Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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

NOTICE OF PROPOSED RULEMAKING

Adopted: November 26, 1996 Released: November 27, 1996

Comment Date: January 6, 1997
Reply Comment Date: January 31, 1997

By the Commission:

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I. INTRODUCTION

1. In February 1996, Congress passed and the President signed the "Telecommunications Act of 1996" ("1996 Act").[1] We initiate this Notice of Proposed Rulemaking ("Complaint NPRM") to implement certain complaint provisions contained in the 1996 Act and to improve generally the speed and effectiveness of our formal complaint process. In furtherance of the 1996 Act's goals of establishing a "pro-competitive, de-regulatory national policy framework"[2] for the telecommunications industry and our goal under the Communications Act of 1934, as amended, of protecting consumers where the market fails to do so,[3] the 1996 Act prescribes deadlines ranging from 90 days to 5 months for the resolution of complaints against

[1] Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 to be codified at 47 U.S.C. §§ 151 et seq. (1996). The Communications Act of 1934, as amended, including the 1996 Act amendments, codified at 47 U.S.C. § 151 et seq., is referred to herein as the "Act."

[2] See S. Conf. Rep. No. 230, 104th Cong., 2nd Sess. 1 (1996) ("Joint Explanatory Statement").

[3] One of the purposes of the Act is to "make available ... to all the people of the United States ... a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges..." 47 U.S.C. § 151.

the Bell Operating Companies[4] and other telecommunications carriers that are subject to the requirements of the Communications Act of 1934, as amended by the 1996 Act.[5] The 1996 Act further directs the Commission to establish such procedures as are necessary for the review and resolution of such complaints within the statutory deadlines.[6]

2. We tentatively conclude that the pro-competitive goals and policies of the 1996 Act would be enhanced by applying the rules proposed in this Complaint NPRM to all formal complaints, not just those enumerated in the 1996 Act. Therefore, our goal in initiating this proceeding is to facilitate faster resolution of all formal complaints by eliminating or streamlining procedures and pleading requirements under our current rules.[7] Applying the same standard procedures to all formal complaints will facilitate the filing process and help ensure consistent and uniform application of Commission rules. At a minimum, the procedures that we ultimately adopt in this proceeding will facilitate the full and fair resolution of complaints filed under the new statutory complaint provisions within the deadlines established by Congress. We seek, however, to establish rules of practice and procedure which, by providing a forum for prompt resolution of complaints of unreasonable, discriminatory, or otherwise unlawful conduct by BOCs and other telecommunications carriers, will foster robust competition in all telecommunications markets. This proceeding is one of a series of interrelated rulemakings designed to implement the 1996 Act by promoting competition and reducing regulation in the telecommunications marketplace, while simultaneously advancing and preserving universal service for all Americans.[8]

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[4] See 47 U.S.C. § 153(4), which defines "Bell Operating Company."

[5] Specifically, 47 U.S.C. § 208(b)(1), 47 U.S.C. § 260(b), 47 U.S.C. § 271(d)(6)(B), and 47 U.S.C. § 275 (c) all contain complaint resolution deadlines. Each of these provisions is discussed in more detail below.

[6] See, e.g., 47 U.S.C. § 271(d)(6)(B) stating that the "Commission shall establish procedures for the review of complaints concerning failures by Bell operating companies to meet conditions required for approval under paragraph 3."

[7] Our current rules regarding procedures to be applied to formal complaints against common carriers are set forth in 47 C.F.R. §§ 1.720 - 1.735. This Complaint NPRM is intended to address solely formal complaint issues and does not address issues concerning our rules for processing informal complaints against common carriers, codified at 47 C.F.R. §§ 1.711 - 1.718.

[8] See, e.g., Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Report and Order, CC Docket No. 96-98, FCC 96-325 (rel. August 8, 1996), petition for review pending sub nom. and partial stay granted, Iowa Utilities Board et al v. FCC, No. 96-3221 and consolidated cases (8th Cir. Oct. 15, 1996) ("Local Competition Report and Order"); Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended; and Regulatory Treatment of LEC Provision of Interexchange Services Originating in the LEC's Local Exchange Area, Notice of Proposed Rulemaking, CC Docket No. 96-149, FCC 96-308 (rel. July 18, 1996) ("BOC In-Region NPRM"); Policy and Rules Concerning the Interstate, Interexchange Marketplace; Implementation of Section 254(g) of the Communications Act of 1934, as amended, Report and Order, CC Docket No. 96-61, FCC 96-331 (rel. August 7, 1996); Implementation of the Telecommunications Act of 1996; Telemessaging, Electronic Publishing, and Alarm Monitoring Services, Notice of Proposed Rulemaking, CC Docket No. 96-152, FCC 96-310 (rel. July 18, 1996) ("Section 260, 274, 275 NPRM"); and Implementation of Section

The proposals made and tentative conclusions reached in this Complaint NPRM should be reviewed in conjunction with the enforcement goals and policies addressed in those related rulemaking proceedings.

A. Background

3. The 1996 Act added and, in some cases, amended, key complaint provisions that, because of their resolution deadlines, necessitate substantial modification of our current rules and policies for processing formal complaints filed against common carriers pursuant to Section 208 of the Act. We begin our background discussion with a review of the statutory framework for Section 208 complaints and a brief overview of the specific complaint provisions contained in the 1996 Act.

1. Statutory Framework for Complaints Against Common Carriers

4. Sections 206 to 209 of the Act[9] provide the statutory framework for our current rules for resolving formal complaints filed against common carriers.[10] Section 206 of the Act establishes the liability of a carrier for damages sustained by any person or persons as a consequence of that carrier's violation of any provision of the Act. Section 207 of the Act permits any person claiming to be damaged by the actions of any common carrier either to make a complaint to the Commission or bring suit in federal district court for the recovery of such damages. Section 208(a) authorizes complaints by any person "complaining of anything done or omitted to be done by any common carrier" subject to the provisions of the Act.[11] Section 208(a) specifically states that "it shall be the duty of the Commission to investigate the matters complained of in such manner and by such means as it shall deem proper."[12] Section 209 of the

255 of the Telecommunications Act of 1996, Notice of Inquiry, WT Docket No. 96-198, FCC 96-382 (rel. Sept. 19,1996).

[9] 47 U.S.C. §§ 206 - 209.

[10] In addition, Section 415 of the Act generally prescribes a two-year statute of limitations on the recovery of damages or overcharges against a common carrier. Subject to limited exceptions, any complaint for recovery of damages must be filed within two years from the time the cause of action accrues. 47 U.S.C. § 415(b) - (c).

[11] Section 208 was derived from Section 13 of the original Interstate Commerce Act of 1887. See I. Sharfman, The Interstate Commerce Commission, Vol. I, 17-19, Vol. IV, 170, 230 (1931). This legislation grew out of the Granger movement's drive to give "to agriculture relief from discriminatory and excessive charges in the transportation and handling of produce." Felix Frankfurter, The Commerce Clause 83 (1936). The legislation was declaratory of and codified existing common law obligations of railroads as common carriers so that they could not exercise their powers arbitrarily. See American Trucking v. Atchison T&S F.R. Co., 387 U.S. 397, 406 (1967).

[12] 47 U.S.C. § 208(a).

Act specifies that if "the Commission shall determine that any party complainant is entitled to an award of damages under the provisions of this Act, the Commission shall make an order directing the carrier to pay to the complainant the sum to which he is entitled on or before a day named."[13]

5. In 1988, Congress added subsection 208(b) to require that a subset of Section 208 complaints, those filed with the Commission concerning the lawfulness of a common carrier's charges, practices, classifications or regulations, must be resolved by the Commission in a final, appealable order within 12 months from the date filed, or 15 months from the date filed if "the investigation raises questions of fact of ... extraordinary complexity."[14] We tentatively conclude that the provisions of the 1996 Act that specifically refer to complaint procedures do not in any way diminish the Commission's broad authority under Section 208. We seek comment on this tentative conclusion.

2. Overview of Complaint Provisions Added by the 1996 Act

6. Certain sections of the 1996 Act contain deadlines for resolution of complaints alleging violations under the sections. For example, Sections 208(b), 260, 271, and 275 each contain specific resolution deadlines.

7. Section 208. Section 208(b)(1) shortens the resolution deadline for a certain subset of formal complaints. Section 208(b)(1) now mandates that "the Commission shall, with respect to any investigation under [Section 208(b)] 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."[15] Congress further added subsection 208(b)(2), which requires the Commission to resolve any such investigation initiated prior to enactment of subsection 208(b)(2) within 12 months after the date of enactment.[16]

8. Section 260. The 1996 Act also added Section 260, which provides, inter alia, that:

> [t]he Commission shall establish procedures for the receipt and review of complaints concerning violations of subsection (a) or the regulations thereunder that result in material financial harm to a provider of

[13] 47 U.S.C. § 209. Under Section 207, any person "claiming to be damaged" by a carrier's violation of the Act has a choice of filing a complaint with the Commission or in federal district court, but not in both fora. 47 U.S.C. § 207.

[14] Federal Communications Commission Authorization Act of 1988, Pub. L. No. 100-594, 102 Stat. 3021 (Nov. 3, 1988) (1988 FCC Authorization Act).

[15] 47 U.S.C. § 208(b)(1).

[16] 47 U.S.C. § 208(b)(2).

> telemessaging service. Such procedures shall ensure that the Commission will make a final determination with respect to any such complaint within 120 days after receipt of the complaint. If the complaint contains an appropriate showing that the alleged violation occurred, the Commission shall, within 60 days after receipt of the complaint, order the local exchange carrier and any affiliates to cease engaging in such violation pending such final determination.[17]

9. Section 271. New Section 271(d)(6)(B) directs the Commission to "establish procedures for the review of complaints concerning failures by [BOCs] to meet conditions required for approval" under Section 271(d)(3) to provide in-region interLATA services.[18] Section 271(d)(6)(B) further provides that, "[u]nless the parties otherwise agree, the Commission shall act on such complaint within 90 days."[19]

10. Section 275. New Section 275(c) requires the Commission to "establish procedures for the receipt and review of complaints concerning violations of [Section 275(b)] or the regulations thereunder that result in material financial harm to a provider of alarm monitoring service."[20] Section 275(c) further provides that:

> [s]uch procedures shall ensure that the Commission will make a final determination with respect to any such complaint within 120 days after receipt of the complaint. If the complaint contains an appropriate showing that the alleged violation occurred, ... the Commission shall, within 60 days after receipt of the complaint, order the incumbent local exchange carrier ... and its affiliates to cease engaging in such violation pending such final determination.[21]

11. Many provisions of the 1996 Act reference complaint proceedings to be conducted by the Commission without mandating resolution deadlines.

12. Section 255. New Section 255 of the Act, for example, imposes, inter alia, an obligation on manufacturers of telecommunications equipment or customer premises equipment to ensure that the equipment is "designed, developed, and fabricated to be accessible to and usable

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[17] 47 U.S.C. § 260(b).

[18] 47 U.S.C. § 271(d)(6)(B).

[19] Id.

[20] 47 U.S.C. § 275(c).

[21] Id.

by individuals with disabilities, if readily achievable."[22] Similarly, Section 255 further requires any providers of telecommunications services to "ensure that the service is accessible to and usable by individuals with disabilities, if readily achievable."[23] The 1996 Act provides that "[t]he Commission shall have exclusive jurisdiction with respect to any complaint under this section."[24] Section 255 imposes no specific complaint resolution deadlines on the Commission. We note that the Commission recently released a Notice of Inquiry seeking comment on the implementation of Section 255. This NOI also seeks comment on enforcement issues.[25]

13. Section 274. New Section 274 of the Act contains no specific resolution deadline; rather, Section 274(e)(1) generally provides a private right of action to "any person claiming that an act or practice of any [BOC], affiliate, or separated affiliate constitutes a violation of [Section 274]."[26] Subsection 274(e)(1) provides that such person may file a complaint with the Commission or bring suit in federal district court as provided in Section 207 of the Act and that a "[BOC], affiliate, or separated affiliate" shall be liable for damages as provided in Section 206 of the Act.[27] Subsection 274(e)(2) permits an aggrieved person to apply to the Commission for a cease-and-desist order or to a U.S. District Court for an injunction or order compelling compliance with Section 274.[28]

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[22] 47 U.S.C. § 255(b). The term "disability" is defined in subsection 255(a) as having the "meaning given to it by section 3(2)(A) of the Americans with Disabilities Act of 1990 (42 U.S.C. 12102(2)(A))." 47 U.S.C. § 255(a)(1). "Readily achievable" is defined in subsection 255(a) as having the meaning given to it by section 301(9) of that Act (42 U.S.C. § 12181(9))." 47 U.S.C. § 255(a)(2).

[23] 47 U.S.C. § 255(c).

[24] 47 U.S.C. § 255(f). In limiting the remedies available under this Section, subsection 255(f) specifically excludes "any private right of action to enforce any requirement of the section or any regulation thereunder." Thus, a complaint filed with the Commission is the sole relief mechanism available to parties claiming a violation of Section 255.

[25] See Implementation of Section 255 of the Telecommunications Act of 1996, Notice of Inquiry, WT Docket No. 96-198, FCC 96-382 (Sept. 19,1996). See also Telecommunications Act Accessibility Guidelines for Customer Premises Equipment and Telecommunications Equipment, Notice, 61 Fed. Reg. 13813 (Architectural and Transportation Barriers Compliance Board, 1996).

[26] 47 U.S.C. § 274(e)(1).

[27] Id. This section further provides, however, that "damages may not be awarded for a violation that is discovered by a compliance review as required by subsection (b)(7) of this section and corrected within 90 days." 47 U.S.C. § 274(b)(8) provides that each separated affiliate or joint venture and the BOC shall have performed annually a compliance review that is conducted by an independent entity for the purpose of determining compliance during the preceding calendar year with any provision of Section 274.

[28] 47 U.S.C. § 274(e)(2).

14. We have already initiated rulemakings to implement the non-complaint provisions contained in the above-mentioned sections of the Act.[29] In commenting on the specific complaint processing provisions proposed in this Complaint NPRM, parties are encouraged to consider fully the proposals and comments in all of the previously released rulemakings that have been initiated to implement the 1996 Act.

B. Current Rules for Processing Formal Complaints Filed Against Common Carriers

15. The Commission's rules of practice and procedure for formal complaints against common carriers are codified in Sections 1.720 through 1.735 of our rules.[30] The Commission revised the rules in 1988[31] and most recently in 1993.[32] The changes in 1993 were initiated to further streamline and improve the complaint process, particularly in light of the 1988 amendment to Section 208 of the Act that imposed a 12 or 15-month deadline on the resolution of certain types of complaints.[33]

16. The Act affords private parties the option to pursue damages claims against common carriers before the Commission or in federal district court. Formal complaint proceedings before the Commission therefore have been treated similarly to federal court litigation but are generally decided on the basis of written pleadings and evidence rather than through trial-type procedures.

17. Under our current rules, the Commission serves any formal complaint containing sufficient allegations that a defendant carrier has violated or is violating a provision of the Act or a Commission rule or order on the defendant common carrier.[34] The defendant must either satisfy the complaint or file an answer within 30 days or such other time as directed by the staff.[35] The complainant may file a reply to affirmative defenses within 10 days after the answer

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[29] See supra note 8.

[30] See 47 C.F.R. §§ 1.720 - 1.735.

[31] Amendment of Rules Governing Procedures to be Followed Where Formal Complaints Are Filed Against Common Carriers, Report and Order, 3 FCC Rcd 1806 (1988).

[32] Amendment of Rules Governing Procedures to be Followed When Formal Complaints Are Filed Against Common Carriers, Report and Order, 8 FCC Rcd 2614 (1993).

[33] 1988 FCC Authorization Act, codified at 47 U.S.C. § 208(b)(1).

[34] 47 C.F.R. § 1.735(d).

[35] 47 C.F.R. § 1.724(a).

is served.[36] Throughout the formal complaint process, the parties to a complaint action may file motions requesting Commission orders addressing a wide variety of procedural and substantive issues. Generally, the parties may file oppositions to such motions within 10 days after the motion is served.[37]

18. Currently, both the complainant and defendant may engage in limited discovery under our rules.[38] Specifically, each party may address up to 30 single interrogatories, including subparts, seeking nonprivileged information relevant to the proceeding from the opposing party.[39] The parties may serve interrogatories within the period beginning with service of the complaint and ending 30 days after the date an answer is due.[40] Answers or objections to interrogatories are due within 30 days after service of the interrogatories, or the defendant may respond within 15 days after its answer to the complaint is filed, whichever date is later.[41] A motion to compel answers to interrogatories may be filed within 15 days from the date answers or objections were due.[42] The opposition to such motion is due 10 days after the motion to compel is filed.[43]

19. Other forms of discovery are available only if so ordered by the Commission.[44] Motions for additional discovery must be filed during the period beginning with the service of the complaint and ending 30 days after the answer to the complaint is filed or 15 days after responses to interrogatories are filed, whichever period is longer.[45] Oppositions to such motions are due 10 days after the motion is filed.[46] Documents produced through discovery may not be filed with the Commission unless so ordered.[47]

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[36] 47 C.F.R. § 1.726.

[37] 47 C.F.R. § 1.727.

[38] 47 C.F.R. §§ 1.729, 1.730.

[39] 47 C.F.R. § 1.729(a).

[40] Id.

[41] 47 C.F.R. § 1.729(b).

