

Issued: February 18, 2020

FEDERAL MARITIME COMMISSION

46 CFR Part 530

Docket No. 20-02

RIN: 3072-AC80

Service Contracts

AGENCY: Federal Maritime Commission.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Federal Maritime Commission (FMC or Commission) proposes to amend its rules governing Service Contracts. The proposed rule is intended to reduce regulatory burden.

DATES: Submit comments on or before: April 14, 2020.

In compliance with the Paperwork Reduction Act, the Commission is also seeking comment on revisions to one information collections. See the Paperwork Reduction Act section under Regulatory Analyses and Notices below. Please submit all comments relating to the revised information collections to the Commission and to the Office of Management and Budget (OMB) at the address listed in the ADDRESSES section on or before April 14, 2020. Comments to OMB are most useful if submitted within 30 days of publication.

ADDRESSES: You may submit comments identified by the Docket No. 20-02 in the heading of this document, by the following methods:

- *E-mail:* secretary@fmc.gov. Include in the subject line: “Docket No. 20-02, Comments on Proposed Service Contract Regulations.” Comments should be attached to the e-mail as a Microsoft Word or text-searchable PDF document. Comments containing confidential information should not be submitted by e-mail.

- *Mail:* Rachel E. Dickon, Secretary, Federal Maritime Commission, 800 North Capitol Street, N.W., Washington, D.C. 20573-0001. *Phone:* (202) 523-5725. *E-mail:* secretary@fmc.gov.
- Comments regarding the revised information collections should be submitted to the Commission through one of the preceding methods and a copy should also be sent to the Office of Information and Regulatory Affairs, Office of Management and Budget, Attention: Desk Officer for Federal Maritime Commission, 725 17th Street N.W., Washington, DC 20503; by Fax: (202) 395-5167; or by email: OIRA_Submission@OMB.EOP.GOV.

Instructions: For detailed instructions on submitting comments, including requesting confidential treatment of comments, and additional information on the rulemaking process, see the Public Participation heading of the Supplementary Information section of this document. Note that all comments received will be posted without change to the Commission's website, unless the commenter has requested confidential treatment.

Docket: For access to the docket to read background documents or comments received, go to the Commission's Electronic Reading Room at: <https://www2.fmc.gov/readingroom/proceeding/20-02/>, or to the Docket Activity Library at 800 North Capitol Street NW, Washington, DC 20573, 9:00 a.m. to 5:00 p.m., Monday through Friday, except Federal holidays. Telephone: (202) 523-5725.

FOR FURTHER INFORMATION CONTACT: For questions regarding submitting comments or the treatment of confidential information, contact Rachel E. Dickon, Secretary. *Phone:*(202) 523-5725. *Email:* secretary@fmc.gov. For technical questions, contact Florence A. Carr, Director, Bureau of Trade Analysis, Federal Maritime Commission,

800 North Capitol Street, N.W., Washington, D.C. 20573-0001. *Phone:* (202) 523-5796.

E-mail: TradeAnalysis@fmc.gov.

SUPPLEMENTARY INFORMATION:

Introduction:

On September 18, 2018, the Federal Maritime Commission (FMC or Commission) issued a Notice of Filing and Request for Comments to obtain public comments on Petition No. P3-18, the petition of the World Shipping Council (WSC), (Petitioner) pursuant to 46 CFR 502.92 “... for an exemption from service contract filing and essential terms publication requirements set forth at 46 U.S.C 40502(b) and (d), respectively...” Petitioner further petitions the Commission for the initiation of a rulemaking proceeding to amend its service contract regulations set forth at 46 CFR part 530 in a manner consistent with the requested exemption.

Comments were received in support of WSC’s petition from Atlantic Container Line, AB (ACL); the National Industrial Transportation League (NITL); and the Caribbean Shipowners Association (CSO). Frankford Candy LLC (Frankford) and Wheaton Grain Inc. (Wheaton) filed comments opposing the petition.

