

February 17, 2011

FEDERAL MARITIME COMMISSION

46 CFR Part 502

Docket No. 11- 02

RIN: 3072-AC41

Amendments to Commission's Rules of Practice And Procedure

AGENCY: Federal Maritime Commission.

ACTION: Final rule.

SUMMARY: The Federal Maritime Commission (FMC or Commission) amends its Rules of Practice and Procedure to update, clarify, and reduce the burden on parties to proceedings before the Commission.

DATES: The final rule is effective February 24, 2011.

FOR FURTHER INFORMATION CONTACT:

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SUPPLEMENTARY INFORMATION:

The Commission's Rules of Practice and Procedure, 46 CFR Part 502, govern procedures before the Commission. 46 CFR 502.1-502.991. The rules are in place to secure just, speedy, and inexpensive resolution of proceedings before the Commission. After review of the

procedural rules in their current form, the Commission has found that certain provisions have become outdated, unclear, or unduly burdensome. Therefore, the Commission has determined to amend Part 502 of Title 46 of the Code of Federal Regulations to update and improve the Commission's Rules of Practice and Procedure.

As a first step in updating and improving its procedural rules, the Commission is making changes to Subparts A, H, I, S, and T of its Rules of Practice and Procedure. A number of technical, non-substantive changes are made to other Subparts of the rules. This Final Rule also includes corrections of some typographical errors in the rules.

The most notable changes are as follows:

Section 502.2

The Commission has clarified the provisions for electronic filing of documents and has amended the number of copies to be filed in Commission proceedings. Previously, in proceedings before the Commission, an original and fifteen (15) copies of certain documents filed and served in the proceedings were required to be furnished for the Commission's use and an original and four (4) copies of other documents were required to be furnished. The Commission is now requiring the filing of an original and five (5) copies of all documents filed in order to simplify this requirement, to reduce the burden on parties to Commission proceedings, and to reduce paper waste. The rule as revised requests that filings also be sent in PDF form when possible, either through electronic email ("email") or on an electronic storage device.

As many parties currently transmit documents by electronic means (except for initial filing of complaints and claims), the Commission has determined to accommodate electronic submission of documents for the purpose of meeting filing deadlines if the original and five (5)

copies follow immediately by mail or courier. This Final Rule includes new rules for such electronic submission of documents to the Commission, and removes reference to facsimile transmissions.

To facilitate communications and service of documents, the amended rule requires all parties to provide the Commission and all other parties with accurate and current contact information.

The Final Rule amends the requirement to file discovery materials. The previous rule, 46 CFR 502.118(b)(3)(i) (repealed by this Final Rule) required parties to file with the Commission a single copy of discovery materials. The Commission has found that filed discovery materials were often not used in the proceedings, and has noted that for years the Commission's Office of Administrative Law Judges has issued orders waiving the filing requirement and prohibiting filing of discovery materials until they were to be used in the proceedings or were ordered by the presiding officer to be filed. Under the Federal Rules of Civil Procedure (FRCP), discovery requests and responses "must not be filed until they are used in the proceeding or the court orders filing." Fed. R. Civ. P. 5(d)(1). The Commission has determined to amend its discovery rules to conform more closely to the FRCP. This change will reduce costs to the parties and to the Commission. The Commission has also determined that, consistent with the FRCP, expert witness reports must not be filed with the Commission until used in the proceeding or ordered to be filed.

The Final Rule provides that discovery materials must not be filed until they are "used in the proceeding." This phrase is meant to refer to a proceeding before the Commission or a presiding officer. This filing requirement is not triggered by "use" of discovery materials in other discovery activities, such as depositions. In connection with a proceeding before the

Commission or presiding officer, however, the rule should be interpreted broadly, and any use of discovery materials before the Commission or presiding officer in connection with a motion, a pretrial conference, or otherwise, would trigger the filing requirement for those discovery materials used.

