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## FEDERAL MARITIME COMMISSION

### 46 CFR Part 502

[Docket No. 16-08]

RIN 3072-AC64

## Rules of Practice and Procedure; Presentation of Evidence in Commission Proceedings

**AGENCY:** Federal Maritime Commission.

**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** The Federal Maritime Commission is proposing to reorganize several subparts of its Rules of Practice and Procedure and revise its rules regarding presentation of evidence in Commission proceedings.

**DATES:** Submit comments on or before July 5, 2016.

**ADDRESSES:** You may submit comments, identified by the docket number in the heading of this document, by any of the following methods:

- E-mail: [secretary@fmc.gov](mailto:secretary@fmc.gov). Include in the subject line: "Docket No. 16-08, Commenter/Company Name." 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: Karen V. Gregory, Secretary, Federal Maritime Commission, 800 North Capitol Street, N.W., Washington, D.C. 20573-0001.

- Docket: For access to the docket to read background documents or comments received, go to: <http://www.fmc.gov/16-08>.

**FOR FURTHER INFORMATION CONTACT:**

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**SUPPLEMENTARY INFORMATION:**

The Commission is proposing to update or reorganize several subparts of 46 CFR part 502, its Rules of Practice and Procedure, and to substantively revise the subpart regarding how hearings are conducted to improve guidance concerning the presentation of evidence in Commission proceedings. Certain current rules would also be removed to clarify current practice and eliminate duplication.

Reorganization of Part 502

Part 502 sets out the rules governing procedure in all types of Commission proceedings. However, after years of revisions, some users find the grouping and ordering of the subparts confusing. The Commission proposes to reorder and rename

certain subparts to better reflect the chronology of a typical adjudication, and to distinguish other types of proceedings, as enumerated in this table:

<b>Current 46 CFR Part 502</b>	<b>Proposed New 46 CFR Part 502</b>	<b>Revisions</b>
Subpart A, General Information		Redesignate § 502.141 as § 502.14
Subpart E, Proceedings; Pleadings; Motions; Replies	Subpart E, Private Complaints and Commission Investigations	Separate subpart E in to subparts E and F, relocate and regroup rules within both subparts
Subpart F, Settlement; Prehearing Procedure	Subpart F, Petitions, Exemptions and Orders to Show Cause	Separate subpart E in to subparts E and F, relocate and regroup rules within both subparts
Subpart J, Hearings; Presiding Officers; Evidence	Subpart L, Presentation of Evidence	Revise several sections and relocate all (see Table below)
Subpart K, Shortened Procedure	Subpart K[Reserved]	Remove subpart K in its entirety
Subpart L, Disclosures and	Subpart J, Disclosures and	Relocate and redesignate all rules

Discovery	Discovery	to subpart J
Subpart M, Briefs; Requests for Findings; Decisions; Exceptions	Subpart M; Decisions, Appeals, Exceptions	Relocate § 502.153, remove § 502.222 and retitle

Subpart A

In subpart A several cross references would be corrected and current § 502.141 that establishes the Commission may hold hearings that are not part of an adjudicatory process, would be moved to this subpart as general information and retitled.

Subpart D

Cross references are corrected in subpart D.

Subpart E

Subpart E, currently “Proceedings, Pleading, Motions, Replies” would apply only to adjudications of private complaints and Commission investigations and would be renamed “Private Complaints and Commission Investigations.” Revised subpart E would contain the procedures for institution of those proceedings, motions practice, opportunity for settlement, and other related rules. Section 502.61 which opens the subpart would be revised by moving and amending a rule on notice of hearings from subpart J.

Subpart F

Current subpart F addresses Settlement and Prehearing Procedure. Inasmuch as those subject areas are part of the process in adjudicatory proceedings, they would be divided and moved into subpart E and a revised subpart L governing presentation of evidence.

Subpart F would be revised to apply to proceedings other than private complaints and Commission investigations, titled: “Petitions, Exemptions, and Orders to Show Cause.” These types of proceedings are generally distinct from complaint and investigation proceedings. With clear headings, the proposed rules are intended to be easier for the user to locate. Revised subpart F would encompass current §§ 502.73 through 502.77.

#### Subparts J, and L

The Commission proposes changes to subpart J, “Hearings; Presiding Officers; Evidence”, and subpart L, “Disclosure and Discovery” to more logically and chronologically group the processes conducted in a formal adjudication. Subpart L, Disclosure and Discovery would be moved in its entirety to subpart J. Current subpart J, Hearings, would be revised to encompass all rules governing the presentation of evidence and presented in revised subpart L titled “Presentation of Evidence.” The proposed revisions to subpart J are discussed more extensively below.

#### Subpart K

The Commission proposes to remove and reserve subpart K, “Shortened Procedure.” Shortened procedure provides that, if the respondent consents, after briefing by the parties, the record is closed and a decision may be issued without discovery or an oral hearing. The procedure has rarely been requested, although parts of the procedure

have become standard practice (e.g. not requiring an oral hearing). The procedure has not resulted in an ALJ decision in recent history, as the three proceedings utilizing shortened procedure since 1998 have resulted in settlement. The Commission has made several rule revisions in the past five years that have enhanced the efficiency of formal complaint proceedings including the requirement for initial disclosures in discovery, (current § 502.201), and the establishment of default rules in the absence of an answer, § 502.62(b)(6). Shortened procedure rules are not consistent with the requirement for initial disclosures, which help expedite all proceedings. If parties want to further limit discovery, that is possible without the provisions of Subpart K. Moreover the subparts S and T small claims proceedings may offer a solution to litigants seeking faster resolution of their disputes. The rules governing small claims proceedings are designed to make the litigation process faster and simpler for litigants seeking reparations of \$50,000 or less.