[42] 47 C.F.R. § 1.729(c).

[43] 47 C.F.R. § 1.727(e).

[44] 47 C.F.R. § 1.730(a).

[45] 47 C.F.R. § 1.730(c).

[46] 47 C.F.R. § 1.730(b).

[47] 47 C.F.R. § 1.730(d).

20. At any time, the Commission may require parties to file additional briefs addressing legal issues and summarizing the pleadings and other record evidence.[48] Parties may also voluntarily submit briefs in the absence of an order by the Commission that briefs be filed.[49] Reply briefs may be submitted within 20 days from the date initial briefs are due.[50] Briefs may be up to 50 pages if discovery is conducted and up to 35 pages if discovery is not conducted.[51] In addition, the Commission may call status conferences to narrow the issues, obtain stipulations of fact, assess the sufficiency of the record, plan discovery, pursue settlement, or conduct other discussions.[52]

II. PROPOSED AMENDMENTS TO RULES OF PRACTICE AND PROCEDURE

21. This proceeding focuses on rules and procedures necessary to implement the 1996 Act's complaint provisions and to expedite generally the resolution of formal complaints against common carriers. In some instances, our current rules permit parties to file pleadings that may be of limited value in reaching final resolution of the complaint and may prolong the resolution of important issues that directly affect competition in the marketplace. The new complaint provisions under the 1996 Act require considerably expedited complaint proceedings. The delays that occur under our current rules will be problematic for all carriers and, in the newly deregulated telecommunications market, small businesses and new entrants will be particularly vulnerable.[53] One of the main goals of this rulemaking is to implement requirements that encourage potential parties to resolve their differences prior to adjudication before the Commission. Encouraging parties to resolve their differences in advance will decrease the likelihood that the parties will need to file formal complaints. To the extent such settlement efforts fail or are otherwise impractical, the proposed rules are designed to ensure diligence by complainants and defendants in presenting their respective claims to the Commission.

22. We recognize the difficulty in crafting procedural rules that contemplate full resolution of what are likely to be complex legal and factual issues within 90 days or even 5 months. Many of our proposals are based, in part, on our examination of several models of

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[48] 47 C.F.R. § 1.732(a).

[49] Id.

[50] 47 C.F.R. § 1.732(d).

[51] 47 C.F.R. §§ 1.732(b), (c).

[52] 47 C.F.R. § 1.733.

[53] See Section 257 Proceeding to Identify and Eliminate Market Entry Barriers for Small Businesses, GN Docket No. 96-113, Notice of Inquiry, 11 FCC Rcd 6280 (rel. May 21, 1996). Some commenters in the Section 257 proceeding cite delay under our current rules as a potential barrier to entry and to effective enforcement. The revisions proposed herein are designed to expedite the process for all carriers, thereby eliminating the real and perceived barriers cited by the commenting parties in the Section 257 proceeding.

litigation efficiency, including the Federal Rules of Civil Procedure and the "rocket docket" procedures utilized in the U.S. District Court for the Eastern District of Virginia.[54] Our goal is to achieve a full and sufficient record upon which to render decisions within the stated deadlines while not adversely affecting the rights or interests of any party. With this purpose in mind, we propose to require or encourage complainants and defendants to engage in certain pre-filing activities, change service requirements, modify the form and content of initial pleadings, and shorten filing deadlines. In addition, we seek comment on whether we should eliminate certain pleading opportunities that may not be useful or necessary, and eliminate or modify the discovery process.

23. Generally, the proposed pleading requirements discussed in detail in the paragraphs that follow would require greater diligence by complainants and defendants in presenting and defending against claims of misconduct. Under these proposals, each complaint filed with the Commission must include: (1) a full recitation or statement of facts believed to be relevant, along with supporting affidavits and documentation, including agreements, offers, counter-offers, denials, or other relevant correspondence; (2) a copy of, or a description by category and location of all documents, data compilations and tangible things in the complainant's possession, custody or control that are relevant to the disputed facts alleged with particularity in the complaint; (3) the name, address and telephone number of each individual likely to have discoverable information relevant to the disputed facts alleged with particularity in the complaint, identifying the subjects of information; (4) full identification or description by the complainant of communications, services, facilities, or other carrier conduct at issue in the complaint and the nature of the injury allegedly sustained; (5) the specific relief or action being sought by the complainant; (6) certification by the complainant that it previously discussed the possibility of settlement with the defendant; (7) a statement whether suit has been filed or action begun in any court or other government agency on the basis of the same cause of action alleged in the complaint; (8) a completed "Formal Complaint Intake Form" indicating full adherence to all form and content requirements.[55]

24. Similarly, the proposed pleading requirements would compel defendant carriers to include in their answers: (1) specific admissions or denials of each and every averment in the complaint (general denials are expressly prohibited) along with affidavits and supporting documentation; (2) a copy of, or a description by category and location of all documents, data compilations and tangible things in the defendant's possession, custody or control that are relevant to the disputed facts alleged with particularity in the pleadings; (3) the name, address and

[54] See E.D. Va. R. 1, et. seq. The system for expedited disposition of civil litigation in the Eastern District of Virginia is popularly known as the "rocket docket." "The Eastern District of Virginia has consistently been the fastest and most efficient judicial district in the federal court system...[T]he mean time from filing of an answer to the trial is only seven months, less than half the national average of eighteen months." George F. Pappas and Robert G. Sterne, Patent Litigation in the Eastern District of Virginia, 35 IDEA: J.L. & Tech. 361, 363 (1995).

[55] See Appendix A, § 1.721.

telephone number of each individual likely to have discoverable information relevant to the disputed facts alleged with particularity in the pleadings, identifying the subjects of information. [56]

25. Mirroring the pleading requirements for complaints and answers, the proposed rules would also require that any motion or other request that is filed by a party to the complaint proceeding seeking procedural or substantive relief must contain or include proposed findings of fact and conclusions of law to support the relief requested, supporting documentation and affidavits; and a proposed order containing full factual and legal support for Commission consideration.[57] Furthermore, the parties would also be required to file a joint statement of proposed stipulated facts after the filing of the answer by the defendant.[58]

26. Our goal is to implement uniform requirements and procedures to resolve all formal complaints in an expeditious and fair manner. Accordingly, we invite interested parties to comment on the specific proposals described in the paragraphs that follow and to identify any other revisions or additions to our rules of practice and procedure that might assist in achieving our goal of timely resolution of all formal complaints. Interested parties are also invited to comment on the need, if any, for specialized requirements and procedures for handling complaints arising under particular provisions of the Act. Interested parties should describe any such specialized requirements and procedures in detail and explain how they can be effectively administered and enforced by the Commission. Appendix A contains the full text of the rules we propose in this Complaint NPRM. Parties that favor different approaches, or specialized requirements or procedures, should accompany their comments with the specific text of proposed rules.

A. Pre-Filing Procedures and Activities

27. We ask interested parties to identify specific pre-filing activities available to potential complainants and defendants that could serve to settle or narrow disputes, or facilitate the compilation and exchange of relevant documentation or other information prior to the filing of a formal complaint with the Commission. In handling numerous formal complaint actions over the years, our experience has been that many complaints have been filed with the Commission with little or no prior discussions or information exchanges between the complainant and the defendant carrier. Often, the complainant and defendant carrier promptly settled the disputes underlying such complaints after the exchange of relevant information or following meetings between knowledgeable company representatives. Therefore, we wish to promote any actions that could either decrease the number of complaints filed with the Commission or narrow the scope of the issues in such complaints, particularly complaints that fall within one or more of the 1996 Act's resolution deadlines.

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[56] See Appendix A, § 1.724.

[57] See Appendix A, § 1.727.

[58] See Appendix A, § 1.732(a).

28. Specifically, we tentatively conclude that we should add a requirement that a complainant, as part of its complaint, certify that it discussed, or attempted to discuss, the possibility of a good faith settlement with the defendant carrier's representative(s) prior to filing the complaint.[59] We believe that requiring settlement discussions prior to filing will encourage greater communication between potential complainants and defendant carriers. The settlement discussion requirement should also encourage the parties to narrow issues and agree on relevant facts or identify facts in dispute well in advance of a complaint being filed with the Commission.[60] We tentatively conclude that failure to comply with this certification requirement will result in dismissal of the complaint. We seek comment on these proposals.

29. We also seek comment on whether a committee composed of neutral industry members would serve a needed role or useful purpose in addressing disputes over technical and other business disputes, before such disputes are brought before the Commission in the form of formal complaint actions that must be resolved under expedited procedures. Participation in a proceeding before such a committee would be strictly voluntary, perhaps in conjunction with an arbitration arrangement or other ADR mechanisms. At the same time, however, the brevity of the statutory timeframes demands that we be careful to ensure that any new procedures further our ability to make capable and fair decisions without adding needlessly to the time required to make them. Therefore, we ask commenters to address whether outside experts would be needed to address the technical issues likely to arise in formal complaints and, if so, whether use of a committee of such experts would expedite the resolution of complaints within the statutory timeframes.

B. Service

30. Service of formal complaints must be accelerated to accommodate the complaint resolution deadlines in the 1996 Act. Our primary goal in proposing changes to the current service procedures is to prevent the delay caused by those procedures, which implement the Section 208 requirement that the Commission serve formal complaints on defendant carriers. In addition, we believe it necessary, in light of the new complaint resolution deadlines, to expedite generally service of all pleadings by authorizing parties to effect service of their pleadings using methods other than service by U.S. mail.

31. Under our current practice, a defendant carrier generally does not receive the complaint until at least ten days after the complainant has filed the complaint with the Commission. Given the 1996 Act requirements that certain complaints be resolved within 90 days or 5 months, delays in service could jeopardize our ability to satisfy the statutory directives. We propose to authorize or require a complainant to effect service simultaneously on the

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[59] See Appendix A, § 1.721(a)(8).

[60] The Commission has in place a pilot project utilizing alternative dispute resolution ("ADR") techniques in the Section 208 formal complaint context. See Use of ADR in Commission Proceedings and Proceedings in which the Commission is a Party, 6 FCC Rcd 5669 (1991).

following persons: the defendant carrier,[61] the Commission, and the appropriate staff office at the Commission.[62] With regard to service on the defendant, a complainant would serve the complaint on an agent designated by the defendant carrier to receive such service.[63] Our proposed rule would require a complainant to serve the defendant's agent directly, either (1) in lieu of service by the Commission or (2) as an agent for the Commission for that limited purpose only. The above service requirements would also apply to defendants filing cross-complaints. We propose that the answer period would begin to run once the complaint has been served by the complainant on the defendant in the manner prescribed by the rules.[64] We seek comment on these proposals. We also propose to revise Section 1.1105 of our rules to provide for a separate lock box at the Mellon Bank in Pittsburgh for complaints against wireless telecommunications service providers. Currently, formal complaints against wireless service providers are sent to a Common Carrier Bureau ("Bureau") lock box at the Pittsburgh Bank and are then routed to the Formal Complaints and Investigations Branch of the Bureau's Enforcement Division. The Formal Complaints Branch staff must review and identify complaints relating to wireless service providers and route them to the Wireless Telecommunications Bureau's Enforcement Division. The establishment of a separate lock box for complaints against wireless service providers will help ensure the prompt receipt and handling of such complaints by the Wireless Telecommunications Bureau.

32. We also propose to amend the rules to require that a complainant, in addition to filing the complaint with the Commission's Secretary, serve a copy of the complaint and associated attachments directly on the Chief of the division or branch responsible for handling the complaint, i.e., the Chief, Formal Complaints and Investigations Branch, Enforcement Division, Common Carrier Bureau; the Chief, Enforcement Division, Wireless Bureau; or the Chief, Telecommunications Division, International Bureau.[65]

33. Consistent with our new service proposal and to facilitate a complainant's ability to effect such service on a defendant carrier, we propose to establish and maintain an electronic directory, available on the Internet, of agents authorized to receive service of complaints on behalf of carriers that are subject to the provisions of the Act and of the relevant Commission personnel who must be served.[66] In this regard, we note that Section 413 of the Act requires all carriers subject to the Act to designate in writing an agent in the District of Columbia for service

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[61] Currently, 47 C.F.R. § 1.47 requires that the Commission serve the complaint on the defendant.

[62] See Appendix A, §§ 1.47(b), 1.735(b), (d).

[63] See Appendix A, § 1.735(d).

[64] See Appendix A, §1.724(a).

[65] See Appendix A, § 1.735(b).

[66] See Appendix A, § 1.47(h).

of all process.[67] Our proposal to establish an electronic "service" directory would supplement the Section 413 requirement. Placing a "service" directory on the Internet would facilitate service of process in all Commission matters, not just those in the formal complaint context, by making the information more accessible as well as enhancing the speed at which information may be updated. The directory would list, in addition to the name and address of the agent, at least one of the following: his or her telephone or voice-mail number, facsimile number, or Internet e-mail address. We seek comment on this proposal and on what information should be included within the service directory.

34. As an additional measure to facilitate the preparation and prompt handling of formal complaints against carriers, we propose to amend Section 1.721 of our rules pertaining to the form and content of such complaints. Currently, Section 1.721(a) lists categories of information that must be included in any formal complaint filed under Section 208 of the Act and Part 1 of the Commission's rules.[68] In applying the requirement in Section 208 of the Act that

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[67] 47 U.S.C. § 413 provides that:

> It shall be the duty of every carrier subject to this Act to designate in writing an agent in the District of Columbia, upon whom service of all notices and process and all orders, decisions, and requirements of the Commission may be made for and on behalf of said carrier in any proceeding or suit pending before the Commission, and to file such designation in the office of the secretary of the Commission.

In light of the proposals relating to service of formal complaints contained within this Complaint NPRM, Section 413 will have heightened significance for potential parties to formal complaints. We will take the necessary actions required to enforce this important statutory provision.

[68] 47 C.F.R. § 1.721. Specifically, subsection (a) provides that a formal complaint "shall" contain:

(1) The name and address of each complainant and defendant;
(2) The occupation, address and telephone number of each complainant and, to the extent known, each defendant;
(3) The name, address and telephone number of complainant's attorney, if represented by counsel;
(4) Citation to the section of the Communications Act and/or order and/or regulation of the Commission alleged to have been violated;
(5) A complete statement of facts which, if proven true, would constitute such a violation;
(6) Complete identification or description, including relevant time period, of the communications, transmissions, services, or other carrier conduct complained of and nature of injury sustained;
(7) The relief sought, including recovery of damages and the amount of damages claimed, if known; and
(8) Whether suit has been filed in any court or other government agency on the basis of the same cause of action.

Subsection (b) specifies a format that "may be used in cases in which it is applicable with such modifications as the circumstances may render necessary." 47 C.F.R. § 1.721(b).

the Commission serve the complaint on the defendant carrier, the staff routinely reviews complaints in the first instance and determines whether they meet the requirements under the Act and the Commission's rules. In light of the short resolution deadlines contained in the 1996 Act, we find it necessary to eliminate the delay often associated with this initial review. We propose to amend Section 1.721(a) to add the requirement that a complainant submit a completed intake form with any formal complaint as part of the filing requirement to indicate that the complaint meets the various threshold requirements for stating a cause of action under the Act and our rules.[69] We believe that such an intake form can be a useful tool to both speed the preparation and filing of complaints and avoid or reduce the time and resources involved in processing procedurally defective or substantively insufficient complaints. Moreover, an intake form requirement should help complainants avoid procedural and substantive defects that might delay full responses to otherwise legitimate complaints. In addition, the intake form can serve another useful purpose by quickly identifying for the staff and defendant carrier the relevant statutory provisions and any associated statutory time constraints. We seek comment on these and any other alternative proposals that would facilitate or improve the preparation and handling of formal complaints.

35. We also propose that, after service of the complaint on the defendant, parties should be required to serve all subsequent pleadings by overnight delivery or by facsimile to be followed by mail delivery.[70] Under our current rules, service is by mail.[71] The proposed new rule, which would affect formal complaints only, would eliminate the time lag involved in service by mail. We seek comment on this proposal.

C. Format and Content Requirements

36. The 1996 Act's complaint resolution deadlines necessitate substantial modification and, in some cases, clarification, of the content requirements for pleadings filed in formal complaint proceedings. Our overall goals are to improve the utility, quality, and content of the complaint, answer, and other filings submitted by parties in formal complaint cases and to expedite the issuance of orders that resolve procedural and substantive issues. Attaining these goals, especially in cases with resolution deadlines of 90 or 120 days, will be challenging. Some of the changes we propose are intended to place greater burdens on complainants and defendants to provide full legal and factual support early in the process, while others are designed to enable the Commission to prepare and issue procedural and substantive orders efficiently. Our goal is to carefully tailor our procedures to ensure that complainants and defendants have a full and fair opportunity to present or defend against allegations of misconduct without unnecessary pleadings.

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[69] See Formal Complaint Intake Form at Appendix B.

[70] See Appendix A, § 1.735(e).

[71] 47 C.F.R. § 1.47(d).

37. Under the proposed changes and clarifications to the existing rules discussed below, any party to a formal complaint proceeding must, in its complaint, answer, or any other pleading required during the complaint process, include full statements of relevant facts, and attach to such pleadings supporting documentation and affidavits of persons attesting to the accuracy of the facts stated in the pleadings.

