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April 30, 2012

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VIA COURIER

Ms. Karen V. Gregory
Secretary
Federal Maritime Commission
800 North Capitol Street, N.W.
Room 1046
Washington, D.C. 20573

Re: FMC Docket No. 11-05, Comments of Cozen O'Connor

Dear Ms. Gregory:

Enclosed herewith are an original and five (5) copies of the comments of Cozen O'Connor in the above-referenced docket. A copy of these comments is also being filed electronically.

A copy of this letter and its enclosure has been provided for your acknowledgement of receipt.

Sincerely,

COZEN O'CONNOR


By: Wayne Rohde

Enclosures

**BEFORE THE
FEDERAL MARITIME COMMISSION**

**AMENDMENTS TO COMMISSION'S RULES OF PRACTICE AND
PROCEDURE -- SUBPARTS E AND L**

FMC Docket No. 11-05

COMMENTS OF COZEN O'CONNOR

Pursuant to the Federal Maritime Commission's ("FMC" or "Commission") February 23, 2012 Notice of Proposed Rulemaking, Cozen O'Connor hereby submits its comments on the proposed revisions to the Commission's rules of practice and procedure.

Statement of Interest

The attorneys of Cozen O'Connor ("Cozen") regularly represent clients in proceedings before the Commission, and are familiar with the Commission's rules of practice and procedure, as well as with the Federal Rules of Civil Procedure ("FRCP").

Summary of Position

Cozen generally supports the proposed revisions, which it believes update the existing regulations in a helpful manner that would bring the Commission's rules into closer alignment with the FRCP. However, as explained below, Cozen recommends some revisions to the proposed changes that it believes would benefit both the Commission and the public.

Comments

1. Proposed Rule 66 -- Proposed Rule 66 governs amendments or supplements to pleadings, and reflects existing Rule 70 almost verbatim. Cozen recommends that proposed Rule 66 be revised to be consistent with FRCP 15(a)(1)(A), such that it would allow parties to amend a pleading as a matter of right (without approval of the Commission or presiding officer) for up to 21 days after service of the original pleading. A response to the amended pleading would be required to be filed within the time left to respond to the original pleading or 14 days after the date of service of the amended pleading, whichever is later. FRCP 15(a)(3).

The FRCP permit one amendment as a matter of course within the limited timeframe set forth in Rule 15(a) because such amendments are efficient and do not prejudice the other party. Cozen sees no reason the Commission's rule should not adopt the same procedure.

2. Proposed Rule 72 -- This rule governs dismissals, and Rule 72(a) would for the first time permit a complainant to voluntarily dismiss a complaint filed with the Commission. Cozen supports this change, which is consistent with the FRCP. However, Cozen suggests that the Commission add a provision to the new rule along the lines of FRCP 41(d), so that a complainant which dismisses a complaint voluntarily, but later files a complaint based on or including the same claim against the same respondent, would be liable for the respondent's cost in responding to the first complaint. Such a rule is necessary to protect respondents from abuse of the complaint process.

Cozen also recommends that the Commission revise proposed Rule 72 to include a provision along the lines of FRCP 41(c). In this regard, proposed Rule 62(b)(4) for the first time expressly permits counterclaims, cross claims and third-party complaints. Accordingly, the application of Rule 72 to those types of pleadings should be clarified as provided in FRCP 41(c).

In addition, Cozen suggests that the Commission confirm that proposed Rule 72 will modify the Commission's current practice with respect to settlements. Presently, if the parties to a proceeding before the Commission settle their dispute, approval of the settlement by the Presiding Officer and/or Commission is necessary before the complaint which initiated the proceeding can be dismissed. If proposed Rule 72 is adopted, then such approval would no longer be required and the complainant could simply dismiss the complaint voluntarily. As the latter procedure is more efficient and consistent with the FRCP, Cozen urges the Commission to confirm that this is the intent of proposed Rule 72.

3. Proposed Rules 201(b) and 201(h) -- Rule 201(b) would, consistent with the FRCP, require the parties to a proceeding to make initial disclosures without first receiving a discovery request. Rule 201(h) establishes the time by which the parties must hold a discovery conference. While Cozen supports the requirement that initial disclosures be made and that a discovery conference be held, it is concerned about two aspects of the timing of these requirements.

First, with respect to the sequence of the disclosures and conference, under the FRCP, the parties have a Rule 26(f) conference as soon as practicable

and in any event at least 21 days before a scheduling conference is held or a scheduling order is due under FRCP 16(b). Disclosures are to be made at or within 14 days of that conference. See FRCP 26(a). In other words, disclosures are typically made at or after the conference. The Commission's proposed rule 201(b) would require disclosures to be made prior to the conference required under proposed Rule 201(h). Cozen believes the sequence established by the FRCP is more logical and efficient.

Second, the time period for disclosures under the Commission's proposed rule would be considerably shorter than those permitted under the FRCP and, in Cozen's view, are not workable.

