

the parties to the proceeding. Any such request which is not made as a motion shall be placed in the public correspondence file and will not be considered by the Administration or any of its staff members or the presiding officer in connection with the disposition of the case.

(b) Written or oral communications involving any substantive or procedural issue in a matter subject to public hearing directed to a Member of the Administration, its staff, or the presiding officer in the case, from any individual in private or public life shall be deemed a private communication in respect of the merits of the case. These communications, unless otherwise provided for by law or a published rule of the Administration are deemed *ex parte* communications and are not to be considered part of any record or the basis for any official action by the Administration, members of its staff or the presiding officer: *Provided, however*, That this prohibition shall not be determined to apply to informal petitions or applications filed with the Administration; the usual informal communications between counsel including discussions directed toward the development of a stipulation or settlement between parties; communications of a nature deemed proper in proceedings in U.S. Federal courts; and communications which merely inquire as to the status of a proceeding without discussing issues or expressing points of view. Any prohibited communications in writing received by a Member of the Administration, its staff or the presiding officer shall be made public by placing it in the correspondence file of the docket which is available for public inspection and will not be considered by the Administration or the presiding officer as part of the record for decision. If the *ex parte* communication is received orally, a memorandum setting forth the substance of the conversation shall be made and filed in the correspondence section of the appropriate public docket.

Subpart T—Effective Date (Rule 20)

§ 201.185 Effective date and applicability of rules.

The regulations in this part shall become effective October 23, 1964, and shall apply only to cases which are designated for hearing on or after October 23, 1964: *Provided, however*, That the regulations in this part shall be applicable to cases designated for hearing prior to October 23, 1964, if consolidated with a case designated for hearing on or after that date. All other cases designated for hearing prior to October 23, 1964, shall be governed by the rules in effect immediately prior to such date.

PART 202—PROCEDURES RELATING TO REVIEW BY SECRETARY OF TRANSPORTATION OF ACTIONS BY MARITIME SUBSIDY BOARD

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- 202.1 Purpose.
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- 202.10 Petitions for reconsideration.
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AUTHORITY: Sec. 204, 49 Stat. 1987, as amended; sec. 204(b), as amended, 46 U.S.C. 1114(b); Reorganization Plan No. 7 of 1961 (26 FR 7315).

SOURCE: 32 FR 2705, Feb. 9, 1967, unless otherwise noted.

§ 202.1 Purpose.

The rules of this part prescribe procedures relating to Secretarial review of any decision, report, order or action of the Maritime Subsidy Board (Board) pursuant to Department Order 117-A (31 FR 8087, 15331). Section 6 of Department Order 117-A is reprinted here for the convenience of the public.

SEC. 6. *Review and finality of actions by Maritime Subsidy Board.* .01 The Secretary of Transportation (hereinafter referred to as "Secretary") may, on his own motion or on the basis of a petition filed as hereinafter

provided, review any decision, report and/or order of the Maritime Subsidy Board based on a hearing held pursuant to (a) statutory requirements or (b) Board order, by entering a written order stating that he elects to review the action of the Board. Copies of all orders for review shall be served on all parties of record (which phrase includes the Board). Petitions for review under this paragraph may be filed by parties of record, shall be in writing, and shall state the grounds upon which petitioner relies. Ten (10) copies of such petitions for review, together with proof of service thereof on all parties of record, shall be filed with the Secretary within fifteen (15) days after the date of the service of the Board's decision, report or order. Parties of record may file replies in writing thereto. Ten (10) copies of such replies, together with proof of service thereof on the petitioner and all other parties of record, shall be filed with the Secretary within ten (10) days after the date the petition for review is timely filed. Petitions for review and replies thereto shall be limited to the record before the Board. If a petition for review is filed within the time prescribed, a decision, report or order of the Board shall be final fifteen (15) days after expiration of the time prescribed for filing a reply thereto unless the Secretary, prior to expiration of the fifteen (15) days, enters a written order granting the petition for review. If no petition for review is filed within the time prescribed, a decision, report or order of the Board shall be final twenty (20) days after the date of service of the decision unless the Secretary, prior to expiration of the twenty (20) days, enters a written order stating that he elects to review the action of the Board. If upon any review the decision of the Secretary rests on official notice of a material fact not appearing in the evidence in the record, any party of record shall, if request is made within ten (10) days after the date of service of the Secretary's decision on said party, be afforded an opportunity to show the contrary. The said ten (10) days shall constitute the period for a "timely request" within the meaning of section 7(d) of the Administrative Procedure Act.