38. As an initial matter, we seek comment on whether we should prohibit complaints that rely solely on assertions based on "information and belief." Assertions based on information and belief, although they may raise questions about the reasonableness or lawfulness of particular carrier conduct, may not be useful in our ultimate decision on the merits of the complaint. Interested parties are encouraged to comment on the benefits, if any, of allowing factual assertions based on information and belief and whether prohibiting such assertions would unduly inhibit a complainant's ability to present claims of unlawful behavior against carriers under applicable provisions of the Act.

39. We tentatively conclude that we should require a complainant to append to its complaint documents and other materials to support the underlying allegations and request for relief set forth in the complaint. Such a rule would, for example, require a complainant alleging violation of Sections 251 or 252 of the Act to append to its complaint a copy of its written interconnection request or proposed agreement submitted to the defendant LEC, along with a copy of the defendant LEC's written denial, counter-proposal or other written response, if any.[72] We tentatively conclude that failure to append such documentation to a complaint will result in summary dismissal of the complaint.

40. Our current rules require complaints to cite to the section of the Act alleged to have been violated by a carrier and to include a complete statement of the facts and a description of the nature of the injury allegedly sustained as a consequence of the alleged violation.[73] Because complainants' submissions under the current rule frequently do not contain the level of detail that we have found necessary or helpful to our resolution of complaints, we tentatively conclude that we should revise our rules to require more specifically that a complaint include a detailed explanation of the manner in which a defendant has violated the Act, Commission order, or Commission rule in question. Such a rule, for example, would require a complainant alleging that a BOC has ceased to meet any of the conditions that were required for approval to provide interLATA services pursuant to Section 271(c)(2)(B) of the Act[74] to include in its complaint a detailed explanation of the manner in which the defendant BOC has ceased to meet such

[72] See Appendix A, § 1.721(a)(5).

[73] See 47 C.F.R. § 1.720(b), (c).

[74] See 47 U.S.C. § 271(c)(2)(B).

condition or conditions, along with any associated documentation.[75] We seek comment on this tentative conclusion.

41. We also propose to require that all pleadings that seek Commission orders contain proposed findings of fact and conclusions of law with supporting legal analysis.[76] Under our current rules, Sections 1.727(c) and (d), parties are required to submit with their procedural or discovery motions and oppositions to such motions, proposed orders that incorporate the legal and factual bases for granting the requested relief.[77] We propose to require these submissions to be in both hard copy and on computer disks in "read only" mode and formatted in WordPerfect 5.1 for Windows,[78] or as otherwise directed by the staff in particular cases. We believe that receiving these pleadings and orders in an electronic format will reduce the burden on Commission staff in drafting necessary orders or letter rulings. The staff will be able either to incorporate relevant portions of the parties' submissions into the required orders or letter rulings or use the parties' proposed submissions or orders in their entirety. The information provided on the computer disk would be provided in hard copy as well, and such hard copy would be made part of the public record. We seek comment on this proposal.

42. We also propose to require parties to conform the format of any proposed order to that of a reported FCC order.[79] This requirement will help ensure consistency in the content and quality of the proposed orders submitted and facilitate prompt action on motions. A proposed order should be clearly captioned as "Proposed Order." We seek comment on this proposal.

43. We propose to require the complaint, answer, and any authorized reply to include two sets of additional information: (1) the name, address and telephone number of each individual likely to have discoverable information relevant to the disputed facts alleged with particularity in the pleadings, identifying the subjects of information; and (2) a copy of, or a description by category and location of all documents, data compilations and tangible things in the possession, custody, or control of the party that are relevant to the disputed facts alleged with particularity in the pleadings.[80] We note that this proposal comports with an analogous requirement under the Federal Rules of Civil Procedure.[81] This type of early disclosure will

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[75] See Appendix A, § 1.721(a)(5).

[76] See Appendix A, § 1.727(g).

[77] 47 C.F.R. § 1.721(c), (d).

[78] See Appendix A, § 1.734(d).

[79] See Appendix A, § 1.727(c)-(d).

[80] See Appendix A, §§ 1.721(a)(10), (11); 1.724(g), (h); 1.726(c), (d).

[81] See Fed. R. Civ. P. 26(a)(1)(A), (B).

enable the Commission and parties to identify quickly sources of information and prevent the delay involved in requesting and exchanging such information. We seek comment on this proposal.

44. We recognize that many of our proposed form and content requirements will require both complainants and defendants to expend more time and resources in the initial phases of formal complaint proceedings than is the case under our current rules and policies. We believe, however, that these higher initial costs will be somewhat offset by the prompt resolution of complaints and the avoidance of protracted and costly discovery proceedings and briefing requirements.[82] We also recognize, however, that many of the new pleading requirements proposed in this Complaint NPRM could be burdensome on individuals or parties, particularly those desiring or compelled to proceed without the assistance of legal counsel due to financial and other reasons. Upon an appropriate showing of financial hardship or other public interest factors, we propose to waive format and content requirements for complaints and answers under Sections 1.721 and 1.772 of the rules.[83] For example, the requirement for supporting documentation may be waived for complainants or defendants demonstrating good cause. We tentatively conclude that this waiver provision will help ensure that full effect is given to the proviso in Section 208 of the Act that "any person, any body politic, or municipal organization, or State Commission," may complain to the Commission about anything "done or omitted to be done" by a common carrier in contravention of the Act.[84] We seek comment on this proposal and tentative conclusion. We also seek comment on what standards should be used to determine "good cause" for waiving Section 1.721's format and content requirements.

45. We propose to modify the current rule that merely encourages parties to provide copies of relevant tariffs[85] to require parties to append copies of relevant tariffs or tariff provisions.[86] This modification comports with our general goal of making the facts of the case more readily available to Commission decision-making staff. We seek comment on this proposal.

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[82] It has been noted that the overall litigation costs of "rocket docket" cases in the U.S. District Court for the Eastern District of Virginia are lower than the costs of cases that take longer to resolve. See supra note 53.

[83] See Appendix A, § 1.721(c); 1.724(i).

[84] 47 U.S.C. § 208.

[85] 47 C.F.R. § 1.720(h).

[86] See Appendix A, § 1.720(h).

46. We will also modify our current rules to include expressly pleadings filed solely to effect delay in the prosecution or disposition of a complaint as filings for improper purpose within the meaning of section 1.734 of our rules.[87]

D. Answers

47. To ensure that we meet the deadlines imposed by the 1996 Act and to expedite the processing of formal complaints in general, we propose to reduce the permissible time for a defendant to file an answer to a complaint from 30 to 20 days after service or receipt of the complaint.[88] We tentatively conclude that this reduction is consistent with changes we have proposed regarding the form and content of pleadings and will not unduly prejudice the rights of any defendant. More pre-filing activity between and among potential complainants and defendants as well as more clear and concise allegations in any subsequent complaint should greatly enhance the ability of defendants to respond promptly to allegations of fact and law made against them. In any event, the 90-day resolution deadline for complaints filed under Section 271, for example, does not afford us much freedom in this area. The 1996 Act imposes greater burdens on complainants and defendants, as well as the Commission, and we believe that this proposed reduction of the time for answering a complaint strikes an appropriate balance with other proposed changes in this proceeding. We seek comment on this proposal.

E. Discovery

48. To implement the requirements of the 1996 Act and attain our overall goal of expediting the formal complaint process generally, we seek to establish a quick, effective, and efficient discovery process, when needed, that is narrowly focused only on relevant issues and facts that are of decisional significance.

49. We believe that one of the key elements to streamlining the enforcement process is to maximize staff control over the discovery process. In addition, we believe that the parties should continue to bear the burden of developing an adequate record, but that to the extent possible, the burden should be borne earlier in the proceeding, upon the filing of the initial pleadings rather than through discovery and associated briefs. In our experience, discovery has been the most contentious and protracted component of the formal complaint process. Under the time pressures of the new statutory deadlines, streamlining our current discovery process will be critical to our ability to meet these deadlines. Therefore we intend to carefully examine what, if any, role discovery should continue to play in resolving formal complaints, and we accordingly seek comment on a range of options to either eliminate or modify our current discovery process. Some of the options are not exclusive and would work in combination with others. Parties

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[87] Currently, Section 1.734 provides that the signature of an attorney or party shall be a certificate that, inter alia, the pleading is not "interposed for any improper purpose." 47 C.F.R. § 1.734. See Appendix A, § 1.734(c).

[88] See Appendix A, § 1.724(a).

should bear in mind when commenting on the specific options and in proposing any additional options that, should we ultimately decide that some degree of discovery as of right is necessary to quickly and fairly resolve formal complaints, heightened staff control of the scope and timing of such discovery will be crucial.[89]

50. First, we seek comment on the benefits and drawbacks of eliminating the self-executing discovery permitted under our current rules by prohibiting discovery as a matter of right. Under this proposal, the emphasis on developing facts and arguments necessary for the Commission to render reasoned decisions about the merits of a complaint would be placed at the complaint and answer stages of the proceeding rather than on discovery and subsequent briefing opportunities. It would be incumbent on complainants and defendants alike to present full legal and factual support for their respective claims in their complaints, answers and associated pleadings. To the extent that the record presented through such pleadings fails to provide a basis for resolving disputes over material facts or is otherwise insufficient to permit our resolution of a complaint, the staff would have the discretion to authorize limited discovery at the initial status conference to be held shortly after receipt of the defendant's answer to the complaint. We ask interested parties to comment on the practical effects of a rule that would prohibit discovery as a matter of right and leave it entirely within the discretion of the staff. For example, is discovery necessary to resolve formal complaints from either a legal or a practical standpoint? Would eliminating the automatic or self-executing discovery permitted under the current rules pose any particular hardship for complainants or defendants in identifying and obtaining relevant information that would assist the Commission in resolving complaints? Would it be difficult for any particular segment of complainants, e.g. small businesses or new entrants? Are there substitutes for traditional discovery at either the pre-complaint or post-complaint stage that would ensure that complainants and defendants can identify and exchange relevant information that could be submitted jointly by the parties? For example, would it be more expeditious in some or all cases to permit the staff to determine what information needs to be supplied and to direct the party in possession to provide it for the record? Would eliminating all discovery as of right increase the number of motions for discovery, thus delaying the resolution of the complaint and increasing the burden on the staff? Are there minimum standards the staff should apply in determining whether limited discovery is necessary to resolve issues and questions of fact raised in the complaint or answer? Would a case-by-case approach to all discovery make it difficult for the staff to ensure fairness and consistency in ruling on discovery requests? Parties are encouraged to address these and any other questions bearing on the proposal to prohibit discovery as a matter of right.

51. Second, as an alternative approach, we seek comment on the benefits and drawbacks of a proposed rule that would limit self-executing discovery to something other than the thirty (30) written interrogatories authorized under the current rules.[90] Consistent with our

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[89] See American Message Centers v. FCC, 50 F.3d 35, 40 (D.C. Cir. 1995) (The court noted the "relatively circumscribed role of discovery in a fact-pleading system" under the Commission's formal complaint rules.

[90] Currently, parties are permitted to serve 30 interrogatories. 47 C.F.R. § 1.729(a).

proposals regarding pre-filing activities and form and content of pleadings, we seek comment on whether a more limited form of discovery of right would accommodate a party's ability, where necessary, to identify and present to the Commission material facts that may be in the possession or control of the other party. We also seek comment on whether allowing a limited amount of discovery of right might decrease the staff's burden, by eliminating the need to decide discovery requests on a case-by-case basis. We also ask, however, whether limiting discovery in this manner would detract from full compliance with our rules regarding the level of detail that should be offered in support of complaints and answers. In keeping with our goal of expediting the processing of complaints, if we adopt this approach, we would allow the staff to permit additional discovery only in extraordinary cases. We invite interested parties to comment on the feasibility of limiting discovery in the manner discussed above. As stated above in paragraph 49, we believe it is crucial to enable the staff to control the scope and timing of discovery as a means to expedite resolution of complaints. For example, would reducing the number of allowable interrogatories achieve this? If so, what would be the appropriate new limit on the number of written interrogatories? Parties are requested to comment on whether there are any other restrictions that could be placed on written interrogatories and other discovery to achieve this objective. For example, in light of proposals discussed elsewhere in this Complaint NPRM that would require complainants and defendants to identify or exchange relevant documents and materials in their possession or control when they file their respective complaints and answers, should written interrogatories be limited to questions designed to illuminate specific factual assertions or denials contained in complaints and answers? Parties are encouraged to address these and other questions that might assist us in evaluating the need for and feasibility of limited, self-executing discovery, particularly in cases subject to one or more of the resolution deadlines mandated by the 1996 Act.

52. If we continue to allow some limited discovery as of right, we seek comment on the benefits and drawbacks of a rule that would require Commission staff to set limits on the scope of that discovery,[91] and to set specific timetables for such discovery. The information contained in the complaint, answer and proposed stipulated facts should enable the staff to determine more readily and more precisely which factual issues or disputes require the use of discovery tools for full and fair resolution. Authorizing the staff to limit the scope of the written interrogatories contemplated in the above paragraph could be an effective deterrent to attempts by parties to use discovery for purposes of delay or to gain tactical leverage for settlement purposes. To assist the staff in controlling the timetable for permissible discovery, we also propose to require that objections to interrogatories must be filed by the date of the initial status conference, during which staff rulings on such objections may be made. As a practical matter, the timetables for completion of discovery may be extremely short, due to the severe time constraints placed on the parties and the Commission by the complaint resolution deadlines in the 1996 Act. Under this proposal, we would anticipate that extensions of time to initiate limited

[91] Under the current rule, discovery subjects must be "nonprivileged matter which is relevant to the pleadings," and may not be "employed for the purpose of delay, harassment or to obtain information which is beyond the scope of permissible inquiry relating to the subject matter of the pleadings." 47 C.F.R. § 1.729(a).

discovery and file objections and motions to compel would be granted only in extraordinary circumstances.

53. As discussed in our proposals regarding the form and content of required pleadings, we have proposed that parties be given the option of either identifying relevant documents in their possession or control at the time they file their respective complaints and answers or providing a copy of such documents at a time concurrent with the filing of the complaint and answer. We seek comment on what benefits, if any, would be realized by the parties or the Commission by requiring such documents to be filed with the Commission along with the complaint and answers. Our current rules prohibit the filing of discovery documents with the Commission unless so ordered by the staff.[92] The principal rationale behind the current rule was our realization that parties typically relied upon only a small percentage of the documents and materials exchanged through discovery. There was no benefit to the staff of receiving hundreds or in some cases thousands of pages of materials that were of no decisional significance in either parties' view. In light of the requirement for expedited resolution of many types of complaints under the 1996 Act, it may be helpful or even necessary to have all relevant documents identified by the parties readily accessible to the staff and the other party. We also recognize, however, that the voluminous document production that is likely to accompany many complaints and answers could be administratively burdensome on the Commission. Thus, we invite interested parties to comment on whether relevant documents identified or exchanged, but not specifically relied upon by the identifying or exchanging party, should be filed with the Commission concurrent with the complaint or answer. We also seek comment on methods to reduce the administrative burden of filing such documentation with the Commission, such as requiring all documents to be scanned by computer and submitted on computer disk for ready access by the staff.

54. We recognize that, notwithstanding our desire to streamline the discovery process, discovery may be necessary in some instances. For such cases, the goal underlying the proposals discussed above is to identify mechanisms that will encourage parties to exercise diligence in identifying and satisfying their discovery needs. In a related vein, we note that the Commission does not have authority to award costs in the context of a formal complaint proceeding.[93] Nonetheless, we believe that resolution deadlines under the 1996 Act require us to identify and utilize new methods to encourage diligence by complainants and defendants in prosecuting or defending complaint actions. In conjunction with our discovery proposals, we seek comment on the feasibility of allowing the parties to a complaint proceeding to agree among themselves to a cost-recovery system as a basis for facilitating the prompt identification and exchange of information each side believes is necessary for a full and fair resolution of the matters in dispute. The parties could, for example, stipulate that the losing party in the complaint proceeding would bear the reasonable costs associated with discovery, including reasonable attorneys' fees. We believe that such a voluntary cost recovery mechanism for discovery efforts could help curb abuse

[92] See 47 C.F.R. 1.730(d).

[93] See Turner v. FCC, 514 F.2d 1354, 1356 (1975); Comark Cable Fund III v. Northwestern Indiana Telephone Co., 100 FCC 2d 1244, 1257 n.51 (1985).

of the discovery process by removing incentive to engage in dilatory and nonessential discovery. We also believe that voluntary agreements regarding imposition of costs will also encourage parties to present their facts fully in the initial pleadings and thereby avoid discovery altogether. We seek comment on this proposal.

55. Where we have granted a motion to compel in response to submission of evasive or incomplete answers to interrogatories or other discovery, we are prepared to use the full panoply of sanctions available to us under the Act and the Commission's rules to enforce compliance with that discovery ruling. This practice comports with the procedures set forth in the Federal Rules of Civil Procedure.[94] Sanctions could include actions such as summary dismissal or denial of relief requested by a party, rejection of proffered evidence, striking pleadings and other submissions from the record, and possible forfeiture actions.[95] We seek comment on these and any other types of sanctions that would be effective.