#### Subpart M

The Commission proposes to revise subpart M to cover only matters that occur after conclusion of the parties' presentations in proceedings (i.e., decisions, appeals and exceptions). The rules concerning briefs would be moved into revised subpart L, "Presentation of Evidence." However, rules governing briefs to accompany exceptions will remain in subpart M. Current § 502.153, Appeal from ruling of presiding officer other than orders or dismissal in whole or in part, would be moved into subpart M as it concerns an appeal.

<b>Subpart M Current Section</b>	<b>Proposed New Section</b>	<b>Revisions</b>
§ 502.221, Briefs; requests for findings	Subpart L, § 502.214, Briefs	Revised for clarity
§ 502.222, Requests for enlargement of time for filing briefs	Subpart L, § 502.215	Revised for clarity
§§ 502.223 through 502.229	Text unchanged	
§ 502.230, Reopening by presiding officer or Commission	§ 502.230, Reopening by Commission	Rule concerning supplementing evidence prior to an initial decision would be moved to § 502.216, Supplementing the record

Subpart J, Hearings - Presentation of evidence

Currently subpart J, Hearings, presents the Commission’s rules on hearings and presentation of evidence. The Commission proposes that these rules governing presentation of evidence be revised and presented in revised subpart L. The proposed revisions are intended to reflect the procedures currently used by the Commission, to utilize current language and standards set by the Federal Rules of Civil Procedure where appropriate, and to clarify and simplify rules where possible. Several rules currently in the subpart would be removed in their entirety to eliminate duplication and reflect current practice. The proposed revisions to subpart J are enumerated in the table below:

<b>Subpart J Current Section</b>	<b>Proposed New Subpart L</b>	<b>Revisions</b>
§ 502.141, Hearings not required by statute	Move to subpart A	Does not pertain to adjudicatory hearings
§ 502.142, Hearings required by statute	§ 502.201, Applicability and Scope	Revised to define “hearing”
§ 502.143, Notice of nature of hearing,	Moved to § 502.61(c),	

jurisdiction and issues	Proceedings	
§ 502.144, Notice of time and place of hearing; postponement of hearing.	§ 502.211	Regroup with other rules pertaining only to oral hearings
§§ 502.145 through 502.149[Reserved]		
§ 502.150, Further evidence required by presiding officer during hearing	Remove	Within presiding officer's authority to regulate a hearing in § 502.25(b)(3)
§ 502.151, Exceptions to rulings of presiding officer unnecessary	§ 502.212	Regroup with other rules pertaining only to oral hearings
§ 502.152, Offer of Proof	§ 502.204(b)	Moved because related to admissibility
§ 502.153, Appeal from ruling of presiding officer other than orders of dismissal in whole or in part	Subpart M, § 502.221	Revised and moved to subpart M as it concerns an appeal
§ 502.154, Rights of parties as to presentation of evidence	§ 502.202	Revised to mirror APA
§ 502.155, Burden of proof	§ 502.203	Revised for clarity
§ 502.156, Evidence admissible	§ 502.204	Revised to clarity
§ 502.157, Written evidence	Removed	Within presiding officer's authority to regulate a hearing in § 502.25(b)(3)
§ 502.158, Documents containing matter not material	Removed	Within presiding officer's authority to regulate a hearing in § 502.25(b)(3)
§ 502.159 [Reserved]		
§ 502.160, Records in other proceedings	§ 502.205	
§ 502.161,	§ 502.206,	Revised for clarity

Commission's files	Incorporation by reference	
§ 502.162, Stipulations	§ 502.207	Revised for clarity
§ 502.163, Receipt of documents after hearing	Removed	Covered by proposed § 502.216, Supplementing the record
§ 502.164, Oral argument at hearing	Removed	Within presiding officer's authority to regulate a hearing in § 502.25(b)(3)
§ 502.165, Official Transcript	§ 502.213	Revised and modernized
§ 502.166, Correction of transcript	§ 502.213	
§ 502.167, Objection to public disclosure of information	§ 502.208	Revised to cross reference § 502.5
§ 502.168, Copies of data or evidence	Removed	Covered by proposed § 502.212
§ 502.169, Record of decision	§ 502.217	Revised for clarity

Following is a more detailed description of each proposed rule that would appear in revised subpart L.

Proposed § 502.201, Applicability and Scope.

Proposed § 502.201 is derived and moved from current § 502.142 and sets out the proceedings for which the rules in the subpart will apply. The term hearing would be defined as “a formal adjudicatory proceeding in which evidence is presented orally, or through written statement, or by combination thereof” to reflect the broader and more inclusive meaning of the term in current administrative practice.

Proposed § 502.202, Rights of parties as to presentation of evidence.

Proposed § 502.202 is derived and moved from current § 502.154 but would be revised to reflect that the presiding officer may limit introduction of evidence if it is

“irrelevant, immaterial, or unduly repetitious” mirroring the Administrative Procedure Act.

Proposed § 502.203, Burden of proof.

Proposed § 502.203 is derived and moved from current § 502.155 and clarifies the language to include reference to motions for ease of understanding the burden of proof.

Proposed § 502.204, Evidence admissible.

Currently § 502.156 states “[u]nless inconsistent with the requirements of the Administrative Procedure Act and these Rules, the Federal Rules of Evidence . . . will also be applicable.” The proposed revision would simplify the standard. Proposed § 502.204 would revise § 502.156 by restating the Administrative Procedure Act (APA) standard for admissibility that allows admission of all evidence which is relevant, material, reliable, and probative, and not unduly repetitious or cumulative, and by stating that the Presiding Officer may also look to the Federal Rules of Evidence (FRE) for guidance. The Commission is particularly interested to receive comment from the public on this particular revision and the applicability of the Federal Rules of Evidence.

