FEDERAL COMMUNICATIONS COMMISSION

47 CFR Parts 0 and 1

[CC Docket No. 96–238; FCC 97–396]

Procedures To Be Followed When Formal Complaints Are Filed Against Common Carriers

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: The Commission adopted a Report and Order that changed the rules for processing formal complaints filed against common carriers. The Report and Order adopted rules that are necessary to implement certain provisions contained in the 1996 Act that prescribe deadlines ranging from 90 days to 5 months for resolution of certain types of complaints against common carriers. The rules adopted in the Report and Order require or encourage parties to engage in pre-filing activities, change service requirements, modify the form and content of initial pleadings, shorten filing deadlines, eliminate pleading opportunities that were not useful or necessary, and modify the discovery process.

EFFECTIVE DATE: March 18, 1998.

FOR FURTHER INFORMATION CONTACT: Deena Shetler (202) 418–7296. For additional information concerning the information collections contained in this Report and Order contact Judy Boley at 202–418–0214, or via the Internet at jboley@fcc.gov.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's Report and Order in CC Docket No. 96–238, adopted and released on November 25, 1997. The full text of the Report and Order is available for inspection and copying during normal business hours in the FCC Reference Center, Room 239, 1919 M Street, N.W., Washington D.C. The complete text of this decision may also be purchased from the Commission's duplicating contractor, International Transcription Services, 1231 20th Street NW, Washington D.C. 20036, (202) 857–3800.

This Report and Order contains new or modified information collections subject to the Paperwork Reduction Act of 1995 (PRA). It has been submitted to the Office of Management and Budget (OMB) for review under the PRA. OMB, the general public, and other federal agencies are invited to comment on the proposed or modified information collections contained in this proceeding.

Paperwork Reduction Act

This Report and Order contains either a new or modified information collection. The Commission, as part of its continuing effort to reduce paperwork burdens, invites the general public and the Office of Management and Budget (OMB) to comment on the information collections contained in this Order, as required by the Paperwork Reduction Act of 1995, Pub. L. 104–12. Written comments by the public on the information collections are due February 6, 1998. OMB notification of action is due March 9, 1998. Comments should address: (1) whether the new or modified collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall practical utility; (b) the accuracy of the Commission's burden estimates; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on the respondents including the use of automated collection techniques or other forms of information technology.

OMB Approval Number: 3060–0411.

Title: Procedures for Formal Complaints Filed Against Common Carriers.

Form No.: FCC Form 485.

Type of Review: Revision.

Respondents: Individuals or households; businesses or other for profit, including small business; not-for-profit institutions; state, local or tribal government.

Section/title	No. of respondents	Est. time per respondent	Total annual burden (hours)
a. Service	760	1.0	760
b. Pleading Content Requirements	760	3.0	2,280
c. Discovery	380 (complainants)	2.25	855
	380 (defendants)	1.5	570
Estimate for recordkeeping	760	0.5	380
d. Scanning	38	5.0	190
e. Damages	380	1.0	380
f. Briefs	760	3.0	2,280
g. Directory of Service Agents	4,965	0.25	1,241.25
h. Joint Statement of Stipulated Facts and Status Conferences	760	2.0	1,520
i. Filing of Copies of Proposed Orders on Disks	760	0.5	380
j. FCC 485-Intake Form	380	0.5	190

Total Annual Burden: 11,026.25 hours.

Estimated Costs Per Respondents: $150.00 for each respondent that files a complaint against a common carrier, it is estimated that 380 complaints will be filed in the next year.

Needs and Uses: The information has been and is currently being used by the FCC to determine the sufficiency of complaints and to resolve the merits of disputes between the parties.

The Report and Order requires all complainants to personally serve their formal complaint on the defendant, as well as serve copies of the complaint with the Mellon Bank, the Secretary of the Commission, and the responsible Bureau or Bureaus. This requirement will speed up the proceeding by eliminating delays in the defendant receiving a copy of the complaint.

Regarding changes to the pleading requirements, the Report and Order concludes that complaints, answers, and any necessary replies must contain complete statements of relevant facts and supporting documentation; an inventory of all documents relevant to the complaint; an identification of all individuals with information relevant to the complaint; and a computation of any damages claimed. The Report and Order concludes that each complaint must contain verification of payment of the filing fee, a certificate of service, and certification that each complainant has mailed a certified letter to each defendant outlining the allegations that form the basis of the complaint it anticipated filing with the Commission to the defendant carrier that invited a response within a reasonable time

period and a summary of all additional steps taken to resolve the dispute prior to the filing of the complaints, or an explanation of why no such steps were taken. The Report and Order concludes that each answer must contain certification that each defendant has discussed the possibility of settlement with each complainant prior to the filing of the complaint, or an explanation of why such discussion was not feasible. The Report and Order also concludes that Answers must be filed within 20 days of service of the complaint on the defendant by the complainant. The Report and Order requires that all pleadings be accompanied by copies of relevant tariffs. The Report and Order concludes that all dispositive motions be accompanied by proposed finding of facts and conclusions of law in both hard copy and on a computer disk, formatted to be compatible with the Commission's word processing software. The Report and Order concludes that no amendments to complaints will be allowed and no cross-complaints or counterclaims may be filed. The Report and Order further requires parties to submit a joint statement of disputed and undisputed facts and key legal issues at least two business days prior to the scheduled date of the initial status conference. These proposals will promote agreement on a significant number of disputed facts and legal issues, as well as serving to better inform the Commission of the factual and legal areas in dispute.

The Report and Order concludes that complainants must file and serve any requests for interrogatories, up to a limit of 10, concurrently with their complaints, defendants must file and serve any requests for interrogatories, up to a limit of 10, prior to or concurrently with their answer, and complainants must file and serve any requests for interrogatories that are directed solely at facts underlying affirmative defenses asserted by the defendant in its answer, up to a limit of 5, within 3 calendar days of service of the defendant's answer. The Report and Order concludes further that individuals who are provided access to proprietary information shall sign a notarized statement affirmatively stating that the individual has personally reviewed the Commission's rules and understands the limitations they impose on the signing party. Parties must maintain a log recording the number of copies made of all proprietary materials and the persons to whom the copies have been provided. Upon termination of a formal complaint proceeding, all originals and reproduction of any proprietary materials disclosed in that proceeding, along with the log recording persons who received copies of such materials, shall be provided to the producing party. These requirements will lead to the disclosure of information relevant to the resolution of formal complaints earlier in the complaint proceeding, thus, allowing for timely resolution of these complaints.

The Report and Order also concludes that the Commission may impose a scanning or other electronic formatting requirement for submission of large numbers of documents in certain cases. This requirement will assist in the efficient management of documents in those cases where the review of large numbers of documents is necessary to the resolution of a dispute.

The Report and Order requires that, where the Commission has ordered parties to attempt to negotiate a damages amount according to an approved damages formula, the parties must submit to the Commission, within thirty days, the written results of such negotiations. The written statement shall contain one of the following: (1) 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 for an extension of time to continue such negotiations; or (3) the bases for the continuing dispute and the reasons why no agreement can be reached. This requirement will encourage parties to negotiate the resolution of damages claims diligently and ensure that the failure of parties to so negotiate will be remedied by the Commission.

The Report and Order resolves that briefs may be prohibited or limited. Where permitted, briefs must contain all claims and defenses that the party wants the Commission to address. Each brief must attach all documents on which it relies and explain how each attachment is relevant to the issues. Brief length has been shortened to 25 pages for initial briefs and 10 pages for reply briefs. This requirement will ensure that briefs will not be filed where they would be redundant of filings already made with the Commission and that briefs will be filed where necessary to the full resolution of a formal complaint.

The Report and Order requires all carriers subject to the Communications Act of 1934, as amended, to file in writing a designation of agent for service of process with the Commission, to facilitate service of process in all Commission proceedings.

The Report and Order concludes that parties must file a joint statement of stipulated facts, disputed facts and key legal issues at least two business days prior to the initial status conference. This requirement will serve to narrow the issues in dispute and serve as further information to be considered in determining the necessity of any discovery sought by the parties. The Report and Order also concludes that parties must submit a joint proposed order memorializing the rulings made at each status conference by the close of business on the business day following the date the status conference was held. Alternatively, parties may submit a transcript of the rulings made at each status conference by the close of business on the third business day following the date the status conference was held. This requirement will save Commission staff time and ensure that the parties fully understand the rulings that will impact the proceedings.

The Report and Order concludes that all proposed orders must be submitted both as hard copies and on computer disk formatted to be compatible with the Commission's computer system and using the Commission's current wordprocessing software. This requirement increasing the efficiency of the formal complaint process by providing Commission staff with the ability to adopt proposed rules either in whole or in part where necessary.

Finally, the Report and Order concludes that complainants are required to submit a completed intake form with its formal complaint to indicate that the complaint meets the threshold requirements for stating a cause of action. This requirement will help to prevent the filing of procedurally deficient complaints.

Summary of Report and Order

[Report and Order in CC Docket No. 96–238]

I. Introduction

1. In February 1996, Congress passed and the President signed the Telecommunications Act of 1996 (''1996 Act''). One of the main goals of the 1996 Act is to establish a ''pro-competitive, deregulatory'' national policy framework for the telecommunications industry. In accordance with this goal, sections 208, 260, 271, and 275 of the Act contain deadlines ranging from ninety days to five months for the Commission's resolution of certain complaints filed against the Bell Operating Companies (''BOCs''), local exchange carriers (''LECs''), and other telecommunications carriers that are subject to the requirements of the Act. Provisions of the 1996 Act further direct the Commission to establish such procedures as are necessary for the review and resolution of such

complaints within the statutory deadlines. Prompt and effective enforcement of the Act and the Commission's rules is crucial to attaining the 1996 Act's goals of full and fair competition in all telecommunications markets. Such widespread competition will ensure that the American public derives the full benefit of such competition through new and better products and services at affordable rates.

2. We conclude that, in order to fulfill the goals and meet the statutory deadlines of the 1996 Act, we must revise our formal complaint rules to provide a forum for prompt resolution of all complaints of unreasonably discriminatory or otherwise unlawful conduct by telecommunications carriers, and thus to reduce impediments to robust competition in all telecommunications markets. Consistent with the Congressional mandate to expedite the processing of formal complaints, on November 26, 1996, the Commission released a *Notice of Proposed Rulemaking,* 61 FR 67978 (December 26, 1996) (''*NPRM*'') proposing changes to the rules that govern formal complaints against common carriers. In the *NPRM* we articulated our goal of expediting the resolution of all formal complaints, not just those enumerated in the 1996 Act. The *NPRM* sought public comment on comprehensive rule changes and additions that would: (1) encourage parties to attempt to settle their disputes before filing formal complaints; (2) facilitate the filing and service of complaints and related pleadings; (3) improve the content and utility of the initial pleadings filed by both parties, while reducing reliance on discovery and subsequent pleading opportunities; and (4) eliminate unnecessary or redundant pleadings and other procedural devices.

3. In this *Report and Order,* we adopt certain of the proposed rules, with some modifications. The amended rules will foster our ability to meet the statutory complaint resolution deadlines of the 1996 Act and expedite the resolution of all formal complaints, while safeguarding the due process interests of affected parties. The rules we adopt today apply to all formal complaints, except complaints alleging violations of section 255. A uniform approach will ensure that the Commission places on all formal complaints the same pro-competitive emphasis underlying the 1996 Act's complaint resolution deadlines. The rules we adopt in this *Report and Order* shall be important tools for promptly assessing a common carrier's compliance with the requirements of the Act and our rules. In addition, these rules provide for suitable remedial actions where appropriate.

4. We intend to closely monitor the effectiveness of our new streamlined rules in promoting the pro-competitive goals of the Act. We will not hesitate to re-visit the rules and policies adopted in this *Report and Order* if we later determine that further modifications are needed to ensure that complaint proceedings are promptly and fairly resolved and, more generally, to promote the Act's goal of full and fair competition in all telecommunications markets.

5. In addition, Commission staff retains considerable discretion under the new rules to, and is indeed encouraged to, explore and use alternative approaches to complaint adjudication designed to ensure the prompt discovery of relevant information and the full and fair resolution of disputes in the most expeditious manner possible. We recently established an Enforcement Task Force, the principal mission of which is to promote timely and appropriate enforcement of the pro-competitive policies of the 1996 Act. Among other duties, the Enforcement Task Force has been charged with identifying and investigating actions by common carriers that may be hindering competition in telecommunications markets and with initiating enforcement actions where necessary to remedy conduct that is unreasonable, anti-competitive or otherwise harmful to consumers. The Enforcement Task Force is considering whether to recommend alternative forms of complaint adjudications and enforcement actions to ensure that the goals underlying the pro-competitive policies of the 1996 Act and the Commission's implementing rules and orders are met. Any such recommendation may form the basis for a subsequent *Report and Order* to be considered by the Commission at a later date.

6. Finally, we note that section 207 of the Act gives any person the option of pursuing claims for damages against common carriers based on alleged violations of the Act either at the Commission or before a federal district court of competent jurisdiction. Thus, parties looking to recover monetary damages are free to weigh the advantages of bringing their claims before a federal district court against the benefits of proceeding under the Commission's expedited complaint procedures.

II. Background

A. Statutory Framework for Complaints Against Common Carriers

7. Prior to enactment of the 1996 Act, sections 206 to 209 of the Act provided the statutory framework for our rules for resolving formal complaints filed against common carriers. Section 206 of the Act establishes the liability of a common carrier for damages sustained by any person or persons as a consequence of that carrier's violation of any provision of the Act. Section 207 of the Act permits any person claiming to be damaged by the actions of any common carrier either to make a complaint to the Commission or bring suit in federal district court for the recovery of such damages. Section 208(a) authorizes complaints by any person ''complaining of anything done or omitted to be done by any common carrier'' subject to the provisions of the Act. Section 208(a) specifically states that ''it shall be the duty of the Commission to investigate the matters complained of in such manner and by such means as it shall deem proper.'' Section 209 of the Act specifies that, if ''the Commission shall determine that any party complainant is entitled to an award of damages under the provisions of this Act, the Commission shall make an order directing the carrier to pay to the complainant the sum to which he is entitled on or before a day named.''

8. In 1988, Congress added subsection 208(b) to require that complaints filed with the Commission concerning the lawfulness of a common carrier's charges, practices, classifications or regulations, must be resolved by the Commission in a final, appealable order within twelve months from the date filed, or fifteen months from the date filed if ''the investigation raises questions of fact of . . . extraordinary complexity.'' In addition, Congress amended subsection 5(c)(1) to require that such decisions be made by the Commission, not the Bureau staff pursuant to delegated authority.

B. Complaint Provisions Amended and Added by the 1996 Act

9. As amended or added by the 1996 Act, sections 208, 260, 271, and 275 of the Act all contain deadlines for the Commission's resolution of formal complaints alleging violations under the particular section by a common carrier.

10. *Section 208.* The 1996 Act amended section 208, entitled ''Complaints to the Commission.'' Section 208(b)(1) now mandates that ''the Commission shall, with respect to any investigation under [section 208(b)] of the lawfulness of a charge,

classification, regulation, or practice, issue an order concluding such investigation within 5 months after the date on which the complaint was filed,'' rather than the twelve to fifteen month deadline previously imposed. In addition, subsection 208(b)(2) provides that any such investigation initiated prior to enactment of subsection 208(b)(2) must be concluded within twelve months after the date of enactment.

11. *Section 260.* The 1996 Act added section 260, entitled ''Provision of Telemessaging Service.'' Section 260(b) provides that:

> [T]he Commission shall establish procedures for the receipt and review of complaints concerning violations of [section 260(a)] or the regulations thereunder that result in material financial harm to a provider of telemessaging service. Such procedures shall ensure that the Commission will make a final determination with respect to any such complaint within 120 days after receipt of the complaint. If the complaint contains an appropriate showing that the alleged violation occurred, the Commission shall, within 60 days after receipt of the complaint, order the local exchange carrier and any affiliates to cease engaging in such violation pending such final determination.