56. In complaint cases involving disputes over material facts that cannot be resolved without resort to formal evidentiary proceedings, we propose to amend our rules to authorize the Common Carrier Bureau, on its own motion, to refer such disputes to an administrative law judge for expedited hearing on factual issues.[96] Section 0.291 of the rules currently provides that the Chief of the Common Carrier Bureau shall not have authority to designate for hearing any formal complaints that present novel questions of fact, law or policy that cannot be resolved under outstanding precedents and guidelines.[97] Under the proposed modifications, the Bureau would no longer be precluded from designating factual issues for hearing. Adjudication of novel questions of law or policy, however, would remain outside of its delegated authority. As a practical matter, the Bureau would only designate matters for hearing in instances where it could not determine, based on the parties' written submissions, what had occurred or failed to occur and where such determination would be relevant to the issue of whether there had been a violation of the Act or our rules, orders, or policy. In other words, the Bureau would refer issues only where necessary to determine acts or omissions, and not to determine the legal consequences of such acts or omissions. We tentatively conclude that expanding the Bureau's delegated authority in this limited way will provide the staff with an important tool for resolving disputes

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[94] Under the Federal Rules of Civil Procedure, sanctions for failing to obey a discovery order may include an order that the matter for which the order was made "shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;" an order refusing to allow the disobedient party to support or oppose designated claims or defenses or an order prohibiting a party from introducing designated matters in evidence; an order striking pleadings or staying further proceedings until the order is obeyed; an order dismissing the action; an order rendering a judgment by default against the disobedient party; or an order treating the failure to obey as contempt. Fed. R. Civ. P. 37(b).

[95] See 47 U.S.C. § 503(b)(1).

[96] See Appendix A, §§ 0.291(d); 1.720. We also note that we have delegated similar authority to the Wireless Telecommunications Bureau. See 47 C.F.R. § 0.331.

[97] 47 C.F.R. § 0.291(d).

over material facts that cannot be resolved without resort to formal evidentiary proceedings.[98] The Eastern District of Virginia has an analogous policy of utilizing magistrate judges for duties that include determining discovery motions, hearing and deciding matters designated by the district judge, and exercising full jurisdiction over civil cases by stipulation of the parties.[99] We seek comment on the feasibility of utilizing administrative law judges in resolving formal complaint actions. We are particularly interested in receiving views on our tentative conclusion that the designation of factual issues to an administrative law judge will, in some instances, facilitate the resolution of complaints filed against carriers subject to the Act's requirements.

F. Status Conferences

57. We propose to modify our rules concerning status conferences to improve the ability of Commission staff responsible for conducting complaint proceedings to render prompt decisions, or require the parties to take any necessary actions, in order to ensure resolution of complaints within the statutory deadlines and on an expedited basis generally.

58. We propose to amend Section 1.733 of our rules to require that, unless otherwise ordered by the staff, an initial status conference take place in all formal complaint proceedings 10 business days after the defendant files its answer to the complaint.[100] At the status conference, the Commission and parties may discuss such issues as claims and defenses, settlement possibilities, scheduling, rulings on outstanding motions, whether discovery is necessary, and if so, the scope of discovery and a timetable for completion of discovery. This proposal is analogous to a similar requirement for status conferences in the Federal Rules of Civil Procedure.[101] We expect that bringing the parties together at this early stage to discuss matters in conference will lead to amicable settlement of more cases or at least a narrowing of the issues, thereby reducing litigation costs as well as allowing the Commission to focus on prompter resolution of the case. We seek comment on this proposal.

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[98] Consistent with the authority delegated in Section 0.151 of our rules, 47 C.F.R. § 0.151, the Chief Administrative Law Judge would have the discretion to establish such expedited procedures and requirements as are necessary to receive documentary evidence, examine and cross-examine witnesses and prepare findings of fact within the timetables specified in any hearing designation order issued by the Commission or the staff pursuant to delegated authority. In the past we have designated pole attachment complaints to the Commission's administrative law judges. See, e.g., TCA Management Co., et. al v. Southwestern Public Service Company, 10 FCC Rcd 11832 (1995). The administrative law judges were instrumental in achieving settlement of all such cases before hearing.

[99] See Report of the Civil Justice Reform Act Advisory Group for the Eastern District of Virginia at 12-28 (Sept. 19, 1991).

[100] See Appendix A, § 1.733(a).

[101] See Fed. R. Civ. P. 26(f).

59. We also propose to modify the requirement in Section 1.733 of the rules that the staff memorialize oral rulings made in status conferences.[102] We propose that, within 24 hours after a status conference, the parties in attendance, unless otherwise directed, must submit a joint proposed order memorializing the oral rulings made during the conference to the Commission. Commission staff will review and make revisions, if necessary, prior to signing and filing the submission as part of the record. Parties may, but are not required to, tape record the Commission's summary of its oral rulings. Alternatively, parties may use a stenographer to transcribe the oral presentations and exchanges between and among the participating parties, insofar as such communications are not "off-the-record." The cost of such stenographer will be shared equally by the parties. We seek comment on these proposals and any alternative proposals that would facilitate the prompt issuance and memorialization of staff rulings at status conferences.

G. Cease, Cease-and-Desist Orders and Other Forms of Interim Relief

60. Our goal in proposing procedural rules for requests for cease-and-desist orders and other forms of interim relief is to expedite the staff's review and disposition of such requests in Section 208 complaint proceedings. As an initial matter, we note that Title III of the Act authorizes the Commission to issue a cease-and-desist order for violation of the Act and certain provisions in Title 18 of the United States Code.[103] Section 312(c) requires the Commission to hold a show cause hearing prior to issuing any cease-and-desist order pursuant to Section 312(b) and Section 312(d) assigns the burden of proceeding with the introduction of evidence and the burden of proof in such proceedings on the Commission.[104] The sole provision in Title II of the

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[102] See 47 C.F.R. § 1.733(c).

[103] Section 312(b) states that:

> Where any person ... (2) has violated or failed to observe any of the provisions of this Act, or section 1304, 1343, or 1464 of title 18 of the United States Code, or (3) has violated or failed to observe any rule or regulation of the Commission authorized by this Act or by a treaty ratified by the United States, the Commission may order such person to cease and desist from such action.

47 U.S.C. § 312(b).

[104] Section 312(c) states that:

> Before ... issuing a cease and desist order pursuant to subsection (b), the Commission shall serve upon the licensee, permittee, or person involved an order to show cause why ... a cease and desist order should not be issued. Any such order to show cause shall contain a statement of the matters to which the Commission is inquiring and shall call upon said licensee, permittee, or person to appear before the Commission at a time and place stated in the order, but in no event less than thirty days after the receipt of such order, and give evidence upon the matter specified therein; except that where safety of life or property is

Act that specifically contemplates the use of Section 312 hearings with respect to cease-and-desist orders is Section 224 regarding the regulation of pole attachments.[105] In contrast, Section 274 of the Act, for example, which specifically authorizes the Commission to issue cease-and-desist orders, is silent as to the use of Section 312 hearings. Because Sections 208 and 274 do not cross-reference to Section 312, and particularly in light of the strict resolution deadlines contained in the 1996 Act, we tentatively conclude that Congress did not intend Section 312 hearings to apply in Section 208 and related complaint proceedings under Title II of the Act, even if they lead to cease-and-desist orders. We seek comment on this tentative conclusion.

61. We propose to amend our rules to delineate the legal and evidentiary standards necessary for obtaining cease or cease-and-desist orders pursuant to Title II of the Act[106] and other forms of interim relief in Section 208 formal complaint cases. Generally, such relief would be based on specific allegations and supporting documentation provided in the complaint. A complaint failing to address these minimum legal and evidentiary standards would provide no basis upon which interim relief could be granted. We believe that creating minimum legal and evidentiary standards is necessary to expedite the issuance of cease or cease-and-desist orders within the 1996 Act's deadlines and to create more certainty regarding the legal and factual basis for granting interim relief. We seek comment on this proposal as well as on the specific standards that should apply to requests for cease or cease-and-desist orders and other forms of interim relief. We note that when a court issues certain types of interim relief, such as a temporary restraining order, it generally requires that the plaintiff demonstrate four factors: (1)

> involved, the Commission may provide in the order for a shorter period. If after hearing, or a waiver thereof, the Commission determines that a ... cease and desist order should issue, it shall issue such order, which shall include a statement of the findings of the Commission and the grounds and reasons therefor and specify the effective date of the order, and shall cause the same to be served on said licensee, permittee, or person.

47 U.S.C. § 312(c).

Section 312(d) states that:

> In any case where a hearing is conducted pursuant to the provisions of this section, both the burden of proceeding with the introduction of evidence and the burden of proof shall be upon the Commission.

47 U.S.C. § 312(d).

[105] Section 224 provides that "the Commission shall take such action as it deems appropriate and necessary, including issuing cease and desist orders, as authorized by section 312(b) of title III..." 47 U.S.C. § 224(b)(1).

[106] Cease-and-desist orders regarding BOC violations of electronic publishing requirements may also be obtained independently of a Section 208 complaint proceeding pursuant to Section 274. See 47 U.S.C. § 274(e)(2).

likelihood of success on the merits; (2) the threat of irreparable harm absent the injunction; (3) no substantial injury to other parties; and (4) the furtherance of the public interest.[107] Courts have also traditionally required the posting of bond in some cases prior to granting interim relief.[108] We seek comment on the applicability of these and other traditional court mechanisms to the Commission's issuance of cease orders, cease-and-desist orders, and other interim relief.

62. We note that Sections 260 and 275 regarding LEC provision of telemessaging service and provision of alarm monitoring service, respectively, require the Commission to issue, within 60 days of filing upon an "appropriate showing" of a violation that resulted in "material financial harm," an order directing the LEC "to cease engaging" in such violation "pending [a] final determination" by the Commission.[109] In addition, Section 274, regarding BOC provision of electronic publishing, authorizes the Commission to issue cease-and-desist orders for violations of this section; however, it contains no deadline for issuing such orders; nor does it predicate issuance of such orders on a showing of material financial harm.[110] We seek comment on whether separate or specialized procedures are necessary for processing requests for cease or cease-and-desist orders under Sections 260, 274 and 275. In our Sections 260, 274, 275 NPRM, we sought comment on what type of showing would constitute an "appropriate showing" for the Commission to issue an order to "cease engaging" to a LEC pursuant to Sections 260(b) and 275(c). We asked whether it would be sufficient for the complainant to establish a prima facie showing of discrimination.[111] In addition, we also sought comment on the meaning of an order "to cease engaging" under Sections 260(b) and 275(c). In particular, we asked whether these sections give the Commission the authority to issue a cease and desist order similar to the order contemplated in Section 274(e)(2) and, if so, whether the showing required under Section 274

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[107] See, e.g., Virginia Petroleum Jobbers Association v. FPC, 259 F.2d 921, 925 (D.C. Cir. 1958); WMATA v. Holiday Tours, Inc., 559 F.2d 841, 843 (D.C. Cir. 1977).

[108] See, e.g., Fed. R. Civ. P. 65(c), stating that:

> No restraining order or preliminary injunction shall issue except upon the giving of security by the applicant, in such sum as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained.

[109] 47 U.S.C. §§ 260(b), 275(c).

[110] 47 U.S.C. § 274(e)(2).

[111] See Sections 260, 274, 275 NPRM, para. 84:

> [W]e seek comment on what type of showing constitutes an "appropriate showing" for the Commission to issue the LEC an order "to cease engaging" in an alleged violation of sections 260 or 275. Would it be enough for the complainant to establish a *prima facie* showing of discrimination?

differs in any material respect.[112] Few parties commented on these issues in response to the Sections 260, 274, 275 NPRM and, therefore, we find it necessary to seek additional comment on these important issues here. We emphasize that all comments pertaining to enforcement issues in the Sections 260, 274, 275 rulemaking proceeding are incorporated by reference.[113] Interested parties are encouraged to address the need, if any, for separate or specialized standards and procedures for cease orders pursuant to Sections 260 and 275 and cease-and-desist orders pursuant to Section 274. Commenters should address in particular the meaning of the terms "material financial harm" as used in Sections 260 and 275. Should a showing of material financial harm also be required in order to obtain a cease-and-desist order under Section 274? What level of proof is required to establish such material financial harm in the context of a Section 208 complaint proceeding?

H. Damages

63. Our goal in the following proposals is to eliminate or minimize the delay that is often inherent in resolving damages issues. Our experience has been that the damages phase of the formal complaint process is often cumbersome and protracted largely due to the scope and magnitude of the discovery typically requested by complainants and defendants to substantiate or refute damages claims. The complaint resolution deadlines mandated by the 1996 Act substantially affect the Commission's ability to resolve both liability and damages issues within the same timeframes.

64. One option would be to permit the complainant to bifurcate liability and damages issues,[114] especially in light of the express resolution deadlines in Sections 208, 260, 271 and 275 of the Act. In many instances, complainants have effectively bifurcated their liability and damages claims by specifically reserving the right to file a supplemental complaint for damages after liability has been determined. Section 1.722(b) of our current rules specifically authorizes such action.[115] Our supplemental complaint provisions have proven to be useful tools. Our

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[112] See id.:

> We also seek comment on the meaning of an order "to cease engaging" under sections 260(b) and 275(c). Do these sections give the Commission authority to issue a cease and desist order similar to the one in section 274(e)(2)? If so, parties should comment on whether the showing under section 274 differs in any material respect from the showing required under sections 260 and 275.

[113] See Section 260, 274, 275 NPRM, paras. 78-84.

[114] See, e.g., Appendix A, § 1.722(c).

[115] Section 1.722(b) states that:

> Damages will not be awarded upon a complaint unless specifically requested. Damages may be awarded, however, upon a supplemental complaint based upon

experience handling formal complaints has shown that a significant amount of the parties' discovery efforts often center around developing facts that would prove or disprove injury or damages incurred as a consequence of a violation of the Act or Commission requirements. The time and effort expended by the parties and the Commission on discovery related to damages claims is effectively wasted if no violation or liability is found on the part of the defendant. Furthermore, the time constraints mandated by certain statutory complaint provisions allow very little time or opportunity for complainants to present evidentiary arguments sufficient to establish both a violation of the Act and a proper measure of damages incurred as a consequence of such violation within such deadlines. Where a complainant voluntarily bifurcates a complaint proceeding, the Commission would defer adjudication of all damages issues until after a finding of liability. This approach would enable the Commission to make a liability finding within the statutory deadline and still preserve the complainant's right to a damage award. We recognize that, while bifurcation results in a faster complaint proceeding if no liability is found, the overall proceeding can be significantly longer if liability is found and damages are decided in a separate, second proceeding. In light of the strict time deadlines in Sections 208, 260, 271 and 275, however, we would expect that complainants would avail themselves of the supplemental complaint bifurcation approach in most instances to avoid the possibility that the time deadlines may not provide them with enough time to develop sufficiently their damages claims.

65. We believe that bifurcation through the voluntary supplemental complaint process would be particularly appropriate in those cases in which a complainant seeks both prospective relief and damages for a defendant carrier's violation of the Act or a Commission rule or order. For example, we believe that a decision by the Commission requiring a defendant carrier to terminate a particular practice or to provide service to a complainant under more reasonable terms

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a finding of the Commission in the original proceeding. *Provided that:*

(1) If recovery of damages or overcharges is first sought by supplemental complaint, such supplemental complaint must be filed within, and recovery is limited to, the statutory periods of limitations contained in section 415 of the Communications Act;

(2) A claim for recovery of damages contained in a supplemental complaint based on a finding of the Commission in the original proceeding which meets the requirements of paragraph (a) of this section shall relate back to the filing date of the original formal complaint if:

(i) The original complaint clearly and unequivocally requests the recovery of damages (even if the precise amount and other specific details are unknown), and

(ii) Such supplemental complaint is filed no later than 60 days after public notice (as defined in § 1.4(b) of the rules) of a decision on the merits of the original complaint.

47 C.F.R. § 1.722(b).

and conditions would constitute a final, appealable order, as would a decision denying a complainant such relief.[116] This would be the case even if there remained issues of damages to be resolved as a result of the complainant's decision to file a supplemental complaint. Bifurcation would enable the parties and the Commission to focus efforts to ensure that important service provisioning and other marketplace issues are resolved expeditiously, consistent with the pro-competitive goals and objectives underlying the complaint resolution deadlines contained in the 1996 Act. A complainant would be free to file a supplemental complaint for damages as provided under Section 1.722 of the rules and both the complainant and defendant carrier would have a full opportunity to present and defend against damages claims in such supplemental proceedings. We invite interested parties to comment on the relative benefits to be gained by bifurcating liability and damages issues in Section 208 proceedings through complainants' voluntary use of the supplemental complaint process and to identify bifurcation standards that might help ensure that both liability and damages issues are fully resolved within the earliest practicable timeframe. We also request comment on whether the Commission legally may and should require bifurcation in certain circumstances.

66. We also propose to require that any complaint seeking an award of damages contain a detailed computation for damages,[117] analogous to the requirement in the Federal Rules of Civil Procedure for initial disclosures.[118] Under this approach, a complainant must submit a computation for any category of damages claimed, as well as identification of all documents or

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[116] This is in contrast to Mountain States in which the sole relief at issue was damages based on historical rates that the Commission had found to be unlawful under the Act. In Mountain States, the complainant claimed injury resulting from access rates charged by the LECs. The Commission issued an order holding the LECs liable but reserved the damages issue for later proceedings. Because the Commission had yet to determine whether the complainants were entitled to any relief (in this case damages) as a consequence of the violations, the Court, in an unpublished decision that therefore has no precedential effect, held that the Commission's decision had no final effect for purposes of judicial review. Mountain States Telephone & Telegraph v. FCC, 1991 WL 268824, at **2 (10th Cir. Dec. 13, 1991). In any event, if a complainant's initial complaint covered only a request for a finding of liability and did not request any damages relief, we believe that a decision within the statutory time deadline would constitute compliance with that deadline even if a court were to conclude that, because no damages relief was ordered, judicial review was unavailable until such damages relief was ordered pursuant to a subsequent adjudication on the complainant's supplemental complaint for damages.