On December 20, 2019, the Commission issued an order denying in part and granting in part the petition. Specifically, the Commission denied WSC’s request for an exemption from the requirement in 46 U.S.C. 40502(b) that ocean common carriers file service contracts with the Commission. *Pet’n of the World Shipping Council for an Exemption from Certain Provisions of the Shipping Act of 1984, as amended, and for a Rulemaking Proceeding*, Pet. No. P3-18, slip op., (FMC Dec. 20, 2019) (P3-18 Order). In contrast, the Commission granted WSC’s request for an exemption from the requirement in § 40502(d) that carriers publish ETs with each service contract, determining that an exemption from § 40502(d) would not result in a substantial reduction in

competition or be detrimental to commerce. *Id.* The Commission also determined to initiate a rulemaking to implement the ET publication exemption. *Id.*

The Commission is therefore proposing to amend its regulations in part 530 in accordance with the P3-18 Order and requests comment on the proposed changes. The Commission emphasizes that the scope of this rulemaking is limited to amending part 530 in line with the Commission's decision. The merits of WSC's petition and the Commission's findings in the P3-18 Order are outside the scope of this rulemaking.

Background:

The Shipping Act of 1984 (the Shipping Act or the Act) introduced the option for liner services to be priced via negotiated service contracts between ocean common carriers and their shipper customers, rather than solely by public tariffs. Pursuant to the Shipping Act and FMC regulations, ocean freight rates, surcharges, and accessorial charges had to be published in tariffs, or agreed to via a service contract filed with the Commission. Contemporaneous with the filing of service contracts, ocean carriers were required to make publicly available a statement of the essential terms (ET) of the service contract, including the line-haul rate, in tariff format.

The Ocean Shipping Reform Act of 1998 (OSRA) amended the Shipping Act of 1984 to eliminate the requirement that service contract rates be published in the carrier's public tariff. Pub. L. No. 105-258, § 106. One of the primary impacts of OSRA was to render service contract rates confidential, and thus no longer available to ocean carriers and shippers as carrier pricing information. In addition, similarly situated shippers could no longer utilize the rates and terms of published service contracts. Subsequent to OSRA, the ET publication has been limited to: origin and destination port ranges, commodities, minimum volume or portion, and duration. The deletion of rates from the scope of the ET publication protected U.S. exporters from their foreign

competitors who would be able to ascertain proprietary business information from these publicly available essential terms. At the same time, the ET publication was also no longer useful either to shippers in contract negotiations with carriers, or among carriers as a tool in potential pricing coordination.

Discussion:

As explained in the P3-18 Order, the Commission's experience indicates that the publication of Statements of Essential Terms corresponding to individual service contracts is of questionable value. No commenters claimed a use for these publications, nor does the Commission use them in-house inasmuch as the Commission has the ability to access complete service contracts, including rate matrices and contract terms.

In determining how to best implement the determination to exempt carriers from the ET publication requirements in 46 U.S.C. 40502(d), the Commission notes that § 40502(d) and the Commission's regulations at 46 CFR 530.12 require that carriers publish concise Statements of Essential Terms corresponding to individual service contracts in tariff format. In addition to the required Statements of Essential Terms, carriers often include in their ET tariff rules and notices that generally apply to all service contracts. An ocean carrier's ET tariff may therefore comprise two components: (1) tariff rules and notices that generally apply to all service contracts; and (2) the required concise Statements of Essential Terms corresponding to individual service contracts.

The general tariff rules and notices are rarely amended once initially published. Indeed, there are significant benefits to publishing a "blanket" rule or notice in the carrier's ET tariff that applies to most, or all, service contracts, thereby eliminating the potential need to periodically amend hundreds of individual service contracts. In contrast, a Statement of Essential Terms is published in the carrier's tariff when each new service contract is confidentially filed, and typically

must be reviewed by the tariff publisher each time a contract is amended, whether or not it is ultimately determined that the public terms must be updated. In some cases, the Statement of Essential Terms is continuously updated to keep the ET amendment number in sync with the contract amendment number.