Once discovery materials are used in the proceeding, the materials must be filed. The Final Rule includes a provision directing a party who wishes to use discovery materials that are not yet in the record to include those materials in an appendix to be filed with the motion or other paper to which they relate. Because the filing requirement applies only with regard to materials that are used, only those parts of voluminous materials that are actually used should be included in the appendix. Any adverse or other party is then free to file an appendix including any other part of the materials that are so used. If the parties are unduly or unfairly sparing in their submissions of materials that are used, the Commission or presiding officer may order further filings.

Finally, to streamline the Commission's filing rules and for ease of reference, the requirements previously found in sections 502.111, 502.112, 502.114(c), 502.118(a) and (b)(1)-(3), and 502.119 are moved to § 502.2.

Section 502.13

Section 205(c)(3) of the E-Government Act of 2002, Public Law No. 107-347, requires the Supreme Court to prescribe rules “to protect privacy and security concerns relating to electronic filing of documents and the public availability . . . of documents filed electronically.” The rule developed by the Court goes further than the E-Government Act requires, and also protects paper filings even when they are not converted to electronic form. *See* Fed. R. Civ. P. 5.2. (“Privacy Protection For Filings Made with the Court”). *See also* Fed. R. Civ. P. 5.2,

advisory committee notes, 2007 adoption. Federal Rule 5.2 requires a party or non-party making an electronic or paper filing with the court to redact personally identifiable information before filing. There has been no comparable Commission rule.

Although Federal Rule 5.2 is applicable in Commission proceedings pursuant to Commission rule § 502.12, the Commission has determined to create a rule to ensure protection of privacy and security concerns. The new rule, 502.13, adopts verbatim Rule 5.2 of the FRCP except where “court” is changed to “Commission or presiding officer” or “Secretary” as appropriate, and portions of subparagraphs (b) and (c) of the Federal Rule that are not applicable to Commission proceedings have been deleted. As under the FRCP, “[t]he responsibility to redact filings rests with counsel and the party or non-party making the filing.” Fed. R. Civ. P. 5.2, advisory committee notes, 2007 adoption.

Section 502.131

Section 502.131 is amended to require that requests for subpoenas be made in writing to the Office of Administrative Law Judges. Under the current rules, requests for subpoenas for the attendance of witnesses may be made orally or in writing, and requests for subpoenas for the production of evidence shall be in writing. The Commission has found it preferable that all subpoena requests must be in writing. The Commission has further found that having subpoena requests delivered to the Office of Administrative Law Judges, as opposed to the presiding officer, will ensure that they are handled promptly. In addition, the number of copies required has been reduced from two copies to one copy in addition to the original, to reduce the burden on the parties.

Sections 502.305 and 502.321

Sections 502.305 and 502.321 are amended to make certain rules of the Commission's Rules of Practice and Procedure applicable to Subpart S (Informal Procedure for Adjudication of Small Claims) and Subpart T (Formal Procedure for Adjudication of Small Claims) proceedings. Currently, only §§ 502.253 and 502.254 are applicable to Subpart S proceedings; under § 502.321, the rules in Subpart A through Q are not applicable to Subpart T proceedings. The Commission has found that certain rules should apply to Subparts S and T proceedings. These include rules for filing, providing contact information, documents in foreign languages, attorney appearances, substitution of parties, interest, and attorney's fees. The amendment also makes Subparts S and T proceedings consistent with other Commission proceedings where appropriate, and clarifies the rules of practice and procedure applicable to those proceedings.

Because the changes made in this Final Rule only address the Commission's Rules of Practice and Procedure, to which the Administrative Procedure Act is not applicable pursuant to 5 U.S.C. 553, the amended rules are published as final.

This Final Rule 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.

For the reasons stated in the supplementary information, the Federal Maritime Commission amends 46 CFR Part 502 as follows.

PART 502—RULES OF PRACTICE AND PROCEDURE

1. The authority citation for Part 502 continues to read as follows:

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. 305, 40103-40104, 40304, 40306, 40501-40503, 40701-40706, 41101-41109, 41301-41309, 44101-44106; E.O. 11222 of May 8, 1965, 30 FR 6469, 3 CFR 1964-1965 Comp. P. 306; 21 U.S.C. 853a.

