OMB, explanations when the Agency decides not to use available and applicable voluntary consensus standards.

This action does not involve technical standards. Therefore, the EPA did not consider the use of any voluntary consensus standards.

9. Submission to Congress and the Comptroller General

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. The EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives and the Comptroller General of the United States prior to publication of the rule in today's **Federal Register**. This rule is not a ''major rule'' as defined by 5 U.S.C. 804(2).

List of Subjects in 40 CFR Part 271

Environmental protection, administrative practice and procedure, confidential business information, hazardous materials transportation, hazardous waste, Indian lands, intergovernmental regulation, penalties, reporting and record keeping requirements, water pollution control, water supply.

Authority: This document is issued under the authority of Sections 2002(a), 3006 and 7004(b) of the Solid Waste Disposal Act as amended, 42 U.S.C. 6912 (a), 6926, 6974 (b).

Dated: April 13, 1999.

William Rice,

Acting Regional Administrator, Region VII.

[FR Doc. 99–11037 Filed 5–3–99; 8:45 am]

BILLING CODE 6560–50–P

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: Confirmation of interim final rule with changes.

SUMMARY: This rule confirms as final the Federal Maritime Commission's interim rule governing service contracts between shippers and ocean common carriers to implement changes made to the Shipping Act of 1984 (''Act'') by the Ocean Shipping Reform Act of 1998 (''OSRA''). The interim final rule implemented section 8(c) of the Act. The interim final rule is adopted as a final rule with certain changes. The final rule: revises the Commission's definition of ''motor vehicle'' in accordance with its regulation governing Carrier Automated Tariff Systems (Docket No.98–29); adds a limited exception to the filing requirements in cases of the Commission's electronic filing systems' malfunction; revises the requirements for registration for filing and cross-referencing for clarity; revises the regulation on ET publication to clarify where those for multiple carrier parties must appear; and carries forward certain exemptions from the requirements of the regulation which the Commission had granted in former part 514 of this chapter, but which had been inadvertently omitted from the interim final rule. The final rule also corrects a paragraph numbering error made in the section dealing with publication.

DATES: Effective May 1, 1999.

FOR FURTHER INFORMATION CONTACT:

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SUPPLEMENTARY INFORMATION: On December 17, 1998, the Federal Maritime Commission (''Commission'' or ''FMC'') issued a notice of proposed rulemaking (''NPR'') to implement changes to the Shipping Act of 1984 (''Act'') mandated by the Ocean Shipping Reform Act of 1998 (''OSRA''), Pub. L. 105–258, 112 Stat. 1902, enacted on October 14, 1998. 63 FR 71062–71076 (December 23, 1998). On March 1, 1999, the Commission issued an interim final rule (''IFR''), removing 46 CFR part 514 and adding 46 CFR part 530, which made significant changes to the proposed rule. 64 FR 11186–11215 (March 8, 1999). The Commission held the interim final rule open for comment until April 1, 1999.

The Commission received comments on the IFR from: Wallenius Lines (''Wallenius''); Effective Tariff Management (''ETM''); Department of the Army, Military Traffic Management Command (''MTMC''); the United States Postal Service (''USPS''); the Council of European and Japanese National Shipowners' Associations (''CENSA''); the American Association of Exporters and Importers (''AAEI''); P&O Nedlloyd (''P&O''); the International Longshore and Warehouse Union, AFL–CIO (''ILWU''); the Ocean Carrier Working Group Agreement (''OCWG''); the National Industrial Transportation League (''NITL''); Sea-Land Service, Inc. (individually, concurring in the U.S. Industry Interests comments) (''Sea-Land''); E.I. du Pont de Nemours and Company (''DuPont''); and joint comments from 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 Industrial Development (''U.S. Industry Interests'').

A. General Comments

The comments generally agree with the Commission's re-assessment of the filing systems and the more innovative approach of the IFR.

B. Section 530.3(m)—Definitions—Motor Vehicle

The Commission received comments from Wallenius on the IFR's definition of ''motor vehicle.'' We adopt the same analysis as set forth in Docket No. 98–29, *Carrier Automated Tariff Systems* (46 CFR part 520) and, accordingly, revise the definition of ''motor vehicle.''

C. Section 530.4—Confidentiality

Section 530.4 of the IFR maintains that all service contracts filed with the Commission will be confidential; however, such confidentiality from the public does not preclude the Commission from providing service contract information to another agency of the Federal government. In order to address certain commenters' concerns about public disclosure of service contract information that could result from sharing such information with other Federal agencies, the Commission will require an agency requesting the information to enter a Memorandum of Understanding (''MOU'') with the Commission, stating that such information is necessary to its statutory functions and agreeing to protect the confidentiality of the information it receives.

MTMC and the U.S. Industry Interests are the only parties that filed comments on this section. MTMC states that it is the Army component of the United States Transportation Command. It is responsible for providing ocean and intermodal transportation services and

related support services to Department of Defense (''DOD'') components during peace, war and national emergencies. MTMC explains that it solicits ocean and intermodal transportation in the U.S. and abroad. It procures transportation services by soliciting rates for fixed periods from operators of U.S.-flag vessels for DOD cargo movements between the continental U.S. and worldwide points, as well as between foreign points. Such DOD cargo is transported, MTMC states, in commercial carriers' regularly scheduled commercial routes, in the same vessels and on the same schedule as any other commercial cargo. MTMC further points out that its worldwide solicitations may result in the acceptance of more than one carrier's offer in order to fulfill DOD transportation requirements.

MTMC agrees with the Commission's assessment that the legislative history of OSRA indicates that confidentiality accorded to service contract filings may not be used to prevent other Federal agencies (particularly DOD) from performing their statutory duties. The Cargo Preference Act of 1904, 10 U.S.C. 2631, and the Competition in Contracting Act, 10 U.S.C. 2302, *et seq.*, MTMC argues, are two statutes whose requirements MTMC can fulfill only by having access to service contract information. The Cargo Preference Act, asserts MTMC, requires DOD to use U.S.-flag vessels for the transportation of Armed Forces' supplies unless ''the freight charged by those vessels is excessive or otherwise unreasonable,'' and prohibits the operators of those vessels from charging rates that are ''higher than the charges made for transporting like goods for private persons.'' MTMC at 5 (quoting 10 U.S.C. 2631(a)). Further, MTMC explains that the law requires that the government purchase supplies and services at ''fair and reasonable'' prices. *Id*. (citing 10 U.S.C. 2304, 2305).

MTMC asserts that it ''relies upon access to tariff and service contract information to fulfil its statutory responsibilities with regard to the Cargo Preference Act of 1904 and other related government acquisition laws,'' and, thus, it is ''vital that government agencies procuring ocean transportation services * * * have access to service contract information concerning commodities, volumes, routing, service commitments and rates.'' *Id*. MTMC argues that examination of publicly available tariff rates is less relevant than the examination of service contract rates in determining fair and reasonable rate levels in a trade lane, because the vast majority of international cargo moves under service contracts. MTMC also notes that the legislative history of OSRA includes several assurances that government agencies would have access to service contract information. MTMC at 6 (citing 144 Cong. Rec. S3320, and 144 Cong Rec. at S11302).

Finally, MTMC asserts its intention to formally request an MOU under which the Commission would release confidential service contract information which MTMC will hold in confidence and will use only for the purposes of enforcing the Cargo Preference Act and for fulfilling the requirements of the Competition in Contracting Act.

The U.S. Industry Interests initially incorporate into their comments by reference the arguments set forth in their comments filed on January 22, 1999, in response to the NPR. The U.S. Industry Interests then argue that making service contracts available to MTMC and other Federal agencies will ensure that such information is made available to government procurement officials responsible for the contracts with carriers. Such disclosure, the U.S. Industry Interests assert, would be inconsistent with the policies underlying OSRA, namely, that carriers ''need the flexibility to keep service contract terms confidential from a shipper who might use such information to seek better terms for itself.'' U.S. Industry Interests at 3.

Assuming, however, that the legislative history does justify disclosure of confidential service contract information to other government officials in order to monitor compliance with the Cargo Preference Act, the U.S. Industry Interests claim that the monitoring function should be performed only by those officials who are independent of the procurement activity.

If the Commission decides to defer the resolution of the aforementioned issues, the U.S. Industry Interests urge the Commission to add the following sentence to § 530.4: ''Before doing so, the Commission will enter into a Memorandum of Understanding (MOU) with such agency setting forth the terms and conditions for use of such information or contracts, and before executing any such MOU will publish it in proposed form for public comment.'' U.S. Industry Interests at 3–4. The U.S. Industry Interests argue that ''[s]uch notice and comment is both appropriate and required given the potential substantive impacts of interagency disclosure of confidential service contract information, and also given the prohibitions of the Trade Secrets Act, 18 U.S.C. 1905.'' U.S. Industry Interests at 4 & n.4 (citing *Reynolds Metals Co.* v. *Rumsfeld*, 564 F.2d 663, 669 (4th Cir. 1977), and *Chem Serv., Inc.* v. *Environmental Monitoring Systems of EPA*, 12 F.3d 1256, 1267 (3d Cir. 1993)).

