FEDERAL MARITIME COMMISSION

46 CFR Parts 514 and 530

[Docket No. 98–30]

Service Contracts Subject to the Shipping Act of 1984

AGENCY: Federal Maritime Commission.

ACTION: Interim final rule.

SUMMARY: The Federal Maritime Commission has revised its regulations governing service contracts between shippers and ocean common carriers to implement changes made to the Shipping Act of 1984 (''Act'') by Pub. L. 105–258 (the Ocean Shipping Reform Act of 1998) and section 424 of Pub. L. 105–383 (the Coast Guard Authorization Act of 1998). Specifically, the Commission has revised its regulations implementing section 8(c) of the Act and has created a new 46 CFR part 530 to govern service contract filing. The interim nature of this rule is due to a major revision of the proposed regulation, which did not include the internet-based filing system of the interim final rule. The proposed regulations have been revised to accommodate the alternative system. Portions of the proposed rule have been redrafted for clarity, repetitive sections have been deleted and the remaining sections are accordingly renumbered.

DATES: Effective date May 1, 1999. Submit comments on this interim final rule on or before April 1, 1999.

ADDRESSES: Address all comments to: Bryant L. VanBrakle, Secretary, Federal Maritime Commission, 800 North Capitol Street, NW., Room 1046, Washington, DC 20573–0001.

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SUPPLEMENTARY INFORMATION: On December 23, 1998, the Federal Maritime Commission (''Commission'') issued proposed regulations to implement changes to the Shipping Act of 1984 (''Act'') mandated by the Ocean Shipping Reform Act of 1998, Pub. L. 105–258, 112 Stat. 1902 (''OSRA''), enacted on October 14, 1998. 63 FR 71062–71076. OSRA made several changes to the existing system by which the Federal Maritime Commission regulates ocean shipping in the foreign commerce of the United States, particularly to the provisions governing service contracts under the Act.

As noted in the Notice of Proposed Rulemaking (''NPR''), the Commission sought to balance the general deregulatory intent of OSRA with the important oversight role that Congress has assigned to it, through the proposed rules. The difficulty in achieving that balance is apparent in the reactions the proposal received from members of the industry. Further, while the Commission recognized that the filing requirements must be crafted with an appreciation for regulated entities' interests in simple, speedy and straightforward filing procedures, the Commission also noted in the NPR that the procedures must enable the Commission to fulfill its statutory duty to guard against section 10 violations and perform its section 6 functions. As several of the comments urge, this responsibility on the part of the Commission is especially important as service contracts will be confidential and potentially aggrieved parties will have to rely on the Commission for oversight. This will be complicated by the predicted increase in the sheer number of service contracts filed. It was with these goals in mind that the Commission originally proposed the draft regulations, designed to enable the Commission to fulfill its regulatory mandate while imposing a minimal burden on regulated parties.

Comments

The Commission received twenty-eight (28) responses to the NPR, from the following: Seaboard Marine (''Seaboard''); International Longshoremen's Association (''ILA''); Cargo Brokers International, Inc. (''CBI''); China Ocean Shipping (Group) Company (''COSCO''); Effective Tariff Management Corporation (''ETM''); Trans-Atlantic Conference Agreement (''TACA'') (endorses OCWG comments); Household Goods Forwarders Association of America, Inc. (''HGFAA''); Council of European & Japanese National Shipowners' Association (''CENSA''); Bicycle Shippers' Association, Inc. (''BSA''); United States Council for International Business, Sea Transportation Committee (''USCIB''); International Longshore & Warehouse Union (''ILWU'') (endorses ILA comments); IBP, Inc. (''IBP''); National Industrial Transportation League (''NITL''); Japan-United States Eastbound Freight Conference (''JUSEFC''); American Institute for Shippers' Associations, Inc. (''AISA''); Ocean Carrier Working Group Agreement (''OCWG''); National Customs Brokers & Forwarders Association of America, Inc. (''NCBFAA''); American Import Shippers' Association (''AImpSA''); E.I. DuPont de Nemours and Company (''DuPont''); Conagra, Inc. (''Conagra''); P&O Nedlloyd, Ltd. (''P&O''); Pacific Coast Tariff Bureau (''PTCB''); American President Lines, Ltd., Sea-Land Service, Inc., Crowley Maritime Corporation, Farrell Lines, Inc., Lykes Lines Ltd., LLC, the Transportation Institute, the American Maritime Congress, and the Maritime Institute for Research and Development (joint comments) (''Carriers''); Chemical Manufacturers Association (''CMA''); American President Lines, Ltd. and APL Co. Pte. Ltd. (''APL'') (endorses OCWG comments); Sea-Land Service, Inc. (''Sea-Land'') (endorses OCWG and TACA comments); American International Freight Association and Transportation Intermediaries Association (''AIFA'') (joint comments) (endorses NITL comments); and Wal-Mart Stores, Inc. (''Wal-Mart'').

These comments reflected the views of large, beneficial interest shippers (DuPont, Wal-Mart, Conagra, and IBP), shippers' associations and representatives (BSA, NITL, AISA, AImpSA, and CMA), labor organizations (ILA and ILWU), carriers, conferences, agreements and carrier associations (APL, COSCO, P&O, CENSA, OCWG, TACA, JUSEFC, Sea-Land Service, Inc., Crowley Maritime Corporation, Farrell Lines, Inc., Lykes Lines Ltd., LLC, the Transportation Institute, the American Maritime Congress, and the Maritime Institute for Research and Development), ocean transportation intermediaries (CBI, HGFAA, NCBFAA, AIFA and the Transportation Intermediaries Association), third-party filing services (ETM and PTCB), and, finally, the American affiliate of the International Chamber of Commerce, representing the general business interests of shippers and carriers (USCIB).

A significant number of comments generally oppose the proposed regulations as inflexible, overly technical, rigid, burdensome and costly, and, as such, inconsistent with the deregulatory aims of OSRA. OCWG; NITL; USCIB; P&O; Sea-Land; Seaboard; CENSA and Conagra. Most of the opposition to the proposed regulation is aimed at the Commission's proposal to adapt an electronic system already in its possession, and the technical constraints that would accompany the use of that system. There are also comments that applaud the Commission's proposal as a

conscientious effort to implement a key feature of OSRA in a timely manner, but which also express concern that some of the provisions may be at odds with OSRA. Conagra.

Several other comments are just as strongly in favor of the regulations as proposed, and support them as a fair reflection and implementation of the changes intended to be made by Congress through OSRA. AISA; AImpSA; NCBFAA; and BSA. Shipper groups urge the Commission to be mindful that, under OSRA, smaller shippers will be disadvantaged and thus will rely more on FMC oversight. Therefore, they argue, OSRA has placed a heightened obligation on the Commission to oversee and prevent potential service contract discrimination, and unreasonable refusals to deal or negotiate. They also comment that while the proposed regulations represent positive initial steps the Commission must take to fulfill its oversight role, they fail to propose adequately strong regulations to enforce section 10's anti-discrimination prohibitions. The shippers further argue that OSRA directed the Commission to concentrate on discrimination based on shipper status, and the regulations fall short in this respect as well.

Section 530.3 Definitions

One commenter takes issue with the proposed definition of ''conference,'' being different from the statute, and not referring to the requirement of a common tariff. APL, 1. The comment suggests that the definition track the statute. The change to the definition of ''conference'' in this rule conforms with the changes made in the Commission's rulemaking on agreements, Docket No. 98-26, and tariffs, Docket No. 98–29.

Similarly, the Commission in this proceeding had proposed a new definition of ''ocean common carrier'' to match that proposed in the agreements rulemaking. However, upon receipt of opposition to that proposal from one commenter and little input from other industry interests, the Commission has determined to carry over its former definition of ''ocean common carrier'' and take the matter up in a later, separate rulemaking. *See*, Docket No. 98–26.

APL also questioned the proposed definition of ''service contract.'' APL, 1–2. The comment urges the Commission to adopt a definition of ''service contract'' which would correct a ''persisting drafting error in OSRA'' as a contract between one or more shippers and an ocean common carrier or an agreement between or among carriers. APL, 1–2. APL complains that this definition literally contemplates an agreement that is a party to an agreement, a circular and legally impossible definition. APL, 2. The comment suggests either redefining or interpreting OSRA so that wherever the statute refers to ''an agreement,'' that the meaning will be two or more ocean common carriers acting pursuant to an agreement on file with the Commission or exempt from such filing. APL, 2.

Prior to revisions made by OSRA, the Act provided that only a certain type of agreement between ocean common carriers, namely a conference agreement, could enter into service contracts. OSRA changed the definition of service contract from ''a contract between a shipper and an ocean common carrier or conference'' to ''a written contract, other than a bill of lading or a receipt, between one or more shippers and an individual ocean common carrier or an agreement between or among ocean common carriers.'' This had two effects. First, it allows a group of two or more unrelated (i.e. not a shippers' association) shippers to jointly enter into a service contract. Second, it allows any ocean common carrier agreement (not just a conference agreement) to enter into service contracts. Therefore, the definition of service contract in the regulation is revised to appear as it does in the Act. APL's observation appears correct. The authority to enter into service contracts extends to carriers acting collectively pursuant to a filed agreement, even if the agreement does not provide for any central administrative entity.

For the sake of clarity, the definitions of ''effective date'' and ''expiration date'' are moved from the Appendix to the definitions section, § 530.3. Finally, a definition of ''motor vehicle'' is added, comporting with the definition of that term in the Commission's tariff regulation, Docket No. 98–29. *See also infra*, discussion of exempt commodities.

Section 530.4 Confidentiality

Carriers, shippers and one filing service commented on § 530.4 of the proposed rule. While most agree that the Commission has the authority to share service contract information with other federal agencies, they also request clarification on how the Commission intends to ensure that other agencies maintain confidentiality. CMA, 3; DuPont, 5. One suggests the following addition to the section:

> any information from or access to service contracts to another agency of the Federal government shall, to the full extent permitted by law, also will be (sic) held in confidence by such other agency or notice of the confidentiality of such information will be provided by the Commission to such other agency.

ETM, 1.

Another suggests,

> The Commission shall seek to ensure, prior to providing access to confidential service contract information to another Government agency, that such other agency will protect the confidentiality of the service contract information.

NITL, 23.

Two comments suggest that the regulations should ensure that information shared not be inadvertently publicized through the Freedom of Information Act (''FOIA'') or other means, and that the same level of protection afforded within the Commission should follow the information when it is shared with another federal agency. DuPont, 5; NITL, 23.

Exemption 4 of FOIA would presumably protect service contract information confidentially filed with the Commission from requests for public disclosure. 5 U.S.C. 552(b)(4)(1994). Exemption 4 of FOIA protects ''commercial or financial information obtained from a person (that is) privileged or confidential.'' The exemption affords protection to those submitters who are required to furnish commercial or financial information to the government by safeguarding them from the competitive disadvantages that could result from disclosure. *See* U.S. Department of Justice, Office of Information and Privacy, *Freedom of Information Act Guide and Privacy Act Overview*, at 123.

Another comment suggests this provision should be amended to provide that all confidential information will be provided to other government agencies which have a Memorandum of Understanding (''MOU'') agreeing that they will maintain confidentiality of the information in accordance with the letter and spirit of OSRA. Conagra, 4. The Commission has concluded that it will provide confidential service contract information only to federal government agencies with which it has an MOU ensuring that the recipient agency will accordingly protect the information from public disclosure. This should adequately address the reasonable concerns expressed in the comments.

One commenter asserts that the confidentiality requirement of the Act applies to the Commission only, and does not give the Commission any authority to review the parties' complaints for breach of a

confidentiality clause in the contract itself. Such a breach, they argue is purely a contract matter and as such, for a court to decide. APL, 2. The comment suggests that in order to clarify this point, the phrase ''by the Commission'' should be added at the end of the first sentence. APL, 2. The statute appears to be adequately clear on this matter, and there is no need for further clarification at this time.

Wal-Mart is concerned that disclosure of the actual international freight rate required by U.S. Customs Service (''USCS'') (form CF 7501) will provide an opportunity for unscrupulous customs brokers to obtain confidential rate information and disclose it. Wal-Mart, 1. Wal-Mart is concerned that, even with a confidentiality agreement with the broker, the monitoring and enforcement of such confidentiality agreements may prove difficult, or impossible. Wal-Mart, 2. Wal-Mart therefore requests the Commission coordinate with other federal government agencies, especially USCS, in its final implementation of the regulations to ensure that the confidentiality of service contracts be preserved by those other agencies, and suggests that one approach may be to declare average or estimated freight rates on the CF 7501 form supplemented by actual data directly to USCS without using the broker. Wal-Mart, 2.

The commenter's request is outside the Commission's jurisdiction. While it understands Wal-Mart's concerns, the Commission has no authority to dictate to other agencies what information they may or may not require from the entities they regulate. Therefore, the comment is more appropriately directed towards USCS.

In contrast, one commenter argues that the proposed regulations do not acknowledge limitations on the Commission's authority to release service contract information, recognize the complexity of the associated issues, or provide procedures for making a determination to release information. Carriers, 2. First, the Carriers argue, the Commission's authority to disclose confidential service contract information to other federal government agencies at all is questionable. Carriers, 2. These comments argue that the colloquy between Senators McCain and Hutchison is of limited value for the purpose of legislative history because it followed, rather than preceded, the adoption of the bill which became OSRA. Carriers, 2 n.1. This argument is unconvincing, however, as we note that Senator Hutchison, with specific reference to section 8(c)(2) of S. 414 (which remained unchanged in the final passage of OSRA), remarked on April 21, 1998, that the Commission ''is encouraged to work with affected Federal agencies to address'' their concerns about how they are to ensure rate compliance with U.S. cargo preference law in an era of service contract rate confidentiality. Cong. Rec S3320 (daily ed., April 21, 1998) (statement of Sen. Hutchison). While the statute itself reads only, ''each contract entered into under this subsection * * * shall be filed confidentially with the Commission'' (section 8(c)(2) of OSRA), and ''[w]hen a service contract is filed confidentially with the Commission, a concise statement of the essential terms * * * shall be published and made available to the general public in tariff format'' (section 8(c)(3)), taken with the remarks made on the same day the Senate passed S. 414, the legislative history indicates that it was the intent of the drafters that the confidentiality provision not hamper other federal government agencies which have legitimate need to access the confidentially filed information in order to carry out their respective duties.

There is further indication that the drafters intended that the confidentiality provision would apply to preclude Commission disclosure to the public. As Senator Hutchison remarked in the aforementioned floor colloquy, ''(o)f course * * * confidential service contract information would remain protected *from disclosure to the public* consistent with the Shipping Act of 1984, as amended by the Ocean Shipping Reform Act and other applicable Federal laws.'' Cong. Rec. S11302 (daily ed. Oct. 1, 1998) (Statement of Sen. Hutchison) (emphasis added). This emphasized the importance of the Commission protecting information filed confidentially with it from disclosure to the public, but does not limit the Commission's right to disclose such information to other federal agencies where clearly warranted and justified. Finally, the Commission noted in the NPR that it would only ''allow access to filed contracts to Federal government agencies where appropriate; any such disclosure will not jeopardize the statutory aim of non-disclosure of confidential service contract information to non-governmental entities.'' 63 FR 71065. This continues to correctly express Commission policy on the subject.

The Carriers argue further that even if the authority of the colloquy is accepted, the only exception to the statutory requirement that the Commission keep service contract information confidential is ''to ensure compliance of U.S.-flag ocean common carriers with cargo preference law shipping rate requirements.'' Carriers, 3. Therefore, they contend that this does not authorize the Commission to disclose such information when a government agency is acting in a proprietary capacity as shipper. Carriers, 2. This implies that the following language of the second sentence of proposed § 530.4 is at least over broad: ''Nothing contained in this part shall preclude the Commission from providing certain information from or access to service contracts to another agency of the Federal government of the United States.'' The Carriers are concerned that there is too large a potential for procurement officials to use such information to drive down rates. Carriers, 4.

The Carriers question whether any statutory requirements, including the cargo preference laws, actually exist which would require information from confidentially filed service contracts and further question the relevancy of the information, as procurement is typically based on ''competitively bid, lowest landed cost awards.'' Carriers, 4. We are not persuaded that service contract information should be withheld from agencies that ship cargo with ocean carriers. The Commission, however, is not attempting in these regulations to predict every situation in which the requested information may or may not be relevant to the purposes of the requesting agency. This would be another matter most appropriately addressed by an MOU.

The Carriers' reference to the pending litigation against the Department of Defense (''DoD'') serves to further illustrate this point. Carriers, 5. The Commission simply does not have the ability to predict in what situations confidential service contract information may or may not be relevant to the execution of the requesting agency's statutory duties, but can require that the agency support its request with a good faith argument for relevancy, in an accordingly drafted MOU.

Furthermore, because Congress did not indicate that it wished to limit the agencies with which the Commission should cooperate, but instead used the term ''other federal agencies,'' the Commission interprets this admonition to include agencies other than DoD and laws other than the Cargo Preference Act of 1904. Again, as the Commission cannot presently predict which statutory requirements other agencies may have for confidential service contract information, the Commission declines to add to its regulations at this

time any such limitation on its future action. Rather, the Commission asserts that disclosure of confidentially filed service contract information will only be made to other federal government agencies with which it has negotiated an MOU which will protect the information from disclosure to the public.

The Carriers complain that the proposed regulations do not provide for procedures for informed comment on and consideration of the conflicting interests, but rather appear to envision an approach to such interagency requests on a unilateral and ad hoc basis. Carriers, 2. The Carriers assert that they are entitled to a ''careful and open appraisal'' based on an informed record before the Commission, rather than the approach contemplated by the proposed rule. Carriers at 6. The Carriers' comments appear to request that the Commission create a formal review proceeding for each request before any service contract information is released to a requesting Federal government agency. Again, the MOU should adequately address the Carriers' concerns without requiring that the Commission initiate an adversary proceeding which would require the Commission to implement new procedures, and undertake the time and expense which would accompany each evaluation.

Finally, the Carriers comment that if the Commission does not delete the provision in question, that a separate proceeding should be initiated to ''permit full ventilation of the issues by concerned parties.'' Carriers at 6. On the contrary, it appears that the notice and comment period in this rulemaking proceeding has given the Carriers an opportunity, of which they have availed themselves, to address such issues.

For the foregoing reasons, therefore, the Commission shall require a requesting federal agency to enter into a Memorandum of Understanding that it will protect the confidentiality of any information it receives from the Commission and that such information is necessary to its statutory functions, and adopts as final the language in § 530.4 of the proposed regulations.

Section 530.5 Duty to File

As stated in the NPR, the Commission's past regulations generally imposed on a conference the duty to file and publish service contract material on behalf of its members. 46 CFR 514.4(d) (duty and authority to file). Specifically, the Commission's former regulation placed the duty to file service contracts and publish their essential terms on either: A service contract signatory carrier which is not a member of a conference for the service covered by the contract; or the conference which is signatory or has one or more members for service otherwise covered by the conference agreement. Conferences could file for and on behalf of one or more of its member lines for service outside the scope of the conference agreement. § 514.4(d)(5)(B)(ii). In such case, the statement of essential terms was to be filed simultaneously in both the essential terms publication of the conference and the carriers involved.[1]

The Commission's past approach distinguished duty to file based on the subject matter of the contract itself. In this respect, for contracts entered into by a member of a conference but which fell outside the scope of that conference, the duty to file and publish fell on the signatory carrier. For contracts which concerned subject matter within the scope of a conference agreement, the duty to file and publish fell upon the conference which was the signatory to the contract or whose member or members were signatories. Conferences, under the Commission's prior regulations, were authorized to file and publish for their member lines for services outside the scope of the conference. § 514.4(d)(5)(ii). For such filing, essential terms were required to be published by both individual carrier and conference. *Id.* OCWG suggests that the Commission continue this approach, and merely revise the previous regulations by changing the term ''conference'' to ''agreement.''