12. *Section 271.* The 1996 Act added section 271, entitled ''Bell Operating Company Entry into InterLATA Services.'' Section 271(d)(6)(B) directs the Commission to ''establish procedures for the review of complaints concerning failures by [BOCs] to meet conditions required for approval'' under section 271(d)(3) to provide in-region interLATA services. Section 271(d)(6)(B) further provides that, ''[u]nless the parties otherwise agree, the Commission shall act on such complaint within 90 days.''

13. *Section 275.* The 1996 Act added section 275, entitled ''Alarm Monitoring Services.'' Section 275(c) requires the Commission to ''establish procedures for the receipt and review of complaints concerning violations of [section 275(b)] or the regulations thereunder that result in material financial harm to a provider of alarm monitoring service.'' Section 275(c) further provides that:

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

14. The 1996 Act also added several provisions that reference complaint proceedings but do not contain resolution deadlines.

15. *Section 255.* The 1996 Act added section 255, entitled ''Access by Persons with Disabilities.'' Section 255 requires manufacturers of telecommunications equipment or customer premises equipment to ensure that the equipment is ''designed, developed, and fabricated to be accessible to and usable by individuals with disabilities'' and further requires any providers of telecommunications services to ''ensure that the service is accessible to and usable by individuals with disabilities.'' Section 255 provides that ''[t]he Commission shall have exclusive jurisdiction with respect to any complaint under this section'' but imposes no specific resolution deadline for such complaints. We have initiated a separate proceeding to implement the provisions of section 255.

16. *Section 274.* The 1996 Act added section 274, entitled ''Electronic Publishing by Bell Operating Companies.'' Section 274(e)(1) provides that ''any person claiming that an act or practice of any [BOC], affiliate, or separated affiliate constitutes a violation of [section 274] may file a complaint with the Commission or bring suit in federal district court as provided in section 207 of the Act'' and that a ''[BOC], affiliate, or separated affiliate'' shall be liable for damages as provided in section 206 of the Act. Similarly, subsection 274(e)(2) permits an aggrieved person to apply to the Commission for a cease-and-desist order or to a U.S. District Court for an injunction or order compelling compliance with section 274. None of the complaint provisions in section 274 contain deadlines for Commission action.

17. In addition, the 1996 Act imposed other requirements on the BOCs and other common carriers which could lead to formal complaint actions under section 208. For example, section 254(k), entitled ''Subsidy of Competitive Service Prohibited,'' prohibits telecommunications carriers from using non-competitive services to subsidize services that are subject to competition. The 1996 Act also added section 276, entitled ''Provision of Payphone Service.'' section 276(a) prohibits a BOC from subsidizing its payphone service through its telephone exchange service operations or its exchange access operations. Timely, responsive enforcement of provisions such as these will be necessary to promote the 1996 Act's goal of fostering competitive telecommunications markets.

18. We tentatively concluded in the *NPRM* that the provisions of the 1996 Act that specifically refer to complaint procedures do not diminish the Commission's broad authority to investigate formal complaints under section 208. AT&T, the sole commenter to address this issue, agrees with our tentative conclusion, explaining that section 261(a) states that:

> nothing in this part [Part II] shall be construed to prohibit the Commission from enforcing regulations prescribed prior to the date of enactment of the Telecommunications Act of 1996 in fulfilling the requirements of this part, to the extent that such regulations are not inconsistent with the provisions of this part.

According to AT&T, specific references in the Act to the Commission's duties to resolve formal complaints under section 271 and elsewhere in the Act affect only the time in which such matters must be decided, but do not affect the Commission's existing authority under section 208.

19. We find that Congress' actions in specifying certain complaint procedures and deadlines for those procedures do not restrict the Commission's authority to resolve formal complaints pursuant to section 208. Section 261 is entitled, ''Effect on Other Requirements'' and subsection (a) indicates Congress'' intent to leave intact the Commission's authority except where it would be inconsistent with the Act itself. We conclude that any references to complaint resolution deadlines in Title II of the Act are intended to affect only the time in which specific matters must be decided, and do not decrease the Commission's existing authority under section 208.

III. Amendments to Rules of Practice and Procedure

A. Overview

20. The focus of this proceeding is on establishing rules and procedures to implement the expedited complaint provisions set forth by the 1996 Act and to speed the resolution of all formal complaints in accordance with the pro-competitive policies underlying the 1996 Act. Three objectives form the basis for the amendment of the formal complaint rules, which focus on settlement efforts, enhanced pleading content, and streamlined procedures.

21. Our first objective is to promote settlement efforts to enable parties to resolve disputes on their own before resorting to adjudication before the Commission. We conclude that more dialogue between parties prior to the complaint process will reduce, and in some cases, eliminate, the need to file formal complaints with the Commission. Consequently, we require complainants and defendant carriers to

certify in their respective complaints and answers that the possibility of settlement was discussed before the complaint was filed with the Commission. Certification of settlement attempts will promote pre-filing discussions and information exchanges among the disputing parties. In situations in which disputes are not resolved, we expect that pre-filing discussions and information exchanges will enable parties to narrow the number and scope of the issues to be presented to the Commission for resolution under the expedited complaint procedures.

22. Our second objective is to improve the utility and content of pleadings, so that the complaint, answer, and any necessary reply may serve as the principal basis upon which the Commission will make a decision on the merits of the complaint. Under the format and content rules, absent a waiver for good cause shown, complainants and defendants must make factual allegations in their pleadings and supply documentation to support such facts. To the extent that the Commission determines that additional information is needed in the record to resolve a complaint fully, the parties will be required to respond quickly.

23. Our third objective is to streamline the formal complaint process by eliminating or limiting procedural devices and pleading opportunities that have contributed to undue delays in formal complaints. For example, we conclude that we should modify discovery to increase staff control over the process and limit the filing, timing, and scope of briefs, as well as streamline the service process by having complainants serve complaints directly on defendants. In addition, we eliminate certain pleading opportunities that have been of little value to the complaint resolution process, including cross-complaints, counterclaims, motions to make a complaint definite and certain, and amendments to complaints.

24. To advance these three objectives, we have designed rules to speed the processing of all formal complaints. By encouraging dialogue among the parties prior to the filing of formal complaints, many conflicts will be settled and those complaints that are filed will have been narrowed in scope. By requiring initial pleadings to contain complete information and documentation, the parties and the Commission will be better prepared to resolve disputed issues at an early stage of the complaint process. And finally, by streamlining and eliminating unnecessary pleading opportunities, the parties and the Commission will be able to focus early on the essential activities and information needed to more quickly resolve formal complaints.

B. Applicability of the Rules

1. Uniform Application of the Rules.

a. The *NPRM.* 25. In the *NPRM,* we tentatively concluded that the pro-competitive goals and policies underlying the short complaint resolution deadlines in the Act should apply to all formal complaints, not just to those specifically added or amended by the 1996 Act. The *NPRM* proposed to implement uniform procedures and pleading requirements to expedite the resolution of all formal complaints and sought comment on the need for specialized rules or procedures for handling complaints arising under particular provisions of the Act.

b. Comments. 26. BellSouth supports applying the same procedures to all formal complaints and the National Association for the Deaf (''NAD'') agrees, stating that separate sets of procedures could be confusing for complainants. The majority of parties commenting on this issue, however, argue for special expedited procedures for those complaints that are subject to specific statutory deadlines, with other complaints proceeding under more relaxed or flexible timetables. American Public Communications Council (''APCC'') expresses concern that the new procedures will place significant burdens on complainants and defendants. Cincinnati Bell Telephone (''CBT'') states that sections 260(b), 271(d)(6)(B), and 275(c), which require complaints to be resolved under ninety or 120-day deadlines, involve very specialized subject matters, while section 208 complaints may involve any aspect of telecommunications and therefore parties to section 208 complaints may need more time to develop and resolve issues. GTE suggests using separate proceedings for ''fast-track'' cases, stating that the Commission should wait until it has gained more experience with application of the provisions of the 1996 Act before attempting to apply the same expedited procedures to all formal complaints.

27. Some commenters also urge the Commission to establish expedited procedures for those complaints that are not specifically covered by a statutory deadline but which, they argue, are needed to ensure full and fair competition. For example, MCI proposes expedited procedures for interconnection-related complaints pursuant to sections 251 and 252 of the Act. Telecommunications Resellers Association (''TRA'') argues that complaints filed by resale carriers should be processed under expedited procedures because of the size and resource disparities between resellers and their underlying network service providers, and because of the unusual circumstances in which resellers have dual status as both customers and competitors of network service providers.

28. The NAD references its comments to the *Section 255 NOI,* 61 FR 50465 (September 26, 1996), in which it proposed that the Commission create procedures to coordinate with the Department of Justice (''DOJ'') to determine the appropriate governmental authority for reviewing complaints that arise out of a lack of access to telecommunications services for persons with disabilities. Such complaints could result either from the failure of a place of public accommodation or state or local governmental entity to follow the requirements of the Americans with Disabilities Act of 1990 (''ADA'') or from the failure of a telecommunications manufacturer or service provider to comply with section 255. The NAD states that its proposal will aid parties who file section 255 complaints that may raise jurisdictional issues.

c. Discussion. 29. We affirm our tentative conclusion that uniform streamlined procedures and pleading requirements should be applied to all formal complaints filed against common carriers, even those that are not subject to specific statutory deadlines, with the exception of complaints alleging violations of section 255. All formal complaints should be resolved as expeditiously as possible. We find that uniform procedures and pleading requirements will promote efficiency in the Commission's administration of complaints and will minimize confusion among the parties. Uniform procedures for all formal complaints will promote the Commission's goal of expediting the resolution of these disputes by allowing the Commission and all parties to follow one set of rules.

30. We disagree with the commenters who support expedited procedures only for complaints that have statutory deadlines or that involve competitive issues for the following reasons. First, we agree with NAD that having separate sets of procedures for certain types of complaints would create confusion for parties who might be unclear as to which rules to follow and might even lead to repeated and inadvertent violations of our procedural rules. Second, we conclude that separate complaint procedures would permit

parties to exploit our rules by alleging certain violations in order to manipulate the time frame or level of evidentiary support required in a particular complaint. For example, a complainant alleging that a BOC has violated certain provisions of the Act might be tempted to add an allegation that the BOC has also failed to meet a condition required for approval for provision of interLATA services in violation of section 271, in order to take advantage of the ninety-day resolution deadline mandated by section 271(d)(6)(B). Third, to the extent that certain commenters contend that subjecting all complaints to expedited procedures will unnecessarily work hardships on complainants and defendants in cases without statutory deadlines, we note that the Commission has considerable discretion under the amended rules to accommodate the needs of parties in cases where no statutory deadline applies. Finally, separate sets of procedures would be administratively burdensome for the Commission. Not only would it be cumbersome to promulgate separate sets of procedures, but it would decrease staff efficiency to apply different procedural rules to different complaints.

31. We defer consideration of NAD's proposal to establish coordination procedures with the DOJ regarding jurisdiction of accessibility complaints in this proceeding. We will address this proposal in our section 255 implementation rulemaking, so as to permit the Commission to take a comprehensive approach to implementation of section 255.

2. Applicability of the Section 208(b)(1) Deadline. a. The *NPRM.* 32. We stated in the *NPRM* that the new five-month resolution deadline in section 208(b)(1) applies only to those formal complaints that investigate the ''lawfulness of a charge, classification, regulation or practice.'' Section 208(b), as originally added by Congress in 1988 in the FCCAA, has been interpreted previously as applicable only to complaints about matters contained in tariffs filed with the Commission. In other words, under this interpretation, only those complaints challenging the ''lawfulness of a charge, classification, regulation or practice'' reflected in a tariff filed with the Commission pursuant to section 203 of the Act have been viewed as subject to the resolution deadlines contained in former section 208(b).

b. Comments. 33. Several commenters take a much broader view of the scope of section 208(b). According to these commenters, the five-month resolution deadline in section 208(b)(1), in the absence of a specific statutory resolution deadline such as in sections 260, 275, and 271, applies to all formal complaints filed pursuant to section 208. Although the commenters provide little argument to support this view, the crux of their claim appears to be that the language in section 208(b)(1) referring to ''investigation[s] into the lawfulness of a charge, classification, regulation or practice'' is broad enough to cover any unlawful act or omission by a common carrier which could subject it to a complaint filed pursuant to section 208. Under this broad interpretation of section 208(b)(1), the Commission would have a maximum of five months to resolve any formal complaint filed pursuant to section 208.

c. Discussion. 34. The plain language of the Act establishes that the class of complaints subject to the deadline in section 208(b)(1) is narrower than the class of complaints that can be filed under section 208(a). Section 208(a), *inter alia,* gives any person the right to complain about ''anything done or omitted to be done'' by a common carrier in contravention of the Act. The complaint resolution deadline in section 208(b)(1), on the other hand, refers only to those complaints involving investigations into the lawfulness of a ''charge, classification, regulation, or practice'' of a carrier.

35. While there is little guidance in section 208 itself for defining the subset of complaints covered by section 208(b), we conclude that section 208(b)(1) covers complaints relating to the lawfulness of those matters required to be in tariffs. Stated another way, the deadline covers complaints relating to the lawfulness of matters with respect to which the Commission could exercise its prescription power under section 205. The deadlines in sections 204(a)(2)(A) (pertaining to the nature and timing of tariff investigations by the Commission) and 208(b)(1) are identical in both the Act, as amended by the FCCAA, and the 1996 Act. In addition, the provision in the 1996 Act establishing the effective date for the changes to the tariff investigation and complaint resolution deadlines specifically states that the new deadlines in sections 204 and 208(b) shall apply only with respect to charges, practices, classifications, or regulations ''filed'' on or after one year after the date of enactment. The use of the word ''filed'' connotes a tariff filing pursuant to section 203 of the Act because it is generally pursuant to section 203 that a ''charge, classification, regulation, or practice'' would be ''filed'' with the Commission.

36. We note, moreover, that the 1996 Act added specific resolution deadlines for complaints filed pursuant to sections 260, 271, and 275. It may be inferred that, because Congress added specific deadlines in certain sections of the 1996 Act for resolving identified types of complaint actions, and was silent as to deadlines for resolving complaints arising from other sections of the Act, Congress did not intend to mandate deadlines for resolving all complaints.

37. We therefore conclude that section 208(b) applies only to formal complaints which involve ''investigation[s] into the lawfulness of a charge, classification, regulation or practice'' contained in tariffs filed with the Commission. In light of our complete detariffing policy for the domestic interstate, interexchange services of nondominant interexchange carriers and our permissive detariffing policy for competitive access providers and competitive LECs, however, we conclude that the interpretation should be modified to ensure that our forbearance decisions do not eviscerate Congress' intent in establishing the five-month resolution deadline for 208(b)(1) complaints. As noted above, the application of the 5-month 208(b)(1) deadline to investigations concerning a carrier's ''charge, classification, regulation, or practice'' is triggered by the filing of any such charge, classification, regulation or practice with the Commission. To the extent that our detariffing decisions relieve carriers of any obligations to make such filings, it could be argued that complaints about matters not filed with the Commission by carriers are not encompassed by section 208(b)(1). We conclude that Congress clearly did not intend this result. We hold, therefore, that the section 208(b)(1) deadline shall apply 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. For example, complaints alleging that a carrier,through its non-tariffed charges, has failed to meet the rate integration or rate averaging requirements of section 254(g) of the Act would be subject to the section 208(b)(1) deadline. Similarly, complaints contending that a carrier has imposed unjust and unreasonable terms and conditions on the provision of a service that would have been tarrifed but for our forbearance decision would fall within the requirements of section 208(b)(1).

