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FEDERAL MARITIME COMMISSION

Docket No. 11-05

FMC 502 ANPR

Rules of Practice and Procedure

**COMMENTS TO ADVANCE NOTICE OF PROPOSED RULEMAKING TO AMEND  
PART 502 OF TITLE 46 OF THE CODE OF FEDERAL REGULATIONS TO UPDATE  
AND IMPROVE THE FMC'S RULES OF PRACTICE AND PROCEDURE**

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## **INTRODUCTION**

The following comments are submitted on behalf of the law firm of Rodriguez O'Donnell Gonzalez & Williams, P.C. ("ROGW" or "Firm"). ROGW frequently appears before the Federal Maritime Commission ("FMC" or "Commission") in formal and informal adjudicatory proceedings, rulemaking and petition proceedings, and other FMC regulatory matters. Our attorneys are admitted to practice before the FMC, state and federal courts.

### **ROGW SUPPORTS THE FMC'S FURTHER EFFORTS TO IMPROVE AND UPDATE ITS RULES OF PRACTICE AND PROCEDURES**

ROGW appreciates the Commission's amendments to Part 502 of Title 46 of the Code of Federal Regulations, which updated and improved the FMC's Rules of Practice and Procedure ("FMC Rules"), 46 CFR Part 502. ROGW notes that the rules in 46 CFR 502.1-502.991 were designed to secure just, speedy, and inexpensive resolution of proceedings before the Commission. However, we also acknowledge that more can be done to address existing rules that could be updated to reflect current practices and technologies, and may improve more efficient and user-friendly procedures. To this end, we appreciate the opportunity to provide comments to the FMC's Advance Notice of Proposed Rulemaking. The following are ROGW's comments and recommendations:

#### **I. Modernization and Efficiency Enhancement**

ROGW welcomes the FMC's willingness to amend and update rules in Part 502 that may improve their effectiveness and enhance administrative efficiency. ROGW also welcomed the recent revision to Subpart A that requests all filings to be submitted in electronic PDF format, as well as paper. This amendment was long overdue and certainly will conserve use of material and

human resource, e.g., FMC staff and the parties appearing and practicing before the FMC in Commission proceedings.

**a. PACER-like Electronic Filing System**

ROGW recommends that the FMC adopt a federal filing system similar to PACER. The PACER electronic filing system or Public Access to Court Electronic Records (PACER) is an electronic public access service that allows users to obtain case and docket information from federal appellate, district and bankruptcy courts, and the PACER Case Locator via the Internet. PACER is provided by the federal Judiciary in keeping with its commitment to providing public access to court information via a centralized service. If Commission funds allow, adoption of a filing system similar to PACER for federal courts, would allow the FMC ALJs, FMC staff and attorneys, the Secretary's office, Commissioners and Chairman, and all private attorney and non-attorney practitioners to obtain FMC formal and informal proceedings and docket information via the Internet.

Adoption of a PACER like filing system would provide the Commission an opportunity to develop a system that could reduce paper and staff time. ROGW frequently utilizes the federal court's PACER system (in most cases—it is mandatory), and also similar filing systems for state courts. For example, WebCivil provides online access to information about cases in Local Civil Court in New York State. One may search for cases by Index Number or the name of the Plaintiff or Defendant, look up cases by Attorney Firm name, and view Calendars for each court. The following are helpful web-sites regarding PACER <http://www.pacer.gov>. For the New York State's Unified Court System: <http://apps.courts.state.ny.us/webcivil/ocp/ECMain>.

**b. The FMC Should Adopt Summary Judgment in Proceedings**

Although the FMC's Rules of Practice and Procedure provides that proceedings under Part 502, which are not covered by a specific Commission rule, the Federal Rules of Civil Procedure will be followed to the extent that they are consistent with sound administrative practice. See § 502.12, Applicability of Federal Rules of Civil Procedure. The FMC's Rule 12, however, is not always all that clear and encompassing and litigants before the FMC must sometimes argue via motions which Federal Rules the presiding Administrative Law Judge must apply to a given FMC proceeding. The FMC's outright adoption of Rule 56 of the Federal Rules of Civil Procedure, and subsections thereto, will allow for expeditious litigation before the FMC by allowing the ALJ to decide, after examining the pleadings, and the evidence before it, what, if any, material facts exists without controversy and what material facts are in good faith in controversy. See FRCP Rule 56 and following notes thereto.