In the proposed rule, the Commission recognized that agreement service contracts would pose somewhat different problems for filing and publishing than did conferences, which unlike some other agreements, maintain a central authority or secretariat. The proposed regulation sought to anticipate situations in which members of an agreement without a central authority enter a service contract. The proposal would have allowed members of such an agreement to delegate the filing duty to one member, but also indicated that such delegation would not relieve the other carrier parties from any liability should there be a failure to comply with the filing requirements of the regulations.

OCWG objects to the proposed rules' provisions placing filing requirements generally on individual carriers. OCWG asserts that a carrier breach of contract confidentiality[2] is not a violation of the Act, citing Senator Hutchison's April 21, 1998 floor remarks. OCWG further asserts that a carrier could publish confidential service contract information in the New York Times and not violate the Act. OCWG at 16. We note, however, that some disclosures could raise issues under section 10(b)(13) of the Act which prohibits any common carrier, either alone or in conjunction with any other person, indirectly or directly, from knowingly disclosing, offering, soliciting, or receiving any information concerning the nature, kind, quantity, destination, consignee or routing of any property tendered or delivered to a common carrier without the consent of the shipper or consignee if that information may be used to the detriment or prejudice of the shipper or consignee, may improperly disclose its business transaction to a competitor, or may be used to the detriment or prejudice of any common carrier.

Carriers and conferences urge they should have the ability to take advantage of the efficiencies membership in an agreement provides for the accomplishment of such ministerial acts as filing. OCWG, 13; CENSA, 2; COSCO, 2; JUSEFC, 2–5. The comments of BSA reveal serious concerns shippers rightfully may have about filing done by agents closely controlled by agreement authorities. The comments of COSCO and JUSEFC also recognize this legitimate shipper concern.

The Commission has determined to revise § 530.5 and simplify the filing duties in accordance with the comments. Section 530.5, as revised, places the duty to file on the individual carrier party to a service contract, as Commission regulations always have. For multi-party service contracts, the duty to file falls equally upon all the carrier parties participating or eligible to participate in the contract. Multi-party service contracts must indicate the agreement (conference or otherwise) under whose authority the contract is entered. Carrier parties may designate any agent they choose for filing, including an agreement secretariat. The

[1] While it related to the responsibility to file tariffs, § 514.4(d)(4)(ii)(A) reminded carrier participants in a conference tariff that they are not relieved from the necessity of complying with Commission regulations and the requirements of section 8(a)(1) of the Act.

[2] We agree with the comments that for publication, no confidentiality issue exists. The underlying duty to publish, however, is identical as that for filing. For publication, the Commission's concern lies primarily in ensuring that the public not be misled by the location of the statement of essential terms. When an essential terms publication appears in an individual carrier's tariff, there must be some indication of whether the underlying service contract was made by that carrier independently or jointly as part of an agreement. For further discussion of publication requirements, *see infra,* § 530.12.

Commission shall closely monitor filing or other ministerial tasks undertaken by central authorities for violations of section 10(b)(13) and other activities which may have implications for the Commission's section 6(g) oversight.

Contrary to the assertion of OCWG, simply adopting the former regulation language and substituting the term ''agreement'' for ''conference'' will not account for the individual member of an agreement which wishes to take independent action within the scope of the agreement, but which does not wish to disclose the service contract information to the agreement. The regulation, therefore, makes clear provision for the contract parties' election on who shall be authorized as filer. Furthermore, the regulation would allow shippers to negotiate a requirement, for filing done by a conference or agreement secretariat, for example, that provisions for confidentiality be undertaken, e.g., through the use of ''firewalls.'' Finally, the use of an agent for filing does not relieve the carrier parties in any way for a failure to duly file or publish. They are unquestionably responsible for ensuring their agents comply with these regulatory requirements.

Section 530.6 Certification of Shipper Status

Proposed § 530.6(a) requires each shipper party to a service contract to sign and certify on the signature page of the service contract its shipper status and the status of all its affiliates which have access to the service contract. NITL, AIFA, and DuPont oppose the proposed regulation, and particularly complain that the rationale for the requirement is unclear and the certification itself is burdensome. NITL, 21; AIFA, 3; DuPont, 3. They recommend that this requirement should only apply when the shipper is an NVOCC. DuPont, 3; AIFA, 3, NITL, 21.

NITL, APL and DuPont assert that contracting parties should be able to resolve on their own the capacity in which a particular shipper is acting with respect to the service contract as a matter of negotiation between the parties, not one mandated by the Commission. NITL, 21; APL, 3; DuPont, 3.

The regulation as proposed, however, does not appear to impose any limitations on the commercial negotiations of service contracts. The parties are free to contract with any individual or entity entitled to enter into service contracts under the Act, and in certain capacities (*e.g.,* no NVOCCs as carrier parties).[3] This was one of the compromises made by OSRA: In return for confidentiality, the parties would report their operations to the Commission, in order that it would continue to be able to monitor the industry for prohibited acts.

DuPont is concerned that the requirement would unnecessarily increase the Commission's workload. DuPont, 3. NITL comments that there are less burdensome ways for the Commission to obtain information about the status of a shipper party. For instance, they suggest that the Commission could request the information informally after the service contract has been executed. Further, AIFA comments that the proposed regulation would require the parties to make fine legal judgments. AIFA, 3.

Contrary to several comments, it appears that the certification does not create an unreasonable burden for shippers. Proposed § 530.7 (here renumbered § 530.6) was adopted nearly verbatim from the Commission's current regulation, 46 CFR 514.7(e)(1), which requires the shipper party to certify its status. Original § 514.7(e)(1) had the same intent, namely to enable the Commission to monitor service contract arrangements for discrimination. Rather than increasing any burden on the parties to service contracts, or creating additional workload for the Commission, § 530.6(a) continues to enable the Commission to monitor service contracts for trends in practices and to guard against OSRA's prohibition on refusals to deal and on concerted unjust discrimination based on shipper status. The burden on the shipper signatory is also minimal. Contrary to the comments of AIFA, determining the shipper's status should be relatively simple and shippers have been doing this since the rules were first implemented.

While NITL is correct that there are other ways for the Commission to obtain this information, the method promulgated herein is not unreasonable because the burden it places on service contract parties is light, and it is of high utility to the Commission, not only because of its intrinsic nature, but also because of the early point at which it is provided. Finally, contrary to the concerns of DuPont, the maintenance of this provision will not create an additional burden on the Commission.

[3] CBI comments that NVOCCs should be able to offer confidential service contract to their shippers. This was explicitly rejected by Congress when it rejected the Gorton Amendment (No. 2287) to S. 414, which would have so allowed. Cong. Rec. S3306–11 (daily ed.) (April 21, 1998).

Some commenters suggest that the certification provision should be deleted altogether or redrafted. APL, 3; AIFA, 3; NITL, 22. NITL suggests the proposed regulation be revised to read as follows:

> If the shipper contract party or any affiliate or member of a shippers' association entitled to access a service contract is an NVOCC, it shall sign and certify on the signature page of the service contract that its status under the service contract is that of an NVOCC. NITL, 22.

With respect to the first purpose of the proposed regulation, NITL and DuPont incorrectly assert that OSRA prohibits discriminatory treatment and refusal to deal towards NVOCCs only. As the shippers' comments correctly point out, smaller shippers which negotiate for service contracts through their shippers' associations are also entitled to such protection, as are all shippers, regardless of whether they are beneficial cargo interests, their representatives, or unaffiliated groups of shippers. OSRA prohibits discrimination and refusals to deal based on anything other than valid transportation factors (such as volumes) and the regulation as proposed intends to guard against such discrimination, prohibited by section 10(b)(10) of the Act.

The comments of several shippers' organizations point to the competing congressional mandates with which the Commission must craft these regulations: to allow parties to negotiate their commercial arrangements with as little interference as possible while maintaining its ability to monitor for discrimination and refusals to deal in violation of section 10. AISA, 5. AISA's comments remind the Commission that with confidential contracts, smaller shippers will be disadvantaged and will, therefore, rely more on the Commission's oversight. AISA, 3. AISA asserts that the Act places an affirmative obligation upon carriers to negotiate and deal in good faith with shippers' associations and to offer them competitively equivalent contracts to those offered to beneficial shippers for the same volumes and goods between the same ports. AISA, 5.

AISA asserts that OSRA requires the Commission to establish mechanisms by which it and the public can discover such discrimination, and point out that filing and publishing essential terms of confidential contracts, as well as establishing a listing on the Commission's website is only a first step in the right direction. AISA, 3–6. AISA is disappointed with the proposed regulations because they fail to be strong enough to enforce section 10 anti-

discrimination prohibitions. Further, they allege that the Commission is wrong in saying the law does not continue to prohibit carrier actions which unreasonably discriminate against small- and medium-sized shippers and shippers' associations. AISA, 3–6.

One commenter urges the Commission to acknowledge Congress' intent that anti-discrimination protections be strengthened and expanded as they apply to shippers' associations and OTIs. BSA, 13–15. NCBFAA believes OSRA directs the Commission to concentrate on discrimination based on a shipper's status as an OTI. NCBFAA, 1. For AImpSA, OSRA's direction to the Commission is to concentrate on status-based discrimination against shippers' associations or OTIs. AImpSA, 2–3. While NCBFAA is concerned about the possibility of collusive, discriminatory and anti-competitive behavior by carrier agreements, it recognizes that Congress intended to allow parties to service contracts to behave like private contract parties in a deregulated environment. NCBFAA, 1. NCBFAA, also, however, recognizes a need for the service contract regulations to be sufficient for Commission oversight in order to combat discriminatory practices such as those which have been carried out by the carriers in the past. NCBFAA, 1.

The opposition of some shipper parties, especially NVOCCs, to this provision is puzzling. Shippers should be willing to assist the Commission in its enforcement of the Act's prohibition on discrimination against them due to their status and refusals to deal because of shipper status. Indeed, the comments of shippers' associations (BSA, AISA, AImpSA) and OTIs (NCBFAA) urge the Commission to adopt strong regulations to protect against shipper status-based discrimination by carriers. This provision serves the simultaneous functions of giving shipper parties to contracts an additional reminder of the capacity in which they may act (*e.g.*, not as an ''agent,'' ''broker'' or ''freight forwarder'') while also decreasing the need for investigations which may unnecessarily burden shippers.

One commenter urges the Commission to establish a separate docket to address regulations to specifically guard against section 10 violations. AImpSA, 2–3. We decline, and point out that the regulations in all the areas that the Commission regulates were drafted with an eye toward our responsibilities in this regard. There is no need for another, separate rulemaking to address this issue at this point. The certification requirement has served the Commission well in the past and appears to continue to be a useful tool for monitoring without being an intrusion into commercial contract negotiations or an overly burdensome reporting requirement. Whether other regulations will be necessary will be a question better answered after the Commission has had some experience with and insight into the way the industry will develop in the new era of confidential service contracting.

BSA requests that the Commission give notice to the shipping public of the extent to which shippers' associations can rely on DOJ safe harbor guidelines for unaffiliated shippers entering joint contracts. BSA, 2–5. The Commission, in Docket 92–31, revised its definition of ''shippers' association'' and found that ''such associations between or among shippers will remain subject to anti-trust laws.'' 57 FR 49665, 49666 (Nov. 3, 1992). Presumably, therefore, shippers operating in informal groups would be similarly subject to the antitrust laws, and could rely on DOJ guidelines for their behavior.

APL complains that the proposed regulation's requirement that carriers identify NVOCC parties and determine that they are compliant is ''overkill.'' APL, 3. The provision, they complain, unreasonably delegates the policing of NVOCCs to ocean common carriers. APL, 3. APL offers that there are other effective and less burdensome ways of ensuring that NVOCC members of shippers' associations are compliant: For instance, requiring an association in the contract to warrant that any of its NVOCC members are compliant and providing evidence of such compliance. APL recommends that § 530.6(b) be deleted or redrafted by changing the word ''signing'' to ''implementing'' and deleting ''or an affiliate or member of a shippers' association''. APL, 3.

Section 530.6(b) as proposed was intended to ensure that carriers do not violate section 10(b)(11) of the Act, which forbids the knowing or willful acceptance of cargo for the account of unbonded or unlicensed NVOCCs. Similar to the benefit to shippers provided by § 530.6(a), § 530.6(b) also inures to the benefit of the carrier party, as certification of its belief that the NVOCC with whom it contracts is in compliance with Commission regulation may assist in establishing it did not act knowingly and/or willfully if later the Commission finds the NVOCC was not properly licensed or bonded.

Furthermore, the burden on the carrier signatory has been significantly reduced, as carriers will now have the ability to confirm an NVOCC's bond status by checking the Commission's website (*see,* 46 CFR 515.27(d)) and its license by reference to an NVOCC's letterhead, as required by 46 CFR 515.31(b). Finally, this provision does not appear to intrude into the negotiations between contract parties, as parties generally would already have a desire to either assert their status, or have good commercial reasons for avoiding entering into business arrangements with a non-compliant entity. Proposed § 530.6, entitled ''service contracts with NVOCCs'' was seen to be repetitive of the certification language of final § 530.6(b). That section is therefore deleted, and the remaining sections are renumbered. For the foregoing reasons, the provision is adopted as it appeared in the notice of proposed rulemaking, except that it is renumbered as § 530.6.

Section 530.7 Duty to Labor Organizations

The proposed regulation included a definition of ''reasonable period of time'' by which a carrier must respond to a labor organization's request. Section 530.7(a)(2). This definition was crafted with sensitivity toward labor organizations' interests in knowing about cargo that is due to arrive in port before it arrives, so that the movement of that cargo may be ''claimed'' as labor work.

However, labor interests contend that the definition is inadequate as it will not ensure a timely response, which they claim should be within 24 hours of receipt of request. ILA, 4. If the carrier is unable to respond, labor argues, the regulation should specify that it shall so state and explain. ILA, 4.

Carrier interests, on the other hand, object to any definition of the term, and assert that it should be determined on a case-by-case basis. OCWG, 21–22. Several argue that the Commission contravenes OSRA by defining the term at all. One maintains that implicit in the concept of ''reasonable'' is the phrase ''under the circumstances.'' APL, 3. If Congress had intended the term to be defined on anything other than a case-by-case basis, it would have defined the term itself in OSRA. APL, 3. It is arbitrary, they argue, for the Commission to fix a reasonable time for reporting. Furthermore, consideration should be given to the carrier's situation and reasonable ability to respond to the request. APL, 3; Sea-Land, 6. Sea-Land asserts that because the Commission determines what is reasonable for other matters (*e.g.*, Sections 6(g); 10(b)(8),(9),(10); 10(c)(8); and 10(d)(1)) on a case-by-case basis, it should do the same in this context. Sea-Land, 7.

The carriers argue that fixing a reasonable period of time is unfair because it gives the labor organization the exclusive control of the timetable in that it is labor who starts the clock with the request. APL, 3; Sea-Land, 6. Also, the comments urge, the requests might be repetitious or unclear, or the labor organization could inundate the carrier with hundreds of requests at a time in which it could not possibly respond in the time allotted by this definition. Sea-Land, 6.

One carrier comments that because service contracts run for terms of many months, no significant union work will be irrevocably lost if the information is not acted on within a matter of hours or days. APL, 3. This assertion is in direct contradiction to the emphatic comments by the ILWU and the ILA that time is most certainly of the essence in these matters. Another carrier is concerned that imposing a specific time limit may be inconsistent with obligations under collective bargaining agreements or labor laws. Sea-Land, 7.

It appears that the approach taken by the Commission in the proposed rule will achieve a workable compromise and protect both carrier and labor interests. But we note the objections of the carriers that the definition of ''reasonable period of time'' as two or four days would not appear to recognize that the reasonableness of any response may depend on the circumstances. Requests may, for example, be made in large batches, or at a time when a two or four day response is not reasonably achievable. It is also unknown at this time how often labor organizations will invoke these provisions, and how simple or burdensome it will be for the carriers to supply the appropriate response. To this end, the Commission amends the definition to include the word ''ordinarily.'' The definition provides the sense, at this pre-implementation stage, of what should normally constitute a reasonable, good faith response to a legitimate request. Any complaints of deviations from these standards resulting in harm to labor organizations would be adjudged in the context of the particular circumstances and the Commission's overall experience with this new provision of the statute.

The Commission is not persuaded by the arguments of the carriers that no definition of reasonable time is appropriate. OSRA is replete with general guidelines and standards for which the Commission is expected to supply more detailed qualifications of elements such as time and dollar amounts. Here, the amended rule provides only general guidelines of what the Commission expects will meet the general standard, in hopes that such guidance will help obviate the need for more formal complaints and procedures. As to the carrier concern that the time limit contravenes collective bargaining agreements or labor laws, it is impossible for the Commission to respond in a meaningful way, as it has no direct involvement in administering either.

Labor organizations criticize other provisions of this section as falling short of the mark. ILA, 1; ILWU, 1–2. They recommend that the Commission add a requirement that a response be adequate as well as timely. The required response, they argue, should include supporting documentation, such as bills of lading, delivery orders, and other non-privileged documents. This is a determination that the Commission must make on a case-by-case basis, as the text of the statute requires only that the response state ''whether'' the carrier is responsible. While one floor remark by Senator Hutchison alludes to the requirement that further documentation be produced,[4] it is unclear what the Commission's role in the disclosure of this information may be and therefore, the Commission declines to assume the authority to impose a requirement that particular documents be produced.

ILWU and ILA comments recommend that a particular Commission investigator be assigned in advance to all of the investigations which might arise out of complaints of non-compliance with this section. The ILWU suggests that the regulations include a requirement that requests for information be concurrently filed with the Commission to help avoid disputes over whether a given response was made within a reasonable period of time. ILWU, 5–6. Then, the ILWU suggests, the regulation should require that the Commission shall promptly solicit the carrier's written position on the complaint and conduct an administrative investigation on the merits of the complaint. The recommended procedure further includes the requirement that the Commission's investigator issue a report within thirty days, including findings to recommend a formal proceeding or dismissal and penalties. ILA, 5; ILWU, 1,2.

There is no requirement that such a procedure be contained in the regulations, and no indication from the legislative history of OSRA that it was the intent of Congress for the Commission to use any procedures other than its current complaint procedures to address violations of this section of the Act. An early version of the bill, which was to become OSRA, did include specific procedures which the Commission would undertake to enforce the responsiveness of ocean common carriers to labor requests for information. The April 3, 1998 version of S. 414 included a different version of section 8(c)(4) and included a section 8(c)(5), which read:

(4) Disclosure of Certain Unpublished Terms.—A party to a collective-bargaining agreement may petition the Commission for the disclosure of any service contract terms not required to be published by paragraph (3) which that party considers to be in violation of that agreement. The petition shall include evidence demonstrating that

(A) A specific ocean common carrier is a party to a collective-bargaining agreement with the petitioner;

(B) The ocean common carrier may be violating the terms and conditions of that agreement; and

(C) The alleged violation involves the moment [sic] of cargo subject to this Act.

(5) Action By Commission.—The Commission, after reviewing a petition under paragraph (4), the evidence provided with the petition, and the filed service contracts of the carrier named in the petition, may disclose to the petitioner only such unpublished terms of that carrier's service contracts that the Commission reasonably believes may constitute a violation of the collective-bargaining agreement. The Commission may not disclose any unpublished service contract terms with respect to a collective-bargaining agreement term or condition determined by the Commission to be in violation of this Act.

Cong. Rec. S3194 (daily ed., April 3, 1998).

Between the version of April 3, 1998 and the bill as finally adopted by the Senate on April 21, 1998, this section underwent significant change. It is clear, therefore, that Congress specifically considered requiring the Commission's involvement in disclosing confidential carrier information to labor organizations. In the final analysis, Congress rejected such Commission involvement, and chose instead to minimize the role of the Commission in implementing the objectives of this section of the statute. The Commission indicated in the NPR that it ''expects that aggrieved labor organizations will use existing Commission processes in the event of noncompliance by a carrier. The Commission would entertain proposals for more specific and stringent rules if the existing standards and procedures prove inadequate in practice.'' 63 F.R. 71064. We are hopeful that labor organizations and carriers will

[4] ''Section 8(c)(4) envisions the release of information not necessarily contained in the service contract (and that provision) may require the use of documents other than the service contract.'' Cong. Rec. S3320 (daily ed., April 21, 1998)(Statement of Sen. Hutchison).

operate diligently and in good faith in exercising their rights and responsibilities in implementing this section of the Act. The Commission expects not to have to initiate programs or promulgate particularized procedures to ensure what should be the routine and noncontentious transmittal of information. We reiterate, however, that the Commission will revisit these issues if experience under the provision suggests such a need. Therefore, the proposed rule in § 530.7 will be finalized, except that the term ''ordinarily'' is added to the definition of ''reasonable period of time'' in § 530.7 (a)(2), and the placement of the provisions defining relevant terms have been re-organized for clarity.

