

## FEDERAL MARITIME COMMISSION

46 CFR Part 502

Docket No. 01-05

## ALTERNATIVE DISPUTE RESOLUTION

**AGENCY:** Federal Maritime Commission.

**ACTION:** Final rule.

**SUMMARY:** The Federal Maritime Commission is issuing new regulations implementing the Administrative Dispute Resolution Act. The new regulations expand the Commission's Alternative Dispute Resolution ("ADR") services, addressing guidelines and procedures for arbitration and providing for mediation and other ADR services. This rule replaces current subpart U - (*Conciliation Service*), with a new subpart U - (*Alternative Dispute Resolution*), that contains a new Commission ADR policy and provisions for various means of ADR. The rule also revises certain other regulations to conform to the Commission's new ADR policy.

**DATES:** (EFFECTIVE: INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER).

### FOR FURTHER INFORMATION CONTACT:

Bryant L. VanBrakle, Secretary  
Federal Maritime Commission  
800 North Capitol Street, NW, Room 1046  
Washington, D.C. 20573-0001  
202-523-5725  
E-mail: [secretary@fmc.gov](mailto:secretary@fmc.gov)

## **SUPPLEMENTARY INFORMATION:**

The Administrative Dispute Resolution Act (“ADRA”) was first promulgated in 1990 (Public Law No. 101-552), and subsequently amended in 1996 (Public Law No. 104-320). It defines ADR to mean any procedure that is used to resolve issues in controversy, including, but not limited to, conciliation, facilitation, mediation, fact-finding, minitrials, arbitration, and use of ombuds, or any combination thereof, 5 U.S.C. 571 (3).

The Federal Maritime Commission intends to expand the ADR services available from the Commission. Accordingly, the Commission published a notice of proposed rulemaking on May 21, 2001, 66 FR 27921, to amend part 502 of the Commission’s rules.

The Commission received comments in response to the proposed rule from the National Customs Brokers and Forwarders Association of America, Inc. (“NCBFAA”) and Charles L. Measter, a member of the Society of Maritime Arbitrators Inc. (“SMA”).

NCBFAA states that it supports the policy behind the proposal, as well as most of the proposed provisions. However, NCBFAA makes three suggestions. First, NCBFAA takes issue with proposed § 502.406(a)(1) and suggests it be deleted. Second, NCBFAA does not believe the proposed rule provides for the use of discovery in arbitration proceedings, and believes the availability of discovery in such proceedings should be provided for in the rule. Third, NCBFAA believes it important that the rule provide for the taking of sworn testimony in arbitration proceedings.

NCBFAA appears to read proposed § 502.406(a)(1) as barring the use of ADR procedures whenever a component of the Commission is a party, and urges that the exemption of the Commission and its components as parties in §502.406(a)( 1) be deleted. However, that provision bars the Commission or one of its components from participating

as a party only in arbitration proceedings. The Commission concurs with NCBFAA that mediation can be an effective way to resolve disputes, even when a component of the Commission is a party. The proposed rule would allow for the use of mediation or other means of assisted negotiation in such situations. Under the ADRA, however, before the Commission or one of its components, as a party, could agree to arbitrate a matter, the Commission must develop and issue guidance on the appropriate use of binding arbitration, including when an officer or employee of the Commission has authority to settle an issue in controversy through binding arbitration. Such guidance must be issued prior to the use of binding arbitration and after consultation with the Attorney General. See 5 U.S.C. § 575 (c). The Commission has not sought to obtain approval of such provisions by the Department of Justice. Moreover, the Commission would not be in a position to review an arbitrator's decision, as it is with respect to the initial decision of an Administrative Law Judge in a Commission proceeding. The Commission is not ready at this time to issue a rule providing for Commission components to participate in arbitration. Rather, the Commission encourages its components to engage in mediation or any other of the various forms of assisted negotiation.

The Commission sees no reason why discovery could not be held or sworn testimony be taken within an arbitration proceeding. Proposed § 502.407 would provide authority to the arbitrator to regulate the course of arbitral hearings and administer oaths and affirmations. The intent behind an arbitration proceeding is to resolve an issue in controversy in a more expeditious and less costly manner than would litigation generally. Extensive discovery therefore is discouraged in an arbitration proceeding, even though some discovery may be necessary. Prior to an arbitration, the parties may agree to a discovery

process, including limitations therein. To the extent the discovery process is not controlled by an agreement to arbitrate, the Commission anticipates that the arbitrator may make rulings with respect to discovery under his authority to regulate the course of the hearing. Also, the arbitrator would be empowered to require testimony under oath.

Mr. Measter states that he is a member of SMA, the members of which he states have expertise in arbitration and mediation. He states that he believes the proposed rule is workable and within the generally accepted practice in the ADR field. He does not believe that members of the Commission's staff should serve as neutrals. He posits that SMA could provide neutrals and even administer the program, even though he also thinks that Commission staff members could administer the process.

Under the ADRA, 5 U.S.C. 573, and proposed § 502.404(a), a neutral may be a Federal Government officer or employee or any other individual acceptable to the parties, as long as the neutral is without official, financial, or personal conflict of interest or any such conflict of interest has been fully disclosed in writing and is acceptable to all parties. Moreover, the proposed rule provides for appointment of neutrals acceptable to the parties. The parties may select a neutral that is not a Commission employee or official. In such event, under § 502.404(d) the fees and expenses would be borne by the parties as they agree. Accordingly, the proposed rule would not prevent parties from using ADR services of organizations like SMA. Indeed, the Commission encourages parties to seek ADR services to resolve disputes prior to bringing them to the Commission. When such a dispute is before the Commission or its staff, however, the Commission would make personnel available for ADR services should the parties so desire.

The rule contains no additional information collection or record keeping requirements and need not be submitted to OMB for approval under the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.*

In accordance with the Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.*, the Chairman of the Federal Maritime Commission has certified to the Chief Counsel for Advocacy, Small Business Administration, that the rule will not have a significant impact on a substantial number of small entities. In its Notice of Proposed Rulemaking, the Commission stated its intention to certify this rulemaking since the rule creates new service options that are voluntary to all ocean shipping entities, including small businesses. The rule benefits small entities by expediting the complaint process, reducing costs, and increasing the Commission's assistance. As no comments refuted this determination, the certification remains unchanged. This regulatory action is not a "major rule" under 5 U.S.C. 804(2).

#### **List of Subjects in 46 CFR Part 502**

Administrative practice and procedure, Claims, Equal access to justice, Investigations, Lawyers, Maritime carriers, Penalties, Reporting and recordkeeping requirements. Therefore, for the reasons set forth above, 46 CFR 502 is amended as set forth below:

#### **PART 502-RULES OF PRACTICE AND PROCEDURE**

1. The authority section is revised to read:

**Authority:** 5 U.S.C. 504, 551, 552, 553, 556(c), 559, 561-569, 571-596; 5 U.S.C. 571-584; 12 U.S.C. 1141j(a); 18 U.S.C. 207; 26 U.S.C. 501(c)(3); 28 U.S.C. 2112(a); 31 U.S.C. 9701; 46 U.S.C. app. 817d, 817e, 1114(b), 1705, 1707-1711, 1713-1716; E.O. 11222 of May 8, 1965, 30 FR 6469, 3 CFR, 1964-1965 Comp. P. 306; 21 U.S.C. 853a; Pub. L. 105-258, 112 Stat. 1902.