The U.S. Industry Interests argue in a footnote that, under the Trade Secrets Act, confidential information such as service contracts can only be disclosed if they are ''authorized by law.'' U.S. Industry Interests at 4 n.5. At a minimum, the U.S. Industry Interests assert, OSRA only allows the Commission to disclose service contract information to other Federal agencies for the purposes of the Cargo Preference Act.[1] However, the U.S. Industry Interests aver that assuming, *arguendo*, that other disclosures would be ''authorized by law,'' any MOU must be adopted in accordance with Administrative Procedure Act (''APA''), 5 U.S.C. 501, *et seq.*, notice and comment procedures. Id. (citing *Chrysler Corp.* v. *Brown*, 441 U.S. 281, 302 (1979) (finding that when a Federal agency is relying on a *federal regulation* as authorization to disclose confidential information to another Federal agency under the exception to the Trade Secrets Act that such disclosure be ''authorized by law,'' such authorization must be based on a substantive agency regulation that has the force and effect of law).[2]

The Federal Reports Act, 44 U.S.C. 3501, *et seq.* (which is part of the Paperwork Reduction Act), governs the disclosure to other Federal agencies of information obtained from the public by agency collection, while the Trade Secrets Act, 18 U.S.C. 1905, governs the disclosure by Federal employees of confidential information generally.

One of the main purposes of the Federal Reports Act is to minimize the paperwork burden on the public by maximizing ''the utility of information created, collected, maintained, used,

[1] However, the U.S. Industry Interests refer to their January 22, 1999 comments to reiterate that they believe the Commission does not have the authority to do this.

[2] The U.S. Industry Interests cite this case in support of their position that the MOU be adopted in accordance with notice and comment procedures; however, this case is inapposite because it speaks to what type of law is sufficient to satisfy the ''authorized by law'' exception to the Trade Secrets Act. The Court found that the law must be substantive, and therefore a procedural rulemaking promulgated by an agency that was not noticed for public comment would be insufficient. In the instant proceeding, as discussed *infra*, the Commission is relying on OSRA, the Cargo Preference Act, and the Competition in Contracting Act as its authorization for disclosing service contract information to other Federal agencies. Moreover, the case does not state that the MOU itself is innately substantive and must be noticed for public comment, as the U.S. Industry Interests suggest.

shared and disseminated by or for the Federal Government.'' 44 U.S.C. 3501(1), (2). In order to accomplish this purpose, the Federal Reports Act encourages the sharing of information between Federal agencies by providing that ''an agency may make available to another agency, information obtained by a collection of information if the disclosure is not inconsistent with applicable law.'' 44 U.S.C. 3510(a). The House Report reiterates this intention: ''The Act promotes sharing and disclosure of information for purposes of maximizing the utility of information to users, both governmental and non-governmental. Sharing of information among Government agencies also serves the goal of minimizing the burden imposed on the public by Government collection of information.'' H.R. Rep. No. 104–37, 104th Cong., 1st Sess. 31 (1995), reprinted in 1995 U.S.C.C.A.N. 164, 194.[3]

The only limitation Congress placed on inter-agency disclosure of information is when such disclosure is ''inconsistent with applicable law.'' 44 U.S.C. 3510(a). Section 3510 was unchanged by the 1980 and 1986 amendments, ''except for word changes for purposes of consistency and clarity,'' (H.R. Rep. No. 104–37 at 53, 1995 U.S.C.C.A.N. at 216); thus, the Commission can rely on the legislative history from the previous amendments in order to determine what Congress intended by ''inconsistent with applicable law.'' The Senate Report states that

> for the sharing of data to be inconsistent with applicable law, the applicable law must prohibit the sharing of data between agencies or must totally prohibit the disclosure to any one outside the agency. A mere prohibition on disclosure to the public would not be inconsistent with sharing the data with another agency unless the sharing would inexorably lead to a violation of that prohibition.

S. Rep. No. 96–930, 96th Cong., 2d Sess. 50 (1980), *reprinted in* 1980 U.S.C.C.A.N. 6241, 6290.

Section 8(c)(1) of OSRA states that ''service contracts shall be filed confidentially with the Commission.'' As was delineated in the NPR (63 FR at 71064–71065) and the IFR (64 FR at 11188), the Commission has found that Congress intended that such service contract information would be held confidential by the Commission from the public, not other Federal agencies.[4] The legislative history indicates that the drafters intended that the confidentiality provision not hamper other Federal agencies which have legitimate needs to access service contract information in order to carry out their statutory duties. The Commission is required to protect information filed confidentially from disclosure to the public, but it is not precluded from disclosing such information to other Federal agencies where clearly warranted and justified. Moreover, Congress did not attempt, through OSRA, to remove other Federal agencies' access to pricing information necessary for the administration of the Cargo Preference Act and the Competition in Contracting Act. All three statutes must be read together to give each validity. Therefore, the Commission declines to read OSRA as repudiating the responsibilities assigned other agencies by those statutes.

As OSRA intended service contract information to be kept confidential from the public and not from other Federal agencies, the disclosure of such information to other Federal agencies is not ''inconsistent with applicable law.'' Furthermore, sharing such information with another Federal agency would not ''inexorably lead to a violation'' of the prohibition against disclosure to the public, because, as the Commission stated in the IFR, such information would only be disclosed to an agency which enters an MOU with the Commission assuring that such information is necessary to the fulfillment of its statutory functions and that it will protect the confidentiality of such information. 64 FR at 11188. Therefore, disclosure of service contract information to other Federal agencies will not jeopardize the statutory aim of non-disclosure of confidential service contract information to non-governmental entities.

The U.S. Industry Interests argue that disclosing confidential service contract information to other Federal agencies would violate the Trade Secrets Act. It is unclear, however, whether the Trade Secrets Act is applicable to the disclosure of confidential service contract information between Federal agencies. Two cases have addressed whether inter-agency disclosures of confidential information are governed by the Federal Reports Act or the Trade Secrets Act: *Shell Oil Co.* v. *Department of Energy*, 477 F. Supp. 413 (D. Del. 1979), *aff'd*, 631 F.2d 231 (3d Cir. 1980), cert. denied, 450 U.S. 1024 (1981), and *Emerson Electric Co.* v. *Schlesinger*, 609 F.2d 898 (8th Cir. 1979). In *Shell Oil*, the District Court of Delaware, affirmed by the Third Circuit, held that the Trade Secrets Act applies to inter-agency disclosures, 477 F.2d at 432, while the Eighth Circuit found in *Emerson Electric* that because the Federal Reports Act controls the exchange of information between Federal agencies, the Trade Secrets Act applies only to the *public* disclosure of trade secret material, 609 F.2d at 907. The Supreme Court has yet to specifically address this conflict among the circuits. Thus, while it is debatable whether the Trade Secrets Act applies, we will assume it does for the purposes of this discussion.

The Trade Secrets Act prohibits Federal employees from disclosing trade secret information unless ''authorized by law.'' 19 U.S.C. 1905. The U.S. Industry Interests argue that such disclosure of confidential service contract information to other Federal agencies is not authorized by law because there is no language in OSRA specifically granting that authority and the legislative history relied on by the Commission followed, rather than preceded, the adoption of S. 414, the Senate bill which became OSRA. As was discussed, *supra*, this argument is unconvincing because section 8(c)(2) remained unchanged in the final version of OSRA, and the statements were made on the same day the Senate passed S. 414.

Furthermore, the Cargo Preference Act requires DOD to use U.S.-flag vessels to transport supplies unless ''the freight charged by those vessels is excessive or unreasonable,'' and prohibits those vessel operators from charging rates that are ''higher than the charges made for transporting *like goods for private persons*.'' 10 U.S.C. 2631(a) (emphasis added). Moreover, the Supreme Court has recognized that the Competition in Contracting Act requires that the government be charged ''fair and reasonable'' prices for the purchase of supplies and services. *Paul* v. *United States*, 371 U.S. 245 (1963); *see also* 10 U.S.C. 2304, 2305. These statutes appear premised on the assumption that certain pricing information will be made available to the relevant agencies.

[3] ''To the extent the legislation is a restatement of the 1980 [Paperwork Reduction] Act, as amended in 1986, the scope, underlying purposes, basic requirements, and legislative history of the law are unchanged. To the extent legislation modifies provisions in current law, the amendments are made strictly for the purposes described in this report, and in order to further the purposes of the original law.'' H.R. Rep. No. 104–37 at 2, 1995 U.S.C.C.A.N. at 165.

