Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of the Telecommunications Act of 1996	)	CC Docket No. 96-238
	)	
Amendment of Rules Governing Procedures to be Followed When Formal Complaints are Filed Against Common Carriers	)	
	)	

ORDER ON RECONSIDERATION

Adopted: February 26, 2001 **Released**: March 7, 2001

By the Commission:

I. INTRODUCTION

1. In this Order on Reconsideration, we address several petitions for reconsideration and/or clarification of our orders that amended the procedures governing formal complaints filed against common carriers pursuant to section 208 of the Communications Act of 1934, as amended ("Act" or "Communications Act").[1] In particular, we deny all of the petitions for reconsideration and one petition for clarification, and grant one petition for clarification. Moreover, on reconsideration on our own motion, we modify or clarify certain rules, consistent with our experience in implementing the amended rules.

II. BACKGROUND

2. In the *First Report and Order*, the Commission adopted rules designed, *inter alia*, to expedite the resolution of formal complaints filed against common carriers pursuant to section 208 of the Act. Toward that end, the Commission tailored the

[1] 47 U.S.C. § 208. *See Implementation of the Telecommunications Act of 1996, Amendment of Rules Governing Procedures to be Followed When Formal Complaints are Filed Against Common Carriers*, Report and Order, 12 FCC Rcd 22497 (1997) ("*First Report and Order*"), Second Report & Order, 13 FCC Rcd 17018 (1998) ("*Second Report & Order*"). To prevent confusion, we will refer to the rules adopted in the *First Report and Order* as the "amended formal complaint rules," and will refer to the rules adopted in the *Second Report & Order* as the "Accelerated Docket rules."

amended formal complaint rules (which became effective on March 18, 1998)[2] to: (1) encourage parties to attempt to settle or narrow their disputes before filing a formal complaint; (2) facilitate the filing and service of complaints and related pleadings; (3) improve the content and utility of the initial pleadings filed by both parties, while reducing reliance on discovery and subsequent pleading opportunities; and (4) eliminate unnecessary or redundant pleadings and other procedural devices.[3] In the *Second Report & Order*, the Commission established "Accelerated Docket" procedures to help spur the development of competition by adjudicating certain complaints within relatively short timeframes. To accomplish this goal, the Accelerated Docket rules (which became effective on October 5, 1998),[4] *inter alia*, require disputing parties to: (1) meet with Commission staff and engage in supervised settlement negotiations before a complaint can be accepted onto the Accelerated Docket, and (2) produce with their initial pleadings those documents in their possession, custody, or control that are likely to bear significantly on any claim or defense.[5]

3. Four parties filed petitions for reconsideration and/or clarification of various rules adopted in the *First Report and Order*.[6] MCI Telecommunications Corp. ("MCI") requests reconsideration of certain discovery rules.[7] AirTouch Paging ("AirTouch"), America's Carriers Telecommunication Association ("ACTA"), and MCI request that the Commission reconsider its interpretation of the scope of the new five-month deadline for resolving certain formal complaints set forth in section 208(b)(1) of the Act.[8] ACTA proposes additional requirements regarding the service of complaints.[9] AT&T Corp. ("AT&T") requests that the Commission clarify that pre-filing settlement

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[2] Procedures to be Followed When Formal Complaints are Filed Against Common Carriers, 63 Fed. Reg. 990 (1998).

[3] *See, e.g.*, *First Report and Order*, 12 FCC Rcd at 22499-500, ¶¶ 1-2.

[4] Procedures to be Followed When Formal Complaints are Filed Against Common Carriers, 63 Fed. Reg. 41,433 (1998).

[5] *Second Report & Order*, 13 FCC Rcd at 17031-32, ¶¶ 25-27; 17048, ¶ 54.

[6] Airtouch Paging Petition for Partial Reconsideration, CC Docket No. 96-238 (filed February 9, 1998) ("Airtouch Petition"); America's Carriers Telecommunication Association Petition for Reconsideration, CC Docket No. 96-238 (filed January 20, 1998) ("ACTA Petition"); AT&T Corp. Petition for Clarification, CC Docket No. 96-238 (filed February 6, 1998) ("AT&T Petition"); MCI Telecommunications Corporation Petition for Reconsideration, CC Docket No. 96-238 (filed February 6, 1998) ("MCI Petition").

[7] MCI Petition at 6-7.

[8] AirTouch Petition at 4-13; ACTA Petition at 1-4; MCI Petition at 2-4.

[9] ACTA Petition at 5.

letters should be sent to certain representatives of the defendant.[10] Bell Atlantic Telephone Companies ("Bell Atlantic"), BellSouth Corporation ("BellSouth"), and Telecommunications Resellers Association ("TRA") filed comments in response to the petitions.[11]

4. One party, BellSouth, filed a petition for reconsideration and clarification of the Accelerated Docket rules adopted in the *Second Report & Order*. BellSouth requests that the Commission reconsider: (1) the rule requiring the automatic production of documents; and (2) the *ex parte* implications of the requirement for staff-supervised, pre-filing settlement negotiations. BellSouth also requests that the Commission routinely grant requests for extensions of time in Accelerated Docket proceedings.[12] BellSouth also seeks clarification on whether staff-supervised pre-filing meetings are required for all Accelerated Docket matters.[13] SBC Communications Inc. ("SBC") and TRA filed comments in response to BellSouth's petition.[14]

III. DISCUSSSION

A. The Reconsideration Petitions are Denied.

1. The Elimination of Self-Executing Discovery is Proper.

5. MCI urges the Commission to reinstate the former rules granting self-executing discovery and permitting "extraordinary" discovery.[15] TRA supports this reinstatement, while Bell Atlantic and BellSouth oppose it.[16] The Commission fully

[10] AT&T Petition at 3.

[11] Comments of Bell Atlantic, CC Docket No. 96-238 (filed March 18, 1998) ("Bell Atlantic Comments"); Comments of the Telecommunications Resellers Association, CC Docket No. 96-238 (filed March 18, 1998) ("TRA Comments"); BellSouth Corporation Opposition, CC Docket No. 96-238 (filed March 18, 1998) ("BellSouth Opposition"). *See also* AT&T Reply to Opposition to AT&T Corp.'s Petition for Clarification, CC Docket No. 96-238 (filed April 1, 1998) ("AT&T Reply"); Reply of AirTouch Paging, CC Docket No. 96-238 (filed March 30, 1998) ("Airtouch Reply").

[12] BellSouth Corporation's Petition for Reconsideration and Clarification, CC Docket No. 96-238 (filed September 3, 1998) ("BellSouth AD Petition") at 2-5, 7-8, 8-9.

[13] *Id*. at 9.

[14] Comments of SBC Communications, CC Docket No. 96-238 (filed September 23, 1998) ("SBC AD Comments"); Reply of the Telecommunications Resellers Association to Comments on Petition for Reconsideration and Clarification, CC Docket No. 96-238 (filed October 15, 1998) ("TRA AD Comments").