2. Section 502.61 is amended by revising paragraph (d) to read as follows:

**\$502.61 Proceedings.**

\* \* \* \* \*

(d) All orders instituting a proceeding or noticing the filing of a complaint will contain language requiring that at an early stage of the proceeding and when practicable the parties shall consider the use of alternative dispute resolution in such manner as the presiding officer shall direct and further requiring that hearings shall include oral testimony and cross-examination in the discretion of the presiding officer only upon proper showing that there are genuine issues of material fact that cannot be resolved on the basis of sworn statements, affidavits, depositions, or other documents, or that the nature of the matter in issue is such that an oral hearing and cross-examination are necessary for the development of an adequate record. [Rule 61.]

3. Section 502.62 is amended by redesignating paragraphs (e) through (h) as paragraphs (f) through (i) and adding a new paragraph (e) to read as follows:

**\$502.62 Complaints and fee.**

\* \* \* \* \*

(e) Complainant(s) must state whether informal dispute resolution procedures were used prior to filing the complaint and whether complainant(s) consulted with the Commission Dispute Resolution Specialist about utilizing alternative dispute resolution (ADR) under the Commission's ADR program.

\* \* \* \* \*

4. Section 502.91 is amended by revising current paragraph (d) and adding new paragraphs (e) and (f) to read as follows:

**\$502.91 Opportunity for informal settlement.**

\* \* \* \* \*

(d) As soon as practicable after the commencement of any proceeding, the presiding judge shall direct the parties or their representatives to consider the use of alternative dispute resolution, including but not limited to mediation, and may direct the parties or their representatives to consult with the Federal Maritime Commission Alternative Dispute Resolution Specialist about the feasibility of alternative dispute resolution.

(e) Any party may request that a mediator or other neutral be appointed to assist the parties in reaching a settlement. If such a request or suggestion is made and is not opposed, the presiding judge will appoint a mediator or other neutral who is acceptable to all parties, coordinating with the Federal Maritime Commission Alternative Dispute Resolution Specialist. The mediator or other neutral shall convene and conduct one or more mediation or other sessions with the parties and shall inform the presiding judge, within the time prescribed by the presiding judge, whether the dispute resolution proceeding resulted in a resolution or not, and may make recommendations as to future proceedings. If settlement is reached, it shall be submitted to the presiding judge who shall issue an appropriate decision or ruling. All such dispute resolution proceedings shall be subject to the provisions of subpart U.

(f) Any party may request that a settlement judge be appointed to assist the parties in reaching a settlement. If such a request or suggestion is made and is not opposed, the presiding judge will advise the Chief Administrative Law Judge who may appoint a settlement judge who is acceptable to all parties. The settlement judge shall convene and preside over conferences and settlement negotiations and shall report to the presiding judge

within the time prescribed by the Chief Administrative Law Judge, on the results of settlement discussions with appropriate recommendations as to future proceedings. If settlement is reached, it shall be submitted to the presiding judge who shall issue an appropriate decision or ruling. [Rule 91].

5. Section 502.94 is amended by revising paragraph (c) to read as follows:

**\$502.94 Prehearing conference.**

\* \* \* \* \*

(c) At any prehearing conference, consideration shall be given to whether the use of alternative dispute resolution would be appropriate or useful for the disposition of the proceeding whether or not there has been previous consideration of such use.

6. Section 502.301 is amended by revising paragraph (b) to read as follows:

**\$502.301 Statement of policy.**

\* \* \* \* \*

(b) With the consent of both parties, claims filed under this subpart in the amount of \$50,000 or less will be decided by a Settlement Officer appointed by the Federal Maritime Commission Alternative Dispute Resolution Specialist, without the necessity of formal proceedings under the rules of this part. Authority to issue decisions under this subpart is delegated to the appointed Settlement Officer.

\* \* \* \* \*

7. Subpart U is revised in its entirety to read as follows:

**Subpart U – Alternative Dispute Resolution**

**Sec.**  
502.401 Policy.  
502.402 Definitions.

- 502.403 General authority.
- 502.404 Neutrals.
- 502.405 Confidentiality.
- 502.406 Arbitration.
- 502.407 Authority of the arbitrator.
- 502.408 Conduct of arbitration proceedings.
- 502.409 Arbitration awards.
- 502.410 Representation of parties.
- 502.411 Mediation and other alternative means of dispute resolution.

**\$502.401 Police.**

It is the policy of the Federal Maritime Commission to use alternative means of dispute resolution to the fullest extent compatible with the law and the agency's mission and resources. The Commission will consider using ADR in all areas including workplace issues, formal and informal adjudication, issuance of regulations, enforcement and compliance, issuing and revoking licenses and permits, contract award and administration, litigation brought by or against the Commission, and other interactions with the public and the regulated community. The Commission will provide learning and development opportunities for its employees to develop their ability to use conflict resolution skills, instill knowledge of the theory and practice of ADR, and to facilitate appropriate use of ADR. To this end, all parties to matters under this part are required to consider use of a wide range of alternative means to resolve disputes at an early stage. Parties are encouraged to pursue use of alternative means through the Commission's Bureau of Consumer Complaints and Licensing in lieu of or prior to initiating a Commission proceeding. All employees and persons who interact with the Commission are encouraged to identify opportunities for collaborative, consensual approaches to dispute resolution or rulemaking.

**\$502.402 Definitions.**

(a) Alternative means of dispute resolution means any procedure that is used to resolve issues in controversy, including, but not limited to, conciliation, facilitation, mediation, factfinding, minitrials, arbitration, and use of ombuds, or any combination thereof;

(b) Award means any decision by an arbitrator resolving the issues in controversy;

(c) Dispute resolution communication means any oral or written communication prepared for the purposes of a dispute resolution proceeding, including any memoranda, notes or work product of the neutral, parties or nonparty participant; except that a written agreement to enter into a dispute resolution proceeding, or final written agreement or arbitral award reached as a result of a dispute resolution proceeding, is not a dispute resolution communication;

(d) Dispute resolution proceeding means any process in which an alternative means of dispute resolution is used to resolve an issue in controversy in which a neutral is appointed and specified parties participate;

(e) In confidence means, with respect to information, that the information is provided –

(1) With the expressed intent of the source that it not be disclosed; or

(2) Under circumstances that would create the reasonable expectation on behalf of the source that the information will not be disclosed;

(f) Issue in controversy means an issue which is material to a decision concerning a program of the Commission, and with which there is disagreement –

(1) Between the Commission and persons who would be substantially affected by the decision; or

(2) Between persons who would be substantially affected by the decision;

(g) Neutral means an individual who, with respect to an issue in controversy, functions specifically to aid the parties in resolving the controversy; and

(h) Person has the same meaning as in 5 U.S.C. 551(2).

**§502.403 General authority.**

(a) The Commission intends to consider using a dispute resolution proceeding for the resolution of an issue in controversy, if the parties agree to a dispute resolution proceeding.

(b) The Commission will consider not using a dispute resolution proceeding if –

(1) A definitive or authoritative resolution of the matter is required for precedential value, and such a proceeding is not likely to be accepted generally as an authoritative precedent;

(2) The matter involves or may bear upon significant questions of Government policy that require additional procedures before a final resolution may be made, and such a proceeding would not likely serve to develop a recommended policy for the agency;

(3) Maintaining established policies is of special importance, so that variations among individual decisions are not increased and such a proceeding would not likely reach consistent results among individual decisions;

(4) The matter significantly affects persons or organizations who are not parties to the proceeding;

(5) A full public record of the proceeding is important, and a dispute resolution proceeding cannot provide such a record; and

(6) The Commission must maintain continuing jurisdiction over the matter with authority to alter the disposition of the matter in the light of changed circumstances, and a dispute resolution proceeding would interfere with the Commission's fulfilling that requirement.