**c. The FMC Should Adopt Rules for Voluntary and Involuntary Dismissal of Complaints in Line with the Federal Rules of Civil Procedure.**

The FMC should adopt and incorporate Rule 41 of the FRCP. Currently, the FMC's Rules do not provide litigants the opportunity after reaching a settlement to simply provide notice that the complainant and respondent desire to end the controversy and provide notice to the presiding ALJ that the complaint be dismissed without or without prejudice. Under the FRCP 41 (a), the plaintiff files a notice of dismissal, terminating the action. The notice must be submitted to the court and served on the defendant before the defendant files an answer or summary judgment motion. In the event an answer or motion for summary was filed, a voluntary dismissal requires a stipulation signed by all defendants and then submitted to the court.

FRCP Rule 41(a) (2) allows a plaintiff to request that the court order dismissal of an action. FRCP 41 (b) also provides for involuntary dismissal if a plaintiff continuously fails to comply with a court order or the Federal Rules of Civil Procedure. In addition, the defendant can request that the lawsuit be dismissed when a plaintiff does not follow through on his lawsuit, and is responsible for numerous delays. Because dismissal is due to plaintiff's failures, the dismissal is with prejudice, the case is considered adjudicated and dismissed with prejudice. Finally, FRCP Rule 41 also governs dismissal of cross claims and counterclaims.

ROGW has encountered situations, whether representing a respondent or complainant, where a settlement is reached but cannot simply file a notice of dismissal and end the controversy. Under Commission precedent, the ALJ is bound to compel the parties to file a motion to approve settlement. This precedent only results in unnecessary expense and waste of time to both the FMC and the parties. In federal court, once a settlement is reached and the court is notified, the presiding judge thanks the parties and either dismisses the case with or without prejudice and may or may not retain jurisdiction to allow the parties to comply with the settlement terms. This is usually requested by the parties. The court is more than pleased to clear its calendar for other matters but does not require or desire to see any more paper.

The FMC should adopt the same approach by federal judges, adopt Rule 41 of the FRCP, and allow the parties to end its dispute without further legal fees and expenses.

**d. Applicability of the FRCP to proceedings before the Commission consistent with its responsibilities under the Administrative Procedure Act, 5 U.S.C. 551-559**

Whenever possible, the Commission should apply the FRCP to proceedings before the Commission. Currently the FMC's Rules provide that the FRCP will apply in situations that are not covered by a specific Commission rule to the extent the federal rules are consistent with sound administrative practice, 46 CFR 502.12. Notwithstanding FMC Rule 502.10, which allows the presiding

officer to exercise discretion and waive any rule “to prevent undue hardship, manifest injustice, or if the expeditious conduct of business so requires,” sometimes this is not the case. For example, if the parties reach a settlement agreement, the ALJ is bound by FMC precedent and compels the parties to submit a motion to approve settlement. If the Commission expressly adopts FRCP Rule 41, the parties can reach a settlement and file a notice of dismissal without the expense of filing a motion to approve settlement.

#### **B. ROGW Supports the FMC’s Modernization of Discovery Rules**

ROGW supports the FMC’s adoption of all the FRCP’s discovery rules and amendments thereto. This includes the requirement to provide initial disclosures, including identification of expert witnesses (FRCP 26(a)); procedures for claiming privilege or protecting trial-preparation materials (FRCP 26(b) (5)); a limitation of number (FRCP 30(a)(2)) and conduct of depositions (FRCP 30(d)); and a limitation on the number of interrogatories (FRCP 33(a)(1)). The FMC should adopt thirty-day period to respond to interrogatories and requests for production of documents that exists in the FRCP, but is not included in the Commission’s rules.

ROGW has experienced situations in litigations before the FMC where parties and their counsel do not voluntarily disclose information and documents, which results in the filing of motions to compel production of documents and information. The FMC’s adoption of the similar provisions of FRCP Rule 26 will compel parties to produce documents and information without the necessity of filing unnecessary motions to compel. The FMC could adopt similar provisions of the FRCP’s Rule 26 given due regard to the differences in the nature of the proceedings and the practice before the federal courts and the FMC.

## **CONCLUSION**

ROGW commends the FMC for its willingness to amend its Rules of Practice and Procedure to update and clarify its rules, and to reduce the burden on parties to proceedings before the Commission. ROGW looks forward to providing further comments in the future when the FMC issues specific proposed rules in a Notice of Proposed Rulemaking.