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

In the Matter of	)	
	)	
Amendment of Procedural Rules Governing	)	EB Docket No. 17-245
Formal Complaint Proceedings Delegated to the	)	
Enforcement Bureau	)	

NOTICE OF PROPOSED RULEMAKING

Adopted: September 13, 2017 **Released: September 18, 2017**

Comment Date: 30 days after publication in the Federal Register
Reply Comment Date: 45 days after publication in the Federal Register

By the Commission:

I. INTRODUCTION

1. In this Notice of Proposed Rulemaking (NPRM), we seek comment on creating a uniform set of procedural rules for certain formal complaint proceedings delegated to the Enforcement Bureau and currently handled by its Market Disputes Resolution Division (MDRD) and Telecommunications Consumers Division (TCD).[1] Three separate sets of procedural rules currently govern such proceedings. The rules are not congruent and the inconsistencies can lead to needless confusion.

2. Specifically, this NPRM proposes to streamline and consolidate the procedural rules governing formal complaints filed under Section 208 of the Communications Act of 1934, as amended (Act);[2] pole attachment complaints filed under Section 224 of the Act;[3] and formal advanced communications services and equipment complaints filed under Sections 255, 716, and 718 of the Act (Disability Access complaints).[4] The rule changes we propose flow from nearly two decades of experience with the Commission's formal complaint and mediation processes, and will serve to enhance the ability of parties and the Commission to promptly and efficiently address alleged violations of the Act and the Commission's rules and orders. We seek comment on the proposed rule revisions, which are set forth in the Appendix to this NPRM.[5]

[1] We note that Open Internet complaints under Part 8 of the Commission's Rules are the subject of a separate Notice of Proposed Rulemaking, and are not addressed here. *Restoring Internet Freedom*, Notice of Proposed Rulemaking, WC Docket 17-108, 32 FCC Rcd 4434 (2017).

[2] 47 U.S.C. § 208. *See* 47 CFR §§ 1.720-1.726.

[3] 47 U.S.C. § 224. *See* 47 CFR §§ 1.1401-1.1424.

[4] 47 U.S.C. §§ 255, 717, 718. *See* 47 CFR §§ 14.38-14.52.

[5] Because the rules addressed herein are procedural in nature, notice and comment are not required under the Administrative Procedure Act. 5 U.S.C. § 553(b)(A) (providing that notice-and-comment rulemaking requirements do not apply to rules of agency organization, procedure, or practice). Nonetheless, we seek comment here to assemble the best possible record to inform our decisions. *Cf. Amendment of Certain of the Commission's Part 1 Rules of Practice and Procedure and Part 0 Rules of Commission Organization*, Notice of Proposed Rulemaking, 25 FCC Rcd 2430, 2430, para. 1 & n.1 (2010); Report and Order, 26 FCC Rcd 1594, 1595, para. 1 & n.1 (2011).

II. BACKGROUND

3. *Section 208 Formal Complaint Rules*. In 1997, the Commission adopted rules setting forth the procedures for formal complaints filed under Section 208 of the Act.[6] The Commission emphasized that it would revisit the rules and policies adopted in the *Formal Complaints Order* "if we determine that further modifications are needed to ensure that complaint proceedings are promptly and fairly resolved and, more generally, to promote th[e] Act's goal of full and fair competition in all telecommunications markets."[7] Four years later, the Commission modified the rules relating to answers, replies, and supplemental complaints for damages.[8]

4. The Section 208 rules have worked well in resolving disputes involving common carriers. The rules facilitate creation of a complete record in each case through fact-based pleading,[9] targeted discovery,[10] and joint statements of stipulated and disputed facts and key legal issues.[11] They also provide for a status conference in which staff can work to narrow issues, manage the discovery process, explore settlement, and establish deadlines for the remainder of the case.[12] Requiring parties to marshal facts and coordinate on stipulations and discovery has narrowed disputes in issue and promoted settlement.

5. *Section 224 Complaint Rules*. Section 224 of the Act directed the Commission to "adopt procedures necessary and appropriate to hear and resolve complaints concerning ... rates, terms, and conditions" for pole attachments.[13] In 1978, the Commission adopted the procedures regarding pole attachment complaints.[14] Although the pole attachment rules afford substantial discretion to Commission staff to request that the parties make additional filings[15] and to hold meetings to clarify issues and explore settlement,[16] they do not specifically provide for joint statements, discovery, or status conferences. The pole attachment rules also contain pleading cycle deadlines that differ from the Section 208 formal complaint rules.

6. *Disability Access Complaints Rules.* In 2011, the Commission adopted rules (which took effect in 2013) governing formal complaints filed under Sections 255, 717, and 718 of the Act alleging that providers of advanced communications services and manufacturers of equipment have failed to make their services and products accessible to people with disabilities. The Disability Access complaints rules generally mirror the section 208 formal complaint rules, although these complaints are not eligible for Accelerated Docket treatment.[17]

---

[6] *In the Matter of 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) (*Formal Complaints Order*), Order on Reconsideration, 16 FCC Rcd 5681 (2001) *(Formal Complaints Recon Order*).

[7] *Formal Complaints Order*, 12 FCC Rcd at 22501, para. 4.

[8] *Formal Complaints Recon Order*, 16 FCC Rcd at 5692-94, paras. 19-30.

[9] 47 CFR § 1.720.

[10] 47 CFR § 1.729.

[11] 47 CFR § 1.732(g).

[12] 47 CFR § 1.733.

[13] 47 U.S.C. § 224(b)(1).

[14] *In the Matter of Adoption of Rules for the Regulation of Cable Television Pole Attachments*, First Report and Order, 68 FCC 2d 1585 (1978) (*Pole Attachment First Report and Order*).

[15] 47 CFR § 1.1409(a).

[16] 47 CFR § 1.1411.

[17] *See Implementation of Sections 716 and 717 of the Communications Act of 1934, as Enacted by the Twenty-First Century Communications and Video Accessibility Act of 2010*, Report and Order and Further Notice of Proposed

(continued….)

III. DISCUSSION

7. We propose amending our rules so that formal complaints currently managed by MDRD (Section 208 formal complaints and Section 224 pole attachment complaints) and TCD (Disability Access complaints) are subject to one set of procedural rules.[18] We use the Section 208 rules as a starting point because they have worked well in resolving hundreds of complaints filed since 1997. In some instances, however, we propose modifying those rules where we believe the pole attachment complaint rules would improve the complaint process. Moreover, we propose retaining specific pole attachment rules that are unique and necessary to resolving those particular types of complaints.[19] We discuss below some of the key changes to the rules. The Appendix attached hereto is a copy of the proposed new rules.[20] We seek comment on our proposed changes. We also ask whether we should make any additional changes in pursuit of our goal of simplifying and clarifying the procedures applicable to formal-complaint proceedings, and whether any additional procedural rules should be included in this proceeding.

8. *Filing Deadlines*. We propose requiring that the deadline for answering any formal complaint be 30 days from service of the complaint, except as otherwise ordered by Commission staff. The Section 208 rules (as well as the Disability Access complaints rules) rules establish a 20-day answer time.[21] In contrast, the pole attachment complaint rules establish a 30-day answer period.[22] With the exception of cases governed by a statutory deadline for Commission action,[23] Commission staff may, in appropriate circumstances, extend the deadline for answering a Section 208 formal complaint to 30 days. The Commission relies on fact-based pleading in its formal complaint proceedings, and the disputes are complex. In our experience, a uniform 30-day rule will allow defendants to more carefully and completely answer the complaint's allegations. Accordingly, we propose that the deadline for answers to these complaints be 30 days from service of the complaint.

9. We further propose that replies be due within 10 days of service of the answer.[24] Currently, there are two different reply schedules in the rules addressed here – three days for Section 208 and Disability Access complaints, and 20 days for pole attachment complaints.[25] As with the answer

(Continued from previous page)
Rulemaking, 26 FCC Rcd 14557, 14674-75, para. 274 (2011) ("Therefore we decline to adopt the Accelerated Docket rules for Section 255, 716, and 718 formal complaints.").

[18] We propose one edit to rule 1.717, which addresses *informal* Section 208 complaints. *See* 47 CFR § 1.717. Specifically, we propose deleting the phrase "and the Commission's disposition" from the last sentence of that rule because the Commission's practice is not to dispose of informal complaints on substantive grounds. We also propose adding a rule memorializing MDRD's staff-assisted mediation process, which enables parties to attempt to resolve their disputes informally before or after the filing of a formal complaint. *See infra* para. 15.

[19] Our proposed revisions to rule 1.1404 (renumbered 1.1405) are intended to simplify the rule by eliminating provisions that specify in detail the factual support that must be included with a pole attachment complaint. *See* 47 CFR § 1.1404. This proposed simplification recognizes that a complainant may not need to adduce all the evidence required by the current rule to prove their case. The proposed revisions would not alter a complainant's obligation to provide adequate evidentiary support for a pole attachment complaint.

[20] Because we propose that the numbering of several procedural rules be revised, the proposed procedural rule changes also require conforming edits to cross-references in other Commission rules.

[21] 47 CFR §§ 1.724(a), 14.42(a).

[22] 47 CFR § 1.1407(a). For the sake of simplicity, we also revise the terms "response" and "respondent" in the pole attachment complaint process, using instead the terms "answer" and "defendant," respectively.

[23] *See* 47 U.S.C. § 208(b)(1).

[24] Our rules currently provide that a complainant may file a reply. *See* 47 CFR §§ 1.726(a), 14.44(a). Because we find replies to be useful in all cases, staff typically requires complainants to file a reply addressing all factual allegations and legal arguments in the answer. We propose to modify rule 1.726(a) to reflect that practice.

[25] 47 CFR §§ 1.726, 1.1407(a), 14.44(a). *See* 47 CFR § 1.4 (explaining computation of time).

time, Commission staff has often seen fit to extend the reply time in non-deadline Section 208 formal complaint proceedings to 10 days, and experience has shown that the 10-day reply period provides parties with a full opportunity to address the answer, and also for the parties to engage in discussions to refine the facts and issues in dispute (and potentially to discuss settlement). Accordingly, we propose that the deadline for replies for Section 208 complaints, pole attachment complaints, and Disability Access complaints be 10 days from service of the answer.[26]

10. *Information Designations*. The Section 208 formal complaint rules and the rules governing Disability Access complaints require parties to include in the complaint, answer, and reply an "information designation" describing individuals with firsthand knowledge of facts, and documents relevant to the facts, alleged in the pleadings.[27] Based on our experience handling complaints and compiling a factual record, we tentatively conclude that these requirements have been beneficial and should also apply to pole attachment complaints. We therefore propose to extend the Commission's information designation requirements to pole attachment complaints, and also to streamline and more closely align the Commission's information designation requirements with Federal Rule of Civil Procedure 26.[28]

11. *Discovery*. Rule 1.729(a) of the Section 208 formal complaint rules and rule 14.47 of the Disability Access complaints rules provide that a complainant and a defendant may serve a request for up to 10 written interrogatories with the complaint and answer, respectively.[29] In addition, a complainant may serve a request for up to five additional interrogatories following service of the answer.[30] The pole attachment complaint rules state that the Commission may request "additional filings."[31] Although discovery is not permitted as a matter of right under any of these rules, experience in handling Section 208 formal complaints has shown that well-crafted interrogatories assist the parties and the Commission in narrowing the facts and issues in dispute.