[117] See Appendix A, § 1.722(c).

[118] The rule states that:

> [A] party shall, without a waiting [sic] a discovery request, provide to other parties ... a computation of any category of damages claimed by the disclosing party, making available for inspection and copying as under Rules 34 the documents or other evidentiary material, not privileged or protected from disclosure, on which such computation is based, including materials bearing on the nature and extent of injuries suffered...

Fed. R. Civ. P. 26(a)(1)(C).

material, not privileged or protected from disclosure, on which such computation is based.[119] We would expect any computation to identify and describe clearly and concisely the information and assumptions underlying the computations. For example, in cases in which a complainant is challenging the reasonableness of charges or rate levels applied by a carrier to particular services taken by the complainant, the complainant's computations must clearly identify the precise nature of the service taken and applicable charges broken down by such factors as minutes of use, traffic mileage and volume, as well as any applicable discounts or other adjustment factors. We further propose that the Commission's adjudication of damages end with a determination about the sufficiency of the computation submitted by the complainant rather than a finding as to the exact amount of damages, if any, owed to the complainant. A similar approach is used in complaints dealing with pole attachments.[120] The advantage of this approach is that the Commission would be spared the detailed and time-consuming investigation of the facts necessary to establish an exact amount of damages, while still issuing a ruling that would allow the parties themselves to compute properly the amount of damages. We seek comment on the above proposals and encourage commenters to submit alternative proposals that would serve to minimize or reduce the need for costly and protracted proceedings on the issue of damages.

67. In conjunction with our proposal to permit complainants to file supplemental complaints and thereby bifurcate liability and damages issues, we propose to establish, following a finding of liability, a limited period during which the parties could engage in settlement negotiations or submit their damage claims to voluntary alternative dispute resolution mechanisms in lieu of further proceedings before the Commission. There are several advantages with this approach. The Commission's time would be more productively spent adjudicating solely liability issues. Any mediator or arbitrator chosen would not be restricted by our ex parte rules in gathering relevant information. The mediator or arbitrator could then take into account factors that may be relevant to offset damages.

68. Also in conjunction with our bifurcation proposal, we ask interested parties to comment on the benefits, if any, of referring damages issues to an administrative law judge for decision once liability for damages has been determined by the Commission or if the parties agree to mediation by an administrative law judge. The administrative law judges could, for example, act as "Special Masters" for purposes of receiving and reviewing evidence necessary to determine the amounts, if any, a complainant is entitled to recover from a defendant carrier for harm suffered in consequence of a violation determined by the Commission in the liability phase of the proceeding.[121] Under this proposal, referral of a damages claim to an administrative law judge would be at the discretion of the Commission or the staff pursuant to delegated authority, depending on the particular facts and circumstances involved. Nothing in this proposal, however,

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[119] We note that in a proceeding which has been bifurcated into separate liability and damages phases, a computation of damages need not be provided until a supplemental complaint for damages has been filed.

[120] See generally, 47 C.F.R. § 1.1404(g).

[121] See Appendix A, § 1.722(d).

would preclude the parties from electing voluntary dispute resolution mechanisms in lieu of proceedings at the Commission. We also encourage commenters to submit alternative proposals that would serve to minimize or reduce the need for costly and protracted proceedings on the issue of damages.

69. We also propose in such bifurcated proceedings, after a finding of liability, to give the Commission discretion to require defendants to place a sum of money in an interest-bearing escrow account, to cover part or all of the damages for which they may be found liable.[122] This measure would be implemented under standards similar to those used for determining whether a preliminary injunction is appropriate, e.g., likelihood of success on the merits, irreparable harm, etc.[123] The requirement should provide complainants with some assurance that any judgment ultimately determined by the Commission can be readily collected. Under this approach, the Commission would not administer the escrow account. We seek comment on this and any additional proposals that may facilitate and expedite the resolution of damages claims.

I. Cross-Complaints and Counterclaims

70. The current rule regarding counterclaims and cross-complaints is permissive, stating that counterclaims and cross-complaints "*may* be filed by a defendant with its answer."[124] To meet our new statutory deadlines, as well as impose greater discipline on the complaint process, we propose to allow compulsory counterclaims, those arising out of the same transaction or occurrence that is the subject matter of the opposing party's claim, only if the defendant files them concurrently with the answer. If a defendant fails to file such a compulsory counterclaim with its answer, it will be barred. A defendant may, but is not required to, file permissive counterclaims (those not arising out of the same transaction or occurrence) against the complainant. In addition, a defendant may, but is not required to, file cross-claims that arise out of the same transaction against co-parties. To the extent that the defendant elects to file such permissive counterclaims and cross-claims, it must file these pleadings concurrently with its answer. The defendant always has the option of filing any barred permissive counterclaims or cross-claims in a separate proceeding, provided that the statute of limitations has not run. Furthermore, if the parties decide to utilize ADR mechanisms to resolve any damages issue if liability is found, the defendant could then bring in the issues of any claims that were barred in the Commission proceeding. Although we realize that efficiency is served by consolidating all claims arising out of one transaction and resolving them in one decision, permitting consideration of claims at a later stage could prevent the Commission from fulfilling statutory resolution mandates.

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[122] See Appendix A, § 1.722(d)(2).

[123] See supra note 107.

[124] 47 C.F.R. § 1.725 (emphasis added).

71. In addition, we will revise our rules to clarify the applicability of filing fees to both complaints and cross-complaints. While it is clear under our current rules that the $150 filing fee must be paid in order to file a formal complaint, the rules may be ambiguous as to whether or not the same fee must be paid to file a cross-complaint.[125] Therefore we will modify our rules to explicitly state that filing fees must be paid by a complainant when filing a formal complaint, as well as by a defendant/cross-complainant when filing a cross-complaint.[126]

J. Replies

72. To further our goals of expediting the processing of complaints and meeting the 1996 Act deadlines, we propose to prohibit replies to answers unless specifically authorized by the Commission. Under current rules, filing a reply is voluntary and failure to reply is not deemed to be an admission of any allegation contained in the answer, except with respect to any facts included in affirmative defenses contained in the answer.[127] Although replies responding to facts initially alleged by defendants's answers in support of affirmative defenses are necessary to complete the record, our experience has been that, in many instances, replies have been filed which repeat arguments made in the original complaint or which offer information or explanations that should have been presented initially in the complaint. We propose to revise Section 1.726 of the rules to authorize replies only upon a complainant's motion showing that there is good cause to reply to affirmative defenses that are supported by factual allegations that are different from any denials also contained in the answer.[128] Limiting a complainant's opportunity to file a reply to such circumstances should expedite resolution of complaints without threatening either the development of a complete record or a complainant's ability to plead a case. If replies are thus limited, the complainant will have an increased incentive to produce a complaint that reflects the nature and facts of a controversy completely and accurately. We also

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[125] 47 C.F.R. § 1.735 states that:

> the complainant must file an original plus three copies of the complaint, accompanied by the correct fee, in accordance with subpart G of this part. See 47 C.F.R. 1.1105(1)(c). However, if a complaint is addressed against multiple defendants, complainant shall pay separate fee and supply three additional copies of the complaint for each additional defendant.

47 C.F.R. § 1.735.

47 C.F.R. § 1.1105(1)(c) states that the filing fee for "Formal Complaints and Pole Attachment Complaints" is $150.

[126] See Appendix A, §§ 1.735(b), 1.1105(1)(c).

[127] 47 C.F.R. § 1.726

[128] See Appendix A, § 1.726.

propose to provide that when no reply is filed to an answer, the Commission will deem any affirmative defenses to be denied by the complainant.[129]

73. We also propose to prohibit replies to oppositions to motions. Such replies seldom aid the Commission in resolving factual or legal issues and are often used to repeat information already contained within the original motion itself. We seek comment on these and any other alternative proposals.

K. Motions

74. Our goals in modifying the current rules regarding motions[130] are to eliminate unnecessary pleadings that merely delay final resolution, while ensuring that parties have full opportunity to develop their cases and to expedite generally the processing of complaints.

75. In cases where discovery is conducted, we propose to require parties filing Motions to Compel to certify that they have made a good faith attempt to resolve the matter before filing the motion.[131] This comports with both the Federal Rules of Civil Procedure[132] and with the rocket docket rules in the Eastern District of Virginia.[133] This would limit Commission involvement in conflicts that should be easily resolved.

76. We also propose to eliminate motions to make the complaint "definite and certain."[134] Under our proposed rules, complaints will have to be very definite and certain to avoid being dismissed.

77. While filing of oppositions to motions will remain permissive, we propose to make failure to file an opposition to a motion possible grounds for granting the motion.[135] We further propose to shorten the deadline for filing oppositions to motions from ten to five business days.[136]

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[129] See Appendix A, § 1.726. See also Fed. R. Civ. P. 8(d).

[130] See 47 C.F.R. § 1.727.

[131] See Appendix A, § 1.729(f).

[132] See Fed. R. Civ. P. 37(a)(2)(A).

[133] See, E.D.Va. R. 11.

[134] See Appendix A, § 1.727(b).

[135] See Appendix A, § 1.727(e).

[136] Id.

78. Finally, we propose to prohibit amendment of complaints except for changes necessary under 47 C.F.R. § 1.720(g), which requires that information and supporting authority be current and updated as necessary in a timely manner.[137] The purpose of this change is to require the complainant to ensure that the complaint is fully developed prior to filing. The complainant would be prevented from introducing new issues late in the development of the case. We seek comment on these and any other alternative proposals.

L. Confidential or Proprietary Information and Materials

79. In revising our formal complaint rules in 1993, we added rules designed to facilitate the exchange and filing of documents claimed by complainants and defendants to be proprietary or confidential. We found that disputes over the exchange of information believed to be proprietary or confidential resulted in lengthy delays in the formal complaint process. Generally, Section 1.731 requires the party asserting confidentiality of any materials that are subject to a discovery request to mark clearly the relevant portions as being proprietary information.[138] If the proprietary designation is challenged, that party bears the burden of demonstrating, by a preponderance of the evidence, that the material falls under the standards for nondisclosure enunciated in the Freedom of Information Act.[139] We propose to revise our rules to allow parties to designate as proprietary any materials generated in the course of a formal complaint, and not limit such designation to materials produced in response to discovery.[140] We seek comment on whether additional procedures are needed in light of the short complaint resolution deadlines in the 1996 Act and our proposals in this Complaint NPRM to eliminate certain pleading and discovery opportunities.

M. Other Required Submissions

80. We propose to require parties to submit a joint statement of stipulated facts and key legal issues five days after the answer is filed.[141] We note that the "rocket docket" rules in the Eastern District of Virginia contain a similar requirement.[142] We believe that requiring the parties to submit a joint statement of stipulated facts and legal issues at this stage would promote agreement on a significant number of the disputed facts and legal issues. Of equal importance is the statement's use as a guide for the Commission to determine whether discovery is necessary

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[137] See Appendix A, § 1.727(h).

[138] 47 C.F.R. § 1.731(a).

[139] Id.

[140] See Appendix A, § 1.731(a).

[141] See Appendix A, § 1.732(a).

[142] E.D.Va. R. 13 requires that, prior to the pre-trial conference, counsel meet to exchange witness and exhibit lists and to create written stipulations of all uncontested facts to be submitted at the pre-trial conference.

or whether discovery should be limited in a particular case. The statement would serve to highlight to the Commission exactly which factual and legal areas are in dispute. Meeting statutory deadlines of 90 and 120-days necessitates that decisions on discovery and scheduling be made as early as possible.

81. We also seek comment on our current briefing process. First, we seek comment on prohibiting the filing of briefs in cases in which discovery is not conducted. If we were to adopt this option, we would require parties to include proposed findings of fact, conclusions of law and legal analysis with their complaints and answers. Such a requirement would expedite the proceeding and would make briefs redundant. We seek comment, however, on whether parties can reasonably prepare proposed findings of fact, conclusions of law and legal analysis before reviewing the response to their pleadings and the set of stipulated facts. We therefore seek comment on whether retention of the briefing process expedites resolving formal complaints. Second, we seek comment on continuing to allow parties to file briefs, but permitting the Commission staff to limit the scope of such briefs. We have proposed to require initial pleadings to contain comprehensive factual and legal information. Such pleadings should enable the Commission to determine the exact issues requiring briefing so that the brief can focus on the relevant issues and facts that are of decisional significance and thus benefit the Commission staff in analyzing and resolving those issues. This option would add some delay to the process but would enable the parties to review both sides of the case before briefing their legal arguments to the Commission.

82. We seek comment on the appropriate timetables for the submission of any briefs and reply briefs in formal complaint cases. Section 1.732(b) of our current rules provides that "in cases where there is no discovery, briefs shall be filed concurrently by the complainant and defendant within 90 days from the date a complaint is served."[143] Section 1.1732(c) states that "in cases when discovery is conducted, briefs shall be filed ... at such time designated by the staff, typically 30 days after discovery is completed."[144] Given the time constraints imposed by the 1996 Act, shorter briefing schedules will be necessary to satisfy these statutory requirements. We seek comment on whether (if briefing continues to be permitted) we should allow the staff to set the timetable for completion of any briefs to give the staff maximum flexibility and control in order to meet the various statutory deadlines for resolution. For example, would this proposal provide parties sufficient certainty as to the briefing process or would the application of standard briefing deadlines to all formal complaint cases be more beneficial to parties and the Commission? Parties are encouraged to comment on this and other questions bearing on timetables for the submission of briefs. Parties should also identify reasonable timetables that they believe would be fair to complainants and defendants and which would enable the Commission to satisfy the statutory resolution deadlines in all cases.

[143] 47 C.F.R. § 1.732(b).

[144] 47 C.F.R. § 1.732(c)

83. We also propose to limit initial briefs to 25 pages and reply briefs to 10 pages in all cases.[145] We seek comment on this and any alternative proposals that would facilitate the preparation and submission of clear and concise briefs within the time constraints imposed by the 1996 Act.

N. Sanctions

84. In this Complaint NPRM, we have proposed rules designed to facilitate the prompt resolution of formal complaints filed with the Commission. The proposed rules, if adopted, will place greater burdens on complainants and defendants alike to be more diligent in presenting and defending against allegations of misconduct within the meaning of various provisions of the Act. Such diligence must be required and enforced if we are to satisfy the explicit complaint resolution directives contained in the 1996 Act and attain our overall goal of generally improving the formal complaint process to better serve the needs of an increasingly competitive marketplace.

85. We ask interested parties to consider carefully the goals and policies underlying the rules of practice and procedure proposed in this Complaint NPRM and comment on what sanctions and/or remedies would be necessary or appropriate to ensure full compliance with and satisfaction of our proposed rule requirements. In this regard, we note that we issued a Public Notice generally advising of our resolve to impose sanctions on parties who file frivolous pleadings or pleadings filed for the purpose of delay in proceedings before the Commission or its staff.[146] In the context of a formal complaint proceeding, parties should comment on the types of sanctions that should be assessed against a complainant or defendant that fails to address or satisfy the explicit requirements under our rules. For example, we envision that a complainant's failure to satisfy the form and content requirements under our rules could result in the summary dismissal of the complaint by our staff. Similarly, a defendant's failure to respond fully and with specificity to a complainant's allegations could result in a summary ruling or other judgment in favor of the complainant. In other instances, the failure to file pleadings in accordance with our rules could, especially if repeated, warrant the imposition of monetary fines under the Act's forfeiture provisions.[147] These are just several examples of sanctions and remedies at our disposal

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[145] See Appendix A § 1.732(b) - (c).

[146] Commission Taking Tough Measures Against Frivolous Pleadings, 11 FCC Rcd 3030 (1996).

[147] 47 U.S.C. § 503(b)(1) states in part that:

> Any person who is determined by the Commission, in accordance with paragraph (3) or (4) of this subsection, to have--
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> . . . .
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> (B) willfully or repeatedly failed to comply with any of the provisions of this Act or of any rule, regulation, or order issued by the Commission under this Act or under any treaty, convention, or other agreement to which the United States is a party and which is binding upon the United States;
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> . . . .

and we encourage parties to comment on these and other alternatives that might help to ensure full compliance with the expedited complaint procedures proposed in this Complaint NPRM.

O. Other Matters

86. Finally, we seek comment on a matter presented by certain language in Section 271 relative to other complaint provisions in the Act. First, Section 271 states that the Commission shall "act on" certain complaints within 90 days.[148] It does not state that the Commission's action with respect to complaints alleging a violation of Section 271(d) must be "final" as is the case with certain other complaint provisions added by the 1996 Act.[149] For example, Section 260 requires that a "final determination" regarding complaints involving material financial harm to providers of telemessaging services be made within 120 days of filing and Section 275 requires that a "final determination" regarding complaints involving material financial harm to providers of alarm monitoring services be made within 120 days of filing. We tentatively conclude that "act on" as used in Section 271(d)(6)(B) encompasses, where appropriate, determinations by the Bureau whether a BOC has ceased to meet the conditions required for approval to provide in-region interLATA services and the imposition of any applicable section 271(d)(6)(A) sanction,[150] and need not necessarily be final action by the full Commission. We seek comment on this tentative conclusion.

