Congressional Committee.

(b) Staff reports served on a party at interest.

(c) Filings:

(1) Reports on self-policing.

(2) Notice of admission and denial of conference membership.

(3) Procedures and reports regarding shippers' requests and complaints.

(4) Applications for license as ocean freight forwarder with the exceptions of those portions protected from public disclosure under the Freedom of Information Act.

(d) Staff records:

(1) Advisory opinions to the public.

(2) Nonconfidential records.

(e) Court records in which the Commission is a party.

(1) Briefs filed in court.

(2) Court decisions.

§ 503.34 Procedures on requests for documents.

(a) Determination of compliance with requests for documents.

(1) Upon request by any member of the public for documents, made in accordance with the rules of this part, the Commission's Secretary or his or her delegate in his or her absence, shall determine whether or not such request shall be granted.

(2) Except as provided in paragraph (c) of this section, such determination shall be made by the Secretary within ten (10) days (excluding Saturdays, Sundays and legal public holidays) after receipt of such request.

(3) The Secretary shall immediately notify the party making such request of the determination made, the reasons therefor, and, in the case of a denial of such request, shall notify the party of its right to appeal that determination to the Chairman.

(b) Appeals from adverse determination (denial of request).

(1) Any party whose request for documents or other information pursuant to this part has been denied in whole or in part by the Secretary may appeal such determination. Any such appeal shall be addressed to: Chairman, Federal Maritime Commission, Washington, D.C. 20573, and shall be submitted within a reasonable time following receipt by the party of notification of the initial denial by the Secretary in the case of a total denial of the request, or within a reasonable time following request, or within a reasonable time following receipt of any of the records requested in the case of a partial denial. In no case shall an appeal be filed later than ten (10) working days following receipt of notification of denial or receipt of a part of the records requested.

(2) Upon appeal from any denial or partial denial of a request for documents by the Secretary, the Chairman of the Federal Maritime Commission, or the Chairman's specific delegate in his or her absence, shall make a determination with respect to that appeal within twenty (20) days (excepting Saturdays, Sundays and legal public holidays) after receipt of such appeal, except as provided in paragraph (c) of this section. If, on appeal, the denial is upheld, either in whole or in part, the Chairman shall so notify the party submitting the appeal and shall notify such person of the provisions of paragraph 4 of subsection (a) of the FOIA (Pub. L. 93–502, 88 Stat. 1561–1562, November 21, 1974) regarding judicial review of such determination upholding the denial. Notification shall also include the statement that the determination is that of the Chairman of the Federal Maritime Commission and the name of the Chairman.

(c) *Exception to time limitation.* In unusual circumstances, as specified in this paragraph, the time limits prescribed with respect to initial actions or actions on appeal may be extended by written notice from the Secretary of the Commission to the person making such request, setting forth the reasons for such extension and the date on which a determination is expected to be dispatched. No such notice shall specify a date that would result in an extension for more than ten (10) working days. As used in this paragraph, "unusual circumstances" means, but only to the extent reasonably necessary to the proper processing of the particular request—

(1) The need to search for and collect the requested records from field facilities or other establishments that are separate from the office processing the request;

(2) The need to search for, collect, and appropriately examine a voluminous amount of separate and distinct records which are demanded in a single request; or

(3) The need for consultation, which shall be conducted with all practicable speed, with another agency having a substantial interest in the determination of the request or among two or more components of the agency having substantial subject matter interest therein.

(d) *Effect of failure by Commission to meet the time limitation.* Failure by the Commission either to deny or grant any request for documents within the time limits prescribed by FOIA (5 U.S.C. 552 as amended) and these regulations shall be deemed to be an exhaustion of the administrative remedies available to the person making the request.

§ 503.35 Exceptions to availability of records.

(a) Except as provided in paragraph (b) of this section, the following records shall not be available:

(1) Records specifically authorized under criteria established by Executive Order to be kept secret in the interest of national defense or foreign policy and which are in fact properly classified pursuant to such Executive Order. Records to which this provision applies shall be deemed by the Commission to have been properly classified. This exception may apply to records in the custody of the Commission which have been transmitted to the Commission by another agency which has designated the record as nonpublic under Executive Order.

(2) Records related solely to the internal personnel rules and practices of the Commission. Such records relate to those matters which are for the guidance of Commission personnel with respect to their employment with the Federal Maritime Commission.

(3) Records specifically exempted from disclosure by statute.

(4) Information given in confidence. This includes information obtained by or given to the Commission which constitutes trade secrets, confidential commercial or financial information, privileged information, or other information which was given to the Commission in confidence or would not customarily be released by the person from whom it was obtained.

(5) Interagency or intraagency memoranda or letters which would not be available by law to a private party in litigation with the Commission. Such communications include interagency memoranda, drafts, staff memoranda transmitted to the Commission, written communications between the Commission, the Secretary, and the General Counsel, regarding the preparation of Commission orders and decisions, other documents received or generated in the process of issuing an order, decision, or regulation, and reports and other work papers of staff attorneys, accountants, and investigators.

(6) Personnel and medical files and similar files, the disclosure of which would constitute a clearly unwarranted invasion of privacy. This exemption includes all personnel and medical records and all private, personal, financial, or business information contained in other files which, if disclosed to the public, would invade the privacy of any person, including members of the family of the person to whom the information pertains.

(7) Investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would (i) interfere with enforcement proceedings, (ii) deprive a person of a right to a fair trial or an impartial adjudication, (iii) constitute an unwarranted invasion of personal privacy, (iv) disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by any agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source, (v) disclose investigative techniques and procedures, or (vi) endanger the life or physical safety of law enforcement personnel. Any record, portions of which are exempt under the provisions of this section, will be provided to any person requesting such record after the exempt portions thereof have been deleted, provided such nonexempt portions are reasonably segregable.

(b) Nothing in this section authorizes withholding of information or limiting the availability of records to the public except as specifically stated in this part, nor shall this part be authority to withhold information from Congress.

§ 503.36 Commission report of actions.

On or before March 1 of each calendar year, the Federal Maritime Commission shall submit a report of its activities with regard to public information requests during the preceding calendar year to the Speaker of the House of Representatives and to the President of the Senate. This report shall include:

(a) The number of determinations made by the Federal Maritime Commission not to comply with requests for records made to the agency under the provisions of this part and the reasons for each such determination.

(b) The number of appeals made by persons under such provisions, the result of such appeals, and the reasons for the action upon each appeal that results in a denial of information.

(c) The name and title or position of each person responsible for the denial of records requested under the provisions of this part and the number of instances of participation for each.

(d) The results of each proceeding conducted pursuant to subsection (a)(4)(F) of FOIA, as amended November 21, 1974, including a report of the disciplinary action taken against the officer or employee who was primarily responsible for improperly withholding records or an explanation of why disciplinary action was not taken.

(e) A copy of every rule made by the Commission implementing the provisions of the FOIA, as amended November 21, 1974.

(f) A copy of the fee schedule and the total amount of fees collected by the agency for making records available under this section.

(g) Such other information as indicates efforts to administer fully the provisions of the FOIA, as amended.

SUBPART E-FEES

§ 503.41 Policy and services available.

Pursuant to policies established by the Congress, the Government's costs for special services furnished to individuals or firms who request such service are to be recovered by the payment of fees (Act of August 31, 1951—5 U.S.C. 140).

(a) Upon request, the following services are available upon the payment of the fees hereinafter prescribed:

(1) Copying records/documents.

(2) Certification of copies of documents.

(3) Records search.

(b) Fees shall also be assessed for the following services provided by the Commission:

(1) Subscriptions to Commission publications.

(2) Placing one's name, as an interested party, on the mailing list of a docketed proceeding.

(3) Processing nonattorney applications to practice before the Commission.

§ 503.42 Payment of fees and charges.

