

FCC FACT SHEET*

Formal Complaint Rules

Report and Order -- EB Docket No. 17-245

Background: The *Order* creates a uniform set of procedural rules for formal complaint proceedings delegated to the Enforcement Bureau. The *Order* streamlines and consolidates procedural rules governing formal complaints filed under Section 208 of the Act; pole attachment complaints filed under Section 224; and formal advanced communications services and equipment complaints filed under Sections 255, 716, and 718 (Disability Access complaints).

What the Report and Order Would Do:

- Adopt a uniform deadline for filing an answer within 30 days after service of a complaint, and require that replies be filed within 10 days of service of the answer;
- Extend to all formal complaint proceedings information designation requirements, the ability of staff to conduct a status conference, and the option of requesting inclusion on the Accelerated Docket;
- Extend interrogatories to all three types of formal complaints without the need to request permission;
- Eliminate the proposed findings of fact and conclusions of law requirement, and require a certification of pre-filing settlement efforts that includes “executive-level” discussions in Section 208 and Disability Access formal complaint proceedings;
- Impose pre-filing obligations on complaints subject to the five-month deadline in Section 208(b)(1) to narrow the factual/legal issues, exchange documents/discovery, discuss case management issues, and engage in settlement negotiations;
- Codify current practice of providing staff-supervised mediation services, and clarify that parties may request mediation as long as the dispute is pending before the Commission;
- Create a 270-day shot clock for resolution of formal complaints, commencing upon the filing of a complaint (pole access complaints remain subject to a 180-day shot clock), which may be paused by staff in consultation with parties.

* This document is being released as part of a “permit-but-disclose” proceeding. Any presentations or views on the subject expressed to the Commission or its staff, including by email, must be filed in WC Docket No. 17-244, which may be accessed via the Electronic Comment Filing System (<https://www.fcc.gov/ecfs/>). Before filing, participants should familiarize themselves with the Commission’s *ex parte* rules, including the general prohibition on presentations (written and oral) on matters listed on the Sunshine Agenda, which is typically released a week prior to the Commission’s meeting. See 47 CFR §1.1200 *et seq.*

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

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

REPORT AND ORDER

Adopted: []

Released: []

By the Commission:

I. INTRODUCTION

1. In this Report and Order, we create a uniform set of procedural rules for formal complaint proceedings delegated to the Enforcement Bureau and currently handled by its Market Disputes Resolution Division (MDRD) and Telecommunications Consumers Division (TCD). Specifically, this Order streamlines and consolidates the procedural rules governing formal complaints against common carriers, formal complaints regarding pole attachments, and formal complaints concerning advanced communications services and equipment. We base these rule refinements on 20 years of experience adjudicating formal complaints and conducting mediations. We find that these rule revisions will eliminate inconsistencies among various complaint proceedings, promote a fully developed record in each case, foster disposition of formal complaints in a timely manner, and conserve resources of the parties and the Commission.

II. BACKGROUND

2. Three different sets of procedural rules, which the Commission adopted at different times, apply to formal complaints that the Enforcement Bureau now handles under its delegated authority. In 1978, the Commission adopted procedural rules for pole attachment complaints governed by Section 224 of the Communications Act of 1934, as amended (Act).1 The pole attachment rules afford substantial discretion to Commission staff to request that the parties make additional filings2 and to hold meetings to clarify issues and explore settlement.3 The pole attachment rules, however, do not specifically provide for joint statements, discovery, or status conferences. In 1997, the Commission adopted rules setting forth the procedures for formal complaints filed under Section 208 of the Act.4 The Section 208 complaint procedural rules provide for fact-based pleading,5 targeted discovery,6 and joint statements of

1 47 U.S.C. § 224(b)(1); In the Matter of Adoption of Rules for the Regulation of Cable Television Pole Attachments, First Report and Order, 68 FCC 2d 1585 (1978) (Pole Attachment First Report and Order).

2 47 CFR § 1.1409(a) (2017).

3 47 CFR § 1.1411 (2017).

4 In the Matter of Implementation of the Telecommunications Act of 1996; Amendment of Rules Governing Procedures to Be Followed When Formal Complaints Are Filed Against Common Carriers, Report and Order, 12 FCC Rcd 22497 (1997) (Formal Complaints Order), Order on Reconsideration, 16 FCC Rcd 5681 (2001) (Formal Complaints Recon Order).

stipulated and disputed facts and key legal issues.⁷ In 2011, the Commission adopted rules governing formal complaints filed under Sections 255, 717, and 718 of the Act alleging that providers of advanced communications services and manufacturers of equipment have failed to make their services and products accessible to people with disabilities (Disability Access complaints).⁸ The Disability Access complaint rules generally mirror the Section 208 formal complaint rules, although these complaints are not eligible for Accelerated Docket treatment.

3. On September 13, 2017, the Commission adopted a Notice of Proposed Rulemaking⁹ seeking comment on streamlining and consolidating the procedural rules governing formal complaints filed under Section 208 of the Act;¹⁰ pole attachment complaints filed under Section 224 of the Act;¹¹ and formal complaints filed under Sections 255, 716, and 718 of the Act concerning access by persons with disabilities to communications equipment and services.¹² Numerous parties filed comments and reply comments. Based on this record, we adopt the rule changes described in this Order.¹³

III. DISCUSSION

4. Two decades of experience with the Section 208 formal complaint rules have shown them to work well in resolving a wide range of complaints filed since 1997. Accordingly, with the refinements set out below, we use the Section 208 formal complaint rules as a model for the uniform set of procedural rules adopted herein.¹⁴ We retain, however, certain pole attachment rules necessary to resolve that type of complaint.¹⁵

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⁵ 47 CFR § 1.720 (2017).

⁶ 47 CFR § 1.729 (2017).

⁷ 47 CFR § 1.732(g) (2017). The Section 208 complaint rules also provide for a status conference in which staff can work to narrow issues, manage the discovery process, explore settlement, and establish deadlines for the remainder of the case. 47 CFR § 1.733. In 2001, the Commission modified the rules relating to answers, replies, and supplemental complaints for damages. *Formal Complaints Recon Order*, 16 FCC Rcd at 5692-94, paras. 19-30.

⁸ *See Implementation of Sections 716 and 717 of the Communications Act of 1934, as Enacted by the Twenty-First Century Communications and Video Accessibility Act of 2010*, Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd 14557, 14674-75, para. 274 (2011) (“Therefore we decline to adopt the Accelerated Docket rules for Section 255, 716, and 718 formal complaints.”).

⁹ *In the Matter of Amendment of Procedural Rules Governing Formal Complaint Proceedings Delegated to the Enforcement Bureau*, Notice of Proposed Rulemaking, 32 FCC Rcd 7155 (2017) (*Formal Complaint Rules NPRM*).

¹⁰ 47 U.S.C. § 208.

¹¹ 47 U.S.C. § 224.

¹² 47 U.S.C. §§ 255, 617, 619.

¹³ The rule changes apply to complaints filed after the effective date of these rules.