12. Consequently, we believe a uniform approach in these formal complaint matters would provide parties with greater certainty regarding this important discovery mechanism. We therefore propose that, in these three types of complaint proceedings, (1) a complainant may file and serve up to 10 written interrogatories with its complaint; (2) a defendant may file and serve up to 10 written interrogatories with its answer; and (3) a complainant may file and serve up to five additional written interrogatories with its reply. Parties no longer need to request permission to propound interrogatories, although the party requesting the discovery still must include an explanation of why the information is both necessary to the resolution of the dispute and not available from any other source. Responding parties may object to an interrogatory, and Commission staff will rule in writing on the scope of, and schedule for answering, any disputed interrogatories.

13. *Proposed Findings of Fact and Conclusions of Law*. We also propose to eliminate the requirement in the Section 208 and Disability Access complaints rules that the complaint, answer, and reply include proposed findings of fact and conclusions of law.[32] We have found this requirement to have

[26] Based on our experience in handling pole attachment complaints – and observing that they generally are no more complex than Section 208 formal complaints – we do not believe a reduction in the period for pole attachment replies will materially impact complainants' ability to prepare their pleadings. Moreover, if necessary, a complainant can request more time by submitting a well-supported motion for an extension. Although such motions should not be routine, staff will, in appropriate circumstances, entertain them.

[27] 47 CFR §§ 1.721(a)(10), 1.724(f), 1.726(d), 14.39(a)(10), 14.42(f), 14.44(d).

[28] Fed R. Civ. P. 26.

[29] 47 CFR §§ 1.729(a), 14.47(a).

[30] *Id.*

[31] 47 CFR § 1.1409(f).

[32] 47 CFR §§ 1.721(a)(6), 1.724(c), 1.726(c), 14.39(a)(5), 14.42(c), 14.44(c).

limited utility, and, in practice, Commission staff, in appropriate circumstances, has waived these rules.[33] The pole attachment rules do not contain this requirement, and we propose to eliminate it altogether.

14. *Complaints Governed by Section 208(b)(1) of the Act.* We propose to add a rule imposing pre-complaint obligations on parties filing complaints subject to the 5-month deadline in Section 208(b)(1) of the Act.[34] The Commission has held that Section 208(b)(1)'s deadline applies to "any complaint about the lawfulness of matters included in tariffs filed with the Commission, and those matters that would have been included in tariffs but for the Commission's forbearance from tariff regulation."[35] In our experience handling 5-month deadline matters, we have found it invaluable for Commission staff to work with the parties prior to the filing of any complaint so that the parties can narrow the factual and legal issues in dispute; exchange relevant documents and discovery; discuss various case management issues, such as the entry of a protective order for the exchange of confidential information; and engage in settlement negotiations. In fact, it has been our standard practice to require parties to participate in such a pre-complaint meeting, and Section 208(b)(1) formal complaints before the Commission have proceeded much more smoothly as a result. Consequently, we propose adding a rule requiring compliance with these pre-complaint procedures in complaints governed by Section 208(b)(1).

15. *Settlement Discussions and Mediation*. We propose to augment the current requirement that Section 208 and Disability Access complaints include a certification of pre-filing settlement efforts. In particular, we propose adding to the Section 208 and Disability Access complaints rules the enhanced requirement from the pole attachment rules that pre-filing settlement discussions occur at the "executive-level."[36] In our experience, the "executive-level" requirement ensures that individuals with settlement authority participate in the pre-complaint discussions and greatly improves prospects for resolving the dispute quickly. Thus, under the proposed rules, these formal complaints must be preceded by "executive-level" settlement talks.

16. We propose to add a rule applicable to all formal complaints codifying MDRD's current practice of providing staff-supervised mediation services to parties wishing to negotiate a resolution of their dispute. The proposed rule provides that parties may request mediation prior to, or after, the filing of a formal complaint, as long as the request precedes the adoption date of any final order. Participation in mediation is voluntary, and all written and oral communications prepared or made for purposes of the mediation are confidential.

17. *Initial Status Conference*. Under rules 1.733 and 14.50(a), Commission staff may direct attorneys and/or the parties to appear for a status conference after the answer is filed.[37] Especially in factually and legally complex cases, the status conference has proven to be an effective venue in which to refine the matters in dispute, address discovery requests, and explore settlement options. We propose, therefore, that Commission staff have the option to direct a status conference for pole attachment complaints, not just Section 208 and Disability Access complaints.

18. *Accelerated Docket*. We propose to consolidate all the Accelerated Docket provisions – which appear in multiple parts of the Section 208 formal complaint rules – into one new rule. Moreover, in our experience, cases on the Accelerated Docket run most smoothly when the adjudicatory process can be tailored to the particular facts of the case. Therefore, we propose to streamline the Accelerated Docket

[33] *See*, *e.g.*, *Farmers Bank, Windsor, Va. v. Verizon Bus. Network Servs. Inc.*, Letter Ruling, Proceeding No. 16-211, Bureau ID No. EB-16-MD-002 (July 1, 2016), at 2.

[34] 47 U.S.C. § 208(b)(1) ("[T]he Commission shall, with respect to any investigation under this section of the lawfulness of a charge, classification, regulation, or practice, issue an order concluding such investigation within 5 months after the date on which the complaint was filed.").

[35] *See Formal Complaints Order*, 12 FCC Rcd at 24516, para. 37.

[36] 47 CFR § 1.1404(k).

[37] 47 CFR §§ 1.733, 14.50(a).

rules to provide greater flexibility to staff while preserving the basic structure of the rules. Finally, we propose to extend the option of requesting inclusion on the Accelerated Docket to Section 224 complaints.[38] The Commission has refined the pole attachment rules over the past several years, including improving the timelines for pole access.[39] The proposed availability, in appropriate circumstances, of Accelerated Docket treatment further supports the Commission's efforts to expedite resolution of pole attachment disputes.[40] We do not, however, propose to revisit the Commission's prior decision that the Accelerated Docket rules are not applicable to Section 255, 717, and 718 formal complaints.[41]

19. *Shot Clocks on Agency Action.* As noted above, the Communications Act provides that the Commission shall issue an order concluding certain Section 208 investigations within 5 months after the date on which the complaint is filed.[42] We seek comment here on whether the FCC should adopt shot clocks for all three types of formal complaint proceedings at issue in this proceeding. If so, we seek comment on the length of such shot clocks and the triggering event that should commence the running of the agency's clock. We also seek comment on whether the agency should adopt a uniform time period that applies to all three types of these proceedings or if there are reasons to adopt different shot clocks for each type of proceeding. Are there circumstances in which the agency should be able to pause the clock? What consequences, if any, should flow from the agency's failure to meet the deadline? Should the agency codify this shot clock in our rules?

IV. PROCEDURAL MATTERS

A. Filing Instructions

20. Pursuant to Sections 1.415 and 1.419 of the Commission's rules, 47 CFR §§ 1.415, 1.419, interested parties may file comments and reply comments on or before the dates indicated on the first page of this document. Comments may be filed using the Commission's Electronic Comment Filing System (ECFS). *See Electronic Filing of Documents in Rulemaking Proceedings*, 63 Fed. Reg. 24121 (1998).

- Electronic Filers: Comments may be filed electronically using the Internet by accessing the ECFS: https://www.fcc.gov/ecfs/.
- Paper Filers: Parties who choose to file by paper must file an original and one copy of each filing. Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail. All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission.
    - All hand-delivered or messenger-delivered paper filings for the Commission's Secretary must be delivered to FCC Headquarters at 445 12th St., SW, Room TW-A325, Washington, D.C. 20554. The filing hours are 8:00 a.m. to 7:00 p.m. All hand deliveries

[38] We note that the Commission separately has requested comment on proposed changes to the pole attachment complaint process, and that these changes would not impact the Accelerated Docket proposal contained in this NPRM. *See In the Matter of Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, Notice of Proposed Rulemaking, Notice of Inquiry, and Request For Comment, WC Docket No. 17-84, paras. 47-51 (rel. Apr. 21, 2017).

[39] *See*, *e.g.*, *Implementation of Section 224 of the Act*, Report and Order and Order on Reconsideration, 26 FCC Rcd 5240 (2011), *aff'd*, *American Elec. Power Serv. Corp. v. FCC*, 708 F.3d 183 (D.C. Cir. 2013), *cert. denied*, 134 S.Ct. 118 (2013).

[40] 47 U.S.C. § 224.

[41] *See supra* note 17.

[42] *See* 47 U.S.C. § 208(b)(1).

must be held together with rubber bands or fasteners. Any envelopes and boxes must be disposed of *before* entering the building.

- Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743.
- U.S. Postal Service first-class, Express, and Priority mail must be addressed to 445 12th Street, SW, Washington, D.C. 20554.

B. Ex Parte Rules

21. This proceeding shall be treated as a "permit-but-disclose" proceeding in accordance with the Commission's *ex parte* rules.[43] Persons making *ex parte* presentations must file a copy of any written presentation or a memorandum summarizing any oral presentation within two business days after the presentation (unless a different deadline applicable to the Sunshine period applies). Persons making oral *ex parte* presentations are reminded that memoranda summarizing the presentation must (1) list all persons attending or otherwise participating in the meeting at which the *ex parte* presentation was made, and (2) summarize all data presented and arguments made during the presentation. If the presentation consisted in whole or in part of the presentation of data or arguments already reflected in the presenter's written comments, memoranda or other filings in the proceeding, the presenter may provide citations to such data or arguments in his or her prior comments, memoranda, or other filings (specifying the relevant page and/or paragraph numbers where such data or arguments can be found) in lieu of summarizing them in the memorandum. Documents shown or given to Commission staff during *ex parte* meetings are deemed to be written *ex parte* presentations and must be filed consistent with rule 1.1206(b). In proceedings governed by rule 1.49(f) or for which the Commission has made available a method of electronic filing, written *ex parte* presentations and memoranda summarizing oral *ex parte* presentations, and all attachments thereto, must be filed through the electronic comment filing system available for that proceeding, and must be filed in their native format (*e.g.*, .docx, .xlsx, .pptx, searchable .pdf). Participants in this proceeding should familiarize themselves with the Commission's *ex parte* rules.

