

Issued: January 29, 2020

FEDERAL MARITIME COMMISSION

46 CFR Parts 502 and 515

Docket No. 19-04

RIN 3072-AC75

Hearing Procedures Governing the Denial, Revocation, or Suspension of an OTI License

AGENCY: Federal Maritime Commission.

ACTION: Final rule.

SUMMARY: The Federal Maritime Commission (Commission) is modifying the hearing procedures governing the denial, revocation, or suspension of an ocean transportation intermediary (OTI) license. The revised hearing procedures align more with other Commission hearing procedures, ensure a more streamlined process, and fulfill the need for more detailed procedural requirements.

DATES: This final rule is effective March 2, 2020.

FOR FURTHER INFORMATION CONTACT: Rachel E. Dickon, Secretary; Phone: (202) 523-5725; Email: secretary@fmc.gov.

SUPPLEMENTARY INFORMATION:

I. INTRODUCTION

Through this final rule, the Commission is modifying its processes for the denial, suspension, and revocation of OTI licenses.¹ The revised hearing procedures are based on the procedure for formal small Shipping Act claims under 46 CFR part 502, subpart T. The new

¹ These hearing procedures also apply to suspensions and terminations of foreign-based non-vessel-operating common carrier (NVOCC) registrations. *See* 46 CFR 515.19(g)(2).

hearing procedure, overseen by an administrative law judge (ALJ), represents an expedient, low-burden process that also fulfills the need for more structure in the proceedings.

A notice of proposed rulemaking (NPRM) was issued by the Commission on September 3, 2019.² The Commission received no comments.

II. BACKGROUND

The Shipping Act requires anyone desiring to operate as an OTI to obtain a license from the Commission.³ The Act provides that “[t]he Commission shall issue a license to a person that the Commission determines to be qualified by experience and character to act as an ocean transportation intermediary.”⁴ The Commission has delegated the authority to approve or disapprove applications for OTI licenses to the Bureau of Certification and Licensing (BCL).⁵

A. Current Procedure

Hearings on the revocation, denial, or suspension of an OTI license are conducted under the procedures in 46 CFR 515.17. All hearing requests are submitted to the Commission’s Secretary. The Secretary then designates a hearing officer. After being advised by the hearing officer that a hearing request had been made, BCL sends the hearing officer and applicant or licensee a copy of the notice of intent (which had already been sent to the applicant or licensee) along with materials supporting the notice under § 515.15 or § 515.16.⁶

² NPRM: Hearing Procedures Governing the Denial, Revocation, or Suspension of an OTI License, 84 FR 45934 (Sept. 3, 2019), as corrected by 84 FR 48578 (Sep. 16, 2019).

³ 46 U.S.C. 40901.

⁴ *Id.* at section 40901(a).

⁵ 46 CFR 501.26(a)(1).

⁶ 46 CFR 515.17(a).

The hearing officer then provides the licensee or applicant with a written notice advising the party of its right to submit written arguments, affidavits of fact, and documents. The licensee or applicant then has 30 days to submit information and documents in support of a license or in support of continuation of a license. BCL then submits its response within 20 days of the licensee or applicant's submission. These records and submissions constitute the entire record for the hearing officer's decision. The hearing officer's decision must be issued within 40 days of the record being closed.⁷ The applicant or licensee, but not BCL, can seek review of the hearing officer's decision by the Commission by filing exceptions in accordance with 46 CFR 502.227, and the Commission can determine to conduct a formal evidentiary hearing under part 502.⁸

B. Concerns with Current Procedure

Despite the Commission's goal of streamlining OTI proceedings with the § 515.17 procedures, hearings under § 515.17 have taken over 150 days to complete. A contributing factor to the length of time in these cases is the delay in the selection of an appropriate hearing officer, which took between 13 and 50 days. These delays resulted from not having a designated office from which to select the hearing officer.