C. Pre-Filing Procedures and Activities

38. In the *NPRM* we asked parties to identify specific pre-filing activities available to potential complainants and

defendants that could serve to settle or narrow disputes, or facilitate the compilation and exchange of relevant documentation or other information prior to the filing of a formal complaint with the Commission. It has been our experience that there is generally little exchange of information or discussion of the dispute between parties prior to the filing of a formal complaint and that such exchange of information and discussion of a dispute will often lead to settlement. We stated in the *NPRM* that our intent was to adopt rules or procedures that would promote actions that could either foster the resolution of disputes prior to filing or narrow the scope of the issues to be resolved in formal complaints.

1. Certification of Settlement Attempts. a. The *NPRM.* 39. We tentatively concluded in the *NPRM* that we should require that a complainant certify in its complaint that it discussed, or attempted to discuss, in good faith the possibility of settlement with the defendant carrier's representative(s) prior to filing the complaint, and, further, that failure to comply with this certification requirement would result in dismissal of the complaint.

b. Comments. 40. Most commenters support the proposal to require a complainant to certify in its complaint that it discussed, or attempted to discuss, the possibility of settlement with the defendant carrier prior to filing its complaint. These commenters agree that settlement should be encouraged and that the certification requirement would provide an additional incentive for parties to settle or narrow disputed issues, thereby resulting in fewer and better-focused complaints. GST Telecom, Inc. (''GST''), KMC Telecom, Inc. (''KMC''), MFS Communications, Co. (''MFS''), and TRA additionally suggest that answers should be required to contain certification that the parties discussed, or attempted to discuss, the possibility of settlement prior to the filing of the formal complaint. In their Joint Reply, Jones Intercable, Inc., Centennial Cellular Corp., Texas Cable and Telecommunications Association, Cable Television Association of Georgia, South Carolina Cable Television Association, and Tennessee Cable Telecommunications Association (collectively, the ''Cable Entities'') recommend mirroring the Commission's pole attachment procedures, which require a complaint to either summarize all steps taken to resolve the dispute prior to filing or explain why no steps were taken. AT&T opposes such a pre-certification requirement, arguing that it would unduly restrict a party's ''unconditional statutory right'' to file a section 208 complaint, citing *AT&T* v. *FCC* as support for its proposition. BellSouth disagrees with AT&T, arguing that there is no section 208 right to file a complaint that is not based on facts, and that encouraging pre-complaint negotiations will facilitate all parties' understanding of the facts. Bell Atlantic, NYNEX, and Pacific Telesis Group (''PTG'') also disagree with AT&T's argument, stating that *AT&T* v. *FCC* deals only with the Commission's prohibition of tariff revisions for certain services and does not deal with section 208 complaints. Competitive Telecommunications Association (''CompTel'') opposes the requirement of certification of settlement attempts, arguing that parties already have sufficient motivation to settle their disputes and that mandatory settlement discussions might force some parties to accept unfavorable settlements.

c. Discussion. 41. We conclude that both the complainant and defendant, as part of the complaint and answer, respectively, must certify that they discussed, or attempted in good faith to discuss, the possibility of settlement with the opposing party prior to the filing of the complaint. We agree with GST, KMC, MFS, and TRA that defendant carriers should be given equal responsibility for exploring settlement options prior to the filing of a formal complaint. To help facilitate meaningful discussion between disputing parties, we will adopt a requirement that the complainant mail a certified letter outlining the allegations that form the basis of the complaint it anticipates filing with the Commission to the defendant carrier that invites a response within a reasonable period of time. We further conclude that the rule setting forth the certification requirement shall be modeled on the Commission's existing pole attachment procedures in § 1.1404(i) of the rules. Therefore, each settlement certification must include a brief summary of all steps taken to resolve the dispute prior to filing. If no steps are taken, then each such certification must state the reason(s) for such failure to conduct settlement discussions. We find that mandating settlement discussions prior to filing a formal complaint will result in (1) more disputes being settled amicably, and (2) the scope of the issues in dispute in formal complaints being narrowed where possible.

42. We disagree with CompTel's assertion that a rule requiring mandatory settlement discussions could be used to coerce parties into accepting unfavorable settlements. This rule requires good faith settlement *attempts,* not settlement itself. Furthermore, requiring good faith settlement attempts will not impose undue restrictions on the right of any person to file a complaint with the Commission. We disagree with AT&T's interpretation of the ruling in *AT&T* v. *FCC* as it applies to the issues under consideration here. In *AT&T* v. *FCC,* the court held that the Commission's requirement that a carrier obtain special permission, *i.e.,* prior Commission approval, before filing a tariff under section 203 unlawfully interfered with the carrier's right to file a tariff. In addition to the fact that *AT&T* v. *FCC* considers the application of section 203, not section 208, the issue considered in *AT&T* v. *FCC* is distinguishable from the issue before us in that the pre-filing requirements we impose here only dictate that parties explore settlement possibilities and do not require any Commission approval prior to filing a formal complaint. If settlement attempts are unsuccessful, the complainant is free to file a formal complaint. The certification requirement will benefit the parties and the Commission by requiring the parties to discuss the facts and issues in dispute prior to the filing of the complaint. Such requirement may, therefore, lead to an informal resolution of the dispute or, at the very least, may reduce or clarify the number and scope of the issues in dispute, consistent with Congress' intent to expedite the resolution of disputes.

2. Neutral Industry Committee. a. The *NPRM.* 43. We also sought comment on whether a committee composed of neutral industry members would serve a needed role or useful purpose in addressing disputes over technical and other business disputes, before parties bring their disputes to the Commission in the form of formal complaints. We asked commenters to address the extent to which there would be a need for outside experts to deal with technical issues that are likely to arise in formal complaints and whether, if such a need exists, the use of a committee of such experts in the form of a voluntary preliminary alternative dispute resolution (''ADR'') procedure would expedite the resolution of complaints

b. Comments. 44. Most commenters oppose the creation of an industry committee. Several parties argue that it would be impossible to construct a neutral committee, PTG and TRA argue that the use of such a committee would delay the resolution of important marketplace issues, and AT&T and GTE argue that the committee would lack the expertise to handle a wide variety of disputes. CBT, Communications and Energy Dispute Resolution Associates (''CEDRA''), and NYNEX contend that

such options are already available to parties. NYNEX additionally states that complaints before the Commission typically involve disputes between individual companies, rather than broad issues affecting the industry. Some commenters, however, support the proposal. Association of Telemessaging Services International (''ATSI''), BellSouth, Southwestern Bell Telephone (''SWBT''), and United States Telephone Association (''USTA'') support the use of an industry committee to assist in resolving technical and business disputes. BellSouth added that an industry committee could be used in conjunction with ADR mechanisms. ATSI asserts that committee proceedings would have to be completed within clearly established deadlines to prevent delay in resolving disputes involving competitive issues and to ensure compliance with the statutory complaint resolution deadlines. In addition, GST, KMC, and MFS suggest permitting the parties and the Commission to utilize such a committee during the complaint process, as well as at the pre-filing stage, to resolve certain factual issues.

c. Discussion. 45. We decline to establish a committee of neutral industry members to resolve disputes over technical and other business issues, before parties file such disputes with the Commission as formal complaints. We note that the majority of commenters oppose this proposal. Several factors weigh against establishing such a committee. First, because the committee's decisions would not be binding on the Commission, it is possible that the committee and the Commission might rule differently on identical issues. The usefulness of committee decisions to resolve disputes would be diminished by such uncertainty, as a losing party would have little incentive to accept the committee's recommendation. Second, we agree with commenters that it would be difficult to establish a standing committee with sufficient expertise to resolve a range of technical and business issues because of the breadth of knowledge and expertise that would be required. Third, we agree with commenters that it would be administratively burdensome to assemble a new committee for each conflict parties sought to submit to such committee. Finally, we agree with the commenters who argue that the potential for conflicts of interest among the committee members is too great to be able to provide a guarantee of neutrality.

3. Additional Commenters' Suggestions. a. The *NPRM* 46. In the *NPRM,* we invited commenters to suggest additional pre-filing requirements or procedures to help settle or narrow disputes, or facilitate the compilation and exchange of relevant documentation or other information.

b. Comments. 47. ATSI, NYNEX, and USTA suggest that formal ADR efforts be made a prerequisite to filing a complaint, while MCI and Sprint oppose such a proposal. MCI, ICG Telecom Group (''ICG''), and Sprint suggest that parties be required to begin their information exchange before a complaint is filed, in order to prepare for the rapid pace of the complaint process. PTG opposes this suggestion, arguing that requiring such information exchanges would lead to fishing expeditions and raise confidentiality concerns. Bell Atlantic proposes that a potential complainant be required to provide the defendant carrier with a statement of its claim and specify documents and information that it believes would be material to the resolution of the dispute, and that the carrier be required to respond in full within a reasonable period of time before a complaint is filed. Similarly, CEDRA and BellSouth suggest that complainants be required to serve advance copies of their complaints on defendant carriers prior to filing such complaints with the Commission. Finally, CompTel, Nextlink and various cable entities suggest that the Commission offer binding arbitration or mediation as an alternative to formal complaints, arguing that Commission staff would be more persuasive and knowledgeable than outside mediators or arbitrators.

c. Discussion. 48. We decline to adopt these proposals because, for the most part, they raise potential problems that would outweigh their potential benefits. We reject suggestions that would impose rigid requirements for pre-filing activities. We find that these proposals could either stifle the parties' ability to develop creative solutions to their differences or delay unnecessarily the filing of complaints, or both. For example, we agree with MCI and Sprint that requiring formal ADR efforts prior to the filing of a formal complaint could permit defendant carriers to delay the filing of formal complaints to the detriment of customers and competitors alike. For the same reason, we reject the suggestions by MCI, ICG, and Sprint that we should mandate the exchange of documents and materials by potential complainants and defendant carriers prior to the filing of a formal complaint. Although the proposals of Bell Atlantic, BellSouth, and CEDRA, to require the exchange of specific information identifying claims and key facts in advance of the filing of the formal complaint, would promote pre-filing discussions, we conclude that parties should be afforded the widest possible latitude in conducting their settlement efforts and not be subjected to rigid requirements. We also reject the proposals of CompTel, Nextlink, and the cable entities to require the Commission to arbitrate or mediate disputes at the request of the disputing parties as an alternative to formal complaints. Such a requirement would unnecessarily tax the Commission's resources when there are many qualified ADR experts outside the Commission. We note that Commission staff will work with industry members and formal complaint parties to resolve disputes informally, both before and after formal complaints have been filed. We see little benefit, however, in requiring the staff to conduct such mediation or arbitration efforts in all cases.

D. Service

49. Under section 208 of the Act and the Commission's existing complaint rules, the staff is responsible for serving formal complaints on defendant carriers. Currently, all formal complaints must be initially filed with the Mellon Bank in Pittsburgh, Pennsylvania; forwarded by the Bank to the Commission's Secretary; and then distributed to the Common Carrier Bureau. The Common Carrier Bureau then forwards complaints against common carriers and complaints against international telecommunications providers to the Common Carrier Bureau's Enforcement Division; complaints against wireless carriers are forwarded to the Wireless Telecommunications Bureau. As a result, ten days or more may pass before the staff receives official copies of a complaint, reviews it for minimum compliance with the rules, and serves it on the defendant carrier(s). It has been common for a defendant carrier to receive a complaint twenty days after it was filed with the Commission. Pleadings filed subsequent to the complaint are currently served by regular U.S. mail, which may delay actual receipt of such pleadings from three days to a week. Because of the new ninety to 120-day statutory deadlines, the *NPRM* proposed to eliminate delays associated with the current filing and service procedures by streamlining the service process.

1. Personal Service of Formal Complaints on Defendants. a. The

NPRM. 50. In the *NPRM* we sought comment on our proposals to modify the service of formal complaints. We proposed to authorize or require a complainant to effect service simultaneously on the following persons: the defendant carrier, the Commission, and the appropriate staff office at the Commission, *i.e.*, the Chief, Formal Complaints and Investigations Branch, Enforcement Division, Common Carrier Bureau; the Chief, Compliance and Litigation Branch, Enforcement and Consumer Information Division, Wireless Telecommunications Bureau; or the Chief, Telecommunications Division, International Bureau. With regard to service on the defendant, we proposed that a complainant would personally serve the complaint on an agent designated by the defendant carrier to receive such service. We proposed that the answer period would begin to run once the complaint has been served by the complainant on the defendant.

51. We also noted that requiring complainants to serve complaints directly on defendants would eliminate the staff's initial review of the complaint prior to the defendant's receipt of the complaint. To alleviate concerns about service of deficient complaints, the *NPRM* proposed to require that parties submit a completed checklist or ''intake'' form with each copy of the formal complaint to indicate: (1) that the complaint satisfies minimum format and content requirements; (2) that the complaint meets the various threshold requirements for stating a cause of action under the Act and the Commission's rules; and (3) the statutory provisions allegedly violated and any applicable statutory resolution deadline. We based this proposal on our belief that such an intake form could be a useful tool both to speed the preparation and filing of complaints and to avoid or reduce the time and resources involved in processing procedurally defective or substantively insufficient complaints. We further noted that the intake form could serve another useful purpose, by quickly identifying for the staff and defendant carrier the relevant statutory provisions and any associated statutory time constraints.

b. Comments. 52. The commenters generally support the proposal to require parties to serve complaints simultaneously on defendants, the Office of the Secretary, and the Bureau responsible for processing the complaint. BellSouth, GTE, and CBT, however, are concerned that defendants may be required to respond to deficient complaints if the Commission eliminates its practice of reviewing complaints prior to serving them on defendants. By contrast, MCI argues that Commission review of a complaint is unnecessary because a defendant would undoubtedly raise the issue if a complaint was deficient. CompTel suggests that the Commission send the defendant a notice of receipt of the complaint to safeguard against faulty service. BellSouth states that section 208(a) mandates that only the Commission may serve complaints on defendants, and suggests that the complainant serve the defendant with a copy of the complaint and notice of intent to file prior to the filing of the complaint with the Commission. AT&T and NYNEX state that, while section 208(a) does require the Commission to serve complaints on defendants, this requirement is fulfilled by allowing complainants to serve complaints on defendants as agents of the Commission for that limited purpose only. PTG asks the Commission to clarify that personal service is required for the complaint.

53. Almost all of the commenters, including ATSI, BellSouth, CBT, CompTel, GST, GTE, KMC, MFS, and TRA, support the proposal to require complainants to submit a completed checklist or ''intake'' form with each copy of the formal complaint. ATSI stated that using ''check-off boxes'' to clearly indicate the specific complaint category utilized would assist all parties and the Commission in determining quickly the special standards and applicable deadlines. BellSouth additionally suggests that the form include a waiver of the section 271(d)(6)(B) 90-day resolution deadline. MCI argues that this form would be useless because a party filing a defective complaint would be unlikely to complete this form correctly.

c. Discussion. 54. We conclude that complainants shall be required to effect personal service of the complaint on the defendant carrier/designated agent simultaneously with the filing of the complaint with the Commission's Secretary, the Chief of the division or branch responsible for handling the complaint within the Bureau responsible for handling the complaint, and the Mellon Bank. The complainant shall serve two copies of the complaint with the Chief of the division or branch responsible for handling the complaint within the Bureau responsible for handling the complaint. The Chief will then forward one of those copies to the defendant, in compliance with the mandate in section 208(a) that complaints ''shall be forwarded by the Commission'' to the defendant. The allowable time period for filing an answer begins to run on the date the complainant serves the complaint on the defendant. Because the Common Carrier Bureau coordinates with the International Bureau to handle international telecommunications complaints, any formal complaint that is filed with the International Bureau must also be filed simultaneously with the Chief, Formal Complaints Branch, Enforcement Division, Common Carrier Bureau. Requiring service of the complaint on the defendant carrier simultaneously with filing the complaint with the Commission will enable the parties and the Commission to begin prompt resolution of the complaint, by eliminating delays that existed under the former rules. This requirement satisfies the Commission's goal of expediting the processing of formal complaints.