The Commission adopted the original language in § 502.156 in 1976, shortly after the FRE went into effect. 41 FR 20585, 20588 (May 19, 1976). In the 1975 notice proposing the language, the Commission stated that the FRE could be of great use to the Commission’s ALJs in disposing of evidentiary issues that arise in Commission proceedings, so long as they were consistent with the requirements of the APA. 40 FR 43295, 43927 (September 24, 1975). The Commission went on to assert that, as a general matter, the FRE did not appear to be inconsistent with the APA. *Id.*

In the years since the Commission promulgated this section, however, it has been generally acknowledged that there are, in fact, meaningful distinctions between the FRE and the APA. Specifically, the FRE are exclusionary in nature and were designed for jury trials in order to allow a presiding officer to determine what evidence a body of lay jurors should consider. *See, e.g.*, Richard J. Pierce, Jr., 2 Admin. Law Treatise 909, Section 10, Evidence, 5<sup>th</sup> Ed. (2010). The APA, on the other hand, is founded on the principle that the presiding officer who is the decision maker is qualified to determine what evidence is relevant, probative and substantial.

The inconsistencies between the FRE and APA standards were evidently not apparent to the Commission when it adopted the language in § 502.156 in 1976. The rulemaking notices and the regulatory text reflect the assumption that both the APA and FRE could be applied in most circumstances without issue. Since promulgation of the section, however, the Commission “has recognized the liberal standards of admissibility of evidence in administrative proceedings and has repeatedly ‘. . . identified the need for considerable relaxation of the rules of evidence followed by the federal courts in proceedings before the Commission.’” *Euroussa Shipping, Inc., et al – Possible Violations*, 31 S.R.R. 540, 547 (FMC 2008) (quoting *Pacific Champion Express Co., Ltd. – Possible Violations*, 28 S.R.R. 1102, 1105–06 (ALJ 1999)). Given the divergence between the FRE and APA standards, the section’s attempt to apply both standards simultaneously creates a tension in the regulation and could be confusing to parties.

In 1986, the Administrative Conference of the United States (ACUS) published recommendations regarding the use of the FRE in administrative proceedings. ACUS compared three general categories of agency evidentiary rules. 1986 ACUS 6, 51 FR

25642. The category that is most analogous to § 502.156 included “rules that require presiding officers to apply the [FRE] ‘so far as practicable.’” *Id.* ACUS identified four significant disadvantages with respect to this standard including:

(1) Courts seem confused as to what it means or how to enforce it; (2) instructing presiding officers to exclude evidence based on the standard forces them to undertake a difficult and hazardous task; (3) excluding evidence on the basis that it is inadmissible in a jury trial is totally unnecessary to insure that agencies act only on the basis of reliable evidence; and (4) agencies, like other experts, should be permitted to rely on classes of evidence broader than those that can be considered by lay jurors.

*Id.* Accordingly, ACUS recommended that “Congress should not require agencies to apply the [FRE], with or without the qualification ‘so far as practicable,’ to limit the discretion of presiding officers to admit evidence in formal adjudications.” *Id.* ACUS also recognized, however, the disadvantages of relying on the APA standard alone, and the Commission has tentatively concluded that the FRE can be useful as a guide for litigants and presiding officers. Accordingly, the Commission is proposing to explicitly provide that presiding officers may look to the FRE for guidance when determining the admissibility of evidence.

The text of current § 502.152 has been modernized to clarify the procedures governing when and how to make an offer of proof. The rule is moved into revised § 502.204 as paragraph (b) as a logical part of the rule governing admissibility of evidence.

Proposed §§ 502.205 and 502.206, Documents incorporated into the record by reference

Revising current § 502.160 (proposed § 502.205) allows documents in another Commission proceeding to be incorporated into the record by reference. Proposed § 502.206 would allow material in any document on file with the Commission that is also available to the public to be incorporated into the record by reference.

Proposed § 502.207, Stipulations

Current § 502.162 allows for stipulation. The Commission proposes to move the rule to § 502.207 and to revise the language of that rule for clarity.

Proposed § 502.208, Objection to public disclosure of information

Proposed § 502.208 would revise current § 502.167, Objection to public disclosure of information. The proposed change would add a cross reference to § 502.5 where the Commission recently spelled out its requirements for submission of confidential material in a final rule. 80 FR 14318 (March 19, 2015).

Proposed §§ 502.209 and 502.210, Prehearing conference and statements

Current §§ 502.94 and 502.95 would be moved from subpart E as they pertain to hearings. No substantive revisions would be made to the content of these rules.

Proposed §§ 502.211 through 502.213, Oral Hearings

Proposed §§ 502.211 through 502.213 would deal with oral hearings and would consist of the provisions found in current §§ 502.144, 502.151, and 502.165. Current § 502.165, Official transcript, requires revision as it currently contains a description of section 11 of the Federal Advisory Committee Act (FACA) and the Office of Management and Budget's (OMB) interpretation of that section, which are the basis for the Commission's regulations with respect to obtaining copies of transcripts. In order to simplify these provisions, the Commission is proposing to include in the new § 502.213

only the relevant requirements and to delete the aforementioned references to FACA and OMB's interpretation.

Proposed §§ 502.214 and 502.215, Briefs.