(c) Alternative means of dispute resolution authorized under this subpart are voluntary procedures which supplement rather than limit other available agency dispute resolution techniques.

**§502.404 Neutrals.**

(a) A neutral may be a permanent or temporary officer or employee of the Federal Government or any other individual who is acceptable to the parties to a dispute resolution proceeding. A neutral shall have no official, financial, or personal conflict of interest with respect to the issues in controversy, unless such interest is fully disclosed in writing to all parties and all parties agree that the neutral may serve.

(b) A neutral who serves as a conciliator, facilitator, or mediator serves at the will of the parties.

(c) With consent of the parties, the Federal Maritime Commission Dispute Resolution Specialist will seek to provide a neutral in dispute resolution proceedings through Commission staff, arrangements with other agencies, or on a contractual basis.

(d) Fees. Should the parties choose a neutral other than an official or employee of the Commission, fees and expenses shall be borne by the parties as the parties shall agree.

**§502.405 Confidentiality.**

(a) Except as provided in subsections (d) and (e), a neutral in a dispute resolution proceeding shall not voluntarily disclose or through discovery or compulsory process be required to disclose any dispute resolution communication or any communication provided in confidence to the neutral, unless –

(1) All parties to the dispute resolution proceeding and the neutral consent in writing, and, if the dispute resolution communication was provided by a nonparty participant, that participant also consents in writing;

(2) The dispute resolution communication has already been made public;

(3) The dispute resolution communication is required by statute to be made public, but a neutral should make such communication public only if no other person is reasonably available to disclose the communication; or

(4) A court determines that such testimony or disclosure is necessary to –

(i) Prevent a manifest injustice;

(ii) Help establish a violation of law; or

(iii) Prevent harm to the public health or safety, of sufficient magnitude in the particular case to outweigh the integrity of dispute resolution proceedings in general by reducing the confidence of parties in future cases that their communications will remain confidential.

(b) A party to a dispute resolution proceeding shall not voluntarily disclose or through discovery or compulsory process be required to disclose any dispute resolution communication, unless –

(1) The communication was prepared by the party seeking disclosure;

(2) All parties to the dispute resolution proceeding consent in writing;

(3) The dispute resolution communication has already been made public;

(4) The dispute resolution communication is required by statute to be made public;

(5) A court determines that such testimony or disclosure is necessary to –

(i) Prevent a manifest injustice;

(ii) Help establish a violation of law; or

(iii) Prevent harm to the public health and safety, of sufficient magnitude in the particular case to outweigh the integrity of dispute resolution proceedings in general by reducing the confidence of parties in future cases that their communications will remain confidential;

(6) The dispute resolution communication is relevant to determining the existence or meaning of an agreement or award that resulted from the dispute resolution proceeding or to the enforcement of such an agreement or award; or

(7) Except for dispute resolution communications generated by the neutral, the dispute resolution communication was provided to or was available to all parties to the dispute resolution proceeding.

(c) Any dispute resolution communication that is disclosed in violation of paragraphs (a) or (b) of this section shall not be admissible in any proceeding relating to the issues in controversy with respect to which the communication was made.

(d) (1) The parties may agree between or amongst themselves to alternative confidential procedures for disclosures by a neutral, and shall inform the neutral before commencement of the dispute resolution proceeding of any modifications to the provisions of paragraph (a) of this section that will govern the confidentiality of the dispute resolution proceeding, in accordance with the guidance on confidentiality in federal proceedings published by the Interagency ADR Working Group and adopted by the ADR Council (<http://www.financenet.gov/financenet/fed/iadrwg/confid.pdf>). If the parties do not so inform the neutral, paragraph (a) of this section shall apply.

(2) To qualify for the exemption under paragraph (j) of this section, an alternative confidential procedure under this subsection may not provide for less disclosure than the confidential procedures otherwise provided under this section.

(e) If a demand for disclosure, by way of discovery request or other legal process, is made upon a neutral regarding a dispute resolution communication, the neutral shall make reasonable efforts to notify the parties and any affected nonparty participants of the demand. Any party or affected nonparty participant who receives such notice and within 15 calendar days does not offer to defend a refusal of the neutral to disclose the requested information shall have waived any objection to such disclosure.

(f) Nothing in this section shall prevent the discovery or admissibility of any evidence that is otherwise discoverable, merely because the evidence was presented in the course of a dispute resolution proceeding.

(g) Paragraphs (a) and (b) of this section shall have no effect on the information and data that are necessary to document an agreement reached or order issued pursuant to a dispute resolution proceeding.

(h) Paragraphs (a) and (b) of this section shall not prevent the gathering of information for research or educational purposes, in cooperation with other agencies, governmental entities, or dispute resolution programs, so long as the parties and the specific issues in controversy are not identifiable.

(i) Paragraphs (a) and (b) of this section shall not prevent use of a dispute resolution communication to resolve a dispute between the neutral in a dispute resolution proceeding and a party to or participant in such proceeding, so long as such dispute resolution communication is disclosed only to the extent necessary to resolve such dispute.

(j) A dispute resolution communication which is between a neutral and a party and which may not be disclosed under this section shall also be exempt from disclosure under 5 U.S.C. 552(b)(3).

**§502.406 Arbitration.**

(a) (1) Arbitration may be used as an alternative means of dispute resolution whenever all parties consent, except that arbitration may not be used when the Commission or one of

its components is a party. Consent may be obtained either before or after an issue in controversy has arisen. A party may agree to --

(i) Submit only certain issues in controversy to arbitration; or

(ii) Arbitration on the condition that the award must be within a range of possible outcomes.

(2) The arbitration agreement that sets forth the subject matter submitted to the arbitrator shall be in writing. Each such arbitration agreement shall specify a maximum award that may be issued by the arbitrator and may specify other conditions limiting the range of possible outcomes.

(b) With the concurrence of the Federal Maritime Commission Dispute Resolution Specialist, binding arbitration may be used to resolve any and all disputes that could be the subject of a Commission administrative proceeding before an Administrative Law Judge. The Federal Maritime Commission Dispute Resolution Specialist may withhold such concurrence after considering the factors specified in § 502.403, should the Commission's General Counsel object to use of binding arbitration.

(c)(1) The Federal Maritime Commission Dispute Resolution Specialist will appoint an arbitrator of the parties' choosing for an arbitration proceeding.

(2) A Commission officer or employee selected as an arbitrator by the parties and appointed by the Federal Maritime Commission Dispute Resolution Specialist shall have authority to settle an issue in controversy through binding arbitration pursuant to the arbitration agreement; provided, however, that decisions by arbitrators shall not have

precedential value with respect to decisions by Administrative Law Judges or the Commission. Administrative Law Judges may be appointed as arbitrators with the concurrence of the Chief Administrative Law Judge.

(d) The arbitrator shall be a neutral who meets the criteria of 5 U.S.C. 573.

**3502.407 Authority of the arbitrator.**

An arbitrator to whom a dispute is referred may –

(a) Regulate the course of and conduct arbitral hearings;

(b) Administer oaths and affirmations;

(c) Compel the attendance of witnesses and production of evidence at the hearing under the provisions of 9 U.S.C. 7 only to the extent the Commission is otherwise authorized by law to do so; and

(d) Make awards.

**§502.408 Conduct of arbitration proceedings.**

(a) The arbitrator shall set a time and place for the hearing on the dispute and shall notify the parties not less than five days before the hearing.