C. Accessible Formats

22. To request materials in accessible formats for people with disabilities (braille, large print, electronic files, audio format), send an email to fcc504@fcc.gov or call the Consumer & Governmental Affairs Bureau at 202-418-0530 (voice), 202-418-0432 (tty).

D. Regulatory Flexibility Act

23. Our action does not require notice and comment,[44] and therefore falls outside of the Regulatory Flexibility Act of 1980 (RFA).[45] We nonetheless note that we anticipate that the rules we propose today will not have a significant economic impact on a substantial number of small entities. In this *Notice*, the proposed modifications to the procedural formal complaint rules do not propose substantive new responsibilities for regulated entities or potential plaintiffs or defendants. We will send a copy of this *Notice* to the Chief Counsel for Advocacy of the Small Business Administration.

E. Paperwork Reduction Act

24. This document contains proposed modified information collection requirements. The Commission, as part of its continuing effort to reduce paperwork burdens, invites the general public and the Office of Management and Budget (OMB) to comment on the information collection requirements contained in this document, as required by the Paperwork Reduction Act of 1995, Public Law 104-13.

---

[43] 47 CFR § 1.1200 *et seq.*

[44] *See supra* note 5.

[45] *See* 5 U.S.C. § 603 (applying RFA requirements "[w]henever an agency is required by section 553 of this title, or any other law, to publish general notice of proposed rulemaking for any proposed rule").

In addition, pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107-198, we seek specific comment on how we might further reduce the information collection burden for small business concerns with fewer than 25 employees.[46]

F. Contact Person

25. For further information about this proceeding, please contact Michael Engel, FCC Enforcement Bureau, Market Disputes Resolution Division, Room 4-C266, 445 12th Street, S.W., Washington, D.C. 20554, (202) 418-1516, michael.engel@fcc.gov.

V. ORDERING CLAUSES

26. **IT IS ORDERED** that, pursuant to the authority contained in 47 U.S.C. §§ 151, 152, 154(i), 154(j), 201(b), 208, 224, 255, 717, and 718, this Notice of Proposed Rulemaking is **ADOPTED**.

27. **IT IS FURTHER ORDERED** that **NOTICE IS HEREBY GIVEN** of the proposed regulatory changes to Commission policy and rules described in this Notice of Proposed Rulemaking and that comment is sought on these proposals.

28. **IT IS FURTHER ORDERED** that the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, **SHALL SEND** a copy of this Notice of Proposed Rulemaking to the Chief Counsel for Advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

[46] *See* 44 U.S.C. § 3506(c)(4).

APPENDIX

Proposed Rules

Part 1 of the Commission's rules is amended as follows:

PART 1: PRACTICE AND PROCEDURE

*****

INFORMAL COMPLAINTS

§ 1.717 Procedure.

The Commission will forward informal complaints to the appropriate carrier for investigation and set a due date for the carrier to provide a written response to the informal complaint to the Commission, with a copy to the complainant. The response will advise the Commission of the carrier's satisfaction of the complaint or of its refusal or inability to do so. Where there are clear indications from the carrier's response or from other communications with the parties that the complaint has been satisfied, the Commission may, in its discretion, consider a complaint proceeding to be closed. In all other cases, the Commission will notify the complainant that if the complainant is not satisfied by the carrier's response, or if the carrier has failed to submit a response by the due date, the complainant may file a formal complaint in accordance with § 1.721 of this part.

§ 1.718 Unsatisfied informal complaints; formal complaints relating back to the filing dates of informal complaints.

When an informal complaint has not been satisfied pursuant to § 1.717, the complainant may file a formal complaint with this Commission in the form specified in § 1.721. Such filing will be deemed to relate back to the filing date of the informal complaint: *Provided,* That the formal complaint: (a) Is filed within 6 months from the date of the carrier's response, or if no report has been filed, within 6 months of the due date for the response; (b) makes reference to the date of the informal complaint, and (c) is based on the same cause of action as the informal complaint. If no formal complaint is filed within the 6-month period, the informal complaint proceeding will be closed.

*****

FORMAL COMPLAINTS

§ 1.720 Purpose.

The following procedural rules apply to formal complaint proceedings under 47 U.S.C. § 208, pole attachment complaint proceedings under 47 U.S.C. § 224, and advanced communications services and equipment formal complaint proceedings under 47 U.S.C. §§ 255, 716, and 718, and part 14 of these rules. Additional rules relevant only to pole attachment complaint proceedings are provided in subpart J of part 1.

§ 1.721 General pleading requirements.

Formal complaint proceedings are generally resolved on a written record consisting of a complaint, answer, reply, and joint statement of stipulated facts, disputed facts and key legal issues, along with all associated evidence in the record. The Commission may also require or permit other written submissions

such as briefs, proposed findings of fact and conclusions of law, or other supplementary documents or pleadings.

(a) All papers filed in any proceeding subject to these rules must be drawn in conformity with the requirements of §§ 1.49, 1.50, and 1.52.

(b) Pleadings must be clear, concise, and direct. All matters concerning a claim, defense or requested remedy, including damages, should be pleaded fully and with specificity.

(c) Pleadings must contain facts which, if true, are sufficient to constitute a violation of the Act or a Commission regulation or order, or a defense to an alleged violation.

(d) Averred facts, claims, or defenses shall be made in numbered paragraphs and must be supported by relevant evidence. The contents of each paragraph shall be limited as far as practicable to a statement of a single set of circumstances. Each claim founded on a separate transaction or occurrence and each affirmative defense shall be separately stated to facilitate the clear presentation of the matters set forth. Assertions based on information and belief are prohibited unless made in good faith and accompanied by a declaration or affidavit explaining the basis for the party's belief and why the party could not reasonably ascertain the facts from any other source.

(e) Legal arguments must be supported by appropriate statutory, judicial, or administrative authority.

(f) Opposing authorities must be distinguished.

(g) Copies must be provided of all non-Commission authorities relied upon which are not routinely available in national reporting systems, such as unpublished decisions or slip opinions of courts or administrative agencies. In addition, copies of state authorities relied upon shall be provided.

(h) Parties are responsible for the continuing accuracy and completeness of all information and supporting authority furnished in a pending complaint proceeding. Information submitted, as well as relevant legal authorities, must be current and updated as necessary and in a timely manner before a decision is rendered on the merits of the complaint.

(i) Specific reference shall be made to any tariff or contract provision relied on in support of a claim or defense. Copies of relevant tariffs, contracts, or relevant portions that are referred to or relied upon in a complaint, answer, or other pleading shall be appended to such pleading.

(j) Pleadings shall identify the name, address, telephone number, and email address for either the filing party's attorney or, where a party is not represented by an attorney, the filing party. Pleadings may be signed by a party’s attorney.

(k) All attachments shall be Bates-stamped or otherwise numbered sequentially. Parties shall cite to Bates-stamped page numbers in their pleadings.

(l) Pleadings shall be served on all parties to the proceeding in accordance with § 1.734 and shall include a certificate of service.

(m) Each pleading or other submission must contain a written verification that the signatory has read the submission and, to the best of his or her knowledge, information and belief formed after reasonable inquiry, it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification or reversal of existing law; and that it is not interposed for any improper purpose,

such as to harass, cause unnecessary delay, or needlessly increase the cost of the proceeding. If any pleading or other submission is signed in violation of this provision, the Commission may upon motion or upon its own initiative impose appropriate sanctions.

(n) Parties may petition the staff, pursuant to § 1.3, for a waiver of any of the rules governing formal complaints. Such waiver may be granted for good cause shown.

(o) A complaint may, on request of the filing party, be dismissed without prejudice as a matter of right prior to the adoption date of any final action taken by the Commission with respect to the complaint. A request for the return of an initiating document will be regarded as a request for dismissal.

(p) Amendments or supplements to complaints to add new claims or requests for relief are prohibited.

(q) Failure to prosecute a complaint will be cause for dismissal.

(r) Any document purporting to be a formal complaint which does not state a cause of action under the Communications Act, or a Commission regulation or order, will be dismissed. In such case, any amendment or supplement to such document will be considered a new filing which must be made within any applicable statutory limitations of actions.

(s) Any other pleading that does not conform with the requirements of the applicable rules may be deemed defective. In such case the Commission may strike the pleading or request that specified defects be corrected and that proper pleadings be filed with the Commission and served on all parties within a prescribed time as a condition to being made a part of the record in the proceeding.

(t) Pleadings shall be construed so as to do justice.

(u) Any party that fails to respond to official correspondence, a request for additional information, or an order or directive from the Commission may be subject to appropriate sanctions.

§ 1.722 Format and content of complaints.

A formal complaint shall contain:

(a) The name of each complainant and defendant;

(b) The occupation, address and telephone number of each complainant and, to the extent known, each defendant;

(c) The name, address, telephone number, and email address of complainant's attorney, if represented by counsel;

(d) Citation to the section of the Communications Act or Commission regulation or order alleged to have been violated; each such alleged violation shall be stated in a separate count;

(e) Legal analysis relevant to the claims and arguments set forth therein;

(f) The relief sought, including recovery of damages and the amount of damages claimed, if known;

(g) 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. In disputes between businesses, associations, or other organizations, the certification shall include a statement that the complainant has engaged or attempted to engage in executive-level discussions concerning the possibility of settlement. Executive-level discussions are discussions among representatives of the parties who have sufficient authority to make binding decisions on behalf of the entity they represent regarding the subject matter of the discussions. Such certification shall include a statement that, prior to the filing of the complaint, the complainant notified each defendant in writing of the allegations that form the basis of the complaint and invited a response within a reasonable period of time. A refusal by a defendant to engage in discussions contemplated by this rule may constitute an unreasonable practice under the Act. The certification shall also include a brief summary of all additional steps taken to resolve the dispute prior to the filing of the formal complaint;

(h) A statement explaining whether a separate action has been filed with the Commission, any court, or other government agency that is based on the same claim or same set of facts, in whole or in part, or whether the complaint seeks prospective relief identical to the relief proposed or at issue in a notice-and-comment rulemaking proceeding that is concurrently before the Commission;

(i) An information designation containing:

(1) The name and, if known, the address and telephone number of each individual likely to have information relevant to the proceeding, along with the subjects of that information, excluding individuals otherwise identified in the complaint or exhibits thereto, and individuals employed by another party; and

(2) A copy—or a description by category and location—of all relevant documents, electronically stored information, and tangible things that the disclosing party has in its possession, custody, or control, excluding documents submitted with the complaint.