Section 530.8 Filing Provisions

The proposed regulation requires service contracts to be filed in their entirety (except for signatures) in a system which would be modified from the current ATFI essential terms publication system. The proposed regulations make no provision for waiver, transition, or other filing options. As stated in the supplemental information to the proposed rule, the Commission proposed that, ''due to the volume of service contract filings * * * expect[ed] after May 1, 1999, adoption of an electronic, as opposed to paper-based, system appears to be the most practical approach.'' 63 F.R. at 71063. Further, the Commission noted that while the ''only viable approach to implementing an electronic system at this juncture would be to create a system adapted from the Commission's currently used filing system for Essential Terms of service contracts,'' it also sought comment on other ''approaches to establishing a new system * * * treating the proposed system as a transitional solution.'' *Id*. Furthermore, comment on continuing the paper filing of service contracts was specifically requested. *Id*.

The comments generally oppose the use of any modified ATFI system for filing, even as an optional system. Seaboard; CENSA; USCIB; NITL; AIFA; OCWG; P&O; Conagra; and Sea-Land. Several commenters assert that using ATFI (as modified) is inconsistent with the deregulatory thrust of OSRA, and the regulations should allow for filing by any electronic means which ''meet the OSRA objective.'' CENSA, 1–2; Sea-Land, 3; NITL, 5–8. Two comments assert that because Congress expressly rejected continuing ATFI for tariffs, it could not have intended to continue its use for service contract filing. NITL, 5–6; Sea-Land, 3.

NITL urges that the Commission, rather than ''clinging to an outmoded electronic system'' for filing common carrier tariffs, and imposing that system on a very different contracting environment, give up its reliance on ATFI in the face of systems for communication that are changing for the better on a daily basis. NITL 5–8. Sea-Land contends that the Commission's assertion that ATFI is the ''only viable approach'' is incorrect and that there are other viable approaches, as evidenced by other agencies which have adopted electronic filing systems using ''off the shelf'' software. Sea-Land, 3.

Generally, CMA and other commenters are concerned that the Appendix requirements are too detailed and would restrict the freedom of parties to negotiate terms. CMA, 2; NITL, 14–15; DuPont, 4. NITL urges the Commission to delete the Appendix entirely because it is completely unworkable, unnecessarily burdensome, very costly and because there is no statutory basis for its requirements. NITL, 14. Further, NITL is concerned that the risks of contract rejection, and its associated costs and penalties, are heightened by the inclusion of so many technical details. NITL, 14.

Two comments object to the regulation as proposed because it appears that it was designed for the administrative ease of the agency without regard to the convenience to the parties. NITL, 5–8; OCWG. 3–4. While electronic filing is the preferred long-term approach, OCWG comments that the proposal to use ATFI would impose substantial burdens on carriers. OCWG, 3–4. OCWG objects to using ATFI because, like CENSA, it believes that the proposal would require filers to create two documents: One for the commercial transaction, and another for FMC filing. CENSA, 1.

These concerns appear somewhat justified. While in the past filers have been required to file an ''essential terms publication'' in ATFI format, the Commission concludes that applying ATFI-like restrictions on the entirety of a filed service contract may not fully benefit both filers and the Commission. In the ATFI-based system, filers may be required to either re-format their commercial agreement or draft it in ATFI format in the first place, or the system may make it difficult for filers to provide the Commission with the true and complete terms of the contract.

On the other hand, several commenters support the draft regulation's proposal to modify and utilize ATFI. ETM; PTCB; AISA; and NCBFAA. Others accept the modification of ATFI provided that there is at least one alternative means of filing. JUSEFC; COSCO. JUSEFC finds the Commission's proposal to use ATFI ''logical.'' JUSEFC, 6. NCBFAA comments that the detailed filing requirements of the proposed regulation (and appendix A) are required if the Commission is to be able to police prohibited conduct. NCBFAA, 1. NCBFAA asserts that the industry will not be able to monitor for prohibited conduct because public essential terms will be limited. NCBFAA, 2. Furthermore, NCBFAA presents, as indication that this was the intent of Congress, that while OSRA specifically eliminates tariff filing, it also retains the requirement that service contracts be filed with the Commission. NCBFAA, 2.

Other commenters oppose any justification of the filing requirements based on section 10(b)(2) monitoring. NITL, 5–8. They suggest rather than imposing strict filing requirements, that the Commission determine whether carriers are providing service in accordance with the rates in their service contracts in the same way that shippers and carriers themselves will monitor each other's contract compliance, namely by consulting the terms of the contracts, and comparing those terms to the actual billed amounts. NITL, 5–8. Similarly, Sea-Land comments that the Commission's interest in oversight for unjust discrimination is limited to protecting ports, shippers' associations and OTIs due to their status and that carriers are relieved by the Act of any affirmative obligations towards shippers. Sea-Land, 5–6. It asserts that the Commission's enforcement of section 10 does not require continuation of ATFI in any form. Sea-Land, 5.

P&O complains that continuing the use of ATFI is not a secure option because it will require third party compilers and filers who will have access to confidential information. P&O, 3–4. BSA also worries that the proposal to ''grandfather'' previously approved software might not ensure confidentiality. BSA, 6. It requests clarification from the Commission on the ability of the proposed system to ensure rate confidentiality, and urges the use of new software and systems which would provide total assurance of confidentiality. BSA, 6–7. BSA recommends that the Commission draft specific regulations to address technical qualifications which software must meet to ensure and guarantee to shippers that service contract information will be confidential during filing, and that the Commission also draft regulations which include penalties for violating the security of the websites and

computer systems which contain service contract information (''hacking''). BSA, 8.

Similar to the preceding comments expressing concern for modernity and the ability to upgrade any system based on ATFI, BSA suggests that the Commission require that all common carrier websites are ''Y2K'' compliant. BSA, 6–7. As the internet is a communication line, and digital, this is not a concern for filing.

With regard to the registration requirements in the proposed regulation, PTCB urges the Commission to allow current ATFI registrants to maintain their current registrations and organization records without having to re-register. PTCB, 3. PTCB agrees that requiring batch filers to re-register for new log-ons and passwords is acceptable, but requests clarification that the organization number will remain the same, thus avoiding a requirement that filing services' clients amend their organizational records in order to re-authorize. PTCB, 4.

The Commission has directed its Office of Information Management (''OIRM'') to allow filers who intend to use either the internet-based system (discussed *infra*) or the dial-ups system to apply for registration and obtain log-on IDs and passwords prior to May 1, 1999 in order that they may be ready on May 1 for filing on that date. Organization numbers will remain the same in the service contract database. OIRM will notify via U.S. mail all presently-registered organization record holders to ensure that the individual will remain the same. If the ''org. holder'' will not be the same individual, a registration form will be included in the letter for the recipient to respond regarding who would ''own'' the organizational I.D. Any other log-ons will have to re-register.

Also, PTCB requests that the Commission continue, as is currently the case in ATFI, the method by which delegation of authority to file is done, namely by revising the organizational record. PTCB, 4. PTCB points out a deficiency in proposed Form FMC–83: It does not have a place to indicate delegation. PTCB, 4. Finally, PTCB requests that the Commission delete the requirement that individuals only (as opposed to organizations) are registered for filing because this unnecessary limitation is time-consuming and expensive. PTCB, 4.

The Commission must deny PTCB's request to allow log-on IDs and passwords to be granted to organizations, not individuals, due to security concerns and the requirements of the Computer Security Act. Therefore, the requirement that individuals, rather than organizations will be the registered filers will continue. Filing authority and delegation will be indicated on the Registration Form, FMC–83.

Four of the comments opposing the proposed regulation's adaptation of the ATFI system for service contract filings offer alternatives. Seaboard; OCWG; NITL; and P&O. Seaboard, OCWG, and P&O propose that the Commission allow filing in a generic word processing format as an attachment via electronic mail (''e-mail''). Seaboard, 1. OCWG suggests the Commission adopt a system based on commercially available software already in common use in the industry, but does not suggest precisely what that may be. OCWG, 4. NITL and OCWG offer generally that there are electronic alternatives to the proposed regulation which include filing via e-mail, internet, and diskettes. NITL, 7; OCWG, 8. OCWG proposes that the only technical requirements which would arise from using ''off-the-shelf'' software would be the assignment of user identification codes and security. OCWG, 4. Sea-Land recommends that filers be allowed to file their service contracts via the internet on a confidential site established by the Commission or via diskette, which apparently would be mailed to the Commission. Sea-Land, 4. They assert that this would be simple, flexible, inexpensive, complete, accessible and accurate and would fulfill all statutory requirements. Sea-Land, 4. Finally, while DuPont praises the Commission's desire to use modern electronic means, it recommends that the Commission approach the U.S. Customs Service to ascertain whether a joint system, or at least a compatible system, could be created to serve both agencies and their ''customers.'' DuPont, 5.

NITL recommends that the Commission revise proposed § 530.8(a) to read:

> Authorized persons pursuant to § 530.5 of this part shall file with the Commission electronically or in paper format a true and complete copy of every service contract before any cargo moves pursuant to that service contract. Service contracts filed electronically may be submitted via electronic mail, the internet, or on diskettes using software that is compatible with the Commission's computer systems.

NITL, 14–15.

P&O offers the most detailed suggestion. P&O suggests the Commission adopt an electronic filing system which allows the carrier/filer to send the entire text of the service contract via e-mail as an attachment to a Commission-designated e-mail address, which would be based on the filer's current organizational record. P&O, 2–3. Upon receipt of the service contract, P&O suggests, the Commission then open a directory for each carrier into which it downloads the service contract and therefore would be able to organize the information according to its own needs. P&O, 3. This information could be easily organized because all word-processing programs are searchable. P&O, 3. P&O analogizes the management of this system to the Commission's current maintenance of a list of filed agreements, which is done on a WordPerfect file. P&O, 3. Finally, P&O recommends that the Commission use passwords for confidentiality. P&O, 3.

Other Federal Agencies' Approaches

Several comments urge the Commission to follow the examples of other Federal government agencies in crafting its approach to electronic service contracts filing, namely the Federal Communication Commission (''FCC'') and the Surface Transportation Board (''STB''). NITL, 7; OCWG, 8. It appears that, after review of the approaches of these agencies, as well as that of the Federal Energy Regulatory Commission (''FERC''), the Commission is still faced with limitations of time and resources which might make the adoption of one of these systems inappropriate for the FMC.

1. Federal Communications Commission

Under the Telecommunications Act of 1996, the FCC receives tariff filings for its common carrier tariffs via its website. This process was developed over two years. The FCC requires that tariff publications be filed in both paper copy and on diskette, subject to various format requirements.[5] Filers must submit a cover letter on paper with the diskette and changes (amendments) to the tariff must be made by re-filing the entire tariff on a new diskette, with the changed material, and indicating the changes. The FCC also receives filing via its internet homepage. This filing system was designed and is managed by a private contractor.

2. Surface Transportation Board

One commenter suggested that because the STB ''requires the filing of pleadings and reports in electronic form, which permits those agencies to analyze filings electronically,'' that modifying ATFI is not the only feasible

[5] The diskette must be 3¼ inch, IBM-compatible form and use MS–DOS 5.0 and WordPerfect 5.1 software, in ''read-only'' mode, and labeled with the carrier's name, tariff number, and date of submission.

approach available to the Commission. NITL, 7. A review of the STB regulations on filing methods, however, indicates that the STB has not reached an electronic panacea for filing. For the filing of summaries of railroad contracts for the transportation of agricultural products, the STB requires that ''two copies of each contract summary'' be filed. 49 CFR 1313.4(a)(1). There does not appear to be an electronic option for this type of filing. For the filing of tariffs for the transportation of cargo by or with a water carrier in a noncontiguous domestic trade, the STB requires that ''tariffs shall be printed on paper not larger than 8½×11 inches.'' 49 CFR 1312.4(b). Filers for these tariffs do have the option of electronic filing; however, that option is accomplished through the FMC's ATFI system. 49 CFR 1312.17. Obviously, this option will be eliminated with the removal of the ATFI system, and there appears to be no contemplation by the STB for the implementation of a new method for receiving these filings electronically after ATFI is discarded.

The notice requirements, on the other hand, under STB regulations may be achieved electronically, but only where there is agreement between the parties. *See, e.g.,* 49 CFR § 1300.2(b); 1300.4(b); 1305.2(b),(c); 1305.3; and 1305.4(a),(b). These notice requirements are between carrier and shipper and are not official filings.

3. Federal Energy Regulatory Commission

While none of the comments referred to the approach of FERC, the Commission has investigated FERC's approach to the crafting of a viable electronic filing system. FERC issued a Notice of Inquiry on May 19, 1998 (Docket No. PL98–1–000, 63 FR 27529–27533) requesting comments on various issues which arise with the implementation of electronic filing, including formats, citations, signatures, methods of transmission, confidentiality, security, attestation and service. FERC held a conference on electronic filing on October 22, 1998. FERC has since taken a broader, agency-wide approach for completely re-engineering its methods for accepting filings and managing documents. For the present, the official copies of filed documents are still in paper form. FERC staff manually scans those documents which are not filed electronically (about 120,000 pages per month) but hopes to achieve a system which would provide for hyper-linking all public filings in a particular docket to the docket sheet so the user has the ability to select a document on the docket sheet list and go to the full text of the document immediately.

Due to the general response in opposition to adapting the ATFI filing system for service contract filings, the Commission will make available an option which will address most of the commenters' concerns that the proposed regulations would be too rigid, cumbersome and costly. Interactive internet filing of service contracts with the Commission will be provided, and while the dial-up system will be available, the Commission expects to phase it out as soon as possible, but certainly no later than the end of Fiscal Year 1999.

Specific details on internet-based filing will be made available on the Commission's website (http://www.fmc.gov) when final development and testing is complete. This option will provide for interactive internet filing of service contracts via the Commission's homepage. Individuals filing service contracts will presumably already have filed Form FMC–1, registering them as tariff publishers, and will have been assigned an organization number. Upon review, the Commission will provide prospective service contract filers with a user ID and password. A service contract filer will sign on to the Commission's website and provide its user ID and password. A screen will then indicate several options (e.g., filing a single contract, amendment or batches of contracts or amendments) in addition to detailed filing instructions. A single initial service contract will be filed by providing certain basic information such as a carrier contract number (which will enable linking of amendments to the initial contract), effective date, organization number, and the location of the service contract file which will be uploaded to the Commission upon activating the screen's ''submit'' button. Amendment filings will be done in the same manner, with the addition of a filer-provided service contract amendment number. Batch filings will require similar information for each contract, but will enable the filer to submit more than one contract per session. Finally, the Commission foresees assessing user fees at a later date, as the Commission gains experience and the details of the system are completed.

Therefore, § 530.8 and appendix A to this part, in which the options for filing are detailed, are accordingly revised to reflect the addition of internet-based filing.

Section 530.8 and Appendix A Transition Issues

Several commenters request that the Commission accept paper filings of service contracts as well as electronic filings for a transitional period. COSCO, 1–2; CMA, 3; JUSEFC, 5–7; OCWG, 6; P&O, 4; NITL, 7; DuPont, 5. OCWG recommends that such a transition period be at least one year. OCWG, 6 n.1. OCWG also asserts that there is no need to have a system in place on May 1, 1999. OCWG, 5. P&O also suggests that if the Commission needs more time to put an electronic system into place, it can receive paper filings. P&O, 4. Only BSA and the filing services (PTCB and ETM) support the immediate adoption of electronic-only filing. BSA, 5.

A satisfactory response to the commenters' general opposition to the modification of the Automated Tariff Filing Information (''ATFI'') system and their general support for electronic filing is achieved by the Commission's determination to offer an alternative filing method to the modified ATFI filing which is internet filing (herein referred to as ''internet-based'' or ''option 1''). This option offers filers great ease and flexibility, while allowing the Commission to receive the entirety of the contract information and to organize those filings for the Commission's monitoring and enforcement duties. Furthermore, most of the commenters' concerns about the rigidity and the cumbersome nature of the dial-up filing system are removed with the implementation of this filing method.

While most comments oppose any transitional system which does not include a paper option, the flexibility of the new system will make it extremely easy to file. Filers need only have created their contract on one of several word-processing systems and have access to the internet. It is not unreasonable to expect that carriers have access to this equipment, or that if they do not, they may choose to out source the filing. Removal of the requirement that they use a dial-up system appears to enable all carriers to do their own filing, if they wish to do so, thus removing any confidentiality concerns they expressed in the comments regarding the use of third party filing services.

The Commission intends to allow the filing of service contracts which have an effective date of May 1, 1999 or later in advance of May 1, 1999, as soon as filing systems are ready. The Commission contemplates that the systems could be ready in the week

prior to May 1, 1999. The Commission will issue further advisory notices of the status of the availability of the revised filing systems as information becomes available.

Again, due to the expense of maintaining the dial-up service, the Commission expects to phase it out as soon as possible, but certainly by the end of FY 1999. Finally, the Commission will request further industry input, if necessary, as it refines the internet-based system.

Section 530.8(c) and 530.12 Cross Referencing

Two comments generally voice support for the regulation allowing for the cross-referencing to tariffs and general rules filing as part of service contract register. BSA, 16; JUSEFC, 7. BSA recommends that the Commission make available on its FMC website the general rules tariff of any carrier or conference and periodically inspect that tariff to determine that changes made by amendments have been made, and thereby ensure that the shipping public will be able to obtain necessary information regarding applicable items (e.g. rules for hazardous cargo). BSA, 16.

P&O comments that the proposed regulation's prohibition against cross-referencing has no support in OSRA and no reasonable regulatory purpose, and that as such it should be withdrawn and the regulations should allow cross-referencing to a carrier's own tariff as well as its conference tariffs. P&O, 8. NITL and OCWG, as a means to allow greater commercial flexibility, both support revision of § 530.8(c)(2) to allow cross-referencing not only to tariffs but also to ''widely available public information.'' OCWG, 19; NITL, 13. OCWG recommends that the Commission add to § 530.8(c)(2) the phrase, ''or unless those terms are available in a regularly published and readily available public source commonly known in the industry.'' OCWG, 18–19. NITL also believes that this change will ensure that the Commission could obtain all of the contract's terms. NITL, 13.

The Commission, in an effort to make filing less burdensome for carriers, but while ensuring that it had the entire contents of, or access to, the service contract terms, proposed that carriers may ''cross-reference'' their own tariff publications or their conference tariff publications in their filed service contracts. This provision was intended to allow carriers to refer to rules of general applicability (free time and demurrage, bunkering rates, currency matters, etc.) for the ''boilerplate'' or terms which appear in all their contracts. Further, the Commission recognized that it was Congress' intent, by lifting the requirement that tariffs be filed with the Commission, to allow parties to service contracts more freedom and flexibility in their commercial arrangements. For those reasons, the proposed rule, originally numbered § 530.9(c)(2), was drafted to permit filed service contracts to refer to terms outside the four corners of the filed service contract, but only if they are contained in the carrier's or conference's tariff publication. P&O appears to have misread the proposed rules as not allowing any cross-referencing whatsoever. This was not the intent of the proposed rules. Rather, the regulation would have allowed cross-referencing, but only to matter contained in a published tariff of the carrier or conference of which it was a member.