(b) Any party wishing a record of the hearing shall –

(1) Be responsible for the preparation of such record;

(2) Notify the other parties and the arbitrator of the preparation of such record;

(3) Furnish copies to all identified parties and the arbitrator; and

(4) Pay all costs for such record, unless the parties agree otherwise or the arbitrator determines that the costs should be apportioned.

(c) (1) The parties to the arbitration are entitled to be heard, to present evidence material to the controversy, and to cross-examine witnesses appearing at the hearing.

(2) The arbitrator may, with the consent of the parties, conduct all or part of the hearing by telephone, television, computer, or other electronic means, if each party has an opportunity to participate.

(3) The hearing shall be conducted expeditiously and in an informal manner.

(4) The arbitrator may receive any oral or documentary evidence, except that irrelevant, immaterial, unduly repetitious, or privileged evidence may be excluded by the arbitrator.

(5) The arbitrator shall interpret and apply relevant statutory and regulatory requirements, legal precedents, and policy directives.

(d) The provisions of § 502.11 regarding ex parte communications apply to all arbitration proceedings. No interested person shall make or knowingly cause to be made to the arbitrator an unauthorized ex parte communication relevant to the merits of the proceeding, unless the parties agree otherwise. If a communication is made in violation of this subsection, the arbitrator shall ensure that a memorandum of the communication is prepared and made a part of the record, and that an opportunity for rebuttal is allowed. Upon receipt of a communication made in violation of this subsection, the arbitrator may, to the extent consistent with the interests of justice and the policies underlying this subchapter,

require the offending party to show cause why the claim of such party should not be resolved against such party as a result of the improper conduct.

(e) The arbitrator shall make an award within 30 days after the close of the hearing, or the date of the filing of any briefs authorized by the arbitrator, whichever date is later, unless the parties agree to some other time limit.

**8502.409 Arbitration awards.**

(a) (1) The award in an arbitration proceeding under this subchapter shall include a brief, informal discussion of the factual and legal basis for the award, but formal findings of fact or conclusions of law shall not be required.

(2) Exceptions to or an appeal of an arbitrator's decision may not be filed with the Commission.

(b) An award entered in an arbitration proceeding may not serve as an estoppel in any other proceeding for any issue that was resolved in the proceeding. Such an award also may not be used as precedent or otherwise be considered in any factually unrelated proceeding.

**§502.410 Representation of parties.**

(a) The provisions of § 502.21 apply to the representation of parties in dispute resolution proceedings, as do the provisions of § 502.27 regarding the representation of parties by nonattorneys.

(b) A neutral in a dispute resolution proceeding may require participants to demonstrate authority to enter into a binding agreement reached by means of a dispute resolution proceeding.

**§502.411 Mediation and other alternative means of dispute resolution.**

(a) Parties are encouraged to utilize mediation or other forms of alternative dispute resolution in all formal proceedings. The Commission also encourages those with disputes to pursue mediation in lieu of, or prior to, the initiation of a Commission proceeding.

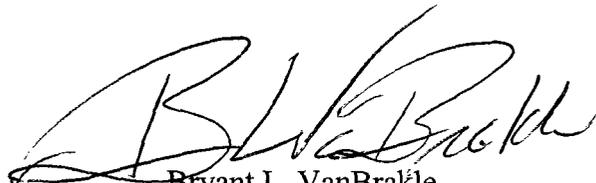
(b) Any party may request, at any time, that a mediator or other neutral be appointed to assist the parties in reaching a settlement. If such a request is made in a proceeding assigned to an Administrative Law Judge, the provisions of § 502.91 apply. For all other matters, alternative dispute resolution services may be requested directly from the Federal Maritime Commission Alternative Dispute Resolution Specialist, who may serve as the neutral if the parties agree or who will arrange for the appointment of a neutral acceptable to all parties.

(c) The neutral shall convene and conduct mediation or other appropriate dispute resolution proceedings with the parties.

(d) ~~Ex parte Communications~~ Ex parte Communications subject to arbitration, the provisions of § 502.11 do not apply to dispute resolution proceedings, and mediators are expressly authorized to conduct private sessions with parties.

\*\*\*\*\*

By the Commission.

  
Bryant L. VanBrakle  
Secretary

responsibilities among the various levels of government, as specified in Executive Order 13132 (64 FR 43255, August 10, 1999), because it merely approves a state rule implementing a Federal standard, and does not alter the relationship or the distribution of power and responsibilities established in the Clean Air Act. This rule also is not subject to Executive Order 13045 (62 FR 19885, April 23, 1997), because it is not economically significant. In reviewing 111(d)/129 plan submissions, EPA's role is to approve state choices, provided that they meet the criteria of the Clean Air Act. In this context, in the absence of a prior existing requirement for the State to use voluntary consensus standards (VCS), EPA has no authority to disapprove a submission for failure to use VCS. It would thus be inconsistent with applicable law for EPA, when it reviews a 111(d)/129 submission, to use VCS in place of a 111(d)/129 plan submission that otherwise satisfies the provisions of the Clean Air Act. Thus, the requirements of section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) do not apply. As required by section 3 of Executive Order 12988 (61 FR 4729, February 7, 1996), in issuing this rule, EPA has taken the necessary steps to eliminate drafting errors and ambiguity, minimize potential litigation, and provide a clear legal standard for affected conduct. EPA has complied with Executive Order 12630 (53 FR 8859, March 15, 1988) by examining the takings implications of the rule in accordance with the "Attorney General's Supplemental Guidelines for the Evaluation of Risk and Avoidance of Unanticipated Takings" issued under the executive order. This rule does not impose an information collection burden under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 et seq.).

#### *B. Submission to Congress and the Comptroller General*

The Congressional Review Act, 5 U.S.C. 801 et seq., as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. This rule is not a

"major rule" as defined by 5 U.S.C. 804(2).

#### *C. Petitions for Judicial Review*

Under section 307(b)(1) of the Clean Air Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by October 19, 2001. Filing a petition for reconsideration by the Administrator of this final rule converting EPA's conditional approval of the Commonwealth of Pennsylvania's MWC 111(d)/129 plan does not affect the finality of this rule for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. (See section 307(b)(2).)

#### **List of Subjects in 40 CFR Part 62**

Environmental protection, Air pollution control, Carbon monoxide, Hydrocarbons, Nitrogen dioxide, Ozone, Particulate matter, Reporting and recordkeeping requirements, Sulfur oxides.

Dated: August 10, 2001.

**Judith Katz,**

*Acting Regional Administrator, Region III*

40 CFR part 62 is amended as follows:

#### **PART 62—[AMENDED]**

1. The authority citation for part 62 continues to read as follows:

**Authority:** 42 U.S.C. 7401–7671q.

#### **Subpart NN—Pennsylvania**

2. Section 62.9640 is revised to read as follows:

##### **§ 62.9640 Identification of plan.**

The 111(d)/129 plan for municipal waste combustors (MWC) units with a capacity greater than 250 tons per day (TPD) and the associated Pennsylvania Department of Environmental Protection operating permits that were submitted to EPA on April 27, 1998, and as amended on September 8, 1998, and July 7, 2000, including supplemental information dated August 15, 2000. All affected facilities must achieve full compliance with all 111(d)/129 plan requirements on or before December 19, 2000.

3. Section 62.9642 is revised to read as follows:

##### **§ 62.9642 Effective dates.**

(a) The effective date of the submitted 1998 111(d)/129 plan is October 22, 1999.

(b) The effective date of the submitted 2000 111(d)/129 plan revision is October 4, 2001.