2. Revise § 502.2 to read as follows:

§ 502.2 Filing of documents.

(a) *Requirement for filing.* Documents relating to any matter pending before the Commissioners for decision or to any matter pending before the Commission which is likely to come before the Commissioners for decision, whether or not relating to proceedings governed by this part, must be filed with the Secretary, Federal Maritime Commission. Such documents should not be filed with or separately submitted to the offices of individual Commissioners. Distribution to Commissioners and other agency personnel is handled by the Office of the Secretary to ensure that persons in decision-making and advisory positions receive identical copies of submissions in a uniform and impersonal manner and to avoid the possibility of ex parte communications within the meaning of § 502.11. These considerations apply to informal and oral communications as well, such as requests for expedited consideration.

(b) *Date and time of filing.* (1) Documents may be hand-delivered at the Commission during normal business hours from 8:30 a.m. to 5 p.m., Monday through Friday.

(2) Except with respect to initial filing of complaints pursuant to §§ 502.62 and 502.63, and claims pursuant to §§ 502.301 and 502.302, the date of filing shall be either the date on which the pleading, document, or paper is physically delivered to the Commission by a party, the date on which a party certifies it to have been deposited in the mail or delivered to a courier, or the date of email transmission.

(c) *Place of filing.* Except for exhibits filed pursuant to § 502.118(b)(4) and petitions for review of final agency orders served on the Commission pursuant to 28 U.S.C. 2112(a), all documents required to be filed in, and correspondence relating to proceedings governed by this part must be addressed and delivered to "Secretary, Federal Maritime Commission, 800 N. Capitol Street, NW, Washington, DC 20573-0001" or to secretary@fmc.gov.

(d) *Service of petition for review of Commission order.* Petitions for review of final agency orders served on the Commission pursuant to 28 U.S.C. 2112(a) must be addressed and delivered to "General Counsel, Office of the General Counsel, Federal Maritime Commission, 800 N. Capitol Street, NW, Washington, DC 20573-0001."

(e) *Number of copies.* Parties filing documents in proceedings before the Commission or an administrative law judge must file an original, signed document and five (5) copies, and, if possible, a PDF of the document. The PDF document should be sent by email to secretary@fmc.gov or submitted on an electronic storage device (such as compact disc or USB flash drive).

(f) *Email transmission of filings.* (1) Initial filing of complaints and claims pursuant to §§ 502.62-502.63 and 502.301-502.302 must be accomplished in the traditional manner on paper, rather than by email.

(2) Pursuant to § 502.5 of this subpart, confidential filings must be accomplished in the traditional manner on paper, rather than by email.

(3) If a filing is submitted electronically as a PDF attached to an email, the original, signed document, and five (5) copies must be received by the Secretary within seven working days. The email transmitting the PDF copy of a document must include a certification by the filing party that the electronic copy is a true and correct copy of the paper original, and that the paper signed

original and five (5) copies are being filed with the Secretary of the Commission. The email Subject Line must include the docket number of the proceeding and be sent to secretary@fmc.gov.

(g) *Filing after announcement of Commission meeting prohibited.* No filings relating to matters scheduled for a Commission meeting will be accepted by the Secretary if submitted subsequent to public announcement of the particular meeting, except that the Commission, on its own initiative, or pursuant to a written request, may in its discretion, permit a departure from this limitation for exceptional circumstances. (See § 503.82(e) of this chapter.)

(h) *Return of rejected filings.* Any pleading, document, writing, or other paper submitted for filing which is rejected because it does not conform to the rules in this part will be returned to the sender.

(i) *Continuing obligation to provide contact information.* All parties and representatives are under a continuing obligation to provide the Commission and all other parties in a proceeding with accurate and current contact information including a street address, telephone number, and email address.