(j) A completed Formal Complaint Intake Form;

(k) 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 § 1.1106 and the complainant's 10-digit FCC Registration Number, as required by part 1, subpart W. Submission of a complaint without the FCC Registration Number will result in dismissal of the complaint.

§ 1.723 Damages.

(a) If a complainant in a formal complaint proceeding under 47 U.S.C. §§ 208, 255, 716, or 718 wishes to recover damages, the complaint must contain a clear and unequivocal request for damages.

(b) In all cases in which recovery of damages is sought, the complaint must include 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 prove the amount of such damages; or

(2) If any information not in the possession of the complainant is necessary to develop a detailed computation of damages, an explanation of:

(i) Why such information is unavailable to the complaining party;

(ii) The factual basis the complainant has for believing that such evidence of damages exists; and

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

(c) 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 bifurcate the case and order that the initial proceeding will determine only liability and prospective relief, and that a separate, subsequent proceeding initiated in accordance with paragraph (d) of this section will determine damages. Any party may request bifurcation of damages in its initial pleading or by motion.

(d) 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 within sixty days after public notice (as defined in § 1.4(b) of this chapter) of a decision that contains a finding of liability on the merits of the original complaint. Supplemental complaints filed pursuant to this section need not comply with the requirements in §§ 1.721(c) or 1.722(d), (g), (h), (j), and (k). The supplemental complaint shall be deemed, for statutory limitations purposes, to relate back to the date of the original complaint.

(1) 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.

(2) The Commission may, in its discretion, end adjudication of damages by adopting a damages computation method or formula. In such cases, 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 30 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.

(e) In any proceeding to which no statutory deadline applies, the Commission may, in its discretion, suspend ongoing damages proceedings to provide the parties with time to pursue settlement negotiations

or mediation under § 1.737.

§ 1.724 Complaints governed by section 208(b)(1).

(a) Any party that intends to file a complaint subject to the 5-month deadline in 47 U.S.C. § 208(b)(1) must comply with the pre-complaint procedures below. The Enforcement Bureau's Market Disputes Resolution Division will not process complaints subject to the 5-month deadline unless the filer complies with these procedures.

(b) A party seeking to file a complaint subject to 47 U.S.C. § 208(b)(1) shall notify the Chief of the Market Disputes Resolution Division in writing of its intent to file the complaint, and provide a copy of the letter sent to the defendant pursuant to § 1.722(f). Commission staff will convene a conference with both parties as soon as practicable. During that conference, the staff may discuss, among other things:

(1) Scheduling in the case;

(2) Narrowing factual and legal issues in dispute;

(3) Information exchange and discovery necessary to adjudicate the dispute;

(4) Entry of a protective order governing confidential material; and

(5) Preparation for and scheduling a mandatory settlement negotiation session at the Commission.

(c) Staff will endeavor to complete the pre-complaint process within 20 days, unless the parties request further time for settlement negotiations. Staff may direct the parties to exchange relevant information during the pre-complaint period.

§ 1.725 Joinder of complainants and causes of action.

(a) Two or more complainants may join in one complaint if their respective causes of action are against the same defendant and concern substantially the same facts and alleged violation of the Communications Act or Commission regulation or order.

(b) Two or more grounds of complaint involving substantially the same facts may be included in one complaint, but should be separately stated and numbered.

§ 1.726 Answers.

(a) Any defendant upon which a copy of a formal complaint is served shall answer such complaint in the manner prescribed under this section within 30 calendar days of service of the formal complaint by the complainant, unless otherwise directed by the Commission.

(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 prohibited unless made in good faith and accompanied by a declaration or 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.

(c) The answer shall include legal analysis relevant to the claims and arguments set forth therein.

(d) Averments in a complaint or supplemental complaint filed pursuant to § 1.723(d) are deemed to be admitted when not denied in the answer.

(e) Affirmative defenses to allegations in the complaint shall be specifically captioned as such and presented separately from any denials made in accordance with paragraph (b) of this section.

(f) The answer shall include an information designation containing:

(1) The name and, if known, the address and telephone number of each individual likely to have information relevant to the proceeding, along with the subjects of that information, excluding individuals otherwise identified in the complaint, answer, or exhibits thereto, and individuals employed by another party; and

(2) A copy—or a description by category and location—of all relevant documents, electronically stored information, and tangible things that the disclosing party has in its possession, custody, or control, excluding documents submitted with the complaint or answer.

(g) Failure to file an answer may be deemed an admission of the material facts alleged in the complaint. Any defendant that fails to file and serve an answer within the time and in the manner prescribed by these rules may be deemed in default and an order may be entered against such defendant in accordance with the allegations contained in the complaint.

§ 1.727 Cross-complaints and counterclaims.

Cross-complaints seeking any relief within the jurisdiction of the Commission against any party (complainant or defendant) to that proceeding are prohibited. Any claim that might otherwise meet the requirements of a cross-complaint may be filed as a separate complaint in accordance with §§ 1.720 through 1.738. For purposes of this subpart, the term "cross-complaint" shall include counterclaims.

§ 1.728 Replies.

(a) A complainant shall file and serve a reply within 10 calendar days of service of the answer, unless otherwise directed by the Commission. The reply shall contain statements of relevant, material facts and legal arguments that respond to the factual allegations and legal arguments made by the defendant. Other allegations or arguments will not be considered by the Commission.

(b) Failure to reply will not be deemed an admission of any allegations contained in the responsive pleading, except with respect to any affirmative defense set forth therein. Failure to reply to an affirmative defense shall be deemed an admission of such affirmative defense and of any facts supporting such affirmative defense that are not specifically contradicted in the complaint.

(c) The reply shall include legal analysis relevant to the claims and arguments set forth therein.

(d) The reply shall include an information designation containing:

(1) The name and, if known, the address and telephone number of each individual likely to have information relevant to the proceeding and addressed in the reply, along with the subjects of that information, excluding individuals otherwise identified in the complaint, answer, reply, or exhibits thereto, and individuals employed by another party; and

(2) A copy—or a description by category and location—of all relevant documents, electronically stored information, and tangible things that the disclosing party has in its possession, custody, or control that are addressed in the reply, excluding documents submitted with the complaint or answer.

§ 1.729 Motions.

(a) A request for a Commission order shall be by written motion, stating with particularity the grounds and authority therefor, including any supporting legal analysis, and setting forth the relief sought.

(b) Motions to compel discovery must contain a certification by the moving party that a good faith attempt to resolve the dispute was made prior to filing the motion.

(c) Oppositions to motions shall be filed and served within 5 business days after the motion is served. Oppositions shall be limited to the specific issues and allegations contained in the motion; when a motion is incorporated in an answer to a complaint, the opposition to such motion shall not address any issues presented in the answer that are not also specifically raised in the motion. Failure to oppose any motion may constitute grounds for granting the motion.

(d) No reply may be filed to an opposition to a motion, except under direction of Commission staff.

(e) Motions seeking an order that the allegations in the complaint be made more definite and certain are prohibited.

§ 1.730 Discovery.

(a) A complainant may file with the Commission and serve on a defendant, concurrently with its complaint, up to 10 written interrogatories. A defendant may file with the Commission and serve on a complainant, concurrently with its answer, up to 10 written interrogatories. A complainant may file with the Commission and serve on a defendant, concurrently with its reply, up to five additional written interrogatories. Subparts of any interrogatory will be counted as separate interrogatories for purposes of compliance with this limit. Interrogatories filed and served pursuant to this procedure may be used to seek discovery of any non-privileged matter that is relevant to the material facts in dispute in the pending proceeding. This procedure may not be employed for the purpose of delay, harassment, or obtaining information that is beyond the scope of permissible inquiry related to the material facts in dispute in the proceeding.

(b) Interrogatories filed and served pursuant to paragraph (a) of this section shall contain an explanation of why the information sought in each interrogatory is both necessary to the resolution of the dispute and not available from any other source.

(c) Unless otherwise directed by the Commission, within seven calendar days, a responding party shall file with the Commission and serve on the propounding party any opposition and objections to interrogatories. The grounds for objecting to an interrogatory must be stated with specificity. Unless otherwise directed by the Commission, any interrogatories to which no opposition or objection is raised shall be answered within 20 calendar days.

(d) Commission staff shall rule in writing on the scope of, and schedule for answering, any disputed interrogatories based upon the justification for the interrogatories properly filed and served pursuant to paragraph (a) of this section, and any objections or oppositions thereto, properly filed and served pursuant to paragraph (c) of this section.

(e) Interrogatories shall be answered separately and fully in writing under oath or affirmation by the party served, or if such party is a public or private corporation or partnership or association, by any officer or agent who shall furnish such information as is available to the party. The answers shall be signed by the person making them, and the attorney who objects must sign any objections. The answers shall be filed with the Commission and served on the propounding party.

(f) The Commission, in its discretion, may allow additional discovery, including, but not limited to, document production and/or depositions, and it may modify the scope, means and scheduling of discovery in light of the needs of a particular case and the requirements of applicable statutory deadlines.

(g) The Commission may, in its discretion, require parties to provide documents to the Commission in a scanned or other electronic format that:

(1) Indexes the documents by useful identifying information; and

(2) Allows staff to annotate the index so as to make the format an efficient means of reviewing the documents.

(h) A propounding party asserting that a responding party has provided an inadequate or insufficient response to a discovery request may file a motion to compel within ten days of the service of such response, or as otherwise directed by Commission staff, pursuant to the requirements of § 1.729.

§ 1.731 Confidentiality of information produced or exchanged.

(a) Any information produced in the course of a formal complaint proceeding may be designated as confidential by either party to the proceeding or a third party if the party believes in good faith that the materials fall within an exemption to disclosure contained in the Freedom of Information Act (FOIA), 5 U.S.C. § 552(b)(1) through (9), and under § 0.459 of this chapter. Any party asserting confidentiality for such materials must:

(1) Clearly mark each page, or portion thereof, for which a confidential designation is claimed. If a confidential designation is challenged, the party claiming confidentiality shall have the burden of demonstrating, by a preponderance of the evidence, that the materials designated as confidential fall under the standards for nondisclosure enunciated in the FOIA.