The fees charged for special services may be paid through the mail by check, draft, or postal money order, payable to the Federal Maritime Commission, except for charges for transcripts of hearings. Transcripts of hearings, testimony, and oral argument are furnished by a nongovernmental contractor, and may be purchased directly from the reporting firm.

§ 503.43 Fees for services.

The basic fees set forth below provide for documents to be mailed with postage prepaid. If copy is to be transmitted by registered, certified, air, or special delivery mail, postage therefor will be added to the basic fee. Also, if special handling or packaging is required, costs thereof will be added to the basic fee.

(a) Photo-copying of records and documents performed by requesting party will be available at the rate of five cents per page (one side), limited to size 8½″ × 14¼″ or smaller.

(b) The certification and validation (with Federal Maritime Commission seal) of documents filed with or issued by the Commission will be available at $5 for each such, certification.

(c) To the extent that time can be made available, records and information search and/or copying will be performed by Commission personnel for

reimbursement at the following rates. Any such charges are in addition to a five cent per page charge for copies provided.

(1) By clerical personnel at a rate of $7 per person per hour.

(2) By professional personnel at an actual hourly cost basis to be established prior to search.

(3) Minimum charge for record and information search, $7.

(4) Minimum charge for copying services performed by Commission personnel, $2.50.

(d) Annual subscriptions to Commission publications for which there are regular mailing lists are available at the charges indicated below for calendar year terms. Subscriptions for periods of less than a full calendar year will be prorated on a quarterly basis. No provision is made for refund upon cancellation of subscription by a purchaser.

(1) Orders, notices, rulings, and decisions (initial and final) issued by Administrative Law Judges and by the Commission in all formal docketed proceedings before the Federal Maritime Commission are available at an annual subscription rate of $195.

(2) Final decisions (only) issued by the Commission in all formal docketed proceedings before the Commission are available at an annual subscription rate of $120.

(3) General rules and regulations of the Commission are available at the following rates: (i) initial set including all current regulations for a fee of $16.50, and (ii) an annual subscription rate of $8.25 for all amendments to existing regulations and any new regulations issued.

(4) *Exceptions.* No charge will be made by the Commission for notices, decisions, orders, etc., required by law to be served on a party to any proceeding or matter before the Commission. No charge will be made for single copies of the above Commission publications individually requested in person or by mail. In addition, a subscription to Commission mailing lists will be entered without charge when one of the following conditions is present:

(i) The furnishing of the service without charge is an appropriate courtesy to a foreign country or international organization.

(ii) The recipient is another governmental agency, Federal, State, or local, concerned with the domestic or foreign commerce by water of the United States or, having a legitimate interest in the proceedings and activities of the Commission.

(iii) The recipient is a college or university.

(iv) The recipient does not fall within paragraphs (d)(4)(i), (d)(4)(ii), or (d)(4)(iii) of this section but is determined by the Commission to be appropriate in the interest of its programs.

(e) To have one's name and address placed on the mailing list of a specific docket as an interested party to receive all issuances pertaining to that docket: $3 per proceeding.

(f) The FMC guide on the shipping of automobiles, entitled "Automobile Manufacturers' Measurements," is available from the U.S. Government Printing Office, on a subscription basis.

(g) Loose-leaf reprint of the Commission's complete, current Rules of Practice and Procedure, Part 502 of this chapter, for an initial fee of $4.25. Future amendments to the reprint are available at an annual subscription rate of $4.

(h) Applications for admission to practice before the Commission for persons not attorneys at law must be accompanied by a fee of $13 pursuant to § 502.27 of this chapter.

(i) Upon a determination by the Commission that waiver or reduction of the fees prescribed in this section is in the public interest because the information furnished has been determined to be of primary benefit to the general public, such information shall be furnished without charge or at a reduced charge at the discretion of the Commission.

(j) Additional issuances, publications and services of the Commission may be made available for fees to be determined by the Secretary which fees shall not exceed the cost to the Commission for providing them.

SUBPART F—INFORMATION SECURITY PROGRAM

§ 503.51 Definitions.

(a) "*Original Classification*" means an initial determination that information requires protection against unauthorized disclosure in the interest of national security, together with a classification designation signifying the level of protection required.

(b) "*Derivative Classification*" means a determination that information is in substance the same as information currently classified, and the application of the same classification markings.

(c) "*Declassification date or event*" means a date or event upon which classified information is automatically declassified.

(d) "*Downgrading date or event*" means a date or event upon which classified information is automatically downgraded in accordance with appropriate downgrading instructions on the classified materials.

(e) "*National security*" means the national defense or foreign relations of the United States.

(f) "*Foreign government information*" means either information provided to the United States by a foreign government or governments, an international organization of governments, or any element thereof with the expectation, expressed or implied, that the information, the source of the information, or both, are to be held in confidence; or information produced by the United States pursuant to or as a result of a joint arrangement with a foreign government or governments, an international organization of governments, or any element thereof, requiring that the information, the arrangement, or both, are to be held in confidence.

§ 503.52 Senior agency official.

The Chairman of the Commission shall designate a senior agency official to be the Security Officer for the Commission who shall be responsible for directing and administering the Commission's information security program, which includes an active oversight and security education program to ensure effective implementation of Executive Order 12356.

§ 503.53 Oversight Committee.

An Oversight Committee is established, under the chairmanship of the Security Officer with the following responsibilities;

(a) Establish a Commission security education program to familiarize all personnel who have or may have access to classified information with the provisions of Executive Order 12356, and Information Security Oversight Office Directive No. 1. The program shall include initial, refresher, and termination briefings;

(b) Establish controls to ensure that classified information is used, processed, stored, reproduced, and transmitted only under conditions that will provide adequate protection and prevent access by unauthorized persons;

(c) Act on all suggestions and complaints concerning the Commission's information security program;

(d) Recommend appropriate administrative action to correct abuse or violations of any provision of Executive Order 12356; and

(e) Consider and decide other questions concerning classification and declassification that may be brought before it.

§ 503.54 Original classification.

(a) No Commission Member or employee has the authority to classify any Commission originated information.

(b) If a Commission Member or employee develops information that appears to require classification, or receives any foreign government information as defined in § 503.51(f), the Member or employee shall immediately notify the Security Officer and appropriately protect the information.

(c) If the Security Officer believes the information warrants classification, it shall be sent to the appropriate agency with original classification authority over the subject matter, or to the Information Security Oversight Office, for review and a classification determination.

(d) If there is reasonable doubt about the need to classify information, it shall be safeguarded as if it were classified pending a determination by an original classification authority. If there is reasonable doubt about the appropriate level of classification, it shall be safeguarded at the higher level of classification pending a determination by an original classification authority.

§ 503.55 Derivative classification.

(a) Any document that includes paraphrases, restatements, or summaries of, or incorporates in new form, information that is already classified, shall be assigned the same level of classification as the sources, unless

consultation with originators or instructions contained in authorized classification guides indicate that no classification, or a lower classification than originally assigned, should be used.

(b) Persons who apply derivative classification markings shall:

(1) Observe and respect original classification decisions, and

(2) Carry forward to any newly created documents any assigned authorized markings. The declassification date or event that provides the longest period of classification shall be used for documents classified on the basis of multiple sources.

(c) A derivative document that derives its classification from the approved use of the classification guide of another agency shall bear the declassification date required by the provisions of that classification guide.

(d) Documents classified derivatively on the basis of source documents or classification guides shall bear all applicable marking prescribed in Sections 2001.5(a) through 2001.5(e), Information Security Oversight Office Directive No. 1.

(1) *Classification authority.* The authority for classification shall be shown as follows:

(i) "*Classified by (description of source documents or classification guide)*", or

(ii) "*Classified by Multiple Sources*", if a document is classified on the basis of more than one source document or classification guide.

(iii) In these cases, the derivative classifier shall maintain the identification of each source with the file or record copy of the derivatively classified document. A document derivatively classified on the basis of a source document that is marked "Classified by Multiple Sources" shall cite the source document in its "Classified by" line rather than the term "Multiple sources."