Sections 502.221 and 502.222 concerning briefs would be included in this subpart and renumbered as §§ 502.214 and 502.215. The last sentence of § 502.221(a), which requires that the period of time for filing briefs will be the same for both parties, would be removed as setting time is within the powers of the presiding officer as established in recently revised § 502.25. Section 502.221(c) would be deleted as it is not current practice for the Presiding Officer to “require the Bureau of Enforcement to file a request for findings of fact and conclusions within a reasonable time prior to the filing of briefs.” Generally, the Commission's Bureau of Enforcement (BOE) files the first brief unless concurrent briefs are appropriate for the particular case; this is more appropriate to address in the scheduling order issued in each particular proceeding.

Proposed § 502.216 Supplementing the record.

Current § 502.230(a), Motion to Reopen, would be renumbered, renamed and revised to provide instructions concerning submission of evidence after final presentations in a proceeding and prior to issuance of an initial decision. The language of the proposed rule and the proposed heading “Supplementing the record” is more descriptive of the current practice before the Commission's Administrative Law Judges but does not substantively revise the process or rights of a party to a proceeding.

§ 502.217, Record of decision.

Current § 502.169 would be moved to subpart L and the reference to “filing and motions” instead of “paper and requests.”

## **Rulemaking Analyses and Notices**

### **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 for public comment an initial regulatory flexibility analysis (IRFA) describing the impact of the proposed rule on small entities. 5 U.S.C. 603. An agency is not required to publish an IRFA, 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.

Although the Commission has elected to seek public comment on its proposed regulatory amendments to part 502, these amendments concern the Commission’s and procedures. Therefore, the APA does not require publication of a notice of proposed rulemaking in this instance, and the Commission is not required to prepare an IRFA.

### **Paperwork Reduction Act**

The Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3521) 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 Commission is not proposing any collections of information, as defined by 44 U.S.C. 3502(3) and 5 CFR 1320.3(c), as part of this proposed rule.

#### 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 in 46 CFR Part 502**

Administrative practice and procedure, Archives and records, Business and industry, Classified information, Confidential business information, Consumer protection, Freedom of information, Government in the Sunshine Act, Government publications, Health records, Information, Newspapers and magazines, Paperwork requirements, Printing, publications, Privacy, Public meetings, Record retention, Records, Reporting and recordkeeping requirements, Trade names, Trade practices.

For the reasons stated in the preamble, the Federal Maritime Commission proposes to amend 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, 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; E.O. 11222 of May 8, 1965.

#### **§ 502.5 [Amended]**

2. Amend § 502.5:

- a. In the introductory text, by removing the phrase "502.167, 502.201(j)(1)(vii)" and adding in its place the phrase "502.141(j)(1)(vii), 502.208", and by removing the reference "§ 502.201(j)" and adding in its place the reference "§ 502.141(j)"; and

- b. In paragraph (b) by removing the reference "§ 502.201(j)(1)(vii)" and adding in its place the reference "§ 502.141(j)(1)(vii)".

#### **§ 502.6 [Amended]**

3. Amend § 502.6(c) by removing the phrase "§ 502.203 or § 502.204" and adding in its place the phrase "§ 502.143 or § 502.144".

#### **§ 501.10 [Amended]**

4. Amend § 502.10 by removing the reference "502.153" and adding in its place the reference "502.221".

### **Subpart D – Rulemaking**

#### **§ 502.52 [Amended]**

5. Amend § 502.52 by removing the citation "§ 502.143" and adding in its place the citation "§ 502.61(c)".

**§ 502.53 [Amended]**

6. Amend § 502.53(a) by removing the reference “subpart J” and adding in its place the reference “subpart L”.

**Subpart E – Private Complaints and Commission Investigations**

7. Revise the subpart E heading to read as set forth above.
8. Amend § 502.61 by removing the words “under normal or shortened procedures (subpart K)” and the last sentence from paragraph (a); redesignating paragraph (b) as paragraph (d) and adding a new paragraph (b) and paragraph (c) to read as follows:

**§ 502.61 Proceedings**

\* \* \* \* \*

(b) The Commission may commence a proceeding for a rulemaking, for an adjudication (including Commission enforcement action under § 502.63), or a non-adjudicatory investigation upon petition or on its own initiative by issuing an appropriate order.

(c) Persons entitled to notice of hearings, except those notified by complaint service under § 502.113, will be duly and timely informed of the nature of the proceeding, the legal authority and jurisdiction under which the proceeding is conducted, and the terms, substance, and issues involved, or the matters of fact and law asserted, as the case may be. Such notice will be published in the Federal Register unless all persons subject thereto are named and either are served or otherwise have notice thereof in accordance with law.

\* \* \* \* \*

**§ 502.69 [Amended]**

9. Amend § 502.69(f) by removing “shortened procedure (subpart K of this part)” and removing the citation “§ 502.221” and adding in its place the citation “§ 502.214”.

**Subpart F – Petitions, Exemptions, and Orders to Show Cause**

10. Revise the subpart F heading to read as set forth above.

**§§ 502.91 through 502.95 [Removed]**

11. Remove §§ 502.91 through 502.95.

**§§ 502.73 through 502.77 [Redesignated as §§ 502.91 through 502.95]**

12. Redesignate §§ 502.73 through 502.77 as §§ 502.91 through 502.95, respectively, and place them under subpart F.

**§§ 502.78 and 502.79 [Redesignated as §§ 502.73 and 502.74]**

13. Redesignate §§ 502.78 and 502.79 as §§ 502.73 and 502.74, respectively, in subpart E.

14. Add a new § 502.75 to subpart E to read as follows:

**§ 502.75 Opportunity for informal settlement.**

(a) Parties are encouraged to make use of all the procedures of this part that are designed to simplify or avoid formal litigation, and to assist the parties in reaching settlements whenever it appears that a particular procedure would be helpful.