(2) File with the Commission, using the Commission's Electronic Comment Filing System, a public version of the materials that redacts any confidential information and clearly marks each page of the redacted public version with a header stating "Public Version." The redacted document shall be machine-readable whenever technically possible. Where the document to be filed electronically contains metadata that is confidential or protected from disclosure by a legal privilege (including, for example, the attorney-client privilege), the filer may remove such metadata from the document before filing it electronically.

(3) File with the Secretary's Office an unredacted hard copy version of the materials that contains the confidential information and clearly marks each page of the unredacted confidential version with a header stating "Confidential Version." The unredacted version must be filed on the same day as the redacted version.

(4) Serve one hard copy of the filed unredacted materials and one hard copy of the filed redacted materials on the attorney of record for each party to the proceeding, or, where a party is not represented by an attorney, each party to the proceeding either by hand delivery, overnight delivery, or email, together with a proof of such service in accordance with the requirements of §§ 1.47(g) and 1.734(f).

(b) An attorney of record for a party or a party that receives unredacted materials marked as confidential may disclose such materials solely to the following persons, only for use in prosecuting or defending a party to the complaint action, and only to the extent necessary to assist in the prosecution or defense of the case:

(1) Support personnel for counsel of record representing the parties in the complaint action;

(2) Officers or employees of the receiving party who are directly involved in the prosecution or defense of the case;

(3) Consultants or expert witnesses retained by the parties; and

(4) Court reporters and stenographers in accordance with the terms and conditions of this section.

(c) The individuals identified above in paragraph (b) shall not disclose information designated as confidential to any person who is not authorized under this section to receive such information, and shall not use the information in any activity or function other than the prosecution or defense in the case before the Commission. Each such individual who is provided access to the information shall sign a declaration or affidavit stating that the individual has personally reviewed the Commission's rules and understands the limitations they impose on the signing party.

(d) Parties may make copies of materials marked confidential solely for use by the Commission or persons designated in paragraph (b) of this section. Each party shall maintain a log recording the number of copies made of all confidential material and the persons to whom the copies have been provided.

(e) The Commission may adopt a protective order with further restrictions as appropriate.

(f) Upon termination of a formal complaint proceeding, including all appeals and petitions, the parties shall ensure that all originals and reproductions of any confidential materials, along with the log recording persons who received copies of such materials, shall be provided to the producing party. In addition, upon final termination of the proceeding, any notes or other work product derived in whole or in part from the confidential materials of an opposing or third party shall be destroyed.

§ 1.732 Other required written submissions.

(a) The Commission may, in its discretion, require the parties to file briefs summarizing the facts and issues presented in the pleadings and other record evidence and presenting relevant legal authority and analysis. The Commission may limit the scope of any briefs to certain subjects or issues. Unless otherwise directed by the Commission, all briefs shall include all legal and factual claims and defenses previously set forth in the complaint, answer, or any other pleading submitted in the proceeding.

(b) Claims and defenses previously made but not reflected in the briefs will be deemed abandoned.

(c) The Commission may require the parties to submit any additional information it deems appropriate for a full, fair, and expeditious resolution of the proceeding.

§ 1.733 Status conference.

(a) In any complaint proceeding, the Commission may, in its discretion, direct the attorneys and/or the parties to appear before it for a status conference. A status conference may include discussion of:

(1) Simplification or narrowing of the issues;

(2) The necessity for or desirability of additional pleadings or evidentiary submissions;

(3) Obtaining admissions of fact or stipulations between the parties as to any or all of the matters in controversy;

(4) Settlement of all or some of the matters in controversy by agreement of the parties;

(5) Whether discovery is necessary and, if so, the scope, type, and schedule for such discovery;

(6) The schedule for the remainder of the case and the dates for any further status conferences; and

(7) Such other matters that may aid in the disposition of the complaint.

(b)(1) Parties shall meet and confer prior to the initial status conference to discuss:

(i) Settlement prospects;

(ii) Discovery;

(iii) Issues in dispute;

(iv) Schedules for pleadings;

(v) Joint statement of stipulated facts, disputed facts, and key legal issues; and

(2) Parties shall submit a joint statement of all proposals agreed to and disputes remaining as a result of such meeting to Commission staff on a date specified by the Commission.

(c) In addition to the initial status conference referenced in paragraph (a) of this section, any party may also request that a conference be held at any time after the complaint has been filed.

(d) During a status conference, the Commission staff may issue oral rulings pertaining to a variety of matters relevant to the conduct of a formal complaint proceeding including, *inter alia,* procedural matters, discovery, and the submission of briefs or other evidentiary materials.

(e) Status conferences will be scheduled by the Commission staff at such time and place as it may designate to be conducted in person or by telephone conference call.

(f) The failure of any attorney or party, following reasonable notice, to appear at a scheduled conference will be deemed a waiver by that party and will not preclude the Commission staff from conferring with those parties or counsel present.

§ 1.734 Fee remittance; electronic filing; copies; service; separate filings against multiple defendants.

(a) Complaints generally may not be brought against multiple defendants unless they are commonly owned or controlled, are alleged to have acted in concert, are alleged to be jointly liable to complainant, or the complaint concerns common questions of law or fact. Complaints may, however, be consolidated by the Commission for disposition.

(b) The complainant shall remit separately the correct fee either by check, wire transfer, or electronically, in accordance with part 1, subpart G (see § 1.1106 of this chapter) and, shall file an original copy of the complaint, using the Commission's Electronic Comment Filing System. If a complaint is addressed against multiple defendants, the complainant shall pay a separate fee for each additional defendant.

(c) The complainant shall serve the complaint by hand delivery on either the named defendant or one of the named defendant's registered agents for service of process on the same date that the complaint is filed with the Commission in accordance with the requirements of paragraph (b) of this section.

(d) Upon receipt of the complaint by the Commission, the Commission shall promptly send, by email, to each defendant named in the complaint, notice of the filing of the complaint. The Commission shall additionally send by email, to all parties, a schedule detailing the date the answer and any other applicable pleading will be due and the date, time, and location of the initial status conference.

(e) Parties shall provide hard copies of all submissions to staff in the Market Disputes Resolution Division of the Enforcement Bureau upon request.

(f) All subsequent pleadings and briefs filed in any formal complaint proceeding, as well as all letters, documents, or other written submissions, shall be filed using the Commission's Electronic Comment Filing System, excluding confidential material as set forth in § 1.731 of these rules. In addition, all pleadings and briefs filed in any formal complaint proceeding, as well as all letters, documents, or other written submissions, shall be served by the filing party on the attorney of record for each party to the proceeding, or, where a party is not represented by an attorney, each party to the proceeding either by hand delivery, overnight delivery, or email, together with a proof of such service in accordance with the requirements of § 1.47(g). Service is deemed effective as follows:

(1) Service by hand delivery that is delivered to the office of the recipient by 5:30 p.m., local time of the recipient, on a business day will be deemed served that day. Service by hand delivery that is delivered to the office of the recipient after 5:30 p.m., local time of the recipient, on a business day will be deemed served on the following business day;

(2) Service by overnight delivery will be deemed served the business day following the day it is accepted for overnight delivery by a reputable overnight delivery service; or

(3) Service by email that is fully transmitted to the office of the recipient by 5:30 p.m., local time of the recipient, on a business day will be deemed served that day. Service by email that is fully transmitted to the office of the recipient after 5:30 p.m., local time of the recipient, on a business day will be deemed served on the following business day.

(g) Supplemental complaints filed pursuant to § 1.723 shall conform to the requirements set forth in this section, except that the complainant need not submit a filing fee.

§ 1.735 Conduct of proceedings.

(a) The Commission may issue such orders and conduct its proceedings as will best conduce to the proper dispatch of business and the ends of justice.

(b) The Commission may decide each complaint upon the filings and information before it, may require one or more informal meetings with the parties to clarify the issues or to consider settlement of the dispute, or may, in its discretion, address any issues raised by the filings through evidentiary procedures, or by hearing.

(c) Before designation for hearing, the Commission shall notify, either orally or in writing, the parties to the proceeding of its intent to so designate, and the parties shall be given a period of 10 days to elect to resolve the dispute through mediation, or to proceed with an adjudicatory hearing. Such election shall be submitted in writing to the Commission.

(d) Unless otherwise directed by the Commission, or upon motion by the Enforcement Bureau Chief, the Enforcement Bureau Chief shall not be deemed to be a party to a proceeding designated for a hearing.

§ 1.736 Accelerated Docket Proceedings.

(a) With the exception of complaint proceedings under 47 U.S.C. §§ 255, 716, and 718, and part 14 of these rules, parties to a formal complaint proceeding against a common carrier, or a pole attachment complaint proceeding against a cable television system operator, a utility, or a telecommunications carrier, may request inclusion on the Accelerated Docket. Proceedings on the Accelerated Docket must be concluded within 60 days, and are therefore subject to shorter pleading deadlines and other modifications to the procedural rules that govern formal complaint proceedings.

(b) A complainant that seeks inclusion of a proceeding on the Accelerated Docket shall submit a request to the Chief of the Enforcement Bureau's Market Disputes Resolution Division, by phone and in writing prior to filing the complaint.

(c) Within five days of receiving service of any formal complaint against a common carrier, or a pole attachment complaint against a cable television system operator, a utility, or a telecommunications carrier, a defendant may submit a request seeking inclusion of the proceeding on the Accelerated Docket to the Chief of the Enforcement Bureau's Market Disputes Resolution Division. The defendant shall submit such request by phone and in writing, and contemporaneously transmit a copy of the written request to all parties to the proceeding.

(d) Commission staff has discretion to decide whether a complaint, or portion of a complaint, is suitable for inclusion on the Accelerated Docket. In determining whether to admit a proceeding onto the Accelerated Docket, staff may consider factors from the following, non-exclusive list:

(1) Whether it appears that the parties to the dispute have exhausted reasonable opportunities for settlement;

(2) Whether the expedited resolution of a particular dispute or category of disputes appears likely to advance competition in the telecommunications market;

(3) Whether the issues in the proceeding appear suited for decision under the constraints of the Accelerated Docket. This factor may entail, *inter alia,* examination of the number of distinct issues raised

in a proceeding, the likely complexity of the necessary discovery, and whether either party has requested bifurcation of any damages claims for decision in a separate proceeding (see § 1.723(c));

(4) Whether the complainant states a claim for violation of the Act, or Commission rule or order that falls within the Commission's jurisdiction;

(5) Whether it appears that inclusion of a proceeding on the Accelerated Docket would be unfair to one party because of an overwhelming disparity in the parties' resources; and

(6) Such other factors as the Commission staff, in its discretion, may deem appropriate and conducive to the prompt and fair adjudication of complaint proceedings.