In addition to the delays in selecting a hearing officer, because § 515.17 provides little detail about the hearing procedure other than deadlines for submission of information, Commission staff have had to resolve several procedural issues arising in hearing proceedings. These experiences demonstrated the need for additional clarification of the procedure and the authority of the hearing officer.

⁷ 46 CFR 515.17(b).

⁸ 46 CFR 515.17(c).

III. FINAL RULE

For the reasons stated in the NPRM and described above, the Commission is adopting the proposed rule with virtually no changes.⁹ The new hearing procedures will be conducted by an ALJ, thereby removing the delay in the appointment of a hearing officer. Using a modified form of the subpart T procedures will ensure a more streamlined procedure than a typical hearing under part 502, which allows for 150 days of discovery,¹⁰ while giving the presiding officer more flexibility in conducting the hearing than the current § 515.17 procedures. The new proceedings will be included in part 502 as subpart X (the existing subpart X will be redesignated) and cross-referenced in § 515.17.

A. New Procedure for License Hearings

As described in the NPRM, the Commission will not change the process for requesting a hearing as stated in §§ 515.15(c) and 515.16(a). If an applicant or licensee requests a hearing after receiving a notice of intent to deny, suspend, or revoke their license, they will continue to have 20 days to do so, and, if no hearing is requested, the decision to deny, revoke, or suspend will become final.

If a hearing request is received, the Secretary will transmit the request to the Office of Administrative Law Judges for assignment. The hearing will then take place under the new subpart X of part 502. Section 515.17 retains its first sentence, indicating that hearing requests

⁹ The NPRM inadvertently listed the wrong authorities for part 502. This has been corrected in the final rule. The final rule also makes very minor wording changes to the new § 502.706 governing requests for oral hearing and argument.

¹⁰ See 46 CFR 502.141-502.150. Given that the record in OTI license application and revocation/suspension is generally more limited, such a substantial discovery process is not necessary.

under §§ 515.15 and 515.16 must be submitted to the Commission's Secretary, and then cross-references subpart X.

The preliminary portions of the new subpart X mirror the previous procedures in § 515.17, save that an ALJ, rather than a hearing officer, will preside over the proceeding. Once a timely request is received, the Secretary will transmit the request to the Office of Administrative Law Judges who would notify BCL and Bureau of Enforcement (BOE) of the hearing request. BOE will provide the applicant or licensee a copy of the notice previously given as well as the BCL materials supporting the decision. The ALJ will then issue a notice advising the applicant or licensee of the right to respond in support of a license application or continuation of a current OTI license. The licensee or applicant will have 30 days to file a response and supporting documentation. BOE will then have 20 days to submit a reply memorandum and supporting documents. These proposed deadlines are identical to those currently listed in § 515.17.

To provide the ALJ with discretion and flexibility, the new subpart X will permit the ALJ to require additional information from the parties. Additionally, the new subpart X allows for parties to request oral hearing or oral argument in either the applicant/licensee's response or BOE's reply to the response. A request for oral hearing or argument will be ruled on within 10 days of receipt of the request and will only occur at the discretion of the ALJ. While neither oral proceedings nor additional information were expressly permitted under § 515.17 and could potentially extend the proceeding beyond the current § 515.17 timeline, we expect use of these procedures to be the exception rather than the norm. In addition, expressly permitting the use of these procedures when necessary will help ensure that determinations are based on a complete and accurate record and eliminate confusion regarding the presiding officer's authority.

To ensure a streamlined process, the Commission will still require that the presiding officer issue a decision within 40 days of the record being closed, which will be either when the reply to the response is submitted, or, if additional information is required or oral hearing or argument is conducted, the completion of either event.

The exceptions process remains the same as under the current § 515.17, except that either party (BOE or the applicant/licensee) has the ability to file exceptions within 22 days after the ALJ's decision is issued.