.02 The Secretary may on his own motion review all actions of the Maritime Subsidy Board other than those referred to in paragraph .01 of this section by entering a written order stating that he elects to review the action of the Board. Any person having an interest in any action of the Board under this paragraph shall have the privilege of submitting to the Secretary within ten (10) days after the date of such Board action, a request that the Secretary undertake such review. Such request shall be in writing and shall state the grounds upon which the person submitting the same relies and his interest in the action for which review is requested. Ten (10) copies of such requests

shall be submitted to the Secretary. Any other person having an interest in such matter shall have the privilege of submitting within fifteen (15) days after the date of the Board's action, a written request that the Secretary not exercise such review. Copies of request that the Secretary undertake or not exercise review will be open for public inspection at the office of the Secretary of the Board. If either a request that the Secretary undertake review or a request that he not exercise review is submitted within the time prescribed, an action of the Board shall be final in ten (10) days after expiration of the time prescribed for submission of a request that review not be exercised unless the Secretary, prior to the expiration of the ten (10) days, enters a written order stating that he elects to review the action of the Board. If neither a request that the Secretary undertake review nor a request that he not exercise review is submitted within the time prescribed, an action of the Board shall be final in twenty (20) days after the date of such action unless the Secretary, prior to expiration of the twenty (20) days, enters a written order stating that he elects to review the action of the Board. Copies of all orders for review shall be served upon the Board, and upon all persons filing requests as herein described.

.03 If a timely petition for reconsideration is filed under the rules prescribed by the Board, the time for filing a petition or request for review by the Secretary under paragraph .01 or .02 of this section, respectively, or the entry of an order by the Secretary on his own motion electing to review an action of the Board under paragraph .01 or .02 of this section, shall, in the case of actions under paragraph .01 of this section run from the date of service of the Board's action and, in the case of actions under paragraph .02 of this section, run from the date of the Board's action, finally disposing of the issues presented by the petition for reconsideration.

.04 In computing any period of time under this section, the time begins with the day following the act, event, or default, and includes the last day of the period unless it is Saturday, Sunday, or national legal holiday, in which event the period runs until the end of the next day which is not a Saturday, Sunday, or such holiday. The prescribed time for action by the Secretary in a proceeding in which additional days have been added pursuant to the provisions of this paragraph shall be extended by the total of such additional days.

.05 Petitions and requests for review by the Secretary shall not be filed:

a. Unless the petitioner shall have first exhausted his administrative remedies (other than a petition for reconsideration) before the Maritime Subsidy Board; nor

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b. With respect to interlocutory decisions of the Maritime Subsidy Board in actions or proceedings referred to in paragraphs .01 and .02 of this section.

.06 The Secretary may, for good cause and/or in order to prevent undue hardship in any particular case, waive or modify any procedural provision of this section by written order.

§ 202.2 Time and place for filings.

All petitions, requests and replies relating to Secretarial review of Maritime Subsidy Board actions shall be filed with the Office of the Secretary of Transportation, Department of Transportation. Such papers shall be filed in accordance with the provisions of and within the time periods prescribed by Department Order 117-A.

§ 202.3 Form of petitions, requests and replies.

(a) All papers presented to the Secretary, other than records, shall bear on the cover the name and post office address of the party, and the name and address of the principal attorney or authorized representative (if any) for the party concerned. Certification shall be made that service of the paper has been made upon all parties of record (if any) and upon the Secretary of the Maritime Subsidy Board. One copy of every paper filed with the Secretary must in addition bear at its close the hand written signature of the party or attorney.

(b) All papers presented to the Secretary, other than records, shall, unless they are fewer than 10 pages in length, be preceded by a subject index of the matter contained therein, with page references, and a table of the cases (alphabetically arranged), textbooks, statutes and other material cited, with references to the pages where they are cited.