(e) In appropriate cases, Commission staff may require that the parties participate in pre-filing settlement negotiations or mediation under § 1.737.

(f) If the parties do not resolve their dispute and the matter is accepted for handling on the Accelerated Docket, staff will establish the schedule and process for the proceeding.

(g) If it appears at any time that a proceeding on the Accelerated Docket is no longer appropriate for such treatment, Commission staff may remove the matter from the Accelerated Docket either on its own motion or at the request of any party.

(h) In Accelerated Docket proceedings, the Commission may conduct a minitrial, or hearing-type proceeding, as an alternative to deciding a case on a written record. Minitrials shall take place no later than between 40 and 45 days after the filing of the complaint. A Commission Administrative Law Judge ("ALJ") or staff will preside at the minitrial.

(i) Applications for review of staff decisions issued on delegated authority in Accelerated Docket proceedings shall comply with the filing and service requirements in §1.115(e)(4). In Accelerated Docket proceedings which raise issues that may not be decided on delegated authority (see 47 U.S.C. § 155(c)(1); 47 C.F.R. § 0.331(c)), the staff decision will be a recommended decision subject to adoption or modification by the Commission. Any party to the proceeding that seeks modification of the recommended decision shall do so by filing comments challenging the decision within 15 days of its release. Opposition comments, shall be filed within 15 days of the comments challenging the decision; reply comments shall may be filed 10 days thereafter and shall be limited to issues raised in the opposition comments.

(j) If no party files comments challenging the recommended decision, the Commission will issue its decision adopting or modifying the recommended decision within 45 days of its release. If parties to the proceeding file comments to the recommended decision, the Commission will issue its decision adopting or modifying the recommended decision within 30 days of the filing of the final comments.

§ 1.737 Mediation.

(a) The Commission encourages parties to attempt to settle or narrow their disputes. To that end, staff in the Enforcement Bureau's Market Disputes Resolution Division are available to conduct mediations. Staff will determine whether a matter is appropriate for mediation. Participation in mediation is generally voluntary, but may be required as a condition for including a matter on the Accelerated Docket. Any party requesting mediation must verify that it has attempted to contact all other parties to determine whether they are amenable to mediation, and shall state the response of each party, if any.

(b) Parties may request mediation of a dispute before the filing of a complaint. After a complaint has been filed, parties may request mediation at any time prior to the adoption date of any final action taken by the Commission with respect to the complaint.

(c) Parties may request mediation by (i) calling the Chief of the Enforcement Bureau's Market Disputes Resolution Division; (ii) submitting a written request in a letter addressed to the Chief of the Market Disputes Resolution Division; or (iii) including a mediation request in any pleading in a formal complaint proceeding, or an informal complaint proceeding under § 1.717 of these rules.

(d) Staff will schedule the mediation in consultation with the parties. Staff may request written statements and other information from the parties to assist in the mediation.

(e) In any proceeding to which no statutory deadline applies, staff may, in its discretion, hold a case in abeyance pending mediation.

(f) The parties and Commission staff shall keep confidential all written and oral communications prepared or made for purposes of the mediation, including mediation submissions, offers of compromise, and staff and party comments made during the course of the mediation (Mediation Communications). Neither staff nor the parties may use, disclose or seek to disclose Mediation Communications in any proceeding before the Commission (including an arbitration or a formal complaint proceeding involving the instant dispute) or before any other tribunal, unless compelled to do so by law. Documents and information that are otherwise discoverable do not become Mediation Communications merely because they are disclosed or discussed during the mediation. Unless otherwise directed by Commission staff, the existence of the mediation will not be treated as confidential. A party may request that the existence of the mediation be treated as confidential in a case where this fact has not previously been publicly disclosed, and staff may grant such a request for good cause shown.

(g) Any party or Commission staff may terminate a mediation by notifying other participants of their decision to terminate. Staff shall promptly confirm in writing that the mediation has ended. The confidentiality rules in paragraph (f) shall continue to apply to any Mediation Communications. Further, unless otherwise directed, any staff ruling requiring that the existence of the mediation be treated as confidential will continue to apply after the mediation has ended.

(h) For disputes arising under 47 U.S.C. §§ 255, 716, and 718, and the advanced communications services and equipment rules, parties shall submit the Request for Dispute Assistance in accordance with § 14.32 of the rules.

§ 1.738 Complaints filed pursuant to 47 U.S.C. § 271(d)(6)(B).

(a) Where a complaint is filed pursuant to 47 U.S.C. § 271(d)(6)(B), parties shall indicate whether they are willing to waive the 90 day resolution deadline contained in 47 U.S.C. § 271(d)(6)(B) in the following manner:

(1) The complainant shall so indicate in both the complaint itself and in the Formal Complaint Intake Form, and the defendant shall so indicate in its answer; or

(2) The parties shall indicate their agreement to waive the 90 day resolution deadline to the Commission staff at the initial status conference, to be held in accordance with § 1.733 of the rules.

(b) Requests for waiver of the 90 day resolution deadline for complaints filed pursuant to 47 U.S.C. § 271(d)(6)(B) will not be entertained by the Commission staff subsequent to the initial status conference, absent a showing by the complainant and defendant that such waiver is in the public interest.

§ 1.739 Primary Jurisdiction Referrals.

(a) Any party to a case involving claims under the Act that has been referred to the Commission by a court pursuant to the primary jurisdiction doctrine must contact the Market Disputes Resolution Division of the Enforcement Bureau for guidance before filing any pleadings or otherwise proceeding before the Commission.

(b) Based upon an assessment of the procedural history and the nature of the issues involved, staff of the Market Disputes Resolution Division will determine the procedural means by which the Commission will handle the primary jurisdiction referral.

(c) Failure to contact the Market Disputes Resolution Division prior to filing any pleadings or otherwise proceeding before the Commission, or failure to abide by the Division's determinations regarding the referral, may result in dismissal.

POLE ATTACHMENTS

§ 1.1401 Purpose.

The rules and regulations contained in subpart J of this part provide complaint and enforcement procedures to ensure that telecommunications carriers and cable system operators have nondiscriminatory access to utility poles, ducts, conduits, and rights-of-way on rates, terms, and conditions that are just and reasonable. They also provide complaint and enforcement procedures for incumbent local exchange carriers (as defined in 47 U.S.C. § 251(h)) to ensure that the rates, terms, and conditions of their access to pole attachments are just and reasonable.

§ 1.1402 Definitions.

(a) The term *utility* means any person that is a local exchange carrier or an electric, gas, water, steam, or other public utility, and who owns or controls poles, ducts, conduits, or rights-of-way used, in whole or in part, for any wire communications. Such term does not include any railroad, any person that is cooperatively organized, or any person owned by the Federal Government or any State.

(b) The term *pole attachment* means any attachment by a cable television system or provider of telecommunications service to a pole, duct, conduit, or right-of-way owned or controlled by a utility.

(c) With respect to poles, the term *usable space* means the space on a utility pole above the minimum grade level which can be used for the attachment of wires, cables, and associated equipment, and which includes space occupied by the utility. With respect to conduit, the term *usable space* means capacity within a conduit system which is available, or which could, with reasonable effort and expense, be made available, for the purpose of installing wires, cable and associated equipment for telecommunications or cable services, and which includes capacity occupied by the utility.

(d) The term *complaint* means a filing by a cable television system operator, a cable television system association, a utility, an association of utilities, a telecommunications carrier, or an association of telecommunications carriers alleging that it has been denied access to a utility pole, duct, conduit, or right-of-way in violation of this subpart and/or that a rate, term, or condition for a pole attachment is not just and reasonable. It also means a filing by an incumbent local exchange carrier (as defined in 47 U.S.C. § 251(h)) or an association of incumbent local exchange carriers alleging that a rate, term, or condition for a pole attachment is not just and reasonable.

(e) The term *complainant* means a cable television system operator, a cable television system association, a utility, an association of utilities, a telecommunications carrier, an association of telecommunications carriers, an incumbent local exchange carrier (as defined in 47 U.S.C. § 251(h)) or an association of incumbent local exchange carriers who files a complaint.

(f) The term *defendant* means a cable television system operator, a utility, or a telecommunications carrier against whom a complaint is filed.

(g) The term *State* means any State, territory, or possession of the United States, the District of Columbia, or any political subdivision, agency, or instrumentality thereof.

(h) For purposes of this subpart, the term *telecommunications carrier* means any provider of telecommunications services, except that the term does not include aggregators of telecommunications services (as defined in 47 U.S.C. § 226) or incumbent local exchange carriers (as defined in 47 U.S.C. § 251(h)).

(i) The term *conduit* means a structure containing one or more ducts, usually placed in the ground, in which cables or wires may be installed.

(j) The term *conduit* system means a collection of one or more conduits together with their supporting infrastructure.

(k) The term *duct* means a single enclosed raceway for conductors, cable and/or wire.

(l) With respect to poles, the term *unusable space* means the space on a utility pole below the usable space, including the amount required to set the depth of the pole.

(m) The term *attaching entity* includes cable system operators, telecommunications carriers, incumbent and other local exchange carriers, utilities, governmental entities and other entities with a physical attachment to the pole, duct, conduit or right of way. It does not include governmental entities with only seasonal attachments to the pole.

(n) The term *inner-duct* means a duct-like raceway smaller than a duct that is inserted into a duct so that the duct may carry multiple wires or cables.

§ 1.1403 Duty to provide access; modifications; notice of removal, increase or modification; petition for temporary stay; and cable operator notice.

(a) A utility shall provide a cable television system or any telecommunications carrier with nondiscriminatory access to any pole, duct, conduit, or right-of-way owned or controlled by it. Notwithstanding this obligation, a utility may deny a cable television system or any telecommunications carrier access to its poles, ducts, conduits, or rights-of-way, on a non-discriminatory basis where there is insufficient capacity or for reasons of safety, reliability and generally applicable engineering purposes.

(b) Requests for access to a utility's poles, ducts, conduits or rights-of-way by a telecommunications carrier or cable operator must be in writing. If access is not granted within 45 days of the request for access, the utility must confirm the denial in writing by the 45th day. The utility's denial of access shall be specific, shall include all relevant evidence and information supporting its denial, and shall explain how such evidence and information relate to a denial of access for reasons of lack of capacity, safety, reliability or engineering standards.

(c) A utility shall provide a cable television system operator or telecommunications carrier no less than 60 days written notice prior to:

(1) Removal of facilities or termination of any service to those facilities, such removal or termination arising out of a rate, term or condition of the cable television system operator's or telecommunications carrier's pole attachment agreement;

(2) Any increase in pole attachment rates; or

(3) Any modification of facilities other than routine maintenance or modification in response to emergencies.