[FR Doc. 01–20892 Filed 8–17–01, 8:45 am]

BILLING CODE 6560–50–P

## **FEDERAL MARITIME COMMISSION**

### **46 CFR Part 502**

[Docket No. 01–05]

#### **Alternative Dispute Resolution**

**AGENCY:** Federal Maritime Commission

**ACTION:** Final rule.

**SUMMARY:** The Federal Maritime Commission is issuing new regulations implementing the Administrative Dispute Resolution Act. The new regulations expand the Commission's Alternative Dispute Resolution ("ADR") services, addressing guidelines and procedures for arbitration and providing for mediation and other ADR services. This rule replaces current subpart U—Conciliation Service, with a new subpart U—Alternative Dispute Resolution, that contains a new Commission ADR policy and provisions for various means of ADR. The rule also revises certain other regulations to conform to the Commission's new ADR policy.

**DATES:** Effective: August 20, 2001.

**FOR FURTHER INFORMATION CONTACT:** Bryant L. VanBrakle, Secretary, Federal Maritime Commission, 800 North Capitol Street, NW, Room 1046, Washington, DC 20573–0001, 202–523–5725. E-mail: [secretary@fmc.gov](mailto:secretary@fmc.gov).

**SUPPLEMENTARY INFORMATION:** The Administrative Dispute Resolution Act ("ADRA") was first promulgated in 1990 (Pub. L. 101–552), and subsequently amended in 1996 (Pub. L. 104–320). It defines ADR to mean any procedure that is used to resolve issues in controversy, including, but not limited to, conciliation, facilitation, mediation, fact-finding, minitrials, arbitration, and use of ombuds, or any combination thereof, 5 U.S.C. 571(3).

The Federal Maritime Commission intends to expand the ADR services available from the Commission. Accordingly, the Commission published a notice of proposed rulemaking on May 21, 2001, 66 FR 27921, to amend part 502 of the Commission's rules.

The Commission received comments in response to the proposed rule from the National Customs Brokers and Forwarders Association of America, Inc. ("NCBFAA") and Charles L. Measter, a member of the Society of Maritime Arbitrators Inc. ("SMA").

NCBFAA states that it supports the policy behind the proposal, as well as most of the proposed provisions. However, NCBFAA makes three suggestions. First, NCBFAA takes issue with proposed § 502.406(a)(1) and suggests it be deleted. Second, NCBFAA does not believe the proposed rule provides for the use of discovery in arbitration proceedings, and believes the availability of discovery in such proceedings should be provided for in the rule. Third, NCBFAA believes it important that the rule provide for the taking of sworn testimony in arbitration proceedings.

NCBFAA appears to read proposed § 502.406(a)(1) as barring the use of ADR procedures whenever a component of the Commission is a party, and urges that the exemption of the Commission and its components as parties in § 502.406(a)(1) be deleted. However, that provision bars the Commission or one of its components from participating as a party only in arbitration proceedings. The Commission concurs with NCBFAA that mediation can be an effective way to resolve disputes, even when a component of the Commission is a party. The proposed rule would allow for the use of mediation or other means of assisted negotiation in such situations. Under the ADRA, however, before the Commission or one of its components, as a party, could agree to arbitrate a matter, the Commission must develop and issue guidance on the appropriate use of binding arbitration, including when an officer or employee of the Commission has authority to settle an issue in controversy through binding arbitration. Such guidance must be issued prior to the use of binding arbitration and after consultation with the Attorney General. See 5 U.S.C. 575(c). The Commission has not sought to obtain approval of such provisions by the Department of Justice. Moreover, the Commission would not be in a position to review an arbitrator's decision, as it is with respect to the initial decision of an Administrative Law Judge in a Commission proceeding. The Commission is not ready at this time to issue a rule providing for Commission components to participate in arbitration. Rather, the Commission encourages its components to engage in mediation or any other of the various forms of assisted negotiation.

The Commission sees no reason why discovery could not be held or sworn testimony be taken within an arbitration proceeding. Proposed § 502.407 would provide authority to the arbitrator to regulate the course of arbitral hearings and administer oaths and affirmations.

The intent behind an arbitration proceeding is to resolve an issue in controversy in a more expeditious and less costly manner than would litigation generally. Extensive discovery therefore is discouraged in an arbitration proceeding, even though some discovery may be necessary. Prior to an arbitration, the parties may agree to a discovery process, including limitations therein. To the extent the discovery process is not controlled by an agreement to arbitrate, the Commission anticipates that the arbitrator may make rulings with respect to discovery under his authority to regulate the course of the hearing. Also, the arbitrator would be empowered to require testimony under oath.

Mr. Measter states that he is a member of SMA, the members of which he states have expertise in arbitration and mediation. He states that he believes the proposed rule is workable and within the generally accepted practice in the ADR field. He does not believe that members of the Commission's staff should serve as neutrals. He posits that SMA could provide neutrals and even administer the program, even though he also thinks that Commission staff members could administer the process.

Under the ADRA, 5 U.S.C. 573, and proposed § 502.404(a), a neutral may be a Federal Government officer or employee or any other individual acceptable to the parties, as long as the neutral is without official, financial, or personal conflict of interest or any such conflict of interest has been fully disclosed in writing and is acceptable to all parties. Moreover, the proposed rule provides for appointment of neutrals acceptable to the parties. The parties may select a neutral that is not a Commission employee or official. In such event, under § 502.404(d) the fees and expenses would be borne by the parties as they agree. Accordingly, the proposed rule would not prevent parties from using ADR services of organizations like SMA. Indeed, the Commission encourages parties to seek ADR services to resolve disputes prior to bringing them to the Commission. When such a dispute is before the Commission or its staff, however, the Commission would make personnel available for ADR services should the parties so desire.

The rule contains no additional information collection or record keeping requirements and need not be submitted to OMB for approval under the Paperwork Reduction Act, 44 U.S.C. 3501 et seq.

In accordance with the Regulatory Flexibility Act, 5 U.S.C. 601 et seq., the Chairman of the Federal Maritime

Commission has certified to the Chief Counsel for Advocacy, Small Business Administration, that the rule will not have a significant impact on a substantial number of small entities. In its Notice of Proposed Rulemaking, the Commission stated its intention to certify this rulemaking since the rule creates new service options that are voluntary to all ocean shipping entities, including small businesses. The rule benefits small entities by expediting the complaint process, reducing costs, and increasing the Commission's assistance. As no comments refuted this determination, the certification remains unchanged. This regulatory action is not a "major rule" under 5 U.S.C. 804(2).

#### List of Subjects in 46 CFR Part 502

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

Therefore, for the reasons set forth above, 46 CFR part 502 is amended as set forth below:

#### PART 502-RULES OF PRACTICE AND PROCEDURE

1. The authority citation is revised to read:

Authority: 5 U.S.C. 504, 551, 552, 553, 556(c), 559, 561-569, 571-596; 5 U.S.C. 571-584; 12 U.S.C. 1141(a); 18 U.S.C. 207; 26 U.S.C. 501(c)(3); 28 U.S.C. 2112(a); 31 U.S.C. 9701, 46 U.S.C. app. 817d, 817e, 1114(b), 1705, 1707-1711, 1713-1716, E.O. 11222 of May 8, 1965, 30 FR 6469, 3 CFR, 1964-1965 Comp. P. 306; 21 U.S.C. 853a; Pub. L. 105-258, 112 Stat. 1902.