(2) *Declassification and downgrading instructions.* Date or events for automatic declassification or downgrading, or the notation "Originating Agency's Determination Required" to indicate that the document is not to be declassified automatically, shall be carried forward from the source document, or as directed by a classification guide, and shown on "declassify on" line as follows:

"Declassify on: (date, description of event); or
"Originating Agency's Determination required (OADR)."

§ 503.56 General declassification policy.

(a) The Commission exercises declassification and downgrading authority in accordance with Section 3.1 of Executive Order 12356, only over that information originally classified by the Commission under previous Executive Orders. Declassification and downgrading authority may be exercised by the Commission Chairman and the Commission Security Officer, and such others as the Chairman may designate. Commission personnel may not declassify information originally classified by other agencies.

(b) The Commission does not now have original classification authority nor does it have in its possession any documents that it originally classified when it had such authority. The Commission has authorized the Archivist of the United States to automatically declassify information originally classified by the Commission and under its exclusive and final declassification jurisdiction at the end of 20 years from the date of original classification.

§ 503.57 Mandatory review for declassification.

(a) Information originally classified by the Commission shall be subject to a review for declassification by the Commission, if:

(1) A request is made by a United States citizen or permanent resident alien, a federal agency, or a state or local government; and

(2) A request describes the documents or material containing the information with sufficient specificity to enable the Commission to locate it with a reasonable amount of effort. Requests with insufficient description of the material will be returned to the requester for further information.

(b) Requests for mandatory declassification reviews of documents originally classified by the Commission shall be in writing, and shall be sent to the Security Officer, Federal Maritime Commission, Washington, D.C. 20573.

(c) If the request requires the provision of services by the Commission, fair and equitable fees may be charged under Title 5 of the Independent Offices Appropriation Act, 65 Stat. 290, 31 U.S.C. 483a.

(d) Requests for mandatory declassification reviews shall be acknowledged by the Commission within 15 days of the date of receipt of such requests.

(e) If the document was originally classified by the Commission, the Commission Security Officer shall forward the request to the Chairman of the Commission for a determination of whether the document should be declassified.

(f) If the document was derivatively classified by the Commission or originally classified by another agency, the request, the document, and a recommendation for action shall be forwarded to the agency with the original classification authority. The Commission may, after consultation with the originating agency, inform the requester of the referral.

(g) If a document is declassified in its entirety, it may be released to the requester, unless withholding is otherwise warranted under applicable law. If a document or any part of it is not declassified, the Security Officer shall furnish the declassified portions to the requester unless withholding is otherwise warranted under applicable law, along with a brief statement concerning the reasons for the denial of the remainder, and the right to appeal that decision to the Commission within 60 days.

(h) If a declassification determination cannot be made within 45 days, the requester shall be advised that additional time is needed to process the request. Final determination shall be made within one year from the date of receipt unless there are unusual circumstances.

(i) In response to a request for information under the Freedom of Information Act, the Privacy Act of 1974, or the mandatory review provisions of Executive Order 12356, the Commission shall refuse to confirm or deny the existence or non-existence of requested information whenever the fact of its existence or non-existence is itself classifiable under Executive Order 12356.

§ 503.58 Appeals of denials of mandatory declassification review requests.

(a) Within 60 days after the receipt of denial of a request for mandatory declassification review, the requester may submit an appeal in writing to the Commission through the Secretary, Federal Maritime Commission, Washington, D.C. 20573. The appeal shall:

(1) Identify the document in the same manner in which it was identified in the original request;

(2) Indicate the dates of the request and denial, and the expressed basis for the denial; and

(3) State briefly why the document should be declassified.

(b) The Commission shall rule on the appeal within 30 days of receiving it. If additional time is required to make a determination, the Commission shall notify the requester of the additional time needed and provide the requester with the reason for the extension. The Commission shall notify the requester in writing of the final determination and the reasons for any denial.

(c) A determination by the Commission under paragraph (b) of this section is final and no further administrative appeal will be permitted. However, the requester may be informed that suggestions and complaints concerning the information security program prescribed by Executive Order 12356 may be submitted to the Director, Information Security Oversight Officer, GSA(AT), Washington, D.C. 20540.

§ 503.59 Safeguarding classified information.

(a) All classified information shall be afforded a level of protection against unauthorized disclosure commensurate with its level of classification.

(b) Whenever classified material is removed from a storage facility, such material shall not be left unattended and shall be protected by attaching an appropriate classified document cover sheet to each classified document.

(c) Classified information being transmitted from one Commission office to another shall be protected with a classified document cover sheet and hand delivered by an appropriately cleared person to another appropriately cleared person.

(d) Classified information shall be made available to a person only when the possessor of the classified information has determined that the person seeking the classified information has a valid security clearance at least commensurate with the level of classification of the information and has established that access is essential to the accomplishment of authorized and lawful Government purposes.

(e) The requirement in paragraph (d) of this section, that access to classified information may be granted only as is essential to the accomplishment of authorized and lawful Government purposes, may be waived as provided in paragraph (f) of this section for persons who:

(1) Are engaged in historical research projects, or

(2) Previously have occupied policy-making positions to which they were appointed by the President.

(f) Waivers under paragraph (e) of this section may be granted when the Commission Security Officer:

(1) Determines in writing that access is consistent with the interest of national security;

(2) Takes appropriate steps to protect classified information from unauthorized disclosure or compromise, and ensures that the information is properly safeguarded; and

(3) Limits the access granted to former presidential appointees to items that the person originated, reviewed, signed, or received while serving as a presidential appointee.

(g) Persons seeking access to classified information in accordance with paragraphs (e) and (f) of this section must agree in writing:

(1) To be subject to a national security check;

(2) To protect the classified information in accordance with the provisions of Executive Order 12356; and

(3) Not to publish or otherwise reveal to unauthorized persons any classified information.

(h) Except as provided by directives issued by the President through the National Security Council, classified information that originated in another agency may not be disseminated outside the Commission.

(i) Only appropriately cleared personnel may receive, transmit, and maintain current access and accountability records for classified material.

(j) Each office which has custody of classified material shall maintain:

(1) A classified document register or log containing a listing of all classified holdings, and

(2) A classified document destruction register or log containing the title and date of all classified documents that have been destroyed.

(k) An inventory of all documents classified higher than confidential shall be made at least annually and whenever there is a change in classified document custodians. The Commission Security Officer shall be notified, in writing, of the results of each inventory.

(l) Reproduced copies of classified documents are subject to the same accountability and controls as the original documents.

(m) Combinations to dial-type locks shall be changed only by persons having an appropriate security clearance, and shall be changed whenever such equipment is placed in use; whenever a person knowing the combination no longer requires access to the combination; whenever a combination has been subject to possible compromise; whenever the equipment is taken

out of service; and at least once each year. Records of combinations shall be classified no lower than the highest level of classified information to be stored in the security equipment concerned. One copy of the record of each combination shall be provided to the Commission Security Officer.

(n) Individuals charged with the custody of classified information shall conduct the necessary inspections within their areas to insure adherence to procedural safeguards prescribed to protect classified information. The Commission Security Officer shall conduct periodic inspections to determine if the procedural safeguards prescribed in this subpart are in effect at all times.

(o) Whenever classified material is to be transmitted outside the Commission, the custodian of the classified material shall contact the Commission Security Officer for preparation and receipting instructions. If the material is to be hand carried, the Security Officer shall ensure that the person who will carry the material has the appropriate security clearance, is knowledgeable of safeguarding requirements, and is briefed, if appropriate, concerning restrictions with respect to carrying classified material on commercial carriers.

(p) Any person having access to and possession of classified information is responsible for protecting it from persons not authorized access to it, to include securing it in approved equipment or facilities, whenever it is not under the direct supervision of authorized persons.