(d) A cable television system operator or telecommunications carrier may file a "Petition for Temporary Stay" of the action contained in a notice received pursuant to paragraph (c) of this section within 15 days of receipt of such notice. Such submission shall not be considered unless it includes, in concise terms, the relief sought, the reasons for such relief, including a showing of irreparable harm and likely cessation of cable television service or telecommunication service, a copy of the notice, and certification of service as required by § 1.1405(b). The named may file an answer within 7 days of the date the Petition for Temporary Stay was filed. No further filings under this section will be considered unless requested or authorized by the Commission and no extensions of time will be granted unless justified pursuant to § 1.46.

§ 1.1404 Pole Attachment Complaint Proceedings.

Pole attachment complaint proceedings shall be governed by the formal complaint rules in subpart E of this part, §§ 1.720–1.738, except as otherwise provided in this subpart J.

§ 1.1405 Complaint.

(a) The complaint shall be accompanied by a certification of service on the named defendant, and each of the Federal, State, and local governmental agencies that regulate any aspect of the services provided by the complainant or defendant.

(b) In a case where it is claimed that a rate, term, or condition is unjust or unreasonable, the complaint shall contain a statement that the State has not certified to the Commission that it regulates the rates, terms and conditions for pole attachments. The complaint shall include a statement that the utility is not owned by any railroad, any person who is cooperatively organized or any person owned by the Federal Government or any State.

(c) The complaint shall be accompanied by a copy of the pole attachment agreement, if any, between the cable system operator or telecommunications carrier and the utility. If there is no present pole attachment agreement, the complaint shall contain:

(1) A statement that the utility uses or controls poles, ducts, or conduits used or designated, in whole or in part, for wire communication; and

(2) A statement that the cable television system operator or telecommunications carrier currently has attachments on the poles, ducts, conduits, or rights-of-way.

(d) The complaint shall state with specificity the pole attachment rate, term or condition which is claimed to be unjust or unreasonable.

§ 1.1406 Dismissal of pole attachment complaints for lack of jurisdiction.

(a) The complaint shall be dismissed for lack of jurisdiction in any case where a suitable certificate has been filed by a State pursuant to paragraph (b) of this section. Such certificate shall be conclusive proof of lack of jurisdiction of this Commission. A complaint alleging a denial of access shall be dismissed for lack of jurisdiction in any case where the defendant or a State offers proof that the State is regulating such access matters. Such proof should include a citation to state laws and regulations governing access and establishing a procedure for resolving access complaints in a state forum. A complaint against a utility shall also be dismissed if the utility does not use or control poles, ducts, or conduits used or designated, in whole or in part, for wire communication or if the utility does not meet the criteria of § 1.1402(a) of this subpart.

(b) It will be rebuttably presumed that the state is not regulating pole attachments if the Commission does not receive certification from a state that:

(1) It regulates rates, terms and conditions for pole attachments;

(2) In so regulating such rates, terms and conditions, the state has the authority to consider and does consider the interests of the subscribers of cable television services as well as the interests of the consumers of the utility services; and

(3) It has issued and made effective rules and regulations implementing the state's regulatory authority over pole attachments (including a specific methodology for such regulation which has been made publicly available in the state).

(c) Upon receipt of such certification, the Commission shall give public notice. In addition, the Commission shall compile and publish from time to time, a listing of states which have provided certification.

(d) Upon receipt of such certification, the Commission shall forward any pending case thereby affected to the state regulatory authority, shall so notify the parties involved and shall give public notice thereof.

(e) Certification shall be by order of the state regulatory body or by a person having lawful delegated authority under provisions of state law to submit such certification. Said person shall provide in writing a statement that he or she has such authority and shall cite the law, regulation or other instrument conferring such authority.

(f) Notwithstanding any such certification, jurisdiction will revert to this Commission with respect to any individual matter, unless the state takes final action on a complaint regarding such matter:

(1) Within 180 days after the complaint is filed with the state, or

(2) Within the applicable periods prescribed for such final action in such rules and regulations of the state, if the prescribed period does not extend beyond 360 days after the filing of such complaint.

§ 1.1407 Commission consideration of the complaint.

(a) The complainant shall have the burden of establishing a *prima facie* case that the rate, term, or condition is not just and reasonable or that the denial of access violates 47 U.S.C. § 224(f). If, however, a utility argues that the proposed rate is lower than its incremental costs, the utility has the burden of

establishing that such rate is below the statutory minimum just and reasonable rate. In a case involving a denial of access, the utility shall have the burden of proving that the denial was lawful, once a *prima facie* case is established by the complainant.

(b) The Commission shall determine whether the rate, term or condition complained of is just and reasonable. For the purposes of this paragraph, a rate is just and reasonable if it assures a utility the recovery of not less than the additional costs of providing pole attachments, nor more than an amount determined by multiplying the percentage of the total usable space, or the percentage of the total duct or conduit capacity, which is occupied by the pole attachment by the sum of the operating expenses and actual capital costs of the utility attributable to the entire pole, duct, conduit, or right-of-way.

(c) The Commission shall deny the complaint if it determines that the complainant has not established a *prima facie* case, or that the rate, term or condition is just and reasonable, or that the denial of access was lawful.

(d) The Commission will apply the following formulas for determining a maximum just and reasonable rate:

(1) The following formula shall apply to attachments to poles by cable operators providing cable services. This formula shall also apply to attachments to poles by any telecommunications carrier (to the extent such carrier is not a party to a pole attachment agreement) or cable operator providing telecommunications services until February 8, 2001:

$$\frac{Maximum}{Rate} = Space\ Factor \times \frac{Net\ \text{Cost of}}{a\ \text{Bare Pole}} \times \frac{Carrying}{Charge\ \text{Rate}}$$

View or download PDF

$$\frac{Where}{Space\ Factor} = \frac{\text{Space Occupied by Attachment}}{Total\ \text{Usable Space}}$$

View or download PDF

(2) With respect to attachments to poles by any telecommunications carrier or cable operator providing telecommunications services, the maximum just and reasonable rate shall be the higher of the rate yielded by paragraphs (d)(2)(i) or (d)(2)(ii) of this section.

(i) The following formula applies to the extent that it yields a rate higher than that yielded by the applicable formula in paragraph (d)(2)(ii) of this section:

Rate = Space Factor × Cost

Where Cost

in Service Areas where the number of Attaching Entities is 5 = 0.66 × (Net Cost of a Bare Pole x Carrying Charge Rate)

in Service Areas where the number of Attaching Entities is 4 = 0.56 × (Net Cost of a Bare Pole x Carrying Charge Rate)

in Service Areas where the number of Attaching Entities is 3 = 0.44 × (Net Cost of a Bare Pole x Carrying Charge Rate)

in Service Areas where the number of Attaching Entities is 2 = 0.31 × (Net Cost of a Bare Pole x Carrying Charge Rate)

in Service Areas where the number of Attaching Entities is not a whole number = N × (Net Cost of a Bare Pole × Carrying Charge Rate), where N is interpolated from the cost allocator associated with the nearest whole numbers above and below the number of Attaching Entities.

$$\text{Where Space Factor} = \left[\frac{\left(\frac{\text{Space}}{\text{Occupied}}\right) + \left(\frac{2}{3} \times \frac{\text{Unusable Space}}{\text{No. of Attaching Entities}}\right)}{\text{Pole Height}}\right]$$

View or download PDF

(ii) The following formula applies to the extent that it yields a rate higher than that yielded by the applicable formula in paragraph (d)(2)(i) of this section:

$$\text{Rate} = \text{Space Factor} \times \text{Net Cost of a Bare Pole} \times \left[\frac{\text{Maintenance and Administrative}}{\text{Carrying Charge Rate}}\right]$$

$$\text{Where Space Factor} = \left[\frac{\left(\frac{\text{Space}}{\text{Occupied}}\right) + \left(\frac{2}{3} \times \frac{\text{Unusable Space}}{\text{No. of Attaching Entities}}\right)}{\text{Pole Height}}\right]$$

View or download PDF

(3) The following formula shall apply to attachments to conduit by cable operators and telecommunications carriers:

$$\frac{\textit{Maximum}}{\textit{Rate} \text{ per}} = \underbrace{\left[\frac{1}{\textit{Number} \text{ of Ducts}} \times \frac{1 \text{ Duct}}{\textit{No.} \text{ of Inner Ducts}}\right]}_{\text{(Percentage of Conduit Capacity)}} \times \underbrace{\left[\frac{\textit{No.} \text{ of}}{\text{Ducts}} \times \frac{\textit{Net} \text{ Conduit Investment}}{\text{System Duct Length (ft./m.)}}\right]}_{\text{(Net Linear Cost of a Conduit)}} \times \frac{\text{Carryi}}{\text{Charg}}$$
$$\textit{Linear} \text{ ft./m.} \qquad \qquad \qquad \qquad \qquad \qquad \qquad \qquad \qquad \qquad \qquad \qquad \qquad \qquad \qquad \qquad \text{Rate}$$

View or download PDF

simplified as:

$$\frac{\textit{Maximum Rate}}{\text{Per } \textit{Linear} \text{ ft./m.}} = \frac{1 \text{ Duct}}{\textit{No.} \text{ of Inner Ducts}} \times \frac{\textit{Net} \text{ Conduit Investment}}{\text{System Duct Length (ft./m.)}} \times \frac{\text{Carrying}}{\text{Charge}} \frac{}{\text{Rate}}$$

View or download PDF

If no inner-duct is installed the fraction, "1 Duct divided by the No. of Inner-Ducts" is presumed to be ½.

§ 1.1408 Remedies.

(a) If the Commission determines that the rate, term, or condition complained of is not just and reasonable, it may prescribe a just and reasonable rate, term, or condition and may:

(1) Terminate the unjust and/or unreasonable rate, term, or condition;

(2) Substitute in the pole attachment agreement the just and reasonable rate, term, or condition established by the Commission; and/or

(3) Order a refund, or payment, if appropriate. The refund or payment will normally be the difference between the amount paid under the unjust and/or unreasonable rate, term, or condition and the amount that would have been paid under the rate, term, or condition established by the Commission, plus interest, consistent with the applicable statute of limitations.

(b) If the Commission determines that access to a pole, duct, conduit, or right-of-way has been unlawfully denied or delayed, it may order that access be permitted within a specified time frame and in accordance with specified rates, terms, and conditions.