However, in response to comments that allowing cross-referencing only to published tariff matter would unduly stifle the parties' contract terms, the Commission has decided to allow cross-reference to a ''publication widely available to the public and well known within the industry.'' § 530.8(c)(2). The Commission wishes to stress, however, that exact terms of the contract must be determinable and certain, in keeping with the requirements of the Act. In response to a comment by COSCO that this approach would undermine the confidentiality of the contract terms, we point out that any term, except of course published essential terms, can be kept confidential by inclusion in a general rules filing or by filing in the text of the contract itself. The Commission is confident that this approach will satisfy both the concerns of filers for confidentiality, and the requirement that the complete contract be filed.

Section 530.8(b)(9) Naming Affiliates

AISA believes that proposed § 530.8(b)(9) should be amended to remove the requirement that shippers' associations name all of their members. They assert that this requirement is not mandated by any change made by OSRA and is contrary to current Commission regulation and policy which requires only such naming if the contract specifically excludes or includes specific members. AISA, 7. AISA is concerned that such disclosure would give carriers blackmail potential, as was found in Fact Finding 15, and Docket 91–1. AISA, 8.

AISA suggests the provision be revised to read as follows:

(9) The legal names and business addresses of the contract parties; the legal names of affiliates entitled to access the contract, except that in the case of a contract entered into by a shippers' association, individual members need not be named unless the contract includes or excludes specific members; the names, titles and addresses of the representatives signing the contract for the parties; and the date upon which the service contract was signed. An agreement service contract must identify the FMC Agreement Number(s) under which the service contract is filed. Carriers, conferences, and/or agreements which enter into contracts that include affiliates must in each instance either: (further unchanged). AISA, 10.

CMA and NITL agree that reporting all names and addresses of shippers would be unnecessarily burdensome. CMA, 2; NITL, 12–13. NITL questions the purpose of this requirement. NITL, 12. If the Commission has a question about identity or location of a particular affiliate, NITL suggests that it obtain the information informally, on a case-by-case basis. Therefore, NITL argues, this requirement should be either deleted or the production period of 10 days should be increased. NITL, 12.

The deletion of the exception for shippers' associations being required to list all members in a service contract was a drafting oversight. We therefore re-insert the exception. However, the production period of 10 days was fully explored when the currently effective rule was put into place and this will be unchanged. OSRA makes no changes which would have an impact on this requirement.

APL complains that proposed § 530.8(b)(9)(ii) (identifying affiliates) is unintelligible, as it is unclear to whom the certification information must be provided. APL, 4. Further, it asserts that the last two sentences of the paragraph seem to be unrelated to clause 9(ii), and requests clarification of the regulation. APL, 4.

Section 530.8(b)(9) as proposed reads, (the filed contract or amendment shall include)

(9) the legal names and business addresses of the contract parties; the legal names of affiliates entitled to access the contract; the names, titles and addresses of the representatives signing the contract for the parties; and the date upon which the service contract was signed. An agreement service contract must identify the FMC Agreement Number(s) under which the service contract is filed. Carriers, conferences and/or agreements which enter into contracts that include affiliates must in each instance either:

(i) list the affiliates' business addresses; or

(ii) certify that this information will be provided to the Commission upon request within ten (10) business days of such request. However, the requirements of this section do not apply to amendments to contracts that have been filed in accordance with the

requirements of this section unless the amendment adds new parties or affiliates. Subsequent references in the contract to the contract parties shall be consistent with the first reference (e.g., (exact name), ''carrier,'' ''shipper,'' or ''association,'' etc.);

The Commission has re-drafted this provision for clarity, and these alterations should sufficiently address the reasonable concerns of the commenters.

Appendix A General Rules Filings

COSCO and JUSEFC comment that allowing filers to make general rules filings or register filings is beneficial and will allow carriers to avoid repetitious filing. COSCO, 1; JUSEFC, 7. COSCO urges that publishing general rules in a tariff would be unacceptable because of the confidentiality issues and, further are concerned that such publication would require a thirty-day delay for the implementation of such rules. COSCO, 1.

ETM is concerned that the proposed regulations are unclear as to whether the Commission would allow for multiple service contract registers, and whether the registers are to be based on strict location group application or if overlapping scopes are allowed. ETM 2–3. Both ETM and PTCB foresee future problems if the Commission intends for the registers to be unique, such as by location group, without conflicting scopes or overlapping of scopes and does not allow different and overlapping scopes between registers. These problems may include amendment numbering, effective dates and contract terms. ETM 2–3; PTCB, 9.

Other comments disfavor allowing service contract registers as being unnecessary, burdensome and without meaningful regulatory purpose. P&O, 7. P&O further comments that using a service contract register for general rules filing seems contrary to the continued requirement to publish essential terms where carriers have traditionally published, and they assume would continue to publish, their ''boilerplate.'' P&O, 7.

The provision for a ''general rules'' filing is somewhat complicated by the fact that there may be two electronic filing systems in place. However, the Commission allowance of more liberal cross-referencing as well as a filing system which would accept the full text of the document in a word processing format (i.e., the same as the document signed by the parties), this should relieve any burden on filers to file with the Commission anything other than the commercially agreed upon service contract, and should be adequate for the Commission to determine the terms of the contract with precision.

Other Term Requirements

Many of the system requirements and restrictions opposed in the comments diminish, if not completely disappear, with the addition of the option for a web-based filing system. First, PTCB's concern that ATFI will not accept port ranges disappears when filers file the full and original text of their contract on-line. PTCB, 5. The Commission has revised the regulations relating to the ATFI-based system to allow the filed matter+ to reflect the true agreement of the parties, to the maximum extent possible, given some inherent technical limitations of that system.

The same is true for location and commodity descriptions: There would be no need to require NIMA or WPI locations, or to use the Harmonized Schedule for commodity descriptions in a ''free text'' system. OCWG, 21; P&O, 8; NITL, 11; Conagra, 4. The Commission agrees that this unduly limited the parties in contracting and might cause confusion, and so has removed references to the US HTS, NIMA and WPI in the interim final rule.

For duration requirements, however, the Commission will continue to require service contracts to have specific effective and expiration dates. P&O, 7; NITL, 12. This is required by the statutory definition, that a service contract be ''a commitment * * * over a fixed time period.'' Section 2(19) of the Act. *See* below, discussion on amendments for renewal of service contracts.

System requirements may also dictate the Commission's ability to allow filers to have access to their filed contracts for reviewing and auditing. PTCB, 3. At first blush, this may create confidentiality/security issues which are, at present, unforeseen. While the new system may give the filer the ability to review (on a read-only basis) its filings, the contents of a filed service contract may only be changed through a subsequent filed amendment or correction.

Finally, the Commission will make the addition of a provision which requires agreement-authorized service contracts to include the filed agreement number, § 530.8(d)(3), and a provision for filers to inform the Commission where the statement of essential terms will be filed, § 530.8(d)(4). For the reasons described above, the proposed regulation is revised to add the alternative system, remove unnecessary requirements and further simplify the filing procedures.

Section 530.9 Notices

Proposed § 530.9 (as renumbered) requires the carrier party to a service contract to notify the Commission within 10 days of the occurrence of certain events which affect the service contract. Those events include: Correction ((a)(1)); cancellation ((a)(2)); termination not covered by the contract ((a)(3)); adjustment of accounts (by re-rating, liquidated damages, or otherwise under § 530.16)((a)(4)); final settlement of any account adjusted as described in § 530.16 ((a)(5)); and any changes to the name of a basic contract party or the list of affiliates, including changes to legal names and business addresses, of any contract party entitled to receive or authorized to offer services under the contract ((a)(6)).

Commenters suggest that there is no need for the Commission to receive notice of matters which are affected by amendment of the service contract because such amendments are filed with the Commission. NITL, 15. They suggest that the events which are enumerated in the proposed regulation are events that would require such amendment.

CMA and NITL believe that requiring changes to be reported within ten days is overly burdensome. CMA, 2. NITL suggests that if the proposal is not completely deleted, the time period should be lengthened to ninety days. NITL, 15–17. In the original regulation, found at § 514.7(g)(2), notices were required to inform the Commission within thirty days of such events, and that period of time was based on the commercial practice for settlements of accounts.

The proposed rules reduced the time in which notification must be made from thirty to ten days based on an understanding that this would be in line with the speed at which these transactions now occur and that, therefore, no additional burden would be created for regulated entities. However, due to the commentary to the contrary, the Commission has decided to simply revert to the former requirement of thirty days.

NITL and DuPont comment that the requirements cover too many events, and are overly broad. DuPont asserts that such notices should only be required to be reported when events occur which affect the essential terms of the service contract. DuPont, 2. The proposed regulation would give the Commission power to limit, restrict and dictate the content of changes to service contracts. DuPont, 2.

Contrary to these assertions, the Commission will continue to require that all changes to a filed service

contract must be filed with the Commission, not only those which effect the essential terms. The Commission must monitor the operation of service contracts for acts prohibited by the statute and simply cannot fulfill this duty if it is not guaranteed of having all the terms of service contracts within its jurisdiction.

The comments suggest the proposed regulation be altered to permit periodic reporting, perhaps on a semi-annual basis in a prescribed format (but not one which would restrict the parties right to mutually alter, modify or terminate) of routine changes which effect essential terms. DuPont, 2,3. CMA suggests this approach for changes to shipper affiliates only. CMA, 2.

Proposed § 530.9 (as renumbered) was adapted from original § 581.5(b) (52 FR at 23939, 23999), which the Commission asserted was

> necessary to enable the Commission to perform its contract surveillance role and ensure the terms of contracts are met. The notice requirements should not be burdensome since such information is exchanged in the normal course of business by the contract parties. Compliance with the notice requirement can be met merely by providing the Commission with a copy of whatever documents are exchanged between the parties under such circumstances.

The Commission continues to have such a surveillance role, which is made more important by the fact that service contracts will not be publicly available. Furthermore, the Commission particularly reminds filers that any changes to the public essential terms must be updated in the essential terms publication, regardless of such notification to the Commission. *See* § 530.12 (publication).

NITL is correct not only that the Commission ''would like'' to receive notice, but that it must receive notice of changes in service contracts in order that it have the complete terms of the contract which are in effect, and to be aware that a certain filed contract is no longer in effect. NITL, 15. Also, NITL argues that corrections should be handled through amendments. NITL, 15–17. If the filer uses the modified ATFI, the filer will receive a special case number with which it will make its own corrections. As the Commission itself does not enter the corrections into the system, the Commission must know when that is done. The introduction of an alternate system filing may or may not have the capability of alerting the Commission when a correction is made, so while there may be no need for notice, the Commission will continue to require it at this point. *See,* discussion regarding correction, § 530.10.

As cancellations (§ 530.10(a)(2)) are necessarily only those not anticipated by the terms of the contract, there is a clear need for the Commission to have notice of that event. If the termination has occurred as anticipated by the service contract, we agree, in accordance with the rationale above, that there is no need for additional notice to the Commission. If, however, an event has occurred which was not contemplated by the parties in the service contract but which affects its operation, the Commission must be so notified in order to assess whether the parties are employing an unjust device to obtain rates otherwise not applicable. Similarly, for terminations not covered by the contract (§ 530.10(a)(3)), the parties will no longer have the right to use the rates in the service contract and there are section 10(a)(1) concerns.

Several commenters assert that the notification requirements of §§ 530.10 (a)(4), (a)(5) and (b) for account adjustments are unnecessary and arbitrary, intrude into the commercial relationship, create needless burdens and are outside the Commission's oversight functions. OCWG, 20; Conagra, 4–5; NITL, 15–17. Notice of account adjustments and final settlement which are made pursuant to the terms of the service contract filed with the Commission appear to have no legitimate basis. NITL, 16. They appear to stem from prior ''me-too'' requirements. NITL, 16.

Again, and contrary to the comments, however, the Commission must know what the adjustments or final settlements of an account may be, not to impose the rate differential on the carrier or shipper, but to ensure that no section 10 violations are being carried out. There is little burden on the filers in providing this information, as they may simply copy the information to the Commission as they send it to the shipper.

Similarly, for final settlement of any account adjusted, the Commission requires notice. Both of these notice requirements were ''intended to apply to only those service contracts where there has been a change to the basic compensation required by the terms of the service contract.'' 52 FR at 23999. The applicable rate must be determinable at any given time, to ensure compliance with the Act and section 10(a)(1). Therefore, while parties are free to provide for liquidated damages, contingencies, etc., in their service contracts, using a rate from a service contract which is not lawful under the Act would create section 10(a)(1) and possibly other violations.

NITL comments that changes to names of parties (requirement of which is discussed *supra*) should be handled through amendments, and that additional notice of these should therefore not be required. NITL 15–17. NCBFAA and CMA suggest that there is no need to notify the Commission of changes to lists of shipper affiliates as required in § 530.9(a)(6)(ii). NCBFAA, 2; CMA, 2. Furthermore, this is too burdensome to shippers. NCBFAA, 2; CMA, 2. DuPont recommends that § 530.9(a)(6)(ii) be altered to eliminate the requirement to report all names and addresses of shippers (except NVOCC) because identity of shippers is not an essential term, is not reported to the public and could be required to be maintained in the records of the carrier, records which can be obtained by the FMC through subpoena power. DuPont, 2–3.

Notice to the Commission of changes to shipper parties arises from the same concerns the Commission has when any other term of the filed service contract changes. The Commission must have the ability at any time to examine the filed service contract and assess whether or not parties (or non-parties) are operating in conformity to the service contract, or whether they may be employing an unjust means or device to elude the requirements of the Act. The Commission must be able to ascertain at any given moment who has the right to access a service contract.

Furthermore, there appears to be no reason at this juncture for the Commission to consider whether periodic reporting of changes to who may have access to a service contract (affiliates) would be adequate to meet its responsibilities. No change to OSRA mandates such a change, and the regulation was carried over from prior Commission regulation found at 46 CFR 514.7(g)(2).

OCWG complains that proposed § 530.9(b) (notice to contract party) fails to acknowledge commercial realities, including the sometimes protracted negotiations and communications delays relating to the covered subject matter and, further, that carriers and shippers have both regulatory and commercial incentives to promptly pursue their contract rights. Thus, they argue, there is no reason to graft further deadlines onto the commercial relationship. OCWG, 20–21.

Originally, this provision was crafted with respect to the general commercial practice of settling accounts in thirty days; additional time was provided, and the regulation as adopted required notice to the shipper party of the final settlement of account within 60 days of

the termination of the contract. 52 FR 23999.

OSRA shifts parties' remedies to their common law contract rights, and as such, this provision appears to be no longer necessary, as it was originally intended to protect the shipper party. With the deregulatory goals of OSRA, parties are expected to protect their own contract rights and as such the Commission's role as mediator between the parties for contract disputes is removed. Accordingly, § 530.10(b)(as originally numbered) is deleted completely.

Section 530.10 Amendment, Correction and Cancellation

The proposed regulation provides that either party to a filed service contract may request permission to correct clerical or administrative errors in a filed service contract by filing a request with the Commission's Office of the Secretary within 45 days of the contract's filing with the Commission, for a fee of $233 pursuant to § 530.11(c)(4). Any notices in connection with the filing of such corrections would be filed with the Commission under § 530.9 within 10 days. Amendments are intended by the rule as proposed to be filed in the same manner as initial service contracts. Finally, cancellation of the service contract is provided for by this section.

COSCO requests clarification about what rules, and specifically whether confidentiality, will apply to service contract amendments filed after May 1, 1999, where the original service contract was filed before May 1, 1999. COSCO, 2.

Amendments filed on or after May 1, 1999 to service contracts filed before May 1, 1999 must comply with the regulations in effect as of May 1, 1999. The Commission expects that many parties to service contracts entered into before May 1, 1999 may wish to obtain confidentiality for more of their service contract terms under OSRA, and therefore will terminate the contracts, write new ones and file them in their entirety rather than simply making amendments. As we previously indicated, the Commission will strive to have the filing systems ready to accept service contracts in the week prior to May 1, 1999 and thereby allow the filing of service contracts which have an effective date of May 1, 1999 or later as soon as possible.

Two commenters believe that requiring a formal correction proceeding and justification for correcting clerical errors of proposed § 530.10(b) incorrectly carries over provisions from the previous regulations on ''me-too,'' which has been eliminated by OSRA. CMA, 2; DuPont, 3. It appears that confusion has arisen among the commenters regarding the differences between the terms ''correction'' and ''amendment'' to a service contract filed with the Commission under the Act. Parties to a filed service contract are free to amend its terms prospectively at any time, by filing their amendments pursuant to § 530.8. Meanwhile, the ability to correct clerical or administrative errors retroactively helps contract parties avoid undue hardships in instances where the parties discover, subsequent to filing a contract with the Commission, that a clerical or an administrative error had been made.

There is utility to having in place a procedure by which the parties may correct inadvertent errors through the correction procedure. However, this procedure must be structured so as to enable the Commission to distinguish between legitimate requests and requests crafted to avoid the statutory requirements of the Act, regardless of the fact that me-too rights have been eliminated by OSRA. The ability to change provisions retroactively without Commission scrutiny would undermine the clear intent of section 10(b)(2)(A) which provides that no common carrier, either alone or in conjunction with any other person, directly or indirectly may provide service in the liner trade that is not in accordance with the rates, charges, classifications, rules, and practices contained in a tariff published or a service contract entered into under section 8 of OSRA.

Furthermore, allowing parties to ''correct'' retroactively terms of the filed service contract would make any such agreement illusory and thereby bring it outside the requirements contained in section 2(19) of the Act that a service contract be certain and contain commitments on the parts of both parties. It appears that allowing for corrections (retroactive) and amendments (prospective) to filed service contracts provides more than adequate flexibility for parties to take advantage of their commercially negotiated arrangements while ensuring adherence to the Act's requirements.

CMA asserts that the Commission has no authority to accept or reject a contract change, as it is a matter for the parties. CMA, 2; DuPont, 3. NITL believes it is nonsensical to require permission to correct a clerical error. NITL, 17. We disagree. The authority for the Commission to scrutinize a retroactive change to a service contract is based on the requirement of section 8(c) of the Act that service contracts be filed with the Commission and that they reflect certain, meaningful commitments. Thus, allowing parties to make retroactive corrections devoid of any review or oversight would render that statutory requirement meaningless.

CMA argues that there should be no distinction between changes that are made prospectively (amendments) and changes that are made retrospectively (corrections). CMA, 2. Again, we disagree, and point out that the Commission has made such a distinction: the terms of corrections, but not those of amendments, are subject to Commission review before they may be made.

Two commenters complain that the correction procedure is excessively burdensome. NITL, 15; NCBFAA, 2. Further, NITL argues, the fee for corrections is too high. NITL, 17. The service fee associated with such requests became effective November 2, 1998, and reflects the costs incurred by the Commission in providing this service to the parties which elect to use it. Correction requires a significant amount of work by Commission staff, because the request must be scrutinized to ensure it is not an attempt to circumvent the requirements of the Act. Again, the need for notice of correction (*see* § 530.9(a)) will depend on the capabilities of the filing system.

PTCB comments that filers should have access to their filings to check them for errors and to audit them. PTCB, 1. The read-only access to filings may be possible, but certainly filers will have no ability to change their filings (except by amendment) once submitted to the Commission's database for the reasons set forth above.

NITL comments that the 45-day period by which filers must report clerical and administrative errors is too short. NITL, 17. This deadline, however, has been a longstanding requirement of the regulations and the Commission is unaware of complaints of hardship in the past. Furthermore, given the recent advances in communication technologies, 45 days would be more than adequate time for parties to detect clerical errors in their service contracts. Also, the requirement that such request be filed within a 45-day period for a service fee encourages contract parties to carefully review contracts before submitting them to the Commission and to take corrective action without undue delay. Finally, the Commission has previously fully assessed the time period required for requesting a correction, and it is not apparent why this analysis would have changed. Docket No. 88–61, 54 FR 1363 (Jan. 13, 1989).

The correction procedure set forth under § 530.10 will serve a useful purpose and will be maintained. Experience has shown that there will likely be only a minimal need to file such requests: during FY 1998, only four such requests were filed with the Commission and this number is not anticipated to increase significantly in the future, particularly given the Commission's determination to encourage contract parties to file their actual arrangements rather than arrangements ''translated'' into FMC formats.