[4] In the IFR, the Commission addressed and rejected the U.S. Industry Interests' argument 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. 64 FR at 11188. The U.S. Industry Interests seek to incorporate that argument by reference in their comments made in response to the IFR. Because no new arguments were made in regard to that issue, it is unnecessary for the Commission to address that argument again.

The Cargo Preference Act entitles DOD to the same rates that other commercial shippers are charged for the transportation of like goods.[5] As the majority of international cargo will be moving under service contracts, we agree with MTMC's argument that the examination of publicly available tariff rates will be less indicative of what are fair and reasonable rate levels than the examination of service contract rates. As tariff and service contract rates could vary significantly, DOD would need to have access to such service contract rate information to ensure that it is being offered equivalent rates for like services and thus fulfill its statutory mandate. Moreover, Federal agencies may require access to such service contract rate information in order to comply with the requirement of the Competition in Contracting Act that they purchase fair and reasonable rates.

Therefore, OSRA and the accompanying legislative history, the Cargo Preference Act, and the Competition in Contracting Act all authorize the disclosure of confidential service contract information filed with the Commission to other Federal agencies. The U.S. Industry Interests, however, further argue that, assuming that the legislative history authorizes the disclosure of confidential service contract information to other Federal agencies, such disclosure would be limited to fulfilling the requirements only of the Cargo Preference Act. As discussed, *supra*, the legislative history only prohibits disclosure to the public and reflects that any Federal agency that requires access to confidential service contract information as necessary to its statutory functions may be entitled to it. Because the legislative history of OSRA indicates that Congress did not wish to limit the agencies with which the Commission should cooperate, but instead used the term ''other federal agencies,'' the Commission interprets this to include agencies other than DOD, as well as laws other than the Cargo Preference Act of 1904. Therefore, these regulations do not attempt to define every situation in which the requested information is relevant to the purposes of the requesting agency.

The U.S. Industry Interests also assert that disclosing service contract information to other Federal agencies would necessarily guarantee that an agency's procurement official would use that information to seek better terms for the agency. Assuming that another Federal agency is entitled to such information in order to monitor compliance with the Cargo Preference Act, the U.S. Industry Interests argue that only an employee at the requesting agency who is independent of the procurement process should have access to the information for such monitoring. Thus, the U.S. Industry Interests' suggestion would compel the Commission to dictate by MOU how DOD conducts its procurement procedures in order to obtain service contract information. The Commission will not attempt to dictate internal DOD procedures or policy. Furthermore, this issue is beyond the scope of this proceeding.

Finally, the U.S. Industry Interests request that the Commission add language to § 530.4 to require it to enter an MOU with any agency to which it discloses confidential service contract information and, prior to execution of such MOU, to publish it for public comment. The U.S. Industry Interests argue that because of the ''potential substantive impact'' of such an MOU, it must be adopted in accordance with notice and comment procedures under the APA. We disagree. An MOU can be formulated in the course of a rulemaking proceeding, but it need only be subjected to notice and comment procedures if it makes a substantive impact on individual rights and obligations. 5 U.S.C. 551(4), 553; *see also Paralyzed Veterans of America* v. *West*, 138 F.3d 1434, 1436 (Fed. Cir. 1998); *Chem Serv., Inc. v. Environmental Monitoring Systems of EPA*, 12 F.3d 1256, 1267 (3d Cir. 1993); and *Reynolds Metal Com.* v. Rumsfeld, 564 F.2d 663, 669 (4th Cir. 1977). Thus, the MOU would have to either diminish or increase the rights or obligations of the parties to a service contract in order to be considered substantive. *See Reynolds Metal Com.*, 564 F.2d at 669.

The parties to a service contract must file the service contract confidentially with the Commission. Because DOD or other Federal agencies are authorized to collect the same information in order to comply with the Cargo Preference Act and the Competition in Contracting Act (as authorized by the Federal Acquisition Regulations, 48 CFR parts 9, 15), the service contract parties' right to confidentiality would not be diminished by disclosing this information pursuant to an MOU. A Federal agency that needs service contract information to fulfill its statutory functions would appear to be entitled to such information already. As such, even if an MOU were promulgated by a rulemaking, it would be procedural under section 553 of the APA, not subject to notice and comment. The Commission declines to add language to § 530.4 to require rulemaking or notice and comment procedures before it can execute an MOU with another Federal agency.

Moreover, the Commission is not inclined to add language to the rule itself requiring that it enter an MOU. Such language was not noticed in the rule for public comment, and therefore, is beyond the scope of this proceeding. As we have already stated in the supplementary information section of the IFR,

> 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.

64 FR at 11188. The Commission therefore adopts as final the language of § 530.4 as it appeared in the IFR.

D. Section 530.5(a), (b)—Duty to File and Filing by Agents

NITL supports the Commission's regulations placing the duty to file upon the carrier party (§ 530.5(a)), but allowing the service contract to be filed by a ''duly agreed upon agent as the parties to the service contract may designate, and subject to conditions as the parties may agree.'' § 530.5(b). NITL points out that this clarification is important due to the changes made by OSRA which authorize individual contracting by members of carrier agreements and which allow for confidentiality of contract terms. NITL asserts that the language of the rule properly provides for flexibility, and leaves the matter appropriately as one to be decided by the parties to the contract. Because the use of an agent for filing may increase risks to confidentiality, NITL points out, some shippers may legitimately prefer that an agent not be used, and insist on a provision against such use of agents in their service contracts.

NITL's commentary does not request any further clarification or change to the Commission's IFR. This section of the IFR is confirmed as final.

E. Section 530.6—Shipper Status Certifications

1. Extending Provisions to Groups of two or More Unrelated Shippers

Sections 530.6(a) and § 530.8(b)(9) of the Commission's IFR carry over an exception for shippers' associations to the requirement that all shippers list their names and addresses and that all shippers certify their status in their

[5] The U.S. Industry Interests point out that the Cargo Preference Act does not require that the government be given rates *lower* than commercial shippers. Neither MTMC nor the Commission has proffered this argument, and in fact we agree that the statute only requires that the government receive *equivalent* rates for like goods.

service contracts. DuPont recommends that the Commission extend these provisions for shippers' associations to include unrelated groups of shippers which choose to enter into a single service contract, and make conforming changes to § 530.9(e)(2) for this expansion. DuPont asserts that the exception for shippers' associations was created in response to ''marketplace realities'' and that it ''helps protect the integrity of the shippers'' association without unduly interfering with the ability of the FMC to enforce the law.'' DuPont at 2. Extending this provision to unrelated groups of shippers which enter into service contracts, DuPont argues, would result in ''more equitable treatment'' of shippers which join together to enter into service contracts, whether as members of associations or as unrelated groups.

This request was not raised in comments responding to the NPR, and the Commission declines now to expand its treatment of shippers' associations to unrelated groups of shippers. As of yet, the Commission has had little indication, besides DuPont's brief and rather general comments, of how unrelated groups of shippers will come together to enter into service contracts. Furthermore, there is difficulty in expanding the treatment of shippers' associations to unrelated shippers groups: while shippers' associations generally can provide a list of members who are legally obligated to fulfill the terms of a service contract, shippers who are unrelated may not be able to provide such a list, because one shipper cannot impose such obligations on other, unrelated shippers who have not signed the service contract. When the shipper status certification was first introduced, the Commission found that the requirement of section 10(b)(15) of the Act (certification) (renumbered as section 10(b)(12) by OSRA) required that ''such certification should encompass not only the signatory shipper, but any affiliates or members of the shippers' associations entitled to ship under the service contract.'' 56 FR 1496. Therefore, DuPont's request is denied.

2. Shipper Status Certifications Generally

NITL reiterates the comments it made to the Commission in response to the NPR: namely that the shipper status certification is unnecessary and that its purpose is unclear. NITL argues that because parties are free to complain to the Commission if they believe they were treated in an illegal fashion, and because OSRA has narrowed the discrimination prohibitions, the Commission should conduct investigations on a case-by-case basis rather than take the IFR's monitoring approach, to justify the status certification requirement. NITL at 9.

The Commission has examined this comment previously and rejected it. When the Commission examined the predecessor of § 530.5 (originally § 581.11) in 1991, it found that this approach would give the Commission ''the opportunity to closely monitor all service contracts to ensure that they are not improperly used by NVOCCs not in compliance with the Act.'' Docket 91–1, *Bonding of Non-Vessel-Operating Common Carriers,* 56 FR 51987, 51992. We reiterate that the shipper status certification requirement serves both to remind shippers in what capacity they may enter into service contracts, and to assist carriers to ensure they enter into a service contract only with compliant NVOCCs.

Sea-Land, OCWG, and NITL take exception to the following statement in the supplementary information section of the IFR which was part of the Commission's reasoning behind a requirement that a shipper status certification be filed with each service contract:

> 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.