¹⁴ We also clarify rule 1.717, which addresses *informal* Section 208 complaints. *See* 47 CFR § 1.717. In addition to wording revisions that do not alter the substance of the rule, we delete the phrase “and the Commission’s disposition” from the last sentence of that rule because the Commission’s practice is not to dispose of informal complaints on substantive grounds. We also add a rule memorializing MDRD’s staff-assisted mediation process, which enables parties to attempt to resolve their disputes before or after the filing of a formal complaint. *See infra* para. 16.

¹⁵ Although our revisions eliminate provisions that specify in detail the factual support that must be included with a pole attachment complaint, a complaint still must contain adequate evidentiary support concerning the alleged violation.

A. Uniform Filing Deadlines

5. We adopt a uniform deadline of 30 days for filing an answer to a formal complaint after service of the complaint, except as otherwise ordered by Commission staff. Experience with a 30-day answer period in Section 208 formal complaint proceedings,¹⁶ as well as in pole attachment complaint proceedings, has shown that 30 days allows defendants to carefully and completely respond to a complex fact-based formal complaint.¹⁷ In addition, to eliminate confusion, we replace the terms “response” and “respondent” in the pole attachment complaint process with the terms “answer” and “defendant,” respectively.

6. We require that replies to answers in Section 208 formal complaints, pole attachment complaints, and formal Disability Access complaints be filed within 10 days of service of the answer.¹⁸ This requirement codifies Commission staff’s routine practice of extending the reply time in non-deadline Section 208 formal complaint proceedings to 10 days. Experience has shown that a 10-day reply period provides parties with a full opportunity to address the answer and to engage in discussions to narrow the facts and issues in dispute (and potentially to discuss settlement). We disagree with commenters that argue for a longer reply period for pole attachments complaints because the cases are fact-intensive.¹⁹ In our experience, pole attachment complaints are neither more nor less fact-intensive than other complaints. Moreover, parties may file motions to lengthen the answer and reply periods if necessary.²⁰

B. Information Designations

7. We extend the Commission’s information designation requirements to pole attachment complaints, requiring the complaint, answer, and reply to include a description of individuals with firsthand knowledge of facts and documents relevant to the allegations in the pleadings.²¹ Information designations in Section 208 proceedings have been beneficial, and we believe they likewise will be useful in compiling a complete factual record in pole attachment proceedings. We also streamline and more closely align the Commission’s information designation requirements with Federal Rule of Civil Procedure 26.²² For example, the revised rule eliminates the requirement that a party identify when each document was mailed and its physical location.

¹⁶ Although the Section 208 formal complaint rules presently provide for a 20-day answer period, Commission staff routinely extends that deadline to 30 days in cases not governed by 47 U.S.C. § 208(b)(1).

¹⁷ See Electric Utilities Comments at 5 (“In the Electric Utilities’ experience, 30 days has been a fair length of time to answer a pole attachment complaint.”); Consumer Groups and RERC Reply Comments at 4 (the Commission should not expand the answer deadline beyond 30 days). We reject Verizon’s suggestion that we should extend the deadline for filing an answer to 45 days. See Verizon Comments at 4. In our experience 30 days has proven sufficient and not unduly burdensome, and parties may seek leave to extend the deadline in appropriate cases.

¹⁸ See Electric Utilities Comments at 6 (“[T]he Electric Utilities believe 10 days is a sufficient time period within which to file a reply brief, given that a reply filing is meant to be limited in nature and address items raised in the answer that were not adequately addressed in the complaint.”); Consumer Groups and RERC Comments at 2-3 (supporting expanding the reply period to 10 days). Staff typically requires complainants to file a reply addressing all factual allegations and legal arguments in the answer. The revised rules memorialize that practice.

¹⁹ See NCTA Comments at 4-5 (the Commission should retain a 20-day reply period for pole attachment complaints because they are fact-intensive).

²⁰ See 47 CFR §§ 1.46, 1.727.

²¹ See Electric Utilities Comments at 4 (supporting these changes). At the same time, we are eliminating the laundry list of facts formerly required by Section 1.1404 to be included in pole attachment complaints. We find that the general Section 208 pleading rules, which require parties to marshal all facts and legal arguments that support their respective positions, are sufficient to ensure a complete record.

²² Fed. R. Civ. P. 26. See ACA Reply Comments at 8 (arguing that the information designation requirement be limited only to require the identification of relevant documents).

8. We disagree with commenters requesting that we no longer require parties to identify individuals with first-hand knowledge of the facts.²³ Verizon argues that identifying such individuals does not assist in resolving complaints because there are no hearings at which a party may call a witness.²⁴ As explained below, however, parties may seek information from individuals with knowledge through targeted interrogatories or other discovery.²⁵ Thus, we retain the requirement, which in any event we find imposes only a slight burden.

C. Enhanced Discovery Mechanisms

9. We adopt a uniform approach to discovery in all formal complaint matters to give parties greater certainty regarding available discovery mechanisms. The existing rules governing formal Section 208 and Disability Access complaints give parties the option of requesting interrogatories, while there is no similar rule in the Section 224 complaint context.²⁶ We have found interrogatories to be very helpful in narrowing the facts and issues in dispute, and we therefore extend this discovery mechanism to pole attachment proceedings.²⁷ Specifically, in all three types of complaint proceedings, (1) a complainant may file and serve up to ten (10) written interrogatories with its complaint; (2) a defendant may file and serve up to ten (10) written interrogatories with its answer; and (3) a complainant may file and serve up to five (5) additional written interrogatories with its reply.²⁸ Parties no longer need to request permission to propound interrogatories,²⁹ but the party requesting the discovery still must include an explanation of why the information is relevant to the dispute and not available from any other source. Responding parties may object to an interrogatory, and Commission staff will issue a written ruling granting or denying a disputed interrogatory, delineating the scope of a permissible interrogatory, and establishing a schedule for answering.³⁰ Moreover, under our revised rules staff has discretion to allow additional discovery, including depositions and document production, when appropriate.³¹

D. Proposed Findings of Fact and Conclusions of Law

10. We eliminate the requirement in the Section 208 and Disability Access formal complaint rules that the complaint, answer, and reply include proposed findings of fact and conclusions of law. The record reflects that this requirement has served little purpose, and the rule modification we adopt today codifies Commission staff's practice of waiving the requirement.³²

²³ Verizon Comments at 5; ACA Reply Comments at 8.

²⁴ Verizon Comments at 5.

²⁵ See *infra* Section III.C.

²⁶ 47 CFR §§ 1.729(a), 14.47(a) (2017).

²⁷ Electric Utilities Comments at 5-6 (supporting applying interrogatories to pole attachment cases).

²⁸ We decline to increase the number of interrogatories beyond the limits we adopt today. See NCTA Comments at 4 (asserting that the Commission should conform its written interrogatory rule to FRCP 33, which allows up to 25 written interrogatories). Experience has shown that the 10/10/5 limits are sufficient, and under the revised rules staff has discretion to allow additional discovery where appropriate.

²⁹ See Consumer Groups and RERC Comments at 3 (asserting that parties should not be required to seek permission to serve interrogatories); Verizon Comments at 6 (proposing the Commission should eliminate the need to request permission before issuing discovery requests).

³⁰ Staff resolution of disputes over interrogatory requests will typically occur after the parties have conferred and attempted to resolve or narrow their differences as required under rule 1.733(b).