Commenters complain that § 530.10(c)(2)(cancellation) is anachronistic and urge the Commission to delete the provision. One commenter complains that these provisions are inconsistent with general principles of contract law and would penalize shippers in situations where both the shipper and the carrier believe the termination is in their self-interest, and as such is not appropriate in a marketplace oriented system, such as the one OSRA contemplates. AImpSA, 1–2. NCBFAA complains that the proposed rule is burdensome and inappropriately harms shippers when the carrier may not have suffered any damages due to unilateral cancellation of a service contract. NCBFAA 3,4. NCBFAA also complains that it is unfairly punitive to re-rate at tariff rates when a shipper cancels a service contract. NCBFAA, 3,4.

The Commission has concluded to redraft this section to reflect the very limited situations in which re-rating will be required. First, we point out that the rejection provision has been eliminated. Second, re-rating, as discussed below, will only be required in situations where a filed service contract has not contemplated and which the parties have not determined to amend the contract. If there is a liquidated damages, or another fall-back rate provision, there will be no need to re-rate cargo which has already been carried. Therefore, most of the shippers' concerns that they may be held unreasonably accountable for a carrier-filer's filing mistakes are removed.

The Commission first added the allowance that parties prospectively may amend their filed service contracts in Docket 92–21, 57 FR 46318 (Oct. 8, 1992). There, the Commission noted that the parties may make retroactive corrections of clerical or administrative errors through the corrections procedure. *Id.* at 46318. Second, the Commission noted, the parties can similarly provide for substantive modifications through contingency clauses. As pointed out below, examples of such contingency clauses had been listed in § 514.17 (d)(7)(viii).[6] As further discussed in the supplemental information to this regulation, any of the terms of the service contract may be amended with prospective effect. 57 FR at 46322.

The terms amendment, correction and cancellation are clarified by the revised section. It is apparent that commenters are confused about the reasoning behind the distinction the Commission has made in the past. Further, we point out that the Commission's Bureau of Tariffs, Certification and Licensing (''BTCL'') received only four petitions for correction last year. This is simply an issue which has not been a problem in the past, but which the Commission will continue to monitor against the abuse of procedures such as correction to evade the prescriptions and prohibitions of the Act.

Therefore, due to the apparent confusion of the comments over the distinction between the terms correction, amendment, and cancellation the proposed regulations are revised to include definitions of these terms.

Section 530.12 Publication of Essential Terms

OSRA continues to require the publication of certain essential terms of service contracts and instructs carrier parties to service contracts to make these essential terms available to the public ''in tariff format.'' Section 530.12 of the proposed regulation suggested that carriers and conferences should be able to satisfy this obligation in the same way they publish their tariff information under proposed 46 CFR part 520. Further, in an effort to assist the shipping public to find statements of essential terms published according to this part, the Commission proposed making a list of the locations of all such publications available on the FMC website. 46 CFR 530.12(f).

OCWG comments that the proposed regulation's requirement that essential terms be published with the tariffs is misplaced because that is just format, not location. OCWG, 18. The proposed rule cross-referenced many of the technical requirements of the newly proposed tariff publication regulations to effectuate the essential terms publication required under this part, in an effort to ease the burden on carriers, and to allow them to take advantage of means by which they would already publish their tariff information. The Carrier Automated Tariff regulation, Commission Docket No. 98–29, gives carriers a wide array of options regarding the location at and method by which they publish. Therefore, requiring carriers to publish statements of essential terms alongside their tariffs would not create any new burdens. Indeed, requiring that a different location be used would appear to be much more burdensome, as it would not allow carriers to take advantage of publications they must already make in accordance with the tariff regulations.

However, the Commission is again faced with issues which arise when a service contract is entered by members of a non-conference agreement which does not publish a common tariff with which its service contract essential terms may be published. One commenter supports the proposal that individual service contracts are published by the individual, and that multiparty service contracts are filed by one party, but published by all the parties. P&O, 8. However, the comments request that the Commission clarify that for individual service contracts, essential terms would be published on the carrier's own essential terms publication and not on a conference's essential terms publication. P&O, 8. We agree that this remains the simplest approach.

Individual carrier service contracts are to be published alongside that carrier's tariff matter, in a separate document, as outlined in § 530.12. Multi-party service contracts entered into under the authority of a conference must be published alongside the conference tariff, and not in the individual member's tariff.

For service contracts jointly entered into by multiple parties of a non-conference agreement, the publication of the statement of essential terms will be published as for individual service contracts, but note must be made of the

[6] That section read, in pertinent part, Later events causing deviation from ET (if any); Where a contract clause provides that there can be a deviation from an original essential term of a service contract, based upon any stated event occurring subsequent to the execution of the contract (this term) shall include a clear and specific description of the event, the existence or occurrence of which shall be readily verifiable and objectively measurable. This requirement applies, inter alia, to the following types of situations:

(A) Retroactive rate adjustments based upon experienced costs;

(B) Reductions in the quantity of cargo or amount of revenues required under the contract;

(C) Failure to meet a volume requirement during the contract duration, in which case the contract shall set forth a rate, charge, or rate basis which will be applied;

(D) Options for renewal or extension of the contract duration without any change in the contract rate or rate schedule;

(E) Discontinuance of the contract;

(F) Assignment of the contract; (or]

(G) Any other deviation from any original essential term of the contract.

relevant FMC-designated Agreement number. Commenters assert that, by requiring a list of fellow carrier participants, the proposed regulation was adding a non-statutory public essential term: the names of the carrier parties. With that in mind, together with the limitations which exist as to tariff-associated statements of essential terms publication, reference to the agreement number will allow the public to ascertain whether certain activity is joint or independent. This approach, while it does not provide the public with a list of which member is or is not participating in an agreement-authorized multi-party service contract, will indicate that the service contract is not an independent, sole-carrier service contract.

One commenter suggested that rather than require all individual carriers to publish the full text of their non-conference agreement contract statements of essential terms, simply a reference to where the published essential terms may be found would be adequate and less burdensome to carriers. COSCO, 2. Due to the automated nature and the limited terms which are required to be published in a statement of essential terms under OSRA, the burden appears to be rather light on carriers, in comparison to the benefits it provides the shipping public.

P&O further requests that the Commission clarify the different publication requirements for non-conference agreement multi-party service contracts, conference agreement multi-party service contracts where the conference is the signatory but not all members are participants, and conference agreement multi-party service contracts where the carriers themselves are the signatories. P&O, 8. We agree that for statements of essential terms, because the terms are public in contrast to the balance of the filed matters, there is no corresponding issue of confidentiality. The clarification in § 530.12 will indicate that service contracts which are entered jointly by members of conferences, regardless of signatory, must be published with the conference's tariff and not in the individual carrier's publication. For an independent service contract, the statement of essential terms will be published with the individual carrier's tariff publication, but not with the conference's tariff. Allowing such would lead to public confusion.

ETM requests that the Commission provide further clarification regarding the failure to make published essential terms contemporaneously available. ETM, 1. We reiterate that such liability would rest on the carrier parties to a service contract under the Commission's jurisdiction, regardless of the appointed agent for publishing.

Section 530.13 Exceptions

One commenter asks the Commission to clarify in supplementary statements that service contracts which are limited to the carriage of used military household goods and personal effects, or shipments of used household goods and personal effects of civilian executive agencies tendered to OTIs under the International Household goods program, administered by GSA, or both, are *required* to be filed with the Commission. HGFAA, 3. The exemption for used military household goods, granted by the Commission under section 16 of the Act, exempts those services from the tariff filing requirement only. The language in the rule as revised should remove any confusion.

The inclusion of the phrase, ''as those terms are defined in section 3 of the Act'' appears to adequately address any concerns regarding the definitions for exempted commodities. The one exception to this is for the term ''motor vehicle'' which is not defined by the Act. Therefore, the addition of that term to the definitions, § 530.3, which mirrors the terms definition in the Commission's regulation on Carrier Automated Tariffs Systems (Docket 98–29) will adequately address such concern. It does not appear necessary to further repeat other definitions here.

The proposed regulations also provided for ''non-acceptance,'' a new term reflecting the congressional mandate that the Commission not accept for filing service contracts which cover only excepted commodities. It appears now that this was a confusing new term. The term ''non-acceptance'' has been removed from the regulation, and the provisions in this section should otherwise adequately address ''mixed'' contracts.

The Commission will retain the provision requiring any service contracts which are filed to relate to commodities or services for which a tariff rate can be established. This is because the situation may arise in which the Commission would require re-rating, and for such re-rating, an ''otherwise applicable rate'' would be required. While such need may be very rare, those concerns remain for replacement applicable rates for such situations.

Finally, issues arise similar to those discussed under the sections on rejection and re-rating. For the reasons discussed, mixed commodity contracts may only be filed if a replacement rate is available. We therefore revise the proposed regulations to clarify this approach. Finally, as it was repetitious, § 530.15, as originally numbered in the proposed regulation, entitled ''non-acceptance'' is deleted entirely, and the following sections have been accordingly renumbered.

Proposed § 530.15—Rejection

Several comments remark on the Commission's authority and criteria it would use for rejection of service contracts as presented in proposed § 530.15. Commenters generally argue that the Commission may only reject service contracts submitted for filing if they do not meet the requirements of the Act, but that the Commission does not have the authority to reject them on the basis that they do not meet the requirements of the Commission's regulations. OCWG, 19–20; CENSA, 3; P&O, 6; NITL, 19. IBP urges the Commission to revise the regulation, and to provide more guidance on when a service contract could be rejected and suggests that rather than a general reference to the Act, this section refer to the requirements in § 530.8 (as renumbered). IBP, 1. Finally, P&O complains that the Commission is wrongfully attempting to intrude on the commercial nature of service contracts through rejection. P&O, 6.

Commission regulations currently outline the procedures for rejection of service contracts and essential terms filed with the Commission. 46 CFR 514.7(j). The Commission rejects service contract essential terms publications filed into the ATFI system which do not conform to the requirements of the Act or Commission regulation, including timeliness of filing and adequacy and accuracy of the publication of the statement of essential terms. The proposed regulation attempted to adapt the current rejection rules as necessary to meet the changes to the Act made by OSRA.

JUSEFC recommends the re-insertion of § 514.7(j)(2) which specifies that rejection is limited to those instances where parties fail to file a corrected copy. JUSEFC, 8–9. The filer, they comment, should be given a chance to cure even if the deficiencies are major, and a notice of intent to reject be sent to the shipper party, because the sanction of re-rating is too harsh on the shipper who relies on the carrier party to do the filing. IBP, 2. This argument is considerably diminished, as the Commission under section 13(f)(1) of the Act as revised by OSRA no longer has the ability to order shippers to pay the undercharge if there is an

enforceable agreement in writing.[7] *See infra,* discussion of re-rating at § 530.14, originally numbered § 530.16 in the proposed regulation.

Several commenters request that the Commission decrease the ''review period'' and increase the ''cure period'' proposed in the regulations. COSCO requests that the Commission shorten the review period from 20 days to 1 day. COSCO, 2. OCWG also recommends a no-penalty cure period of 20 days. OCWG, 20.

NITL suggests amending § 530.15(b) as proposed to read:

> Within 20 days after the initial filing of an initial or amended service contract, the Commission may reject a service contract that does not conform to the requirements of section 8(c) of the 1984 Act. Prior to rejection, the Commission shall provide notice to the filing party of the deficiencies in the contract and shall provide such party 20 days to cure the deficiencies. A failure to cure the deficiencies within the stated time period will result in rejection of the contract. The filer of the contract shall notify the shipper of any contract rejection within 10 days of its receipt of notice of rejection. Until the cause for potential rejection is cured, no cargo may be transported under the contract following the receipt of notice of the rejection by the shipper.

NITL, 21

JUSEFC suggests a two-tier approach to review. First, they suggest, a short period (3 days) in which the Commission would determine whether there is a serious enough breach as to require rejection *ab initio,* notify the filer and give it the opportunity to make corrections. Then, a second period (10 days)(if the deficiency is not corrected) for continuing review, after which (again if not corrected), rejection would be effective as of the close of the correction period, but not as of the date the contract was originally filed. JUSEFC, 8–9. JUSEFC's proposal would appear to allow the contract rates to be effective for a period of up to 13 days, even if the deficiencies are never cured, and to allow the contract rates to be lawful. JUSEFC, 8–9. This procedure, JUSEFC claims, would comply with the Commission's practice with respect to tariff rates rejected after they have become effective as well as the Filed Rate Doctrine as affirmed in *Maislin Industries, Inc.* v. *Primary Steel, Inc.*, 497 U.S. 116 (1990).[8]

With the changes the Commission has made to the filing system, and the relief from many of the technical requirements which accompany those changes, the Commission will completely remove the rejection procedure in the proposed regulation. There will therefore be no requirement that the Commission conduct a review of service contract filings according to any deadline. Of course, this would have no effect on the Commission's ability to review service contract filings for statutory and regulatory compliance and pursue investigatory or enforcement action as it deems necessary.

JUSEFC's concern that the Commission has compromised the right of filing parties to amend their contracts to meet the Commission's objections and preserve the original effective dates of their contracts is misplaced. The assertion that parties have a right to ''correct'' or ''cure'' their deficient service contracts and preserve the filing date is unsupported by any statutory requirement. Commenters who argue for the Commission to give filers time to correct deficiencies appear to suggest that the Commission must review filings for facial defects as they are filed, and further, that if the Commission does not notify the filer of a deficiency, that the service contract is compliant with the Act and regulations. While it has been the past policy and practice of the Commission in the past to review essential terms documents as they were filed with the ATFI system and its ability to conduct associative checks, there is no statutory requirement that the Commission give parties time to ''cure'' their defective filings during which they may operate under the defective service contract.

The rejection procedure was originally intended to, first, be a service to filers and, second, to preserve the system integrity of the data in the ATFI-based statements of essential terms. When transmission to ATFI failed, BTCL, through the rejection procedure outlined in the proposed regulations, would notify filers that the essential terms publication they had attempted to file was defective. The automated nature of conformity checks made this possible.

Acceptance by the Commission of a document, including an electronically-filed statement of essential terms does not and never did, indicate the Commission's ''approval'' of a service contract. The Commission expects that BTCL, as it detects minor deficiencies in filed service contracts, may notify the filers and allow for re-filing within a reasonable period of time, at their discretion, but will not be required to do so. Therefore, the rejection procedures are deleted entirely.

Carrying cargo under a service contract before it has been filed with the Commission is prohibited by proposed Commission regulation § 530.8(a). Carrying cargo under a defective service contract (for example, one which does not contain one of the eight essential terms or which fails to state them with adequate certainty; or does not contain the shipper certification; or does not conform to the filing requirements of § 530.8; or does not concurrently publish the four public essential terms) would be a violation of the Act, and subject to penalties of section 13 of the Act. The comments reveal confusion on this point which the Commission wishes to dispel. The filing of a service contract does not, nor did it ever, imbue the service contract with any type of Commission approval or imprimatur, any more than would the filing of a tax return with the Internal Revenue Service.

It has, however, been the past practice of BTCL to informally notify filers of deficiencies in their service contract filings. BTCL would provide filers of essential terms statements an opportunity to cure the defects by re-transmitting the electronic data to the ATFI system. Furthermore, it appears that BTCL has rarely, if ever, invoked the predecessor section of this regulation. However, the reception of the entirety of service contracts in electronic form will significantly change the method by which the Commission may review the filings. Therefore, with that, and the following discussion in mind, the Commission has concluded that the rejection provision of the proposed rule will be removed.

A service contract is defined by section 2(19) of the Act, as revised by OSRA, as

> a written contract, other than a bill of lading or a receipt, between one or more shipper and an individual ocean common carrier or an agreement between or among ocean common carriers in which the shipper or shippers makes a commitment to provide a certain volume or portion of cargo over a fixed period of time, and the ocean common carrier or the agreement commits to a certain rate or rate schedule and a defined service

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[7] This does not, however, relieve parties of liability for acting pursuant to an unfiled service contract.

[8] The Supreme Court in *Maislin* construed the Interstate Commerce Act (''ICA'') requirement that tariffs be filed (49 U.S.C. 10762(a)(1)(1982 ed.)), that carriers were prohibited from providing services at any other rate other than the filed rate (49 U.S.C. 10761(a)(1982 ed.), and that the Interstate Commerce Commission (''ICC'') assess those rates for reasonableness. Like the Commission under the 1984 Act as amended by OSRA, the ICC had the authority to impose civil penalties for deviation from the filed rate (49 U.S.C. 11902–11904(1982)). However, unlike the Commission under OSRA, the ICC was directed by statute to order that the difference between the filed rate and the actual rate be paid. With the addition of the second sentence to section 13(f)(1) to the Act, the Commission no longer has either that mandate or authority.

level, such as assured space, transit time, port rotation, or similar service features. The contract may also specify provisions in the event of nonperformance on the part of any party.

Two specific requirements for service contracts are found in section 8(c)(2): First, that the service contract be filed with the Commission; and second, that it contain seven specific terms. Section (8)(c)(2)(A)–(G). If the service contract either (1) does not meet the definition in the Act; (2) is not filed with the Commission; or (3) does not contain one of the terms required by the Act, it is not a service contract as defined by the Act.

Finally, the comments agree that the Commission should accept for filing mixed contracts, but recommend that the requirement that exempt commodities in such filed service contracts have a tariff rate be deleted, as there is no need for the Commission to regulate exempt commodity rates, charges and conditions of service in a mixed exempt and non-exempt commodity service contract any more than the Commission has a need to regulate contracts that are exclusively exempt commodities. P&O, 5. The exempt commodities to which P&O refers are those exempted from tariff publication and from service contract filing by the Act in section 8. A service contract of mixed exempt and non-exempt commodities therefore may not have corresponding tariff rates. Therefore, in the unlikely event that the service contract is canceled as described in § 530.10 (as renumbered), and there is no provision for such cancellation in the terms of the contract itself, there would be no corresponding tariff rate at which the exempt cargo would be re-rated. Therefore, some ''general rate'' must be available if an exempt commodity is to be filed in a service contract, and the proposed rule will not be amended in this regard. As this is adequately provided for in § 530.13 as revised, and with regard to the foregoing discussion of rejection, § 530.15 is deleted entirely and the following sections are accordingly renumbered.

Proposed Regulation § 530.16—Implementation, Prohibition and Re-Rating

The proposed regulations in § 530.16 (as originally numbered) had carried over some of the provisions of current § 514.7(l)(ii) which read,

> In the event of a contract which is not provided for in the contract itself and which results from mutual agreement of the parties or because the shipper * * * has failed to tender the minimum quantity required by the contract: * * * (B) The cargo previously carried under the contract shall be re-rated according to the otherwise applicable tariff provisions of the carrier or conference in effect at the time of each shipment.

The proposed regulations anticipated re-rating[9] for service contracts with non-conference agreements, but did not address how the regulations should be changed in recognition of the new limitations to penalties added by section 13(f)(1) of OSRA. Re-rating under the proposed rules would take place only if the contract *did not contemplate* mutual termination or if the shipper failed to meet minimum cargo requirements. Many comments generally appear to misconstrue the congressional intent of the prohibition of 13(f)(1), and the Commission seeks to clarify the matter in this supplemental information and in the revised text of the regulations.

Commenters have three basic objections to proposed regulation § 530.16, namely that re-rating by the Commission is: (1) Contrary to section 13(f)(1) of the Act as amended by OSRA; (2) contrary to the deregulatory spirit of OSRA; and (3) unfair to the shipper parties to service contracts.

Several comments point to section 13(f)(1) of OSRA as expressly forbidding the re-rating provision in the proposed rules. Conagra, 5; P&O, 6. Other commenters express the belief that re-rating for rejection based on failure to meet regulatory, as opposed to statutory requirements. BSA, 11; CMA, 2; Dupont, 4; NITL, 19–20. NITL asserts that re-rating either for termination by the parties *or* for rejection by the Commission would be contrary to OSRA. NITL, 18. NITL comments that section 13(f)(1) of the revised Act ''expressly prohibits the Commission or a court from ordering a shipper to pay the difference between rates that the shipper and carrier agree upon in writing and that are billed by the carrier, and the rates that are set forth in a tariff or service contract that would otherwise cover the transportation movements.'' NITL, 18–19.