64 FR at 11190. The comments maintain that this language misinterprets the scope of the prohibited acts under the OSRA. The three commenters complain first, that the Commission improperly confused refusals to deal and negotiate with discrimination, and second, that the statement incorrectly expands the Act's prohibitions on discrimination.

NITL asserts that the Commission's statement is an over-broad characterization of the discrimination prohibitions of the Act which have been substantially narrowed by OSRA with respect to service contracts. NITL urges the Commission to clarify the application of the discrimination prohibitions with regard to service contracts. Sea-Land also requests that the Commission clarify that service contracting discrimination prohibitions are limited to sections 10(b)(5), 10(b)(9), 10(c)(7) and 10(c)(8). Concurring with Sea-Land's comments, OCWG argues that differentiating service contract rates and terms between shippers for any reasons other than those prescribed in sections 10(c)(7) and (8) is entirely lawful in joint service contracts offered by ocean common carriers. OCWG at 3–4.

We concede that in our effort to be succinct, the statement objected to by the commenters was over-broad and unclear. OSRA does retain prohibitions against refusals to deal and negotiate as well as against discrimination in certain circumstances in section 10.[6] Sections 10(b)(5), 10(b)(9), 10(c)(7) and 10(c)(8) of the Act refer to discrimination; section 10(b)(10) of the Act prohibits unreasonable refusals to deal; and section 10(c)(1) prohibits concerted action resulting in unreasonable refusals to deal. Further clarification is unnecessary.

F. Section 530.7—Duty to Labor Organizations

ILWU comments that the incorporation of the word ''ordinarily'' into the regulation's definition of ''reasonable period of time'' to respond to a labor request, ''invites a delayed response from the carriers, and inevitably raises a host of tangential issues that will have to be investigated and perhaps even litigated.'' ILWU urges the Commission to avoid this potential waste of resources by deleting ''ordinarily'' from the definition of ''reasonable period of time.''

We find no reason to revise the approach taken by the Commission in the IFR; only experience under this new statutory provision will reveal whether more stringent regulations are warranted. The Commission reiterates its expectation that carriers will comply

[6] Section 10 of the Act reads, in pertinent part,

(b) Common carriers. No common carrier, either alone or in conjunction with any other person, directly or indirectly, may—

* * * * *

(5) for service pursuant to a service contract, engage in any unjustly discriminatory practice in the matter of rates or charges with respect to any port;

* * * * *

(9) for service pursuant to a service contract, give any undue or unreasonable preference or advantage or impose any undue or unreasonable prejudice or disadvantage with respect to any port.

* * * * *

(10) unreasonably refuse to deal or negotiate;

* * * * *

(c) Concerted action. No conference or group of two or more common carriers may—

* * * * *

(1) Boycott, or take any other concerted action resulting in an unreasonable refusal to deal.

* * * * *

(7) for service pursuant to a service contract, engage in any unjustly discriminatory practice in the matter of rates or charges with respect to any locality, port, or persons due to those persons' status as shippers' associations or ocean transportation intermediaries; or

(8) for service pursuant to a service contract, give any undue or unreasonable preference or advantage or impose any undue or unreasonable prejudice or disadvantage with respect to any locality, port, or persons due to those persons' status as shippers' associations or ocean transportation intermediaries.

with the spirit of the legislation and respond promptly to requests from labor organizations for information.

G. Section 530.8—Filing of Service Contracts

1. Transition Issues and Contingency Plans

OCWG, CENSA and NITL express concern about the Commission's filing systems' abilities to accommodate the rush of filings they predict to occur early in May. NITL supports the Commission's decision to accept before May 1, 1999, service contracts in the new system effective on or after May 1, 1999. This, NITL asserts, should avoid an anticipated rush of filings on May 1 and likewise avoid overburdening the internet-based system on May 1. CENSA comments that, because neither of the proposed electronic systems are currently operational, in the event the internet-based system is not available at least ten days prior to May 1, 1999 (which is April 21, 1999), filers should be permitted to file in the current paper format until the system is operational, and should be granted a grace period after the system is operational (implicitly also 10 days) before filers will be required to use the new system.

Similarly, OCWG urges the Commission to adopt a contingency plan for the filing of service contracts in the event that the internet-based system is not available for filing by April 20, 1999. OCWG asserts that thousands of service contracts will be filed for effect on May 1, and as such, the volume of filings both before and after May 1 will be enormous. OCWG suggests that the Commission allow for paper or diskette filing beginning April 20 and continuing until 30 days after the internet-based filing system becomes available. This, OCWG argues, would allow both the industry and the Commission to make a more gradual transition, and is similar to the approach the Commission took when it made the transition from paper tariffs to the Commission's Automated Tariff Filing Information (''ATFI'') system. Finally, OCWG comments that it would not object if those service contracts filed in paper format during the transition period were required to be re-filed via the internet system at a later date, provided there was a reasonable period allowed for making such refilings. Such a contingency plan, OCWG suggests, would provide for a smooth transition to electronic filing while ensuring there is no commercial disruption due to the unavailability of the internet-based system.

The Commission's IFR introduced two service contract filing systems: option 1 (''internet-based'') and option 2 (''dial-up''). Presently, the Commission is confident that both systems will be available on May 1. Indeed, the internet-based system will accept filings on April 26. In addition, as announced in press releases and on the Commission's website, the Commission's Office of Information Resources Management (''OIRM'') conducted certification sessions for the dial-up system in which filers test their filing software on April 22 and 23.

The Commission has taken other steps to help filers be prepared to file as soon as the Commission's systems are operational. On April 8, 1999, OIRM sent letters to entities currently registered to do batch filing in the ATFI system, requesting an indication of their intent to register in the new systems. Another reminder of the registration requirement was also placed on the Commission's website by OIRM. Based on all of the above preparations, therefore, a transitional alternative filing plan is not deemed necessary.

As for the ongoing contingency plans suggested by the comments, the Commission is confident that the systems will be able to receive a large volume of filings in the early days of May. Both systems will be available to receive filings 24 hours each day and 7 days per week. Therefore, the times that filing will be unavailable to filers would appear to be rare. Of course, there may be minutes or hours in which either of the systems will be ''down'' and will be unavailable to receive filings, whether for scheduled maintenance or for unscheduled interruptions due to telephonic or other systemic problems. Contrary to the commenters' concerns, however, the Commission does not anticipate that these brief periods of unavailability will create interruptions of commercial transactions on the scale implied by the comments.

However, the Commission wishes to further allay concerns as to the capability of the systems to accept the amount of filings that may occur around May 1, or at some time in the future, by providing for a suspension of the timeliness requirement of the rules in the event that the filing systems malfunction. The Commission therefore has adopted a limited exception from the requirements of §§ 530.8(a) and 530.14(a) (that the service contract must be filed before any cargo may be carried under it) in situations in which the Commission's filing systems are unavailable for twenty-four (24) consecutive hours or more. This limited exception requires filing to be done at the latest by twenty-four (24) hours after the system returns to service. Also, this limited exception will only arise in situations where the Commission has verified that the filing system is unavailable to all filers, and not, for instance, when the filer's own computers or communications systems are non-functional. The Commission therefore adds paragraph (e) to § 530.8.

2. Appendix A—Registration

While the Commission received no formal comments on the matter, several informal requests for information indicate that there is some confusion over registration for filing under both internet-based and dial-up systems. First, all of a carrier's, conference's or agreement's service contracts must be filed in one and only one of the systems. Second, while a carrier, conference or agreement may only be registered to file in one of the systems, a publisher which files on behalf of many carrier parties, may be registered in both systems. However, the regulation requires that a publisher must file an entity's service contracts in only one of the systems. Therefore, to make this clear, we revise Appendix A paragraph I., Registration, Log-on ID and Password.

H. Section 530.8(c)(2)—Cross-Referencing

As it appears in the IFR, § 530.8(c) reads,

> (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.

CENSA is concerned that the revision of § 530.8(c)(2) may confuse filers and lead them to mistakenly conclude that a service contract may not refer to a tariff or a service contract register filing. CENSA points out that, as originally proposed by the Commission in the NPR, § 530.8(c)(2) specifically permitted cross-referencing to tariff publications. OCWG also comments that in revising § 530.8(c)(2), the Commission inadvertently omitted language which would have allowed cross-referencing to tariffs and service contract registers. Both CENSA and OCWG suggest that the Commission revise the provision to read as follows:

> . . . make reference to terms not explicitly contained in the service contracts filing itself, unless those terms are contained in: (i) a tariff publication in accordance with the requirements of 46 CFR part 520; or (ii) a service contract register filed with the Commission; or (iii) a publication widely available to the public and well known within the industry.