³¹ See CEHE Comments at 1-2 (proposing that additional discovery be available, such as requests for production, requests for admission, and depositions, as needed); Edison Electric Institute Comments at 3-4 (proposing that additional discovery be available on a case-by-case basis).

³² See Consumer Groups and RERC Comments at 3-4; Verizon Comments at 6. See, e.g., *Farmers Bank, Windsor, Va. v. Verizon Bus. Network Servs. Inc.*, Letter Ruling, Proceeding No. 16-211, Bureau ID No. EB-16-MD-002 (July

(continued....)

E. Pre-Complaint Procedures for Complaints Governed by Section 208(b)(1) of the Act

11. We adopt a rule imposing pre-filing obligations on parties who plan to file complaints subject to the five-month deadline in Section 208(b)(1) of the Act.³³ The deadline applies to “any complaint about the lawfulness of matters included in tariffs filed with the Commission, and those matters that would have been included in tariffs but for the Commission’s forbearance from tariff regulation.”³⁴ Because of the tight five-month deadline, standard practice has been for Commission staff to work with the parties prior to the filing of a Section 208(b)(1) complaint to narrow the factual and legal issues in dispute; exchange relevant documents and discovery; discuss case management issues, such as the entry of a protective order for the exchange of confidential information; and engage in settlement negotiations.³⁵ As a result, deadline complaints before the Commission have proceeded smoothly. Accordingly, we adopt a rule codifying these pre-complaint procedures in complaints governed by Section 208(b)(1).³⁶

F. Motions to Dismiss

12. AT&T proposes that we amend the rules to include a provision for motions to dismiss formal complaints, much like Federal Rule of Civil Procedure 12(b).³⁷ AT&T contends that addition of a rule expressly providing for a motion to dismiss “would significantly narrow or eliminate entirely the litigation, minimizing or avoiding the need for potentially costly, lengthy, and onerous discovery, non-dispositive motions practice, and fact-finding.”³⁸ The Commission previously rejected a similar proposal and concluded:

We find this practice of filing a separate motion to dismiss to be unnecessary, in virtually all cases. As explained above, the Commission’s rules are designed so that a defendant’s answer is a comprehensive pleading containing complete factual and legal analysis, including a thorough explanation of every ground for dismissing or denying the complaint. Thus, the Commission should be able to address the merits of any defenses on the basis

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1, 2016), at 2. In appropriate cases, Commission staff retains the discretion to direct parties to file proposed findings of fact and conclusions of law.

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

³⁴ See *Implementation of the Telecommunications Act of 1996, Amendment of Rules Governing Procedures to Be Followed when Formal Complaints Are Filed Against Common Carriers*, Report and Order, 12 FCC Rcd 22497, 22516, para. 37 (1997) (*Formal Complaints Order*).

³⁵ Verizon Comments at 7 (“The Commission should codify the [5-month] pre-complaint procedures that are part of its standard practice.”).

³⁶ We adopt this requirement pursuant to Section 4(j) of the Act, which authorizes the Commission to “conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice.” 47 U.S.C. § 154(j). Section 4(i) of the Act further provides that the Commission may “perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions.” 47 U.S.C. § 154(i). Our longstanding practice of requiring pre-filing coordination has served the statutory purpose of expediting resolution of disputes governed by Section 208(b)(1) by ensuring that complaints are filed only to the extent necessary to resolve continuing disputes. Moreover, we have adopted similar pre-complaint requirements in other contexts. See, e.g., 47 CFR §§ 1.730(b), 1.1404(k) (2017).

³⁷ See Letter from Jeanine Poltronieri, Assistant Vice President-External Affairs, AT&T Services, Inc., to Marlene H. Dortch, Secretary, FCC (dated May 1, 2018) (Ex Parte re: Amendment of Procedural Rules Governing Formal Complaint Proceedings Delegated to the Enforcement Bureau: EB 17-245) (AT&T Ex Parte).

³⁸ See *id.* at 2.

of the answer alone. If warranted, the Commission will dismiss a complaint after the close of the initial pleading cycle, even without an actual motion to dismiss.³⁹

13. We find no basis to depart from this process. We disagree with AT&T that a rule authorizing motions to dismiss would result in more efficient adjudication and conservation of resources.⁴⁰ To the contrary, we find that such a rule would result in a needless and time-consuming motions practice that will delay resolution of proceedings. We emphasize that staff carefully reviews complaints and may dismiss a complaint that fails to state a cause of action under the Act, thus serving the same function as a motion to dismiss.⁴¹ In addition, staff has discretion to deny discovery where there is no adequate basis for the request⁴² and to direct parties to brief a particular issue.⁴³

G. Damages

14. The current Section 208 damages rule provides that a complainant may request bifurcation in its complaint, deferring the determination of damages to a supplemental proceeding following the finding of liability.⁴⁴ The rule proposed in the *Formal Complaint Rules NPRM* set forth the requirements for pleading damages with specificity before the provision permitting bifurcation.⁴⁵ Commenters expressed concern that the proposed rule could have been interpreted as unnecessarily requiring damages-related submissions during the initial liability phase of a bifurcated proceeding.⁴⁶ In light of the comments indicating that the Commission's proposed changes to the damages rule would, if adopted, create unnecessary confusion, we maintain the rule largely as written. As under the previous rule, a Complainant may elect to bifurcate a case and seek a determination of damages in a proceeding separate from, and subsequent to, a determination of liability. Our experience has been that bifurcation conserves resources, because parties often are in a better position to reach a prompt settlement once the Commission has determined liability. We eliminated language in proposed subsection (c) that appeared to limit the Commission's discretion to bifurcate proceedings not subject to a statutory deadline.⁴⁷ The only statutory deadline applicable to MDRD cases is section 208(b)(1) of the Act, and that deadline is limited to liability determinations.⁴⁸

H. Settlement Discussions and Mediation

15. We adopt a requirement that Section 208 and Disability Access formal complaints include a certification of pre-filing settlement efforts that included "executive-level" discussions among

³⁹ *Formal Complaints Recon Order*, 16 FCC Rcd at 5696, para. 34 (discussing the procedures pertaining to formal complaint proceedings).

⁴⁰ AT&T Ex Parte at 2.

⁴¹ See 47 CFR § 1.721(r).

⁴² See 47 CFR § 1.730.

⁴³ See 47 CFR § 1.733(d).

⁴⁴ See 47 CFR § 1.722 (2017).

⁴⁵ See *Formal Complaint Rules NPRM* at Appendix, proposed rule § 1.723.

⁴⁶ See CenturyLink Comments at 3-4 (arguing that the proposed rule could have imposed initial "more-onerous" damages-related pleading requirements, even when a case is bifurcated so that damages would be determined in a subsequent proceeding); ITTA Reply Comments at 3.

⁴⁷ See 47 CFR § 1.722(c).