Although the Commission has determined to exempt carriers from the requirement that they publish Statements of Essential Terms for individual service contracts, the Commission wants to ensure that carriers continue to publish generally applicable service contract tariff rules and notices. The Commission therefore proposes to replace the requirement in § 530.12 that carriers publish Statements of Essential Terms for individual service contracts with a requirement that carriers publish general service contract rules and notices as a separate part of the individual carrier's automated tariff system. The Commission is also proposing changes to a number of other sections in part 530 to reflect the elimination of the Statement of Essential Terms publication requirements. Finally, the Commission proposes to correct in part 530 outdated references to FMC bureaus and offices, as well as correct an outdated reference to a Department of Defense Command.

Public Participation

How do I prepare and submit comments?

Your comments must be written and in English. To ensure that your comments are correctly filed in the docket, please include the docket number of this document in your comments.

You may submit your comments via email to the email address listed above under ADDRESSES. Please include the docket number associated with this notice and the subject matter in the subject line of the email. Comments should be attached to the email as a Microsoft

Word or text-searchable PDF document. Only non-confidential and public versions of confidential comments should be submitted by email.

You may also submit comments by mail to the address listed above under ADDRESSES.

How do I submit confidential business information?

The Commission will provide confidential treatment for identified confidential information to the extent allowed by law. If your comments contain confidential information, you must submit the following by mail to the address listed above under ADDRESSES:

- A transmittal letter requesting confidential treatment that identifies the specific information in the comments for which protection is sought and demonstrates that the information is a trade secret or other confidential research, development, or commercial information.
- A confidential copy of your comments, consisting of the complete filing with a cover page marked “Confidential-Restricted,” and the confidential material clearly marked on each page. You should submit the confidential copy to the Commission by mail.
- A public version of your comments with the confidential information excluded. The public version must state “Public Version—confidential materials excluded” on the cover page and on each affected page, and must clearly indicate any information withheld. You may submit the public version to the Commission by email or mail.

Will the Commission consider late comments?

The Commission will consider all comments received before the close of business on the comment closing date indicated above under DATES. To the extent possible, we will also consider comments received after that date.

How can I read comments submitted by other people?

You may read the comments received by the Commission at the Commission's Electronic Reading Room or the Docket Activity Library at the addresses listed above under ADDRESSES.

Regulatory Notices and Analysis

Regulatory Flexibility Act

The Regulatory Flexibility Act, 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 for public comment an initial regulatory flexibility analysis describing the impact of the proposed rule on small entities, unless the head of the agency certifies that the rulemaking will not have a significant economic impact on a substantial number of small entities. 5 U.S.C. 603, 605. Accordingly, the Chairman of the Federal Maritime Commission certifies that the proposed rule, if promulgated, will not have a significant impact on a substantial number of small entities. The regulated business entities that would be impacted by the rule are vessel-operating common carriers (VOCCs). The Commission has determined that VOCCs generally do not qualify as small entities under the guidelines of the Small Business Administration (SBA). *See FMC Policy and Procedures Regarding Proper Consideration of Small Entities in Rulemakings* (Feb. 7, 2003), available at https://www.fmc.gov/wp-content/uploads/2018/10/SBREFA_Guidelines_2003.pdf.

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.

The information collection requirements in Part 530, Service Contracts, are currently authorized under OMB Control Number 3072-0065. If approved, this rule would eliminate for VOCCs the publication of concise statements of essential terms in their carrier automated tariff systems. The proposed rule would require VOCCs to continue their general practice of publishing service contract rules and notices in their carrier automated tariff systems. The proposed rule does not make any changes to the requirement to file service contracts with the Commission.

As background, of the 155 vessel-operating common carriers serving the U.S. trades, 68 do not file service contracts with the Commission, and thus would not be impacted by this rulemaking. Further, of the 87 carriers that file service contracts, 31 filed less than ten contracts or amendments thus far in FY 2019, with ten of those only filing 1 contract this fiscal year. Among VOCCs that utilize service contracts more extensively as a pricing mechanism, only 31 filed over 100 original contracts this fiscal year.