P&O supports the OCWG comments on this section. P&O requests that the Commission also clarify that service contracts may cross-reference their own or their conference tariff; their service contract register; or publications that are widely available to the public and well known within the industry (including, for example, whether published as a tariff relating to hazardous materials or privately published as a register for intermodal equipment). Further, P&O argues that cross-referencing will be an essential element in multi-trade service contracts, and the Commission must ensure that its regulations on cross-referencing do not preclude carriers from making such multi-trade contracts in a ''commercially acceptable manner.'' P&O does not elaborate with particularity on how such multi-trade contracts might be affected.

In its NPR, which proposed only one filing system modeled on ATFI, the Commission specifically solicited comments from the industry on whether the provision of a ''service contract register,'' in which service contract boilerplate may be filed, would be desirable. The comments were generally positive, and the Commission determined that the first proposed system (''dial-up'') would have the capability of such register filings. There were few other details given in the IFR regarding register filings. 64 FR at 11197.

There is a dichotomy between the two filing systems due to their technological configurations and their distinct approaches to filing: the dial-up system requires an ''organizational record'' filing which has the ability to also accept ''register'' filings; the internet-based system has neither ''organizational record'' requirements nor provisions for ''register'' filings. With the major revisions made in the IFR, the technological question of whether such a ''register'' would be part of the internet-based system was not specifically discussed.

The guiding concept of the internet-based filing system was principally that the carrier party to the service contract would be able to file the complete, commercial agreement it had entered into with the shipper party. The matter of a register was not specifically considered for the internet-based system, because that system, in contrast to the dial-up system, would allow ''free text'' and not require the more rigidly formatted line items of the dial-up system. For the internet-based system, the principle was that the filer would simply transmit the contract as agreed to by the parties and executed by them, via the internet and into the Commission's database. In other words, whatever document the parties had signed would be identical to the document transmitted to the Commission. All the ''boilerplate'' of such contracts would be included in them, thereby eliminating any necessity for a ''register'' filing. Indeed, such ''register'' filings would appear to impose additional burdens of multiple filings for what could now easily be accomplished in a single filing.

Furthermore, the Commission is concerned that adopting the language suggested by the three aforementioned commenters may lead to situations in which shippers are party to service contracts referring to boilerplate which is filed in a service contract register which the shipper may have never read, and to which it would necessarily have no access from the Commission after filing. Therefore, the Commission has added a caveat to the allowance for cross-referencing material contained in a service contract register: the material filed in the service contract register and referred to in the service contract must be available to the other parties to the contract. Further, we wish to make it absolutely clear that changes to boilerplate which affect service contracts must be treated as amendments, and as such, subject to the mutual agreement of the parties. Such ''registers'' will only be available in the dial-up system.

Finally, because tariffs are published and widely available, cross-referencing to those publications in service contracts does not appear to pose any new issues. The Commission notes, therefore, that a tariff published pursuant to part 520 of the Commission's regulations will be considered ''a publication widely available and well known within the industry'' for the purposes of cross-referencing in service contracts.

The Commission therefore revises § 530.8(c) to clarify its approach to cross-referencing, particularly references to ''service contract register'' filings.

I. Section 530.10—Cancellation

AAEI comments that § 530.10 directly contradicts section 13(f) of the Act as revised by OSRA.[7] AAEI asserts that § 530.10 imposes the following choice on parties to service contracts: that they contemplate a shortfall (*i.e.* a failure to meet minimum cargo commitments) with a liquidated damages provision or they will be subject to § 530.10(d), which states that further or continued implementation of the service contract is prohibited; and that the cargo previously carried under it is to be re-rated at otherwise applicable tariff rates. AAEI doubts the legality of this provision, and asserts that it contradicts the ''black and white letter of the law in section 112(c)(3)'' of OSRA. AAEI further states that the failure of a contract to include a liquidated damages clause does not render the contract illusory. AAEI asks the Commission to consider whether it ''makes sense'' for example, to require the re-rating of 9,900 FEUs of cargo which has already been shipped when there has been a shortfall of only 100 FEUs in a service contract commitment for 10,000 FEUs. Finally, AAEI asserts that the proper penalty for fraudulent misrepresentation by a shipper is the imposition of monetary penalties, not the re-rating of previously carried cargo.

DuPont comments that the Commission's proposed ''solution * * * is worse than the original problem it sought to cure.'' DuPont at 5. DuPont, relying on its ''vast experience in the field of transportation contracting'' asserts that ''no matter how expert, complete and thorough negotiations are, the parties will inevitably experience barriers to fulfilling all of their obligations.'' DuPont at 5. Mandating re-rating, in situations in which the parties in good faith cannot meet their contractual obligations and elect to mutually terminate, is inappropriate in DuPont's estimation.

DuPont therefore urges the Commission to revise § 530.10(d)(2) to make re-rating permissible, but not mandatory, subject to Commission order, and proposes the provision read as follows:

> In the event of cancellation as defined in § 530.10(a)(3) * * * (ii) the cargo previously carried under the contract * * * may, pursuant to order by the FMC based upon its finding of a purposeful violation of applicable regulation, be re-rated according to the otherwise applicable tariff provisions.

This provision, DuPont asserts, would permit more lenient treatment of the ''unsophisticated, small, or first time shipper (or carrier) for its lack of foresight or experience'' and re-rating would only be imposed if the Commission found an intent to defraud or avoid compliance. DuPont at 6.

AAEI appears to have misread both the Commission's supplementary information and the text of the IFR itself. The supplementary information makes it clear that other provisions (*i.e.*

[7] Section 13(f) reads, in pertinent part,

> Neither 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.

not only liquidated damages provisions) can ensure that the service contract has a fall-back rate for shortfalls. 64 FR at 11204. The text of the regulation itself defines cancellation as

> 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. § 530.10(a)(3)(emphasis added).

The regulation, rather than being a penalty provision, is a method by which the ''applicable rate'' can be determined, and is invoked only when the parties have chosen not to make other provisions.

DuPont's recommendation that the re-rating provision be subject to Commission order, not automatic, and optional for the Commission to impose, may create uncertainty in the industry. DuPont's comment indicates its belief that this requirement is a penalty provision. Again, the requirement in § 530.10 for re-rating is only a last resort means of determining the applicable rate when the contract parties make no other provision and fail to amend the contract.

''Penalizing'' Shippers for Operating Under Unfiled Service Contracts

NITL states that it is unfair to ''penalize'' shippers for violations of §§ 530.8(a) or 530.14(a) (which require that a service contract or amendment be properly filed with the Commission before cargo moves under it) when they have no control over the timeliness or method of such filing or ensuring that the filing is not defective. NITL asserts that shippers which tender cargo for carriage under a service contract which they believe to have been filed, should not be subject to such violations. NITL describes a scenario in which an innocent shipper may have been told by its carrier that the service contract has been filed, and then would be subject to penalties for violation of Commission regulations. NITL complains that it is not clear what the consequences for a shipper would be in such a case, and requests that the Commission clarify that it will not hold a shipper liable for penalties and will protect the shipper from re-rating in such a situation.

DuPont expresses concern about shipper parties not receiving independent, written confirmation of service contract and amendment filings, but facing re-rating or penalties, as well as legal defense costs for failure to file or improper filing. To eliminate this potential problem, therefore, DuPont urges the Commission to provide shipper parties with written (or electronic) notice when service contracts or amendments are filed or rejected within 5 working days of the filing or rejection. This approach, DuPont suggests, would eliminate the potential for a recreation of the motor carrier filed rate problem. In the alternative, DuPont proposes that shippers be held harmless and permitted to carriage pursuant to an otherwise valid contract which the carrier either failed to file or failed to notify the shipper if rejected by the Commission.

There are several reasons why the Commission declines to adopt DuPont's suggestion either to hold shippers harmless from such failures to file or to require that the Commission send confirmation of filing to the shipper as well as to the carrier. First, the filing requirement has been part of the Act and Commission regulation since 1984, and we are unaware of any shipper having been held to have violated section 10(a)(1) of the Act when it had a reasonable belief that the carrier had duly filed the service contract. Second, we note that shippers may require confirmation of filing from their carrier as part of the negotiation process, if they wish to do so. Third, the shipper may have some indication of whether or not a service contract has been duly filed by verifying that the ET for that service contract has been published by the carrier. Finally, with respect to NITL's scenario, the Commission's position can only be determined in the course of proceedings with parties in interest arguing the facts before an administrative law judge. We note only that while it is not the shipper party who has the obligation to file under Commission regulations, if it operates under an unfiled service contract, it may violate section 10(a)(1) of the Act. That section only applies to knowing and willful actions, however, rather than a question of absolute liability, and would therefore not apply to a shipper unknowingly victimized by a carrier's failure to file. Furthermore, there is nothing in the legislation which suggests that the Commission can immunize shippers from the assessment of civil penalties. However, under section 13(f), a shipper's culpability is part of any consideration in an assessment of civil penalties.