⁴⁸ See 47 U.S.C. § 208(b)(1) ("[T]he Commission shall, with respect to any investigation under this section of the lawfulness of a charge, classification, regulation, or practice, issue an order concluding such investigation within 5 months after the date on which the complaint was filed.") (emphasis added); see also *Verizon Tele. Cos. v. FCC*, 269 F.3d 1098, 1104-06 (D.C. Cir. 2001).

representatives with settlement authority. The pole attachment complaint rules presently contain the “executive-level” obligation, and it has significantly improved prospects for resolving disputes quickly. Moreover, we agree with Electric Utilities that these pre-filing discussions, at a minimum, serve to narrow the facts and issues in dispute.⁴⁹ Thus, under the rules we adopt today, all formal complaints between businesses, associations, or other organizations must be preceded by “executive-level” settlement talks.⁵⁰

16. We also codify MDRD’s current practice of providing staff-supervised mediation services to parties wishing to negotiate settlement of their dispute. We clarify that parties may request mediation prior to the filing of a formal complaint. After a complaint has been filed, parties also may request mediation for as long as a proceeding is pending before the Commission.⁵¹ We emphasize that participation in mediation is voluntary, and all written and oral communications prepared or made for purposes of the mediation are confidential.

I. Initial Status Conference

17. We amend the rules to provide Commission staff with the ability to order a status conference in pole attachment complaint proceedings.⁵² Previously, only the Section 208 and Disability Access formal complaint rules contained an express status conference rule.⁵³ In factually and legally complex cases, the status conference has been an effective vehicle for refining the matters in dispute, addressing discovery requests, and exploring settlement options.

J. Accelerated Docket

18. We consolidate the Accelerated Docket provisions—which previously appeared in multiple parts of the Section 208 formal complaint rules—into one new streamlined rule. The new rule extends the option of requesting inclusion on the Accelerated Docket beyond currently authorized cases to include Section 224 pole attachment complaints.⁵⁴ The Commission has refined the pole attachment rules over the past several years, including improving the timelines for pole access.⁵⁵ The expanded availability of Accelerated Docket treatment, in appropriate circumstances, will further support the Commission’s efforts to expedite resolution of pole attachment disputes.⁵⁶ Commission staff retain the discretion to determine whether a particular complaint is suitable for the Accelerated Docket, and to tailor the procedures for each case accepted onto the Accelerated Docket to the particular facts and circumstances of that case.

⁴⁹ See Electric Utilities Comments at 6-7; see also Consumer Groups and RERC Comments at 4; Verizon Comments at 7 (asserting that the Commission should require pre-filing discussions in all cases to avoid unnecessary litigation).

⁵⁰ See *supra* at 5 n.36 (discussing the Commission’s authority to adopt pre-filing requirements).

⁵¹ See Consumer Groups and RERC Reply Comments at 5 (arguing that mediation should be allowed at any time, because it is the “fastest and cheapest way to resolve a complaint for both parties”).

⁵² See Verizon Comments at 7 (“The Commission should extend the availability of initial status conferences to pole attachment complaints.”).

⁵³ 47 CFR §§ 1.733, 14.50(a) (2017).

⁵⁴ As stated in the NPRM, we are not revisiting the Commission’s prior decision that the Accelerated Docket rules do not apply to Section 255, 617, and 618 formal complaints. *Formal Complaint Rules NPRM*, 32 FCC Rcd at 7160, para. 18.

⁵⁵ See, e.g., *Implementation of Section 224 of the Act*, Report and Order and Order on Reconsideration, 26 FCC Rcd 5240 (2011), *aff’d*, *American Elec. Power Serv. Corp. v. FCC*, 708 F.3d 183 (D.C. Cir. 2013), *cert. denied*, 134 S.Ct. 118 (2013).

⁵⁶ 47 U.S.C. § 224.

K. Shot Clocks

19. On November 16, 2017, the Commission adopted a 180-day “shot clock” for disposition of pole attachment complaints alleging a denial of access under Section 224(f) of the Act (“pole access” complaints).⁵⁷ The Commission recognized that pole access complaints are more urgent than complaints related to rates, terms, and conditions of attachment, and that pole access complaints generally have only one remedy—a grant of immediate access.⁵⁸ The Commission did not apply the 180-day shot clock to complaints alleging unjust and unreasonable rates, terms, and conditions, deferring instead to the record developed in this proceeding.⁵⁹

20. Several commenters support the imposition of a shot clock for pole attachment complaints regarding rates, terms, and conditions.⁶⁰ Likewise, a number of commenters propose a shot clock for Section 208 Complaints not governed by Section 208(b)(1)⁶¹ and Disability Access complaints.⁶² The time frames proposed by the commenters generally range from 180 days⁶³ to one year.⁶⁴ We agree that a deadline is desirable and conclude that a 270-day shot clock, commencing upon the filing of a complaint, is appropriate for resolving all such complaints.

21. We anticipate that the Commission will be able to complete review of many complaints in less than 270 days. Complaints filed pursuant to Sections 224 and 208 raise an extensive range of issues, however, often requiring the Commission to determine for the first time and in an era of rapidly-changing technology whether specific conduct is lawful under existing rules and orders.⁶⁵ A 180-day shot clock would restrict the agency’s ability to analyze and adjudicate all cases effectively. For example, a determination of a rate, term, or condition’s reasonableness may have a precedential impact on an entire industry, and the Commission may need more time to establish a full record and resolve a complicated matter. Similarly, complaints brought under Section 208 often are procedurally complex, involve multiple claims and parties, and require extensive pleadings, discovery, and briefing. Indeed, many Section 208 complaints effectuate primary jurisdiction referrals from federal district courts.⁶⁶ These cases

⁵⁷ *Wireline Broadband Deployment Report and Order*, 2017 WL 5969302, para. 9.

⁵⁸ *Id.* at para. 9.

⁵⁹ *Id.* at para. 14.

⁶⁰ See ACA Reply Comments at 2-5; Crown Castle Reply Comments at 3; Edison Electric Institute Comments at 6.

⁶¹ See NCTA Comments at 4 (supporting a 180-day shot clock, starting from the day the complaint is filed); Comments of Verizon at 2-3 (proposing parties negotiate with Commission staff for either a 180-day or 270-day shot clock); USTelecom Reply Comments at 2 (proposing a 180-day shot clock, with a longer shot clock for more complex proceedings).

⁶² See Consumer Groups and RERC Comments at 4.

⁶³ See ACA Reply Comments at 2-5 (proposing a 180-day shot clock); Consumer Groups and RERC Reply Comments at 4 (proposing a 150-day shot clock); Crown Castle Reply Comments at 3 (proposing a 180-day shot clock); Edison Electric Institute Comments at 6 (proposing a 180-day shot clock, beginning when parties “have been able to fully brief their case”).

⁶⁴ See CenturyLink Comments at 2 (proposing a longer shot clock, akin to the one-year period in forbearance proceedings); Verizon Comments at 3 (proposing a 270-day clock).

⁶⁵ See, e.g., *In the Matter of Worldcall Interconnect, Inc. a/k/a Evolve Broadband v. AT&T Mobility LLC*, Order on Review, 32 FCC Rcd 7144 (2017) (denying an application for review in a complex formal complaint proceeding concerning the commercial reasonableness of a carrier’s proposed data roaming rates).