[15] MCI Petition at 6-7. In brief, the former rules permitted the parties to engage in discovery without leave of the Commission, whereas the amended formal complaint rules permit the parties to engage only in the discovery that the Commission specifically allows in the context of the particular proceeding.

[16] TRA Comments at 8-11; Bell Atlantic Comments at 3-5; BellSouth Opposition at 1-3.

addressed this issue in the *First Report and Order*,[17] and neither the petitioners nor the commenters offer any new information or arguments on this issue to persuade us that our decision was erroneous. Moreover, the new discovery rules have worked well in streamlining proceedings while allowing the parties access to sufficient information to support their claims and defenses. Accordingly, we deny reconsideration of the amendments to the discovery rules in formal complaint proceedings.

2. The Commission's Construction of Section 208(b)(1) of the Act is Proper.

6. AirTouch, ACTA, and MCI urge the Commission to interpret section 208(b)(1) of the Act so that the five-month deadline provided therein will apply to *all* formal complaints filed pursuant to section 208, not just to formal complaints concerning the lawfulness of tariff provisions.[18] Bell Atlantic and TRA support this position.[19] The Commission fully addressed this issue in the *First Report and Order*,[20] and neither the petitioners nor the commenters offer any new arguments or information to persuade us that our decision was erroneous. Accordingly, we deny reconsideration of our interpretation of section 208(b)(1).

3. The Rules Regarding Service of Process are Proper.

7. In the *First Report and Order*, the Commission adopted rules requiring each carrier to designate an agent in the District of Columbia to accept service of Commission process on behalf of the carrier, and permitting each carrier to designate other service agents outside the District of Columbia.[21] Moreover, the Commission adopted a rule requiring the complainant to "serve the complaint by hand delivery on either the named defendant or *one* of the named defendant's registered agents. . . ."[22] ACTA supports requiring personal service of the complaint on one of the defendant's registered agents, but maintains that the complaint should also be served, by overnight mail or facsimile, on any other designated service agents.[23] ACTA argues that requiring service on all designated agents would ensure that a defendant actually receives a copy of

[17] *First Report and Order*, 12 FCC Rcd at 22547-51, ¶¶ 115-125.

[18] AirTouch Petition at 4-13; ACTA Petition at 1-4; MCI Petition at 2-4.

[19] Bell Atlantic Comments at 2-3; TRA Comments at 4-6.

[20] *First Report and Order*, 12 FCC Rcd at 22511-14, ¶¶ 32-37.

[21] *First Report and Order*, 12 FCC Rcd at 22528, ¶ 67; 47 C.F.R. § 1.47(h).

[22] 47 C.F.R. § 1.735(d) (emphasis added).

[23] ACTA Petition for Reconsideration at 5. *See* Bell Atlantic Comments at 5.

the complaint by at least the next day after the complaint is filed, allowing the defendant to prepare and file a timely response.[24]

8. We decline to adopt such a requirement. We disagree with ACTA's contention that additional notification is necessary to enable defendants to file answers in a timely manner. We expect all common carriers to exercise due diligence in selecting designated agents who, at a minimum, can be relied on to convey promptly notices of pending legal actions to the carrier. Moreover, requiring service on all of a carrier's registered agents would impose on a complainant an unduly burdensome task of identifying and serving agents throughout the country. In addition, we are not aware of any occasion after the Commission adopted the amended formal complaint rules when a carrier's designated agent failed to inform the carrier promptly of a new complaint.

9. We also emphasize that the amended formal complaint rules require the complainant to discuss or attempt to discuss the possibility of settlement with the defendant before filing a formal complaint.[25] Accordingly, the defendant should always have advance notice of a pending dispute. As stated in the *First Report and Order*:

> [T]he pre-filing requirement will alert the defendant as to the basis of the dispute. The action taken by a defendant in participating in a good faith settlement negotiation should require the same collection of information and documents that will be necessary to support its answer in compliance with the format and content requirements.[26]

For these reasons, we find that adoption of ACTA's proposal would burden complainants with additional service requirements, without any discernable benefit to defendants, who already will know of the nature of the dispute and the need to collect and review relevant documentation. Accordingly, we deny reconsideration of our rules regarding service of process.

4. The Automatic Production of Documents in Accelerated Docket Proceedings is Proper.

10. BellSouth, supported by SBC, requests reconsideration of the Accelerated Docket rules requiring automatic production of documents, especially by defendants.[27] TRA opposes reconsideration of these rules, arguing that they help to resolve complaints

[24] ACTA Petition for Reconsideration at 5.

[25] *See* 47 C.F.R. § 1.721(a)(8).

[26] *First Report and Order*, 12 FCC Rcd at 22541, ¶100.

[27] BellSouth AD Petition at 2–5; SBC AD Comments at 2-3. *See* 47 C.F.R. §§ 1.729(i), 1.724(k)(5).

rapidly.[28] The Commission fully addressed this issue in the *Second Report & Order*,[29] and the parties offer no new information or arguments to persuade us that the decision was erroneous. Moreover, our experience has been that the rules regarding the automatic production of documents have worked well. Accordingly, we deny reconsideration of the rules requiring automatic production of documents in Accelerated Docket proceedings.

5. Extensions of Time Should Not Routinely Be Granted in Accelerated Docket Proceedings.

11. BellSouth and SBC state that the Commission should routinely grant requests for extensions of time in Accelerated Docket proceedings, especially where neither party opposes such extension.[30] BellSouth argues that joint requests for extensions of time "reflect traditional professional courtesies and cooperation, and help build cooperative relationships between parties engaged in litigation."[31] BellSouth also contends that rigid adherence to the Accelerated Docket schedule could result in insufficient records.[32]

12. We reject the proposal that the Commission should routinely grant extensions of time. We agree with TRA that parties should not ordinarily need extensions of time, because they should have a sufficient amount of time during pre-filing discussions to begin preparing their cases in the event a complaint subsequently is filed on the Accelerated Docket.[33] Although we encourage professional courtesies between disputing parties, we must preserve the efficiency of the Accelerated Docket schedule. Routinely granting extensions of time in Accelerated Docket proceedings would eviscerate the expedited mechanism that the Commission crafted. Commission staff screen disputes carefully and only place on the Accelerated Docket those disputes that they believe can be resolved fairly within the constraints of the expedited procedure. In the exceptional case that turns out to be unexpectedly complicated, the staff has discretion to grant extensions of time or modify the process in other respects. The Accelerated Docket was designed to be a 60-day process, and participating parties should expect to have to conform to the time limitations necessary to complete that process. Accordingly, we deny reconsideration of the time requirements for the Accelerated Docket.

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[28] TRA AD Comments at 3.

[29] *Second Report & Order*, 13 FCC Rcd at 17045-50, ¶¶ 48-58.

[30] BellSouth AD Petition at 8; SBC AD Comments at 4.

[31] BellSouth AD Petition at 8.

[32] *Id.* at 8-9.

[33] TRA AD Comments at 5.