87. Second, we also note that the 90-day complaint resolution deadline for Section 271(d) complaints applies only in the absence of an agreement otherwise by the parties to the complaint action.[151] We seek comment on the appropriate procedure or mechanism for early notice to the Commission of the parties' agreement to extend or waive the 90-day resolution deadline. Given the new form and content requirements and expedited procedures we propose in this rulemaking proceeding, we expect that parties, at a minimum, will reach any such agreement and so notify the staff very early in the complaint process. For example, once the staff

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> shall be liable to the United States for a forfeiture penalty. A forfeiture penalty under this subsection shall be in addition to any other penalty provided for by this Act.

[148] 47 U.S.C. § 271(d)(6)(B).

[149] Id.

[150] See 47 U.S.C. § 271 (d)(6)(B); BOC In-Region NPRM, para. 97.

[151] Section 271(d)(6)(B) states that:

> The Commission shall establish procedures for the review of complaints concerning failures by Bell operating companies to meet conditions required for approval under paragraph (3). *Unless the parties otherwise agree, the Commission shall act on such complaint within 90 days.*

47 U.S.C. § 271(d)(6)(B), emphasis added.

and the parties have established a sufficient record upon which to base a decision on a Section 271(d) complaint, we see no benefit to delaying or postponing a decision in the matter. We ask parties to comment on specific procedures and timetables that could be employed to ensure early notification to the Commission of waivers or extension agreements under Section 271(d)(6)(B) and to avoid the unnecessary expenditure of time and resources by the staff and parties to such a complaint action.

IV. CONCLUSION

88. In this Complaint NPRM, we propose to amend our rules governing the filing of formal complaints to implement certain complaint provisions in the 1996 Act and establish procedures necessary to facilitate the full and fair resolution of complaints filed under such provisions within the deadlines established by the Telecommunications Act of 1996. We tentatively conclude that the pro-competitive goals and policies underlying the complaint resolution deadlines in the 1996 Act would be enhanced by applying the rules proposed in this Complaint NPRM to all formal complaints, not just those enumerated in the 1996 Act. Applying standard procedures to all formal complaints will result in consistent and uniform Commission rules, which will facilitate the filing of complaints by complainants and defendant carriers. Our overall goal is to establish rules of practice and procedure which, by providing a forum for prompt resolution of complaints of unreasonable, discriminatory, or otherwise unlawful conduct by telecommunications carriers, will foster robust competition in all telecommunications markets. This proceeding is one of a series of interrelated rulemakings designed to implement the mandates of the 1996 Act by promoting competition and reducing regulation in the telecommunications market, while simultaneously advancing and preserving universal service for all Americans. The proposals made and tentative conclusions reached in this Complaint NPRM should be reviewed in conjunction with the enforcement goals and policies addressed in those related rulemaking proceedings.

V. PROCEDURAL MATTERS

A. Ex Parte Rules - Non-restricted Proceeding

89. This is a non-restricted notice-and-comment rulemaking proceeding. Ex parte presentations are permitted, except during the Sunshine Agenda period, provided they are disclosed as provided in the Commission's rules. See generally 47 C.F.R. §§ 1.1202, 1.1203, and 1.1206(a).

B. Paperwork Reduction Act Analysis

90. This Complaint NPRM contains either a proposed or modified information collection. As part of its continuing effort to reduce paperwork burdens, we invite the general public and the Office of Management and Budget (OMB) to take this opportunity to comment on the information collections contained in this Complaint NPRM, as required by the Paperwork Reduction Act of 1995, Pub. L. No. 104-13. Public and agency comments are due at the same

time as other comments on this Complaint NPRM; OMB comments are due 60 days from the date of publication of this Complaint NPRM in the Federal Register. Comments should address: (a) whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimates; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology.

91. Written comments by the public on the proposed and/or modified information collections are due January 6, 1997. Written comments must be submitted by OMB on the proposed and/or modified information collections on or before 60 days after date of publication in the Federal Register. In addition to filing comments with the Secretary, a copy of any comments on the information collections contained herein should be submitted to Dorothy Conway, Federal Communications Commission, Room 234, 1919 M Street, N.W., Washington, D.C. 20554, or via the Internet to dconway@fcc.gov and to Timothy Fain, OMB Desk Officer, 10236 NEOB, 725 - 17th Street, N.W., Washington, D.C. 20503 or via the Internet to fain_t@al.eop.gov.

C. Initial Regulatory Flexibility Analysis

92. As required by Section 603 of the Regulatory Flexibility Act,[152] the Commission has prepared an Initial Regulatory Flexibility Analysis (IRFA) of the expected significant economic impact on small entities by the policies and rules proposed in the Implementation of the Telecommunications Act of 1996: Amendment of Rules Governing Procedures to be Followed When Formal Complaints are Filed Against Common Carriers - Notice of Proposed Rulemaking ("Complaint NPRM"). Written public comments are requested on the IRFA. Comments must be identified as responses to the IRFA and must be filed by the same deadlines for comments on the Complaint NPRM.

93. Need for and Objectives of the Proposed Rules: The Commission is issuing this Complaint NPRM to implement certain complaint provisions contained in the Telecommunications Act of 1996 and to improve generally the speed and effectiveness of our formal complaint process.

94. Legal Basis: The Complaint NPRM is adopted pursuant to Sections 1, 4(i), 4(j), 207 - 209, 260, 271, 274, and 275 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), 207 - 209, 260, 271, 274, 275.

95. Description and Number of Small Entities Which May be Affected: The proposals in this proceeding may have a significant impact on a substantial number of small businesses as

[152] 5 U.S.C. § 603.

defined by Section 601(3) of the Regulatory Flexibility Act. Under the Small Business Act, a "small business concern" is one that: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) meets any additional criteria established by the Small Business Administration (SBA).[153] SBA has defined a small business for Standard Industrial Classification (SIC) categories 4812 (Radiotelephone Communications) and 4813 (Telephone Communications, Except Radiotelephone) as those which have fewer than 1,500 employees.[154]

1. Telephone Companies (SIC 481)

96. Estimate of Potential Complainants that may be Classified as Small Businesses. Section 208(a) provides that formal complaints against a common carrier may be filed by "[a]ny person, any body politic or municipal organization."[155] The FCC has no control as to the filing frequency of complaints, nor as to the parties that will file complaints. The filing of complaints depends entirely upon the complainant's perception that it possesses a cause of action against a common carrier subject to the Communications Act of 1934, as amended, and it is the complainant's decision to file its complaint with the FCC. Therefore we are unable at this time to estimate the number of future complainants that would qualify as small business concerns under SBA's definition.

97. Estimate of Potential Defendants that may be Classified as Small Businesses. The United States Bureau of the Census ("the Census Bureau") reports that, at the end of 1992, there were 3,497 firms engaged in providing telephone services, as defined therein, for at least one year.[156] This number encompasses a broad category which contains a variety of different subsets of carriers, including local exchange carriers, interexchange carriers, competitive access providers, cellular carriers, mobile service carriers, operator service providers, pay telephone operators, PCS providers, covered SMR providers, and resellers. It seems certain that some of those 3,497 telephone service firms may not qualify as small entities or small incumbent LECs because they are not "independently owned and operated."[157] For example, a PCS provider that is affiliated with an interexchange carrier having more than 1,500 employees would not meet the definition of a small business. It seems reasonable to conclude, therefore, that fewer than 3,497 telephone service firms are small entity telephone service firms or small incumbent LECs that may be

[153] 15 U.S.C. § 632. See, e.g., Brown Transport Truckload, Inc. v. Southern Wipers, Inc., 176 B.R. 82 (N.D. Ga. 1994).

[154] 13 C.F.R. § 121.201.

[155] 47 U.S.C. § 208(a).

[156] United States Department of Commerce, Bureau of the Census, 1992 Census of Transportation, Communications, and Utilities: Establishment and Firm Size, at Firm Size 1-123 (1995) (1992 Census).

[157] 15 U.S.C. § 632(a)(1).

affected by this Order. We seek comment on this conclusion. We estimate below the potential defendants affected by this order by service category. We seek comment on these estimates.

98. Wireline Carriers and Service Providers. SBA has developed a definition of small entities for telephone communications companies other than radiotelephone (wireless) companies. The Census Bureau reports that, there were 2,321 such telephone companies in operation for at least one year at the end of 1992.[158] All but 26 of the 2,321 non-radiotelephone companies listed by the Census Bureau were reported to have fewer than 1,000 employees. Thus, even if all 26 of those companies had more than 1,500 employees, there would still be 2,295 non-radiotelephone companies that might qualify as small entities or small incumbent LECs. Although it seems certain that some of these carriers are not independently owned and operated, we are unable at this time to estimate with greater precision the number of wireline carriers and service providers that would qualify as small business concerns under SBA's definition. Consequently, we estimate that there are fewer than 2,295 small entity telephone communications companies other than radiotelephone companies that may be affected by the decisions and rules adopted in this Order.

99. Local Exchange Carriers. Neither the Commission nor SBA has developed a definition of small providers of local exchange services (LECs). The closest applicable definition under SBA rules is for telephone communications companies other than radiotelephone (wireless) companies. The most reliable source of information regarding the number of LECs nationwide of which we are aware appears to be the data that we collect annually in connection with the Telecommunications Relay Service (TRS). According to our most recent data, 1,347 companies reported that they were engaged in the provision of local exchange services.[159] Although it seems certain that some of these carriers are not independently owned and operated, or have more than 1,500 employees, we are unable at this time to estimate with greater precision the number of LECs that would qualify as small business concerns under SBA's definition. Consequently, we estimate that there are fewer than 1,347 small incumbent LECs that may be affected by the decisions and rules adopted in this Order.

100. Interexchange Carriers. Neither the Commission nor SBA has developed a definition of small entities specifically applicable to providers of interexchange services (IXCs). The closest applicable definition under SBA rules is for telephone communications companies other than radiotelephone (wireless) companies. The most reliable source of information regarding the number of IXCs nationwide of which we are aware appears to be the data that we collect annually in connection with TRS. According to our most recent data, 97 companies

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[158] 1992 Census, supra, at Firm Size 1-123.

[159] Federal Communications Commission, CCB, Industry Analysis Division, Telecommunications Industry Revenue: TRS Fund Worksheet Data, Tbl. 21 (Average Total Telecommunications Revenue Reported by Class of Carrier) (Feb. 1996) (TRS Worksheet).

reported that they were engaged in the provision of interexchange services.[160] Although it seems certain that some of these carriers are not independently owned and operated, or have more than 1,500 employees, we are unable at this time to estimate with greater precision the number of IXCs that would qualify as small business concerns under SBA's definition. Consequently, we estimate that there are fewer than 97 small entity IXCs that may be affected by the decisions and rules adopted in this Order.

101. Competitive Access Providers. Neither the Commission nor SBA has developed a definition of small entities specifically applicable to providers of competitive access services (CAPs). The closest applicable definition under SBA rules is for telephone communications companies other than radiotelephone (wireless) companies. The most reliable source of information regarding the number of CAPs nationwide of which we are aware appears to be the data that we collect annually in connection with the TRS. According to our most recent data, 30 companies reported that they were engaged in the provision of competitive access services.[161] Although it seems certain that some of these carriers are not independently owned and operated, or have more than 1,500 employees, we are unable at this time to estimate with greater precision the number of CAPs that would qualify as small business concerns under SBA's definition. Consequently, we estimate that there are fewer than 30 small entity CAPs that may be affected by the decisions and rules adopted in this Order.

102. Operator Service Providers. Neither the Commission nor SBA has developed a definition of small entities specifically applicable to providers of operator services. The closest applicable definition under SBA rules is for telephone communications companies other than radiotelephone (wireless) companies. The most reliable source of information regarding the number of operator service providers nationwide of which we are aware appears to be the data that we collect annually in connection with the TRS. According to our most recent data, 29 companies reported that they were engaged in the provision of operator services.[162] Although it seems certain that some of these companies are not independently owned and operated, or have more than 1,500 employees, we are unable at this time to estimate with greater precision the number of operator service providers that would qualify as small business concerns under SBA's definition. Consequently, we estimate that there are fewer than 29 small entity operator service providers that may be affected by the decisions and rules adopted in this Order.

103. Pay Telephone Operators. Neither the Commission nor SBA has developed a definition of small entities specifically applicable to pay telephone operators. The closest applicable definition under SBA rules is for telephone communications companies other than radiotelephone (wireless) companies. The most reliable source of information regarding the number of pay telephone operators nationwide of which we are aware appears to be the data that

[160] Id.

[161] Id.

[162] Id.

we collect annually in connection with the TRS. According to our most recent data, 197 companies reported that they were engaged in the provision of pay telephone services.[163] Although it seems certain that some of these carriers are not independently owned and operated, or have more than 1,500 employees, we are unable at this time to estimate with greater precision the number of pay telephone operators that would qualify as small business concerns under SBA's definition. Consequently, we estimate that there are fewer than 197 small entity pay telephone operators that may be affected by the decisions and rules adopted in this Order.

104. Wireless (Radiotelephone) Carriers. SBA has developed a definition of small entities for radiotelephone (wireless) companies. The Census Bureau reports that there were 1,176 such companies in operation for at least one year at the end of 1992.[164] According to SBA's definition, a small business radiotelephone company is one employing fewer than 1,500 persons.[165] The Census Bureau also reported that 1,164 of those radiotelephone companies had fewer than 1,000 employees. Thus, even if all of the remaining 12 companies had more than 1,500 employees, there would still be 1,164 radiotelephone companies that might qualify as small entities if they are independently owned are operated. Although it seems certain that some of these carriers are not independently owned and operated, we are unable at this time to estimate with greater precision the number of radiotelephone carriers and service providers that would qualify as small business concerns under SBA's definition. Consequently, we estimate that there are fewer than 1,164 small entity radiotelephone companies that may be affected by the decisions and rules adopted in this Order.

105. Cellular Service Carriers. Neither the Commission nor SBA has developed a definition of small entities specifically applicable to providers of cellular services. The closest applicable definition under SBA rules is for telephone communications companies other than radiotelephone (wireless) companies. The most reliable source of information regarding the number of cellular service carriers nationwide of which we are aware appears to be the data that we collect annually in connection with the TRS. According to our most recent data, 789 companies reported that they were engaged in the provision of cellular services.[166] Although it seems certain that some of these carriers are not independently owned and operated, or have more than 1,500 employees, we are unable at this time to estimate with greater precision the number of cellular service carriers that would qualify as small business concerns under SBA's definition. Consequently, we estimate that there are fewer than 789 small entity cellular service carriers that may be affected by the decisions and rules adopted in this Order.

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[163] Id.

[164] 1992 Census, at Firm Size 1-123.

[165] 13 C.F.R. § 121.201, Standard Industrial Classification (SIC) Code 4812.

[166] Id.

106. Mobile Service Carriers. Neither the Commission nor SBA has developed a definition of small entities specifically applicable to mobile service carriers, such as paging companies. The closest applicable definition under SBA rules is for telephone communications companies other than radiotelephone (wireless) companies. The most reliable source of information regarding the number of mobile service carriers nationwide of which we are aware appears to be the data that we collect annually in connection with the TRS. According to our most recent data, 117 companies reported that they were engaged in the provision of mobile services.[167] Although it seems certain that some of these carriers are not independently owned and operated, or have more than 1,500 employees, we are unable at this time to estimate with greater precision the number of mobile service carriers that would qualify under SBA's definition. Consequently, we estimate that there are fewer than 117 small entity mobile service carriers that may be affected by the decisions and rules adopted in this Order.

107. Broadband PCS Licensees. The broadband PCS spectrum is divided into six frequency blocks designated A through F. As set forth in 47 C.F.R. § 24.720(b), the Commission has defined "small entity" in the auctions for Blocks C and F as a firm that had average gross revenues of less than $40 million in the three previous calendar years. Our definition of a "small entity" in the context of broadband PCS auctions has been approved by SBA.[168] The Commission has auctioned broadband PCS licenses in Blocks A, B, and C. We do not have sufficient data to determine how many small businesses bid successfully for licenses in Blocks A and B. There were 90 winning bidders that qualified as small entities in the Block C auction. Based on this information, we conclude that the number of broadband PCS licensees affected by the decisions in this Order includes, at a minimum, the 90 winning bidders that qualified as small entities in the Block C broadband PCS auction.

108. At present, no licenses have been awarded for Blocks D, E, and F of broadband PCS spectrum. Therefore, there are no small businesses currently providing these services. However, a total of 1,479 licenses will be awarded in the D, E, and F Block broadband PCS auctions, which are scheduled to begin on August 26, 1996. Of the 153 qualified bidders for the D, E, and F Block PCS auctions, 105 were small businesses.[169] Eligibility for the 493 F Block licenses is limited to entrepreneurs with average gross revenues of less than $125 million.[170] There are 114

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[167] Id.

[168] See Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, PP Docket No. 93-253, Fifth Report and Order, 9 FCC Rcd 5532, 5581-84 (1994).

[169] See Auction of Broadband Personal Communications Service (D, E, and F Blocks), Public Notice, DA 96-1400 (rel. Aug. 20, 1996).