(q) Employees of the Commission shall be subject to appropriate sanctions, which may include reprimand, suspension without pay, removal, termination of classification authority, loss or denial of access to classified information, or other sanctions in accordance with applicable law and agency regulation, if they:

(1) Knowingly, willfully, or negligently disclose to unauthorized persons information properly classified under Executive Order 12356 or predecessor orders;

(2) Knowingly and willfully classify or continue the classification of information in violation of Executive Order 12356 or any implementing directive; or

(3) Knowingly and willfully violate any other provision of Executive Order 12356 or implementing directive.

(r) Any person who discovers or believes that a classified document is lost or compromised shall immediately report the circumstances to his or her supervisor and the Commission Security Officer, who shall conduct an immediate inquiry into the matter.

(s) Questions with respect to the Commission Information Security Program, particularly those concerning the classification, declassification, downgrading, and safeguarding of classified information, shall be directed to the Commission Security Officer.

SUPBART G—ACCESS TO ANY RECORD OF IDENTIFIABLE PERSONAL INFORMATION

§ 503.60 Definitions.

For the Purpose of this subpart:

(a) "*Agency*" means each authority of the government of the United States as defined in 5 U.S.C. 551(1) and shall include any executive department, military department, government corporation, government controlled corporation or other establishment in the executive branch of the government (including the Executive Office of the President), or any independent regulatory agency.

(b) "*Commission*" means the Federal Maritime Commission.

(c) "*Individual*" means a citizen of the United States or an alien lawfully admitted for permanent residence to whom a record pertains.

(d) "*Maintain*"includes maintain, collect, use, or disseminate.

(e) "*Person*" means any person not an individual and shall include, but is not limited to, corporations, associations, partnerships, trustees, receivers, personal representatives, and public or private organizations.

(f) "*Record*" means any item, collection, or grouping of information about an individual that is maintained by the Federal Maritime Commission, including but not limited to a person's education, financial transactions, medical history, and criminal or employment history, and that contains the person's name, or the identifying number, symbol or other identifying particular assigned to the individual, such as a finger or voice print, or a photograph.

(g) "*Routine use*" means [with respect to the disclosure of a record], the use of such records for a purpose which is compatible with the purpose for which it was collected.

(h) "*Statistical record*" means a record in a system of records, maintained for statistical research or reporting purposes only and not used in whole or in part in making any determination about an identifiable individual, but shall not include matter pertaining to the Census as defined in 13 U.S.C. 8.

(i) "*System of records*" means a group of any records under the control of the Commission from which information is retrieved by the name of the individual or by some identifying number, symbol or other identifying particular assigned to the individual.

§ 503.61 Conditions of disclosure.

(a) Subject to the conditions of paragraphs (b) and (c) of this section, the Commission shall not disclose any record which is contained in a system of records, by any means of communication, to any person or other agency who is not an individual to whom the record pertains.

(b) Upon written request or with prior written consent of the individual to whom the record pertains, the Commission may disclose any such record to any person or other agency.

(c) In the absence of a written consent from the individual to whom the record pertains, the Commission may disclose any such record, provided such disclosure is:

(1) To those officers and employees of the Commission who have a need for the record in the performance of their duties;

(2) Required under the Freedom of Information Act (5 U.S.C. 552);

(3) For a routine use;

(4) To the Bureau of Census for purposes of planning or carrying out a census or survey or related activity under the provisions of Title 13 of the United States Code;

(5) To a recipient who has provided the Commission with adequate advance written assurance that the record will be used solely as a statistical research or reporting record, and the record is to be transferred in a form that is not individually identifiable;

(6) To the National Archives of the United States, as a record which has sufficient historical or other value to warrant its continued preservation by the United States government, or for evaluation by the Administrator of General Services or his designee to determine whether the record has such value;

(7) To another agency or to an instrumentality of any governmental jurisdiction within or under the control of the United States for a civil or criminal law enforcement activity authorized by law, provided the head of the agency or instrumentality has made a prior written request to the Secretary of the Commission specifying the particular record and the law enforcement activity for which it is sought;

(8) To either House of Congress, and to the extent of a matter within its jurisdiction, any committee, subcommittee, or joint committee of Congress;

(9) To the Comptroller General, or any authorized representative, thereof, in the course of the performance of the duties of the GAO; or

(10) Under an order of a court of competent jurisdiction.

§ 503.62 Accounting of disclosures.

(a) The Secretary shall make an accounting of each disclosure of any record contained in a system of records in accordance with 5 U.S.C. 552a(c)(1) and 552a(c)(2).

(b) Except for a disclosure made under § 503.61(c)(7), the Secretary shall make the accounting described in paragraph (a) of this section available to any individual upon written request made in accordance with § 503.63(b) or § 503.63(c).

(c) The Secretary shall make reasonable efforts to notify the individual when any record which pertains to such individual is disclosed to any person under compulsory legal process, when such process becomes a matter of public record.

§ 503.63 Request for Information.

(a) Upon request, in person or by mail, made in accordance with the provisions of paragraph (b) or (c) of this section, any individual shall be informed whether or not any Commission system of records contains a record pertaining to him or her.

(b) Any individual requesting such information in person shall personally appear at the Office of the Secretary, Federal Maritime Commission, 1100 L Street, N.W., Washington, D.C. 20573 and shall:

(1) Provide information sufficient, in the opinion of the Secretary, to identify the record, e.g., the individual's own name, date of birth, place of birth, etc.;

(2) Provide identification acceptable to the Secretary to verify the individual's identity, e.g., driver's license, employee identification card or medicare card;

(3) Complete and sign the appropriate form provided by the Secretary.

(c) Any individual requesting such information by mail shall address such request to the Secretary, Federal Maritime Commission, 1100 L Street, N.W., Washington, D.C. 20573 and shall include in such request the following:

(1) Information sufficient in the opinion of the Secretary to identify the record, e.g., the individual's own name, date of birth, place of birth, etc.;

(2) A signed notarized statement to verify his or her identity.

§ 503.64 Commission procedure on request for information.

Upon request for information made in accordance with § 503.63, the Secretary or his or her delegate shall, within 10 days (excluding Saturdays, Sundays, and legal public holidays), furnish in writing to the requesting party notice of the existence or nonexistence of any records described in such request.

§ 503.65 Request for access to records.

(a) *General.* Upon request by any individual made in accordance with the procedures set forth in paragraph (b) of this section, such individual shall be granted access to any record pertaining to him or her which is contained in a Commission system of records. However, nothing in this section shall allow an individual access to any information compiled by the Commission in reasonable anticipation of a civil or criminal action or proceeding.

(b) *Procedures for requests for access to records.* Any individual may request access to a record pertaining to him or her in person or by mail in accordance with paragraphs (b)(1) and (b)(2) of this section:

(1) Any individual making such request in person shall do so at the Office of the Secretary, Federal Maritime Commission, 1100 L Street, N.W., Washington, D.C. 20573 and shall:

(i) Provide identification acceptable to the Secretary to verify the individual's identity, e.g., driver's license, employee identification card, or medicare card; and

(ii) Complete and sign the appropriate form provided by the Secretary.

(2) Any individual making a request for access to records by mail shall address such request to the Secretary, Federal Maritime Commission, 1100 L Street, N.W., Washington, D.C. 20573, and shall include therein a signed notarized statement to verify his or her identity.

(3) Any individual requesting access to records under this section in person may be accompanied by a person of his or her own choosing, while reviewing the record requested. If an individual elects to be so accompanied, he or she shall notify the Secretary of such election in the request and shall provide a written statement authorizing disclosure of the record in the presence of the accompanying person. Failure to so notify the Secretary in a request for access shall be deemed to be a decision by the individual not to be accompanied.

(c) *Commission determination of requests for access.*

(1) Upon request made in accordance with this section, the Secretary or his or her delegate shall:

(i) Determine whether or not such request shall be granted.

(ii) Make such determination and provide notification within 10 days (excluding Saturdays, Sundays, and legal public holidays) after receipt of such request, and, if such request is granted shall;

(iii) Notify the individual that fees for reproducing copies will be made in accordance with § 503.69.