(b) Where time, the nature of the proceeding, and the public interest permit, all interested parties will have the opportunity for the submission and consideration of facts,

argument, offers of settlement, or proposal of adjustment, without prejudice to the rights of the parties.

(c) No settlement offer, or proposal will be admissible in evidence over the objection of any party in any hearing on the matter.

(d) As soon as practicable after the commencement of any proceeding, the presiding officer will direct the parties or their representatives to consider the use of alternative dispute resolution, including but not limited to mediation, and may direct the parties or their representatives to consult with the Federal Maritime Commission Alternative Dispute Resolution Specialist about the feasibility of alternative dispute resolution.

(e) Any party may request that a mediator or other neutral be appointed to assist the parties in reaching a settlement. If such a request or suggestion is made and is not opposed, the presiding officer will appoint a mediator or other neutral who is acceptable to all parties, coordinating with the Federal Maritime Commission Alternative Dispute Resolution Specialist. The mediator or other neutral will convene and conduct one or more mediation or other sessions with the parties and will inform the presiding officer, within the time prescribed by the presiding officer, whether the dispute resolution proceeding resulted in a resolution or not, and may make recommendations as to future proceedings. If settlement is reached, it will be submitted to the presiding officer who will issue an appropriate decision or ruling. All such dispute resolution proceedings are subject to the provisions of subpart U of this part.

(f) Any party may request that a settlement judge be appointed to assist the parties in reaching a settlement. If such a request or suggestion is made and is not opposed, the presiding officer will advise the Chief Administrative Law Judge who may appoint a settlement judge who is acceptable to all parties. The settlement judge will convene and preside over conferences and settlement negotiations and will report to the presiding officer within the time prescribed by the Chief Administrative Law Judge, on the results of settlement discussions with appropriate recommendations as to future proceedings. If settlement is reached, it must be submitted to the presiding officer who will issue an appropriate decision or ruling. [Rule 75.]

15. Revise the newly redesignated § 502.91 to read as follows:

**§ 502.91 Order to show cause.**

The Commission may institute a proceeding by order to show cause. The order will be served upon all persons named therein, will include the information specified in § 502.221, will require the person named therein to answer, and may require such person to appear at a specified time and place and present evidence upon the matters specified. [Rule 91.]

**Exhibit No. 1 to Subpart F of Part 502 [Removed]**

16. Remove heading, “Exhibit No. 1 to Subpart F of Part 502”.

**Subpart H – Service of Documents**

**§ 502.114 [Amended]**

17. Amend § 502.114(a) by removing the citation “§ 502.145” and adding in its place the citation “§ 502.131”.

**§ 502.118 [Removed]**

18. Remove § 502.118.

**Subpart I – Subpoenas**

**§ 502.132 [Amended]**

19. Amend § 502.132(c) by removing the citation “§ 502.203” and adding in its place the citation “§ 502.143”.

**§ 502.136 [Amended]**

20. Amend § 502.136 by removing the citation “§ 502.210(b)” and adding in its place the citation “§ 502.150(b)”.

**Subpart J – Disclosures and Discovery**

21. Revise the subpart J heading to read as set forth above.

22. Redesignate § 502.141 as § 502.14, place it under subpart A, and revise the section heading to read as follows:

**§ 502.14 Public hearings.**

\* \* \* \* \*

**§§ 502.142 through 502.150 [Removed]**

23. Remove §§ 502.142 through 502.150.

**§§ 502.201 through 502.210 [Redesignated as §§ 502.141 through 502.150]**

24. Redesignate §§ 502.201 through 502.210 as §§ 502.141 through 502.150, respectively, and place them under subpart J.

**§ 502.143 [Amended]**

25. Amend newly redesignated § 502.143:

- a. In paragraph (a)(1) by removing the citation “§ 502.203(a)(2)” and adding in its place the citation “§ 502.143(a)(2);
- b. In paragraph (a)(2)(i) by removing the citation “§ 502.204” and adding in its place the citation “§ 502.144”;
- c. In paragraph (b)(2) by removing the citation “§ 502.206” and adding in its place the citation “§ 502.146”;
- d. In paragraph (b)(5)(i) by removing the citation “§ 502.202” and adding in its place the citation “§ 502.142”;
- e. In paragraph (b)(5)(ii) by removing the citation “§ 502.203(b)(5)(i)(A)” and adding in its place the citation “§ 502.143(b)(5)(i)(A)”;
- f. In paragraph (c)(1) by removing the citation “§ 502.154” and adding in its place the citation “§ 502.202” and by removing the citation “§ 502.203(b)(3)” and adding in its place the citation “§ 502.143(b)(3)”;
- g. In paragraph (c)(2) by removing the citation “§ 502.203(d)(2)” and adding in its place the citation “§ 502.143(d)(2)”;
- h. In paragraph (d)(1) by removing the citation “§ 502.201(e)(2)” and adding in its place the citation “§ 502.141(e)”;
- i. In paragraph (d)(2)(ii) by removing the citation “§ 502.201(j)” and adding in its place the citation “§ 502.141(j)”;
- and
- j. In paragraph (e)(2) by removing the citation “§ 502.203(f)(1)” and adding in its place the citation “§ 502.143(f)(1)”.

**§ 502.144 [Amended]**

26. Amend newly redesignated § 502.144:

- a. In paragraph (a)(2)(i) by removing the citation “§ 502.203” and adding in its place the citation “§ 502.143”;
- b. In paragraph (1)(4) by removing the citation “§ 502.203(b)(6)” and adding in its place the citation “§ 502.143(b)(6)”.