⁶⁶ See, e.g., *AT&T Corp. v. All American Telephone Co., e-Pinnacle Communications, Inc., ChaseCom*, Memorandum Opinion and Order, 28 FCC Rcd 3477 (2013), *petition for recon denied*, 29 FCC Rcd 6393 (2014) (resolving the liability phase of a primary jurisdiction referral from the United States District Court for the Southern District of New York involving multiple competitive local exchange carriers created for the purpose of inflating terminating access revenues, billed to the complainant for access services not provided under valid tariffs).

sometimes require numerous rounds of communications among the parties and staff to define the parameters of the dispute, and the Commission may need the parties to seek clarification from the referring court concerning the scope of its referral. Section 208 cases also often involve subjects that are intertwined with separate Commission rulemaking and declaratory proceedings (such as complex intercarrier compensation issues) and require extensive coordination within the agency. Given the unpredictable breadth of potential issues that would be raised in complaints challenging unjust, unreasonable, or discriminatory practices by carriers or rates, terms, and conditions of pole attachment arrangements, we decline to adopt a more restrictive timeline.⁶⁷

22. A 270-day shot clock is more reasonable for a greater range of cases. The 270-day timeline splits the difference between the deadlines suggested by the parties and still ensures an expeditious resolution of formal complaints. As is the case with pole access complaints, staff may pause the clock when circumstances outside the Commission's control delay review of the complaint. For example, staff may pause the clock when parties elect to engage in mediation or settlement negotiations, or when the issues and record are particularly complex, necessitating additional time for discovery or briefing.⁶⁸

IV. PROCEDURAL MATTERS

A. Paperwork Reduction Act Analysis

23. This document contains new or modified information collection requirements subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104-13. It will be submitted to the Office of Management and Budget (OMB) for review under section 3507(d) of the PRA. OMB, the general public, and other federal agencies are invited to comment on the new information collection requirements contained in this proceeding. In addition, we note that pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107-198, *see* 44 U.S.C. § 3506(c)(4), we sought specific comment on how the Commission might further reduce the information collection burden for small business concerns with fewer than 25 employees.

24. In this document, we modify the requirements regarding materials to be submitted in formal complaints proceedings. We have assessed the effects of this rule and find that any burden on small businesses will be minimal because the rules streamline the formal complaint process and reduce burdens on all parties.

B. Regulatory Flexibility Act

25. As noted in the *Formal Complaint Rules NPRM*, this action did not require notice and comment,⁶⁹ and therefore falls outside of the Regulatory Flexibility Act of 1980 (RFA).⁷⁰ We nonetheless note that we anticipate that the rules we adopt today will not have a significant economic impact on a substantial number of small entities. The modifications we adopt to the procedural formal complaint rules do not propose substantive new responsibilities for regulated entities or potential plaintiffs or defendants. We will send a copy of this order to the Chief Counsel for Advocacy of the Small Business Administration.

⁶⁷ Imposition of a shot clock any shorter than 270-days would require us to impose pre-filing processes in all cases.

⁶⁸ As noted in the *Formal Complaint Rules NPRM*, the adopted procedural rule changes also require conforming edits to cross-references in other Commission rules. *See Formal Complaint Rules NPRM* at n.20.

⁶⁹ *Formal Complaint Rules NPRM* at para. 23.

⁷⁰ *See* 5 U.S.C. § 603 (applying RFA requirements “[w]henver an agency is required by section 553 of this title, or any other law, to publish general notice of proposed rulemaking for any proposed rule”).

C. Congressional Review Act

26. The Commission will send a copy of the Order in a report to be sent to Congress and the Government Accountability Office pursuant to the Congressional Review Act.⁷¹

D. Accessible Formats

27. To request materials in accessible formats for people with disabilities (braille, large print, electronic files, audio format), send an e-mail to fcc504@fcc.gov or call the Consumer & Governmental Affairs Bureau at 202-418-0530 (voice), 202-418-0432 (tty). Contact the FCC to request reasonable accommodations for filing materials (accessible format documents, sign language interpreters, CARTS, etc.) by e-mail: FCC504@fcc.gov; phone: (202) 418-0530 (voice), (202) 418-0432 (TTY).

V. ORDERING CLAUSES

28. IT IS ORDERED that, pursuant to sections 151, 152, 154(i), 154(j), 201(b), 208, 224, 255, 716, and 718 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 152, 154(i), 154(j), 201(b), 208, 224, 255, 617, 619, this Report and Order IS ADOPTED

29. IT IS FURTHER ORDERED that Parts 1, 6, 7, 14, 20, 64, and 68 of the Commission's rules are amended as set forth in Appendix A.

30. IT IS FURTHER ORDERED that the rules in Appendix A to this Report and Order SHALL BE EFFECTIVE 30 days after publication of a summary in the Federal Register.

31. IT IS FURTHER ORDERED that the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, SHALL SEND a copy of this Report and Order to Congress and the Government Accountability Office pursuant to the Congressional Review Act, *see* 5 U.S.C. § 801(a)(1)(A), and to the Chief Counsel for Advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

⁷¹ *See* 5 U.S.C. § 801(a)(1)(A).

APPENDIX A**Final Rules**

For the reasons set forth above, Parts 1 and 14 of Title 47 of the Code of Federal Regulations (the Commission's rules) are amended as follows:

PART 1—PRACTICE AND PROCEDURE

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

1. The table of contents of Part 1, Subpart E-Complaints, Applications, Tariffs, and Reports Involving Common Carriers is revised to read as follows:

* * * * *

FORMAL COMPLAINTS

§ 1.720 Purpose.

§ 1.721 General pleading requirements.

§ 1.722 Format and content of complaints.

§ 1.723 Damages.

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

§ 1.726 Answers.

§ 1.727 Cross-complaints and counterclaims.

§ 1.728 Replies.

§ 1.729 Motions.

§ 1.730 Discovery.

§ 1.731 Confidentiality of information produced or exchanged.

§ 1.732 Other required written submissions.

§ 1.733 Status conference.

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

§ 1.735 Conduct of proceedings.

§ 1.736 Accelerated Docket Proceedings.

§ 1.737 Mediation.

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

§ 1.739 Primary jurisdiction referrals.**§ 1.740 Review period for Section 208 formal complaints not governed by Section 208(b)(1).**

* * * * *

2. Amend section 1.47 by revising paragraph (d) to read as follows:

(d) Except in formal complaint proceedings against common carriers §§ 1.720 through 1.740 of this chapter, documents may be served upon a party, his attorney, or other duly constituted agent by delivering a copy or by mailing a copy to the last known address. Documents that are required to be served must be served in paper form, even if documents are filed in electronic form with the Commission, unless the party to be served agrees to accept service in some other form.

* * * * *

3. Amend section 1.49 by revising paragraph (f)(1)(i) to read as follows:

(i) Formal complaint proceedings under Section 208 of the Act and rules in §§ 1.720 through 1.740, and pole attachment complaint proceedings under Section 224 of the Act and rules in §§ 1.1401 through 1.1415;

* * * * *

INFORMAL COMPLAINTS

4. Sections 1.717 – 1.718 of the Commission’s rules are amended to read as follows:

§ 1.717 Procedure.

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

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

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

based on the same cause of action as the informal complaint. If no formal complaint is filed within the 6-month period, the informal complaint proceeding will be closed.

* * * * *

FORMAL COMPLAINTS

5. Sections 1.720 – 1.736 of the Commission’s rules are amended to read as follows:

§ 1.720 Purpose.