The discretionary review process has also been altered somewhat. Previously, discretionary Commission review of hearing officer decisions was governed by the general provisions in 46 CFR 501.27, which allowed for review if one less than a majority of Commissioners (i.e., two Commissioners if there are four or five Commissioners total) voted to review the matter. The change makes the discretionary review procedures consistent with those for other decisions under part 502 (i.e., ALJ and small claims officer decisions), and a single Commissioner may now request Commission review within 30 days after the ALJ's decision is issued.

Through this rule, the Commission also incorporates via cross-reference nearly all of subparts G, governing time, and H, governing service of documents, of part 502. This brings license hearings in line with other proceedings under part 502 and any future improvements to the Commission rules on service and time will automatically apply to these proceedings. The only section in these subparts that will not apply to license hearings under subpart X is § 502.115, which concerns service in rulemaking and petition proceedings.

To ensure consistency across part 502 proceedings, other sections of part 502 will also apply to license hearings under subpart X, including: §§ 502.1-502.13 (General information);

502.21-502.23 (Appearance, Authority for representation, Notice of appearance; substitution and withdrawal of a representative); 502.42 (Bureau of Enforcement); 502.43 (Substitution of parties); and 502.223-502.230 (Decisions).

IV. CONCLUSION

Under the hearing procedures in § 515.17, the Commission has encountered issues with regards to expediency and clarity of process. To resolve these issues and improve the license hearing process, the Commission is replacing the current hearing procedures with a modified version of the procedures in subpart T of the Commission’s Rules of Practice and Procedure. This new procedure will provide additional structure while ensuring a low-burden and efficient process.

V. RULEMAKING ANALYSES AND NOTICES

Congressional Review Act

This final rule is not a “rule” as defined by the Congressional Review Act (CRA), codified at 5 U.S.C. 801 *et seq.*, and is not subject to the provisions of the CRA. The CRA adopts the Administrative Procedure Act’s definition of a “rule” in 5 U.S.C. 551, subject to certain exclusions. *See* 5 U.S.C. 804(3). In particular, the CRA does not apply to rules of agency organization, procedure, and practice that do not substantially affect the rights or obligations of non-agency parties. *Id.* This final rule relates to agency organization, procedures, and practices. Specifically, the rule will amend the Commission’s procedures for OTI license hearings. These changes will not, however, substantially affect the rights or obligations of non-agency parties. Applicants and licensees will still have the opportunity to request a hearing on proposed denials, suspensions, or revocations, and will still have the ability to seek Commission review of initial decisions. The final rule merely designates an ALJ as the presiding officer, brings the OTI

license hearing procedures into alignment with other Commission proceedings, and adds additional procedural flexibility by allowing the ALJ to request additional information and documents from the parties, as well as allowing parties to request oral hearing or argument. The final rule also creates additional avenues for Commission review of initial license decisions by: (1) permitting BOE to file exceptions; and (2) allowing a single Commissioner to request review of the ALJ's decision. While these changes will alter the way OTI license hearings are conducted, they do not substantially affect the rights of applicants or licensees, and therefore the final rule is not a "rule" under the CRA and is not subject to the CRA's requirements.

Regulatory Flexibility Act

The Regulatory Flexibility Act (codified as amended at 5 U.S.C. 601–612) provides that whenever an agency is required to publish a notice of proposed rulemaking under the Administrative Procedure Act (APA) (5 U.S.C. 553), the agency must prepare and make available a final regulatory flexibility analysis (FRFA) describing the impact of the rule on small entities. 5 U.S.C. 604. An agency is not required to publish an FRFA, however, for the following types of rules, which are excluded from the APA's notice-and-comment requirement: interpretative rules; general statements of policy; rules of agency organization, procedure, or practice; and rules for which the agency for good cause finds that notice and comment is impracticable, unnecessary, or contrary to public interest. *See* 5 U.S.C. 553(b).

Although the Commission elected to seek public comment, the rule is a rule of agency organization, procedure, or practice. Therefore, the APA did not require publication of a notice of proposed rulemaking in this instance, and the Commission is not required to prepare a FRFA.