(c) The Commission may, in its discretion, end adjudication of a refund or payment with a determination of the sufficiency of a refund or payment computation method or formula. In such cases, the parties shall negotiate in good faith to reach an agreement on the exact amount of a refund or payment pursuant to the Commission-mandated method or formula. Within thirty days of the release date of the refund or payment order, parties shall submit jointly to the Commission either:

(1) A statement detailing the parties' agreement as to the amount of a refund or payment;

(2) 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

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

§ 1.1409 Imputation of rates; modification costs.

(a) A utility that engages in the provision of telecommunications services or cable services shall impute to its costs of providing such services (and charge any affiliate, subsidiary, or associate company engaged in the provision of such services) an equal amount to the pole attachment rate for which such company would be liable under this section.

(b) The costs of modifying a facility shall be borne by all parties that obtain access to the facility as a result of the modification and by all parties that directly benefit from the modification. Each party described in the preceding sentence shall share proportionately in the cost of the modification. A party with a preexisting attachment to the modified facility shall be deemed to directly benefit from a modification if, after receiving notification of such modification as provided in subpart J of this part, it adds to or modifies its attachment. Notwithstanding the foregoing, a party with a preexisting attachment to a pole, conduit, duct or right-of-way shall not be required to bear any of the costs of rearranging or replacing its attachment if such rearrangement or replacement is necessitated solely as a result of an

additional attachment or the modification of an existing attachment sought by another party. If a party makes an attachment to the facility after the completion of the modification, such party shall share proportionately in the cost of the modification if such modification rendered possible the added attachment.

§ 1.1410 Allocation of Unusable Space Costs.

(a) With respect to the formula referenced in § 1.1407(d)(2), a utility shall apportion the cost of providing unusable space on a pole so that such apportionment equals two-thirds of the costs of providing unusable space that would be allocated to such entity under an equal apportionment of such costs among all attaching entities.

(b) All attaching entities attached to the pole shall be counted for purposes of apportioning the cost of unusable space.

(c) Utilities may use the following rebuttable presumptive averages when calculating the number of attaching entities with respect to the formula referenced in § 1.1407(d)(2). For non-urbanized service areas (under 50,000 population), a presumptive average number of attaching entities of three. For urbanized service areas (50,000 or higher population), a presumptive average number of attaching entities of five. If any part of the utility's service area within the state has a designation of urbanized (50,000 or higher population) by the Bureau of Census, United States Department of Commerce, then all of that service area shall be designated as urbanized for purposes of determining the presumptive average number of attaching entities.

(d) A utility may establish its own presumptive average number of attaching entities for its urbanized and non-urbanized service area as follows:

(1) Each utility shall, upon request, provide all attaching entities and all entities seeking access the methodology and information upon which the utilities presumptive average number of attachers is based.

(2) Each utility is required to exercise good faith in establishing and updating its presumptive average number of attachers.

(3) The presumptive average number of attachers may be challenged by an attaching entity by submitting information demonstrating why the utility's presumptive average is incorrect. The attaching entity should also submit what it believes should be the presumptive average and the methodology used. Where a complete inspection is impractical, a statistically sound survey may be submitted.

(4) Upon successful challenge of the existing presumptive average number of attachers, the resulting data determined shall be used by the utility as the presumptive number of attachers within the rate formula.

§ 1.1411 Use of presumptions in calculating the space factor.

With respect to the formulas referenced in § 1.1407(d)(1) and § 1.1407(d)(2), the space occupied by an attachment is presumed to be one foot. The amount of usable space is presumed to be 13.5 feet. The amount of unusable space is presumed to be 24 feet. The pole height is presumed to be 37.5 feet. These presumptions may be rebutted by either party.

§ 1.1412 Timeline for access to utility poles.

(a) The term "attachment" means any attachment by a cable television system or provider of telecommunications service to a pole owned or controlled by a utility.

(b) All time limits in this subsection are to be calculated according to § 1.4.

(c) *Survey.* A utility shall respond as described in § 1.1403(b) to a cable operator or telecommunications carrier within 45 days of receipt of a complete application to attach facilities to its utility poles (or within 60 days, in the case of larger orders as described in paragraph (g) of this section). This response may be a notification that the utility has completed a survey of poles for which access has been requested. A complete application is an application that provides the utility with the information necessary under its procedures to begin to survey the poles.

(d) *Estimate.* Where a request for access is not denied, a utility shall present to a cable operator or telecommunications carrier an estimate of charges to perform all necessary make-ready work within 14 days of providing the response required by § 1.1412(c), or in the case where a prospective attacher's contractor has performed a survey, within 14 days of receipt by the utility of such survey.

(1) A utility may withdraw an outstanding estimate of charges to perform make-ready work beginning 14 days after the estimate is presented.

(2) A cable operator or telecommunications carrier may accept a valid estimate and make payment any time after receipt of an estimate but before the estimate is withdrawn.

(e) *Make-ready.* Upon receipt of payment specified in paragraph (d)(2) of this section, a utility shall notify immediately and in writing all known entities with existing attachments that may be affected by the make-ready.

(1) For attachments in the communications space, the notice shall:

(i) Specify where and what make-ready will be performed.

(ii) Set a date for completion of make-ready that is no later than 60 days after notification is sent (or 105 days in the case of larger orders, as described in paragraph (g) of this section).

(iii) State that any entity with an existing attachment may modify the attachment consistent with the specified make-ready before the date set for completion.

(iv) State that the utility may assert its right to 15 additional days to complete make-ready.

(v) State that if make-ready is not completed by the completion date set by the utility (or, if the utility has asserted its 15-day right of control, 15 days later), the cable operator or telecommunications carrier requesting access may complete the specified make-ready.

(vi) State the name, telephone number, and e-mail address of a person to contact for more information about the make-ready procedure.

(2) For wireless attachments above the communications space, the notice shall:

(i) Specify where and what make-ready will be performed.

(ii) Set a date for completion of make-ready that is no later than 90 days after notification is sent (or 135 days in the case of larger orders, as described in paragraph (g) of this section).

(iii) State that any entity with an existing attachment may modify the attachment consistent with the specified make-ready before the date set for completion.

(iv) State that the utility may assert its right to 15 additional days to complete make-ready.

(v) State the name, telephone number, and e-mail address of a person to contact for more information about the make-ready procedure.

(f) For wireless attachments above the communications space, a utility shall ensure that make-ready is completed by the date set by the utility in paragraph (e)(2)(ii) of this section (or, if the utility has asserted its 15-day right of control, 15 days later).

(g) For the purposes of compliance with the time periods in this section:

(1) A utility shall apply the timeline described in paragraphs (c) through (e) of this section to all requests for pole attachment up to the lesser of 300 poles or 0.5 percent of the utility's poles in a state.

(2) A utility may add 15 days to the survey period described in paragraph (c) of this section to larger orders up to the lesser of 3000 poles or five percent of the utility's poles in a state.

(3) A utility may add 45 days to the make-ready periods described in paragraph (e) of this section to larger orders up to the lesser of 3000 poles or five percent of the utility's poles in a state.

(4) A utility shall negotiate in good faith the timing of all requests for pole attachment larger than the lesser of 3000 poles or five percent of the utility's poles in a state.

(5) A utility may treat multiple requests from a single cable operator or telecommunications carrier as one request when the requests are filed within 30 days of one another.

(h) A utility may deviate from the time limits specified in this section:

(1) Before offering an estimate of charges if the parties have no agreement specifying the rates, terms, and conditions of attachment.

(2) During performance of make-ready for good and sufficient cause that renders it infeasible for the utility to complete the make-ready work within the prescribed time frame. A utility that so deviates shall immediately notify, in writing, the cable operator or telecommunications carrier requesting attachment and other affected entities with existing attachments, and shall include the reason for and date and duration of the deviation. The utility shall deviate from the time limits specified in this section for a period no longer than necessary and shall resume make-ready performance without discrimination when it returns to routine operations.

(i) If a utility fails to respond as specified in paragraph (c) of this section, a cable operator or telecommunications carrier requesting attachment in the communications space may, as specified in § 1.1415, hire a contractor to complete a survey. If make-ready is not complete by the date specified in paragraph (e)(1)(ii) of this section, a cable operator or telecommunications carrier requesting attachment in the communications space may hire a contractor to complete the make-ready:

(1) Immediately, if the utility has failed to assert its right to perform remaining make-ready work by notifying the requesting attacher that it will do so; or

(2) After 15 days if the utility has asserted its right to perform make-ready by the date specified in paragraph (e)(1)(ii) of this section and has failed to complete make-ready.

§ 1.1413 Contractors for survey and make-ready.

(a) A utility shall make available and keep up-to-date a reasonably sufficient list of contractors it authorizes to perform surveys and make-ready in the communications space on its utility poles in cases where the utility has failed to meet deadlines specified in § 1.1412.

(b) If a cable operator or telecommunications carrier hires a contractor for purposes specified in § 1.1412, it shall choose from among a utility's list of authorized contractors.

(c) A cable operator or telecommunications carrier that hires a contractor for survey or make-ready work shall provide a utility with a reasonable opportunity for a utility representative to accompany and consult with the authorized contractor and the cable operator or telecommunications carrier.

(d) The consulting representative of an electric utility may make final determinations, on a nondiscriminatory basis, where there is insufficient capacity and for reasons of safety, reliability, and generally applicable engineering purposes.

§ 1.1414 Complaints by incumbent local exchange carriers.

Complaints by an incumbent local exchange carrier (as defined in 47 U.S.C. § 251(h)) or an association of incumbent local exchange carriers alleging that a rate, term, or condition for a pole attachment is not just and reasonable shall follow the same complaint procedures specified for other pole attachment complaints in this part, as relevant. In complaint proceedings where an incumbent local exchange carrier (or an association of incumbent local exchange carriers) claims that it is similarly situated to an attacher that is a telecommunications carrier (as defined in 47 U.S.C. § 224(a)(5)) or a cable television system for purposes of obtaining comparable rates, terms or conditions, the incumbent local exchange carrier shall bear the burden of demonstrating that it is similarly situated by reference to any relevant evidence, including pole attachment agreements.

*****

Part 14 of the Commission's rules is amended as follows:

PART 14: ACCESS TO ADVANCED COMMUNICATIONS SERVICES AND EQUIPMENT BY PEOPLE WITH DISABILITIES

*****

§ 14.38 Pleadings.

Formal complaint proceedings alleging a violation of 47 U.S.C. §§ 255, 716, and 718, and part 14 of these rules, shall be governed by the formal complaint rules in subpart E of part 1, §§ 1.720-1.738.

[Delete sections 14.39 – 14.52].