The following procedural rules apply to formal complaint proceedings under 47 U.S.C. 208, pole attachment complaint proceedings under 47 U.S.C. 224, and advanced communications services and equipment formal complaint proceedings under 47 U.S.C. 255, 617, and 619, and part 14 of these rules. Additional rules relevant only to pole attachment complaint proceedings are provided in subpart J of part 1.

§ 1.721 General pleading requirements.

Formal complaint proceedings are generally resolved on a written record consisting of a complaint, answer, reply, and joint statement of stipulated facts, disputed facts and key legal issues, along with all associated evidence in the record. The Commission may also require or permit other written submissions such as briefs, proposed findings of fact and conclusions of law, or other supplementary documents or pleadings.

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

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

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

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

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

(f) Opposing authorities must be distinguished.

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

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

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

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

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

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

(m) Each pleading or other submission must contain a written verification that the signatory has read the submission and, to the best of his or her knowledge, information and belief formed after reasonable inquiry, it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification or reversal of existing law; and that it is not interposed for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of the proceeding. If any pleading or other submission is signed in violation of this provision, the Commission may upon motion or upon its own initiative impose appropriate sanctions.

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

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

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

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

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

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

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

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

§ 1.722 Format and content of complaints.

A formal complaint shall contain:

- (a) The name of each complainant and defendant;
- (b) The occupation, address and telephone number of each complainant and, to the extent known, each defendant;
- (c) The name, address, telephone number, and email address of complainant's attorney, if represented by counsel;
- (d) Citation to the section of the Communications Act or Commission regulation or order alleged to have been violated; each such alleged violation shall be stated in a separate count;
- (e) Legal analysis relevant to the claims and arguments set forth therein;
- (f) The relief sought, including recovery of damages and the amount of damages claimed, if known;
- (g) Certification that the complainant has, in good faith, discussed or attempted to discuss the possibility of settlement with each defendant prior to the filing of the formal complaint. In disputes between businesses, associations, or other organizations, the certification shall include a statement that the complainant has engaged or attempted to engage in executive-level discussions concerning the possibility of settlement. Executive-level discussions are discussions among representatives of the parties who have sufficient authority to make binding decisions on behalf of the entity they represent regarding the subject matter of the discussions. Such certification shall include a statement that, prior to the filing of the complaint, the complainant notified each defendant in writing of the allegations that form the basis of the complaint and invited a response within a reasonable period of time. A refusal by a defendant to engage in discussions contemplated by this rule may constitute an unreasonable practice under the Act. The certification shall also include a brief summary of all additional steps taken to resolve the dispute prior to the filing of the formal complaint;
- (h) A statement explaining whether a separate action has been filed with the Commission, any court, or other government agency that is based on the same claim or same set of facts, in whole or in part, or whether the complaint seeks prospective relief identical to the relief proposed or at issue in a notice-and-comment rulemaking proceeding that is concurrently before the Commission;
- (i) An information designation containing:
 - (1) The name and, if known, the address and telephone number of each individual likely to have information relevant to the proceeding, along with the subjects of that information, excluding individuals otherwise identified in the complaint or exhibits thereto, and individuals employed by another party; and
 - (2) A copy—or a description by category and location—of all relevant documents, electronically stored information, and tangible things that the disclosing party has in its possession, custody, or control, excluding documents submitted with the complaint.
- (j) A completed Formal Complaint Intake Form;

(k) A declaration, under penalty of perjury, by the complainant or complainant's counsel describing the amount, method, and date of the complainant's payment of the filing fee required under § 1.1106 and the complainant's 10-digit FCC Registration Number, as required by part 1, subpart W. Submission of a complaint without the FCC Registration Number will result in dismissal of the complaint.

§ 1.723 Damages.

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

(b) In all cases in which recovery of damages is sought, the complaint must include either:

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

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

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

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

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

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

(1) Comply with paragraph (a) of this section, and

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

(d) If the Commission decides that a determination of damages would best be made in a proceeding that is separate from and subsequent to the proceeding in which the determinations of liability and prospective relief are made, the Commission may at any time bifurcate the case and order that the initial proceeding will determine only liability and prospective relief, and that a separate, subsequent proceeding initiated in accordance with paragraph (e) of this section will determine damages.

(e) If a complainant exercises its right under paragraph (c) of this section, or the Commission invokes its authority under paragraph (d) of this section, the complainant may initiate a separate proceeding to obtain a determination of damages by filing a supplemental complaint within sixty days after public notice (as defined in § 1.4(b) of this chapter) of a decision that contains a finding of liability on the merits of the original complaint. Supplemental complaints filed pursuant to this section need not comply with the requirements in §§ 1.721(c) or 1.722(d), (g), (h), (j), and (k). The supplemental complaint shall be deemed, for statutory limitations purposes, to relate back to the date of the original complaint.

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

- (1) The complainant's potential irreparable injury in the absence of such deposit;
- (2) The extent to which damages can be accurately calculated;
- (3) The balance of the hardships between the complainant and the defendant; and
- (4) Whether public interest considerations favor the posting of the bond or ordering of the deposit.

(g) The Commission may, in its discretion, end adjudication of damages by adopting a damages computation method or formula. In such cases, the parties shall negotiate in good faith to reach an agreement on the exact amount of damages pursuant to the Commission-mandated method or formula. Within 30 days of the release date of the damages order, parties shall submit jointly to the Commission either:

- (1) A statement detailing the parties' agreement as to the amount of damages;
- (2) A statement that the parties are continuing to negotiate in good faith and a request that the parties be given an extension of time to continue negotiations; or
- (3) A statement detailing the bases for the continuing dispute and the reasons why no agreement can be reached.

(h) In any proceeding to which no statutory deadline applies, the Commission may, in its discretion, suspend ongoing damages proceedings to provide the parties with time to pursue settlement negotiations or mediation under § 1.737.

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

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

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

- (1) Scheduling in the case;
- (2) Narrowing factual and legal issues in dispute;
- (3) Information exchange and discovery necessary to adjudicate the dispute;
- (4) Entry of a protective order governing confidential material; and

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

(c) Staff will endeavor to complete the pre-complaint process as expeditiously as possible. Staff may direct the parties to exchange relevant information during the pre-complaint period.

§ 1.725 Joinder of complainants and causes of action.

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

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

§ 1.726 Answers.

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

(b) The answer shall advise the complainant and the Commission fully and completely of the nature of any defense, and shall respond specifically to all material allegations of the complaint. Every effort shall be made to narrow the issues in the answer. The defendant shall state concisely its defense to each claim asserted, admit or deny the averments on which the complainant relies, and state in detail the basis for admitting or denying such averment. General denials are prohibited. Denials based on information and belief are prohibited unless made in good faith and accompanied by a declaration or affidavit explaining the basis for the defendant's belief and why the defendant could not reasonably ascertain the facts from the complainant or any other source. If the defendant is without knowledge or information sufficient to form a belief as to the truth of an averment, the defendant shall so state and this has the effect of a denial. When a defendant intends in good faith to deny only part of an averment, the defendant shall specify so much of it as is true and shall deny only the remainder. The defendant may deny the allegations of the complaint as specific denials of either designated averments or paragraphs.

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

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

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

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

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

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

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

§ 1.727 Cross-complaints and counterclaims.

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

§ 1.728 Replies.