In response to DuPont's comments, and as the Commission has already discussed in the IFR, section 13(f) would appear to protect a shipper against a claim by a carrier for undercharges. 64 FR at 11204. The Commission has already stated its position in the IFR, namely that section 13(f) does not operate to nullify section 10 requirements; that the Act must be read so that every section is given meaning and harmonizes with the others;[8] that section 13(f) should not be interpreted so as to make service contracts illusory, or allow parties to take advantage of service contract rates without being bound to a contract;[9] and that the Commission's provisions for maximum flexibility (*e.g.*, amendments, contingencies, and liquidated damages) are adequate methods by which the parties may avoid the application of § 530.10 and protect their commercial interests. Therefore, the Commission makes no revision to this section and adopts it as final as it appeared in the IFR.

J. Section 530.12—Publication

P&O, ETM, OCWG and CENSA comment that the IFR is unclear as to whether the statements of essential terms of service contracts (hereinafter ''ETs''), currently required to be filed in the ATFI system, will remain adequate for compliance with § 530.12 after May 1, 1999. ETM urges that the publication of ETs in ATFI be sufficient for publication under the new regulations, and further that such ETs not be required to be ''re-published'' in a new private system.

ETM argues that ETs of service contracts effective prior to May 1, 1999 were filed in ATFI for two reasons: to meet the filing requirements of the Act and to allow for public notice of the eligibility period for ''me-too'' shippers. As for the ''me-too'' aspect of the publication, P&O and ETM assert that because no further ''me-too'' eligibility is required after the end of the eligibility period, and because the ETs are available to interested parties (presumably in the then-historical ATFI system), to require the re-publishing of such ETs would provide no benefit to anyone and would impose a substantial

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[8] As stated in *Sutherland on Statutory Construction* at § 46.05 at 103:

> A statute is passed as a whole and not in parts or sections and is animated by one general purpose and intent. Consequently, each part or section should be construed in connection with every other part or section so as to produce a harmonious whole. Thus, it is not proper to confine interpretation to the one section to be construed.
>
> The Commission must ''strive to implement the policy of the legislature and harmonize all provisions of the statute.'' *Id.* at 104.

[9] Section 10(b)(1) reads, in pertinent part: No common carrier * * * may allow 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 * * * any other unjust or unfair device or means;

(2) 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 * * *

burden on carriers. ETM appears to assert that service contracts filed effective prior to May 1, 1999 may have an eligibility period which runs beyond May 1, 1999, and that this may be a problem for similarly situated shippers accessing the privately maintained Carrier Automated Tariff Systems (''CATS'') pursuant to Commission regulations at part 520 after May 1, rather than ATFI.

Further, ETM argues, requiring such re-publication would be duplicative and burdensome; the FMC staff would be inundated with reviewing re-published ETs as well as new ETs and determining which publication required a simultaneous filing and which did not. ETM also argues that the filing requirements of OSRA are met if service contracts effective prior to May 1, 1999 are electronically filed by use of ATFI, and, therefore, further filing or re-publication of either ETs or the service contracts themselves should not be required. ETM proposes that the Commission issue the following guidelines for the transition period:

1. Except for amended service contracts, all service contracts with an effective date prior to May 1, 1999 and with an eligibility period that expires no later than April 30, 1999, shall not require re-publication of essential terms or re-filing of the contract on or after May 1, 1999;

2. Amended service contracts with an effective date prior to May 1, 1999 and with an eligibility period that expires no later than April 30, 1999 shall not require re-publication of essential terms or re-filing of the contract on or after May 1, 1999;

3. Amended service contracts with an effective date prior to May 1, 1999 but with an eligibility period that expires no later than April 30, 1999 shall not be re-filed but the essential terms are to be re-published in the Carrier's Automated Tariff System and reference to the eligibility period should be stated in the duration clause;

4. All service contract amendments with an effective date of May 1 or later shall be filed in accordance with the provisions of 46 CFR part 530 and the essential terms shall be re-published in the Carrier's Automated Tariff System.

CENSA also asserts that requiring the re-publication of ETs of ''carry over'' service contracts will not benefit the carriers, their customers or the Commission. CENSA points out that many service contracts will continue. P&O, CENSA and OCWG urge the Commission to grant a blanket exemption from such republication; or in the alternative, give carriers and conferences a period of time over which to re-publish these ETs in their CATS.

P&O agrees with CENSA and ETM that ETs previously published in ATFI should not be required to be republished in CATS by May 1, 1999, because there is little regulatory purpose in such a requirement and because republication is time-consuming and expensive.[10] Furthermore, P&O argues, republication will create confusion because new service contract numbers will have to be assigned to such re-published ETs. P&O suggests the Commission grant a blanket exemption, or alternatively that it extend the time for republication to the date of amendment of the ETs or October 1, 1999, whichever comes first.

OCWG also comments that existing service contract ETs, which are published in the Commission's ATFI system, should not be required to be published again in a private tariff publication after May 1, 1999. OCWG asserts that it represents carriers which collectively will have thousands of service contracts which would be affected by such a requirement. Such republication, OCWG asserts, would be burdensome and will have no little or no benefit because there will be no right to ''me-too'' after May 1. Instead of requiring republication as of May 1, OCWG contends, the Commission should require ETs for contracts in effect prior to May 1 be republished the first time the contract is amended after May 1, or by October 1, whichever is later.

1. Eligibility for ''Me-Tooing'

First, with regard to eligibility periods for ''me-too'' rights, it is clear that OSRA completely eliminates ''me-tooing'' of service contracts. OSRA is effective May 1, 1999, and therefore, no shipper can assert ''me-too'' rights after May 1, 1999, regardless of what the eligibility period of the service contract may have been under the Act prior to OSRA's effective date.

2. Accessability to and Maintenance of ATFI

Second, regarding accessability and content in the ATFI database, the Commission reiterates that it will maintain ATFI for historical information only, and access to ATFI will continue as it has been done in the past, by registration, log on and password. ATFI will become exclusively historical on April 30, 1999, as filers will cease to have the ability to file and amend ETs, but will continue to be able to retrieve them.

3. Republication

OSRA requires that ''when a service contract is filed confidentially with the Commission, a concise statement of essential terms * * * shall be published and made available to the general public in tariff format.'' Section 8(c)(3). The Commission has determined that the simplest and least burdensome way for filers to comply with this requirement of the Act is to require publication of ETs as part of the privately published tariff systems. This publication requirement ensures that the shipping public has access to certain very general information on service contracts filed with the Commission. However, for service contracts currently in effect, ETs of such service contracts may not be as readily accessible to the extent that they are still in the ATFI system. Allowing currently effective service contracts' ETs to appear in two places (*i.e.* the ATFI historical database and the active CATS publication) may add a degree of complexity for those seeking access to the ETs, but any confusion would be minimal, especially as compared to the cost and burden on the filers if republication were required.

Therefore, the Commission will not require that ETs for service contracts previously filed in the ATFI system, but which continue in effect after May 1, be published in the CATS system. However, the Commission wishes to make it clear that pre-May 1 service contracts which are amended after May 1 will require republication of ETs as soon as possible after the filing of the amendment (comporting with the requirement of § 530.12(g)) regardless of whether or not the four essential terms are affected by the amendment.

K. Amendment Filing

Although the Commission received no formal comment on this matter, several informal inquiries have indicated that filers need further guidance as to how pre-May 1 service contracts are to be amended after May 1. The internet filing system will not require the re-filing of the original service contract. The dial-up system, however, will require that the filer re-file a restatement of the service contract. This is due to the fact that the dial-up system requires a data file with which amendments must be associated; amendments may not stand on their own. In the dial-up system, all reissued service contracts will be required to:

(1) Have a current effective date which is no earlier than the system assigned filing date (Appendix to Part 530, section II. H. 2);

(2) Employ an amendment code of ''I'' and an amendment number of ''null'' or ''0'' (§ 530.10(b)(2) and Appendix to Part 530, section II D.);

(3) Contain all twelve mandatory terms and the exact term titles

[10] P&O comments that it will have 350 such service contracts.

(Appendix to Part 530, section IV. (Format Requirements));

(4) Reflect the latest version of each mandatory term, optional term and any Register Rules for each pre-OSRA term and rule; and

(5) State at term 12 that the service contract was ''reissued'' and cross-reference the FMC File Number of the pre-OSRA filing of the ET filing(s) in ATFI.