6. The *Ex Parte* Rules are Not Implicated in Accelerated Docket Pre-Filing Procedures.

13. BellSouth and SBC express concerns regarding the propriety of "*ex parte*" discussions in the pre-filing stage of cases being considered for the Accelerated Docket.[34] These concerns are unfounded. As the Commission explained in the *Second Report & Order*, our *ex parte* rules restrict the actions of parties only after a complaint has been filed. Staff-supervised settlement discussions that take place prior to the filing of a complaint do not implicate the *ex parte* rules.[35] Moreover, we disagree with SBC's contention that staff involvement during pre-filing meetings will taint the complaint process or have a chilling effect on settlement discussions.[36] It is the Commission's role to act as an impartial entity during all formal complaint proceedings, including Accelerated Docket proceedings, and we are confident that staff members can fulfill this obligation. We also are not persuaded by BellSouth's argument that staff members who have contact with parties during the pre-filing phase of a proceeding could later become witnesses subject to deposition.[37] The Commission staff controls all discovery in formal complaint and Accelerated Docket proceedings.[38] Thus, staff would not permit any party to abuse the Commission's rules by attempting to introduce into complaint proceedings individual representations made in settlement discussions. We also note that staff-supervised pre-filing discussions have led to the resolution of many disputes without resort to litigation. Accordingly, we deny reconsideration of the pre-filing requirements for the Accelerated Docket.

B. One Clarification Petition is Denied; One Clarification Petition is Granted.

1. AT&T's Petition for Clarification of the Formal Complaint Rules Regarding Pre-Filing Letters is Denied.

14. In the *First Report and Order*, the Commission adopted a requirement that the complainant engage in good faith settlement discussions with the defendant prior to filing a formal complaint.[39] As part of this process, the complainant must mail to the defendant a certified letter outlining the allegations that form the basis of the complaint it

[34] BellSouth AD Petition at 7-8; SBC AD Comments at 3.

[35] *Second Report & Order*, 13 FCC Rcd at 17037, ¶ 36. *See* 47 C.F.R. §§ 1.1200, *et seq*.

[36] SBC AD Comments at 3.

[37] BellSouth AD Petition at 7.

[38] 47 C.F.R. §§ 1.729(d), 1.729(h), 1.729(i)(2).

[39] *First Report and Order*, 12 FCC Rcd at 22516-7, ¶¶ 41-42; 47 C.F.R. § 1.721(a)(8).

anticipates filing with the Commission.[40] AT&T notes that, because the rules do not specify the representative of a defendant to whom the letter must be sent, it is "foreseeable that some complainants will make only a pro forma effort at compliance in order to gain an advantage by surprising a defendant with a complaint to which an Answer must be filed in only 20 calendar days."[41] To prevent this from occurring, AT&T proposes that the Commission clarify that the pre-filing letter must be sent to: 1) the defendant's registered agent in the District of Columbia, and 2) the defendant's "representative that, to the best of the complainant's knowledge, has decision making authority over the disputed matters or has been designated as the defendant's attorney regarding those matters."[42]

15. We agree with TRA that we need not "clarify" the rules in such a manner.[43] Although AT&T correctly observes that the rules are silent as to who should receive the pre-filing settlement letter, this omission is by design and not inadvertence. The Commission deliberately left the determination of the appropriate recipient of the letter to the discretion of the complainant, who must exercise such discretion reasonably and in good faith. The complainant is closest to the conflict and should be able to identify a representative of the defendant who can make the appropriate internal notifications and attempt to resolve the dispute. If the complainant does know who the defendant has designated as the decision maker or the attorney regarding the disputed matter, we would generally expect the complainant to serve that person. Nevertheless, we share TRA's concerns that AT&T's proposal could make a complainant's choice of correspondent a matter of routine contention.[44] The purpose of the pre-filing settlement letter is to forewarn the defendant of a potential dispute and allow time for the parties to engage in constructive dialogue to resolve such issues. Where a complainant attempts to circumvent or thwart this purpose and gain an unfair advantage over a defendant by intentionally misdirecting a letter, the Commission has ample remedies at its disposal to address such conduct, including dismissal of the complaint.[45] Moreover, since this pre-filing requirement took effect, we are not aware of any defendant that has alleged its abuse. Accordingly, we deny the petition for clarification of our rules regarding pre-filing settlement letters.

16. We do believe, however, that our service rule regarding pre-filing settlement letters should mirror our service rule regarding complaints. The latter rule permits a complainant to serve a complaint on either "the named defendant or one of the

[40] 47 C.F.R. § 1.721(a)(8).

[41] AT&T Petition at 3.

[42] *Id.*

[43] TRA Comments at 10-11.

[44] *Id.* at 11.

[45] *See, e.g., First Report and Order,* 12 FCC Rcd at 22610, ¶ 278.

named defendant's registered agents for service of process. . . ."[46] Therefore, to promote consistency and thereby minimize confusion, we amend section 1.721(a)(8) to permit a complainant to serve the pre-filing settlement letter on the defendant carrier or one of the defendant's registered agents for service of process.[47]

2. BellSouth's Petition for Clarification Regarding Accelerated Docket Pre-Filing Settlement Conferences is Granted.

17. BellSouth requests clarification on whether every Accelerated Docket proceeding must involve staff-supervised, pre-filing settlement conferences.[48] BellSouth's request apparently stems from the fact that, although the text of *the Second Report & Order* states that "requiring supervision of the parties' pre-filing discussion will provide substantial benefits in the Accelerated Docket,"[49] the text of the rule states that only "in *appropriate* cases, Commission staff shall schedule and supervise pre-filing settlement negotiations. . . ."[50] We clarify that, before a matter is accepted onto the Accelerated Docket, the parties must participate in staff-supervised settlement negotiations. This does not mean, however, that all requests for inclusion on the Accelerated Docket will result in a staff-supervised settlement conference. Instead, only those matters actually under active consideration for inclusion on the Accelerated Docket must ultimately have such a conference. Thus, the Commission retains the necessary discretion to direct the expenditure of the finite resources of the parties and the Commission to matters that could merit Accelerated Docket treatment. Accordingly, we grant the petition for clarification of our rules regarding pre-filing settlement conferences for the Accelerated Docket. We also strongly encourage disputing parties to contact Commission staff to assist in the resolution of matters prior to filing any formal complaint, regardless of whether the parties wish to have such complaint placed on the Accelerated Docket.[51]

C. Based on Our Experience In Implementing the Amended Formal Complaint Rules, Certain Further Modifications Are Appropriate.

18. In the *First Report and Order,* the Commission declared:

> [W]e intend to closely monitor the effectiveness of our new streamlined rules in promoting the pro-competitive goals of

[46] 47 C.F.R. § 1.735 (d).

[47] *See* Appendix A, at § 1.721(a)(8). We note that the method of serving the pre-complaint filing letter remains the same, *i.e.*, by certified letter.

[48] BellSouth AD Petition at 9.