(j) *Form of documents.* All papers to be filed under the rules in this part must be clear and legible, dated, show the docket number and title of the proceeding, document title, and include the title, if any, and address of the authorized signer or representative. An original signed in ink must be provided. Text shall appear on only one side of the paper and must be double spaced except that quotations of fifty or more words should be single-spaced and indented on the left and right without quotation marks. The paper must be strong and durable, of letter size (8½ × 11 in or 215.9 × 279.4 mm) or A4 size (8.27 × 11.69 in or 210 × 297 mm), with a margin

of at least one inch on all four sides. Documents must be printed in clear type, and the type size, including footnotes and endnotes, must not be smaller than 12-point.

(k) *Discovery materials excluded from filing requirement.* (1) The following discovery requests and responses must not be filed with the Secretary until they are used in the proceeding, or the Commission or presiding officer orders filing:

(i) Notice and transcript of depositions;

(ii) Interrogatories

(iii) Requests for documents or tangible things or to permit entry onto designated land or other property;

(iv) Requests for admission; and

(v) Expert witness reports.

(2) The party that served the notice of deposition or discovery papers must preserve and ensure the integrity of original transcripts and discovery papers for use by the Commission or the presiding officer. A party that wants to use any part or all of discovery requests and responses in the proceeding must include the part or all of the documents in an appendix to be filed with the motion or other paper that refers to those documents. A party filing an appendix exceeding 100 pages should file an original and two (2) copies on paper and, if possible, also file such appendix by email or on an electronic storage device. [Rule 2.]

3. Revise § 502.3 to read as follows:

§ 502.3 Compliance with rules or orders of Commission.

Persons named in a rule or order shall notify the Commission during business hours on or before the day on which such rule or order becomes effective whether they have complied therewith, and if so, the manner in which compliance has been made. [Rule 3.]

4. Revise § 502.4 to read as follows:

§ 502.4 Authentication of rules or orders of Commission.

All rules or orders issued by the Commission in any proceeding covered by this part shall, unless otherwise specifically provided, be signed by the Secretary of the Commission in the name of the Commission. [Rule 4.]

5. Add § 502.5 to read as follows:

§ 502.5 Documents containing confidential materials.

Except as otherwise provided in the rules of this part, all filings that contain information previously designated as confidential pursuant to §§ 502.13, 502.167, 502.201(i)(1)(vii), or any other rules of this part or for which a request for protective order pursuant to § 502.201(i) is pending, are subject to the following requirements:

(a) Filings shall be accompanied by a transmittal letter that identifies the filing as "confidential" and describes the nature and extent of the authority for requesting confidential treatment. The confidential copies shall consist of the complete filing and shall include a cover page marked "Confidential-Restricted," with the confidential materials clearly marked on each page.

Confidential filings should not be made by email.

(b) Whenever a confidential filing is submitted, there must also be submitted an original and one copy of a public version of the filing. Such public version shall exclude confidential materials,

and shall indicate on the cover page and on each affected page "confidential materials excluded."
Public versions of confidential filings may be submitted by email.

(c) Confidential treatment afforded by this section is subject to the proviso that any information designated as confidential may be used by the administrative law judge or the Commission if deemed necessary to a correct decision in the proceeding. [Rule 5.]

6. Add § 502.6 to read as follows:

§ 502.6 Verification of documents.

(a) If a party is represented by an attorney or other person qualified to practice before the Commission under the rules in this part, each pleading, document or other paper of such party filed with the Commission shall be signed by at least one person of record admitted to practice before the Commission in his or her individual name, whose address shall be stated. Except when otherwise specifically provided by rule or statute, such pleading, document or paper need not be verified or accompanied by affidavit. The signature of a person admitted or qualified to practice before the Commission constitutes a certificate by the signer that the signer has read the pleading, document or paper; that the signer is authorized to file it; that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry, the filing is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. For a willful violation of this section, a person admitted or qualified to practice before the Commission may be subjected to appropriate disciplinary action.

(b) If a party is not represented by a person admitted or qualified to practice before the Commission, each pleading, document or other paper of such party filed with the Commission shall be signed and verified under oath by the party or by a duly authorized officer or agent of the party, whose address and title shall be stated.