National Environmental Policy Act

The Commission's regulations categorically exclude certain rulemakings from any

requirement to prepare an environmental assessment or an environmental impact statement because they do not increase or decrease air, water or noise pollution or the use of fossil fuels, recyclables, or energy. 46 CFR 504.4. The proposed rule would amend the Commission procedures for the revocation, suspension, and denial of OTI licenses. This rulemaking thus falls within the categorical exclusion for “issuance, modification, denial and revocation of ocean transportation intermediary licenses.” 46 CFR 504.4(a)(1). Therefore, no environmental assessment or environmental impact statement is required.

Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (44 U.S.C. 3501-3521) (PRA) requires an agency to seek and receive approval from the Office of Management and Budget (OMB) before collecting information from the public. 44 U.S.C. 3507. The agency must submit collections of information in proposed rules to OMB in conjunction with the publication of the notice of proposed rulemaking. 5 CFR 1320.11. This rule does not contain any collections of information as defined by 44 U.S.C. 3502(3) and 5 CFR 1320.3(c).

Executive Order 12988 (Civil Justice Reform)

This rule meets the applicable standards in E.O. 12988 titled, “Civil Justice Reform,” to minimize litigation, eliminate ambiguity, and reduce burden.

Regulation Identifier Number

The Commission assigns a regulation identifier number (RIN) to each regulatory action listed in the Unified Agenda of Federal Regulatory and Deregulatory Actions (Unified Agenda). The Regulatory Information Service Center publishes the Unified Agenda in April and October of each year. You may use the RIN contained in the heading at the beginning of this document to

find this action in the Unified Agenda, available at
<http://www.reginfo.gov/public/do/eAgendaMain>.

List of Subjects

46 CFR Part 502

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

46 CFR Part 515

Freight, Freight forwarders, Maritime carriers, Reporting and recordkeeping requirements.

For the reasons set forth above, the Federal Maritime Commission amends 46 CFR parts 502 and 515 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; 18 U.S.C. 207; 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; 5 CFR part 2635.

Subpart X [Redesignated as Subpart Y]

2. Redesignate subpart X, consisting of § 502.991, as subpart Y.

3. Add new subpart X, consisting of §§ 502.701 through 502.709, to read as follows:

Subpart X—Hearing Procedure Governing Denial, Suspension, or Revocation of OTI

License

Sec.

502.701 Purpose and scope.
502.702 Hearing requests.

- 502.703 Applicant or licensee response.
- 502.704 Reply.
- 502.705 Additional information.
- 502.706 Request for an oral hearing or argument.
- 502.707 Intervention.
- 502.708 Decision.
- 502.709 Applicability of other rules to this subpart.

Subpart X—Hearing Procedure Governing Denial, Suspension, or Revocation of OTI License

§ 502.701 Purpose and scope.

(a) The purpose of this subpart is to provide the hearing procedures for the denial, suspension, or revocation of an ocean transportation intermediary (OTI) license applied for or issued under part 515 of this chapter when the Bureau of Certification and Licensing has issued a notice of intent to deny under § 515.15 of this chapter or notice of revocation or suspension under § 515.16 of this chapter and the applicant or licensee timely requests a hearing under those sections.

(b) Denial, suspension, and revocation proceedings under this subpart will be adjudicated by the administrative law judges of the Commission under the procedures set forth in this subpart. [Rule 701.]

§ 502.702 Hearing requests.

(a) Upon receipt of a timely hearing request under § 515.17 of this chapter, the Secretary will transmit the request to the Office of Administrative Law Judges.

(b) The assigned administrative law judge will notify the Bureau of Certification and Licensing (BCL) and the Bureau of Enforcement of the hearing request, and the Bureau of Enforcement must file with the administrative law judge and serve on the applicant or licensee a copy of the notice given to the applicant or licensee and a copy of BCL materials supporting the notice. [Rule 702.]

§ 502.703 Applicant or licensee response.