**§ 502.145 [Amended]**

27. Amend newly redesignated § 502.145:

- a. In paragraph (a)(1) by removing the citation “§ 502.201(e)(2)” and adding in its place the citation “§ 502.141(e)(2)”;
- b. In paragraph (a)(2) by removing the citation “§ 502.201(e) and (f)” and adding in its place the citation “§ 502.141(e) and (f)” ; and
- c. In paragraph (b)(2) by removing the citation “§ 502.201(l)” and adding in its place the citation “§ 502.141(l)”.

**§ 502.146 [Amended]**

28. Amend newly redesignated § 502.146:

- a. In paragraph (a) by removing the citation “§ 502.201(e) and (f)” and adding in its place the citation “§ 502.141(e) and (f)”;
- b. In paragraph (b)(2) by removing the citation “§ 502.201(l)” and adding in its place the citation “§ 502.141(l)”.

**§ 502.147 [Amended]**

29. Amend newly redesignated § 502.147(a)(3) by removing the citation “§ 502.201(l)” and adding in its place the citation “§ 502.141(l)”.

**§ 502.148 [Amended]**

30. Amend newly redesignated § 502.148(a) by removing the citation “§§ 502.202 through 502.207” and adding in its place the citation “§§ 502.142 through 502.147”.

**§ 502.149 [Amended]**

31. Amend newly redesignated § 502.149:
- a. In paragraph (a)(1)(iii) by removing the citation “§ 502.209(a)(2) through (7)” and adding in its place the citation “§ 502.149(a)(2) through (7)”;
  - b. In paragraph (a)(2) by removing the citation “§ 502.156 of subpart J” and adding in its place the citation “§ 502.204 of subpart L”;
  - c. In paragraph (a)(3) by removing the phrase “§ 502.203(b)(6) or § 502.204(a)(4)” and adding in its place the phrase “§ 502.143(b)(6) or § 502.144(a)(4);
  - d. In paragraph (a)(7) by removing the citation “§ 502.156 of subpart J” and adding in its place the citation “§ 502.204 of subpart L”;
  - e. In paragraph (b) by removing the phrase “§ 502.202(b) and § 502.209(d)(3)” and adding in its place the phrase “§ 502.142(b) and § 502.149(d)(3)”; and
  - f. In paragraph (d)(3)(iii) by removing the citation “§ 502.204” and adding in its place the citation “§ 502.144”.

**§ 502.150 [Amended]**

32. Amend newly redesignated § 502.150(a)(1) by removing the citation “§ 502.201” and adding in its place the citation “§ 502.141” and by removing the citation “§ 502.206” and adding in its place the citation “§ 502.146”.

**§§ 502.151 through 502.169 [Removed and reserved]**

33. Remove and reserve §§ 502.151 through 502.169.

**Subpart K [Removed and reserved]**

34. Remove and reserve subpart K, consisting of §§ 502.181 through 502.187.

35. Revise subpart L to read as follows:

**Subpart L – Presentation of Evidence**

Sec.

502.201 Applicability and scope.

502.202 Right of parties to present evidence.

502.203 Burden of proof.

502.204 Evidence admissible.

502.205 Records in other proceedings.

502.206 Documents incorporated into the record by reference.

502.207 Stipulations.

502.208 Objection to public disclosure of information.

502.209 Prehearing conference.

502.210 Prehearing statements.

502.211 Notice of time and place of oral hearing; postponement of hearing.

502.212 Exceptions to rulings of presiding officer unnecessary.

502.213 Official transcript.

502.214 Briefs; requests for findings.

502.215 Requests for enlargement of time for filing briefs.

502.216 Supplementing the record.

502.217 Record of decision.

**§ 502.201 Applicability and scope.**

(a) The rules in this subpart apply to adjudicatory proceedings conducted under the statutes administered by the Commission involving matters which require determination after notice and opportunity for hearing. Adjudicatory proceedings are formal proceedings commenced upon the filing of a sworn complaint or by Order of the Commission. Such proceedings will be conducted pursuant to the Administrative Procedure Act, 5 U.S.C. 554, and the rules in this subpart.

(b) The term hearing means a formal adjudicatory proceeding in which evidence is presented orally, or through written statements, or by combination thereof. The term oral hearing means a hearing at which evidence is presented through oral testimony of a witness. [Rule 201].

**§ 502.202 Right of parties to present evidence.**

Every party has the right to present its case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. The presiding officer, however, has the right and duty to limit the introduction of evidence and the examination and cross-examination of witnesses when, in his or her judgment, such evidence or examination is irrelevant, immaterial, or unduly repetitious. [Rule 202.]

**§ 502.203 Burden of proof.**

In all cases governed by the requirements of the Administrative Procedure Act, 5 U.S.C. 556(d), the burden of proof is on the proponent of the motion or the order. [Rule 203.]

**§ 502.204 Evidence admissible.**

(a) In any proceeding under the rules in this part and in accordance with the Administrative Procedure Act, all evidence which is relevant, material, reliable and probative, and not unduly repetitious or cumulative, will be admissible. All other evidence will be excluded. The Presiding Officer may look to the Federal Rules of Evidence for guidance.

(b) A party who objects to a ruling of the presiding officer rejecting or excluding proffered evidence may make an offer of proof. If the ruling excludes proffered oral testimony, an offer of proof may consist of a statement by counsel of the substance of the evidence that would be adduced, or in the discretion of the presiding officer, testimony of the witness. If the ruling excludes documentary evidence or reference to documents or records, the evidence shall be marked for identification and will constitute the offer of proof. [Rule 204.]

**§ 502.205 Records in other proceedings.**

Portions of the record of other proceedings may be received in evidence. A true copy of such portion must be presented for the record in the form of an exhibit unless the presiding officer accepts the parties' stipulation that such portion may be incorporated by reference. [Rule 205.]