2. Section 502.61 is amended by revising paragraph (d) to read as follows:

#### § 502.61 Proceedings.

\* \* \* \* \*

(d) All orders instituting a proceeding or noticing the filing of a complaint will contain language requiring that at an early stage of the proceeding and when practicable the parties shall consider the use of alternative dispute resolution in such manner as the presiding officer shall direct and further requiring that hearings shall include oral testimony and cross-examination in the discretion of the presiding officer only upon proper showing that there are genuine issues of material fact that cannot be resolved on the basis of sworn statements, affidavits, depositions, or other documents, or that the nature of the matter in issue is such that an oral hearing and cross-examination are necessary for the development of an adequate record. [Rule 61.]

3. Section 502.62 is amended by redesignating paragraphs (e) through (h) as paragraphs (f) through (i) and adding a new paragraph (e) to read as follows:

**§ 502.62 Complaints and fee.**

\* \* \* \* \*

(e) Complainant(s) must state whether informal dispute resolution procedures were used prior to filing the complaint and whether complainant(s) consulted with the Commission Dispute Resolution Specialist about utilizing alternative dispute resolution (ADR) under the Commission's ADR program.

\* \* \* \* \*

4. Section 502.91 is amended by revising current paragraph (d) and adding new paragraphs (e) and (f) to read as follows:

**§ 502.91 Opportunity for informal settlement.**

\* \* \* \* \*

(d) As soon as practicable after the commencement of any proceeding, the presiding judge shall direct the parties or their representatives to consider the use of alternative dispute resolution, including but not limited to mediation, and may direct the parties or their representatives to consult with the Federal Maritime Commission Alternative Dispute Resolution Specialist about the feasibility of alternative dispute resolution.

(e) Any party may request that a mediator or other neutral be appointed to assist the parties in reaching a settlement. If such a request or suggestion is made and is not opposed, the presiding judge will appoint a mediator or other neutral who is acceptable to all parties, coordinating with the Federal Maritime Commission Alternative Dispute Resolution Specialist. The mediator or other neutral shall convene and conduct one or more mediation or other sessions with the parties and shall inform the presiding judge, within the time prescribed by the presiding judge, whether the dispute resolution proceeding resulted in a resolution or not, and may make recommendations as to future proceedings. If settlement is reached, it shall be submitted to the presiding judge who shall issue an appropriate decision or ruling. All such dispute resolution proceedings shall be subject to the provisions of subpart U.

(f) Any party may request that a settlement judge be appointed to assist the parties in reaching a settlement. If such a request or suggestion is made and is not opposed, the presiding judge will advise the Chief Administrative Law Judge who may appoint a settlement judge who is acceptable to all

parties. The settlement judge shall convene and preside over conferences and settlement negotiations and shall report to the presiding judge within the time prescribed by the Chief Administrative Law Judge, on the results of settlement discussions with appropriate recommendations as to future proceedings. If settlement is reached, it shall be submitted to the presiding judge who shall issue an appropriate decision or ruling. [Rule 91].

5. Section 502.94 is amended by revising paragraph (c) to read as follows:

**§ 502.94 Prehearing conference.**

\* \* \* \* \*

(c) At any prehearing conference, consideration shall be given to whether the use of alternative dispute resolution would be appropriate or useful for the disposition of the proceeding whether or not there has been previous consideration of such use.

6. Section 502.301 is amended by revising paragraph (b) to read as follows:

**§ 502.301 Statement of policy.**

\* \* \* \* \*

(b) With the consent of both parties, claims filed under this subpart in the amount of \$50,000 or less will be decided by a Settlement Officer appointed by the Federal Maritime Commission Alternative Dispute Resolution Specialist, without the necessity of formal proceedings under the rules of this part. Authority to issue decisions under this subpart is delegated to the appointed Settlement Officer.

\* \* \* \* \*

7. Subpart U is revised in its entirety to read as follows:

**Subpart U-Alternative Dispute Resolution Sec.**

502.401 Policy.  
502.402 Definitions.  
502.403 General authority.  
502.404 Neutrals.  
502.405 Confidentiality.  
502.406 Arbitration.  
502.407 Authority of the arbitrator.  
502.408 Conduct of arbitration proceedings.  
502.409 Arbitration awards.  
502.410 Representation of parties.  
502.411 Mediation and other alternative means of dispute resolution.

**Subpart U-Alternative Dispute Resolution**

**§ 502.401 Policy.**

It is the policy of the Federal Maritime Commission to use alternative means of dispute resolution to the fullest extent compatible with the law and the agency's mission and resources.

The Commission will consider using ADR in all areas including workplace issues, formal and informal adjudication, issuance of regulations, enforcement and compliance, issuing and revoking licenses and permits, contract award and administration, litigation brought by or against the Commission, and other interactions with the public and the regulated community. The Commission will provide learning and development opportunities for its employees to develop their ability to use conflict resolution skills, instill knowledge of the theory and practice of ADR, and to facilitate appropriate use of ADR. To this end, all parties to matters under this part are required to consider use of a wide range of alternative means to resolve disputes at an early stage. Parties are encouraged to pursue use of alternative means through the Commission's Bureau of Consumer Complaints and Licensing in lieu of or prior to initiating a Commission proceeding. All employees and persons who interact with the Commission are encouraged to identify opportunities for collaborative, consensual approaches to dispute resolution or rulemaking.

**§ 502.402 Definitions.**

(a) *Alternative means of dispute resolution* means any procedure that is used to resolve issues in controversy, including, but not limited to, conciliation, facilitation, mediation, factfinding, minitrials, arbitration, and use of ombuds, or any combination thereof;

(b) *Award* means any decision by an arbitrator resolving the issues in controversy;

(c) *Dispute resolution communication* means any oral or written communication prepared for the purposes of a dispute resolution proceeding, including any memoranda, notes or work product of the neutral, parties or nonparty participant; except that a written agreement to enter into a dispute resolution proceeding, or final written agreement or arbitral award reached as a result of a dispute resolution proceeding, is not a dispute resolution communication;

(d) *Dispute resolution proceeding* means any process in which an alternative means of dispute resolution is used to resolve an issue in controversy in which a neutral is appointed and specified parties participate;

(e) *In confidence* means, with respect to information, that the information is provided-

(1) With the expressed intent of the source that it not be disclosed; or

(2) Under circumstances that would create the reasonable expectation on behalf of the source that the information will not be disclosed;

(f) *Issue in controversy* means an issue which is material to a decision concerning a program of the Commission, and with which there is disagreement—

(1) Between the Commission and persons who would be substantially affected by the decision; or

(2) Between persons who would be substantially affected by the decision;

(g) *Neutral* means an individual who, with respect to an issue in controversy, functions specifically to aid the parties in resolving the controversy; and

(h) *Person* has the same meaning as in 5 U.S.C. 551(2).

#### § 502.403 General authority.

(a) The Commission intends to consider using a dispute resolution proceeding for the resolution of an issue in controversy, if the parties agree to a dispute resolution proceeding.

(b) The Commission will consider not using a dispute resolution proceeding if—

(1) A definitive or authoritative resolution of the matter is required for precedential value, and such a proceeding is not likely to be accepted generally as an authoritative precedent;

(2) The matter involves or may bear upon significant questions of Government policy that require additional procedures before a final resolution may be made, and such a proceeding would not likely serve to develop a recommended policy for the agency;

(3) Maintaining established policies is of special importance, so that variations among individual decisions are not increased and such a proceeding would not likely reach consistent results among individual decisions;

(4) The matter significantly affects persons or organizations who are not parties to the proceeding;

(5) A full public record of the proceeding is important, and a dispute resolution proceeding cannot provide such a record; and

(6) The Commission must maintain continuing jurisdiction over the matter with authority to alter the disposition of the matter in the light of changed circumstances, and a dispute resolution proceeding would interfere with the Commission's fulfilling that requirement.