(c) Whenever a reference is made to a transcript, exhibit or other part of the record, such reference must be accompanied by a specific citation identifying the document and indicating the relevant page number of the document concerned.

(d) Papers filed with the Secretary should be logically arranged, with proper headings, concise, and free from irrelevant and unduly repetitious matter.

(e) It will not be necessary to reproduce the opinion of the Board.

§ 202.4 Petitions and requests for review—content.

Petitions and requests for review shall contain in the order here indicated—

(a) A reference to the decision, report, order or action of the Board;

(b) A concise statement of the interest of the party submitting the paper;

(c) A concise summary statement of the case containing that which is material to the consideration of the questions presented;

(d) A listing of each of the grounds upon which the party seeking review relies, expressed in the terms and circumstances of the case, each ground set forth in a separate, numbered paragraph;

(e) The argument, generally amplifying the material in paragraph (d) of this section and exhibiting clearly the points of law, policy and fact being presented, citing the authorities, statutes and other material relied upon. The argument should separately identify and treat each of the grounds upon which review is sought. In cases where reversible legal error is contended, a full legal argument on the points concerned should be presented. In cases where policy error is contended, it should be pointed out what policy of the Board is alleged to be wrong, what is wrong with it and what policy the submitting party advocates as the correct one. In cases where reversible factual error is contended, the findings of fact alleged to be erroneous should be pointed out along with citations to the record where appropriate. The party should further indicate precisely what it contends to be the correct findings of fact, with supporting references;

(f) A conclusion, specifying with particularity the action which the submitting party believes the Secretary should take.

§ 202.5 Replies and requests that review not be exercised—content.

Replies and requests that review not be exercised shall contain in the order here indicated—

(a) A reference to the decision, report, order, or action of the Board;

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(b) A concise statement of the interests of the party submitting the paper;

(c) Where deemed necessary by the submitting party, a concise summary statement of the case explicitly pointing out any inaccuracy or omission in the statement of the other side, with references to the record where appropriate;

(d) A listing of the reasons why review should not be exercised, each reason set forth in a separate, numbered paragraph;

(e) The argument generally amplifying the material in paragraph (d) of this section and, in addition, specifically replying to the points of law, policy and fact presented by the other side (each stated separately) citing the authorities, statutes, and other material relied upon by the submitting party;

(f) A conclusion, specifying with particularity the action which the submitting party believes the Secretary should take.

§ 202.6 Grant or denial of review.

(a) A petition or request for review by the Secretary of any decision, report, order or action of the Board will not be granted unless significant and important questions of over-all policy requiring the Secretary's attention are involved or there appears to be significant legal, policy, or factual error in the Board's action.

(b) The parties and the Secretary of the Board will be notified, by Order, of the Secretary's decision to review a case on his own motion, and of his decision to review or to deny review of a case where a petition or request concerning review has been filed.

(c) Promptly upon notice of a decision by the Secretary to review a case subject to review under section 6.01 of Department Order 117-A, the Secretary of the Board shall certify to the Secretary the complete record of the proceeding before the Board and shall serve upon all parties a copy of such certification which shall adequately identify the matter so certified. The Secretary of the Board shall further serve upon all parties a copy of any further communication from the Board or Maritime Administration on such a case.

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§ 202.7 Supplemental briefs.

If an order taking review is entered by the Secretary, further briefs supplementing the arguments set forth in the petitions and replies may be requested in cases where the Secretary deems such to be appropriate and desirable.

§ 202.8 Oral argument.

Generally, oral argument will not be necessary. However, the Secretary reserves the right to schedule such when he deems it desirable.

§ 202.9 Decisions by the Secretary of Transportation.

Decisions of the Secretary will be reached in accordance with applicable law and the evidence. Upon the determination of a case taken under review by the Secretary, a written decision and opinion which states the Secretary's conclusions and an explanation thereof will be issued.

§ 202.10 Petitions for reconsideration.