[170] Amendment of Parts 20 and 24 of the Commission's Rules -- Broadband PCS Competitive Bidding and the Commercial Mobile Radio Service Spectrum Cap, WT Docket No. 96-59, Amendment of the Commission's Cellular/PCS Cross-Ownership Rule, Report and Order, GN Docket No. 90-314, FCC 96-278 (rel. June 24, 1996).

eligible bidders for the F Block.[171] We cannot estimate, however, the number of these licenses that will be won by small entities under our definition, nor how many small entities will win D or E Block licenses. Given that nearly all radiotelephone companies have fewer than 1,000 employees[172] and that no reliable estimate of the number of prospective D, E, and F Block licensees can be made, we assume for purposes of this IRFA, that all of the licenses in the D, E, and F Block Broadband PCS auctions may be awarded to small entities under our rules, which may be affected by the decisions and rules adopted in this Order.

109. SMR Licensees. Pursuant to 47 C.F.R. § 90.814(b)(1), the Commission has defined "small entity" in auctions for geographic area 800 MHz and 900 MHz SMR licenses as a firm that had average annual gross revenues of less than $15 million in the three previous calendar years. This definition of a "small entity" in the context of 800 MHz and 900 MHz SMR has been approved by the SBA.[173] The rules adopted in this Order may apply to SMR providers in the 800 MHz and 900 MHz bands that either hold geographic area licenses or have obtained extended implementation authorizations. We do not know how many firms provide 800 MHz or 900 MHz geographic area SMR service pursuant to extended implementation authorizations, nor how many of these providers have annual revenues of less than $15 million. We assume, for purposes of this IRFA, that all of the extended implementation authorizations may be held by small entities, which may be affected by the decisions and rules adopted in this Order.

110. The Commission recently held auctions for geographic area licenses in the 900 MHz SMR band. There were 60 winning bidders who qualified as small entities in the 900 MHz auction. Based on this information, we conclude that the number of geographic area SMR licensees affected by the rule adopted in this Order includes these 60 small entities. No auctions have been held for 800 MHz geographic area SMR licenses. Therefore, no small entities currently hold these licenses. A total of 525 licenses will be awarded for the upper 200 channels in the 800 MHz geographic area SMR auction. However, the Commission has not yet determined how many licenses will be awarded for the lower 230 channels in the 800 MHz geographic area SMR auction. There is no basis, moreover, on which to estimate how many small entities will win these licenses. Given that nearly all radiotelephone companies have fewer than 1,000 employees and that no reliable estimate of the number of prospective 800 MHz licensees can be

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[171] See Auction of Broadband Personal Communications Service (D, E, and F Blocks), Public Notice, DA 96-1400 (rel. Aug. 20, 1996).

[172] 1992 Census, Table 5, Employment Size of Firms: 1992, SIC Code 4812.

[173] See Amendment of Parts 2 and 90 of the Commission's Rules to Provide for the Use of 200 Channels Outside the Designated Filing Areas in the 896-901 MHz and the 935-940 MHz Bands Allotted to the Specialized Mobile Radio Pool, PR Docket No. 89-583, Second Order on Reconsideration and Seventh Report and Order, 11 FCC Rcd 2639, 2693-702 (1995); Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band, PR Docket No. 93-144, First Report and Order, Eighth Report and Order, and Second Further Notice of Proposed Rulemaking, 11 FCC Rcd 1463 (1995).

made, we assume, for purposes of this IRFA, that all of the licenses may be awarded to small entities who, thus, may be affected by the decisions in this Order.

111. Resellers. Neither the Commission nor SBA has developed a definition of small entities specifically applicable to resellers. The closest applicable definition under SBA rules is for all telephone communications companies. The most reliable source of information regarding the number of resellers nationwide of which we are aware appears to be the data that we collect annually in connection with the TRS. According to our most recent data, 206 companies reported that they were engaged in the resale of telephone services.[174] Although it seems certain that some of these carriers are not independently owned and operated, or have more than 1,500 employees, we are unable at this time to estimate with greater precision the number of resellers that would qualify as small business concerns under SBA's definition. Consequently, we estimate that there are fewer than 206 small entity resellers that may be affected by the decisions and rules adopted in this Order.

2. Cable System Operators (SIC 4841)

112. Cable Systems: SBA has developed a definition of small entities for cable and other pay television services, which includes all such companies generating less than $11 million in revenue annually. This definition includes cable systems operators, closed circuit television services, direct broadcast satellite services, multipoint distribution systems, satellite master antenna systems and subscription television services. According to the Census Bureau, there were 1,323 such cable and other pay television services generating less than $11 million in revenue that were in operation for at least one year at the end of 1992.[175]

113. The Commission has developed its own definition of a small cable system operator for the purposes of rate regulation. Under the Commission's rules, a "small cable company," is one serving fewer than 400,000 subscribers nationwide.[176] Based on our most recent information, we estimate that there were 1,439 cable operators that qualified as small cable system operators at the end of 1995.[177] Since then, some of those companies may have grown to serve over 400,000 subscribers, and others may have been involved in transactions that caused them to be combined with other cable operators. Consequently, we estimate that there are fewer than 1,439

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[174] Id.

[175] 1992 Census, supra, at Firm Size 1-123.

[176] 47 C.F.R. § 76.901(e). The Commission developed this definition based on its determinations that a small cable system operator is one with annual revenues of $100 million or less. Implementation of Sections of the 1992 Cable Act: Rate Regulation, Sixth Report and Order and Eleventh Order on Reconsideration, 10 FCC Rcd 7393.

[177] Paul Kagan Associates, Inc., Cable TV Investor, Feb. 29, 1996 (based on figures for Dec. 30, 1995).

small entity cable system operators that may be affected by the decisions and rules adopted in this Order.

114. The Communications Act also contains a definition of a small cable system operator, which is "a cable operator that, directly or through an affiliate, serves in the aggregate fewer than 1 percent of all subscribers in the United States and is not affiliated with any entity or entities whose gross annual revenues in the aggregate exceed $250,000,000."[178] The Commission has determined that there are 61,700,000 subscribers in the United States. Therefore, we found that an operator serving fewer than 617,000 subscribers shall be deemed a small operator, if its annual revenues, when combined with the total annual revenues of all of its affiliates, do not exceed $250 million in the aggregate.[179] Based on available data, we find that the number of cable operators serving 617,000 subscribers or less totals 1,450.[180] Although it seems certain that some of these cable system operators are affiliated with entities whose gross annual revenues exceed $250,000,000, we are unable at this time to estimate with greater precision the number of cable system operators that would qualify as small cable operators under the definition in the Communications Act.

115. Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements: Section 1.721 of the proposed rules would require all complainants to complete and submit a Formal Complaint Intake Form with their complaints.[181] The intake form requirement is designed to help complainants avoid procedural and substantive defects that might affect the staff's ability to quickly process complaints and delay full responses by defendant carriers to otherwise legitimate complaints. In addition, the completed form should enable the staff and the defendant carriers to quickly identify the specific statutory provisions under which relief is being sought in the complaint. Because the proposed form would solicit information that would be already contained in the body of the formal complaint, no additional professional skills would be necessary to complete the form.

116. Potential Impact: Some of the proposed requirements in this Complaint NPRM may have a significant economic impact on small business entities. Generally, this Complaint NPRM proposes to require or encourage complainants and defendants to engage in certain pre-filing activities, change service requirements, modify the form of initial pleadings, shorten filing deadlines, eliminate certain pleading opportunities that do not appear useful or necessary, and modify the discovery process.

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[178] 47 U.S.C. § 543(m)(2).

[179] 47 C.F.R. § 76.1403(b).

[180] Paul Kagan Associates, Inc., Cable TV Investor, Feb. 29, 1996 (based on figures for Dec. 30, 1995).

[181] See Appendix A, Section 1.721(a)(12); Appendix B.

117. Pre-Filing Activities and Discovery: The Commission proposes to require a complainant to do the following: certify that it discussed the possibility of settlement with the defendant carrier's representative(s) prior to filing the complaint and attach certain written documentation.[182] The Commission seeks comment on limiting discovery.[183] The Commission also seeks comment on the feasibility of allowing the parties to a complaint proceeding to agree among themselves to a cost-recovery system as a basis for facilitating the prompt identification and exchange of information. While these proposed rules may place a greater burden on a small business entity to provide better legal and factual support early in the process, we tentatively conclude that it does not significantly alter the level of evidentiary and legal support that would be ultimately required of parties in formal complaint actions pursuant to the current rules. It may, however, make it more difficult for all complainants, including small business, to gather the information needed to prevail on their complaints. Potentially higher initial costs may be somewhat offset by the prompt resolution of complaints and the avoidance of protracted and costly discovery proceedings and briefing requirements. It has been noted, for example, that the overall litigation costs of "rocket docket"[184] cases in the U.S. District Court for the Eastern District of Virginia are lower than the costs of cases that take longer to resolve.[185] Indeed, by requiring better and more complete submissions earlier in the process, this proposed rule reduces the need for discovery and other information filings, thereby significantly reducing the burden on small business entities. We seek comment on this tentative conclusion and any other potential impact of these proposals on small business entities.

118. Format and Content Requirements and Other Required Submissions: The Commission proposes to require parties to submit a joint statement of stipulated facts and key legal issues five days after the answer is filed.[186] The Commission also proposes to require all pleadings that seek Commission orders, as well as the orders themselves, to contain proposed findings of fact and conclusions of law, with supporting legal analysis,[187] and to require these submissions to be in both hard copy and on computer disks in "read only" mode and formatted in WordPerfect 5.1 for Windows,[188] or as otherwise directed by the staff in particular cases. The Commission also proposes to require the complaint, answer, and any authorized reply to include: (1) the name, address and telephone number of each individual likely to have discoverable information relevant to the disputed facts alleged in the pleadings, identifying the subjects of

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[182] See Appendix A, § 1.721(a)(9).

[183] See supra section on "Discovery."

[184] See supra note 54.

[185] See supra note 82.

[186] See Appendix A, § 1.732(a).

[187] See Appendix A, § 1.727(g).

[188] See Appendix A, § 1.734(d).

information; and (2) a copy of, or a description by category and location of all documents, data compilations and tangible things in the possession, custody, or control of the party that are relevant to the disputed facts alleged with particularity in the pleadings.[189] While these proposed rules may place a greater burden on a small business entity to provide better legal and factual support early in the process, we tentatively conclude that it does not significantly alter the level of evidentiary and legal support that would be ultimately required of parties in formal complaint actions pursuant to the current rules. It may, however, make it more difficult for all complainants, including small business, to gather the information needed to prevail on their complaints. Potentially higher initial costs may be somewhat offset by the prompt resolution of complaints and the avoidance of protracted and costly discovery proceedings and briefing requirements. It has been noted, for example, that the overall litigation costs of "rocket docket"[190] cases in the U.S. District Court for the Eastern District of Virginia are lower than the costs of cases that take longer to resolve.[191] Indeed, by requiring better and more complete submissions earlier in the process, this proposed rule reduces the need for discovery and other information filings, thereby significantly reducing the burden on small business entities. We seek comment on this tentative conclusion and any other potential impact of these proposals on small business entities.

119. Damages. The Commission proposes to allow bifurcation of liability and damages issues[192] by permitting a complainant to file a supplemental complaint for damages after a finding of liability. In such a case, the Commission would defer adjudication of all damages issues until after a finding of liability. The Commission also proposes to require, in certain cases after liability has been found, defendants to place a sum of money in an interest-bearing escrow account, to cover part or all of the damages for which they may be found liable.[193] While the bifurcation of liability and damages issues may require small business entities to postpone litigation of damages issues, any increased costs will be somewhat offset by the prompt resolution of the liability issues in complaints and the avoidance of protracted and costly discovery proceedings and briefing requirements in the initial proceeding. The proposal to require defendants to place a sum of money in an interest-bearing escrow account may have a significant economic impact on defendants that are small business entities without sufficient funds. We seek comment on this tentative conclusion and any other potential impact of these proposals on small business entities.

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[189] See Appendix A, §§ 1.721(a)(10), (11); 1.724(g),(h); 1.726(c).

[190] See supra note 54.

[191] See supra note 82.

[192] See Appendix A, § 1.722(c).

[193] See Appendix A, § 1.722(d)(2).

120. Significant Alternatives to the Proposed Rules Which Minimize Significant Economic Impact on Small Entities and Accomplish Stated Objectives: We have included a proposal to waive many of the proposed pleading requirements with respect to complainants and other entities that can demonstrate good cause.[194] Upon an appropriate showing of financial hardship or other public interest factors, we propose to waive format and content requirements under Section 1.721 of the rules.[195] Furthermore, the proposed rules apply only to Section 208 complaints that are filed with the Commission. Complainants wishing to assure themselves of the ability to utilize full discovery, for example, are not precluded from filing their complaints in federal district court.[196] The impact on small business entities of the proposal to require defendants to place a sum of money in an interest-bearing escrow account would be minimized by the fact that this measure would be implemented under standards similar to those used for determining whether a preliminary injunction is appropriate, e.g., likelihood of success on the merits, irreparable harm, etc.[197] In addition, the Complaint NPRM solicits comments on a variety of alternatives.

121. Federal Rules that May Overlap, Duplicate, or Conflict with the Proposed Rules: None.

D. Comments

122. Pursuant to Sections 1.415 and 1.419 of the Commission's rules, 47 C.F.R. §§ 1.415, 1.419, all interested parties may file comments on the matters discussed in this Complaint NPRM and on proposed rules contained in the appendices on or before January 6, 1997 and reply comments on or before January 31, 1997. Parties are also invited to submit, in conjunction with their comments or reply comments, proposed text for rules that the Commission could adopt in this proceeding. Specific rule proposals should be filed as an appendix to a party's comments or reply comments. Such appendices may include only proposed text for rules that would implement proposals set forth in the parties' comments and reply comments in this proceeding, and may not include any comments or arguments. Proposed rules should be provided in the format used for rules in the Code of Federal Regulations, and should otherwise conform to the Comment Filing Procedures set forth in this Complaint NPRM.

123. To file formally in this proceeding, participants must file an original and six copies of all comments, reply comments, and supporting comments. If participants want each Commissioner to receive a personal copy of their comments, they must file an original and nine copies. In addition, participants are encouraged to submit two additional copies directly to the

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[194] See supra section on "Format and Content Requirements."

[195] See Appendix A, § 1.721(c).

[196] See 47 U.S.C. § 207.

[197] See supra note 107.

Common Carrier Bureau, Enforcement Division, Room 6008, 2025 M Street, N.W., Washington, D.C. 20554. Comments and reply comments should be sent to the Office of the Secretary, Federal Communications Commission, 1919 M Street, N.W., Room 222, Washington, D.C. 20554. Parties should also file one copy of any documents filed in this docket with the Commission's copy contractor, International Transcription Services, Inc., 2100 M Street, N.W., Suite 140, Washington, D.C. 20037. Comments and reply comments will be available for public inspection during regular business hours in the FCC Reference Center, 1919 M Street, N.W., Room 239, Washington, D.C. 20554.

124. In order to facilitate review of comments and reply comments, both by parties and the Commission, comments and reply comments should include a summary of the substantive arguments raised in the pleading.[198]

125. Parties are also asked to submit comments and reply comments on diskette. Such diskette submissions would be in addition to the formal filing requirements addressed above. Parties submitting diskettes should submit them to Anita Cheng, Common Carrier Bureau, Enforcement Division, Room 6008, 2025 M Street, N.W., Washington, D.C. 20554. Such a submission should be on a 3.5 inch diskette formatted in an IBM compatible form using MS-DOS 5.0 and WordPerfect 5.1 software. The diskette should be submitted in "read only" mode. The diskette should be clearly labelled with the party's name, proceeding, type of pleading (comment or reply comments) and date of submission. The diskette should be accompanied by a cover letter.

VI. ORDERING CLAUSES

126. Accordingly, IT IS ORDERED that pursuant to Sections 1, 4, 201-205, 208, 215, 218, 220 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154, 201-205, 208, 215, 218 and 220, a NOTICE OF PROPOSED RULEMAKING is hereby ADOPTED.

127. IT IS FURTHER ORDERED that the Secretary shall send a copy of this Complaint NPRM, including the IRFA, to the Chief Counsel for Advocacy of the Small Business Administration in accordance with paragraph 603(a) of the Regulatory Flexibility Act, Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C. §§ 601, et seq. (1981).

[198] The summary may be paginated separately from the rest of the pleading (e.g., as "i, ii").

128. IT IS FURTHER ORDERED that the Chief of the Common Carrier Bureau is delegated authority to require the submission of additional information, make further inquiries, and modify the dates and procedures, if necessary, to provide for a fuller record and a more efficient proceeding.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

APPENDIX A

PROPOSED RULE CHANGES

Part 0 of Title 47 of the Code of Federal Regulations is proposed to be amended as follows:

1. Section 0.291 is revised to read as follows:

§ 0.291 Authority delegated

. . . .

(d) *Authority to designate for hearing.* The Chief, Common Carrier Bureau shall not have authority to designate for hearing any formal complaints which present novel questions of law or policy which cannot be resolved under outstanding precedents or guidelines. The Chief, Common Carrier Bureau shall not have authority to designate for hearing any applications except applications for facilities where the issues presented relate solely to whether the applicant has complied with outstanding precedents and guidelines.

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

2. Section 1.47 is revised to read as follows:

§ 1.47 Service of documents and proof of service

. . . .

(b) Where any person is required to serve any document filed with the Commission, service shall be made by that person or by his representative on or before the day on which the document is filed.

. . . .