[49] *Second Report & Order*, 13 FCC Rcd at 17032, ¶ 27.

[50] BellSouth AD Petition at 9, *quoting* 47 C.F.R. § 1.730(b) (emphasis added).

[51] *See* Part III(D)(4), *infra*.

> the Act. We will not hesitate to re-visit the rules and policies adopted in this Report and Order if we later determine that further modifications are needed to ensure that complaint proceedings are promptly and fairly resolved and, more generally, to promote the Act's goal of full and fair competition in all telecommunications markets.[52]

Consistent with that declaration, we have, in fact, closely monitored the effectiveness of the amended formal complaint rules. In our view, the amended formal complaint rules have greatly succeeded in (1) encouraging parties to resolve their differences and narrow disputed issues before resorting to filing formal complaints; (2) aiding the settlement of filed formal complaints; (3) eliminating unnecessary pleadings; and (4) boosting the utility of initial pleadings. As a result, the amended formal complaint rules have helped the Commission reduce the number of pending formal complaints and the time needed to resolve formal complaints.[53] We believe, nevertheless, on reconsideration on our own motion, that a few additional modifications to the rules are appropriate to promote further the expedited resolution of formal complaints.

1. The Rule Governing Answers Is Modified.

19. We believe that amending our rule regarding answers is necessary to ensure that defendants file complete and detailed answers that address each allegation and averment contained in complaints. Section 1.724(d) of our rules currently states that "averments in a pleading to which a responsive pleading is required, *other than those as to the amount of damages*, are deemed to be admitted when not denied in this responsive pleading."[54] Based on our experience, we no longer believe that exempting damage averments from the response requirement is the best approach. Instead, we find that requiring a defendant to respond specifically to all averments in a complaint, including those regarding damage amounts, will enhance the ability of Commission staff to resolve complaints more efficiently. The sooner the record contains all of the relevant materials, the sooner the Commission will have a basis on which to resolve the dispute. Therefore, we amend section 1.724(d) to specify that defendants are required to respond to any and all averments raised in both initial and supplemental complaints, including averments relating to damage amounts. Failure by the defendant to respond to any averment in the complaint or supplemental complaint will result in the averment being admitted as true.[55]

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[52] *First Report and Order*, 12 FCC Rcd at 22501, ¶ 4.

[53] For example, from November 1999 (when the Commission's Enforcement Bureau began) until February 15, 2001, the number of pending complaint matters dropped from approximately 174 to approximately 38, and only about 16 of the original 174 remain pending.

[54] 47 C.F.R. § 1.724(d) (emphasis added).

[55] *See* Appendix A, at § 1.724(d).

20. In addition, we amend section 1.724(b) to require that denials based on information and belief are expressly prohibited unless made in good faith and accompanied by an affidavit explaining the basis for the defendant's belief and why the defendant could not reasonably ascertain the facts from the complainant or any other source.[56] This new requirement regarding denials in answers mirrors an existing requirement regarding averments in complaints.[57] We believe that we should discourage defendants from relying on "information and belief" allegations just as much as we discourage complainants from doing so. This will promote diligence on defendants' part in gathering all of the relevant facts and documentation, and thereby expedite the development of a complete and substantial record on which the Commission can resolve the dispute.[58]

2. The Rule Governing Replies Is Modified.

21. We further believe that amending our rule regarding replies is necessary to ensure that complainants can file complete and detailed replies that address all of the grounds asserted by defendants to support an answer's affirmative defenses. Section 1.726(a) of our rules currently permits a complainant to include in a reply only "statements of relevant, material *facts* that shall be responsive to *only* those specific *factual* allegations made by the defendant in support of its affirmative defenses."[59] Based on our experience, we no longer believe that limiting the reply to factual assertions is the best approach. Instead, we find that permitting a complainant to include in the reply both factual statements and legal arguments that respond to both the factual allegations and the legal arguments made by a defendant in support of affirmative defenses will enhance the ability of Commission staff to resolve complaints more efficiently. As previously stated, the sooner the record contains all of the relevant factual and legal materials, the sooner the Commission will have a basis on which to resolve the dispute. Therefore, we amend section 1.726(a) to permit complainants to include in replies both factual statements and legal arguments that respond to both the factual allegations and the legal arguments made by defendants in support of their affirmative defenses.[60]

3. The Payment Verification Requirement is Modified.

22. Complainants must pay a filing fee for each initial formal complaint filed.[61] In the *First Report and Order*, the Commission adopted a rule requiring the complainant

[56] *See* Appendix A, at § 1.724(b).

[57] *See* Appendix A, at § 1.721(a)(5).

[58] *See generally*, *First Report and Order*, 12 FCC Rcd at 22534, ¶ 82.

[59] 47 C.F.R. § 1.726(a) (emphasis added).

[60] *See* Appendix A, at § 1.726(a).

[61] 47 C.F.R.§§ 1.735(b), 1.1105(1)(c), (d).

to include with the complaint a "verification of the filing payment . . . ."[62] To implement this rule, the Commission explained that a complainant should attach to its complaint a photocopy of its fee payment.[63] We have found, however, that this photocopy requirement does not serve its verification purpose in all cases. This is largely because, where the complainant pays by wire transfer or with a credit card, there exists no paper record of the transaction that can be contemporaneously photocopied. Thus, in order to create a uniform method of payment verification that will work in all cases, we amend the payment verification requirement set forth in the *First Report and Order* and section 1.721(a)(13) as follows: the complaint shall include a declaration, under penalty of perjury, by complainant or complainant's counsel describing the amount, method, and date of the complainant's payment of the filing fee, and the complainant's 10-digit FCC Registration Number (FRN), if any.[64]

4. The Rules Governing Supplemental Complaints for Damages Are Modified.

23. Our rules enable complainants, and Commission staff under certain circumstances, to bifurcate formal complaints into two separate complaints: (1) an initial complaint for liability and any prospective relief, and (2) a supplemental complaint for damages.[65] Our experience in implementing the rules regarding supplemental complaints for damages indicates that certain revisions are appropriate to clarify and modify how the supplemental complaint process operates.

24. We start with several revisions to section 1.722 of our rules. First, we amend section 1.722 to state expressly what the Commission concluded in the *First Report and Order*: in a proceeding to which no statutory deadline applies, the Commission may, on its own motion, bifurcate the proceeding so that only liability and prospective relief issues are before the Commission initially, and damage issues come before the Commission only if the complainant prevails and later chooses to initiate a separate proceeding seeking damages.[66] Consistent with that amendment, we further amend section 1.722 of our rules to clarify that the procedures set forth therein apply to all supplemental complaints for damages, regardless of whether bifurcation was made upon the Commission's own motion or the complainant's request.[67]

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[62] *See First Report and Order*, 12 FCC Rcd at 22524, ¶ 56; 47 C.F.R. § 1.721(a)(13).

[63] *See First Report and Order*, 12 FCC Rcd at 22524, ¶ 56.

[64] *See* Appendix A, at § 1.721(a)(13).