(2) If access to a record is denied because such information has been compiled by the Commission in reasonable anticipation of a civil or criminal action or proceeding, or for any other reason, the Secretary shall notify the individual of such determination and his or her right to judicial appeal under 5 U.S.C. 552a(g).

(d) *Manner of providing access.*

(1) If access is granted, the individual making such request shall notify the Secretary whether the records requested are to be copied and mailed to the individual.

(2) If records are to be made available for personal inspection, the individual shall arrange with the Secretary a mutually agreeable time and place for inspection of the record.

(3) Fees for reproducing and mailing copies of records will be made in accordance with § 503.69.

§ 503.66 Amendment of a record.

(a) *General.* Any individual may request amendment of a record pertaining to him or her according to the procedure in paragraph (b) of this section.

(b) *Procedures for requesting amendment of a record.* After inspection of a record pertaining to him or her, an individual may file with the

Secretary a request, in person or by mail, for amendment of a record. Such request shall specify the particular portions of the record to be amended, the desired amendments and the reasons therefor.

(c) *Commission procedures on request for amendment of a record.*

(1) Not later than ten (10) days (excluding Saturdays, Sundays, and legal public holidays) after the date of receipt of a request made in accordance with this section to amend a record in whole or in part, the Secretary or his or her delegate shall:

(i) Make any correction of any portion of the record which the individual believes is not accurate, relevant, timely or complete and thereafter inform the individual of such correction; or

(ii) Inform the individual, by certified mail, return receipt requested, of refusal to amend the record, setting out the reasons therefore, and notify the individual of his or her right to appeal that determination to the Chairman of the Commission under § 503.67.

(2) The Secretary shall inform any person or other agency to whom a record has been disclosed of any correction or notation of dispute made by the Secretary with respect to such records, in accordance with 5 U.S.C. 552a(c)(4) referring to amendment of a record, if an accounting of such disclosure has been made.

§ 503.67 Appeals from denial of request for amendment of a record.

(a) *General.* An individual whose request for amendment of a record pertaining to him or her is denied, may further request a review of such determination in accordance with paragraph (b) of this section.

(b) *Procedure for appeal.* Not later than thirty (30) days (excluding Saturdays, Sundays, and legal public holidays) following receipt of notification of refusal to amend, an individual may file an appeal to amend the record. Such appeal shall:

(1) Be addressed to the Chairman, Federal Maritime Commission, 1100 L Street, N.W., Washington, D.C. 20573; and

(2) Specify the reasons for which the refusal to amend is challenged.

(c) *Commission procedure on appeal.*

(1) Upon appeal from a denial to amend a record, the Chairman of the Commission or the officer designated by the Chairman to act in his or her absence, shall make a determination whether or not to amend the record and shall notify the individual of that determination by certified mail, return receipt requested, not later than thirty (30) days (excluding Saturdays, Sundays and legal public holidays) after receipt of such appeal, unless extended pursuant to paragraph (d) of this section.

(2) The Chairman shall also notify the individual of the provisions of 5 U.S.C. 552a(g)(1)(A) regarding judicial review of the Chairman's determination.

(3) If, on appeal, the refusal to amend the record is upheld, the Commission shall permit the individual to file a statement setting forth the reasons for disagreement with the Commission's determination.

(d) The Chairman, or his or her delegate in his or her absence, may extend up to thirty (30) days the time period prescribed in paragraph (c)(1) of this section within which to make a determination on appeal from refusal to amend a record for the reasons that a fair and equitable review cannot be completed within the prescribed time period.

§ 503.68 Exemptions.

The Chairman of the Commission reserves the right to promulgate rules in accordance with the requirements of 5 U.S.C. 553(b)(1), (2) and (3), 553(c) and 553(e) (Administrative Procedure Act-Rulemaking), to exempt any system of records maintained by the Commission in accordance with the provisions of 5 U.S.C. 552a(k).

§ 503.69 Fees.

(a) *General.* The following Commission services are available, with respect to requests made under the provisions of this subpart, for which fees will be charged as provided in paragraphs (b) and (c) of this section:

(1) Copying records/documents.

(2) Certification of copies of documents.

(b) *Fees for services.* The fees set forth below provide for documents to be mailed with ordinary first-class postage prepaid. If a copy is to be transmitted by registered, certified, air, or special delivery mail, postage therefor will be added to the basic fee. Also, if special handling or packaging is required, costs thereof will be added to the basic fee.

(1) The copying of records and documents will be available at the rate of 30 cents per page (one side), limited to size 8¼″ × 14″ or smaller.

(2) The certification and validation (with Federal Maritime Commission seal) of documents filed with or issued by the Commission will be available at $5 for each certification.

(c) *Payment of fees and charges.* The fees charged for special services may be paid by check, draft, or postal money order, payable to the Federal Maritime Commission.

SUBPART H—PUBLIC OBSERVATION OF FEDERAL MARITIME COMMISSION MEETINGS AND PUBLIC ACCESS TO INFORMATION PERTAINING TO COMMISSION MEETINGS

§ 503.70 Policy.

It is the policy of the Federal Maritime Commission, under the provisions of the "Government in the Sunshine Act" (5 U.S.C. 552b, September 13, 1976) to entitle the public to the fullest practicable information regarding the decisional processes of the Commission. The provisions of this Subpart set forth the procedural requirements designed to provide the public with such information while continuing to protect the rights of individuals and to maintain the capabilities of the Commission in carrying out its responsibilities under the shipping statutes administered by this Commission.

§ 503.71 Definitions.

The following definitions apply for purposes of this subpart:

(a) "*Agency*" means the Federal Maritime Commission;

(b) "*Information pertaining to a meeting*" means, but is not limited to the following: the record of any agency vote taken under the provisions of this subpart, and the record of the vote of each member; a full written explanation of any agency action to close any portion of any meeting under this Subpart; lists of persons expected to attend any meeting of the agency and their affiliation; public announcement by the agency under this subpart of the time, place, and subject matter of any meeting or portion of any meeting; announcement of whether any meeting or portion of any meeting shall be open to public observation or be closed; any announcement of any change regarding any meeting or portion of any meeting; and the name and telephone number of the Secretary of the agency who shall be designated by the agency to respond to requests for information concerning any meeting or portion of any meeting;

(c) "*Meeting*" means the deliberations of at least three of the members of the agency which determine or result in the joint conduct of disposition of official agency business, but does not include: (1) individual member's consideration of official agency business circulated to the members in writing for disposition on notation: (2) deliberations by the agency in determining whether or not to close a portion or portions of a meeting or series of meetings as provided in §§ 503.74 and 503.75; (3) deliberations by the agency in determining whether or not to withhold from disclosure information pertaining to a portion or portions of a meeting or series of meetings as provided in § 503.80; or (4) deliberations pertaining to any change in any meeting or to changes in the public announcement of such a meeting as provided in § 503.83;

(d) "*Member*" means each individual Commissioner of the agency;

(e) "*Person*" means any individual, partnership, corporation, association, or public or private organization, other than an agency as defined in 5 U.S.C. 551(1);

(f) "*Series of meetings*" means more than one meeting involving the same particular matters and scheduled to be held no more than thirty (30) days after the initial meeting in such series.

§ 503.72 General rule—meetings.

(a) Except as otherwise provided in §§ 503.73, 503.74, 503.75 and 503.76, every meeting and every portion of a series of meetings of the agency shall be open to public observation.

(b) The opening of a portion or portions of a meeting or a portion or portions of a series of meetings to public observation shall not be construed to include any participation by the public in any manner in the meeting. Such an attempted participation or participation shall be cause for removal of any person so engaged at the discretion of the presiding member of the agency.

§ 503.73 Exceptions—meetings.