55. After consideration of commenters' concerns regarding notice to the defendant in the event of defective service of the complaint, we conclude that the Commission will send each defendant notice of receipt of the complaint as a precaution against defective service. Upon receipt of the complaint, the Commission shall promptly send notice of receipt of the complaint by facsimile transmission to the defendant. In addition to mailing a copy of the complaint to the defendant, the staff will send to all parties a schedule detailing the date the answer is due and the date of the initial status conference. The date of service of the formal complaint upon the defendant shall be presumed to be the same date as service on the Commission. Where, however, a complainant fails to properly serve the complaint on the defendant, the complaint will be dismissed without prejudice.

56. We further conclude that the complainant must file the complaint, along with the appropriate fee, with the Mellon Bank on the same day that it serves the complaint on the Commission and the defendant. Although this requirement was not specifically proposed in the *NPRM*, we find that requiring the complaint to be filed with the Mellon Bank on the same day as service on the defendant and the Commission is a natural extension of the proposal in the *NPRM* to require simultaneous service of the complaint on the defendant and the Commission. Such requirement is further justified by the fact that the date on which the complaint is filed with the Mellon Bank is the official commencement date of the complaint with the Commission. Thus, the date on which the complaint is filed with the Mellon Bank is the date on which any statutory deadlines begin to

run and timely prosecution of such complaints requires service on the defendant at the earliest date possible. Additionally, requiring delivery of the complaint and fee payment to the Mellon Bank by the day of service of the complaint on the Commission and defendant will help the Commission to determine quickly whether the fee has been properly paid. We also require the complainant to attach to each copy of the intake form, a photocopy of its fee payment (check, etc.) as well as a certificate of service. Attachment of a copy of the fee payment will provide some assurance to the Commission and a defendant that payment was made. Where a fee is not properly paid, the Commission will notify both parties promptly that the complaint has been dismissed without prejudice.

57. BellSouth, GTE, and CBT raise some valid concerns about the possibility of defendants having to respond to deficient complaints under our new service requirements. To address these concerns, we require a complainant to submit a completed intake form with its formal complaint to indicate that the complaint satisfies the procedural and substantive requirements under the Act and our rules. The completed intake form shall identify all relevant statutory provisions, any relevant procedural history of the case, and, in the case of a section 271(d)(6)(B) complaint, whether the complainant desires to waive the ninety-day resolution deadline. We disagree with MCI's assertion that a complainant who files a defective complaint will probably be unable to fill out the intake form properly. Rather, we find that the intake form will serve as a checklist to guide complainants who may be unfamiliar with the necessary components of a formal complaint and in that way reduce the number of defective complaints filed. We conclude further that this requirement will permit the Commission to eliminate the delay associated with the initial review of a complaint. To the extent that frivolous complaints are filed, the intake form requirement will assist in weeding out such complaints prior to Commission review. The form will identify for the Commission staff any relevant statutory provisions and associated deadlines. Furthermore, the staff will be alerted if there is relevant procedural history that will require review of related non-Commission records by the staff. We note that a defendant is not relieved of its obligation to file and serve its answer on time by the fact that a complainant failed to correctly complete the intake form.

58. In addition, we reject NAD's proposal to permit service of complaints by facsimile transmission because we conclude that service of the complaint must be accomplished in the most reliable manner possible. Because we are requiring the defendant to submit its answer within twenty days of receipt of the complaint, any delay or uncertainty in the receipt of the complaint and associated documents through facsimile transmission could unduly infringe on the defendant's due process rights.

2. Expediting Service Generally. a. The *NPRM. 59. In the NPRM,* we proposed to require service of all documents filed subsequent to the complaint (answer, motions, briefs, etc.) by overnight delivery. Alternatively, parties would be permitted to serve pleadings by facsimile transmission, to be followed by hard copies sent by regular mail delivery.

60. We further proposed to establish and maintain an electronic directory, available on the Internet, of agents authorized to receive service of complaints on behalf of carriers that are subject to the provisions of the Act and of the relevant Commission personnel who must be served. We noted that section 413 of the Act requires all carriers subject to the Act to designate in writing an agent in the District of Columbia for service of all process. The proposed directory would list, in addition to the name and address of the agent, at least one of the following: his or her telephone or voice-mail number, facsimile number, or Internet e-mail address. We sought comment on this proposal and on what information should be included within the service directory.

61. Finally, we recognized that the practice of routing formal complaints against wireless telecommunications providers was unwieldy and time-consuming. We noted that under the current rules, wireless complaints are routed from the Common Carrier Bureau lock box at the Mellon Bank in Pittsburgh to the Commission's Secretary, who forwards the complaint to the Formal Complaints and Investigations Branch of the Common Carrier Bureau's Enforcement Division, which then reviews and forwards the complaints to the Wireless Telecommunications Bureau. Therefore, we sought comment on our proposal to revise our rules to provide for a separate lock box at the Mellon Bank for the receipt of complaints against wireless telecommunications service providers.

b. Comments. 62. Commenters strongly support these proposals. BellSouth suggests that facsimile service would be facilitated by requiring pleading signature blocks to include facsimile and phone numbers. SWBT additionally suggests that service include delivery by certified mail. ICG argues that service should be by hand delivery or overnight mail only. GST, KMC, MFS, and NAD suggest permitting service by Internet, with NAD particularly encouraging Internet or facsimile service of complaints and related documents to facilitate service by consumers with disabilities. CBT opposes service by Internet because of technical difficulties and problems with verification. CBT asks the Commission to clarify that it will take responsibility for updating the electronic directory and make allowances for improper service due to mistakes in the directory. America's Carriers Telecommunication Association (''ACTA'') suggests that carriers be able to designate someone other than an agent located in the District of Columbia for receipt of service, arguing that limiting service to what in many cases will be an ''artificial agent'' in the District of Columbia is inefficient in light of the availability of national overnight delivery. MCI suggests that a paper directory of service agents be kept in the Secretary's office for those parties lacking Internet access.

c. Discussion. 63. We conclude that parties must serve documents or pleadings filed subsequent to the complaint by either hand delivery, overnight delivery, or facsimile transmission followed by mail delivery. Any facsimile transmission or hand delivery must be completed by 5:30 p.m., local time of the recipient, in order to be considered served on the date of receipt. Service by overnight delivery will be deemed served the business day following the date it is accepted for overnight delivery by a reputable overnight delivery service. Although we are permitting service of pleadings subsequent to the complaint to be by facsimile transmission, we also require that facsimile service be accompanied by mailed hard copies to alleviate the effects of possible faulty facsimile transmission. These requirements will ensure timely and verifiable service. To facilitate facsimile delivery, we require pleading signature blocks to include facsimile and telephone numbers, as suggested by BellSouth.

64. We decline to authorize service by Internet at this time because we have received insufficient comments on the issue, given the significance of permitting electronic filing or service of complaint pleadings. We may revisit this issue at a later date, following our consideration of possible procedures for

the electronic filing of documents in rulemaking proceedings in GC Docket 97–113.

65. We also reject SWBT's proposal to deliver pleadings by certified mail. Although SWBT presumably offered this suggestion to improve verification of service rather than speed of service, we did not seek comment on verification procedures in the *NPRM* because we have not found verification of service to be a significant problem.

66. Although we considered establishing an electronic directory of agents designated by carriers to receive service of process, we decline to establish such a directory at this time. We have concluded that more review is needed to determine the most efficient means for collecting the data necessary to establish such a directory. This data collection may be combined with other collections of data from common carriers by the Commission in the future. The Commission intends to reconsider this issue in conjunction with streamlining its other data collection procedures.

67. We recognize the need to provide complainants with the information necessary to effect personal service on defendant carriers as required by our rules. Accordingly, the Commission will provide access to a listing of agents designated by carriers to receive service of process in the Office of the Commission Secretary. In order to establish this listing, all common carriers are required to designate service agents within the District of Columbia, although they may additionally identify an alternative service agent outside the District of Columbia. For each designated agent for service of process, each carrier is required to identify its name, address, telephone or voice-mail number, facsimile number, and Internet e-mail address if available. In addition, the carrier shall identify any other names by which it is known or under which it does business, and, if the carrier is an affiliated company, its parent, holding, or management company. This information shall be provided to the Commission by filing it with the Formal Complaints and Investigations Branch of the Common Carrier Bureau. Parties are required to notify the Commission within one week of any changes in their information. We note that ACTA's proposal to permit designation of service agents outside of the District of Columbia was based on the incorrect premise that overnight delivery would fulfill our requirement of having the complainant personally serve the complaint on the defendant. It will not. Only hand delivery constitutes personal service for the purposes of our service requirement. We note, however, that the complainant is not required to hand deliver the complaint to the Commission Secretary, the Chief of the division or branch responsible for handling the complaint within the Bureau responsible for handling the complaint, or the Mellon Bank.

68. We establish a separate lock box at the Mellon Bank in Pittsburgh for the receipt of complaints against wireless telecommunications service providers. Currently, all formal complaints against common carriers, including Wireless Telecommunications Bureau complaints and International Bureau complaints, are filed in the lockbox of the Common Carrier Bureau at the Mellon Bank. Because the Common Carrier Bureau coordinates with the International Bureau to handle international telecommunications complaints, filing the International Bureau's complaints in the Common Carrier Bureau's lockbox does not delay the complaint process. Providing the Wireless Telecommunications Bureau with its own lockbox, however, will both expedite the delivery of the complaint and verification of fee payment to the Wireless Telecommunications Bureau, and relieve the Common Carrier Bureau of the responsibility of reviewing wireless complaints for routing to the Wireless Telecommunications Bureau.

E. Format and Content Requirements

69. The short resolution deadlines contained in the Act place greater burdens on parties to provide facts and legal arguments in their respective complaints and answers to support or defend against allegations of misconduct by common carriers. Similarly, the short resolution deadlines place greater demands on the Commission and its staff to expedite the review and disposition of these complaints.

70. The Commission's rules have always required fact-based pleadings. That is, all complaints, answers and related pleadings are required to contain complete statements of fact, supported by relevant documentation and affidavits. In actual practice, however, many parties file what amount to ''notice'' pleadings similar to filings that would be made in federal district court. Both complainants and defendants have placed substantial reliance on self-executing discovery and additional briefing opportunities to present their respective claims and defenses to the Commission.

71. A principal goal of this rulemaking that was set forth in the *NPRM* was to improve the utility and content of the complaint and answer by requiring complainants and defendants to exercise diligence in compiling and submitting full legal and factual support in their initial filings with the Commission. The proposals in the *NPRM* were designed to promote fact-based pleadings and to shift the focus of fact-finding away from costly, time-consuming discovery and towards the pre-filing and initial complaint and answer periods.

1. Support and Documentation of Pleadings. a. The NPRM. 72. In the *NPRM*, we proposed to require that any party to a formal complaint proceeding must, in its complaint, answer, or any other pleading required during the complaint process, include full statements of relevant facts and attach to such pleadings supporting documentation and affidavits of persons attesting to the accuracy of the facts stated in the pleadings. This would effectively prohibit defendants from making general denials in their answers. We proposed to require a complainant to append to its complaint documents and other materials to support the underlying allegations and requests for relief, and tentatively concluded that failure to append such documentation would result in summary dismissal of the complaint. Although our rules already required each complainant to provide a complete statement of the facts and description of the nature of the alleged violation, we tentatively concluded that we should require more specifically that a complainant include a detailed explanation of the manner in which a defendant has violated the Act, Commission order, or Commission rule in question in the formal complaint. Such a rule, for example, would require a complainant alleging that a BOC has ceased to meet any of the conditions that were required for approval to provide interLATA services pursuant to section 271(c)(2)(B) of the Act to include in its complaint a detailed explanation of the manner in which the defendant BOC has ceased to meet such condition or conditions, along with any associated documentation. The *NPRM* also sought comment on whether we should prohibit complaints that rely solely on assertions based on ''information and belief.'' We stated that, while assertions based on information and belief may not be useful in deciding on the merits of a complaint, prohibiting such assertions might inhibit a complainant's ability to present claims of unlawful behavior against carriers under applicable provisions of the Act.

73. We proposed to require the complaint, answer, and any authorized reply include two sets of additional information: (1) the name, address, and

telephone number of each individual likely to have discoverable information relevant to the disputed facts alleged with particularity in the pleadings, identifying the subjects of information; and (2) a copy of, or a description by category and location of, all documents, data compilations, and tangible things in the possession, custody, or control of the party that are relevant to the disputed facts alleged with particularity in the pleadings. We noted that this proposal, which would enable the Commission and parties to identify quickly sources of information, comported with an analogous requirement under the Federal Rules of Civil Procedure. We also sought comment on what benefits, if any, would be realized by the parties or the Commission by requiring the identified relevant documents to be filed with the Commission along with the complaint and answers.

74. The *NPRM* proposed to require parties to append copies of relevant tariffs or tariff provisions to their complaints, answers, and replies, noting that the current rules only encourage parties to append such tariffs. The *NPRM* also proposed to modify the rules to include expressly pleadings filed solely to effect delay in the prosecution or disposition of a complaint as filings for improper purpose within the meaning of § 1.734 of our rules.

b. Comments. 75. Most commenters, including AT&T, BellSouth and TRA, strongly support the proposals to require all pleadings to include complete facts and documentation. AT&T states that supporting affidavits and documentation are ''critical to understanding the parties' positions on the matters at issue.'' NYNEX agrees with the observation in the *NPRM* that ''[t]ypically, complainants file 'bare bones' complaints with numerous allegations, but with little or no documentation'' and that the proposal would allow the Commission to ''process complaints more quickly, since it would have access to the relevant information from the beginning[.]'' BellSouth suggests that the Commission impose requirements similar to its rules for pole attachment complaints which require detailed, fact-based complaints, supported by extensive documentation and verifications detailing the alleged violations.

76. Several commenters, including CBT, NYNEX, and PTG, only support our proposals regarding complaints, and oppose our proposals regarding answers. They state that the format and content proposals for complaints are not overly burdensome because complainants control the timing of the filing of the complaint and can gather information prior to bringing the complaint. They oppose the format and content proposals with regard to answers, however, because they argue that the requirements will be too onerous for defendants who will have little time to respond with such specificity in their answers, especially in light of our proposal to reduce the time to file answers to twenty days.

77. AT&T agrees that general denials should be prohibited. MCI, however, contends that general denials should be permitted where a complainant has been uncooperative with the defendant prior to the filing of the complaint and the defendant lacks the necessary information upon which to respond to the complaint in detail. The cable entities state that general denials should be permitted in accordance with the Federal Rules of Civil Procedure (''FRCP''), subject to Rule 11 sanctions, if the party intends in good faith to controvert all the averments of a pleading or specific paragraph.

78. AT&T and PTG endorse the proposal to prohibit assertions based solely on information and belief, stating that it would help to reduce the number of frivolous complaints, including those brought to harass defendants or as fishing expeditions. Many commenters, however, including APCC, Bell Atlantic, CompTel, MCI, NYNEX, NAD, TRA, and Teleport Communications Group (''TCG''), argue that allowances should be made for situations in which a complainant will have difficulty obtaining access to information that may be in the sole possession of a defendant or third parties who might be unwilling to relinquish such information. APCC, GTE, ICG, and TCG propose that information and belief allegations should be permitted if the complainant pleads with particularity facts that would establish a credible case, or supplies affidavits stating that the necessary information is in the possession of the defendant or an uncooperative third party. ATSI, KMC, and MFS oppose the proposal because of the potential hardship on small or emerging businesses. APCC and ICG also seek clarification on whether the Commission's proposal is to prohibit complaints based solely on information and belief, or only those allegations based solely on information and belief.