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

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

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

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

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

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

§ 1.729 Motions.

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

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

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

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

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

§ 1.730 Discovery.

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

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

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

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

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

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

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

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

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

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

§ 1.731 Confidentiality of information produced or exchanged.

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

(1) Clearly mark each page, or portion thereof, for which a confidential designation is claimed. The party claiming confidentiality should restrict its designations to encompass only the specific information that it asserts is confidential. If a confidential designation is challenged, the party claiming confidentiality shall have the burden of demonstrating, by a preponderance of the evidence, that the materials designated as confidential fall under the standards for nondisclosure enunciated in the FOIA and that the designation is narrowly tailored to encompass only confidential information.

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

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

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

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

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

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

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

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

(c) The individuals identified above in paragraph (b) shall not disclose information designated as

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

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

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

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

§ 1.732 Other required written submissions.

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

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

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

§ 1.733 Status conference.

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

- (1) Simplification or narrowing of the issues;
- (2) The necessity for or desirability of additional pleadings or evidentiary submissions;
- (3) Obtaining admissions of fact or stipulations between the parties as to any or all of the matters in controversy;
- (4) Settlement of all or some of the matters in controversy by agreement of the parties;
- (5) Whether discovery is necessary and, if so, the scope, type, and schedule for such discovery;
- (6) The schedule for the remainder of the case and the dates for any further status conferences; and
- (7) Such other matters that may aid in the disposition of the complaint.

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

(i) Settlement prospects;

(ii) Discovery;

(iii) Issues in dispute;

(iv) Schedules for pleadings;

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

§ 1.735 Conduct of proceedings.

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

(b) The Commission may decide each complaint upon the filings and information before it, may request additional information from the parties, and may require one or more informal meetings with the parties to clarify the issues or to consider settlement of the dispute.

§ 1.736 Accelerated Docket Proceedings.

(a) With the exception of complaint proceedings under 47 U.S.C. 255, 617, and 619, and part 14 of these rules, parties to a formal complaint proceeding against a common carrier, or a pole attachment complaint proceeding against a cable television system operator, a utility, or a telecommunications carrier, may request inclusion on the Accelerated Docket. Proceedings on the Accelerated Docket must be concluded within 60 days, and are therefore subject to shorter pleading deadlines and other modifications to the procedural rules that govern formal complaint proceedings.

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

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

(d) Commission staff has discretion to decide whether a complaint, or portion of a complaint, is suitable for inclusion on the Accelerated Docket.

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

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

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

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

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

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

* * * * *

6. Add new sections 1.737 – 1.740 to read as follows:

§ 1.737 Mediation.

(a) The Commission encourages parties to attempt to settle or narrow their disputes. To that end, staff in the Enforcement Bureau's Market Disputes Resolution Division are available to conduct mediations. Staff will determine whether a matter is appropriate for mediation. Participation in mediation is generally voluntary, but may be required as a condition for including a matter on the Accelerated Docket.

(b) Parties may request mediation of a dispute before the filing of a complaint. After a complaint has been filed, parties may request mediation as long as a proceeding is pending before the Commission.

(c) Parties may request mediation by (i) calling the Chief of the Enforcement Bureau's Market Disputes Resolution Division; (ii) submitting a written request in a letter addressed to the Chief of the Market Disputes Resolution Division; or (iii) including a mediation request in any pleading in a formal complaint proceeding, or an informal complaint proceeding under § 1.717 of these rules. Any party requesting mediation must verify that it has attempted to contact all other parties to determine whether they are amenable to mediation, and shall state the response of each party, if any.

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

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

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

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

(h) For disputes arising under 47 U.S.C. 255, 617, and 619, and the advanced communications services and equipment rules, parties shall submit the Request for Dispute Assistance in accordance with § 14.32 of the rules.

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

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

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

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

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

§ 1.739 Primary jurisdiction referrals.

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

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

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

§ 1.740 Review period for Section 208 formal complaints not governed by Section 208(b)(1).

(a) Except in extraordinary circumstances, final action on a formal complaint filed pursuant to Section 208 of the Act, and not governed by Section 208(b)(1), should be expected no later than 270 days from the date the complaint is filed with the Commission.

(b) The Enforcement Bureau shall have the discretion to pause the 270-day review period in situations where actions outside the Commission's control are responsible for unreasonably delaying Commission review of a complaint referenced in paragraph (a) of this section.

* * * * *

POLE ATTACHMENTS

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

7. The table of contents of Part 1, Subpart J-Pole Attachment Complaint Procedures is revised to read as follows:

§ 1.1401 Purpose.

§ 1.1402 Definitions.

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

§ 1.1404 Pole attachment complaint proceedings.

§ 1.1405 Complaint.

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

§ 1.1407 Commission consideration of the complaint.

§ 1.1408 Remedies.

§ 1.1409 Imputation of rates; modification costs.

§ 1.1410 Allocation of unusable space costs.

§ 1.1411 Use of presumptions in calculating the space factor.

§ 1.1412 Timeline for access to utility poles.

§ 1.1413 Contractors for survey and make-ready.

§ 1.1414 Complaints by incumbent local exchange carriers.

§ 1.1415 Review period for pole access complaints.

8. Section 1.1401 is revised to read as follows:

§ 1.1401 Purpose.

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

9. Section 1.1402(f) is revised to read as follows:

§ 1.1402 Definitions.

* * * * *

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

* * * * *

10. Sections 1.1403(c)(1) and 1.1403(d) are revised to read as follows:

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

* * * * *

(c) * * *

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

* * * * *

(d) A cable television system operator or telecommunications carrier may file a "Petition for Temporary Stay" of the action contained in a notice received pursuant to paragraph (c) of this section within 15 days of receipt of such notice. Such submission shall not be considered unless it includes, in concise terms, the relief sought, the reasons for such relief, including a showing of irreparable harm and likely cessation of cable television service or telecommunication service, a copy of the notice, and certification of service as required by § 1.1404(b). The named may file an answer within 7 days of the date the Petition for Temporary Stay was filed. No further filings under this section will be considered unless requested or authorized by the Commission and no extensions of time will be granted unless justified pursuant to § 1.46.

* * * * *

11. Sections 1.1404 – 1.1405 are revised to read as follows:

§ 1.1404 Pole attachment complaint proceedings.

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

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

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

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

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

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

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

§ 1.1405 Dismissal of pole attachment complaints for lack of jurisdiction.

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

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

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

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

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

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

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

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

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

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

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

12. Remove sections 1.1407 – 1.1408.

13. Redesignate section 1.1409 as section 1.1407, and revise as follows:

§ 1.1407 Commission consideration of the complaint.

(a) The complainant shall have the burden of establishing a *prima facie* case that the rate, term, or condition is not just and reasonable or that the denial of access violates 47 U.S.C. 224(f). If, however, a utility argues that the proposed rate is lower than its incremental costs, the utility has the burden of establishing that such rate is below the statutory minimum just and reasonable rate. In a case involving a denial of access, the utility shall have the burden of proving that the denial was lawful, once a *prima facie* case is established by the complainant.