Petitions for reconsideration of decisions by the Secretary in any case taken under review will be considered, upon a showing of good cause, if filed within ten (10) days of service of the Secretary's decision.

§ 202.11 Ex parte communications.

Oral or written communications with the Department concerning a matter subject to Secretarial review under section 6.01 of Department Order 117-A, unless otherwise provided by law or by order, rule, or regulation of the Department, shall be deemed ex parte communications and shall not be part of the record and shall not be considered in making any recommendation, decision or action; *Provided, however*, That this rule shall not apply to customary informal communications with Department counsel, including discussions directed toward the development of a stipulation or settlement between parties; communications of a nature deemed proper in proceedings in U.S. Federal courts; and communications with Department counsel which merely inquire as to procedures or the status of a proceeding without discussing issues or expressing points of view. Any

written communication subject to the above stated rule received by the Department shall be placed in the correspondence file of the case, which is available for public inspection. If an oral communication subject to the above stated rule is received, a memorandum setting for the substance of the conversation shall be made and placed in the correspondence file.

PART 203—PROCEDURES RELATING TO CONDUCT OF CERTAIN HEARINGS UNDER THE MERCHANT MARINE ACT, 1936, AS AMENDED

Sec.

- 203.1 Scope of rules.
- 203.2 Applications.
- 203.3 Opposition to applications.
- 203.4 Replies.
- 203.5 Types of hearings.
- 203.6 Oral evidentiary hearing before one or more members.

AUTHORITY: Secs. 204(b), 605(c) and 805(a), Merchant Marine Act, 1936, as amended (46 U.S.C. app. 1114(b), 1175(c) and 1223(a)).

SOURCE: 55 FR 12358, Apr. 3, 1990, unless otherwise noted.

§ 203.1 Scope of rules.

(a) The provisions of this part apply to applications which involve statutorily mandated hearings under sections 605(c) and 805(a) of the Merchant Marine Act, 1936, as amended (46 U.S.C. app. 1175(c), 1223(a)), hereinafter referred to as the "Act", conducted by the Maritime Administrator or Maritime Subsidy Board of the Maritime Administration, hereinafter referred to collectively as the "Administration".

(b) The provisions of this part are to be construed consistently with the Administration Rules of Practice and Procedure in 46 CFR part 201. If this part and 46 CFR part 201 conflict, this part shall govern.

§ 203.2 Applications.

(a) Notice of all applications subject to this part shall be published in the FEDERAL REGISTER, in accordance with the provisions of 46 CFR 201.72.

(b) All applications under section 605(c) of the Act shall specify, at a minimum, full details of the existing or proposed new or amended service, to

include itineraries and the number and type of vessels currently operated in the trade or trade route, the number and type of vessels proposed to be operated in the trade or trade route, the frequency of sailings and port calls and the nature and extent of U.S.-flag and any foreign-flag competition. As a matter of discretion, the Administration may request additional information, which may be protected by a confidentiality ruling, if justified. If the application is one for additional service on a route in which the applicant has an established service, or for an existing service, then the applicant must include information on its previous three years of operation. Applicants for permission under section 805(a) of the Act must describe clearly the scope of permission sought, including details of proposed domestic service and existing or proposed foreign service, as well as the applicant's operating structure.

(c) Applications under section 605(c) of the Act shall be filed on Form MA-964, in accordance with the instructions annexed thereto. Copies of Form MA-964 may be obtained on request from the Secretary of the Administration.

(d) Applications for permission under section 805(a) of the Act shall be submitted in accordance with the procedures set forth in 46 CFR part 380, and shall comply with all of the requirements of that part.

§ 203.3 Opposition to applications.

(a) *Required documents.* A person seeking to oppose an application shall file with the Secretary of the Administration, and concurrently serve upon the applicant, a petition for leave to intervene, together with an answer, within the time period specified in the FEDERAL REGISTER notice of the application. Normally, twenty days will be provided.

(b) *Petition for leave to intervene.* The petition for leave to intervene shall specify the basis upon which such person asserts a right to intervene and shall set forth with particularity:

(1) The number and type of U.S.-flag vessels currently operated by the person seeking intervention in the trade or trade route to which the application pertains.