

October 6, 2011

FEDERAL MARITIME COMMISSION

46 CFR Parts 530 and 531

DOCKET NO. 11-17

[RIN 3072-AC47]

**CERTAINTY OF TERMS OF SERVICE CONTRACTS
AND NVOCC SERVICE ARRANGEMENTS**

AGENCY: Federal Maritime Commission.

ACTION: Notice of Proposed Rulemaking.

SUMMARY: The Federal Maritime Commission proposes to amend its rules regarding certainty of terms of service contracts and non-vessel-operating common carrier service arrangements. The proposed rule is intended to provide common carriers and their customers with certainty and flexibility if they decide to use long-term contracts that adjust based on a freight rate index that reflects changes in market conditions.

DATES: Comments or suggestions due on or before November 28, 2011.

ADDRESSES: Address all comments concerning this proposed rule to:

Karen V. Gregory, Secretary
Federal Maritime Commission
800 North Capitol Street, N.W.
Washington, D.C. 20573-0001
Phone: (202) 523-5725

SUPPLEMENTARY INFORMATION:

Submit Comments: Submit an original and five (5) copies in paper form, and if possible, send a PDF of the document by e-mail to secretary@fmc.gov. Include in the subject line: Docket No. 11-17, Comments on Certainty of Terms of Service Contracts and NSAs.

Background

The Federal Maritime Commission (FMC or Commission) has found that an increasing number of service contracts filed with the Commission reference freight rate indices. These indices include, for

example, the China Containerized Freight Index (CCFI), the Shanghai Containerized Freight Index (SCFI), the Drewry Freight Insight Index, and the Transpacific Stabilization Agreement (TSA) Index. The ocean freight rates in these negotiated service contracts adjust in increments based upon the changes in the referenced index levels or their annual or quarterly averages. It appears that some carriers and shippers in the ocean transportation industry are seeking stability through long-term contracts, while trying to preserve flexibility to adjust contract rates reflecting changes in market conditions.

Questions have arisen, however, whether references to these indices in service contracts are consistent with the Commission's current regulations. The Commission's regulations with respect to terms of service contracts and Non-Vessel-Operating Common Carrier (NVOCC) service arrangements (NSAs) state that the terms, if they are not explicitly contained in the contracts, must be "contained in a publication widely available to the public and well known within the industry." 46 CFR 530.8(c)(2), 531.6(c)(2).

The Commission has received inquiries from the industry as to whether certain freight rate indices meet the Commission's standard, particularly its "widely available to the public" requirement. For example, until August 2011, the TSA index was not available to the public, even though some service contracts referenced TSA index before its publication. In addition, CCFI, SCFI, and Drewry indices make their current index levels available to the public without charge, but access to their historical data requires payment of subscription fees that can reach several thousand dollars per year.

As the Commission began to consider whether these service contracts referencing freight indices comport with its regulation, it decided to do a more fundamental assessment of whether the regulation in its current form is more restrictive than is necessary to protect the shipping public and carry out the purposes of the Shipping Act.

When adopting the rules for “[c]ertainty of terms” of service contracts, the Commission recognized that through the Ocean Shipping Reform Act of 1998, Congress intended, by lifting the requirements that tariffs be filed with the Commission, to allow parties to service contracts more freedom and flexibility in their commercial arrangements. *See* 63 FR 71062, 71066 (Dec. 23, 1998). More recently, the President has directed federal agencies to review their regulations and to reduce burdens and promote flexibility where appropriate. *See* Exec. Order 13563, 76 FR 3821 (Jan. 21, 2011); Exec. Order 13579, 76 FR 41587 (Jul. 14, 2011).

Proposed Change

Consistent with Congressional intent and the President’s directives in Executive Orders 13563 and 13579, the Commission seeks to revise its regulations so that they are not unnecessarily burdensome and do not impede innovation and flexibility in commercial arrangements, while ensuring continued compliance with the Shipping Act’s requirements.

The proposed change would facilitate references to indices in service contracts and NSAs so that contracting parties can pursue long-term contracts with rates that adjust through an agreed and ascertainable manner. The change will also ensure compliance with two important Shipping Act requirements. First, the Shipping Act requires that a service contract be a “written contract,” in which the ocean carrier “commits to a certain rate or rate schedule.” 46 U.S.C. 40102(20). In order for a rate or rate schedule to be “certain” in a valid contract that is the product of a meeting of the minds, the rate should be known or easily ascertainable to the contracting parties.

Second, the Shipping Act requires service contracts to be “filed” with the Commission. 46 U.S.C. 40502(b). The Commission believes that both the language and purpose of the Shipping Act’s filing requirement would be undermined if contracting parties were permitted to include in service

contracts references to unfiled terms, in this case important rate terms, which are not readily available to the Commission. The Commission is especially interested in public comments on the possible methods by which contracting parties could ensure that the information referred to in service contracts is readily available to the Commission. The Commission is also interested in public comments on ways to reduce any impediments to small shippers having the option of index-linked service contracts.

The Commission also proposes the same change to the rule for NSAs, which are NVOCCs' contracts with their shippers and analogous to ocean common carriers' service contracts with their shippers.

Certifications

The Chairman of the Commission certifies, pursuant to section 605(b) of the Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.*, that the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities. The proposed rule simply provides parties to service contracts and NVOCC service arrangements more freedom and flexibility in their commercial arrangements and will not adversely affect contracting parties.

This rule is not a “major rule” under 5 U.S.C. 804(2).

List of Subjects

46 CFR Parts 530 and 531

Freight, Maritime carriers, Reporting and recordkeeping requirements.

For the reasons stated in the supplementary information, the Federal Maritime Commission revises 46 CFR 530.8(c)(2) and 531.6(c)(2) as follows.

PART 530—SERVICE CONTRACTS

1. The authority citation for Part 530 continues to read as follows:

Authority: 5 U.S.C. 553; 46 U.S.C. 305, 40301–40306, 40501-40503, 41307.

§ 530.8 [Amended]

2. Revise § 530.8(c)(2) to read as follows:

§ 530.8 Service Contracts.

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(c) * * *

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(2) Make reference to terms not explicitly contained in the service contract itself unless those terms are readily available to the parties and the Commission.

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PART 531—NVOCC SERVICE ARRANGEMENTS

3. The authority citation for Part 531 continues to read as follows:

Authority: 46 U.S.C. 40103.

§ 531.6 [Amended]

4. Revise § 531.6(c)(2) to read as follows:

§ 531.6 NVOCC Service Arrangements.

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(c) * * *

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(2) Make reference to terms not explicitly contained in the NSA itself unless those terms are readily available to the parties and the Commission. Reference may not be made to a tariff of a common carrier other than the NVOCC acting as carrier party to the NSA.

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By the Commission.

Karen V. Gregory
Secretary