Except in a case where the agency finds that the public interest requires otherwise, the provisions of § 503.72(a) shall not apply to any portion or portions of an agency meeting or portion or portions of a series of meetings where the agency determined under the provisions of § 503.74 or § 503.75 that such portion or portions or such meeting or series of meetings is likely to:

(a) Disclose matters that are (1) specifically authorized under criteria established by an Executive Order to be kept secret in the interests of national defense or foreign policy and (2) in fact properly classified pursuant to such Executive Order;

(b) Relate solely to the internal personnel rules and practices of any agency;

(c) Disclose matters specifically exempted from disclosure by any statute other than 5 U.S.C. 552 (FOIA), provided that such statute (1) requires that the matter be withheld from the public in such a manner as to leave no discretion on the issue, or (2) establishes particular criteria for withholding or refers to particular types of matters to be withheld;

(d) Disclose trade secrets and commercial or financial information obtained from a person and privileged or confidential;

(e) Involve accusing any person of a crime, or formally censuring any person;

(f) Disclose information of a personal nature where disclosure would constitute a clearly unwarranted invasion of personal privacy;

(g) Disclose investigatory records compiled for law enforcement purposes, or information which, if written, would be contained in such records, but only to the extent that the production of such records or information would (1) interfere with enforcement proceedings, (2) deprive a person of a right to a fair trial or an impartial adjudication, (3) constitute an unwarranted invasion of personal privacy, (4) disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source, (5) disclose investigative techniques and procedures, or (6) endanger the life or physical safety of law enforcement personnel;

(h) Disclose information contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions;

(i) Disclose information, the premature disclosure of which would be likely to significantly frustrate, implementation of a proposed agency action unless the agency has already disclosed to the public the content or nature of its proposed action, or where the agency is required by law to make such disclosure on its own initiative prior to taking final agency action on such proposal; or

(j) Specifically concern the agency's issuance of a subpena, or the agency's participation in a civil action or proceeding, an action in a foreign court or international tribunal, or an arbitration, or the initiation, conduct, or disposition by the agency of a particular case of formal agency adjudication pursuant to the procedures in 5 U.S.C. 554 or otherwise involving a determination on the record after opportunity for a hearing.

§ 503.74 Procedures for closing a portion or portions of a meeting or a portion or portions of a series of meetings on agency initiated requests.

(a) Any member of the agency or the General Counsel of the agency may request that any portion or portions of a series of meetings be closed to public observation for any of the reasons provided in § 503.73 by submitting such request in writing to the Secretary of the agency in sufficient time to allow the Secretary to schedule a timely vote on the request pursuant to paragraph (b) of this section.

(b) Upon receipt of any request made under paragraph (a) of this section, the Secretary of the agency shall schedule a time at which the members of the agency shall vote upon the request, which vote shall take place not later than eight (8) days prior to the scheduled meeting of the agency.

(c) At the time the Secretary schedules a time for an agency vote as described in paragraph (b) of this section, he or she shall forward the request to the General Counsel of the agency who shall act upon such request as provided in § 503.77.

(d) At the time scheduled by the Secretary as provided in paragraph (b) of this section, the members of the agency, upon consideration of the request submitted under paragraph (a) of this section and consideration of the certified opinion of the General Counsel of the agency provided to the members under § 503.77, shall vote upon that request. That vote shall determine whether or not any portion or portions of a meeting may be closed to public observation for any of the reasons provided in § 503.73, and whether or not the public interest requires that the portion or portions of the meeting or meetings remain open, notwithstanding the applicability of any of the reasons provided in § 503.73 permitting the closing of any meeting to public observation.

(e) In the case of a vote on a request under this section to close to public observation a portion or portions of a meeting, no such portion or portions of any meeting may be closed unless, by a vote on the issues described in paragraph (d) of this section, a majority of the entire membership of the agency shall vote to close such portion or portions of a meeting by recorded vote.

(f) In the case of a vote on a request under this section to close to public observation a portion or portions of a series of meetings as defined in § 503.71, no such portion or portions of a series of meetings may be closed unless, by a vote on the issues described in paragraph (d) of this section, a majority of the entire membership of the agency shall vote

to close such portion or portions of a series of meetings. A determination to close to public observation a portion or portions of a series of meetings may be accomplished by a single vote on each of the issues described in paragraph (d) of this section, provided that the vote of each member of the agency shall be recorded and the vote shall be cast by each member and not by proxy vote.

§ 503.75 Procedures for closing a portion of a meeting on request initiated by an interested person.

(a) Any person as defined in § 503.71, whose interests may be directly affected by a portion of a meeting of the agency, may request that the agency close that portion of a meeting for the reason that matters in deliberation at that portion of the meeting are such that public disclosure of that portion of a meeting is likely to:

(1) Involve accusing any person of a crime, or formally censuring any person;

(2) Disclose information of a personal nature where disclosure would constitute a clearly unwarranted invasion of personal privacy; or

(3) Disclose investigatory records compiled for law enforcement purposes, or information which if written would be contained in such records, but only to the extent that the production of such records or information would:

(i) Interfere with enforcement proceedings;

(ii) Deprive a person of a right to a fair trial or an impartial adjudication;

(iii) Constitute an unwarranted invasion of personal privacy;

(iv) Disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source;

(v) Disclose investigative techniques and procedures; or

(vi) Endanger the life or physical safety of law enforcement personnel.

(b) Any person described in paragraph (a) of this section who submits a request that a portion of a meeting be closed shall submit an original and 15 copies of that request to the Secretary, Federal Maritime Commission, Washington, DC 20573, and shall state with particularity that portion of a meeting sought to be closed and the reasons therefor as described in paragraph (a) of this section.

(c) Upon receipt of any request made under paragraphs (a) and (b) of this section, the Secretary of the agency shall:

(1) Furnish a copy of the request to each member of the agency; and

(2) Furnish a copy of the request to the General Counsel of the agency.

(d) Upon receipt of a request made under paragraphs (a) and (b) of this section, any member of the agency may request agency action upon the request to close a portion of a meeting by notifying the Secretary of the agency of that request for agency action.

(e) Upon receipt of a request for agency action under paragraph (d) of this section, the Secretary of the agency shall schedule a time for an agency vote upon the request of the person whose interests may be directly affected by a portion of a meeting, which vote shall take place prior to the scheduled meeting of the agency.

(f) At the time the Secretary receives a request for agency action and schedules a time for an agency vote as described in paragraph (e) of this section, the request of the person whose interests may be directly affected by a portion of a meeting shall be forwarded to the General Counsel of the agency who shall act upon such request as provided in § 503.77.

(g) At the time scheduled by the Secretary, as provided in paragraph (e) of this section, the members of the agency, upon consideration of the request of the person whose interests may be directly affected by a portion of a meeting submitted under paragraphs (a) and (b) of this section, and consideration of the certified opinion of the General Counsel of the agency provided to the members under § 503.77, shall vote upon that request. That vote shall determine whether or not any portion or portions of a meeting or portions or portions of a series of meetings may be closed to public observation for any of the reasons provided in paragraph (a) of this section, and whether or not the public interest requires that the portion or portions of the meeting or meetings remain open, notwithstanding the applicability of any of the reasons provided in paragraph (a) of this section permitting the closing of any portion of any meeting to public observation.

(h) In the case of a vote on a request under this section to close to public observation a portion of a meeting, no such portion of a meeting may be closed unless, by a vote on the issues described in paragraph (g) of this section, a majority of the entire membership of the agency shall vote to close such portion of a meeting by a recorded vote.

§ 503.76 Effect of vote to close a portion or portions of a meeting or series of meetings.

(a) Where the agency votes as provided in § 503.74 or § 503.75, to close to public observation a portion or portions of a meeting or a portion or portions of a series of meetings, the portion or portions of a meeting or the portion or portions of a series of meetings shall be closed.