As noted above, FRCP 26(a) requires initial disclosures to be made at or within 14 days after the parties' Rules 26(f) conference, which is to take place at least 21 days before a scheduling conference is held or a scheduling order is due under FRCP 16(b). Since FRCP 16(b)(2) calls for a scheduling order to be issued by the earlier of 120 days after any defendant has been served with the complaint or 90 days after any defendant has appeared, the deadline for the parties to confer is 69 days after any defendant has appeared or 99 days after any defendant has been served. Initial disclosures are to be made within 14 days after such conference, i.e., within 83 or 103 days after appearance or service, as the case may be.

In contrast, the Commission's proposed rule would require disclosures within 32 days of service (25 days in which to answer plus 7 days). Moreover, whereas FRCP 26(a)(1)(C) permits the parties to stipulate to a longer period of

time for disclosures to be made, the Commission's proposed rule contains no such flexibility.

Based on Cozen's experience, it is unduly optimistic to expect parties to be able to comply with the proposed deadline for initial disclosures, particularly in cases where one or both parties have offices in numerous countries that may need to be searched for documents and information.

In light of the foregoing, Cozen recommends that the Commission revise proposed Rules 201(b) and 201(h) in three respects:

(a) Revise Rule 201(h) to require the discovery conference to occur within 21 days after the answer is filed;

(b) Revise Rule 201(b) to require initial disclosures to be made by the earlier of 90 days after the respondent's appearance or 75 days after the filing of the answer; and

(c) Revise Rule 201(b) to permit the parties to stipulate to a longer period for disclosures, as permitted by the FRCP.

4. Proposed Rule 201(g) -- This proposed rule would carry forward the current requirement that discovery be completed within 120 days of the service of the complaint. See, 46 C.F.R. §502.201(c). Cozen suggests this provision be revised to extend the deadline for the completion of discovery.

Experience with the existing 120-day requirement shows that discovery is rarely, if ever, completed within that timeframe. While it is of course desirable to keep litigation proceeding expeditiously, Cozen believes that

perpetuating what has proven to be an unrealistic deadline is unlikely to serve this purpose any better in the future than it has to date.

We believe the Commission would be better served by recognizing that discovery often takes more than 120 days to complete, and that this is unlikely to change, even with a new disclosure requirement. We recommend that a more realistic deadline of 180 days be adopted.

5. Proposed Rule 201(k) -- This proposed rule deals with the supplementation of discovery responses. Cozen recommends that this proposed rule be revised to make it clear that the obligation to supplement responses applies to expert witness information disclosed under Rule 201(d).

6. Proposed Rule 202 -- This proposed rule, which governs the taking of depositions, omits current Rule 202(e), which permits the parties to stipulate to the taking of depositions before any person, at any time and place, upon any notice, and in any manner. Cozen believes current Rule 202(e), which affords litigants additional flexibility, should be retained in the revised rules.

7. Proposed Rule 203 -- Cozen suggests two revisions to this proposed rule, which governs depositions on oral examination. First, Cozen recommends that the maximum number of depositions permitted without leave of the presiding officer be reduced from 20 to 10, to maintain consistency with the FRCP.¹ In Cozen's experience, most proceedings before the Commission do not require a large number of depositions. In those proceedings that do, the presiding officer can grant leave to take additional depositions. Cozen believes

¹ The same change should also be made in proposed Rule 204(a)(2).

that having fewer depositions permitted as a matter of right will assist the presiding officers in managing proceedings efficiently, and will also help keep the costs of discovery down by forcing litigants to consider carefully the number of depositions that need to be taken.

Cozen also recommends that this rule be revised to incorporate the sanctions applicable under FRCP 30(g) when a party fails to attend a deposition or to secure the attendance of a third-party witness. This is a fair and reasonable obligation to impose on a party to litigation before the Commission. Such a sanction would help ensure cooperation in the timely completion of the discovery process, keep costs to a minimum, and protect against abuse of the Commission's adjudicatory functions.

8. Proposed Rule 205 -- This rule deals with written interrogatories. We suggest the proposed rule be revised to reduce the maximum number of interrogatories permitted without leave of the presiding officer from 50 to 35. The FRCP permit only 25 interrogatories without leave of court. While proceedings before the Commission are often conducted based on written submissions, and this in Cozen's view warrants greater flexibility in the use of written interrogatories than would be the case in federal court, 50 is too high a number. Cozen believes 35 is a reasonable compromise between flexibility in conducting the proceeding and the efficient conduct of discovery. In that small number of cases in which a greater number of interrogatories is required, leave can be sought and obtained from the presiding officer.

Conclusion

Cozen generally supports the proposed revisions to the Commission's rules of practice and procedure. It believes the changes suggested above will benefit both the Commission and the public by improving even further the efficiency with which proceedings before the Commission are administered.

Respectfully submitted,

By:



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Dated: April 30, 2012