(c) Alternative means of dispute resolution authorized under this subpart are voluntary procedures which supplement rather than limit other available agency dispute resolution techniques.

#### § 502.404 Neutrals.

(a) A neutral may be a permanent or temporary officer or employee of the Federal Government or any other individual who is acceptable to the parties to a dispute resolution proceeding. A neutral shall have no official, financial, or personal conflict of interest with respect to the issues in controversy, unless such interest is fully disclosed in writing to all parties and all parties agree that the neutral may serve.

(b) A neutral who serves as a conciliator, facilitator, or mediator serves at the will of the parties.

(c) With consent of the parties, the Federal Maritime Commission Dispute Resolution Specialist will seek to provide a neutral in dispute resolution proceedings through Commission staff, arrangements with other agencies, or on a contractual basis.

(d) Fees. Should the parties choose a neutral other than an official or employee of the Commission, fees and expenses shall be borne by the parties as the parties shall agree.

#### § 502.405 Confidentiality.

(a) Except as provided in paragraphs (d) and (e) of this section, a neutral in a dispute resolution proceeding shall not voluntarily disclose or through discovery or compulsory process be required to disclose any dispute resolution communication or any communication provided in confidence to the neutral, unless—

(1) All parties to the dispute resolution proceeding and the neutral consent in writing, and, if the dispute resolution communication was provided by a nonparty participant, that participant also consents in writing;

(2) The dispute resolution communication has already been made public;

(3) The dispute resolution communication is required by statute to be made public, but a neutral should make such communication public only if no other person is reasonably available to disclose the communication; or

(4) A court determines that such testimony or disclosure is necessary to—

(i) Prevent a manifest injustice;

(ii) Help establish a violation of law;

or

(iii) Prevent harm to the public health or safety, of sufficient magnitude in the particular case to outweigh the integrity of dispute resolution proceedings in general by reducing the confidence of parties in future cases that their communications will remain confidential.

(b) A party to a dispute resolution proceeding shall not voluntarily disclose or through discovery or compulsory process be required to disclose any dispute resolution communication, unless—

(1) The communication was prepared by the party seeking disclosure;

(2) All parties to the dispute resolution proceeding consent in writing;

(3) The dispute resolution communication has already been made public;

(4) The dispute resolution communication is required by statute to be made public;

(5) A court determines that such testimony or disclosure is necessary to—

(i) Prevent a manifest injustice;

(ii) Help establish a violation of law;

or

(iii) Prevent harm to the public health and safety, of sufficient magnitude in the particular case to outweigh the integrity of dispute resolution proceedings in general by reducing the confidence of parties in future cases that their communications will remain confidential;

(6) The dispute resolution communication is relevant to determining the existence or meaning of an agreement or award that resulted from the dispute resolution proceeding or to the enforcement of such an agreement or award; or

(7) Except for dispute resolution communications generated by the neutral, the dispute resolution communication was provided to or was available to all parties to the dispute resolution proceeding.

(c) Any dispute resolution communication that is disclosed in violation of paragraph (a) or (b) of this section shall not be admissible in any proceeding relating to the issues in controversy with respect to which the communication was made.

(d) (1) The parties may agree between or amongst themselves to alternative confidential procedures for disclosures by a neutral, and shall inform the neutral before commencement of the dispute resolution proceeding of any modifications to the provisions of paragraph (a) of this section that will govern the confidentiality of the dispute resolution proceeding, in accordance with the guidance on confidentiality in federal proceedings published by the Interagency ADR Working Group and adopted by the ADR Council (<http://www.financenet.gov/financenet/fed/iadrwg/confid.pdf>). If the parties do not so inform the neutral, paragraph (a) of this section shall apply.

(2) To qualify for the exemption under paragraph (j) of this section, an alternative confidential procedure under this subsection may not provide for less disclosure than the confidential procedures otherwise provided under this section.

(e) If a demand for disclosure, by way of discovery request or other legal process, is made upon a neutral regarding a dispute resolution communication, the neutral shall make reasonable efforts to notify the parties and any affected nonparty participants of the demand. Any party or affected nonparty participant who receives such notice and within 15 calendar days does not offer to defend a refusal of the neutral to disclose the requested information shall have waived any objection to such disclosure.

(f) Nothing in this section shall prevent the discovery or admissibility of any evidence that is otherwise discoverable, merely because the evidence was presented in the course of a dispute resolution proceeding.

(g) Paragraphs (a) and (b) of this section shall have no effect on the information and data that are necessary to document an agreement reached or order issued pursuant to a dispute resolution proceeding.

(h) Paragraphs (a) and (b) of this section shall not prevent the gathering of information for research or educational purposes, in cooperation with other agencies, governmental entities, or dispute resolution programs, so long as the parties and the specific issues in controversy are not identifiable.

(i) Paragraphs (a) and (b) of this section shall not prevent use of a dispute resolution communication to resolve a dispute between the neutral in a dispute resolution proceeding and a party to or participant in such proceeding, so long as such dispute resolution communication is disclosed only to the extent necessary to resolve such dispute.

(j) A dispute resolution communication which is between a neutral and a party and which may not be disclosed under this section shall also be exempt from disclosure under 5 U.S.C. 552(b)(3).

#### § 502.406 Arbitration.

(a)(1) Arbitration may be used as an alternative means of dispute resolution whenever all parties consent, except that arbitration may not be used when the Commission or one of its components is a party. Consent may be obtained either before or after an issue in controversy has arisen. A party may agree to-

(i) Submit only certain issues in controversy to arbitration; or

(ii) Arbitration on the condition that the award must be within a range of possible outcomes.

(2) The arbitration agreement that sets forth the subject matter submitted to the arbitrator shall be in writing. Each such arbitration agreement shall specify a maximum award that may be issued by the arbitrator and may specify other conditions limiting the range of possible outcomes.

(b) With the concurrence of the Federal Maritime Commission Dispute Resolution Specialist, binding arbitration may be used to resolve any and all disputes that could be the subject of a Commission administrative proceeding before an Administrative Law Judge. The Federal Maritime Commission Dispute Resolution Specialist may withhold such concurrence after considering the factors specified in § 502.403, should the Commission's General Counsel object to use of binding arbitration.

(c)(1) The Federal Maritime Commission Dispute Resolution Specialist will appoint an arbitrator of the parties' choosing for an arbitration proceeding.

(2) A Commission officer or employee selected as an arbitrator by the parties and appointed by the Federal Maritime Commission Dispute Resolution Specialist shall have authority to settle an issue in controversy through binding arbitration pursuant to the arbitration agreement; provided, however, that decisions by arbitrators shall not have precedential value with respect to decisions by Administrative Law Judges or the Commission. Administrative Law Judges may be appointed as arbitrators with the concurrence of the Chief Administrative Law Judge.

(d) The arbitrator shall be a neutral who meets the criteria of 5 U.S.C. 573.

#### § 502.407 Authority of the arbitrator.

An arbitrator to whom a dispute is referred may-

(a) Regulate the course of and conduct arbitral hearings;

(b) Administer oaths and affirmations;

(c) Compel the attendance of witnesses and production of evidence at the hearing under the provisions of 9 U.S.C. 7 only to the extent the Commission is otherwise authorized by law to do so; and

(d) Make awards.

#### § 502.406 Conduct of arbitration proceedings.

(a) The arbitrator shall set a time and place for the hearing on the dispute and shall notify the parties not less than five days before the hearing.