(b) Except as otherwise provided in §§ 503.80, 503.81 and 503.82, not later than the day following the day on which a vote is taken under § 503.74 or § 503.75, by which it is determined to close a portion or portions of a meeting or a portion or portions of a series of meetings to public observation, the Secretary shall make available to the public:

(1) A written copy of the recorded vote reflecting the vote of each member of the agency;

(2) A full written explanation of the agency action closing that portion or those portions to public observation; and

(3) A list of the names and affiliations of all persons expected to attend the portion or portions of the meeting or the portion or portions of a series of meetings.

(c) Except as otherwise provided in §§ 503.80, 503.81 and 503.82, not later than the day following the day on which a vote is taken under § 503.74, or § 503.75, by which it is determined that the portion or portions of a meeting or the portion or portions of a series of meetings shall remain open to public observation, the Secretary shall make available to the public a written copy of the recorded vote reflecting the vote of each member of the agency.

§ 503.77 Responsibilities of the General Counsel of the agency upon a request to close any portion of any meeting.

(a) Upon any request that the agency close a portion or portions of any meeting or any portion or portions of any series of meetings under the provisions of §§ 503.74 and 503.75, the General Counsel of the agency shall certify in writing to the agency, prior to an agency vote on that request, whether or not in his or her opinion the closing of any such portion or portions of a meeting or portion or portions of a series of meetings is proper under the provisions of this subpart and the terms of the Government in the Sunshine Act (5 U.S.C. 552b). If, in the opinion of the General Counsel, the closing of a portion or portions of a meeting or portion or portions of a series of meetings is proper under the provisions of this subpart and the terms of the Government in the Sunshine Act (5 U.S.C. 552b), his or her certification of that opinion shall cite each applicable, particular, exemptive provision of that Act and provision of this subpart.

(b) A copy of the certification of the General Counsel as described in paragraph (a) of this section, together with a statement of the officer presiding over the portion or portions of any meeting or the portion or portions of a series of meetings setting forth the time and place of the relevant meeting or meetings, and the persons present, shall be maintained by the Secretary for public inspection.

§ 503.78 General rule—information pertaining to meeting.

(a) As defined in § 503.71, all information pertaining to a portion or portions of a meeting or portion or portions of a series of meetings of the agency shall be disclosed to the public unless excepted from such disclosure under §§ 503.79, 503.80 and 503.81.

(b) All inquiries as to the status of pending matters which were considered by the Commission in closed session should be directed to the Secretary of the Commission. Commission personnel who attend closed meetings of the Commission are prohibited from disclosing anything that occurs during those meetings. An employee's failure to respect the confidentiality of closed meetings constitutes a violation of the Commission's General Standards of Conduct. The Commission can, of course, determine to make public the events or decisions occurring in a closed meeting, such informa-

tion to be disseminated by the Office of the Secretary. An inquiry to the Office of the Secretary as to whether any information has been made public is not, therefore, improper. However, a request of or attempt to persuade a Commission employee to divulge the contents of a closed meeting constitutes a lack of proper professional conduct inappropriate to a person practicing before this agency, and requires that the employee file a report of such event so that a determination can be made whether disciplinary action should be initiated pursuant to § 502.30 of this chapter.

§ 503.79 Exceptions—information pertaining to meeting.

Except in a case where the agency finds that the public interest requires otherwise, information pertaining to a portion or portions of a meeting or portion or portions of a series of meetings need not be disclosed by the agency if the agency determines, under the provisions of §§ 503.80 and 503.81 that disclosure of that information is likely to disclose matters which are:

(a) Specifically authorized under criteria established by an Executive Order to be kept secret in the interests of national defense or foreign policy and (2) in fact properly classified pursuant to such Executive Order;

(b) Related solely to the internal personnel rules and practices of an agency;

(c) Specifically exempted from disclosure by any statute other than 5 U.S.C. 552 (FOIA), provided that such statute (1) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (2) establishes particular criteria for withholding or refers to particular types of matters to be withheld;

(d) Trade secrets and commercial or financial information, obtained from a person and privileged or confidential;

(e) Involved with accusing any person of a crime, or formally censuring any person;

(f) Of a personal nature, where disclosure would constitute a clearly unwarranted invasion of personal privacy;

(g) Investigatory records compiled for law enforcement purposes, or information which if written would be contained in such records, but only to the extent that the production of such record or information would (1) interfere with enforcement proceedings, (2) deprive a person of a right to a fair trial or an impartial adjudication, (3) constitute an unwarranted invasion of personal privacy, (4) disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source, (5) disclose investigative techniques and procedures, or (6) endanger the life or physical safety of law enforcement personnel;

(h) Contained in or related to examination, operation, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions;

(i) Information, the premature disclosure of which would be likely to significantly frustrate implementation of a proposed agency action, unless the agency has already disclosed to the public the content or nature of its proposed action, or where the agency is required by law to make such disclosure on its own initiative prior to taking final agency action on such proposal; or

(j) Specifically concerned with the agency's issuance of a subpena, the agency's participation in a civil action or proceeding, an action in a foreign court or international tribunal, or an arbitration, or the initiation, conduct, or disposition by the agency of a particular case of formal agency adjudication pursuant to the procedures in 5 U.S.C. 554 or otherwise involving a determination on the record after opportunity for a hearing.

§ 503.80 Procedures for withholding information pertaining to meeting.

(a) Any member of the agency, or the General Counsel of the agency may request that information pertaining to a portion or portions of a meeting or to a portion or portions of a series of meetings be withheld from public disclosure for any of the reasons set forth in § 503.79 by submitting such request in writing to the Secretary not later than two (2) weeks prior to the commencement of the first meeting in a series of meetings.

(b) Upon receipt of any request made under paragraph (a) of this section, the Secretary shall schedule a time at which the members of the agency shall vote upon the request, which vote shall take place not later than eight (8) days prior to the scheduled meeting of the agency.

(c) At the time scheduled by the Secretary in paragraph (b) of this section, the Members of the agency, upon consideration of the request submitted under paragraph (a) of this section, shall vote upon that request. That vote shall determine whether or not information pertaining to a meeting may be withheld from public disclosure for any of the reasons provided in § 503.79, and whether or not the public interest requires that the information be disclosed notwithstanding the applicability of the reasons provided in § 503.79 permitting the withholding from public disclosure of the information pertaining to a meeting.

(d) In the case of a vote on a request under this, section to withhold from public disclosure information pertaining to a portion or portions of a meeting, no such information shall be withheld from public disclosure unless, by a vote on the issues described in paragraph (c) of this section, a majority of the entire membership of the agency shall vote to withhold such information by recorded vote.

(e) In the case of a vote on a request under this section to withhhold information pertaining to a portion or portions of a series of meetings, no such information shall be withheld unless, by a vote on the issues described in paragraph (c) of this section, a majority of the entire member-

ship of the agency shall vote to withhold such information. A determination to withhold information pertaining to a portion or portions of a series of meetings from public disclosure may be accomplished by a single vote on the issues described in paragraph (c) of this section, provided that the vote of each member of the agency shall be recorded and the vote shall be cast by each member and not by proxy vote.

§ 503.81 Effect of vote to withhold information pertaining to meeting.

(a) Where the agency votes as provided in § 503.80 to withhold from public disclosure information pertaining to a portion or portions of a meeting or portion or portions of a series of meetings, such information shall be excepted from the requirements of §§ 503.78, 503,82 and 503.83.

(b) Where the agency votes as provided in § 503.80 to permit public disclosure of information pertaining to a portion or portions of a meeting or portion or portions of a series of meetings, such information shall be disclosed to the public as required by §§ 503.78, 503.82 and 503.83.

(c) Not later than the day following the date on which a vote is taken under § 503.80, by which the information pertaining to a meeting is determined to be disclosed, the Secretary shall make available to the public a written copy of such vote reflecting the vote of each member of the agency on the question.

§ 503.82 Public announcement of agency meeting.

(a) Except as provided in §§ 503.80 and 503.81 regarding a determination to withhold from public disclosure any information pertaining to a portion or portions of a meeting or portion or portions of a series of meetings, or as otherwise provided in paragraph (c) of this section, the Secretary of the agency shall make public announcement of each meeting of the agency.