L. Section 530.12 (c)—Multiple Carrier Party Contracts-Publication of ETs

CENSA characterizes § 530.12(c) as giving multiple carrier parties the option of publishing either in their individual tariffs or in a conference tariff, which CENSA asserts is ''logical and reasonable.'' CENSA believes, however, that the rule's language is contradicted by the language of the supplementary information, which requires that ''essential terms of an individual service contract entered into by multiple carrier parties to a conference must be filed in the conference tariff.'' CENSA urges the Commission to revise the supplementary information to confirm that carriers would have an option of where to publish the ETs of a multi-carrier contract. CENSA asserts that this flexibility would not hinder the Commission's ability to carry out its regulatory responsibilities.

OCWG urges the Commission to revise § 530.12(c) as follows:

(c) *Location.* The statement of essential terms shall be published in an automated tariff publication in accordance with 520.12(c)(1) through (4) and in conformance with the format requirements set forth in part 520 of this chapter. The statement of essential terms may be published in the following locations:

(1) *Conference service contracts.* In the conference tariff(s).

(2) *Individual service contracts.* In the carrier's individual tariff publication or in the tariff publication of a conference of which the carrier is a member, at the carrier's option.

(3) *Multi-party contracts.* For a multi-party individual service contract entered into pursuant to the authority of a conference agreement, in each of the participating carriers' individual tariff publications or in the tariff publication of the conference, at the carriers' option.

(4) *All other service contracts.* In the individual tariffs of the participating carrier(s).

The foregoing language, OCWG asserts, would increase carrier flexibility by giving the members of a conference the choice of where to publish. It would also, OCWG asserts, make clear that individual carrier members of conferences may have their own tariff in which they may publish ETs even if they participate in a conference rate tariff. OCWG argues that this may be necessary to comply with the legal requirements of other jurisdictions, particularly those of the European Union. Giving carriers these options, OCWG argues, would not inhibit or discourage individual contracting, nor would it complicate the Commission's compliance monitoring. ETs belonging to carriers/conferences and individual/agreement service contracts but published in the same tariff, OCWG asserts, will be easily distinguished because the ET must contain the FMC agreement number for conference and non-conference agreement service contracts. OCWG also complains that allowing agents to file, but restricting who the carrier party may appoint to publish ''makes little sense.'' OCWG at 8. They argue that because carriers are ''very unlikely to permit anyone other than their employees or their tariff publisher to access their tariff publication,'' the approach of the IFR ''effectively prohibits carriers from using an agreement secretariat to publish the ETs of their individual service contracts.'' OCWG at 8.

We agree with CENSA that there appear to be conflicting approaches to publishing between the text of the rule itself and the language of the supplementary information. The supplementary information included a discussion of the competing interests behind the publication requirement for multiple carrier service contracts: on the one hand avoiding confusion to the public and ensuring that ETs can be located by the public, and on the other, minimizing the burden on the publishing carriers. 64 FR at 11200–11201.

Despite OCWG's and CENSA's arguments regarding flexibility for publication of multi-party ETs, however, the Commission has revised the language of the regulation to make it clear that conference ETs must appear with the conference tariff; individual ETs must appear with the individual tariff; and non-conference agreement ETs must appear with each of the individual carriers' tariffs. Where non-conference agreement or conference ETs may appear is *not* optional. While allowing such options would give carriers ''increased flexibility,'' we are not persuaded that doing so has the same implications as those for filing of confidential terms, and therefore it appears not to be particularly relevant whether or not it is ''entirely consistent with the approach the Commission has taken with respect to the filing of service contracts.'' OCWG at 8.

OSRA clearly distinguishes filing from publication. The publication of ETs is required in order that the information is reasonably available to the public. If the Commission were to allow the option suggested by these comments, the public may only with significant difficulty ever be able to find non-conference agreement ETs or conference ETs. This would not appear consistent with the statutory requirement that the ETs be ''made available to the public.''

The Commission has already determined that having ETs published alongside the carrier party's CATS is the simplest and least duplicative approach to such publication. As the Commission stated in the IFR, the statement of essential terms of

[i]ndividual carrier service contracts are to be published alongside that carrier's tariff matter * * * * 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 [*i.e.* in each of the individual carrier's tariffs] but note must be made of the relevant FMC-designated Agreement number.

64 FR at 11200–11201.

For independent individual service contracts entered into by a conference member, therefore, ETs must be published with the individual carrier's tariff publication, and not with the conference's tariff. As the Commission previously found, ''[a]llowing such would lead to public confusion.'' 64 FR at 11201. For multi-party service contracts, the IFR appears to allow non-conference agreements a choice as to where their ETs could be published (*i.e.* in a conference's tariff or in an individual tariff). The language of § 530.12(c)(2) is revised to clarify that for non-conference agreement service contracts, the ETs must be published in each of the individual participating carriers' tariffs, noting the FMC-assigned agreement number pursuant to which the service contract is entered.

CENSA alternatively asserts that the Commission should permit non-conference agreements to ''create a tariff in which the ETs of the service contracts of its members may be published either by themselves in their own tariffs, or through an agreement secretariat created for that purpose.'' CENSA at 2. Such an approach, CENSA argues, would neither hinder individual contracting nor compromise the confidentiality of contract terms. Furthermore, CENSA comments, such an approach could enhance the Commission's ability to

determine the level of contracting taking place pursuant to a non-conference agreement, because the ETs would all be published in a single tariff.

Allowing non-conference agreements to publish tariffs may be convenient; however, sections 3(7) and 8(a) of the Act reserve the ability to publish a tariff solely for ''carriers and conferences.'' Non-conference agreements are precluded from publishing tariffs by the statute. If the IFR's approach to the publication of ETs for non-conference agreements or for individual carrier members of conferences becomes overly burdensome or confusing to the public, and another approach is therefore warranted, the Commission may then revise the regulations to address such concerns. Before having had experience with the practices of the industry and the concerns of the public, however, it appears to be more prudent to leave this approach in place. Therefore, the Commission has revised the language of § 530.12(c)(2) to clarify with which tariff system multiple carrier service contracts must be filed and to correct a numbering error which appeared in the IFR.

Although the Commission received no formal comments on the provision, there has been informal inquiry about the meaning of the provision of § 530.12 which requires that ETs ''be published as a separate part in the filer's automated tariff publication, conforming to the format requirements of part 520 of this chapter.'' As this language was merely intended to indicate that ETs be located in the carrier's automated tariff system, the Commission has deleted the phrase ''conforming to the format requirements of part 520 of this chapter,'' and to change the term ''publication'' to ''system.'' The balance of the paragraph adequately indicates that ETs must be published in the carrier's automated tariff system. Therefore, § 530.12(c) is revised to address both the issues concerning multiple carrier party service contract filing and format requirements.

M. Section 530.13—Exceptions and Exemptions

USPS urges the Commission to continue a specific exemption to the requirements of this part for the transportation of mail between the United States and foreign countries. USPS recommends that § 530.13(a) be revised to include an exemption to the requirements of the regulation for mail. USPS points out that mail had been granted an exemption in 1976 (Docket No. 75–41, June 22, 1976) to the tariff filing requirements and further argues that this exemption should be carried forward for service contract filing as well.[11] Nor, USPS asserts, did the order find that such an exemption would deprive the shipping public of a means for determining the rates for the carriage of mail, because, with respect to mail, there is no ''shipping public'' other than foreign governments which set the rates applicable to the transportation of their mail. Finally, USPS notes that the 1976 exemption order recognized that under 39 U.S.C. 5005(b)(3), USPS' contracts for the carriage of mail are available for inspection by the general public.

USPS cites 46 CFR 514.3(b)(2) of the Commission's former regulations to support its proposition that service contracts for the carriage of mail in the U.S.-foreign trade are exempt from *both* tariff and service contract filing requirements. Under current practice, furthermore, carriers under contract with the USPS do not file their service contracts with the Commission. USPS argues that there is nothing contained in OSRA which would require a change from current practice. For the foregoing reasons, therefore, USPS urges the Commission to carry forward the exemption for mail to the Commission's regulation on service contracts.[12]

USPS' comment was the only comment regarding section 16 exemptions the Commission received, with the exception of the Household Goods Forwarders Association of America's comments to the proposed rule. USPS did not comment on the NPR, and the Commission did not consider in the IFR whether exemptions which had appeared in the combined tariff and service contract part of the Commission's former regulations (part 514) would continue to have application.

The Commission's regulations on tariffs and service contracts were originally contained in separate parts of the CFR. Subsequently, however, when the ATFI filing system was adopted to accept ETs, the Commission combined its service contract and tariff regulations into one part. As USPS' comment has brought to the Commission's attention that it had inadvertently failed to consider in the IFR the extension of certain exemptions which had been contained in the combined tariffs/service contract rule, the Commission will carry forward the section 16 exemptions the Commission had previously granted and which have relevance for the service contract filing requirements of this part. The Commission has therefore revised § 530.13 to include the relevant Commission exemptions, and further to indicate that terms not particularly defined in this section will have the same meaning they have as defined by the Act itself or by 46 CFR part 520 (Carrier Automated Tariff Systems).