(c) Wherever, under any rules of this part, any matter is required or permitted to be supported, evidenced, established, or proved by the sworn declaration, verification, certificate, statement, oath, or affidavit, in writing of the person making the same (other than a deposition under § 502.203 or § 502.204), such matter may, with like force and effect, be supported, evidenced, established, or proved by the unsworn declaration, certificate, verification, or statement, in writing of such person which is subscribed by such person, as true under penalty of perjury, in substantially the following form:

(1) If executed without the United States: "I declare (or certify, verify, or state) under penalty of perjury under the laws of the United States of America that the foregoing is true and correct."

(2) If executed within the United States, its territories, possessions, or commonwealths: "I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct." [Rule 6.]

7. Add § 502.13 to Subpart A of Part 502 to read as follows:

§ 502.13 Privacy protection for filings made with the Commission.

(a) *Redacted filings.* Unless the Commission or presiding officer orders otherwise, in an electronic or paper filing that contains an individual's social-security number, taxpayer-identification number, or birth date, the name of an individual known to be a minor, or a financial-account number, a party or nonparty making the filing may include only:

- (1) The last four digits of the social-security number and taxpayer-identification number;
 - (2) The year of the individual's birth;
 - (3) The minor's initials; and
 - (4) The last four digits of the financial-account number.
- (b) *Exemptions from the redaction requirement.* The redaction requirement does not apply to the following:
- (1) The record of an administrative or agency proceeding;
 - (2) The record of a state-court proceeding;
 - (3) The record of a court or tribunal, if that record was not subject to the redaction requirement when originally filed; and
 - (4) A filing covered by paragraph (c) of this section.
- (c) *Filings made under seal.* The Commission or presiding officer may order that a filing be made under seal without redaction. The Commission or presiding officer may later unseal the filing or order the person who made the filing to file a redacted version for the public record.
- (d) *Protective orders.* For good cause, the Commission or presiding officer may by order in a case:
- (1) Require redaction of additional information; or
 - (2) Limit or prohibit a nonparty's remote electronic access to a document filed with the Commission.
- (e) *Option for additional unredacted filing under seal.* A person making a redacted filing may also file an unredacted copy under seal. The Commission must retain the unredacted copy as part of the record.

(f) *Option for filing a reference list.* A filing that contains redacted information may be filed together with a reference list that identifies each item of redacted information and specifies an appropriate identifier that uniquely corresponds to each item listed. The list must be filed under seal and may be amended as of right. Any reference in the case to a listed identifier will be construed to refer to the corresponding item of information.

(g) *Waiver of protection of identifiers.* A person waives the protection of this rule as to the person's own information by filing it without redaction and not under seal. [Rule 13.]

§ 502.27 [Amended]

8. Amend § 502.27(a)(1), in the last sentence, by removing the reference “§ 503.43(g)” and adding the reference “§ 503.43(e)” in its place.

Exhibit No. 1 to Subpart E [§ 502.62] of Part 502—[Amended]

9. Amend the appendix, Exhibit No. 1 to Subpart E, by removing the reference “subpart S [Informal Docket for a claim of \$10,000 or less]” and adding the reference “subpart S [Informal Docket for a claim of \$50,000 or less]” in its place in the first paragraph of the Exhibit's *Information To Assist in Filing Formal Complaint, General.*

§ 502.111 [Removed and Reserved]

10. Remove and reserve § 502.111 .

§ 502.112 [Removed and Reserved]

11. Remove and reserve § 502.112 .

§ 502.114 [Amended]

12. In § 502.114, remove paragraph (c).

§ 502.118 [Amended]

13. In § 502.118, remove and reserve paragraphs (a) and (b)(1) through (3).

§ 502.119 [Removed]

14. Remove § 502.119.

Subpart I—Subpoenas

15. Revise the heading to subpart I as set forth above.

16. Revise § 502.131 to read as follows:

§ 502.131 Requests; issuance.