**§ 502.206 Documents incorporated into the record by reference.**

Any matter contained in a document on file with the Commission that is available to the public may be received in evidence through incorporation by reference without producing such document, provided that the matter so offered is specified in such manner as to be clearly identified, with sufficient particularity, and readily located electronically.

[Rule 206.]

**§ 502.207 Stipulations.**

The parties may, and are encouraged, to stipulate any facts involved in the proceeding and include them in the record with the consent of the presiding officer. A stipulation may be admitted even if all parties do not agree, provided that any party who does not agree to the stipulation has the right to cross-examine and offer rebuttal evidence. [Rule 207.]

**§ 502.208 Objection to public disclosure of information.**

(a) If any party wishes to present confidential information or upon objection to public disclosure of any information sought to be elicited, the requirements and procedures in § 502.5 will apply.

(b) In an oral hearing, the presiding officer may in his or her discretion order that a witness will disclose such information only in the presence of the parties and those designated and authorized by the presiding officer. Any transcript of such testimony will be held confidential to the extent the presiding officer determines. Copies of transcripts

will be served only to authorized parties or their representatives or other parties as the presiding officer may designate.

(c) Any information given pursuant to this section may be used by the presiding officer or the Commission if deemed necessary to a correct decision in the proceeding.

[Rule 208.]

**§ 502.209 Prehearing conference.**

(a)(1) Prior to any hearing, the Commission or presiding officer may direct all interested parties, by written notice, to attend one or more prehearing conferences for the purpose of considering any settlement under § 502.91, formulating the issues in the proceeding and determining other matters to aid in its disposition. In addition to any offers of settlement or proposals of adjustment, the following may be considered:

- (i) Simplification of the issues;
- (ii) The necessity or desirability of amendments to the pleadings;
- (iii) The possibility of obtaining admissions of fact and of documents that will avoid unnecessary proof;
- (iv) Limitation of the number of witnesses;
- (v) The procedure to be used at the hearing;
- (vi) The distribution to the parties prior to the hearing of written testimony and exhibits;
- (vii) Consolidation of the examination of witnesses by counsel;

(viii) Such other matters as may aid in the disposition of the proceeding.

(2) Prior to the hearing, the presiding officer may require, exchange of exhibits and any other material that may expedite the hearing. The presiding officer will assume the responsibility of accomplishing the purposes of the notice of prehearing conference so far as this may be possible without prejudice to the rights of any party.

(3) The presiding officer will rule upon all matters presented for decision, orally upon the record when feasible, or by subsequent ruling in writing. If a party determines that a ruling made orally does not cover fully the issue presented, or is unclear, such party may petition for a further ruling within ten (10) days after receipt of the transcript.

(b) In any proceeding under the rules in this part, the presiding officer may call the parties together for an informal conference prior to the taking of testimony, or may recess the hearing for such a conference, with a view to carrying out the purposes of this section.

(c) At any prehearing conference, consideration may be given to whether the use of alternative dispute resolution would be appropriate or useful for the disposition of the proceeding whether or not there has been previous consideration of such use. [Rule 209.]

**§ 502.210 Prehearing statements.**

(a) Unless a waiver is granted by the presiding officer, it is the duty of all parties to a proceeding to prepare a statement or statements at a time and in the manner to be established by the presiding officer provided that there has been reasonable opportunity for discovery. To the extent possible, joint statements should be prepared.

(b) The prehearing statement must state the name of the party or parties on whose behalf it is presented and briefly set forth the following matters, unless otherwise ordered by the presiding officer:

(1) Issues involved in the proceeding.

(2) Facts stipulated pursuant to the procedures together with a statement that the party or parties have communicated or conferred in a good faith effort to reach stipulation to the fullest extent possible.

(3) Facts in dispute.

(4) Witnesses and exhibits by which disputed facts will be litigated.

(5) A brief statement of applicable law.

(6) The conclusion to be drawn.

(7) Suggested time and location of hearing and estimated time required for presentation of the party's or parties' case.

(8) Any appropriate comments, suggestions, or information which might assist the parties in preparing for the hearing or otherwise aid in the disposition of the proceeding.

(c) The presiding officer may, for good cause shown, permit a party to introduce facts or argue points of law outside the scope of the facts and law outlined in the prehearing statement. Failure to file a prehearing statement, unless waiver has been granted by the presiding officer, may result in dismissal of a party from the proceeding,

dismissal of a complaint, judgment against respondents, or imposition of such other sanctions as may be appropriate under the circumstances.

(d) Following the submission of prehearing statements, the presiding officer may, upon motion or otherwise, convene a prehearing conference for the purpose of further narrowing issues and limiting the scope of the hearing if, in his or her opinion, the prehearing statements indicate lack of dispute of material fact not previously acknowledged by the parties or lack of legitimate need for cross-examination and is authorized to issue appropriate orders consistent with the purposes stated in this section.

[Rule 210.]

**§ 502.211 Notice of time and place of oral hearing; postponement of hearing.**

(a) The notice of an oral hearing will designate the time and place the person or persons who will preside, and the type of decision to be issued. The date or place of a hearing for which notice has been issued may be changed when warranted. Reasonable notice will be given to the parties or their representatives of the time and place of the change thereof, due regard being had for the public interest and the convenience and necessity of the parties or their representatives. Notice may be served by mail, facsimile transmission, or electronic mail.

(b) Motions for postponement of any hearing date must be filed in accordance with § 502.104. [Rule 211.]

**§ 502.212 Exceptions to rulings of presiding officer unnecessary.**

A formal exception to a ruling or order is unnecessary. When the ruling or order is requested or made, the party doing so need only state the action that it wants the

presiding officer to take or that it objects to, along with the grounds for the request or objection. Failing to object does not prejudice a party who had no opportunity to do so when the ruling or order was made. [Rule 212.]