79. AT&T and PTG note that the identification of individuals with discoverable information should not include phone numbers because such individuals should be contacted only through counsel. Regarding the document production proposal, Bechtel & Cole and Ameritech support requiring all relevant documents to be produced to the opposing party and the Commission. Most commenters, however, such as CBT, BellSouth, MCI, the cable entities, and PTG, express concern that the information produced might be overbroad and argue that requiring the filing of numerous documents with only tangential relevance to the dispute is likely to overwhelm the Commission with materials of marginal or no use in resolving the complaint. CBT notes that many federal courts have opted out of compliance with the federal rule and that it would be more efficient to respond to discovery requests than to identify and gather the universe of available information. MCI questions whether this requirement will be useful, stating that a party would identify as relevant only those documents already attached as documents upon which that party intends to rely and that party would be unable to guess at what materials another party might find relevant. ACTA, BellSouth, and GTE propose requiring parties to file only the documents relied upon concurrently with the complaint and answer and any subsequently filed brief, rather than requiring the production of all potentially relevant documents. GST, KMC, and MFS argue that, to prevent the copying of millions of unnecessary documents, parties should only be required to identify documents and provide the opportunity to copy such documents. AT&T supports the identification or attachment of documents to complaints and answers only with respect to section 271(d)(6)(B) complaints; otherwise, AT&T argues, all document production should occur at the initial status conference. CBT, NYNEX, and SWBT express concern that defendants will not have time to execute document identification and production of this broad scope. Bell Atlantic states that, because the Commission seldom permits depositions or broad document searches, the provision of this information would rarely be utilized. PTG and USTA suggest that parties be allowed to amend their information designations without leave. Several parties, including MCI, express doubt that such information disclosure requirements could entirely substitute for discovery.

80. All commenters who discussed the proposal to require parties to append copies of relevant tariffs or tariff provisions to their complaints, answers, and replies support the proposal. No parties commented on the proposal, to include expressly within the meaning of

§ 1.734 of our rules, that pleadings filed solely to effect delay in the prosecution or disposition of a complaint are filings for improper purpose.

c. Discussion. 81. We conclude that the complaint, answer, reply, and any other required pleading are required to include full statements of relevant, material facts with supporting affidavits and documentation. This requirement will improve the utility and content of pleadings by requiring parties to plead their cases with specific, material facts and supply documentation early in the complaint process. In order to speed resolution of all formal complaints, the Commission must adhere to the fact-pleading process. Such quick resolution of certain formal complaints is necessitated by the Act. Further, such quick resolution of all formal complaints where possible is consistent with the overall goals of the Act to promote and protect competition in the marketplace.

82. We conclude that complainants shall be required to provide, in their complaints, a detailed explanation of the manner in which a defendant has violated the Act, Commission order, or Commission rule in question. Substantive claims, or ''counts,'' based solely upon information and belief shall be generally prohibited. A complainant may be permitted, however, to file claims based on information and belief if such claims are made in good faith and the complainant attaches an affidavit to the complaint that explains why the supporting facts could not be reasonably ascertained. Our goal is to discourage complainants from filing claims based solely upon information and belief without firsthand knowledge of the violation alleged. Because quick resolution of formal complaints is essential to the Commission's goal of fostering and preserving competition in today's deregulated telecommunications markets, strict adherence to the Commission's fact pleading requirements is necessary. A general rule prohibiting assertions based solely upon information and belief will ensure that complainants exercise diligence in preparing and submitting allegations of misconduct against a carrier. We have considered, however, commenters' concerns that complainants may not always have in their possession the information that would substantiate their claims and that such information may be in the sole possession or control of the defendant carrier or of uncooperative third parties. Each complainant has the general duty to provide, whenever possible, full statements of fact supported by relevant documentation and affidavits. Complainants should not, however, be penalized or prevented from filing a formal complaint in those situations in which the necessary information could not have been reasonably obtained prior to the filing of the complaint. We conclude that this requirement strikes an equitable balance between the Commission's need for complete information as early as possible, and the complainant's potential difficulty in obtaining that information.

83. We disagree with the comments of the cable entities that defendants should be permitted to make general denials if the defendant intends in good faith to controvert all the averments of a pleading or specific paragraph. Requiring the answer to include full statements of relevant, material facts with supporting affidavits and documentation will prohibit defendants from making general denials in their answers. Specific denials supported by facts and documentation will aid the Commission staff in understanding the nature of the dispute and facilitate its resolution. Formal complaints often raise questions about a rate, charge, term or condition of a particular service offering. In our staff's experience, defendant carriers have the requisite knowledge to specifically deny a complainant's allegations about such charges, practices or service requirements in the vast majority of cases. A diligent defendant should almost always have sufficient information with which to make specific denials. We conclude further that, contrary to MCI's suggestion, the benefits to speedy resolution of a complaint that arise from specific denials outweigh the potential benefit of allowing general denials as a mechanism to enforce compliance with the pre-filing activities requirements.

84. We conclude that parties must include in the complaint, answer, and any necessary reply, an ''information designation'' that identifies individuals known or believed by the parties to have knowledge about the matters in dispute. This information designation must identify such individuals by name and business or other address and include a description of the information possessed by that source and its relevance to the dispute. We conclude that such mandatory information designation will simplify, expedite, and, in some cases, eliminate the need for time-consuming discovery. We agree with AT&T and PTG that parties should not be required to supply the phone numbers of individuals who should only be contacted through counsel. Therefore parties are required to identify in the complaint, answer, and any necessary reply only the name and address of each individual likely to have discoverable information relevant to the disputed facts alleged with particularity in the pleadings.

85. We conclude further that parties shall also be required to identify in their information designations all documents in their possession or control believed to be relevant to the matters in dispute, including an inventory that contains for each document the date, the source, the intended recipient(s), and a description of the document's relevance to the dispute. We disagree with MCI's assertion that parties will be unable to guess what kinds of material the opposing party would regard as relevant. In most cases, parties to formal complaints before the Commission are sophisticated business entities who fully understand the issues before them and know which documents in their possession or control are relevant to those issues. We find CBT's arguments that many federal courts have opted out of compliance with this rule's equivalent in the FRCP unpersuasive. We note that, while we looked to the FRCP for some guidance during this proceeding, that guidance was limited by the many differences between federal court proceedings and Commission proceedings. Not only does the Commission require fact-based pleadings, but certain of the Commission's formal complaint proceedings are subject to statutory resolution deadlines shorter than any deadline applicable to the federal courts. Although some federal courts have opted out of compliance with FRCP 26(a)(1), we adopt its equivalent for Commission proceedings because it will aid us greatly in meeting statutory deadlines under our individual procedural constraints as well as in expediting the resolution of competitive issues that affect the telecommunications marketplace.

86. We disagree with CBT's statement that it would be more efficient to have parties respond to discovery requests than to have parties identify all relevant documents in their information designations. We find that requiring such information designations early in the dispute will facilitate the Commission's ability to focus on the facts and issues in the case quickly. Having such information on hand will further expedite the Commission's consideration of the necessity of any discovery requests early in the proceeding. We also disagree with the suggestions by PTG and USTA to permit parties to amend their information designations without leave. We conclude that this would run contrary to

our objective of procuring as much information as early as possible. The allowance of amendments would reduce parties' incentives to file thorough information designations with their complaints, answers, and replies because they will rely on their right to supplement their designations at a later time. Accepting routinely late-obtained information will only delay the resolution of complaints. We do recognize, however, that parties may occasionally, after submitting their initial pleadings, discover information that should be included in their information designations. Accordingly, a party may submit a request for permission to amend its information designations, along with an explanation of why the information was not designated at the time of the filing of the complaint, answer, or reply.

87. We do not find it necessary to require the production or exchange of all documents identified as relevant to a dispute as a matter of course in all cases. It will be helpful and often necessary, however, in light of the Act's complaint resolution deadlines and the Commission's goal of expediting the resolution of all complaints, to have certain documents identified by the parties readily accessible to the staff and opposing parties. Therefore we require parties to file concurrently with the complaint, answer, and any necessary reply, only those documents and affidavits upon which they intend to rely to support their respective claims and defenses. Required attachments include relevant tariffs or tariff provisions where applicable. Because it is in each party's self-interest to support its most persuasive arguments, we conclude that it is reasonable to rely on each party's judgment to identify the key documents in the dispute. We acknowledge that a party may be reluctant to divulge information that would weaken its case, and, therefore, would probably not attach such information to its complaint, answer, or reply. We conclude that this concern can be adequately addressed by requiring each party to identify all such information in their information designations, however, and opposing parties will therefore be aware of, and have subsequent opportunity to request, such information at the initial status conference.

88. We conclude that each party shall be required to attach supporting affidavits and documents to any allowed briefs, along with a full explanation in the brief of the material's relevance to the issues and matters in dispute. Such attachments shall have been previously identified in the parties' information designations, but need not have been attached to the complaint, answer, or any necessary reply. We find that this strikes an appropriate balance between the needs of the Commission and opposing parties to have readily available information and the hardships of producing unnecessary materials. We agree with PTG and USTA that parties may, despite good faith efforts to file complete submissions, later acquire documents or information upon which they wish to rely but which they did not identify as relevant information in their information designations. Therefore we permit a party to attach such subsequently obtained documents, upon which the party intends to rely, to any subsequent brief filed in the matter, provided it is accompanied by a full explanation in the brief of the material's relevance to the issues and matters in dispute and why such material was not identified in the party's information designation.

89. We disagree with AT&T's suggestion that all document production should occur at the initial status conference, except in section 271(d)(6)(B) complaints under 90-day resolution deadlines. This document production requirement is intended to work in conjunction with the other requirements adopted in this rulemaking, including the requirement that parties discuss, before the initial status conference, issues such as settlement prospects and stipulations of facts and disputed facts. It is essential that parties be able to review the documents produced with the initial pleadings in order to meet and discuss these issues knowledgeably prior to the initial status conference. Furthermore, we conclude that requiring the identification of individuals and the identification, inventory, and production of documents will facilitate the staff's ability to require further disclosure of information about individuals with relevant information and/or further production of documents when necessary.

90. We are not persuaded by the arguments of some commenters, such as CBT, NYNEX, PTG, and SWBT, that twenty days is an insufficient amount of time in which to prepare answers with the level of information contemplated under these rules. We do not view defendants as having only twenty days in which to prepare their answers. The pleading requirements are intended to work in conjunction with the pre-filing requirements. Thus, by the time parties reach the stage of participating in a formal complaint before the Commission, settlement talks will have narrowed the number and scope of issues in dispute, and parties will have already commenced the collection and/or exchange of relevant information that will be used to substantiate the defendant's answer. We conclude that the imposition of these format and content requirements on defendants is not unduly burdensome, particularly in light of Congress' clear intent to expedite resolution of complaints to promote the competitive goals of the Act.

91. We also disagree with Bell Atlantic that the information produced would only be useful for depositions or broad document searches, which are seldom permitted by the Commission. Early identification of individuals knowledgeable about the matters in dispute will be an important tool for the parties and the staff, particularly in those cases where additional affidavits or other forms of factfinding become necessary. Given our experience, and in light of the short complaint resolution deadlines, we conclude that it is necessary and appropriate to require parties to identify knowledgeable individuals and potentially relevant documents early in the complaint process.

92. We also conclude that pleadings filed solely to effect delay in the prosecution or disposition of a complaint are filings for improper purpose within the meaning of § 1.734 of our rules. No commenters opposed this proposal. Adoption of this definition will work in conjunction with the new rules to further deter parties from filing unnecessary pleadings in formal complaints before the Commission.

2. *Waivers for Good Cause Shown.* a. The *NPRM.* 93. In the *NPRM,* we recognized that many of the proposed pleading requirements could be burdensome on some individuals or parties, particularly those desiring or compelled to proceed without the assistance of legal counsel due to financial and other reasons. Therefore, we proposed to waive format and content requirements for complaints, answers, and replies upon an appropriate showing of financial hardship or other public interest factors. We tentatively concluded that this waiver provision would help to ensure that full effect is given to the provision in section 208 of the Act that ''any person, any body politic, or municipal organization, or State Commission,'' may complain to the Commission about anything ''done or omitted to be done'' by a common carrier in contravention of the Act. We sought comment on this proposal and tentative conclusion, as well as on what standards should be

used to determine ''good cause'' for waiving format and content requirements.

b. Comments. 94. All parties commenting on this proposal support it. APCC and NYNEX suggest that waivers should be granted primarily for financial hardship or public interest reasons and suggest specific revenue or asset levels to define ''financial hardship.'' ATSI argues that complainants alleging violations of section 260, regarding the provision of telemessaging service, should not have to make special requests to receive good cause waivers. GST, KMC, MFS, and USTA suggest that the Commission issue form complaints and model pleadings that *pro se* complainants could either fill out or follow. GTE warns against routine granting of waivers. The NAD suggests establishing an ombudsman within the Commission to assist with accessibility complaints.

c. Discussion. 95. We conclude that parties may petition the staff for waivers of the format and content requirements for complaints, answers, and any authorized replies. Such waiver requests shall be considered on a case-by-case basis and may be granted upon an appropriate showing of financial hardship or other public interest factors. We note this waiver provision will work in conjunction with the Commission's existing general authority to waive any provision of the rules on its own motion or on petition if good cause is shown. The discretion to grant waivers of the format and content requirements based on financial hardship and other public interest factors will ensure, pursuant to section 208, that ''any person'' has the right to complain to the Commission about acts or omissions by a carrier that contravene the Act. For this reason, we do not agree with APCC or NYNEX that financial hardship should be determined solely based on set revenue or asset levels. The range of potential complainants under section 208 is broad and may include individuals, state commissions, municipalities, associations, and other entities of all forms and sizes. Likewise, the size and makeup of defendant carriers will vary greatly. Thus we conclude that waiver determinations should be made on a case-by-case basis. The Commission shall make every effort to apply its discretion in a consistent and fair manner to strike an appropriate balance between strict compliance with the rules and the needs of certain parties for more lenient requirements and timetables. Furthermore, the Commission shall have discretion to waive or modify some or all of its rules as appropriate when a waiver is granted for good cause shown. For example, if the Commission grants a waiver of the document production requirements to a party who demonstrates financial hardship, the Commission may establish an appropriate alternative method for review and production of documents in that matter.

96. We find that § 1.721(b) of the rules contains a suggested format for formal complaints that is clear and explicit and that no further form complaints or model pleadings for *pro se* complainants are necessary. Furthermore, the Enforcement Division of the Common Carrier Bureau currently provides, via the Internet, direct mailings, and public reference room access, a fact sheet designed to instruct consumers on how to file a formal complaint with the Commission. Finally, we conclude that the range of subjects that could conceivably be contained within a pleading is too broad for a model pleading form to be of much utility to *pro se* parties.

97. We decline to address in this proceeding NAD's proposal to establish a Commission ombudsman to assist with accessibility complaints in this proceeding. Such a proposal should be addressed in our section 255 implementation rulemaking, so as to permit the Commission to take a comprehensive approach to implementation of section 255.