Upon receiving the materials described in § 502.702(b), the administrative law judge will issue a notice advising the applicant or licensee of the right to respond in support of an OTI application or continuation of a current OTI license. The response must be:

(a) Filed with the administrative law judge within 30 days of the administrative law judge's notice; and

(b) Include any supporting information or documents, such as affidavits of fact, memoranda, or written argument. [Rule 703.]

§ 502.704 Reply.

The Bureau of Enforcement may, within twenty (20) days of service of the response filed by the applicant or licensee, file with the administrative law judge and serve upon the applicant or licensee a reply memorandum accompanied by appropriate affidavits and supporting documents.

§ 502.705 Additional information.

The administrative law judge may require the submission of additional affidavits, documents, or memoranda from the Bureau of Enforcement or the licensee or applicant. [Rule 705.]

§ 502.706 Request for an oral hearing or argument.

(a) In the usual course of disposition of matters filed under this subpart, no oral hearing or argument will be held, but the administrative law judge, in their discretion, may order such hearing or argument.

(b) A request for oral hearing or argument may be incorporated in the applicant or licensee's response or in the Bureau of Enforcement's reply to the response. Requests for oral

hearing or argument will not be entertained unless they set forth in detail the reasons why the filing of affidavits or other documents will not permit the fair and expeditious disposition of the matter, and the precise nature of the facts sought to be proved or issues to be addressed at an oral hearing or argument.

(c) The administrative law judge will rule upon a request for oral hearing or argument within ten (10) days of its receipt.

(d) In the event oral hearing or argument is ordered, it will be held in accordance with the rules applicable to other formal proceedings, as set forth in subparts A through Q of this part.

[Rule 706.]

§ 502.707 Intervention.

Intervention will ordinarily not be permitted. [Rule 707.]

§ 502.708 Decision.

(a) Except as described in paragraph (b) of this section, the administrative law judge will issue a decision within forty (40) days after the submission of the Bureau of Enforcement's reply.

(b) If oral hearing or argument is conducted or additional information is required, then the decision will be issued within forty (40) days after the oral proceeding or the deadline for submission of additional information, whichever is later.

(c) The decision of the administrative law judge will be final, unless, within twenty-two (22) days from the date of service of the decision, either party files exceptions under

§ 502.227(a)(1) or the Commission makes a determination to review under § 502.227(a)(3) and

(d). [Rule 708.]

§ 502.709 Applicability of other rules to this subpart.

(a) Except as 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 proceedings covered by this subpart.

(b) The following sections in subparts A through Q apply to proceedings covered by this subpart: §§ 502.1 through 502.11, 502.13 (Filing requirements, Document requirements, and General rules); 502.21 through 502.23 (Appearance, Authority for representation, Notice of appearance, Substitution, and Withdrawal of representative); 502.42 (Bureau of Enforcement); 502.43 (Substitution of parties); 502.101 through 502.105 (Computation of time); 502.114, 502.116 through 502.117 (Service of documents); 502.223 through 502.230 (Decisions). [Rule 709.]

**PART 515 - LICENSING, REGISTRATION, FINANCIAL RESPONSIBILITY
REQUIREMENTS AND GENERAL DUTIES FOR OCEAN TRANSPORTATION
INTERMEDIARIES**

4. The authority citation for part 515 continues to read as follows:

Authority: 5 U.S.C. 553; 31 U.S.C. 9701; 46 U.S.C. 305, 40102, 40104, 40501-40503, 40901-40904, 41101-41109, 41301-41302, 41305-41307; Pub. L. 105-383, 112 Stat. 3411; 21 U.S.C. 862.

5. Revise § 515.17 to read as follows:

§ 515.17 Hearing procedures governing denial, revocation, or suspension of OTI license.

All hearing requests under §§ 515.15 and 515.16 shall be submitted to the Commission's Secretary. The hearing will be adjudicated under the procedures set forth in subpart X of part 502 of this chapter.

By the Commission.

Rachel E. Dickon
Secretary