With respect to the cost savings associated with eliminating the publication of statements of essential terms corresponding to original service contracts and amendments, the Commission estimates the savings to VOCCs as roughly 41,048 man-hours, for an approximate savings of \$1,987,133 annually.¹ Service contract rules and notices in carrier automated tariff systems, on the other hand, are rarely published or revised, inasmuch as they govern a broad swath of carrier contracts, and many times are intended to quickly and efficiently address an *ad hoc* industry

¹ The Commission's previous service contract rulemaking in Docket No. 16-05 estimated the time associated with preparation of an individual ET publication as 3 minutes. No commenters opposed that estimate. More recently, BTA informally interviewed two major tariff publishers that file service contracts and publish ETs for multiple VOCCs. These tariff publishers estimated the time required to prepare an ET to be 3 to 6 minutes. The larger of the two tariff publishers reported that their 3-minute preparation time was due to its proprietary technological efficiencies. The above-referenced savings are based on the 3-minute preparation time estimate, using the Commission's most recent fiscal year's filing statistics for new contracts and amendments. In FY 2018, 47,962 new service contracts and 772,803 amendments were filed.

situation.² Thus, in any given year, there may be no new service contract rules or notices published in a carrier's automated tariff system. The Commission observes that the benefit of maintaining rules and notices which allow a carrier to avoid revising hundreds of service contracts greatly outweighs the burden of publishing such a notice. The Commission invites comment on this.

Regarding the burden associated with the filing of service contracts with the Commission, a substantial majority of filers, 74 percent, have recognized greater efficiencies by automating their service contract filing processes using the Commission's "web services" automated filing system. Using FY 2018 figures, BTA staff estimates the remaining burden associated with service contract filing to be roughly 3,542 man-hours, or \$402,088 annually.³ Inclusive of the burden associated with the Service Contract Rules Publication requirement,⁴ the entire burden associated with this information collection is calculated as \$3,482,351 for contract filers, a substantial reduction.

In compliance with the PRA, the Commission has submitted the proposed revised information collection to the Office of Management and Budget.

² As one example, a major ocean carrier published a blanket notice in its ET tariff applying to hundreds of its service contracts when it deployed an extra loader vessel to meet unexpected shipper demand. This notice allowed existing contract rates applying to a specifically named service string to also apply to cargo moving on the extra loader vessel, thereby eliminating the VOCC's burden of amending hundreds of service contracts.

³ In the Commission's previous service contract rulemaking in Docket No. 16-05, each service contract filing (new or amendment) was estimated to take 3 minutes. Since that rulemaking, carriers and tariff publishers comprising the highest volume service contract filers have continued automating their filing processes. Filers that implemented the Commission's "web services" automated filing process have advised that minimal software programming was required to facilitate the automated upload of service contracts and amendments. Once automated, contract data can be transmitted into SERVCON in a matter of seconds, without need for human intervention.

⁴ In our OMB filing related to this Information Collection, the burden of maintaining service contract rules and notices is estimated at 87 hours.

Comments are invited on:

- Whether the collection of information is necessary for the proper performance of the functions of the Commission, including whether the information will have practical utility;
- Whether the Commission's estimate for the burden of the information collection is accurate;
- Ways to enhance the quality, utility, and clarity of the information to be collected;
- Ways to minimize the burden of the collection of information on respondents, including the use of automated collection techniques or other forms of information technology.

Please submit any comments, identified by the docket number in the heading of this document, by any of the methods described in the ADDRESSES section of this document.

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 amends the requirements related to the publication of essential terms associated with service contracts. This rulemaking thus falls within the categorical exclusion for actions related to the receipt service contracts (§ 504.4(a)(5)). Therefore, no environmental assessment or environmental impact statement is required.

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, at <http://www.reginfo.gov/public/do/eAgendaMain>.

Proposed Rule:

For the reasons stated in the supplementary information, the Federal Maritime Commission proposes to amend 46 CFR part 530 as follows:

List of Subjects

46 CFR Part 530

Freight, Maritime carriers, Report and recordkeeping requirements.