(b) Any party wishing a record of the hearing shall-

(1) Be responsible for the preparation of such record;

(2) Notify the other parties and the arbitrator of the preparation of such record;

(3) Furnish copies to all identified parties and the arbitrator; and

(4) Pay all costs for such record, unless the parties agree otherwise or the arbitrator determines that the costs should be apportioned.

(c)(1) The parties to the arbitration are entitled to be heard, to present evidence material to the controversy, and to cross-examine witnesses appearing at the hearing.

(2) The arbitrator may, with the consent of the parties, conduct all or part of the hearing by telephone, television, computer, or other electronic means, if each party has an opportunity to participate.

(3) The hearing shall be conducted expeditiously and in an informal manner.

(4) The arbitrator may receive any oral or documentary evidence, except that irrelevant, immaterial, unduly repetitious, or privileged evidence may be excluded by the arbitrator.

(5) The arbitrator shall interpret and apply relevant statutory and regulatory requirements, legal precedents, and policy directives.

(d) The provisions of § 502.11 regarding *ex parte* communications apply to all arbitration proceedings. No interested person shall make or knowingly cause to be made to the arbitrator an unauthorized *ex parte* communication relevant to the merits of the proceeding, unless the parties agree otherwise. If a communication is made in violation of this subsection, the arbitrator shall ensure that a memorandum of the communication is prepared and made a part of the record, and that an opportunity for rebuttal is allowed. Upon receipt of a communication made in violation of this subsection, the arbitrator may, to the extent consistent with the interests of justice and the policies underlying this subchapter, require the offending party to show cause why the claim of such party should not be resolved against such party as a result of the improper conduct.

(e) The arbitrator shall make an award within 30 days after the close of the hearing, or the date of the filing of any briefs authorized by the arbitrator, whichever date is later, unless the parties agree to some other time limit.

**§ 502.409 Arbitration awards.**

(a)(l) The award in an arbitration proceeding under this subchapter shall include a brief, informal discussion of the factual and legal basis for the award, but formal findings of fact or conclusions of law shall not be required.

(2) Exceptions to or an appeal of an arbitrator's decision may not be filed with the Commission.

(b) An award entered in an arbitration proceeding may not serve as an estoppel in any other proceeding for any issue that was resolved in the proceeding. Such an award also may not be used as precedent or otherwise be considered in any factually unrelated proceeding.

**§ 502.410 Representation of parties.**

(a) The provisions of § 502.21 apply to the representation of parties in dispute resolution proceedings, as do the provisions of § 502.27 regarding the representation of parties by nonattorneys.

(b) A neutral in a dispute resolution proceeding may require participants to demonstrate authority to enter into a binding agreement reached by means of a dispute resolution proceeding.

**§ 502.411 Mediation and other alternative means of dispute resolution.**

(a) Parties are encouraged to utilize mediation or other forms of alternative dispute resolution in all formal proceedings. The Commission also encourages those with disputes to pursue mediation in lieu of, or prior to, the initiation of a Commission proceeding.

(b) Any party may request, at any time, that a mediator or other neutral be appointed to assist the parties in reaching a settlement. If such a request is made in a proceeding assigned to an Administrative Law Judge, the provisions of § 502.91 apply. For all other matters, alternative dispute resolution services may be requested directly from the Federal Maritime Commission Alternative Dispute Resolution Specialist, who may serve as the neutral if the parties agree or who will arrange for the appointment of a neutral acceptable to all parties.

(c) The neutral shall convene and conduct mediation or other appropriate dispute resolution proceedings with the parties.

(d) *Ex parte Communications.* Except with respect to arbitration, the provisions of § 502.11 do not apply to dispute resolution proceedings, and mediators are expressly authorized to conduct private sessions with parties.

By the Commission.

Bryant L. VanBrakle,  
Secretary.

[FR Doc. 01-20755 Filed 8-17-01, 8:45 am]

BILLING CODE 6730-m-P

---

**FEDERAL COMMUNICATIONS  
COMMISSION**
**47 CFR Part 51**

[CC Docket No. 96-147; FCC 01-204]

**Deployment of Wireline Services  
Offering Advanced  
Telecommunications Capability**

AGENCY: Federal Communications  
Commission.

ACTION: Final rule.

**SUMMARY:** This document reevaluates certain provisions of the Commission's collocation rules on remand from the United States Court of Appeals for the District of Columbia Circuit. Specifically, the Commission amends its rules regarding which equipment is "necessary for interconnection or access to unbundled network elements" within the meaning of section 251(c)(6) of the Communications Act of 1934, as amended, (Communications Act or Act) and thus may be collocated without an incumbent local exchange carrier's (incumbent LEC's) approval. The Commission also amends its rules regarding cross-connects between collocators at an incumbent LEC's premises. The Commission further amends its rules addressing how an incumbent LEC may assign and configure physical collocation space.

DATES: Effective September 19, 2001.

**FOR FURTHER INFORMATION CONTACT:** William Kehoe, Special Counsel, or Kimberly Cook, Attorney Advisor, Policy and Program Planning Division, Common Carrier Bureau, (202) 418-1580.

**SUPPLEMENTARY INFORMATION:** This is a summary of the Commission's *Fourth Report and Order* in CC Docket No. 98-147, released August 8, 2001. The complete text of this Order is available for inspection and copying during regular business hours in the FCC Reference Information Center, Courtyard Level, 445 12th Street, SW., Washington, DC and also may be purchased from the Commission's copy contractor, International Transcription Services (ITS, Inc.), CY-B400, 445 12th Street, SW., Washington, DC. It is also available on the Commission's website at <http://www.fcc.gov>.

**Synopsis of Fourth Report and Order**

1. The Commission concludes that equipment is "necessary for interconnection or access to unbundled network elements" within the meaning of section 251(c)(6) of the Communications Act of 1934, as amended (Communications Act or Act), and thus may be collocated without an incumbent local exchange carrier's (incumbent LEC's) approval if, an inability to deploy that equipment would, as a practical, economic, or operational matter, preclude the requesting carrier from obtaining interconnection or access to unbundled network elements as contemplated in sections 251(c)(2) and 251(c)(3) of the Act. The Commission also concludes that section 251(c)(6) allows a requesting carrier to collocate any equipment necessary for obtaining equal interconnection or nondiscriminatory access to unbundled network elements as contemplated in sections 251(c)(2) and 251(c)(3). Applying the statutory standard set forth in section 251(c)(2), the Commission concludes that section 251(c)(6) allows the interconnecting carrier to collocate any equipment necessary for interconnecting with the incumbent LEC at a level equal in quality to that which the incumbent obtains within its own network or the incumbent provides to any affiliate, subsidiary, or other party. Similarly, applying the statutory standard set forth in section 251(c)(3), the Commission further concludes that section 251(c)(6) allows a requesting carrier to collocate any equipment necessary for obtaining "nondiscriminatory access" to an unbundled network element, including any of its features, functions, or capabilities.

2. The Commission finds that multifunction equipment meets the "necessary" standard only if the primary purpose and function of the equipment, as the requesting carrier seeks to deploy it, are to provide the requesting carrier with "equal in quality" interconnection or "nondiscriminatory access" to one or more unbundled network elements. The Commission also finds that, for purposes of determining whether a piece of equipment is to be used primarily to obtain "equal in quality" interconnection or "nondiscriminatory access" to one or more unbundled network elements, there must be a logical nexus between the additional functions the equipment would perform and the telecommunication services the requesting carrier seeks to provide to its customers by means of the interconnection or unbundled network