BSA remarks that re-rating during the period between initial filing and rejection by the Commission under § 530.16 is counter to the deregulatory spirit of OSRA. BSA, 11. Commenters also point to this deregulatory spirit to support their assertion that Congress intended parties resolve the question of re-rating due to FMC rejection as a private contractual matter. BSA, 11. Further, P&O comments, re-rating is not consistent with the ability of service contract terms to include liquidated damages or amendments to reduce minimum volume requirements. P&O, 6. NITL also complains that proposed § 530.10(c)(2) (as renumbered) appears to be mandating liquidated damages terms (*i.e.*, the tariff rate) even though parties did not do so. NITL, 19–20.

Comments also cite OSRA's permission to parties to resolve undercharge matters with a written agreement. Dupont, 4. The proposed provisions for re-rating, Dupont complains, would deprive parties of their right to mutually determine settlement of outstanding charges. Dupont, 3–4. Therefore, if there is any Commission rejection at all, the regulations should require the Commission to also notify the shipper of the rejection, and either limit re-rating to shipments made after receipt of such notice or impose penalty on the carrier alone. Dupont, 4.

Shippers complain that re-rating for rejection penalizes the shipper, when it is the carrier who has the responsibility of complying with the filing requirements. Conagra, 4; Dupont, 4; NITL, 19–20; IBP, 2. Several comments suggest that a solution to this injustice would be for the regulations to require the filing of corrections within a specific period of time and to impose a monetary penalty on the filing carrier for significant filing errors. Conagra, 6; Dupont, 4.

NCBFAA complains that proposed § 530.10(c)(2)(ii) (as renumbered), which requires all cargo to be re-rated in the event the service contract is canceled, is arbitrary and punitive. NCBFAA, 20. Furthermore, proposed § 530.16(b)(2) (as originally numbered) would unfairly impose the higher tariff rates on the shipper when it is the carrier who is at fault, especially in a situation, for instance, in which the Commission rejects a service contract six months after filing. NCBFAA 4, 5. Our response to rejection arguments is outlined in the previous discussion of proposed § 530.15 (as originally numbered) which has been deleted from this interim final rule.

As the comments correctly indicate, OSRA adds a new limitation to the remedies the Commission may impose on parties with an added sentence to section 13(f)(1) of the Act, which as revised reads

> [n]either the Commission nor any court shall order any person to pay the difference between the amount billed and agreed upon in writing with a common carrier or its agent and the amount set forth in any tariff or service contract by that common carrier for the transportation service provided.

As explained by Senator Hutchison as she introduced the amendment to S. 414

[9] Such re-rating was proposed to be pursuant to regulation 46 CFR part 530 subpart E, at the tariff rate of the carrier which actually carried the cargo in question.

which added the above language, the drafters intended to

> [r]evise section 13(f) of the 1984 Act to make clear that, while a common carrier may be penalized for charging shippers less than its tariff or service contract rates, a carrier should not be able to collect from the shipper the difference between the tariff or contract rate and the rate actually charged and agreed upon in writing. The collection of these so-called ''undercharges'' was a major problem for shippers when the trucking industry was deregulated. We want to avoid any recurrence of that problem in connection with ocean shipping reform.
>
> 144 Cong. Rec. S1068 (March 4, 1998) (Statement of Sen. Hutchison).

The intent of the provision was not, contrary to the assertion of some comments, that parties to a meaningless service contract may circumvent the prohibitions of sections 10(a) and (b) of the Act. Nor was it Congress' intent that parties which wrongfully terminate a service contract have the ability to impose higher rates on an innocent party for cargo that has already moved. The redrafted regulations at §§ 530.10 (as renumbered) and 530.14 (as renumbered) therefore make it clear that if a service contract does not contemplate termination, neither can the parties have illegal access to contract rates, nor can the carrier which wrongfully terminates bill the shipper at the higher tariff rates. Section 530.14 (as renumbered) indicates re-rating is only applicable to such cancellation, and prohibition or suspension of service contracts pursuant to the Commission's authority under sections 9 and 11 of the Act. *See*, Docket No. 98–25; 46 CFR 560.7.

In regard to comments on the unfairness of re-rating after rejection, the concerns of the commenters generally become moot with the elimination of the rejection provisions. The regulations have been redrafted with these particular shipper concerns in mind. First, the Commission points out that it is in the best interests of both parties that a service contract make provision for mutual termination, unilateral termination, and termination for failure to meet minimum cargo commitments. It is only in the absence of such provisions in the terms of the contract itself that the re-rating provisions will apply. The regulations are intended to ensure that parties conform to sections 10(a)(1)[10] (illusory contract or failure to meet minimum quantity commitment); 10(b)(1)[11] (carrier billing contract rate when shipper fails to meet minimum quantity commitment); and 10(b)(2)[12] (failing to charge rate other than that in a filed and valid service contract) of the Act.

If a carrier has entered into a contract with a shipper, that contract would appear to satisfy the requirements of section 13(f) (''an amount agreed upon in writing'') which would in turn protect the shipper from having the cargo re-rated; the charged rates would be those in the service contract. The carrier would likely be hard-pressed to seek to enforce contract obligations upon a shipper where the carrier has unilaterally terminated. Finally, depending on the circumstances, the carrier may be in violation of various proscriptions of section 10, or the shipper may have a cause of action in court for breach of contract.

The Commission finds that section 13(f)(1) was particularly intended to avoid the type of requirement ordered by the Supreme Court in *Maislin*. In *Maislin*, the trustee in bankruptcy of a carrier sought to recover the difference between amount billed (negotiated rate) and the tariff rate. *Maislin* at 135. In response to the deregulatory spirit of the Motor Carrier Act, the Interstate Commerce Commission (''ICC'') had instituted a ''Negotiated Rates Policy,'' namely, that the ICC would not order the shipper to pay the shortfall between a negotiated rate and a tariff rate. The Court found that the ICC was required by the Interstate Commerce Act (''ICA'') to review for reasonableness the rates charged to shippers. Because ''secret'' (negotiated) rates were unreasonable under the ICA, in the event that those rates were not in conformity to the tariff rates, the ICC was required by the Interstate Commerce Act to order the shippers to pay the difference between the filed rate and the negotiated rate (the ''filed rate'' doctrine). *Maislin* at 129. The Court further found that ''if strict adherence to * * * the filed rate doctrine has become an anachronism in the wake of the MCA, it is the responsibility of Congress to modify or eliminate these sections.'' *Maislin* at 135. With this background squarely in mind, taken together with the balance of the Act and the remarks of the sponsors of the bill as finally adopted, it is clear that section 13(f)(1), as added by OSRA, only limits the Commission from ordering a shipper to pay the undercharge in a *Maislin*-type situation. The limitation of section 13(f)(1) was not intended to allow shippers and carriers to use service contracts as an ''unfair or unjust means or device'' to avoid the application of the ''otherwise applicable rate'' contrary to other provisions in the Act. If there are no provisions which anticipate the shipper's failure to meet the minimum cargo requirements of the service contract and the cargo is not subject to re-rating, the contract would appear to be illusory. Allowing the parties to take advantage of an illusory contract would be contrary to the prohibitions of section 10 and the intent of the Act.

Proposed regulations §§ 530.10 and 530.14 (as renumbered) are revised to reflect OSRA's intent that parties to a service contract may not use that agreement as an unfair means or device to avoid the otherwise applicable rate.[13] Thus, the regulations require re-rating for cargo which has already moved under a service contract which is nullified due to a shipper shortfall (unless due to carrier misconduct) and which is not contemplated by the contract's terms.

Finally, subpart D is re-titled, ''Exceptions and Implementation,'' proposed regulation § 530.15 is deleted, and proposed regulation § 530.16 is retitled ''Implementation'' and correspondingly renumbered § 530.14.

Section 530.15 (as Renumbered)—Recordkeeping and Audit

P&O comments that the notice of proposed rulemaking did not adequately explain why this rule is necessary or appropriate. P&O, 7. Further, it complains, there is no statutory authority for the requirement, and it is pointless because the service contract is already subject to a filing requirement. P&O, 7. Also it questions why there is no provision for confidentiality for records obtained by the Commission under this provision of the proposed regulations. P&O, 7.

[10] Section 10(a)(1) prohibits any person to, knowingly and willfully, directly or indirectly, by means of false billing, false classification, false weighing, false report of weight, false measurement, or by any other unjust or unfair device or means obtain or attempt to obtain ocean transportation for property at less than the rates or charges that would otherwise be applicable.

[11] Section 10(b)(1) prohibits a common carrier from, allow[ing] any person to obtain transportation for property at less than the rates or charges established by the carrier in its * * * service contract by means of false billing, false classification, false weighing, false measurement, or by any other unjust or unfair device or means.

[12] Section 10(b)(2)(A) prohibits a common carrier to provide service in the liner trade that

(A) is not in accordance with the rates, charges, classifications, rules and practices contained in a * * * service contract entered into under section 8 of this Act unless excepted or exempted under section 8(a)(1) or 16 of this Act.

[13] The provision will also require re-rating if the service contract has been prohibited or suspended under sections 9 or 11 of the Act, pursuant to § 560.7 of this chapter.

Section 530.15 (as renumbered) was carried over nearly verbatim from the current §§ 514.7(m)(1) and 514.7(m)(3), which read:

(1) Every common carrier or conference shall maintain service contract records in an organized, readily accessible or retrievable manner for a period of five years from the termination of each contract.

* * * * *

(3) Every common carrier or conference shall, upon written request from the FMC's Director, Bureau of Enforcement or any Area Representative, submit requested service contract records within 30 days from the date of the request.

The purpose and statutory authority for these provisions has been examined previously by the Commission and its regulated entities when §§ 514.7(m)(1) and (m)(3) were added to the Commission's regulation.

The electronic filing options that the Commission has chosen to offer, in an effort to reduce burdens on ocean common carrier filers and at their urging, both fall short in one significant respect: The electronic versions of the documents will not have the ability to capture the signature of the parties. Because the Commission will still need to examine the originally executed service contracts, the shortcoming of the electronic filing system continues to make the language in the proposed regulation necessary. While it is true that the Commission has the authority to obtain the information in any event under section 12 of the Act, the Commission has found it useful to reiterate that authority here in order to impress upon carriers that their executed service contracts and related records must be retained and ready for inspection.

It is difficult to imagine how this provision would create any additional burden on filers, as they would presumably retain the originally executed service contract to protect their rights under that contract. With respect to P&O's concerns about confidentiality, the statute already provides for the confidentiality of service contracts and there appears to be no need for further clarification of the issue through rulemaking. For the foregoing reasons, the regulation in this section will be adopted as proposed.

Global Service Contracts

The Commission, in an effort to minimize burden on filers, and encourage them to structure their commercial negotiations based on market forces rather than to conform them to regulatory requirements, requested comment on the filing of global service contracts. Comments generally commend the Commission for recognizing the commercial desirablility of global service contracting. Dupont, Conagra, NITL, CENSA, P&O, P&O and CENSA request confirmation from the Commission that the voluntary inclusion of extrajurisidictional matter in a filed service contract would not expand the Commission's jurisdiction over those matters.

The Commission's intent was to allow parties to enter into service contracts which fit their commercial needs, and relieve them of the burden of negotiating contracts which ''carve out'' the U.S. trades simply because of U.S. filing requirements. Again we confirm that Commission will not assert jurisdiction over foreign-to-foreign matters due solely to the fact that they are included in a service contract filed with the Commission. We also note, however, that the extent to which the U.S. trade matters are affected by, contingent on or reliant on foreign-to-foreign movements, the Commission will have the statutory duty and jurisdiction to obtain the relevant records.

While voluntary filing of global contracts will not subject the non-U.S. matters to FMC jurisdiction, as discussed above, there is a difficulty with how the statement of essential terms shall be made. There is too great a danger that the public will be misled if only the ''U.S. trade'' volumes, for instance, are published, when those volumes are affected by foreign-to-foreign volumes. Therefore, the interim final rules require that the statement of essential terms for filed contracts which include both U.S. trade and non-U.S. trade matters which affect those terms must indicate that the contract includes matter outside the Commission's jurisdiction. Failing to require this disclaimer has too great a potential for confusion by the public reviewing those essential terms. *See*, § 530.12 (publication section regarding exempt and global service contracts).

Inland European Movements in Conference Contracts

In the NPR, the Commission noted the difference in the approaches by the United States and the European Commission (''E.C.'') to the question of inland rate setting by conferences. The NPR requested comment on how the Commission may treat carriers which participate in a conference service contract covering U.S.-Europe ocean movements but sign an individual service contract covering European inland transport for the same shipper customer. The Commission noted in the NPR that it would appear that filing would be consistent with statutory requirements to the extent the contracts establish the European inland portion of a through rate charged by a carrier in a U.S.-Europe intermodal movement. However, the Commission wished to make an effort to minimize the regulatory burdens occasioned by these differences in regulatory regimes, to the extent it may do so given its own statutory responsibility.

The comments make three basic arguments with respect to inland rates in Europe. First, to the extent that service contracts for inland movements in Europe are within the Commission's jurisdiction, they should be exempt from filing because the EU regulates them adequately. BSA and TACA. Second, that they are completely outside the Commission's jurisdiction. BSA. Finally, P&O comments that European charges, if included in a service contract, must be filed with the Commission and are part of the filed essential terms, but not the public essential terms.

P&O's approach appears to be sound. As rate information is not one of the essential terms required to be published by the Act, any regulatory requirement would not order rate information to be published, although it would be filed. As discussed in the filing of ''mixed contracts'' it would appear that the allowance of such filing is for the ease of the filer.

TACA suggests that sections of a service contract relating to inland movements of cargo in Europe should not be required to be filed with the Commission. TACA, 8. TACA proposes that sections of service contracts stating the terms and conditions of European inland transport of shipments covered by the service contract be available from the individual carrier upon request from the Commission (in electronic or paper format at the option of the carrier) within ten days of the request. TACA, 8–9. This would ease the burden on the Commission, completely harmonize with E.C. law, ensure no breach of confidentiality that might take place due to filing via third parties, and ensure public access to the information. TACA, 9.

The disparity between Commission and E.C. requirements generally only becomes problematic when a conference or members of an agreement enter into a service contract in which the rate calculation for port-to-port rates are included, but for which the inland movements in Europe are not included because of the E.C. prohibition on joint rate setting for inland rates. The conference contract filed with the

Commission would presumably include a ''multi-factor through rate'' which would be the ocean transport rate as laid out in the contract, plus an unspecified rate arising from the inland portion of the transportation. If the conference is required by the Commission to file the independent inland rate so that the Commission can calculate the total through rate, the conference may be in violation of the E.C.''s prohibition on confidentiality.

P&O argues that it is clear that inland European charges, if included in a service contract, would have to be filed with the FMC. P&O points out that carriers and shippers may choose to construct multi-factor through rates to and from Europe by using a confidential port/port rate, or a point/port and then adding a published European inland tariff rate to construct a ''multi-factor through rate.''

TACA's suggestion that the Commission exempt these inland movements from filing is a substantial deviation from the filing requirements under the Act. Such an exemption is more properly adopted after a full examination of the matter under Section 16 of the Act. For these reasons and because the change is not mandated by OSRA, the Commission will continue to require that the service contracts in question be filed.

Interim Final Rule Status

As the Commission is introducing substantial matters which were not explored in the NPR, this shall be an interim final rule, under the Commission's authority granted by section 17(b) of the Act.

Regulatory Flexibility Act Analysis

In accordance with the Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.*, the Chairman of the Commission has certified to the Chief Counsel for Advocacy, Small Business Administration, that the rule will not have a significant impact on a substantial number of small entities. In its NPR, the Commission stated that it intended to certify the rulemaking since the affected universe of parties is limited to vessel-operating common carriers. The Commission has determined that such entities do not typically qualify as small under the Small Business Administration guidelines. No comments disputed the Commission's intention to certify. The certification is, therefore, continued.

The Commission has received Office of Management and Budget (OMB) approval for the collection of this information required in this part. Section 530.91 displays the control numbers assigned by OMB to information collection requirements of the Commission in this part by the pursuant to the Paperwork Reduction Act of 1995, as amended. In accordance with that Act, agencies are required to display a currently valid control number. In this regard, the valid control number for this collection of information is 3072–0065.

This regulatory action is not a ''major rule'' under 5 U.S.C. 804(2).

List of Subjects for 46 CFR Part 530

Freight, Maritime carriers, Reporting and recordkeeping requirements.

For the reasons set out in the preamble, the Commission removes 46 CFR part 514 and add new 46 CFR part 530, to subchapter B to read as follows:

PART 514—[REMOVED]

PART 530—SERVICE CONTRACTS

Subpart A—General Provisions

Subpart B—Filing Requirements

Subpart C—Publication of Essential Terms

Subpart D—Exceptions and Implementation

Subpart E—Recordkeeping and Audit

Authority: 5 U.S.C. 553; 46 U.S.C. App. 1704, 1705, 1707, 1716.

Subpart A—General Provisions

§ 530.1 Purpose.

The purpose of this part is to facilitate the filing of service contracts and the publication of certain essential terms of those service contracts as required by section 8(c) of the Shipping Act of 1984 (''Act''). This part enables the Commission to review service contracts to ensure that these contracts and the parties to them comport with the requirements of the Act. This part also implements electronic filing provisions for service contracts to facilitate compliance and minimize the filing burdens on the oceanborne commerce of the United States.

§ 530.2 Scope and applicability.

An individual ocean common carrier or an agreement between or among ocean common carriers may enter into a service contract with one or more shippers subject to the requirements of the Act.

§ 530.3 Definitions.

When used in this part:

(a) *Act* means the Shipping Act of 1984 as amended by the Ocean Shipping Reform Act of 1998.

(b) *Agreement* means an understanding, arrangement, or association (written or oral) and any modification or cancellation thereof which has been filed and effective under part 535 of this chapter with the Commission. The term does not include a maritime labor agreement.

(c) *Authorized person* means a carrier or a duly appointed agent who is authorized to file service contracts on behalf of the carrier party to a service contract and to publish the corresponding statement of essential terms and is registered by the Commission to file under § 530.5(d) and appendix A to this part.

(d) *BTCL* means the Commission's Bureau of Tariffs, Certification and Licensing or its successor bureau.

(e) *Commission* means the Federal Maritime Commission.

(f) *Common carrier* means a person holding itself out to the general public to provide transportation by water of passengers or cargo between the United States and a foreign country for compensation that:

(1) Assumes responsibility for the transportation from the port or point of receipt to the port or point of destination; and

(2) Utilizes, for all or part of that transportation, a vessel operating on the high seas or the Great Lakes between a port in the United States and a port in a foreign country, except that the term does not include a common carrier engaged in ocean transportation by ferry boat, ocean tramp, or chemical parcel tanker, or by a vessel when primarily engaged in the carriage of perishable agricultural commodities:

(i) If the common carrier and the owner of those commodities are wholly owned, directly or indirectly, by a

person primarily engaged in the marketing and distribution of those commodities and

(ii) Only with respect to those commodities.

(g) *Conference* means an agreement between or among two or more ocean common carriers which provides for the fixing of and adherence to uniform rates, charges, practices and conditions of service relating to the receipt, carriage, handling and/or delivery of passengers or cargo for all members. The term does not include joint service, pooling, sailing, space charter, or transshipment agreements.

(h) *Controlled carrier* means an ocean common carrier that is, or whose operating assets are, directly or indirectly owned or controlled by a government. Ownership or control by a government shall be deemed to exist with respect to any ocean common carrier if:

(1) A majority portion of the interest in the carrier is owned or controlled in any manner by that government, by any agency thereof, or by any public or private person controlled by that government; or

(2) That government has the right to appoint or disapprove the appointment of a majority of the directors, the chief operating officer or the chief executive officer of the carrier.