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.

2. Amend § 530.1 by revising the first sentence to read as follows:

§ 530.1 Purpose

The purpose of this part is to facilitate the filing of service contracts as required by section 8(c) of the Shipping Act of 1984 (“the Act”) (46 U.S.C. 40502). * * *

3. Amend § 530.3 by revising paragraphs (d) and (o) and removing paragraph (s) to read as follows:

§ 530.3 Definitions.

* * * * *

(d) *BTA* means the Commission's Bureau of Trade Analysis or its successor bureau.

* * * * *

(o) *OIT* means the Commission's Office of Information Technology.

* * * * *

4. Amend § 530.5 by revising paragraphs (a) and (c)(1) to read as follows:

§ 530.5 Duty to file.

(a) The duty under this part to file service contracts, amendments, and notices shall be upon the individual carrier party or parties participating or eligible to participate in the service contract.

* * * * *

(c) * * *

(1) *Application.* Authority to file or delegate the authority to file must be requested by a responsible official of the service contract carrier in writing by submitting to BTA the Registration Form (FMC-83) in Exhibit 1 to this part.

* * * * *

5. Amend § 530.8 by revising paragraph (d) introductory text and removing paragraph (d)(4) to read as follows:

§ 530.8 Service Contracts.

* * * * *

(d) Every service contract filed with BTA shall include, as set forth in appendix A to this part by:

* * * * *

§ 530.10 [Amended]

6. Amend § 530.10 by removing paragraph (f).

7. Revise subpart C heading to read as follows.

Subpart C-Publication of Essential Terms

8. Revise § 530.12 to read as follows:

§ 530.12 Rules and Notices.

(a) *Location-(1) Generally.* A statement of service contract rules and notices shall be published as a separate part of the individual ocean common carrier's automated tariff system.

(2) *Multi-party service contracts.* For service contracts in which more than one carrier participates or is eligible to participate, the statement of service contract rules and notices shall be published:

(i) If the service contract is entered into under the authority of a conference agreement, then in that conference's automated tariff system;

(ii) If the service contract is entered into under the authority of a non-conference agreement, then in each of the participating or eligible-to-participate carriers' individual automated tariff systems, clearly indicating the relevant FMC-assigned agreement number.

(b) *Certainty of terms.* The statement of service contract rules and notices described in paragraph (a) of this section may not:

(1) Be uncertain, vague, or ambiguous;

or

(2) Make reference to terms not explicitly detailed in the statement of service contract rules and notices, unless those terms are contained in a publication widely available to the public and well known within the industry.

(c) *Agents.* Common carriers, conferences, or agreements may use agents to meet their publication requirements under this part.

(d) *Commission listing.* The Commission will publish on its website, www.fmc.gov, a listing of the locations of all service contract rules and notices.

9. Amend § 530.13 by revising paragraph (b)(2) to read as follows:

§ 530.13 Exceptions and exemptions.

* * * * *

(b) * * *

(2) *Department of Defense cargo.* Transportation of U.S. Department of Defense cargo moving in foreign commerce under terms and conditions negotiated and approved by the Surface Deployment and Distribution Command and published in a universal service contract. An exact copy of the universal service contract, including any amendments thereto, shall be filed with the Commission as soon as it becomes available.

* * * * *

10. Amend § 530.15 by revising paragraph (c) to read as follows:

§ 530.15 Recordkeeping and audit.

* * * * *

(c) *Production for audit within 30 days of request.* Every carrier or agreement shall, upon written request of the FMC’s Director, Bureau of Enforcement, any Area Representative or the Director, Bureau of Trade Analysis, submit copies of requested original service contracts or their associated records within thirty (30) days of the date of the request.

* * * * *

Appendix A to Part 530 [Amended]

11. In Appendix A revise all references to “BTCL” to read “BTA” and revise all references to “OIRM” to read “OIT”.

By the Commission.

Rachel E. Dickon,
Secretary