[65] 47 C.F.R. § 1.722(b). *See also First Report and Order*, 12 FCC Rcd at 22575-78, ¶¶ 178-186.

[66] *First Report and Order*, 12 FCC Rcd at 22575, ¶ 178; Appendix A, at §1.722(c).

[67] Appendix A, at § 1.722(d)-(i).

25. Second, section 1.722(b)(1) presently permits a prevailing complainant to file a subsequent complaint for damages arising from the same facts alleged in the first complaint, even if the first complaint made no mention whatsoever of any intent to seek damages.[68] Upon further consideration of this provision, we believe that it should be stricken, because it conflicts with the principles of efficiency, notice, and fairness to defendants that underlie the doctrine of *res judicata*.[69] To promote those principles, defendants and the Commission should know as soon as possible whether a dispute may ultimately involve a resolution of damages. Therefore, we amend section 1.722 of our rules to state that, in order to preserve the option of filing a supplemental complaint for damages, a complainant must include in its initial complaint a notice of intent to file such a supplemental complaint, in accordance with the requirements of our rules.[70]

26. Third, we amend section 1.722 to clarify that, except where otherwise indicated (*see, e.g.*, ¶¶ 26-29, *infra*), the rules governing initial formal complaint proceedings govern supplemental complaint proceedings, as well.[71] Fourth, our experience in applying section 1.722 of our rules reveals that its wording can be improved. Accordingly, we modify much of the language of section 1.722, intending to clarify rather than change its meaning (except the intended changes described above).[72]

27. Other rules require revisions, as well, because our experience with supplemental complaints indicates that some confusion exists as to whether, and to what extent, the format and content requirements for initial complaints apply to supplemental complaints for damages. We now recognize that our current rules seek more and different information than is needed to evaluate a supplemental complaint for damages. Accordingly, we amend, in relevant part, sections 1.721 and 1.735 of our rules to specify what is required in supplemental damage complaints. As described below, these changes will streamline the supplemental complaint process by eliminating unnecessary or redundant information, reducing paperwork, and clarifying that additional filing fees are not required.

28. We amend section 1.735 of our rules to make clear that (1) a filing fee need not be paid in conjunction with filing a supplemental complaint for damages pursuant to section 1.722 of our rules, and (2) a complainant may serve a supplemental complaint

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[68] 47 C.F.R. § 1.722(b)(1). *See First Report and Order*, 12 FCC Rcd at 22576, ¶ 182.

[69] *See generally COMSAT v. IDB Mobile Communications,* Memorandum Opinion and Order, 15 FCC Rcd 7906 (Enf. Bur. 2000), *review denied*, *COMSAT v. IDB Mobile Communication*, Order on Review, 15 FCC Rcd 14697 (2000).

[70] *See* Appendix A, at § 1.722(d).

[71] See Appendix A, at § 1.722(j).

[72] *See* Appendix A, at § 1.722(a)-(i).

for damages in accordance with section 1.735(f) rather than section 1.735(d).[73] Moreover, we amend the rules so that sections 1.720(b) and 1.721(a)(4), (5), (8), (9), (12), and (13) [74] do not apply to supplemental complaints for damages filed pursuant to section 1.722 of our rules.[75] Thus, supplemental complaints for damages are not required to include the following: (1) a full description of the statutory violation described previously in the initial complaint; (2) a statement regarding whether a separate action has been filed with the Commission, any court, or another government agency based on the same claim; (3) a formal complaint intake form; or (4) verification of the payment of a filing fee.[76]

29. We further amend our rules to make clear, however, that a supplemental complaint for damages filed pursuant to section 1.722 must provide a complete statement of facts which, if proven true, would support the complainant's calculations of damages in each category of damages for which recovery is sought. This statement of facts must include a detailed explanation of all matters relevant to the calculation of damages and the nature of any injury alleged to have been sustained by the complainant. Moreover, relevant affidavits and documentation must support this statement of facts.[77]

30. In addition, although we change the rules so that the requirement of pre-filing settlement efforts set forth in section 1.721(a)(8) does not apply to supplemental complaints, we add a new rule imposing essentially the same requirement on supplemental complainants. This new rule, however, is tailored to the particular deadlines applicable to supplemental complaints. Specifically, the complainant must mail to each defendant, within 30 days of the release of the order on liability, a certified letter describing, *inter alia*, the basis for the damages to be sought in a supplemental complaint.[78] We believe that the order on liability usually will give the parties a strong incentive to resolve on their own any outstanding damages issues, and a 30-day deadline for formally initiating settlement efforts should ensure that the parties have sufficient time to reach a resolution before the 60-day deadline for filing a supplemental complaint.[79] Finally, we note that supplemental complaints must continue to meet the requirements of section 1.722 of our rules.

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[73] *See* Appendix A, at § 1.735(g).

[74] 47 C.F.R. § 1.721(a)(4), (5), (8), (9), (12), and (13).

[75] *See* Appendix A, at § 1.721(e)(i).

[76] *See* Appendix A, at §1.721(e)(i).

[77] *See* Appendix A, at § 1.721(e)(ii).

[78] *See* Appendix A, at § 1.721(e)(iii).

[79] *See* 47 C.F.R. § 1.722(b)(2)(ii).

D. Certain Further Guidance to Parties in Formal Complaint Proceedings Is Appropriate.

31. Although our amended formal complaint rules have been in place since 1998, we find that some parties still fail to comply fully with our procedures in certain respects. The staff's usual practice in individual complaint proceedings is to reject improper filings and to order parties to file pleadings that comply with our rules. Below we articulate some of the more common errors that Commission staff have seen in pleadings, as well as some advice that could benefit parties in formal complaint proceedings.

1. The Parties' Initial Pleadings Must Contain All of the Parties' Supporting Facts, Legal Arguments, and Documentation.

32. In the *First Report and Order*, the Commission explained at length that, under the amended formal complaint rules, the parties' initial pleadings should not merely provide bare notice of their claims and defenses, but rather should set forth in detail *all* of the parties' supporting facts, legal arguments, affidavits, and documentation.[80] We reiterate that point here. Complaints and answers filed at the Commission pursuant to section 208 of the Act should not resemble their counterparts filed in federal courts under Fed. R. Civ. P. 8. Instead, if anything, complaints and answers filed here should resemble a *combination* of complaints/answers filed under Fed. R. Civ. P. 8, motions to dismiss (and oppositions thereto) filed under Fed. R. Civ. P. 12(b), and motions for summary judgment (and oppositions thereto) filed under Fed. R. Civ. P. 56. In other words, the parties' initial pleadings should contain every allegation, fact, argument, affidavit, and supporting paper that the parties can muster at that time. Moreover, the parties should support each and every factual statement in their initial pleadings (and in their replies and briefs) with a specific citation to an affidavit(s) and to all other relevant portions of the record. When parties submit such comprehensive initial pleadings, the Commission can resolve the parties' disputes more expeditiously.