(i) *Effective date* means the date upon which a service contract or amendment is scheduled to go into effect by the parties to the contract. A service contract or amendment becomes effective at 12:01 a.m. Eastern Standard Time on the beginning of the effective date. The effective date cannot be prior to the filing date of the service contract or amendment with the Commission.

(j) *Expiration date* means the last day after which the entire service contract is no longer in effect.

(k) *File or filing* (of service contracts or amendments thereto) means use of the Commission's electronic filing system for receipt of a service contract or an amendment thereto by the Commission, consistent with one of the methods set forth in appendix A to this part, and the recording of its receipt by the Commission.

(l) *Labor agreement* means a collective-bargaining agreement between an employer subject to the Act, or group of such employers, and a labor organization or an agreement preparatory to such a collective-bargaining agreement among members of a multi-employer bargaining group, or an agreement specifically implementing provisions of such a collective-bargaining agreement or providing for the formation, financing, or administration of a multi-employer bargaining group, but the term does not include an assessment agreement.

(m) *Motor vehicle* means an automobile, truck, van or other motor vehicle used for the transportation of passengers and cargo; but does not include equipment such as farm or road equipment which has wheels, but whose primary purpose is other than transportation.

(n) *Ocean common carrier* means a vessel-operating common carrier.

(o) *OIRM* means the Commission's Office of Information and Resources Management.

(p) *Non-vessel-operating common carrier (''NVOCC'')* means an ocean transportation intermediary as defined by section 3(17)(B) of the Act.

(q) *Service contract* means a written contract, other than a bill of lading or receipt, between one or more shippers and an individual ocean common carrier or an agreement between or among ocean common carriers in which the shipper makes a commitment to provide a certain minimum quantity or portion of its cargo or freight revenue over a fixed time period, and the individual ocean common carrier or the agreement commits to a certain rate or rate schedule and a defined service level, such as, assured space, transit time, port rotation, or similar service features. The contract may also specify provisions in the event of nonperformance on the part of any party.

(r) *Shipper* means a cargo owner; the person for whose account the ocean transportation is provided; the person to whom delivery is to be made; a shippers' association; or an NVOCC that accepts responsibility for payment of all applicable charges under the service contract.

(s) *Statement of essential terms* means a concise statement of the essential terms of a service contract required to be published under § 530.12 of this part.

§ 530.4 Confidentiality.

All service contracts and amendments to service contracts filed with the Commission shall, to the full extent permitted by law, be held in confidence. Nothing contained in this part shall preclude the Commission from providing certain information from or access to service contracts to another agency of the Federal government of the United States.

§ 530.5 Duty to file.

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

(b) Filing may be accomplished by any duly agreed-upon agent, as the parties to the service contract may designate, and subject to conditions as the parties may agree.

(c) Registration. (1) *Application.* For filing pursuant to dial-up filing (option 2 as outlined in appendix A to this part), authority to file or delegate the authority to file must be requested by a responsible official of the service contract carrier party in writing, by submitting to BTCL the Registration Form in Exhibit 1 to this part and the appropriate fee as defined under § 530.11.

(2) *Approved registrations.* OIRM shall provide approved Registrants a log-on ID and password for filing and amending service contracts and so notify Registrants via U.S. mail.

(3) *Software certification.* For filing pursuant to dial-up filing (option 2 as outlined in appendix A to this part), certification of software may be requested by appointment through OIRM and payment of the appropriate fee as set forth in § 530.11. OIRM will test the software as set out in appendix A to this part. Organizations certified prior to May 1, 1999 for the batch filing of ''Essential Terms Publications'' (''ETs'') in the Commission's former ''Automated Tariff Filing Information System'' (''ATFI'') are not required to re-certify their software but may if they so choose using the same procedure as for initial certification.

(4) *Emergencies.* In an emergency, a person, already authorized to maintain and edit its firm's organization record under appendix A to this part, may change its designated ''publisher'' under appendix A to this part, verbally notify BTCL, and promptly submit the proper documents.

(5) *Prior registration and certification.* Each organization registered to file essential terms publications in the Commission's dial-up system before May 1, 1999 will be issued a log-on ID and password for access to file service contracts under the Commission's electronic filing system pursuant to option 2 as set forth in Appendix A to this part.

§ 530.6 Certification of shipper status.

(a) *Certification.* The shipper contract party shall sign and certify on the signature page of the service contract its shipper status (e.g., owner of the cargo, shippers' association, NVOCC, or specified other designation), and the status of every affiliate of such contract party or member of a shippers'

association entitled to receive service under the contract.

(b) *Proof of tariff and financial responsibility.* If the certification completed by the contract party under paragraph (a) of this section identifies the contract party or an affiliate or member of a shippers' association as an NVOCC, the ocean common carrier, conference or agreement shall obtain proof that such NVOCC has a published tariff and proof of financial responsibility as required under sections 8 and 19 of the Act before signing the service contract. An ocean common carrier, conference or agreement can obtain such proof by the same methods prescribed in § 515.27 of this chapter.

(c) *Joining shippers' association during term of contract.* If an NVOCC joins a shippers' association during the term of a service contract and is thereby entitled to receive service under the contract, the NVOCC shall provide to the ocean common carrier, agreement or conference the proof of compliance required by paragraph (b) of this section prior to making any shipments under the contract.

(d) *Reliance on NVOCC proof; independent knowledge.* An ocean common carrier, agreement or conference executing a service contract shall be deemed to have complied with section 10(b)(12) of the Act upon meeting the requirements of paragraphs (a) and (b) of this section, unless the carrier party had reason to know such certification or documentation of NVOCC tariff and bonding was false.

§ 530.7 Duty to labor organizations.

(a) *Terms.* When used in this section, the following terms will have these meanings:

(1) *Dock area* and *within the port area* shall have the same meaning and scope as defined in the applicable collective bargaining agreement.

(2) *Reasonable period of time* ordinarily means:

(i) If the cargo in question is due to arrive in less than five (5) days from the date of receipt of the request as defined in paragraph (b) of this section, two (2) days from the date of receipt of the request; but

(ii) If cargo in question is due to arrive in more than five (5) days from the date of receipt of the request as defined in paragraph (b) of this section, four (4) days from the date of receipt of the request.

(3) *Movement* includes, but is not necessarily limited to, the normal and usual aspects of the loading and discharging of cargo in containers; placement, positioning and re-positioning of cargo or of containers; the insertion and removal of cargo into and from containers; and the storage and warehousing of cargo.

(4) *Assignment* includes, but is not limited to, the carrier's direct or indirect control over the parties which, the manner by which, or the means by which the shipper's cargo is moved, regardless of whether such movement is completed within or outside of containers.

(5) *Transmit* means communication by first-class mail, facsimile, telegram, hand-delivery, or electronic mail (''e-mail'').

(b) *Procedure.* In response to a written request transmitted from a labor organization with which it is a party or is subject to the provisions of a collective bargaining agreement with a labor organization, an ocean common carrier shall state, within a reasonable period of time, whether it is responsible for the following work at dock areas and within port areas in the United States with respect to cargo transported under a service contract:

(1) The movement of the shipper's cargo on a dock area or within the port area or to or from railroad cars on a dock area or within a port area;

(2) The assignment of intraport carriage of the shipper's cargo between areas on a dock or within the port area;

(3) The assignment of the carriage of the shipper's cargo between a container yard on a dock area or within the port area and a rail yard adjacent to such container yard; or

(4) The assignment of container freight station work and maintenance and repair work performed at a dock area or within the port area.

(c) *Applicability.* This section requires the disclosure of information by an ocean common carrier only if there exists an applicable and otherwise lawful collective bargaining agreement which pertains to that carrier.

(d) *Disclosure not deemed admission or agreement.* No disclosure made by an ocean common carrier shall be deemed to be an admission or agreement that any work is covered by a collective bargaining agreement.

(e) *Dispute resolution.* Any dispute regarding whether any work is covered by a collective bargaining agreement and the responsibility of the ocean common carrier under such agreement shall be resolved solely in accordance with the dispute resolution procedures contained in the collective bargaining agreement and the National Labor Relations Act, and without reference to this section.

(f) *Jurisdiction and lawfulness.* Nothing in this section has any effect on the lawfulness or unlawfulness under the Shipping Act of 1984, the National Labor Relations Act, the Taft-Hartley Act, the Federal Trade Commission Act, the antitrust laws, or any other federal or state law, or any revisions or amendments thereto, of any collective bargaining agreement or element thereof, including any element that constitutes an essential term of a service contract under section 8(c) of the Act.

Subpart B—Filing Requirements

§ 530.8 Service Contracts.

(a) Authorized persons shall file with BTCL, in one of the manners set forth in appendix A to this part, a true and complete copy of every service contract or amendment to a filed service contract before any cargo moves pursuant to that service contract or amendment.

(b) Every service contract filed with the Commission shall include the complete terms of the service contract including, but not limited to, the following:

(1) The origin port ranges in the case of port-to-port movements and geographic areas in the case of through intermodal movements;

(2) The destination port ranges in the case of port-to-port movements and geographic areas in the case of through intermodal movements;

(3) The commodity or commodities involved;

(4) The minimum volume or portion;

(5) The service commitments;

(6) The line-haul rate;

(7) Liquidated damages for non-performance (if any);

(8) Duration, including the

(i) Effective date; and

(ii) Expiration date;

(9) The legal names and business addresses of the contract parties; the legal names of affiliates entitled to access the contract; the names, titles and addresses of the representatives signing the contract for the parties; and the date upon which the service contract was signed, except that in the case of a contract entered under the authority of an agreement or by a shippers' association, individual members need not be named unless the contract includes or excludes specific members. Subsequent references in the contract to the contract parties shall be consistent with the first reference (e.g., (exact name), ''carrier,'' ''shipper,'' or ''association,'' etc.). Carrier parties which enter into contracts that include affiliates must either:

(i) List the affiliates' business addresses; or

(ii) Certify that this information will be provided to the Commission upon

request within ten (10) business days of such request. However, the requirements of this section do not apply to amendments to contracts that have been filed in accordance with the requirements of this section unless the amendment adds new parties or affiliates;

(10) A certification of shipper status;

(11) A description of the shipment records which will be maintained to support the service contract and the address, telephone number, and title of the person who will respond to a request by making shipment records available to the Commission for inspection under § 530.15 of this part; and

(12) All other provisions of the contract.

(c) *Certainty of terms.* The terms described in paragraph (b) of this section may not:

(1) Be uncertain, vague or ambiguous; or

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

(d) *Other requirements.* Every service contract filed with BTCL shall include, as set forth in appendix A to this part by:

(1) A unique service contract number of more than one (1) but less than ten (10) alphanumeric characters in length (''SC Number''); and

(2) A consecutively numbered amendment number no more than three digits in length, with initial service contracts using ''0''(''Amendment number'');

(3) The filed FMC Agreement Number(s) assigned by the Commission under 46 CFR part 535 (if applicable); and

(4) An indication of the method by which the statement of essential terms will be published.

§ 530.9 Notices.

Within thirty (30) days of the occurrence of any event listed below, there shall be filed with the Commission, pursuant to the same procedures as those followed for the filing of an amendment pursuant to § 530.10 and appendix A to this part, a detailed notice of:

(a) Correction (clerical or administrative errors);

(b) Cancellation (as defined in § 530.10(a)(3));

(c) Adjustment of accounts, by re-rating, liquidated damages, or otherwise;

(d) Final settlement of any account adjusted as described in paragraph (c) of this section; and

(e) Any change to:

(1) The name of a basic contract party; or

(2) The list of affiliates under § 530.8(b)(9), including changes to legal names and business addresses, of any contract party entitled to receive or authorized to offer services under the contract.

§ 530.10 Amendment, correction, and cancellation.

(a) *Terms.* When used in this section, the following terms will have these meanings:

(1) *Amendment* means any change to a service contract which has prospective effect and which is mutually agreed upon by the service contract parties.

(2) *Correction* means any change to a service contract which has retroactive effect.

(3) *Cancellation* means an event which is unanticipated by the service contract, in liquidated damages or otherwise, and is due to the failure of the shipper party to tender minimum cargo as set forth in the contract, unless such tender was made impossible by an action of the carrier party.

(b) *Amendment.* Service contracts may be amended by mutual agreement of the parties to the contract. Amendments shall be filed electronically with the Commission in the manner set forth in § 530.8 and Appendix A to this part.

(1) Where feasible, service contracts should be amended by amending only the affected specific term(s) or subterms.

(2) Each time any part of a service contract is amended, the filer shall assign a consecutive amendment number (up to three digits), beginning with the number ''1.''

(3) Each time any part of the service contract is amended, the ''Filing Date'' will be the date of filing of the amendment.

(c) *Corrections.* Either party to a filed service contract may request permission to correct clerical or administrative errors in the terms of a filed contract. Requests shall be filed, in duplicate, with the Commission's Office of the Secretary within forty-five (45) days of the contract's filing with the Commission, and shall include:

(1) A letter of transmittal explaining the purpose of the submission, and providing specific information to identify the initial or amended service contract to be corrected;

(2) A paper copy of the proposed correct terms. Corrections shall be indicated as follows:

(i) Matter being deleted shall be struck through; and

(ii) Matter to be added shall immediately follow the language being deleted and be underscored;

(3) An affidavit from the filing party attesting with specificity to the factual circumstances surrounding the clerical or administrative error, with reference to any supporting documentation;

(4) Documents supporting the clerical or administrative error; and

(5) A brief statement from the other party to the contract concurring in the request for correction.

(6) If the request for correction is granted, the carrier, agreement or conference shall file the corrected contract provisions using a special case number as described in appendix A to this part.

(d) *Cancellation.* (1) An account may be adjusted for events and damages covered by the service contract. This shall include adjustment necessitated by either liability for liquidated damages under § 530.8(b)(8), or the occurrence of an event described in paragraph (d)(2) of this section.

(2) In the event of cancellation as defined in § 530.10(a)(3):

(i) Further or continued implementation of the service contract is prohibited; and

(ii) The cargo previously carried under the contract shall be re-rated according to the otherwise applicable tariff provisions.

(e) If the amendment, correction or cancellation affects an essential term required to be published under § 530.12 of this part, the statement of essential terms shall be changed as soon as possible after the filing of the amendment to accurately reflect the change to the contract terms.

§ 530.11 Filing Fees and other costs.

(a) Under the authority of the Independent Offices Appropriation Act, 31 U.S.C 9701, the Commission assesses a filing fee for the filing of service contracts, modifications and corrections thereto. Unless otherwise provided in this part, checks, drafts or money orders shall be remitted and made payable to Federal Maritime Commission, 800 N. Capitol Street, NW., Washington, DC 20573.

(b) Unless otherwise specified, overdue payments will be charged interest in accordance with the rate established by the Department of the Treasury for each 30-day period or portion thereof that the payment is overdue. In addition to any other remedy and penalty provided by law and regulation, if payment is overdue for ninety (90) days the Commission

may suspend or terminate electronic filing access.

(c) Fees. (1) *Service contracts and amendments.* For filing pursuant to option 2, as set forth in Appendix A to this part (''dial-up filing''), the filing fee shall be $1.63 per filing for all initial and amended service contract filings.

(2) *Filer registration.* For filing pursuant to option 2, filer registration fee shall be $91 for initial registration for one firm and one individual; and $91 for additions and changes. No fee will be assessed to continue filer registration for organizations registered for batch filing with the Commission prior to May 1, 1999.

(3) *Filing Guide.* For filing pursuant to option 2, filing guides shall cost $25 for diskette; $49 for paper format. Requests for filing guides should be made in writing and addressed to: ''BTCL Manuals,'' Federal Maritime Commission, 800 N. Capitol Street, NW, Washington, DC 20753.

(4) *Corrections.* The fee for corrections to service contracts under § 530.10(c) shall be $233.

(5) *Software certification.* For filing pursuant to option 2, the fee for software certification shall be $496 per test submission.

Subpart C—Publication of Essential Terms

§ 530.12 Publication.

(a) *Contents.* All authorized persons who have a duty to file service contracts under § 530.5 are also required to make available to the public, contemporaneously with the filing of each service contract with the Commission, and in tariff format, a concise statement of the following essential terms:

(1) The port ranges:

(i) Origin; and

(ii) Destination;

(2) The commodity or commodities involved;

(3) The minimum volume or portion; and

(4) The duration.

(b) *Certainty of terms.* The terms 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 essential terms, unless those terms are contained in a publication widely available to the public and well known within the industry.

(c) *Location.* (1) The statement of essential terms shall be published as a separate part in the filer's automated tariff publication, conforming to the format requirements set forth in part 520 of this chapter.

(2) Multi-party service contracts. For contracts in which more than one carrier party participates or is eligible to participate, the statement of essential terms may be published:

(i) As a separate part of the parties' relevant conference tariff; or

(ii) By each of the parties as a separate part of their individual tariff publication pursuant to part 520 of this chapter, clearly indicating the relevant FMC-assigned agreement number.

(c) *References.* The statement of essential terms shall contain a reference to the same number as that for the confidentially filed service contract (''SC Number'' as described in § 530.8(d)(1)).

(d) *Terms.* (1) The publication of the statement of essential terms shall accurately reflect the terms as filed confidentially with the Commission.

(2) If any of the published essential terms include information not required to be filed with the Commission but filed voluntarily, the statement of essential terms shall so note.

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

(f) *Commission listing.* The Commission will publish on its website, www.fmc.gov, a listing of the locations of all service contract essential terms publications.

(g) *Updating statements of essential terms.* To ensure that the information contained in a published statement of essential terms is current and accurate, the statement of essential terms publication shall include a prominent notice indicating the date of its most recent publication or revision. When the published statement of essential terms is affected by filed amendments, corrections, or cancellations, the current terms shall be changed and published as soon as possible in the relevant statement of essential terms.

Subpart D—Exceptions and Implementation

§ 530.13 Exceptions.

(a) *Generally.* The Commission will not accept for filing service contracts which exclusively concern bulk cargo, forest products, recycled metal scrap, new assembled motor vehicles, waste paper or paper waste, as those terms are defined in section 3 of the Act or § 530.3 of this part, or service contracts which relate solely to commodities or services exempted from service contract filing by the Commission under Section 16 of the Act.

(b) *Inclusion in service contracts.* An excepted commodity or exempted service, as listed in paragraph (a) of this section, may be included in a service contract filed with the Commission, but only if:

(1) There is a tariff of general applicability for the transportation, which contains a specific commodity rate for the excepted commodity; or

(2) The contract itself sets forth a rate or charge which will be applied if the contract is canceled, as defined in § 530.10(a)(3).

(c) *Waiver of exemption.* Upon filing under this section, the service contract shall be subject to the same requirements as those for service contracts generally.

§ 530.14 Implementation

(a) *Generally.* Performance under a service contract or amendment thereto may not begin before the day it is effective and filed with the Commission.

(b) *Prohibition or suspension.* When the filing parties receive notice that an initial or amended service contract has been prohibited under section 9(d) or suspended under section 11a(e)(1)(B) of the Act:

(1) Further or continued implementation of the service contract is prohibited;

(2) All services performed under the contract shall be re-rated in accordance with the otherwise applicable tariff provisions for such services with notice to the shipper within five (5) days of the date of prohibition or suspension; and

(3) Detailed notice shall be given to the Commission under § 530.9 within thirty (30) days of:

(i) The re-rating or other account adjustment resulting from prohibition or suspension under paragraph (b)(2) of this section; or

(ii) Final settlement of the account adjusted under § 530.10.

(c) *Agreements.* If the prohibited or suspended service contract was that of an agreement with no common tariff, the re-rating shall be in accordance with the published tariff rates of the carrier which transported the cargo in effect at the time.

Subpart E—Recordkeeping and Audit

§ 530.15 Recordkeeping and audit.

(a) *Records retention for five years.* Every common carrier, conference or agreement shall maintain original signed service contracts, amendments, and their associated records in an organized, readily accessible or retrievable manner for a period of five (5) years from the termination of each contract.