(h) Every carrier subject to the Communications Act of 1934, as amended, shall designate an agent in the District of Columbia, upon whom service of all notices, process, orders, decisions, and requirements of the Commission may be made for and on behalf of said carrier in any proceeding pending before the Commission. Such designation shall be filed, and updated as necessary, in writing and electronically in the office of the secretary of the Commission. Service of all notices, process, orders, decisions, and requirements of the Commission may be made upon such carrier by leaving a copy thereof with such designated agent at his office or usual place of residence in the District of Columbia. If a carrier fails to designate such an agent, service of any notice or other process in any proceeding before the Commission, or of any order, decision, or requirement of the Commission, may be made by posting such notice, process, order, requirement, or decision in the office of the secretary of the Commission.

3. Section 1.720 is revised to read as follows:

§ 1.720 General pleading requirements

Formal complaint proceedings are generally resolved on a written record consisting of a complaint, answer, and statement of stipulated facts, but may also include other written submissions such as briefs and responses to written interrogatories. The Bureau in its discretion may designate formal complaint proceedings for resolution by hearing before an Administrative Law Judge, or where appropriate, it may refer certain issues of fact to an Administrative Law Judge for expedited hearing, while responsibility for the overall resolution of the proceeding is retained by the responsible Bureau.

All written submissions, both substantively and procedurally, must conform to the following standards:

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

. . . .

(h) Specific reference must be made to any tariff provision relied on in support of a claim or defense. Copies of relevant tariffs or relevant portions of tariffs that are relied upon in a pleading shall be appended to the pleading.

4. Section 1.721 is revised to read as follows:

§ 1.721 Format and content

. . . .

(a)(5) A complete statement of facts which, if proven true, would constitute such a violation. All facts must be supported, pursuant to §1.720(c), by relevant affidavits and documentation, including copies of all applicable agreements, offers, counter-offers, denials, or other relevant correspondence.

(6) Complete detailed explanation of the manner in which a defendant has violated the Act, Commission order, or Commission rule in question, including identification or description and relevant time period, of the communications, transmissions, services, or other carrier conduct complained of and nature of the injury sustained;

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

(8) Certification that each complainant has discussed the possibility of settlement with each defendant prior to the filing of the formal complaint;

(9) Whether suit has been filed in any court or other government agency on the basis of the same cause of action, or whether the complaint itself seeks prospective relief identical to the relief proposed or at issue in a notice-and-comment proceeding that is concurrently before the Commission;

(10) A copy of, or a description by category and location of all documents, data compilations and tangible things in the complainant's possession, custody or control that are relevant to the disputed facts alleged with particularity in the complaint. The complaint may also include an explanation of why any relevant documents are believed to be confidential.

(11) The name, address and telephone number of each individual likely to have discoverable information relevant to the disputed facts alleged with particularity in the complaint, identifying the subjects of information.

(12) A completed Formal Complaint Intake Form.

. . . .

(c) Upon showing of good cause by the complainant, the Commission may waive any of the requirements of this section.

5. Section 1.722 is revised to read as follows:

§ 1.722 Damages

(a) In case recovery of damages is sought, the complaint shall contain appropriate allegations showing such evidence that will identify, with reasonable certainty, the amount of damages for which recovery is sought.

(b) Damages will not be awarded upon a complaint unless specifically requested. Damages may be awarded, however, upon a supplemental complaint as described more fully in section (c) below, based upon a finding of the Commission in the original proceeding. *Provided that:*

. . . .

(c) In all cases in which recovery of damages is sought, it shall be the responsibility of the complainant to provide a computation of each and every category of damages for which recovery is sought, along with an identification of all relevant documents and materials or such other evidence to be used by the complainant to determine the amount of such damages.

(1) Where the recovery of damages is sought on the original complaint, such original complaint must include the computation of damages and identification of documents, materials and other evidence to be used in such computation described in (c) above.

(2) A complainant electing to seek damages upon a supplemental complaint as provided in subsection (b) above must clearly and unequivocally state such election in the original complaint. In cases in which a complainant clearly and unequivocally states its election to seek damages upon supplemental complaint, the computation and identification of all relevant documents, materials and other evidence described in (c) above need not be provided until such time the complainant files its supplemental complaint.

(3) Where a complainant voluntarily elects to seek the recovery of damages upon a supplemental complaint, the Commission will resolve the liability complaint within the relevant complaint resolution deadlines contained in the Act and defer adjudication of the damage complaint until after the liability complaint has been resolved.

(d) Where a complainant elects in its original complaint to seek the recovery of damages upon a supplemental complaint, the following procedures may apply in the event the Commission determines liability based upon its review of the original complaint:

(1) If the parties agree, issues concerning the amount, if any, of damages may be submitted for mediation to a Commission Administrative Law Judge. Such Administrative Law Judge shall be chosen in the following manner:

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

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

(2) After the defendant has been determined to be liable in such bifurcated proceeding, the Commission may order the defendant to deposit into an interest bearing escrow account a sum equal to the amount of damages which it 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) complainant's potential irreparable injury in the absence of such deposit; (ii) the likelihood that the amount of damages ordered at the conclusion of litigation will be equal to or greater than the amount deposited; (iii) the balance of the hardships between complainant and defendant; and (iv) whether public interest considerations favor the ordering of the deposit.

6. Section 1.724 is revised to read as follows:

§ 1.724 Answers

(a) Any carrier upon which a copy of a formal complaint is served under this subpart shall answer within 20 days of service of the formal complaint, 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 should be made to narrow the issues in the answer. Any defendant failing 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 the defendant in accordance with the allegations contained in the complaint.

(c) The defendant shall state concisely its defenses to each claim asserted and shall admit or deny the averments on which the complainant relies. 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 make its denials as specific denials of designated averments or paragraphs. General denials are prohibited.

. . . .

(g) The answer shall include a copy of, or a description by category and location of all documents, data compilations and tangible things in the defendant's possession, custody or control that are relevant to the disputed facts alleged with particularity in the pleadings. The answer may also include an explanation of why any relevant documents are believed to be confidential.

(h) The answer shall also list the name, address and telephone number of each individual likely to have discoverable information relevant to the disputed facts alleged with particularity in the pleadings, identifying the subjects of information.

(i) Upon showing of good cause by the defendant, the Commission may waive any of the requirements of this section.

7. Section 1.725 is revised to read as follows:

§ 1.725 Cross-complaints and Counterclaims

(a) Compulsory counterclaims, those claims arising out of the transaction or occurrence that is the subject matter of the complaint and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction, must be filed concurrently with the answer or it will be barred.

(b) Permissive counterclaims, those claims not arising out of the transaction or occurrence that is the subject matter of the complaint, must be filed concurrently with the answer in order to be resolved in the same proceeding. If not filed concurrently with the answer, however, the defendant will not be barred from filing such claim in a separate proceeding, provided that the statute of limitations has not run.

(c) Cross-complaints, claims by one party against a co-party arising out of the same transaction or occurrence that is the subject matter of either the complaint or counterclaim therein or relating to any property that is the subject matter of the original matter, must be filed concurrently with the answer in order to be resolved in the same proceeding. If not filed concurrently with the answer, however, the co-party will not be barred from filing such claim in a separate proceeding, provided the statute of limitations has not run.

8. Section 1.726 is revised to read as follows:

§ 1.726 Replies

(a) Replies are prohibited unless authorized by the Commission for good cause shown. If no reply is submitted, the complainant will be deemed to have denied the affirmative defenses.

(b) A complainant wishing to submit a reply must, within five days after the service of the answer, file a motion seeking leave to do so. A copy of the complainant's proposed reply should accompany its motion. A complainant's reply shall respond only to the specific factual allegations made by the defendant supporting its affirmative defenses. Replies which contain other allegations or arguments will not be accepted or considered by the Commission.

(c) Replies shall be accompanied by a copy of, or a description by category and location of all documents, data compilations and tangible things in the complainant's possession, custody or control that are relevant to the disputed facts alleged with particularity in the pleadings. The reply may also include an explanation of why any relevant documents are believed to be confidential. Replies shall also include the name, address and telephone number of each individual likely to have discoverable information relevant to the disputed facts alleged with particularity in the pleadings, identifying the subjects of information.

9. Section 1.727 is revised to read as follows:

§ 1. 727 Motions

. . . .

(b) Motions that the allegations in the complaint be made more definite and certain are prohibited.

(c) The moving party shall provide a proposed order for adoption, which appropriately incorporates the basis therefor, including proposed findings of fact and conclusions of law relevant to the pleading. The proposed order shall be clearly marked as a "proposed order." The proposed order shall be submitted both as a hard copy and on computer disk in accordance with the requirements of § 1.734(d). The proposed order format should conform to that of a reported FCC order.

(d) A party opposing any motion shall also provide a proposed order for adoption, which appropriately incorporates the basis therefor. The proposed order shall be clearly captioned as a "Proposed Order." The proposed order shall be submitted both as a hard copy and on computer disk in accordance with the requirements of § 1.734(d). The proposed order format should conform to that of a reported FCC order.

(e) Oppositions to motions may be filed within five days after the motion is filed. 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, an opposition to the 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 of the motion.

. . . .

(g) All motions must contain proposed findings of fact and conclusions of law, with supporting legal analysis, relevant to the content of the pleading. All facts relied upon in motions must be supported by documentation or affidavits pursuant to § 1.720(c), except for those facts of which official notice may be taken. Assertions based on information and belief are prohibited.

(h) Amendments or supplements to complaints to add new claims or requests for relief are prohibited. Parties are responsible, however, for the continuing accuracy and completeness of all information and supporting authority furnished in a pending complaint proceeding as required under § 1.720(g).

10. Section 1.730, titled "Other forms of discovery," is deleted.

11. Section 1.731 is revised to read as follows:

§ 1.731 Confidentiality of information produced or exchanged by the parties

(a) Any materials generated in the course of a formal complaint proceeding may be designated as proprietary by that 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) - (9). Any party asserting confidentiality for such materials shall so indicate by clearly marking each page, or portion thereof, for which a proprietary designation is claimed. If a proprietary designation is challenged, the party claiming confidentiality shall have the burden of

demonstrating, by a preponderance of the evidence, that the material designated as proprietary falls under the standards for nondisclosure enunciated in the FOIA.

. . . .

12. Section 1.732 is revised to read as follows:

§ 1.732 Other required written submissions

. . . .

(b) In cases when discovery is not conducted, briefs shall be filed concurrently by both complainant and defendant within 90 days from the date a complaint is served. Such briefs shall be no longer than 25 pages.

(c) In cases when discovery is conducted, briefs shall be filed concurrently by both complainant and defendant at such time designated by the staff, typically within 30 days after discovery is completed.

(d) Reply briefs may be submitted by either party within 20 days from the date initial briefs are due. Reply briefs shall be no longer than 10 pages.

. . . .

(h) Within 5 days after the answer is filed, the parties shall submit a joint statement of stipulated facts and key legal issues.

13. Section 1.733 is revised to read as follows:

§ 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. Unless otherwise ordered by the Commission, an initial status conference shall take place within ten business days after the answer is filed, unless otherwise directed by the staff. 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 any discovery;

(6) The schedule for the remainder of the case and the date for further conferences; and

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

(b) In addition to the status conference referenced in subpart (a), any party may also request that a conference be held at any time after the complaint has been filed.

(c) During a status conference, the Commission may issue oral rulings pertaining to a variety of interlocutory 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. Within 24 hours after a status conference, the parties in attendance, unless otherwise directed, must submit a joint proposed order memorializing the oral rulings made during the conference to the Commission. Commission staff will review and make revisions, if necessary, prior to signing and filing the submission as part of the record. Parties may, but are not required to, tape record the Commission's summary of its oral rulings. Alternatively, parties may use a stenographer to transcribe the oral presentations and exchanges between and among the participating parties, insofar as such communications are not "off-the-record." The cost of such stenographer will be shared equally by the parties.

14. Section 1.734 is revised to read as follows:

§ 1.734 Specifications as to pleadings, briefs, and other documents; subscription

. . . .

(c) The original of all pleadings and other submissions filed by any party shall be signed by that party, or by the party's attorney. The signing party shall state his or her address, telephone number, facsimile number and the date on which the document was signed. Copies should be conformed to the original. Except when otherwise specifically provided by rule or statute, pleadings need not be verified. The signature of an attorney or party shall be a certificate that the attorney or party has read the pleading, motion, or other paper; that 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 solely for purposes of delay or for any other improper purpose.

(d) All proposed orders shall be submitted both as hard copies and on a 3.5 inch diskette formatted in an IBM compatible form using MS-DOS 5.0 and WordPerfect 5.1 software.

The diskette should be submitted in "read only" mode. The diskette should be clearly labelled with the party's name, proceeding, type of pleading, and date of submission. The diskette should be accompanied by a cover letter. Parties who have submitted copies of tariffs or reports with their hard copies need not include such tariffs or reports on the magnetic disk.

15. Section 1.735 is revised to read as follows:

§ 1.735 Copies; service; separate filings against multiple defendants

. . . .

(b) The complainant must file an original plus three copies of the complaint, accompanied by the correct fee, in accordance with subpart G of this part. See 47 C.F.R. 1.1105(1)(c). However, if a complaint is addressed against multiple defendants, the complainant shall pay a separate fee and supply three additional copies of the complaint for each additional defendant. For complaints filed with the Common Carrier Bureau, the complainant must also serve a copy on the Chief, Formal Complaints and Investigations Branch. For complaints filed with the Wireless Telecommunications Bureau, the complainant must also serve a copy on the Chief, Enforcement Division. For complaints filed with the International Bureau, the complainant must also serve a copy on the Chief, Telecommunications Division. The requirements of this subparagraph also apply to defendants filing cross-complaints.

. . . .

(d) The complainant shall serve the complaint on the named defendant's registered agent for service of process. If filing a cross-complaint, the defendant/cross-complainant shall serve such cross-complaint on the named cross-defendant's registered agent for service of process and all counsel of record in the complaint proceeding.

(e) All subsequent pleadings and briefs filed in any formal complaint proceeding, as well as all letters, documents or other written submissions, shall be served either by overnight delivery or by facsimile and followed by mail, by the filing party on the counsel of record of all other parties to the proceeding, together with a proof of such service in accordance with the requirements of § 1.47(g).

16. Section 1.1105 is revised to read as follows:

§ 1.1105 Schedule of charges for applications and other filings in the common carrier services

. . . .

(1)(c) Formal Complaints/Cross-Complaints and Pole Attachment Complaints/Cross-Complaints, except those relating to wireless telecommunications services, Filing Fee.

(1)(d) Formal Complaints relating to wireless telecommunications services, including cellular telephone, paging, personal communications services and other commercial mobile radio services, Filing Fee.

The same information shall be placed in the next three columns for (d) as for (c), except that in the column headed "Address" the following should be inserted for subsection (d):

Federal Communications Commission, Wireless Telecommunications Bureau, P.O. Box 358128, Pittsburgh, PA 15251-5120.

APPENDIX B

FORMAL COMPLAINT INTAKE FORM

CaseName:_____

Complainant Name, Address, Phone and Facsimile Number:

_____

_____

_____

_____

Complaint alleges violation of the following provisions of the Communications Act of 1934, as amended:_____

Answer (Y)es, (N)o or N/A to the following:

____ Complaint conforms to the specifications prescribed by 47 C.F.R. §§1.49, 1.734.
____ Complaint complies with the pleading requirements of 47 C.F.R. § 1.720.
____ Complaint conforms to the format and content requirements of 47 C.F.R. §1.721:
- ____ Complaint contains a detailed explanation of the manner in which the defendant violated the provisions of the Communications Act of 1934, as amended.
- ____ Relevant documentation and/or affidavits is attached, including agreements, offers, counter-offers, denials, or other relevant correspondence.
- ____ Contains certification that complainant has discussed the possibility of settlement with each defendant prior to the filing of the formal complaint.
- ____ Suit has been filed in another court or government agency on the basis of the same cause of action. If yes, please explain:_____.
- ____ Seeks prospective relief identical to the relief proposed or at issue in a notice-and-comment proceeding that is concurrently before the Commission. If yes, please explain:_____.
- ____ If damages are sought, contains specified amount and nature of damages claimed.
- ____ Contains a copy of, or a description by category and location of all documents, data compilations and tangible things in the complainant's possession, custody or control that are relevant to the disputed facts alleged with particularity in the complaint.
- ____ Contains the name, address and telephone number of each individual likely to have discoverable information relevant to the disputed facts alleged with particularity in the complaint, identifying the subjects of information.

____ All reported FCC orders relied upon have been properly cited in accordance with Section 1.14 of the Commission's Rules, Title 47 Code of Federal Regulations, 47 C.F.R. §1.14.
____ Copies of cited non-FCC authority are attached.
____ Copy of complaint has been served on defendant's registered agent for service in accordance with [to be amended] 47 C.F.R. § 1.47(b).

____ If more than 10 pages, the complaint contains a table of contents as specified in 47 C.F.R. §1.49(b).

____ The correct number of copies, required by 47 C.F.R. § 1.51(c)(2) and 47 C.F.R. § 1.51(c)(2) if applicable, have been filed.

____ Complaint has been properly signed and verified in accordance with 47 C.F.R. §1.52.

____ $150.00 filing fee specified in 47 C.F.R. § 1.1105(1)(c) is attached.

____ If complaint is by multiple complainants, it conforms with the requirements of 47 C.F.R. § 1.723(a).

____ If complaint involves multiple grounds, it complies with the requirements of 47 C.F.R. §1.723(b).

____ If complaint is directed against multiple defendants, it complies with the requirements of 47 C.F.R. §1.735(a)-(b).