F. Answers

1. *Reduction of Time to File Answers.*

a. The *NPRM.* 98. In the *NPRM* we proposed to reduce the permissible time for a defendant to file an answer to a complaint from thirty to twenty days after service or receipt of the complaint. We tentatively concluded that this reduction was consistent with the changes we proposed regarding the form and content of pleadings and would not unduly prejudice the rights of any defendant. We further tentatively concluded that this reduction in time to answer struck the appropriate balance in distributing the burdens of compliance with the new formal complaint resolution deadlines among the complainants, defendants and the Commission.

b. Comments. 99. The majority of commenters, including AT&T, Bell Atlantic, CBT, CompTel, the cable entities, MCI, TRA, and USTA support this proposal. Ameritech, BellSouth, GTE, PTG, and SWBT contend, however, that because complainants will have months to prepare their complaints, requiring defendant carriers to submit detailed responses with full legal and factual support within a twenty day window would be unfair and unreasonably burdensome in most cases. PTG suggests that defendants be required to file their answers within twenty days only in complaints filed pursuant to section 271(d)(6)(B). ACTA and USTA suggest that defendants be permitted to supplement their answers at a later time.

c. Discussion. 100. We conclude that a defendant shall be required to file its answer to a complaint within twenty days after receipt of service of the complaint by the complainant. We find that reducing the time in which to file an answer is necessary in light of the Congressional intent to expedite the resolution of complaints alleging anti-competitive behavior by defendant carriers. We disagree with commenters who assert that defendant carriers will be overly burdened by having to file answers that comply with the format and content requirements within twenty days from the date of service. As stated earlier, we view the defendants as having far more than twenty days in which to prepare their answers because the pre-filing and format and content requirements adopted in this proceeding are intended to work in conjunction with the reduction in time to file an answer. The pre-filing requirements will alert the defendant as to the basis of the dispute. The actions taken by a defendant in participating in good faith settlement negotiations should require the same collection of information and documents that will be necessary to support its answer in compliance with the format and content requirements. The requirement of fully supported and thoroughly prepared complaints, furthermore, will facilitate a defendant carrier's ability to prepare a full response to a complaint within the twenty day period. Such pre-filing and format and content requirements will eliminate any need to allow defendants to supplement their answers. Permitting defendants to supplement their answers routinely would only encourage defendants to submit incomplete answers.

G. Discovery

101. The *NPRM* sought comment on a variety of ways to modify the discovery process in light of the new statutory deadlines. Discovery is inherently time-consuming and often fails to yield information that aids in the resolution of a complaint. The *NPRM*, in conjunction with other proposals designed to improve the content and utility of the complaint, answer, and related pleadings, sought comment on discovery proposals that would balance the parties' legitimate need for discovery with the twin goals of (1)

meeting statutory resolution deadlines, and (2) facilitating prompt resolution of all formal complaints.

1. Permissible Requests for Discovery.

a. The *NPRM.* 102. In our experience, discovery has been the most contentious and protracted component of the formal complaint process. In the *NPRM,* we stated that one of the key elements to streamlining the enforcement process was to maximize staff control over the discovery process. We stated our intention to examine carefully what role, if any, discovery should continue to play in resolving formal complaints, and sought comment on a range of options to either eliminate or modify the current discovery process.

103. For our first approach, we sought comment on the benefits and drawbacks of eliminating the self-executing discovery permitted under our current rules by prohibiting discovery as a matter of right. This proposal placed the emphasis of developing facts and arguments at the complaint and answer stages of the proceeding, rather than on discovery and subsequent briefing opportunities. Under this proposal, if the record presented through such pleadings failed to provide a basis for resolving disputes over material facts or was otherwise insufficient to permit our resolution of a complaint, the staff would have the discretion to authorize limited discovery at the initial status conference, that would be held shortly after receipt of the defendant's answer to the complaint. We sought comment on various aspects of eliminating automatic discovery, including whether discovery was necessary in all cases, whether such a rule would pose a hardship for any particular segment of complainants, and what standards should apply in the event that discovery was authorized by the staff.

104. For our second alternative approach, we sought comment on the benefits and drawbacks of a proposed rule that would limit self-executing discovery to something other than the thirty written interrogatories authorized under the current rules. We asked parties to comment on whether a more limited form of discovery as a matter of right would accommodate a party's ability, where necessary, to identify and present to the Commission material facts that may be in the possession or control of the other party; whether allowing a limited amount of discovery as a matter of right might decrease the staff's burden in deciding discovery requests on a case-by-case basis; and whether limiting discovery in this manner would detract from full compliance with our rules regarding the level of detail that should be offered in support of complaints and answers. Pursuant to this approach, the staff would permit additional discovery only in extraordinary cases. We sought comment on various aspects of this approach, including whether a reduction in the number of allowable written interrogatories would be appropriate, and whether interrogatories should be limited to questions designed to illuminate specific factual assertions or denials.

105. In our third alternative approach, we sought comment on continuing to allow some limited discovery as a matter of right, but allowing Commission staff to set limits on the scope of that discovery and to set specific timetables for such discovery. We noted that authorizing the staff to limit the scope of the written interrogatories could be an effective deterrent to attempts by parties to use discovery for purposes of delay or to gain tactical leverage for settlement purposes. In conjunction with this approach, we proposed to require that objections to interrogatories be filed by the date of the initial status conference, thereby enabling staff to rule on such objections at that time. We noted that under this proposal, extensions of time to initiate limited discovery and file objections and motions to compel would be granted only in extraordinary circumstances.

b. Comments. 106. The majority of commenting parties argue that the Commission should continue to allow discovery as a matter of right. CBT, ICG, and MCI argue that eliminating discovery as a matter of right will cause delay due to the fact that motions requesting discovery will almost always be filed and ICG argues further that such motions may produce inconsistent discovery rulings. PTG argues that the prohibition of discovery would inhibit the development of facts. Bechtel & Cole argue that the right to discovery is necessary because defendants have the power to protect information in their sole possession. APCC, CompTel and TRA argue that discovery is especially necessary where the defendant has sole possession of the information a complainant needs to make its case, such as in the case of allegations of cross-subsidies or discrimination. ACTA and CompTel argue that due process requires that a complainant be able to direct its case as it sees fit.

107. Parties objecting to the elimination of discovery as a matter of right propose several ways to streamline the discovery process. PTG and TCG suggest that the Commission could limit discovery to twenty written interrogatories, while USTA and GTE suggest that fifteen interrogatories would be the appropriate number. The cable entities, however, suggest allowing thirty discovery requests, including interrogatories, requests for production of documents, and requests for physical inspection of materials and facilities, to be filed ten days after service of the complaint, an additional fifteen such discovery requests to be filed within five days of the filing of the answer, and allowing parties to request additional discovery thereafter. The cable entities argue that the certainty of prompt resolution of discovery disputes will discourage parties from making frivolous requests or objections.

108. A number of the parties that oppose the elimination of discovery as a matter of right suggest that discovery disputes should be resolved at the initial status conference. Several parties argue that it would be useful for Commission staff to use the initial status conference to control the scope and/or scheduling of discovery. U S West and TRA, however, argue that discovery should be limited by the staff only with regard to timetables. TRA states that even Rule 26 of the FRCP provides for traditional discovery, in addition to voluntary disclosure, and states further that Commission staff should not control the prosecution of an action. MCI suggests that requiring discovery to be discussed at the initial status conference will help Commission staff maintain control over the discovery process, although MCI asserts that the proposed timing of the initial status conference is too early in formal complaint proceedings to rule on objections to discovery.

109. To promote the resolution of discovery disputes at the initial status conference, several parties argue that discovery requests and objections thereto should be served and filed prior to the initial status conference. MCI argues, however, that it would be unfair to complainants to require discovery requests to be filed with complaints and answers because the defendants would be able to formulate their requests after seeing the complaint, while the complainants would be required to formulate their requests prior to seeing the answer. CompTel argues that the proposed timetables for objecting to interrogatories provides insufficient time for parties to review the interrogatories, and that therefore parties will always file objections to interrogatories rather than answer them. CompTel suggests instead that parties be required to respond promptly to interrogatories for which their objections are denied. While they support retaining discovery as a matter

of right, GST, KMC and MFS argue that interrogatories should be prohibited or limited because they are often useless. If allowed, interrogatories should not be served until after the parties file their joint statement of stipulated facts and key legal issues, to facilitate the targeting of disputed areas. APCC suggests that the Commission require early discovery, including expedited rulings on discovery disputes.

110. GTE, MCI, Nextlink and TCG argue that discovery as a matter of right is necessary because all prior disclosures are ''voluntary'' and parties would disclose only those facts solely in their possession that are most favorable to their case. ICG argues that the absence of discovery as a matter of right would preclude parties from checking the accuracy of their opponent's disclosures. TRA is concerned that elimination of discovery as a matter of right would result in fewer complaints being filed with the Commission because injured parties would lack access to information.

111. AT&T, BellSouth, NYNEX, and SWBT argue that there should be no discovery as a matter of right. AT&T argues that abuses will continue to occur if parties are entitled to a fixed number of interrogatories. BellSouth argues that full discovery is always available in federal court. MCI counters this argument by asserting that discovery should not be the exclusive province of federal courts because courts often make primary jurisdiction referrals to the Commission in section 207 cases. SWBT's support of the elimination of discovery is contingent upon two requirements: (1) providing defendants with the right to remove a formal complaint proceeding to federal court, and (2) a complete prohibition on motions for discovery to prevent the routine filing of such motions. TRA opposes SWBT's suggestion that the Commission provide defendants with the right to remove formal complaints to federal court because it argues that defendants would use such a procedure to their tactical advantage to avoid expedited resolution.

112. SWBT argues that discovery is not needed because parties do not have a right to file a formal complaint and then use discovery to determine if a claim exists. SWBT suggests that parties be required to certify that they engaged in good faith discovery discussions and exchanges prior to the filing of the complaint.

113. AT&T and NYNEX argue that the Commission should control all discovery, including the scope, timing and number of interrogatories, and issue discovery rulings at the initial status conference. NYNEX proposes that parties be required to propound up to thirty interrogatories with the complaint and answer and file any opposition to such discovery five days prior to the initial status conference. AT&T argues that discovery requests in addition to interrogatories should be (1) only allowed in extraordinary circumstances, (2) requested at the initial status conference, and (3) discussed with the opposing party prior to the filing of the motion requesting such discovery, with any opposition to such motion due in five days.

114. AT&T suggests that responses to interrogatories should be filed with the Commission. APCC suggests that a ''good cause waiver'' should be available to grant relief to parties from discovery limitations. Ameritech suggests, and BellSouth concurs in its Reply comments, that the Commission implement procedures such as those contained in section 252(b)(2) of the Act, that are applicable to compulsory arbitration of interconnection disputes. GST, KMC and MFS suggest the implementation of mandatory ''meet and confer'' conferences between the parties to address procedural issues and potential disputes prior to the initial status conference. AT&T supports the meet and confer concept. CBT opposes mandatory meet and confer conferences, arguing that the Commission should not be adding unnecessary requirements for the parties to fulfill. ICG suggests that the Commission make clear that it will not tolerate form objections and answers. In light of the Commission's proposals to permit interrogatories only when it determines such discovery is appropriate, AT&T suggests deleting § 1.729(e) of the Commission's rules because it would be superfluous.

c. Discussion. 115. For the reasons discussed below, we eliminate the rule authorizing the parties to initiate self-executing discovery. In its place, we have adopted rules and policies that carefully balance the rights of the parties and the need to expedite the resolution of complaints in a number of important aspects. These new rules: (1) require complainants and defendants to exercise diligence in compiling and submitting facts to support their complaints and answers; (2) discourage reliance on the often protracted discovery process as a means to identify or develop information needed to support a complaint or answer; (3) give parties an opportunity to make their cases for or against limited discovery early in the proceedings; (4) reduce the need for time-consuming motions to compel; (5) provide Commission staff with more control over the discovery process; and (6) limit each party's ability to use discovery for delay or other purposes unrelated to the merits of the dispute. The 1996 Act imposed both statutory deadlines on certain complaints and an overall pro-competitive policy on the handling of all formal complaints, thus signifying an intent that we resolve quickly disputes involving allegations of interference in the development of competition in telecommunications markets. The discovery procedures under the old rules were time consuming and were susceptible to abuses that often caused undue delays in our consideration of the merits of a complainant's claims. The discovery rules adopted in this proceeding expedite the discovery process, which, in turn, expedites the resolution of all formal complaints, in accordance with the requirements and policies of the 1996 Act.

116. The new procedures and policies allow the staff to consider and rule on reasonable, properly focused requests for interrogatories and other discovery on an expedited basis as follows:

(a) With its complaint, a complainant may file with the Commission and serve on the defendant requests for ten written interrogatories. A defendant may file with the Commission and serve on the complainant requests for ten written interrogatories during the period beginning with the service of the complaint and ending with the service of the answer.

(b) Within three calendar days following service of the answer, a complainant may file with the Commission and serve on the defendant requests for five written interrogatories. Such additional interrogatories shall be directed only at specific factual allegations made by the defendant in support of its affirmative defenses.

(c) Requests for interrogatories shall contain (1) a listing of the interrogatories requested; and (2) an explanation of why the information sought in each interrogatory is necessary to the resolution of the dispute and unavailable from any other source.

(d) Oppositions and objections to the requests for interrogatories shall be filed with the Commission and served on the propounding party (1) by the defendant, within ten calendar days of service of interrogatories served simultaneously with the complaint and within five calendar days of interrogatories served following service of the answer, (2) by the complainant, within five calendar days of service of the interrogatories, and (3) in no event less than three calendar days prior to the initial status conference.

(e) Section 1.730 of the current rules, which expressly authorizes parties to petition for additional ''extraordinary'' discovery in the form of requests for document production, depositions and additional interrogatories, shall be deleted.

(f) Commission staff will be inclined to grant all reasonable requests for interrogatories and other forms of discovery to the extent permitted under any applicable statutory deadlines. It will issue rulings and direct the parties accordingly at the initial status conference.

(g) Commission staff retains the discretion to order on its own motion, additional discovery including, but not limited to, document production, depositions, and/or interrogatories. The staff also retains discretion to limit the scope of permissible interrogatories and to modify or otherwise relax the discovery available in particular cases where appropriate.

117. These rules and policies are designed to work in conjunction with our pre-filing and format and content requirements, which are designed to improve the utility and content of the initial complaint and answer filed in a section 208 proceeding. The rules as a whole are intended to change fundamentally the nature of the formal complaint process to enforce the Commission's long-standing requirement that ''[a]ll matters concerning a claim [be pled] fully and with specificity.'' In adhering to these fact-pleading requirements, we will further the pro-competitive policies of the 1996 Act by expediting the resolution of all formal complaints. We find that these new requirements strike a reasonable balance between, on the one hand, providing for discovery where necessary to ensure the development of a complete record and, on the other hand, preventing the use of discovery as the primary means of determining if a claim exists.

118. Some commenters express doubt that parties will disclose unfavorable information, and argue that discovery is needed to verify the accuracy of initial disclosures. The format and content rules address this concern by requiring that parties reveal the means by which they determine what documents and information to disclose. Disclosure of the nature of the inquiry should significantly reduce concerns about accuracy, since a failure to address a patently relevant topic will be readily apparent. The arguments of some commenters are based on the use of the phrase ''voluntary disclosure.'' We emphasize that the phrase ''voluntary disclosure'' refers to the fact that the parties are obligated to disclose all information that is relevant to the resolution of a dispute in the absence of a specific discovery request. Use of the term ''voluntary disclosure'' does not limit the obligation of the disclosing party to identify all information that is relevant to the facts in dispute, including information that is unfavorable to the disclosing party.

119. The rules adopted address MCI's concerns that it is unfair to require complainants to file their discovery requests without an opportunity to review the answer. First, because the parties must make a good faith effort to resolve their dispute prior to the filing of the complaint, the complainant will know what to expect in the defendant's answer. Second, the rules provide the complainant with an opportunity to seek discovery on affirmative defenses first raised in the answer. In light of these factors and the time constraints of statutory deadlines, MCI's fairness argument fails.