As the Commission previously noted in the IFR, which it now confirms as final, it has received approval from the Office of Management and Budget for this collection of information pursuant to the Paperwork Reduction Act of 1995, as amended. Also as noted in the IFR, 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. 64 FR 11206.

List of Subjects in 46 CFR Part 530

Freight, Maritime carriers, Reporting and recordkeeping requirements.

Accordingly, the interim final rule removing 46 CFR part 514 and adding 46 CFR part 530 which was published at 64 FR 11186–11215 on March 8, 1999, is adopted as a final rule with the following changes:

PART 530—SERVICE CONTRACTS

1. The authority citation for part 530 continues to read as follows:

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

2. Amend § 530.3 by revising paragraph (m) to read as follows:

§ 530.3 Definitions.

* * * * *

(m) *Motor vehicle* means a wheeled vehicle whose primary purpose is ordinarily the non-commercial transportation of passengers, including an automobile, pickup truck, minivan or sport utility vehicle.

* * * * *

3. Amend § 530.8 by revising paragraph (c) and adding paragraph (e) to read as follows:

§ 530.8 Service Contracts.

* * * * *

[11] In that order the Commission found that, while it may move in foreign commerce, mail is not a U.S. export or an item of trade between countries, and thus it is apparent that the exemption would not be detrimental to the commerce of the United States.

[12] USPS also argues that the current regulations, 46 CFR § 514.3(b)(2) indicate that the Commission recognizes that mail transportation is exempt from the Act itself, as well as from its implementing regulations. Further, USPS argues, the Postal Reorganization Act not only preempts the application of the Shipping Act to mail transportation, but further exempts mail transportation by the USPS from all other federal contract laws except those listed in 39 U.S.C. § 410(b). 39 U.S.C. § 5001 *et seq.* Finally, USPS contends, mail is not cargo, and for that reason the Commission's requirements do not apply to contracts for its movement.

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

(1) Be uncertain, vague or ambiguous;

(2) Make reference to terms not explicitly contained in the service contract itself unless:

(i) Those terms are contained in a publication widely available to the public and well known within the industry; or

(ii) Those terms are contained in a service contract register filing duly filed in the Commission's dial-up filing system and are available to all parties to the service contract. Service contract register filings are subject to the same requirements of this part as service contracts and amendments.

* * * * *

(e) *Exception in case of malfunction of Commission filing system.*

(1) In the event that the Commission's filing systems are not functioning and cannot receive service contract filings for twenty-four (24) continuous hours or more, affected parties will not be subject to the requirements of paragraph (a) of this section and § 530.14(a) that a service contract be filed before cargo is shipped under it.

(2) However, service contracts which go into effect before they are filed, pursuant to paragraph (e)(1) of this section, must be filed within twenty-four (24) hours of the Commission's filing systems' return to service.

(3) Failure to file a service contract that goes into effect before it is filed, pursuant to paragraph (e)(1) of this section, within twenty-four (24) hours of the Commission's filing systems' return to service will be considered a violation of Commission regulations.

4. Amend § 530.10 by revising paragraph (d)(1) to read as follows:

§ 530.10 Amendment, correction, and cancellation.

* * * * *

(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 appearing in the service contract as filed with the Commission under § 530.8(b)(7), or the occurrence of an event described below in paragraph (d)(2) of this section.

* * * * *

5. Amend § 530.12 by redesignating the second paragraph (c) and paragraphs (d) through (g) as paragraph (d) and paragraphs (e) through (h), respectively, and by revising paragraph (c) and newly redesignated paragraphs (d) through (h) to read as follows:

§ 530.12 Publication.

* * * * *

(c) *Location.* (1) *Generally.* The statement of essential terms shall be published as a separate part of the individual carrier's automated tariff system.

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

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

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

(d) *References.* The statement of essential terms shall contain a reference to the ''SC Number'' as described in § 530.8(d)(1).

(e) *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.

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

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

(h) *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.

6. Revise § 530.13 to read as follows:

§ 530.13 Exceptions and exemptions.

(a) *Statutory exceptions.* Service contracts for the movement of the following, as defined in section 3 of the Act, § 530.3 or § 520.1 of this chapter, are excepted by section 8(c) of the Act from the requirements of that section, and are therefore not subject to the requirements of this part:

(1) Bulk cargo;

(2) Forest products;

(3) Recycled metal scrap;

(4) New assembled motor vehicles; and

(5) Waste paper or paper waste.

(b) *Commission exemptions.* Exemptions from the requirements of this part are governed by section 16 of the Act and Rule 67 of the Commission's Rules of Practice and Procedure, § 502.67 of this chapter. The following commodities and/or services are exempt from the requirements of this part:

(1) *Mail in foreign commerce.* Transportation of mail between the United States and foreign countries.

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

(c) *Inclusion of excepted or exempted matter.* (1) The Commission will not accept for filing service contracts which exclusively concern the commodities or services listed in paragraph (a) or (b) of this section.

(2) Service contracts filed with the Commission may include the commodities or services listed in paragraph (a) or (b) of this section only if:

(i) There is a tariff of general applicability for the transportation, which contains a specific commodity rate for the commodity or service in question; or

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

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

7. Amend Appendix A to part 530 by revising the introductory text, paragraph A under the heading Registration, Log-On ID and Password, and by adding paragraph D under the same heading to read as follows:

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. Carriers, conferences, and agreements may only be registered to file in one system at a particular time. Publishers may be registered in both systems, but must file each carrier, conference or agreement service contracts into only one system.

I. Registration, Log-On ID and Password

A. To register for filing, a carrier, conference, agreement or publisher must submit the Service Contract Registration Form (Form FMC–83) 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.

* * * * *

D. A carrier, conference, or agreement may be registered to file its service contracts in only one of the Commission's filing systems at any given time. A publisher which files on behalf of many carriers, conferences or agreements may be registered to file into both systems simultaneously, however, each of its clients' service contracts must be filed in only one system. For example, a publisher who files for carrier X and conference Y may file all of carrier X's service contracts into the option 1 (internet-based) filing system, and all of conference Y's service contracts into the option 2 (dial-up) filing system, but cannot file some of carrier X's service contracts in the option 1 filing system and some of carrier X's service contracts in the option 2 filing system.

* * * * *

By the Commission.

Bryant L. VanBrakle,

Secretary.

[FR Doc. 99–11058 Filed 4–29–99; 4:01 pm]

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FEDERAL MARITIME COMMISSION

46 CFR Parts 535 and 572

[Docket No. 98–26]

Ocean Common Carrier and Marine Terminal Operator Agreements Subject to the Shipping Act of 1984; Correction

AGENCY: Federal Maritime Commission.

ACTION: Final rule; correction.

SUMMARY: The Federal Maritime Commission published in the **Federal Register** of March 8, 1999, a final rule amending its regulations governing agreements among ocean common carriers and marine terminal operators to reflect changes made to the Shipping Act of 1984 by the Ocean Shipping Reform Act of 1998. Inadvertently, internal references to part 572 were not revised to reflect the redesignation of that part as part 535. In addition, amendment to a section heading was overlooked in the instructions.

DATES: Effective on May 4, 1999.

FOR FURTHER INFORMATION CONTACT: Bryant L. VanBrakle, Secretary, Federal Maritime Commission, 800 North Capitol St., NW., Room 1046, Washington, DC 20573–0001, (202) 523–5725, E-mail: secretary@fmc.gov.

SUPPLEMENTARY INFORMATION: The Federal Maritime Commission published in the **Federal Register** of March 8, 1999, a final rule amending its regulations governing agreements among ocean common carriers and marine terminal operators to reflect changes made to the Shipping Act of 1984 by the Ocean Shipping Reform Act of 1998. Inadvertently, internal references to part 572 were not revised to reflect the redesignation of that part as part 535. In addition, amendment to the section heading for § 535.301 was overlooked in the instructions.

In Docket No. 98–26, published on March 8, 1999, (64 FR 11236) make the following corrections:

26. In redesignated part 535 and the appendices to the part, revise all references to sections in part 572 to reflect redesignation as part 535.

1. On page 11242, in the first column, correct the section heading of § 535.301 to read: ''§ 535.301 Exemption procedures.''

2. On page 11244, in the third column after § 535.803, add amendatory instructions 25 and 26 to read as follows:

25. In Appendices A & B to redesignated part 535, revise the references in the first column to read as shown in the second column wherever they occur:

Remove	Add
572.104(y)	535.104(x).
572.104(bb)	535.104(aa).
572.104(cc)	535.104(bb).
572.104(dd)	535.104(cc).
572.104(hh)	535.104(gg).
572.104(kk)	535.104(jj).

Bryant L. VanBrakle,

Secretary.

[FR Doc. 99–10897 Filed 5–3–99; 8:45 am]

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