**§ 502.213 Official transcript.**

(a) The Commission will designate the official reporter for all hearings. The official transcript of testimony taken, together with any exhibits and any briefs or memoranda of law filed therewith, will be filed with the Commission. Transcripts of testimony will be available in any proceeding under the rules in this part, at actual cost of duplication.

(b)(1) Where the Commission does not request daily copy service, any party requesting such service must bear the incremental cost of transcription above the regular copy transcription cost borne by the Commission, in addition to the actual cost of duplication. Where the party applies for and properly shows that the furnishing of daily copy is indispensable to the protection of a vital right or interest in achieving a fair hearing, the presiding officer in the proceeding in which the application is made will order that daily copy service be provided the applying party at the actual cost of duplication, with the full cost of transcription being borne by the Commission.

(2) In the event a request for daily copy is denied by the presiding officer, the requesting party, in order to obtain daily copy, must pay the cost of transcription over and above that borne by the Commission, i.e., the incremental cost between that paid by the Commission when it requests regular copy and when it requests daily copy. The decision

of the presiding officer in this situation is interpreted as falling within the scope of the functions and powers of the presiding officer, as defined in § 502.25(a).

(c) Motions made at the hearing to correct the transcript will be acted upon by the presiding officer. Motions made after an oral hearing to correct the record must be filed with the presiding officer within twenty-five (25) days after the last day of hearing or any session thereof, unless otherwise directed by the presiding officer, and must be served on all parties. If no objections are received within ten (10) days after date of service, the transcript will, upon approval of the presiding officer, be changed to reflect such corrections. If objections are received, the motion will be acted upon with due consideration of the stenographic record of the hearing. [Rule 213.]

**§ 502.214 Briefs; requests for findings.**

(a) The presiding officer will determine the time and manner of filing briefs and any enlargement of time.

(b) Briefs will be served upon all parties pursuant to subpart H of this part.

(c) Unless otherwise ordered by the presiding officer, opening or initial briefs must contain the following matters in separately captioned sections:

(1) Introductory section describing the nature and background of the case;

(2) Proposed findings of fact in serially numbered paragraphs with reference to exhibit numbers and pages of the transcript;

(3) Argument based upon principles of law with appropriate citations of the authorities relied upon; and

(4) Conclusions.

(d) All briefs must contain a subject index or table of contents with page references and a list of authorities cited.

(e) All briefs filed pursuant to this section must ordinarily be limited to eighty (80) pages in length, exclusive of pages containing the table of contents, table of authorities, and certificate of service, unless the presiding officer allows the parties to exceed this limit for good cause shown and upon application filed not later than seven (7) days before the time fixed for filing of such a brief or reply. [Rule 214.]

**§ 502.215 Requests for enlargement of time for filing briefs.**

Requests for enlargement of time to file briefs must conform to the requirements of § 502.102. [Rule 215.]

**§ 502.216 Supplementing the record.**

A motion to supplement the record, pursuant to § 502.69, should be filed if submission of evidence is desired after the parties' presentation in a proceeding, but before issuance by the presiding officer of an initial decision. [Rule 216.]

**§ 502.217 Record of decision.**

The transcript of testimony and exhibits, together with all filings and motions filed in the proceeding, will constitute the exclusive record for decision. [Rule 217.]

**Subpart M – Decisions; Appeals; Exceptions**

36. Revise the subpart M heading to read as set forth above.

37. Revise § 502.221 to read as follows:

**§ 502.221 Appeal from ruling of presiding officer other than orders of dismissal in whole or in part.**

(a) Rulings of the presiding officer may not be appealed prior to or during the course of the hearing, or subsequent thereto, if the proceeding is still before him or her, except where the presiding officer finds it necessary to allow an appeal to the Commission to prevent substantial delay, expense, or detriment to the public interest, or undue prejudice to a party.

(b) Any party seeking to appeal must file a motion for leave to appeal no later than fifteen (15) days after written service or oral notice of the ruling in question, unless the presiding officer, for good cause shown, enlarges or shortens the time. Any such motion must contain the grounds for leave to appeal and the appeal itself.

(c) Replies to the motion for leave to appeal and the appeal may be filed within fifteen (15) days after date of service thereof, unless the presiding officer, for good cause shown, enlarges or shortens the time. If the motion is granted, the presiding officer must certify the appeal to the Commission.

(d) Unless otherwise provided, the certification of the appeal will not operate as a stay of the proceeding before the presiding officer.

(e) The provisions of § 502.10 do not apply to this section. [Rule 221.]

**§ 502.222 [Removed and reserved]**

38. Remove and reserve § 502.222.

39. Revise § 502.230 to read as follows:

**§ 502.230 Reopening by Commission.**

(a) *Reopening by the Commission.* After an initial decision by the presiding officer, or in a matter otherwise pending before the Commission, but before issuance of a Commission decision, the Commission may, after petition and reply in conformity with paragraphs (b) and (c) of this section, or upon its own motion, reopen a proceeding for the purpose of taking further evidence.

(b) *Motion to reopen.* A motion to reopen shall be served in conformity with the requirements of subpart H and will set forth the grounds requiring reopening of the proceeding, including material changes of fact or law alleged to have occurred.

(c) *Reply.* Within ten (10) days following service of a motion to reopen, any party may reply to such motion.

(d) *Remand by the Commission.* Nothing contained in this rule precludes the Commission from remanding a proceeding to the presiding officer for the taking of additional evidence or determining points of law. [Rule 230.]

By the Commission.

Karen V. Gregory

Secretary

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