120. We disagree with the argument that the Commission should provide discovery as a matter of right because federal court rules provide for discovery as a matter of right, in addition to required initial disclosures. While the Commission has often found the federal rules instructive, it has consistently rejected wholesale adoption of them. A significant difference exists in the procedural requirements of actions brought before the different fora. Federal court rules require notice pleading while the Commission's rules require fact pleading. Notice pleading anticipates the use of discovery to obtain evidence of the facts to support a complainant's claims, while fact pleading requires that a complainant know the specific facts necessary to prove its claim at the time of filing. Neither section 208 of the Act nor the Commission's own rules and policies contemplate the expansive discovery available in federal district court, and in fact, section 207 of the Act gives parties the option of filing their complaints in federal district court rather than with the Commission. We, further, disagree with the argument that self-executing discovery is necessary because due process requires that a complainant be able to direct its case as it sees fit. As we have stated, our rules require that parties plead all matters fully and specifically, and commission staff will be inclined to grant reasonable requests for discovery to the extent permitted under any applicable statutory deadlines. In this context, a party's due process rights are fulfilled by being provided with the opportunity to request discovery and present its argument to the Commission as to why discovery is necessary in its particular case. The fact that the Commission may deny a party's discovery request, following consideration of the merits of such request, does not negate the party's right to the opportunity to make its case for discovery.

121. We disagree with the commenters who state that ending self-executing discovery will result in an avalanche of motions for discovery, which would lengthen the discovery process and could result in inconsistent discovery rulings. Our rules will provide for the quick resolution of discovery disputes by the date of the initial status conference, which will be held ten days after the answer is filed. We note that these same commenters strongly support proposals requiring the staff to play a more active role in the discovery process by defining the timing and scope of necessary discovery. These rules allow Commission staff to take a more active role in the discovery process to meet statutory deadlines and expedite the resolution of all formal complaints.

122. We conclude that SWBT's suggestion that the Commission require the parties to engage in good faith discovery discussions prior to the filing of the complaint is unduly burdensome. The Commission is already requiring parties to engage in good faith settlement negotiations prior to the filing of a complaint. As part of that obligation, we anticipate that parties will exchange relevant documentation to the extent that it would help to resolve conflicts. We also conclude that SWBT's suggestion would be likely to raise numerous disputes after the filing of the complaint, *e.g.*, concerning what constitutes ''good faith discovery,'' that would consume more time and resources than would be saved by the implementation of such a requirement.

123. SWBT suggests that the Commission adopt a rule providing defendants with the right to remove disputes to federal court where broader discovery is available. We decline to adopt this suggestion because it would eliminate rights provided to complainants in the Act. The Act provides complainants with the choice of filing claims with the Commission or in federal court. The 1996 Act further provides complainants with the right to have the Commission resolve certain types of complaints within statutory deadlines. Because those deadlines are enforceable only at the Commission, providing a defendant with the right to remove any claim to federal court would provide it with the ability to eliminate the complainant's right to have its

dispute resolved within the applicable statutory deadline. SWBT, furthermore, made this proposal in conjunction with its support for the proposal to eliminate all discovery, which we have declined to adopt.

124. Additionally, we reject Ameritech's proposal that, as a means to effective discovery, the Commission adopt disclosure requirements similar to those in section 252(b)(2), which are for compulsory arbitration of interconnection agreements. Such a proposal is unworkable in light of the fact that section 252(b)(2) procedures would not accommodate the variety of complaints that may be brought before the Commission. Section 252(b)(2) disclosure procedures are directed at arbitration of disputes of a particular nature before state commissions. Our voluntary disclosure rules will provide the benefits of that provision, the initial disclosure of relevant documentation, while the discovery rules adopted herein contain sufficient flexibility to be adapted to the unique circumstances of individual cases.

125. The issue of requiring a meet and confer conference to discuss discovery disputes is addressed in the Status Conference section of this *Report and Order*.

2. Reduction of the Administrative Burden of Filing Documents. a. The *NPRM*. 126. In the *NPRM* we sought comment on methods to reduce the administrative burden on the Commission of accepting filed documents, either identified in initial filings or obtained through discovery, including implementation of a computer scanning requirement for large document productions.

b. Comments. 127. Those parties that commented on this proposal oppose the imposition of a scanning requirement. CBT argues that such a requirement would be a waste of resources while CompTel argues it would be too burdensome.

c. Discussion. 128. We decline to adopt a scanning requirement for all large document productions. Instead, we shall provide Commission staff with the discretion, in individual cases involving the review of a large number of documents, to require the parties to provide the documents to the Commission in a scanned or other electronic format. Material in any electronic format shall be indexed and submitted in such manner as to facilitate the staff's review of the information. Commission staff shall have discretion to reach an agreement with the parties about the appropriate technology to be used in light of the needs of the staff and the current cost and availability of document management technology. Commenters opposed to the imposition of a scanning requirement make general statements that a scanning requirement would be unjustifiably costly and burdensome to implement. Because such a requirement will be imposed on an individualized basis, the staff shall decide on a case-by-case basis whether the nature of the production involved will justify the cost and burden of electronic formatting.

129. We also recognize that a significant number of complex technical issues that are beyond the scope of the *NPRM* would have to be addressed prior to the implementation of a comprehensive document scanning requirement. Because scanning technology is varied and not universally compatible, the implementation of a standardized scanning requirement would require us to choose a single type of scanning technology. Several complex questions would therefore arise, including, but not limited to, what information should be placed in identifying fields and whether the documents must be searchable by text. Because of these complex technical questions, we decline to impose a scanning requirement at this time, although we may address this issue again at a later date, following our consideration of possible procedures for allowing the electronic filing of documents in GC Docket 97–113.

3. Voluntary Agreements for the Recovery of Discovery Costs. a. The *NPRM*. 130. One of the goals in the *NPRM* was to identify ways to encourage parties to exercise diligence in identifying and satisfying their discovery needs. For example, although the Commission does not have authority to award costs in the context of a formal complaint proceeding, we sought comment on whether encouraging formal complaint parties to agree among themselves to a cost-recovery system for discovery would facilitate the prompt identification and exchange of information. As an example, we suggested that the parties could stipulate that the losing party in the complaint proceeding would bear the reasonable costs associated with discovery, including reasonable attorneys' fees.

b. Comments. 131. Although GST, KMC and MFS support the Commission encouraging parties to enter into voluntary cost recovery agreements, Ameritech, CBT, CompTel, PTG, SWBT, and TCG oppose such a position. CompTel, GTE, PTG, and SWBT argue that parties will be unable to agree to a cost recovery system. Ameritech argues that parties will be tempted to convince the decisionmaker to award enough money to the ''losing'' party to offset the costs of discovery. Ameritech suggests the alternative of giving the factfinder the discretion to decide cost recovery issues and award financial damages for the filing of frivolous complaints. TCG argues that, if the Commission encouraged such agreements, parties might not comply with discovery requests unless they are compensated. CBT argues that discovery abuse would not be lessened by having the loser pay the cost of discovery, since the winning party is as likely to have abused discovery. CBT supports, however, requiring parties to compensate each other for extraordinary efforts to comply with discovery requests. CompTel suggests that the Commission should set a reasonable copying fee.

c. Discussion. 132. We decline to encourage voluntary cost recovery agreements among parties for several reasons. We conclude that recovery of discovery costs will not be a significant problem in formal complaints because the rules we adopt today will make extensive discovery the rare exception rather than the general rule, regardless of the willingness of parties to pay for discovery. Furthermore, most of the commenters oppose this proposal. Since the majority of the commenters are potential parties to formal complaints before the Commission, we find it unlikely that parties would enter into such voluntary cost recovery agreements.

4. Referral of Factual Disputes to Administrative Law Judges. a. The *NPRM*. 133. In the *NPRM* we proposed to amend our rules to authorize the Common Carrier Bureau and the Wireless Telecommunications Bureau, on their own motion, to refer disputes over material facts in formal complaint proceedings to an administrative law judge (''ALJ'') for expedited hearing. The disputes referred would be those that cannot be resolved without resorting to formal evidentiary proceedings, although adjudication of novel questions of law or policy would remain outside of the delegated authority of the ALJ. We noted that, as a practical matter, the Bureaus would refer issues only where necessary to determine acts or omissions, and not to determine the legal consequences of such acts or omissions. We tentatively concluded that expanding the Bureaus' delegated authority in this limited way would provide the staff with an important tool for resolving disputes over material facts that cannot be resolved without resort to formal evidentiary proceedings.

b. Comments. 134. The majority of commenters support the adoption of a rule authorizing the Common Carrier Bureau and the Wireless Telecommunications Bureau to refer factual disputes to an ALJ for resolution. Bechtel & Cole's support for authorizing such referral, however, is contingent upon the establishment of deadlines for ALJs to resolve such disputes, as well as a clear definition of the role and responsibility of the ALJ in each case. CBT suggests that the ALJ hearing be located at the site of the alleged violation. GST, KMC and MFS argue generally that the procedures for referral of factual disputes to ALJs should be clarified. BellSouth, however, opposes the referral of factual issues to ALJs, except as a last resort, arguing that it would only add a layer of procedural rules while still requiring the Commission to make a legal determination on the case itself. BellSouth supports referral of disputes to ALJs for hearing only if the Commission adopts the pole attachment complaint rules.

c. Discussion. 135. We amend § 0.291 of the rules to authorize the Chief of the Common Carrier Bureau to designate factual disputes for evidentiary hearings before an ALJ and clarify that the change in the Bureau's delegated authority is intended to authorize the Bureau to designate factual disputes for hearing even in those cases where the facts to be determined may be considered ''novel.'' We retain, however, the existing prohibition on the Common Carrier Bureau designating for hearing those issues involving novel questions of law or policy which cannot be resolved under outstanding precedents or guidelines. No revision is required in the existing delegated authority of the Wireless Telecommunications Bureau, which now permits it to delegate novel factual issues for hearing.

136. Factual disputes that are referred to an ALJ for hearing shall be referred to such ALJ through a hearing designation order. The hearing designation order may set a recommended deadline for the ALJ to certify the record by, and, if time permits, issue a recommended decision on the factual dispute. The presiding judge shall certify the record and if time permits, issue a recommended decision, pursuant to the instructions contained in the hearing designation order, before referring the matter back to the Commission for, *inter alia*, final resolution of all outstanding factual, legal and policy issues. We clarify that, where the Common Carrier Bureau or the Wireless Telecommunications Bureau designates a dispute for expedited hearing, the designating Bureau may authorize the presiding judge to schedule the proceedings to enable such deadline to be met. We further clarify that the Common Carrier and Wireless Telecommunications Bureaus will not refer a factual dispute to an ALJ for hearing where the time required by the ALJ to complete a hearing on such dispute would preclude the Commission from meeting an applicable statutory deadline.

137. There is broad support among the commenters for the use of ALJs to resolve factual disputes. After due consideration of commenters' concerns about compliance with statutory deadlines, we conclude that the existing rules provide the Commission with the authority to request, in a hearing designation order, that disputes be resolved by an ALJ within a set period of time consistent with the final Commission decision complying with the statutory deadline and to authorize ALJs to use discretion in the application of their hearing rules to ensure compliance with the deadline recommended by the Commission. We conclude, in addition, that the concerns of some commenters about such referrals slowing down the complaint process are unwarranted. The Commission's obligation to comply with statutory deadlines is not eliminated by such referral. Referral of factual disputes to ALJs will, in fact, expedite the process because referrals will be used in those circumstances where the factual disputes cannot be resolved promptly, if at all, on a written record. In such cases, it would take longer for the Commission to resolve such disputes itself without a hearing than it would for the Commission to do so after a hearing before an ALJ. ALJs are, furthermore, expert triers of fact and are well-situated to conduct their proceedings within the time frames given by the Commission, such that sufficient time will remain for the Commission to issue its decision in compliance with the statutory deadline. We also conclude that ALJ hearings will be held at the offices of the Commission in Washington, D.C., unless otherwise ordered by the Commission. It would be impractical to provide for hearings at the location of each dispute in light of both the time limitations that may be imposed on the ALJs and the limited resources of the Commission.

138. Additionally, we note that the Enforcement Task Force is currently evaluating whether it may be appropriate, in certain limited categories of disputes, to conduct mini-trials or some other form of live evidentiary proceeding, either before an ALJ or the Task Force. If adopted, this test procedure, subject to careful time constraints, would allow parties a substantially greater opportunity to present live testimony and oral argument than is contemplated by the hearings conducted pursuant to designation orders.

H. Status Conferences

139. The *NPRM* proposed to use status conferences to speed up the formal complaint process in order to enable compliance with the newly imposed statutory deadlines and overall streamlining of the formal complaint procedures. The status conference proposals were intended to work in conjunction with the modifications of the briefing and discovery rules.

1. The Initial Status Conference. a. The *NPRM.* 140. We proposed to modify our rules concerning status conferences to improve the ability of the Commission staff to render prompt decisions and order any necessary actions by the parties. We proposed to require that, unless otherwise ordered by the staff, an initial status conference take place in all formal complaint proceedings ten business days after the defendant files its answer to the complaint. Such an early status conference would be used to discuss such issues as claims and defenses, settlement possibilities, scheduling, rulings on outstanding motions, the necessity of and, if necessary, scope and/or timetable of discovery.

b. Comments. 141. A number of commenters support scheduling the initial status conference ten days after the filing of the answer. Several commenters, such as CompTel, MCI, Nextlink, and PTG, however, assert that it may be unrealistic for parties to be required to argue all discovery issues in that short a time period. They suggest either a second status conference or that the initial status conference be held twenty to thirty days after the filing of the answer. AT&T, CBT, PTG, and U S West argue that parties should continue to be permitted to attend status conferences by telephone conference call.

142. The commenters agree that the issues to be resolved at the initial status conference should include the scope and scheduling of discovery and the briefing schedule. The cable entities state that they envision the initial status conference as the ''focal point of the complaint proceeding.'' PTG suggests the scheduling of a formal settlement conference at that time. GST, KMC, and MFS also propose to have parties attend ''meet and confer'' conferences prior to the initial status conference so that

agreements reached and disputes remaining unresolved after the meet and confer may be reduced to writing and given to the staff at the initial status conference. GST, KMC, and MFS suggest that the following subjects be discussed at the meet and confer: (1) the necessity and/or scope of discovery beyond the exchange of documents and information designations; (2) if depositions or affidavits are necessary, and if so, the number and proposed dates; (3) the timetable for completion of discovery; (4) the need or desirability of referring technical issues to an neutral expert; (5) settlement possibilities; (6) if briefing is necessary; (7) whether parties are willing to have damages claims resolved separately from liability issues using the supplemental complaint process, where such action has not already taken place; (8) disagreements over designation of documents as confidential or proprietary; (9) in section 271(d)(6)(B) cases, whether parties can agree to waive the ninety-day resolution deadline; and (10) the draft joint statement of stipulated facts and key legal issues. AT&T and the cable entities support requiring the meet and confer, while CBT opposes the meet and confer because it argues that the Commission should not impose additional requirements on parties.

c. Discussion. 143. We require that the initial status conference take place ten business days after the date the answer is due to be filed unless otherwise ordered by the staff. Setting the initial status conference date for ten business days after the date the answer is due to be filed will enable Commission staff to render decisions and/or order necessary actions promptly. Commission staff retain the discretion to permit parties to attend status conferences by telephone conference call on a case-by-case basis.

144. Commenters that oppose scheduling the initial status conference for ten business days after the date the answer is due to be filed claim that it may be unrealistic to require the parties to address discovery issues so early in the proceeding. In response to these commenters, we shall use a complaint with a ninety-day resolution deadline as an example. In a ninety-day complaint, the date of the initial status conference is 34 days into the proceeding under the amended rules. In other words, over one third of the time allocated for resolution of such complaint will have passed before the status conference takes place. In the remaining fifty-six days, the parties will be required to comply with any discovery ordered and to draft briefs to include such discovery findings, and the staff will be required to consider all submissions by the parties and issue a decision taking appropriate action. Given these requirements, it is necessary for the parties and the Commission to move the proceeding along with great speed. Even if the complaint is not subject to such an abbreviated schedule, the expedited resolution of all formal complaints is essential to fostering and maintaining competition in accordance with the goals of the 1996 Act. Furthermore, the requirement of an early initial status conference will not be as burdensome as some commenters envision. Our status conference requirement must be considered in conjunction with the establishment of requirements for pre-filing activities, format and content of pleadings, and discovery procedures. The pre-filing activities will narrow the scope of disputed issues. The format and content requirements will reduce the amount of discovery that is necessary by requiring the disclosure of relevant evidence at the complaint and answer stage of a formal complaint proceeding. The new discovery procedures will require the filing of all requests for discovery, as well as objections and oppositions thereto, prior to the initial status conference, to enable the staff to address discovery issues at the initial status conference. Finally, Commission staff will retain the discretion to modify the scheduling of the initial status conference when it is warranted by the facts and circumstances of an individual case.