(b) (paragraph (b) is stayed until further notice.) *Where maintained.* (1) Service contract records shall be maintained in the United States, except that service contract records may be maintained outside the United States if the Chairman or Secretary of an agreement or President or Chief Executive Officer of the carrier certifies annually by January 1, on a form to be supplied by the Commission, that service contract records will be made available as provided in paragraph (c) of this section.

(2) Penalty. If service contract records are not made available to the Commission as provided in paragraph (c) of this section, the Commission may cancel any carrier's or agreement's right to maintain records outside the United States pursuant to the certification procedure of paragraph (b) of this section.

(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 Economics and Agreements Analysis, submit copies of requested original service contracts or their associated records within thirty (30) days of the date of the request.

(d) *Agreement service contracts.* In the case of service contracts made by agreements, the penalties for a failure to maintain records pursuant to this section shall attach jointly and severally on all of the agreement members participating in the service contract in question.

§ 530.91 OMB control numbers assigned pursuant to the Paperwork Reduction Act.

The Commission has received OMB approval for this collection of information pursuant to the Paperwork Reduction Act of 1995, as amended. In accordance with that Act, agencies are required to display a currently valid control number. The valid control number for this collection of information is 3072–0065.

Appendix A—Instructions for the Filing of Service Contracts

Service contracts shall be filed in accordance with one of the methods described in this appendix, at the filer's option.

I. Registration, Log-On ID and Password

A. For filing pursuant to dial-up filing (option 2 as outlined in this appendix A), system identifications for filing log-on (''log-on IDs'') and initial password are obtained by submitting the Service Contract Registration Form (Form FMC–83, Exhibit 1 to this part), along with the proper fee under § 530.11 and other necessary documents, including delegation of authority, as prescribed by this part, to BTCL. A separate Service Contract Registration Form is required for each individual that will file service contracts. However, each organization certified prior to May 1, 1999 to perform batch filing of Essential Terms Publications in the Commission's former Automated Tariff Filing Information (''ATFI'') system, will be issued a new log-on ID and password for access to file service contracts. Filers who wish a third party (publisher) to file their service contracts must so indicate on Form FMC–83. Authority for organizational filing can be transferred by submitting an amended registration form requesting the assignment of a new log-on ID and password. The original log-on ID will be canceled when a replacement log-on ID is issued.

B. Log-on IDs and passwords may not be shared with or loaned to or used by any individual other than the individual registrant. The Commission reserves the right to disable any log-on ID that is shared with, loaned to or used by parties other than the registrant.

C. Authority for organizational filing can be transferred by submitting an amended registration form requesting the assignment of a new log-on ID and password. The original log-on ID will be canceled when a replacement log-on ID is issued.

Option 1—Interactive Internet-based Filing

I. General Instructions

Filers who wish to file service contracts via the internet shall do so in accordance with the instructions found on the Commission's home page, http://www.fmc.gov. Internet-based filers must first register with BTCL which, upon review of the registration, will direct OIRM to provide the filer with a log-on ID and a password. After receiving a log-on ID and password from OIRM, the filer will be able to log on to the service contract filing area on the Commission's home page and file service contracts.

The filing screen will request such information as: Filer name, Registered Persons Index (''RPI'') number and carrier RPI number (if different); Service Contract and Amendment Number; and effective date. The filer will attach the entire service contract file and submit it into the system. When the service contract has been submitted for filing, the system will assign a filing date and an FMC control number, both of which will be included in the acknowledgment/confirmation message.

Option 2—Dial-up Filing

I. General Instructions

Filers who wish to file service contracts directly in the Commission's database via dial-up filing shall do so in accordance with the instructions found in the Service Contract Filing Guide (''Filing Guide''). Filers may inspect a copy of the Filing Guide at the office of BTCL, 800 N. Capitol St., NW, Suite 940, Washington, DC 20753. The Filing Guide may be purchased from BTCL for the fee specified in 46 CFR 530.11.

The Filing Guide includes the following items:

(a) *Transaction set.* The transaction set format includes all transaction set segments and segment definitions.

(b) *Data Element Dictionary (''DED'').* The data element dictionary contains the definition of data elements (e.g., amendment number, date formats, etc.)

II. Filing

The dial-up system assigns the filing date, which is the date an electronically transmitted (''on-line batch'') filing session file transfer is initiated, assuming there has been a successful file transfer. After the filing is processed, a filing-results message is placed in the filer's electronic mailbox on the central site system.

A. *Procedure.* Filing by dial-up is performed by transmission of prepared service contract material to the FMC system over dial-up lines from the filer's own computer, using Filing Guide service contract transaction set formats and the KERMIT or ZMODEM file transfer protocols. The conclusion of the file transfer sequence is a positive keyboard entry to initiate the transfer and a response that indicates completion of that submission.

B. *General format requirements.*

1. *Database format.* The FMC service contract database is structured from service contract data elements and the service contract terms formed by logical grouping of those elements.

2. *Transmission.* On-line batch transmission of service contracts to the FMC computer is governed by the transaction sets contained in the Filing Guide. Service contract filings not complying with the regulations in this part or the formats and valid codes contained in the Filing Guide will not be accepted by the system.

3. *Adding new transaction data.* Requests for major changes or additions to the transaction set format and/or data shall be submitted in writing to BTCL, with sufficient detail and reasons for each proposed change. A contact person and telephone number also should be provided in case of questions.

(a) A proposed major change (other than a correction), such as one made to a transaction set, will require formal configuration management procedures and a minimum of thirty (30) days' advance notice of the change in the **Federal Register** and the ''Service Contract System News,'' available at system log-on, and by other established Commission communications procedures.

(b) Minor changes will be entered into the system and published as soon as possible. Such minor changes include additions to any of the standard terminology published in appendix A to part 520 of this chapter.

C. *Hardware and software requirements.*

The basic equipment necessary to file service contracts is a personal computer (''PC''), a VT–100 emulation software package, and a modem. The modem must be v.34 compatible. The transmitted filing session must be formatted to comply with the transaction sets. The transmission may be via the use of KERMIT or ZMODEM file transfer protocols after establishing a link for on-line batch filing with the FMC central site computer.

The Commission will not make available to the public software packages for firms to use in formulating service contract filings for the dial-up system. The Commission has released

the Filing Guide (with transaction set format) into the public domain so that qualified commercial firms can develop filing software for the general market. Firms which develop filing software, must, by appointment through the Commission's Office of Information Resources Management and payment of the fee set forth in § 530.11 of this part, test their formatting of service contract transaction set format by submission of that data to the FMC central site computer before they will be permitted to transmit any filings. The data must be submitted via on-line batch transmission over dial-up telecommunications links using the required file transfer protocols. Testing will require submission of sample service contract filings to the FMC system, with an evaluation of the actual results of the attempted filings to ensure that the transaction set formats are properly employed and that the filing results are consistent with the filer's expectations. Organizations certified prior to May 1, 1999 for the batch filing of Essential Terms Publications in the Commission's former ATFI system are not required to re-test their software but may if they so choose using the same procedure as for initial registrants.

D. *Connecting to the Service Contract Filing System.*

The dial-up procedures are set forth in the Filing Guide.

E. *Major menu selections.*

Proper connection will lead the filer to the ''Logo Menu,'' which allows selections by any filer for ''Organization Maint.,'' ''Mailbox,'' ''Service Contract System News,'' ''Change Password,'' ''Screen Setup,'' and ''Logout.'' Additionally, a registered filer can access ''Begin File Transfer'' to initiate the on-line batch filing of a service contract. Upon the selection of ''Begin File Transfer'' the filer will be presented the option to select KERMIT or ZMODEM and to commence the file transfer.

F. *Conformity checks.*

Certain service contract data submitted to the FMC for filing via dial-up may be automatically screened for compliance with conformity checks. The conformity checks are syntax checks, validity checks and associative checks. The system will generally not accept service contracts which fail conformity checks. Filers may be notified of automatic conformity check problems at this stage by electronic mail, with a follow-up letter if the electronic mail has not been read within ten (10) days of dispatch. The conformity checks are:

1. *Syntax Checks.* Service contracts will be checked for file integrity, proper data types, field lengths, and logical sequence according to the Filing Guide's transaction sets.

2. *Validity Checks.* Certain data elements of filed service contracts will also be checked for data validity by type against the DED's published reference tables, such as amendment codes, amendment numbers and valid dates.

3. *Associative Checks.* The system uses associative checks to identify logical conformity with the requirements of the Act and Commission regulations. The following are some representative types of associative checks performed by the system.

(a) Any initial service contract or amendment must have:

(i) A valid organization number.

(ii) No suspended carrier or object status.

(iii) Appropriate filing authority.

(iv) Filing date (system-assigned) equal to or less than the effective date.

(v) Valid and appropriate filing/amendment codes.

(vi) Valid and appropriate filing, effective, and expiration dates.

(vii) When used, valid special case number and filing/amendment code ''S,'' with no other filing/amendment codes entered.

(viii) Each service contract must have a new (unique to carrier/conference/agreement) service contract number. The service contract number must be paired with a unique essential terms number and the pair must remain constant for all amendments and must be consistent between the filed service contracts and the published statement of essential terms.

G. *Filing/amendment codes.*

1. *Codes.* Filing/amendment codes must be valid Filing Guide codes and the effective, termination (if any) and expiration dates must match the corresponding dates published in the statement of essential terms.

2. *Multiple symbols.* Filed service contracts frequently can be coded with more than one symbol. Accordingly, the field, ''Amendment Type,'' will allow up to three different, compatible symbols (amendment codes and definitions are presented in the Filing Guide and the Standard Terminology appendix to 46 CFR part 520).

H. *Control dates and history.*

1. *Filing date.* Filers will have a filing date automatically assigned to all service contracts and amendments filed according to the start time of the file transfer, for file transfers that are successfully completed (U.S. Eastern Standard Time).

2. *Effective date.* The effective date is the date upon which a service contract or amendment is scheduled to go into effect by the parties to the contract. A service contract or amendment becomes effective at 12:01 a.m. on the beginning of the effective date. The effective date cannot be prior to the filing date of the service contract or amendment with the Commission.

3. *Expiration date.* The expiration date is the last day, after which the entire service contract is no longer in effect.

III. Organization Record and Register

A. *Organization Record.* The organization record is the master record for all service contract information in the system for a specific firm. Upon registration, a ''shell'' organization record, specific to the requestor, is established and contains the organization number, organization name and organization type. The firm's authorized representative can then access the newly established organization record, using the special access log-on ID and password to file the address for the firm's home office, and complete the affiliations, d/b/as, and publisher lists as appropriate. To maximize security of the data, review and maintenance of the organization record will be permitted only to the individual in the firm holding the special access log-on ID and password for organization record maintenance.

B. *Service Contract Register.* Each organization must create a service contract register (''register'') prior to the filing of any service contracts or amendments thereto (and including ''general rules'' filings). The register is a directory subordinate to which service contracts and their amendments are filed. Each organization may create more than one register according to any criteria they wish (e.g., according to location groups). Each register must include a record reflecting the filer's name and organization number. At the option of the filer, the register may also include the filer's service contract rules of general applicability, (''boilerplate'') i.e., the standard terms and conditions set by the carrier party to a service contract which govern the application of service contract rates, charges and other matters.

IV. Format Requirements

Each service contract filed by Option 2 (''dial-up'') shall contain the following:

A. *Service Contract Title.* The filer's title of the service contract (generally descriptive of the commodity and/or service).

B. *SC Number (Service contract number).* The ''SC Number'' is defined by the filer and shall be entered in the appropriate field.

C. *ET Number (statement of essential terms number).* The ''ET Number'' is defined by the filer and shall be entered in the appropriate field. (Note: Service contracts must have a new (unique to carrier/conference/agreement) service contract number for the initial filing. The service contract number must be paired with a unique essential terms number and the pair must remain constant for all amendments and must be consistent between the filed service contracts and the published essential terms documents.)

D. *Amendment Number.* Where feasible, service contracts should be amended by amending only the affected specific term(s) or subterms. Each time any part of a service contract is amended, the filer shall assign a consecutive amendment number (up to three digits), beginning with the number ''1.'' The amendment number field must be ''0'' or void for the initial filing. Each time any part of the service contract is amended, the filing date will be the date of filing of the amendment.

E. *FMC File Number.* The FMC File Numbers will be system-assigned as initial service contract filings are received and processed. The FMC File Numbers will be assigned sequentially and will start at a number designated by the FMC. The FMC File Number will be provided to filers in the acknowledgment message (via electronic mail).

F. *Effective Date.* The service contract must indicate the effective date and the expiration date governing the duration of the contract. The duration must also be set forth in Term No. 8 where the duration of the contract shall be stated as a specific fixed time period, with an effective date and an ending date.

G. *Amendment Codes.* All amendment codes listed in the Filing Guide, except ''G'' and ''S'', may be used in any combination, but limited to three amendment codes per amendment.

H. *Special case symbol and number.* The ''S'' amendment code must be used singly, and in conjunction with a validated special case number for corrections to service contracts.

I. *Filing Date.* The filing date is automatically set by the system whenever a service contract or amendment thereto is filed.

J. *Contract terms (''terms'').* Nos. 1 to 11 shall address the subjects and bear the terms' titles for the respective numbers exactly as provided in this section. (Note: If a subject is not included, such as No. 12, the number must be listed with the appropriate title and the designation ''NA.'' All terms may be subdivided into subterms to facilitate amendment).

1. *Origin (No. 1).* ''Origin'' includes the origin port range(s) in the case of port-to-port movements, and the origin geographic area(s) in the case of through intermodal movements, except that the origin and destination of cargo moving under the contract need not be stated in the form of ''port ranges'' or ''geographic areas,'' but shall reflect the actual locations agreed to by the contract parties.

2. *Destination (No. 2).* ''Destination'' includes the destination port range(s) in the case of port-to-port movements, and the destination geographic area(s) in the case of through intermodal movements, except that the origin and destination of cargo moving under the contract need not be stated in the form of ''port ranges'' or ''geographic areas,'' but shall reflect the actual locations agreed to by the contract parties.

3. *Commodities (No. 3).* Term No. 3 shall include all commodities covered by the service contract. For each commodity filed in this term, a separate formatted commodity index entry is required.

4. *Minimum quantity or portion (No. 4).* Term No. 4 shall address the minimum quantity or portion of cargo and/or amount of freight revenue necessary to obtain the rate or rate schedule(s). The minimum quantity or cargo committed by the shipper may be expressed as a fixed percentage of the shipper's cargo.

5. *Service commitments (No. 5).* Term No. 5 shall address the service commitments of the carrier party(ies), such as assured space, transit time, port rotation or similar service features.

6. *Rates or rate schedule(s) (No. 6).* Term No. 6 shall contain the contract rates or rate schedules, including any additional or other charges (e.g., general rate increases, surcharges, terminal handling charges, etc.) that apply, and any and all conditions and terms of service or operation or concessions which in any way affect such rates or charges.

7. *Liquidated damages for non-performance, if any (No. 7).* Term No. 7 shall include liquidated damages for non-performance, if the parties have seen fit to so provide.

8. *Duration of the contract (No. 8).* The duration of the contract shall be stated as a specific, fixed time period, with an effective date and an expiration date.

9. *Signature date/contract parties/ signatories & any affiliates (No. 9).* The identification of contract parties must be included as follows:

(a) The legal names and business addresses of the contract parties. (Note: if the service contract is entered into under the authority of an agreement, this shall include the corresponding agreement number on file with the Commission);

(b) The legal names, titles, and addresses of representatives signing the contract for the parties and the date the contract was signed; and

(c) The legal name(s) and business address(es) of affiliates entitled to access the contract, if any. Subsequent references in the contract to the contract parties shall be consistent with the first reference (e.g., (exact name), ''carrier,'' ''shipper,'' or ''association,'' etc.). (Note: This term must name every affiliate of each contract party named under § 530.8(b)(9) entitled to receive or authorized to offer services under the contract, except that in the case of a contract entered into by all the members of a conference, agreement or shippers' association, individual members need not be named unless the contract includes or excludes specific members.)

10. *Shipper's Status Certification and Affiliates, if any. (No. 10).* The shipper signatory(ies) must certify its status and that of any affiliates in accordance with § 530.6 of this part.

11. *Records (No. 11).* Term No. 11 must contain:

(a) A description of the shipment records which will be maintained to support the contract; and

(b) The address, title, and telephone number of the person who will respond to a request by making the original signed service contract and shipment records available to the Commission for inspection under § 530.15 of this part.

12. *Other Provisions of the Contract (No. 100–999).* Any term of a service contract not otherwise specifically provided for in this section shall be entered after the above terms and in numerical order, beginning with No. 100.

BILLING CODE 6730–01–P

EXHIBIT 1 -- SERVICE CONTRACT REGISTRATION [FORM FMC-83]

ORGANIZATION NO. _____

PLEASE TYPE OR PRINT

SERVICE CONTRACT REGISTRATION

(SEE ATTACHED INSTRUCTIONS)

1. This Registration is: [ ] **Initial** [ ] **Amendment** (Specify change)_____
[ ] **Dial-up** [ ] **Internet-based**

2. Registrant

_____
Full Legal Name of firm (or individual, if not a firm)
(Doing Business As)

3. Address of Home Office

_____ ( ) _____
(Number and Street) Telephone

_____ ( ) _____
(Number and Street) Fax

_____
(City/State/Country) (Federal TIN Number) E - M a i l (optional)

4. Billing Address If Different

_____ ( ) _____
(Number and Street) Telephone

_____ ( ) _____
(Number and Street) Fax

_____
(City/State/Country) E - M a i l (optional)

5. Organization Number (If known)_____

6. Registrant Type (Check one) [ ] **VOCC** [ ] **Tariff Publisher/Agent/Other** [ ] **Agreement** [ ] **Conference/Joint Service**

7. Permissions Requested and Person granted these permissions (Check permissions that apply)

_____
Full Legal Name

☐ **Maintenance of organization record** ☐ **File Service Contracts**

8. Registered for Batch Filing Prior to May 1, 1999? (Y/N) ____ If Yes, show date_____
If the person to perform the filing already has an existing Log-on, list only the Log-on for that person.

Existing Log-on_____

_____ _____
Signature of Authorized Official date Print or Type name of Authorized Official

FMC USE ONLY

Logon_____Initial Password_____ID_____Directory_____
DateAsg____/____/____AsgBy_____ **3/01**

BILLING CODE 6730-01-C

Instructions for Form FMC–83

Instructions

Line 1. Registration. Indicate whether this is the initial (first time) registration or an amendment to an existing Service Contract Registration.

Line 2. Registrant. This must be the full legal name of the firm or individual registering for the FMC's Service Contract Filing System and any trade names. The registrant name should match the corporate charter or business license, conference membership, etc. It should be noted that the registrant name cannot be changed by the registrant after the registration without submission of an amended registration fee.

Line 3. Address of Home Office. The complete street address should be shown in addition to the post office box. Also, provide the registrant's Federal Taxpayer Identification Number (''TIN'' Number).

Line 4. Billing Address if Different. This should be completed if the billing address differs from the home office address. Show the firm name (if different from the registrant), street address and post office box (if applicable).

Line 5. Organization Number. Complete if known. (Regulated Persons Index or ''RPI'' number.)

Line 6. Registrant Type. Indicate the type of organization. A registrant cannot be more than one type. This data cannot be changed by the registrant after registration without submission of an amended registration form.

Line 7. Permissions Requested and Person Granted These Permissions. Delegation of the authority to file should be noted here.

Maintenance of Organization Record—The person listed in line 8 is authorized to access the organization maintenance functions (i.e., modify organization information, assign publishers, affiliations, and d/b/as).

Service Contract Filing—The person listed in line 8 is authorized only to submit filings.

Line 8. Certified for Batch Filing. Indicate whether the registrant was registered with software certified to perform batch filings prior to May 1, 1999. Otherwise, the registrant must first be certified for batch filing as outlined in 46 CFR part 530. After certification, the registrant can submit an amended registration form to request permission for a person in their organization to perform the batch filing. If the person already has an existing log-on, the log-on (not the password) should be listed on the registration form. Also, the certification date received from the FMC should be listed on the registration form.

By the Commission.

Bryant L. VanBrakle,

Secretary.

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