(b) Except as otherwise provided in this section, public announcement of each meeting of the agency shall be accomplished not later than one week prior to commencement of a meeting or the commencement of the first meeting in a series of meeting, and shall disclose:

(1) The time of the meeting;

(2) The place of the meeting;

(3) The subject matter of each portion of each meeting or series of meetings;

(4) Whether any portion or portions of any meeting or any portion or portions of any series of meetings is open or closed to public observation; and

(5) The name and telephone number of the Secretary of the agency who shall respond to requests for information about a meeting.

(c) The announcement described in paragraphs (a) and (b) of this section may be accomplished less than one week prior to the commencement of any meeting or series of meetings, provided the agency determines by recorded vote that the agency business requires that any such meeting or series of meetings be held at an earlier date. In the event of such

a determination by the agency, public announcement as described in paragraph (b) of this section shall be accomplished at the earliest practicable time.

(d) Immediately following any public announcement accomplished under the provisions of this section, the Secretary of the agency shall submit a notice for publication in the *Federal Register* disclosing:

(1) The time of the meeting;

(2) The place of the meeting;

(3) The subject matter of each portion of each meeting or series of meetings;

(4) Whether any portion or portions of any meeting or any portion or portions of any series of meetings is open or closed to public observation; and

(5) The name and telephone number of the Secretary of the agency who shall respond to requests for information about a meeting.

§ 503.83 Public announcement of changes in meeting.

(a) Except as provided in §§ 503.80 and 503.81, under the provisions of paragraphs (b) and (c) of this section, the time or place of a meeting or series of meetings may be changed by the agency following accomplishment of the announcement and notice required by § 503.82, provided the Secretary of the agency shall publicly announce such change at the earliest practicable time.

(b) The subject matter of a portion or portions of a meeting or a portion or portions of a series of meetings, the time and place of such meeting, and the determination that the portion or portions of a series of meetings shall be open or closed to public observation may be changed following accomplishment of the announcement required by § 503.82, provided:

(1) The agency, by recorded vote of the majority of the entire membership of the agency, determines that agency business so requires and that no earlier announcement of the change was possible; and

(2) The Secretary of the agency publicly announces, at the earliest practicable time, the change made and the vote of each member upon such change.

(c) Immediately following any public announcement of any change accomplished under the provisions of this section, the Secretary of the agency shall submit a notice for publication in the *Federal Register* disclosing:

(1) The time of the meeting;

(2) The place of the meeting;

(3) The subject matter of each portion of each meeting or series of meetings;

(4) Whether any portion or portions of any meeting or any portion or portions of any series of meetings is open or closed to public observation; and

(5) Any change in paragraphs (c)(1), (c)(2), (c)(3), or (c)(4) of this section; and

(6) The name and telephone number of the Secretary of the agency who shall respond to requests for information about any meeting.

§ 503.84 [Reserved.]

§ 503.85 Agency recordkeeping requirements.

(a) In the case of any portion or portions of a meeting or portion or portions of a series of meetings determined by the agency to be closed to public observation under the provisions of this subpart, the following records shall be maintained by the Secretary of the agency:

(1) The certification of the General Counsel of the agency required by § 503.77;

(2) A statement from the officer presiding over the portion or portions of the meeting or portion or portions of a series of meetings setting forth the time and place of the portion or portions of the meeting or portion or portions of the series of meetings, the persons present at those times; and

(3) Except as provided in paragraph (b) of this section, a complete transcript or electronic recording fully recording the proceedings at each portion of each meeting closed to public observation.

(b) In case the agency determines to close to public observation any portion or portions of any meeting or portion or portions of any series of meetings because public observation of such portion or portions of any meeting is likely to specifically concern the agency's issuance of a subpena, or the agency's participation in a civil action or proceeding, an action in a foreign court or international tribunal, or an arbitration, or the initiation, conduct, or disposition by the agency of a particular case of formal agency adjudication pursuant to the procedures in 5 U.S.C. 554 or otherwise involving a determination on the record after opportunity for a hearing, the agency may maintain a set of minutes in lieu of the transcript or recording described in paragraph (a)(3) of this section. Such minutes shall contain:

(1) A full and clear description of all matters discussed in the closed portion of any meeting;

(2) A full and accurate summary of any action taken on any matter discussed in the closed portion of any meeting and the reasons therefor;

(3) A description of each of the views expressed on any matter upon which action was taken as described in paragraph (b)(2) of this section;

(4) The record of any rollcall vote which shall show the vote of each member on the question; and

(5) An identification of all documents considered in connection with any action taken on a matter described in paragraph (b)(1) of this section.

(c) All records maintained by the agency as described in this section shall be held by the agency for a period of not less than two (2) years following any meeting or not less than one (1) year following the conclusion of any agency proceeding with respect to which that meeting or portion of a meeting was held.

§ 503.86 Public access to records.

(a) All transcripts, electronic recordings or minutes required to be maintained by the agency under the provisions of §§ 503.85(a)(3) and 503.85(b) shall be promptly made available to the public by the Secretary of the agency, except for any item of discussion or testimony of any witnesses which the agency determines to contain information which may be withheld from public disclosure because its disclosure is likely to disclose matters which are:

(1)(i) specifically authorized under criteria established by an Executive Order to be kept secret in the interests of national defense or foreign policy and (ii) in fact properly classified pursuant to such Executive Order;

(2) Related solely to the internal personnel rules and practices of an agency;

(3) Specifically exempted from disclosure by any statute other than 5 U.S.C. 552 (FOIA), provided that such statute (i) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (ii) establishes particular criteria for withholding or refers to particular types of matters to be withheld;

(4) Trade secrets and commercial or financial information obtained from a person and privileged or confidential;

(5) Involved with accusing any person of a crime, or formally censuring any person;

(6) Of a personal nature where disclosure would constitute a clearly unwarranted invasion of personal privacy;

(7) Investigatory records compiled for law enforcement purposes, or information which, if written, would be contained in such records, but only to the extent that the production of such records or information would (i) interfere with enforcement proceedings, (ii) deprive a person of a right to a fair trial or an impartial adjudication, (iii) constitute an unwarranted invasion of personal privacy, (iv) disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source, (v) disclose investigative techniques and procedures or (vi) endanger the life or physical safely of law enforcement personnel;

(8) Contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions;

(9) Information, the premature disclosure of which would be likely to significantly frustrate implementation of a proposed agency action, unless the agency has already disclosed to the public the content or nature of its proposed action, or where the agency is required by law to make such disclosure on its own initiative prior to taking final agency action on such proposal; or

(10) Specifically concerned with the agency's issuance of a subpena, or the agency's participation in a civil action or proceeding, an action in a foreign court or international tribunal, or an arbitration, or the initiation, conduct, or disposition by the agency of a particular case of formal agency adjudication pursuant to the procedures in 5 U.S.C. 554 or otherwise involving a determination on the record after opportunity for a hearing.

(b) Requests for access to the records described in this section shall be made in accordance with procedures described in §§ 503.31 through 503.36.

(c) Records disclosed to the public under this section shall be furnished at the expense of the party requesting such access at the actual cost of duplication of transcription.

§ 503.87 Effect of provisions of this subpart on other subparts.

(a) Nothing in this subpart shall limit or expand the ability of any person to seek access to agency records under Subpart D (§§ 503.31 to 503.36) of this part except that the exceptions of § 503.86 shall govern requests to copy or inspect any portion of any transcript, electronic recordings or minutes required to be kept under this subpart.

(b) Nothing in this subpart shall permit the withholding from any individual to whom a record pertains any record required by this subpart to be maintained by the agency which record is otherwise available to such an individual under the provisions of Subpart G of this part.

NOTE: This part does not contain any collection of information requests or requirements within the meaning of the Paperwork Reduction Act of 1980, Pub. L. 96–511.