33. Certain parties' practices in submitting answers merit a few additional observations. First, our rules require the answer to "admit or deny the averments on which the complainant relies *and state in detail the basis for admitting or denying such averment*."[81] Notwithstanding this clear requirement, some parties have continued to submit bald denials and/or to refrain from responding to a complaint's averment on the grounds that the averment asserts a legal conclusion. These responses are improper. Denials in answers must be accompanied by a thorough explanation of their basis; and if a complaint asserts a legal conclusion, then the answer's corresponding denial should fully explain why the legal conclusion is erroneous.[82] Moreover, in its answer, a defendant

[80] *See First Report and Order*, 12 FCC Rcd at 22529-35, ¶¶ 72-85; 47 C.F.R. §§ 1.720, 1.721, 1.722, 1.724, 1.726.

[81] 47 C.F.R. § 1.724(b) (emphasis added).

[82] *See First Report and Order*, 12 FCC Rcd at 22534-35, ¶ 83.

must provide affidavits (as well as all supporting documents, data compilations, and tangible things) to support all of the facts on which the answer relies.[83]

2. Motions to Dismiss Are Rarely Necessary.

34. Although most defendants properly include affirmative defenses in the body of their answers, some defendants also file motions to dismiss as separate pleadings. We find this practice of filing a separate motion to dismiss to be unnecessary, in virtually all cases. As explained above, the Commission's rules are designed so that a defendant's answer is a comprehensive pleading containing complete factual and legal analysis, including a thorough explanation of every ground for dismissing or denying the complaint. Thus, the Commission should be able to address the merits of any defenses on the basis of the answer alone. If warranted, the Commission will dismiss a complaint after the close of the initial pleading cycle, even without an actual motion to dismiss. Accordingly, we remind defendants that the grounds for a motion to dismiss ordinarily should be raised in the answer alone rather than in a separate pleading.

3. The Joint Statement Filed Before the Initial Status Conference Must Be Detailed and Comprehensive.

35. Parties to a formal complaint must submit a joint statement of stipulated facts, disputed facts, key legal issues, discovery matters, and proposed pleading schedules two days prior to a staff-supervised, initial status conference.[84] The purpose of this procedure is to promote settlement, narrow and sharpen the relevant factual and legal issues, and otherwise expedite the Commission's resolution of the dispute.[85] In some cases, however, parties have frustrated the accomplishment of this goal by submitting separate statements or joint statements that are vague, cursory, and/or incomplete. We reiterate here that the parties must together file a single, joint statement.[86] Moreover, joint statements must be comprehensive, detailed, and specific, providing a thorough description of all stipulated and disputed facts, as well as a productive summary of key legal issues. Finally, in our view, if the parties work together with sufficient diligence, they should be able to stipulate to the bulk of relevant facts and key legal issues in most cases. Therefore, we urge parties to devote substantial and cooperative effort in arriving at stipulated facts and key legal issues.[87] Such effort will benefit the parties by assisting

[83] 47 C.F.R. § 1.724(g).

[84] 47 C.F.R. §§ 1.732(h); 1.733(b)(1), (2). *See also First Report and Order*, 12 FCC Rcd at 22559-60, ¶ 145; 22602-03, ¶¶ 258-60.

[85] *First Report and Order*, 12 FCC Rcd at 22602, ¶ 258.

[86] *First Report and Order*, 12 FCC Rcd at 22603, ¶ 260.

[87] To the extent that parties cannot agree on all of the relevant facts and legal issues, they should include in the joint filing itself separate statements of those disputed matters. As explained above, however, the (continued….)

the Commission in reaching a swifter resolution of the parties' disputes than would otherwise be possible.

4. We Encourage Disputing Parties to Seek Mediation From Commission Staff Before Filing A Formal Complaint.

36. Parties seeking placement of their dispute on the Accelerated Docket must participate in a staff-supervised, pre-filing settlement negotiation meeting.[88] These pre-filing discussions have resulted in a substantial number of disputes being resolved without the parties having to resort to litigation. Moreover, many parties have voluntarily engaged in such discussions before filing non-accelerated formal complaints, and those discussions have often culminated in settlements, as well.

37. In light of the staff's success in helping parties achieve settlements, we highly recommend that parties avail themselves of the opportunity to use staff-supervised mediation and settlement negotiations prior to filing any formal complaint. Staff-supervised, pre-filing meetings enable parties to discuss disputed issues before a neutral party. In our experience, the presence of Commission staff in mediation and settlement talks has facilitated the achievement of mutually agreeable solutions to disputes. Even when no final resolution is reached, the parties and the Commission can still benefit by having identified and narrowed issues that can be resolved more quickly in a subsequent formal complaint proceeding.

5. The Commission Generally Will Rule on Interlocutory Appeals of Staff Rulings Only in Conjunction with Ruling on the Merits.

38. During the course of a formal complaint proceeding, the Commission's staff has delegated authority to rule on any evidentiary, discovery, or procedural disputes arising between the parties.[89] Some parties have elected to file interlocutory appeals of such rulings pursuant to section 1.115 of the Commission's rules.[90] We emphasize that the Commission generally will not consider applications for review of interlocutory staff rulings in the context of section 208 complaint proceedings except in conjunction with ruling on the merits of the complaint. In the event, however, that the ruling on the merits of the complaint is made pursuant to delegated authority, the application for review will not be considered until after the Enforcement Bureau, acting on delegated authority, has issued its final ruling on the merits of the complaint. This Commission policy has been in

(Continued from previous page)
need to resort to such statements should occur rarely; and even when it does, such statements should usually concern only a small portion of the relevant circumstances.

[88] 47 C.F.R. § 1.730(b).

[89] *See generally* 47 C.F.R. § 0.311.

[90] 47 C.F.R. § 1.115(a) (providing that any person aggrieved by any action taken pursuant to delegated authority may file an application requesting review of that action by the Commission).

place since at least 1998[91] and rests on the need to maximize the efficient use of limited administrative resources. By avoiding piecemeal interlocutory appeals of staff rulings, the formal complaint process will move more quickly and will prevent parties from engaging in dilatory tactics. At the same time, fairness to the parties is not compromised, because all rights to appeal a staff decision to the Commission are preserved.

IV. PROCEDURAL MATTERS

A. Paperwork Reduction Act of 1995

39. This Order on Reconsideration has been analyzed with respect to the Paperwork Reduction Act of 1995 (the "1995 Act") and found to impose slightly modified information collection requirements on the public.[92] Implementation of these modified requirements will be subject to approval by the Office of Management and Budget (OMB), as prescribed by the 1995 Act, and will go into effect upon announcement in the Federal Register of OMB approval.

40. Written comments by the public on the modified information collections are due on or before 30 days after publication in the Federal Register. Written comments by OMB on the modified information collections are due on or before 60 days after publication in the Federal Register. In addition to filing comments with the Secretary, a copy of any comments on the modified information collections contained herein should be submitted to Judy Boley, Federal Communications Commission, Room 1-C804, 445 12th Street, SW, Washington, DC 20554, or via the Internet to jboley@fcc.gov and to Edward Springer, OMB Desk Officer, Room 10236 NEOB, 725 17th Street, N.W., Washington, DC 20503, or via the Internet to edward.springer@omb.eop.gov.