Subpoenas for the attendance of witnesses or the production of evidence shall be issued upon request of any party, without notice to any other party. Requests for subpoenas must be submitted in writing to the Office of Administrative Law Judges. The party requesting the subpoena shall tender an original and one copy of such subpoena. Where it appears that the subpoena sought may be unreasonable, oppressive, excessive in scope, or unduly burdensome, the administrative law judge may in his or her discretion, as a condition precedent to the issuance of the subpoena, require the person seeking the subpoena to show the general relevance and reasonable scope of the testimony or other evidence sought. [Rule 131.]

§ 502.132 [Amended]

17. Amend § 502.132 by removing “subpena” and adding “subpoena” in its place wherever it occurs.

§ 502.133 [Amended]

18. Amend § 502.133 by removing “subpena” and adding “subpoena” in its place.

§ 502.134 [Amended]

19. Amend § 502.134 as follows:

- a. Amend the section heading by removing “subpenas” and adding “subpoenas” in its place; and
- b. Amend the text by removing “subpena” and adding “subpoena” in its place wherever it occurs.

§ 502.135 [Amended]

20. Amend § 502.135 as follows:

- c. Amend the section heading by removing “Subpena” and adding “Subpoena” in its place;
- d. Amend paragraph (a) by removing “subpena” and adding “subpoena” in its place wherever it occurs; and
- e. Amend paragraph (b) by removing “subpenaed” and adding “subpoenaed” in its place.

§ 502.136 [Amended]

21. Amend § 502.136 by removing “subpena” and adding “subpoena” in its place.

§ 502.147 [Amended]

22. Amend § 502.147(a), in the first sentence, by removing “subpenas” and adding “subpoenas” in its place.

§ 502.203 [Amended]

23. Amend § 502.203(a)(2) and (3) by removing “subpena” and adding “subpoena” in its place wherever it occurs.

§ 502.210 [Amended]

24. Amend § 502.210 in paragraph (b) by removing “subpenas” and “subpoena” and adding “subpoenas” and “subpoena”, respectively, in their place wherever they occur.

§ 502.286 [Amended]

25. Amend § 502.286 by removing “subpenas” and adding “subpoenas” in two places.

26. Revise § 502.305 to read as follows:

§ 502.305 Applicability of other rules of this part.

(a) Except otherwise specifically provided in this subpart or in paragraph (b) of this section, the sections in subparts A through Q, inclusive, of this part do not apply to situations covered by this subpart.

(b) The following sections in subparts A through Q of this part apply to situations covered by this subpart: §§ 502.2(a) (Requirement for filing); 502.2(f)(1) (Email transmission of filings); 502.2(i) (Continuing obligation to provide contact information); 502.7 (Documents in foreign languages); 502.21-502.23 (Appearance, Authority for representation, Notice of appearance; substitution and withdrawal of representative); 502.43 (Substitution of parties); 502.101 (Computation); 502.117 (Certificate of service); 502.253 (Interest in reparation proceedings); and 502.254 (Attorney’s fees in reparation proceedings). [Rule 305.]

Exhibit No. 1 to Subpart S —[Amended]

27. Amend the appendix, Exhibit No. 1 to subpart S, by removing “\$10,000 or less” and adding “\$50,000 or less” in its place in the first paragraph of the Exhibit’s *Information To Assist in Filing Informal Complaints*.

28. Revise § 502.321 to read as follows:

§ 502.321 Applicability of other rules of this part.

(a) Except otherwise specifically provided in this subpart or in paragraph (b) of this section, the sections in subparts A through Q, inclusive, of this part do not apply to situations covered by this subpart.

(b) The following sections in subparts A through Q apply to situations covered by this subpart:

§§ 502.2(a) (Requirement for filing); 502.2(f)(1) (Email transmission of filings); 502.2(i) (Continuing obligation to provide contact information); 502.7 (Documents in foreign languages); 502.21-502.23 (Appearance, Authority for representation, Notice of appearance; substitution and withdrawal of representative); 502.43 (Substitution of parties); 502.253 (Interest in reparation proceedings); and 502.254 (Attorney's fees in reparation proceedings). [Rule 321.]

By the Commission.

Karen V. Gregory
Secretary