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

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

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

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

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

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

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

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

Rate = Space Factor × Cost

Where Cost

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

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

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

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

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

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

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

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

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

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

$$\text{Maximum Rate per Linear ft./m.} = \left[\frac{1}{\text{Number of Ducts}} \times \frac{1 \text{ Duct}}{\text{No. of Inner Ducts}} \right] \times \left[\frac{\text{No. of Ducts}}{\text{System Duct Length (ft./m.)}} \times \frac{\text{Net Conduit Investment}}{\text{Carrying Charge Rate}} \right] \times \text{Charge Rate}$$

(Percentage of Conduit Capacity) (Net Linear Cost of a Conduit)

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simplified as:

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

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If no inner-duct is installed the fraction, “1 Duct divided by the No. of Inner-Ducts” is presumed to be $\frac{1}{2}$.

14. Redesignate section 1.1410 as section 1.1408, and revise as follows:

§ 1.1408 Remedies.

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

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

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

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

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

15. Remove sections 1.1411 – 1.1415.

16. Redesignate section 1.1416 as section 1.1409.

17. Redesignate section 1.1417 as section 1.1410, and revise as follows:

§ 1.1410 Allocation of unusable space costs.

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

* * * * *

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

* * * * *

18. Redesignate section 1.1418 as section 1.1411, and revise as follows:

§ 1.1411 Use of presumptions in calculating the space factor.

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

19. Redesignate section 1.1420 as section 1.1412, and revise sections 1.1412(d) and 1.1412(i) as follows:

§ 1.1412 Timeline for access to utility poles.

* * * * *

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

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

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

* * * * *

(i) If a utility fails to respond as specified in paragraph (c) of this section, a cable operator or telecommunications carrier requesting attachment in the communications space may, as specified in § 1.1413, hire a contractor to complete a survey. If make-ready is not complete by the date specified in paragraph (e)(1)(ii) of this section, a cable operator or telecommunications carrier requesting attachment in the communications space may hire a contractor to complete the make-ready:

* * * * *

20. Redesignate section 1.1422 as section 1.1413, and revise as follows:

§ 1.1413 Contractors for survey and make-ready.

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

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

* * * * *

21. Redesignate section 1.1424 as section 1.1414.

A.

22. Redesignate section 1.1425 as section 1.1415, and revise as follows:

B. § 1.1415 Review period for pole attachment complaints.

(a) *Pole access complaints.* Except in extraordinary circumstances, final action on a complaint where a cable television system operator or provider of telecommunications service claims that it has been denied access to a pole, duct, conduit, or right-of-way owned or controlled by a utility should be expected no later than 180 days from the date the complaint is filed with the Commission. The Enforcement Bureau shall have the discretion to pause the 180-day review period in situations where actions outside the Enforcement Bureau's control are responsible for delaying review of a pole access complaint.

(b) *Other pole attachment complaints.* All other pole attachment complaints shall be governed by the review period in § 1.740 in subpart E of this part.

* * * * *

**PART 6—ACCESS TO TELECOMMUNICATIONS SERVICE, TELECOMMUNICATIONS
EQUIPMENT AND CUSTOMER PREMISES EQUIPMENT BY PERSONS WITH
DISABILITIES**

23. Amend section 6.21 to read as follows:

§ 6.21 Formal complaints, applicability of §§ 1.720 through 1.740 of this chapter.

Formal complaints against a manufacturer or provider, as defined under this subpart, may be filed in the form and in the manner prescribed under §§ 1.720 through 1.740 of this chapter. Commission staff

may grant waivers of, or exceptions to, particular requirements under §§ 1.720 through 1.740 of this chapter for good cause shown; provided, however, that such waiver authority may not be exercised in a manner that relieves, or has the effect of relieving, a complainant of the obligation under §§ 1.721 and 1.722 of this chapter to allege facts which, if true, are sufficient to constitute a violation or violations of section 255 of the Act or this subpart.

* * * * *

**PART 7—ACCESS TO VOICEMAIL AND INTERACTIVE MENU SERVICES AND
EQUIPMENT BY PEOPLE WITH DISABILITIES**

24. Amend section 7.21 to read as follows:

§ 7.21 Formal complaints, applicability of §§ 1.720 through 1.740 of this chapter.

Formal complaints against a manufacturer or provider, as defined under this subpart, may be filed in the form and in the manner prescribed under §§ 1.720 through 1.740 of this chapter. Commission staff may grant waivers of, or exceptions to, particular requirements under §§ 1.720 through 1.740 of this chapter for good cause shown; provided, however, that such waiver authority may not be exercised in a manner that relieves, or has the effect of relieving, a complainant of the obligation under §§ 1.721 and 1.722 of this chapter to allege facts which, if true, are sufficient to constitute a violation or violations of section 255 of the Act or this subpart.

* * * * *

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

25. Part 14 of the Commission's rules is amended to read as follows:

§ 14.38 Pleadings.

Formal complaint proceedings alleging a violation of 47 U.S.C. 255, 617, and 619, and part 14 of these rules, shall be governed by the formal complaint rules in subpart E of part 1, §§ 1.720-1.740.

* * * * *

26. Delete sections 14.39 – 14.52 in their entirety.

* * * * *

PART 20—COMMERCIAL MOBILE SERVICES

27. Amend section 20.18 by revising paragraph (m)(4)(vii) to read as follows:

(vii) A copy of the certification must be served on the PSAP in accordance with § 1.47 of this chapter. The PSAP may challenge in writing the accuracy of the carrier's certification and shall serve a copy of such challenge on the carrier. *See* §§ 1.45 and 1.47 and §§ 1.720 through 1.740 of this chapter.

* * * * *

PART 64—MISCELLANEOUS RULES RELATING TO COMMON CARRIERS

28. Amend section 64.1160 by revising paragraph (e) to read as follows:

(e) *Election of forum.* The Federal Communications Commission will not adjudicate a complaint filed pursuant to §§ 1.719 or §§ 1.720-1.740 of this chapter, involving an alleged unauthorized change, as defined by § 64.1100(e), while a complaint based on the same set of facts is pending with a state commission.

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29. Amend section 64.6217 by revising paragraph (c) to read as follows:

(c) *Formal Complaints.* Formal complaints against a NDBEDP certified program may be filed in the form and in the manner prescribed under §§ 1.720 through 1.740 of this chapter. Commission staff may grant waivers of, or exceptions to, particular requirements under §§ 1.720 through 1.740 of this chapter for good cause shown; provided, however, that such waiver authority may not be exercised in a manner that relieves, or has the effect of relieving, a complainant of the obligation under §§ 1.721 and 1.722 of this chapter to allege facts which, if true, are sufficient to constitute a violation or violations of section 719 of the Communications Act or this subpart.

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PART 68—CONNECTION OF TERMINAL EQUIPMENT TO THE TELEPHONE NETWORK

30. Amend section 68.105 by revising paragraph (d)(3) to read as follows:

(3) In any multiunit premises where the demarcation point is not already at the MPOE, the provider of wireline telecommunications services must comply with a request from the premises owner to relocate the demarcation point to the MPOE. The provider of wireline telecommunications services must negotiate terms in good faith and complete the negotiations within forty-five days from said request. Premises owners may file complaints with the Commission for resolution of allegations of bad faith bargaining by provider of wireline telecommunications services. See 47 U.S.C. 208, 47 C.F.R. §§ 1.720 through 1.740.