B. Regulatory Flexibility Act

41. The Regulatory Flexibility Act ("RFA")[93] requires that an agency prepare a regulatory flexibility analysis for notice-and-comment rulemaking proceedings. In the *First Report and Order* and *Second Report & Order*, the Commission included a Final Regulatory Flexibility Analysis[94] and a supplemental Final Regulatory Flexibility

[91] *See Halprin, Temple, Goodman, & Sugrue v. MCI Telecommunications Corp.*, Memorandum Opinion and Order, 13 FCC Rcd 22568, 22584 at ¶ 36 (1998), *recon. denied*, 14 FCC Rcd 21092 (1999).

[92] *See* ¶¶ 18, 19, 20, 21, 24, 28, 29, *supra*.

[93] The RFA, *see* 5 U.S.C. § 601 *et. seq.*, has been amended by the Contract with America Advancement Act of 1996, Pub. L. No. 104-121, 110 Stat. 847 (1996) ("CWAAA"). Title II of the CWAAA is the Small Business Regulatory Enforcement Fairness Act of 1996 ("SBREFA").

[94] *See First Report and Order*, 12 FCC Rcd at 22619-33, ¶¶ 333-340.

Analysis,[95] respectively. In this Order, however, neither the clarifications to the rules nor the rule changes adopted on our own motion require a regulatory flexibility analysis.

V. ORDERING CLAUSES

42. Accordingly, IT IS ORDERED, pursuant to sections 1, 4(i), 4(j), 201-205, 208, 260, 271, 274, and 275 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), 201-205, 208, 260, 271, 274, and 275, and section 1.429 of the Commission's rules, 47 C.F.R. § 1.429, that the petitions for reconsideration filed by AirTouch Paging, America's Carriers Telecommunication Association, and MCI Telecommunications Corporation are DENIED, the Petition for Clarification filed by AT&T Corporation is DENIED, and the Petition for Reconsideration and Clarification filed by BellSouth Corporation is GRANTED IN PART and DENIED IN PART.

43. IT IS FURTHER ORDERED that sections 1.721, 1.722, 1.724, 1.726, and 1.735 of the Commission's rules, 47 C.F.R. §§ 1.721, 1.722, 1.724, 1.726, and 1.735, ARE AMENDED as set forth in Appendix A. These sections of the rules, all involving collections of information, shall be effective upon approval by OMB and the publication of notice thereof in the Federal Register.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas
Secretary

[95] *See Second Report & Order*, 13 FCC Rcd at 17073-17085, ¶¶ 108-134.

APPENDIX A

AMENDMENT OF FORMAL COMPLAINT RULES AND PROCEDURES
CC DOCKET NO. 96-238

TEXT OF RULE CHANGES

Part 1 of Title 47 of the Code of Federal Regulations is amended as follows:

§ 1.721 Format and content of complaints

To be inserted and substituted for paragraph (a)

(a) Subject to paragraph (e) of this section governing supplemental complaints filed pursuant to section 1.722, and paragraph (f) of this section governing Accelerated Docket proceedings, a formal complaint shall contain:

To be inserted and substituted for paragraph (a)(8)

8) Certification that the complainant has, in good faith, discussed or attempted to discuss the possibility of settlement with each defendant prior to the filing of the formal complaint. Such certification shall include a statement that, prior to the filing of the complaint, the complainant mailed a certified letter outlining the allegations that form the basis of the complaint it anticipated filing with the Commission to the defendant carrier or one of the defendant's registered agents for service of process that invited a response within a reasonable period of time and a brief summary of all additional steps taken to resolve the dispute prior to the filing of the formal complaint. If no additional steps were taken, such certificate shall state the reason(s) why the complainant believed such steps would be fruitless;

To be inserted and substituted for paragraph (a)(13)

(a)(13) A declaration, under penalty of perjury, by the complainant or complainant's counsel describing the amount, method, and date of the complainant's payment of the filing fee required under § 1.1105(1)(c) or (d), and the complainant's 10-digit FCC Registration Number, if any; and

Former subsection (e) is redesignated as new subsection (f)

To be inserted as new subsection (e)

(e) Supplemental complaints.

(1) Supplemental complaints filed pursuant to section 1.722 shall conform to the requirements set out in this section and section 1.720, except that the requirements in subsections 1.720(b), 1.721(a)(4), (5), (8), (9), (12), and (13) shall not apply to such supplemental complaints;

(2) In addition, supplemental complaints filed pursuant to section 1.722 shall contain a complete statement of facts which, if proven true, would support complainant's calculation of damages for each category of damages for which recovery is sought. All material facts must be supported, pursuant to the requirements of section 1.720(c) and paragraph (a)(11) of this section, by relevant affidavits and other documentation. The statement of facts shall include a detailed explanation of the matters relied upon, including a full identification or description of the communications, transmissions, services, or other matters relevant to the calculation of damages and the nature of any injury allegedly sustained by the complainant. Assertions based on information and belief are expressly prohibited unless made in good faith and accompanied by an affidavit explaining the basis for the complainant's belief and why the complainant could not reasonably ascertain the facts from the defendant or any other source;

(3) Supplemental complaints filed pursuant to section 1.722 shall contain a certification that the complainant has, in good faith, discussed or attempted to discuss the possibility of settlement with respect to damages for which recovery is sought with each defendant prior to the filing of the supplemental complaint. Such certification shall include a statement that, no later than 30 days after the release of the liability order, the complainant mailed a certified letter to the primary individual who represented the defendant carrier during the initial complaint proceeding outlining the allegations that form the basis of the supplemental complaint it anticipates filing with the Commission and inviting a response from the carrier within a reasonable period of time. The certification shall also contain a brief summary of all additional steps taken to resolve the dispute prior to the filing of the supplemental complaint. If no additional steps were taken, such certification shall state the reason(s) why the complainant believed such steps would be fruitless.

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§ 1.722 Damages

To be revised to read as follows:

(a) If a complainant wishes to recover damages, the complaint must contain a clear and unequivocal request for damages.

(b) If a complainant wishes a determination of damages to be made in the same proceeding as the determinations of liability and prospective relief, the complaint must contain the allegations and information required by paragraph (h) of this section.

(c) Notwithstanding paragraph (b) of this section, in any proceeding to which no statutory deadline applies, if the Commission decides that a determination of damages would best be made in a proceeding that is separate from and subsequent to the proceeding in which the determinations of liability and prospective relief are made, the Commission may at any time order that the initial proceeding will determine only liability and prospective relief, and that a separate, subsequent proceeding initiated in accordance with paragraph (e) of this section will determine damages.

(d) If a complainant wishes a determination of damages to be made in a proceeding that is separate from and subsequent to the proceeding in which the determinations of liability and prospective relief are made, the complainant must:

(i) comply with paragraph (a) of this section, and

(ii) state clearly and unequivocally that the complainant wishes a determination of damages to be made in a proceeding that is separate from and subsequent to the proceeding in which the determinations of liability and prospective relief will be made.

(e) If a complainant proceeds pursuant to paragraph (d) of this section, or if the Commission invokes its authority under paragraph (c) of this section, the complainant may initiate a separate proceeding to obtain a determination of damages by filing a supplemental complaint that complies with section 1.721(e) and paragraph (h) of this section within sixty days after public notice (as defined in section 1.4(b)) of a decision that contains a finding of liability on the merits of the original complaint.

(f) If a complainant files a supplemental complaint for damages in accordance with paragraph (e) of this section, the supplemental complaint shall be deemed, for statutory limitations purposes, to relate back to the date of the original complaint.

(g) Where a complainant chooses to seek the recovery of damages upon a supplemental complaint in accordance with the requirements of paragraph (e) of this section, the Commission will resolve the separate, preceding liability complaint within any applicable complaint resolution deadlines contained in the Act.

(h) In all cases in which recovery of damages is sought, it shall be the responsibility of the complainant to include, within either the complaint or supplemental complaint for damages filed in accordance with paragraph (e) of this section, either:

(1) a computation of each and every category of damages for which recovery is sought, along with an identification of all relevant documents and materials or such other evidence to be used by the complainant to determine the amount of such damages; or

(2) an explanation of:

(i) the information not in the possession of the complaining party that is necessary to develop a detailed computation of damages;

(ii) why such information is unavailable to the complaining party;

(iii) the factual basis the complainant has for believing that such evidence of damages exist;

(iv) a detailed outline of the methodology that would be used to create a computation of damages with such evidence.

(i) Where a complainant files a supplemental complaint for damages in accordance with paragraph (e) of this section, the following procedures may apply:

(1) Issues concerning the amount, if any, of damages may be either designated by the Enforcement Bureau for hearing before, or, if the parties agree, submitted for mediation to, a Commission Administrative Law Judge. Such Administrative Law Judge shall be chosen in the

following manner:

(i) By agreement of the parties and the Chief Administrative Law Judge; or

(ii) In the absence of such agreement, the Chief Administrative Law Judge shall designate t the Administrative Law Judge.

(2) The Commission may, in its discretion, order the defendant either to post a bond for, or deposit into an interest bearing escrow account, a sum equal to the amount of damages which the Commission finds, upon preliminary investigation, is likely to be ordered after the issue of damages is fully litigated, or some lesser sum which may be appropriate, provided the Commission finds that the grant of this relief is favored on balance upon consideration of the following factors:

i) The complainant's potential irreparable injury in the absence of such deposit;

(ii) The extent to which damages can be accurately calculated;

(iii) The balance of the hardships between the complainant and the defendant; and

(iv) Whether public interest considerations favor the posting of the bond or ordering of the deposit.

(3) The Commission may, in its discretion, suspend ongoing damages proceedings for fourteen days, to provide the parties with a time within which to pursue settlement negotiations and/or alternative dispute resolution procedures.

(4) The Commission may, in its discretion, end adjudication of damages with a determination of the sufficiency of a damages computation method or formula. No such method or formula shall contain a provision to offset any claim of the defendant against the complainant. The parties shall negotiate in good faith to reach an agreement on the exact amount of damages pursuant to the Commission-mandated method or formula. Within thirty days of the release date of the damages order, parties shall submit jointly to the Commission either:

(i) A statement detailing the parties' agreement as to the amount of damages;

(ii) A statement that the parties are continuing to negotiate in good faith and a request that the parties be given an extension of time to continue negotiations; or

(iii) A statement detailing the bases for the continuing dispute and the reasons why no agreement can be reached.

(j) Except where otherwise indicated, the rules governing initial formal complaint proceedings govern supplemental formal complaint proceedings, as well.

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§ 1.724 Answer.

To be inserted and substituted for paragraph (b)

(b) The answer shall advise the complainant and the Commission fully and completely of the nature of any defense, and shall respond specifically to all material allegations of the complaint. Every effort shall be made to narrow the issues in the answer. The defendant shall state concisely its defense to each claim asserted, admit or deny the averments on which the complainant relies, and state in detail the basis for admitting or denying such averment. General denials are

prohibited. Denials based on information and belief are expressly prohibited unless made in good faith and accompanied by an affidavit explaining the basis for the defendant's belief and why the defendant could not reasonably ascertain the facts from the complainant or any other source. If the defendant is without knowledge or information sufficient to form a belief as to the truth of an averment, the defendant shall so state and this has the effect of a denial. When a defendant intends in good faith to deny only part of an averment, the defendant shall specify so much of it as is true and shall deny only the remainder. The defendant may deny the allegations of the complaint as specific denials of either designated averments or paragraphs.
To be inserted and substituted for paragraph (d)

(d) Averments in a complaint or supplemental complaint filed pursuant to section 1.722 are deemed to be admitted when not denied in the answer.

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§ 1.726 Replies

To be inserted and substituted for paragraph (a)

(a) Subject to paragraph (g) of this section governing Accelerated Docket proceedings, within three days after service of an answer containing affirmative defenses presented in accordance with the requirements of §1.724(e), a complainant may file and serve a reply containing statements of relevant, material facts and legal arguments that shall be responsive to only those specific factual allegations and legal arguments made by the defendant in support of its affirmative defenses. Replies which contain other allegations or arguments will not be accepted or considered by the Commission.

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§ 1.735 Copies; service; separate filings against multiple defendants

To be inserted as new paragraph (g)

(g) Supplemental complaint proceedings. Supplemental complaints filed pursuant to section 1.722 shall conform to the requirements set out in this section, except that the complainant need not submit a filing fee, and the complainant may effect service pursuant to paragraph (f) of this section rather than paragraph (d) of this section.

APPENDIX B

PARTIES SUBMITTING PETITIONS FOR RECONSIDERATION/CLARIFICATION OF THE *FIRST REPORT AND ORDER*

AirTouch Paging
America's Carriers Telecommunication Association
AT&T Corp.
MCI Telecommunications Corporation

PARTIES SUBMITTING COMMENTS IN RESPONSE TO THE PETITIONS FOR RECONSIDERATION/CLARIFICATION OF THE *FIRST REPORT AND ORDER*

AirTouch Paging
AT&T Corp.
Bell Atlantic Telephone Companies
BellSouth Corporation
Telecommunications Resellers Association

PARTIES SUBMITTING PETITIONS FOR RECONSIDERATION/CLARIFICATION OF THE *SECOND REPORT & ORDER*

BellSouth Corporation

PARTIES SUBMITTING COMMENTS IN RESPONSE TO THE PETITIONS FOR RECONSIDERATION/CLARIFICATION OF THE *SECOND REPORT & ORDER*

SBC Communications Inc.
Telecommunications Resellers Association