145. We also adopt, in part, the proposal made by GST, KMC, and MFS to require the parties to meet and confer prior to the initial status conference. Parties will be required to schedule and attend a meet and confer conference amongst themselves prior to the initial status conference to discuss the following issues: (1) settlement prospects; (2) discovery; (3) issues in dispute; (4) schedules for pleadings; (5) joint statements of stipulated facts, disputed facts, and key legal issues; and (6) in a section 271(d)(6)(B) proceeding, whether the parties agree to waive the ninety-day resolution deadline. All proposals agreed to and disputes remaining must be reduced to writing and submitted to the staff two business days prior to the initial status conference. This submission is to be made separately from the joint statement of disputed and undisputed facts and key legal issues that is due on the same date. Our requirement that the parties meet and confer will prepare the parties for a productive status conference because it will require the parties to consult early on substantive and procedural issues. The requirement to meet and confer should also eliminate any element of surprise that might prevent parties from reaching agreements at the status conference, due to a party needing time to consider an opponent's newly disclosed position on a particular issue. CBT's argument against the imposition of further requirements is unpersuasive. The meet and confer will not require the parties to address any new issues, but rather imposes an earlier deadline for completing activities which the parties would have to perform in any case.

2. Status Conference Rulings. a. The *NPRM.* 146. In the *NPRM,* we proposed to modify the requirement that the staff memorialize oral rulings made in status conferences. We proposed that, within twenty-four hours of a status conference, the parties in attendance, unless otherwise directed, would submit to the Commission a joint proposed order memorializing the oral rulings made during the conference. Commission staff would review and make revisions, if necessary, prior to signing and filing the submission as part of the record. To facilitate the submission of these joint proposed orders, we further proposed that parties be allowed, but not required, to tape record the staff's summary of its oral rulings or, alternatively, to transcribe the status conference proceedings. We sought comment on these proposals and any other alternative proposals.

b. Comments. 147. Most commenters, including ACTA, ATSI, Bell Atlantic, GTE, and ICG, support requiring parties to file a joint proposed order within twenty-four hours of a status conference. ACTA, AT&T and GTE suggest that the Commission provide an alternative procedure for parties that cannot agree on a proposed order. Bell Atlantic suggests that the Commission provide the parties with resources to draft the proposed order on-site following the conference, with staff remaining available for consultation. CBT, NYNEX, and PTG oppose requiring parties to file a joint proposed order memorializing the status conference rulings. They argue that parties will be unable to agree on the content of such an order and that the Commission staff member making the ruling is in the best position to know what was intended by the ruling. AT&T suggests that joint proposed orders would be unnecessary if the parties have made a stenographic record.

148. Commenters are split regarding the allowance of audio recording and/or the use of stenographers at status conferences. ICG supports audio recording of the entire status conference. GST, KMC, and MFS

support the audio recording of a summary of the staff's oral rulings, but oppose the use of a stenographer as being unnecessary. SWBT opposes using a stenographer because of concern that a transcribed record may have a chilling effect on the free flow of discussions at status conferences.

c. Discussion. 149. We require parties to provide the Commission with a joint proposed order memorializing the rulings made at each status conference. Because of the many important issues that will be resolved during the status conference, a written record of the rulings will be an essential reference and organizational tool for the parties and the Commission. Requiring the parties to provide a joint proposed order will allow the Commission to focus its scarce resources on other aspects of the complaint process. Requiring the parties to submit such joint proposed order by the end of the business day following the status conference is necessary because compliance with rulings made at status conference may require action within a matter of days. Such time sensitivity requires that any confusion or dispute among the parties over rulings made at the status conference be brought to the attention of Commission staff as early as possible. It is instructive to note that the Commission's *ex parte* rules require parties making oral *ex parte* presentations to file a written memorandum with the Commission's Office of the Secretary that summarizes the data and arguments presented on the next business day after the presentation. It has been our experience that parties do not have difficulties complying with such requirement. As explained below, we have eased the burden of compliance with this requirement by providing parties with the opportunity to submit either the joint proposed order or a transcript of the status conference.

150. The joint proposed order shall summarize the rulings made by the staff in the status conference. If the parties cannot agree on all rulings in the joint proposed order they may submit instead a joint proposed order that contains the proposed rulings upon which they agree and alternative proposed rulings for those rulings upon which they cannot agree. The joint proposed order shall comply with the format and content requirements for proposed orders, and shall be filed with the Commission by 5:30 p.m. on the business day following the date of the status conference, unless otherwise directed by Commission staff.

151. If parties choose to make an audio recording or stenographically transcribe parts of the status conference, they shall submit, in lieu of a joint proposed order, either a transcript of the audio recording or the stenographic transcript of such status conference within three business days following the conference, unless otherwise directed by Commission staff. Parties will be permitted to make an audio recording of or stenographically transcribe only those parts of a status conference that are deemed ''on the record'' by Commission staff at its discretion. We shall prohibit any recording in any manner of those parts of the status conference deemed ''off-the-record'' by the staff. Any party wishing to make an audio recording of the staff's summary of oral rulings only must notify the staff and all attending parties in writing of its intent at least three business days prior to the scheduled conference. Any party wishing to make an audio recording of those portions of a status conference that are ''on-the-record'' must secure the agreement of the attending parties and notify the staff of such intent at least three business days prior to the scheduled conference. Such audio recordings shall be transcribed and such transcript submitted as part of the record no later than three business days after the conference, unless otherwise directed by the staff. Parties wishing to transcribe by stenographer those portions of a status conference that are ''on-the-record'' must secure the agreement of the attending parties and notify the staff in writing of such intent at least three business days prior to the scheduled conference. Such transcript shall be submitted as part of the record no later than three business days after the status conference, unless otherwise directed by the staff. It is the sole responsibility of the party or parties choosing to make an audio recording of or stenographically transcribe any part of a status conference to make all arrangements for such recording or transcription, including, but not limited to, arrangements for payment of the costs of such recording or transcription.

152. The commenters have raised legitimate concerns that the making of a formal record of a status conference by any means may have a chilling effect on the free exchange of information by the parties. We emphasize that the staff will retain significant discretion to determine in each case what is ''on-the-record'' and what is ''off-the-record'' to prevent parties from using the record to stifle such exchanges.

I. Cease Orders, Cease and Desist Orders, and Other Forms of Interim Relief

153. Certain provisions added by the 1996 Act authorize the Commission to take interim actions against LECs pending final resolution of complaints in some instances and to order permanent injunctive relief in others. Sections 260 and 275 of the Act contain nondiscrimination provisions governing the provision of telemessaging service and the provision of alarm monitoring service, respectively, by incumbent LECs. Sections 260(b) and 275(c) require the Commission to issue, upon an appropriate showing by the complainant of a violation that resulted in ''material financial harm,'' an order directing the incumbent LEC ''to cease engaging'' in such violation ''pending a final determination'' by the Commission. Both sections provide that such cease orders ''shall'' be issued within 60 days of the filing of a complaint that satisfies the stated criteria. In addition, section 274, pertaining to electronic publishing by BOCs, authorizes the Commission (or federal district court) to issue cease and desist orders for violations of the section. Unlike sections 260 and 275, however, section 274 contains no deadline for issuing such orders, nor does it predicate the issuance of such orders on a showing of material financial harm.

1. Cease and Cease and Desist Orders Under Title II of the Act and Other Forms of Interim Relief. a. The *NPRM.* 154. In the *NPRM,* we invited comment on our tentative conclusion that the procedures prescribed in Title III (section 312) of the Act for issuing cease and desist orders are not mandatory in section 208 and related Title II complaint proceedings, and that the complaint provisions added by the 1996 Act give the Commission additional authority to issue cease or cease and desist orders in certain cases.

155. Section 312 prescribes certain ''Administrative Sanctions'' available to the Commission to remedy violations of the Act and the Commission's rules and orders. Subsection 312(a) provides that the Commission ''may'' revoke a station license or construction permit under any one of seven enumerated factual circumstances. 47 U.S.C. 312(a). Subsection 312(b) similarly provides that the Commission ''may'' order ''any person'' who has failed to operate substantially as set forth in a license or has otherwise violated a provision of the Act, certain provisions of Title 18 of the United States Code, or any rule or regulation of the Commission, to ''cease and desist'' from such action. 47 U.S.C. 312(b). Before taking the actions prescribed in Subsections 312 (a) and (b), Subsections 312 (c) and (d) require that the Commission conduct ''show cause'' proceedings in which the Commission bears both the burden of proceeding with the introduction of evidence and the burden of proof. 47

U.S.C. 312 (c) and (d). We also asked commenters to address whether an order to ''cease engaging in'' violations under sections 260(b) and 275(c) would be the same as an order to ''cease and desist'' violations under section 274(e)(2).

2. Comments. 156. Apart from comments regarding the evidentiary showing that should be required to obtain cease and cease and desist orders, few commenting parties draw a distinction between the cease orders contemplated under sections 260(b) and 275(c) and the cease and desist order described in section 274(e)(2). Voice-Tel asserts that cease and cease and desist orders are the same and that the language between sections 260 and 275 differs only because section 274 gives the complainant the option of obtaining relief in federal court.

157. Commenters are evenly divided, however, on the issue of whether the Commission must follow the procedures prescribed in section 312 of the Act before issuing cease and cease and desist orders in Title II complaint proceedings. Bechtel & Cole, GST, KMC, MFS, and TRA argue that, in light of the requirement in the 1996 Act for prompt issuance of cease orders in cases alleging violations of sections 260 and 275, Congress did not intend for section 312 hearings to apply to cease and cease and desist orders pursuant to section 208 and related Title II complaint proceedings. These commenters argue that the application of section 312 show cause hearings would contravene Congressional intent. Bell Atlantic, CompTel, PTG, and SWBT, on the other hand, contend that section 312 hearings are a prerequisite to the issuance of any cease or cease and desist order pursuant to the Act. These commenters maintain that the D.C. Circuit Court decision in *General Telephone Co. of California* v. *FCC* (''*General Telephone*'') establishes that section 312 show cause hearings are required before the Commission can issue cease and cease and desist orders.

c. Discussion. 158. Congress clearly distinguished between cease orders in sections 260 and 275 and cease and desist orders in section 274. Both sections 260(b) and 275(c) provide that, if a complaint contains an appropriate showing of a violation that results in material financial harm, the Commission ''shall,'' within 60 days, issue an order directing incumbent LECs to ''cease engaging in'' the violation pending resolution of the complaint. Section 274(e)(2), on the other hand, authorizes ''any person'' claiming that a BOC or BOC affiliate has violated section 274 ''to make application'' to the Commission or the federal district courts for a cease and desist order, but does not specify circumstances in which a cease and desist order must be issued. In addition, unlike sections 260(b) and 275(c), section 274(e)(2) contains no deadline for Commission action on applications for cease and desist orders, nor does it predicate issuance of such orders on a showing of material financial harm by the petitioner. We therefore disagree with VoiceTel's argument that Congress intended section 260 and 275 cease orders to be identical to section 274 cease and desist orders.

159. Based on the express language of sections 260(b) and 275(c), we conclude that any order issued by the Commission pursuant to these sections must be in the nature of an injunction directed against a defendant incumbent LEC pending a final determination on the merits of a complainant's discrimination claims. As is customarily the case with permanent or preliminary injunctive actions, orders issued under sections 260(b) and 275(c) directing a LEC to ''cease engaging in'' a particular act will either be discharged or made final depending on the outcome of the complaint. We further conclude that, apart from the interim enforcement actions authorized under sections 260(b) and 275(c), the Commission retains discretion under section 4(i) of the Act to entertain requests for interim relief in other Title II complaint proceedings involving alleged violations of the Act or our rules and orders. We disagree with commenters who claim that section 312 procedures must be applied to requests for cease orders under sections 260(b) and 275(c), particularly since these sections make it clear that the complainants, not the Commission, have the burden of proof. By contrast, section 312(c) states that ''both the burden of proceeding with the introduction of the evidence and the burden of proof shall be upon the Commission.'' The commenters' reliance on *General Telephone* is misplaced. That case stands for the proposition that the Commission may properly invoke section 312(b) in carrying out its functions under Title II, not that the Commission is compelled to use section 312 procedures in determining if a carrier should be required to discontinue a particular practice on a temporary or interim basis. Sections 260(b) and 275(c), and section 4(i) generally, clearly empower the Commission to act promptly to restrain, on a temporary or interim basis, apparent or *prima facie* violations of the Act and our rules and orders without resorting to section 312 procedures.

160. With regard to cease and desist orders under section 274(e)(2), we conclude that Congress intended to assign the same meaning to ''cease and desist'' orders in section 274(e)(2) as used for ''cease and desist'' orders in section 312 of the Act. Section 274(e)(2) simply authorizes parties to petition the Commission for cease and desist orders based on alleged violations of the requirements of section 274. There is no support in section 274 or elsewhere in the Act for applying procedures other than those prescribed in section 312 for acting on requests for such cease and desist orders. We conclude that, in contrast to the permanent or preliminary injunctive relief required under sections 260(b) and 275(c), Congress intended the cease and desist orders contemplated under section 274(e)(2) to be in the nature of final injunctive orders to be issued in conformance with the notice and opportunity for hearing requirements of section 312 of the Act.

2. Legal and Evidentiary Standards. a. The *NPRM.* 161. We proposed to amend our rules to delineate the legal and evidentiary standards necessary for obtaining cease and cease and desist orders pursuant to Title II of the Act and other forms of interim relief in section 208 formal complaint cases. We noted that creating minimum legal and evidentiary standards would expedite the issuance of cease and cease and desist orders within statutory deadlines and create more certainty in the industry as to the legal and factual basis for obtaining such injunctive or interim relief. We noted further that, when a court considers requests for various types of interim or injunctive relief, such as a temporary restraining order, it generally requires that the plaintiff demonstrate four factors: (1) likelihood of success on the merits; (2) the threat of irreparable harm absent the grant of the injunctive relief requested; (3) no substantial injury to any other party; and (4) that issuance of the order will further the public interest. Courts have also required the posting of bond in some cases prior to granting interim relief.

162. Few parties responded in detail to our requests for comment in the *Sections 260, 274, 275 NPRM* regarding (1) the ''appropriate showing'' required for the Commission to issue a ''cease'' order pursuant to section 260(b) or 275(c); (2) whether it would be sufficient for the complainant to make a *prima facie* showing of discrimination to obtain a cease order; (3) the meaning of ''cease engaging in'' under sections 260(b) and 275(c); and (4) whether sections 260(b) and 275(c) give the

Commission the authority to issue a cease and desist order similar to the action contemplated in section 274(e)(2) and, if so, whether the showing required to obtain cease orders and cease and desist orders should differ in any material way. Accordingly, the *NPRM* sought additional comment on these issues and emphasized that all comments pertaining to enforcement issues in response to the *Sections 260, 274, 275 NPRM* would be incorporated by reference into the instant proceeding. We also asked parties to comment on (1) the meaning of the terms ''material financial harm'' as used in sections 260 and 275; (2) whether a showing of material financial harm should also be required in order to obtain a cease and desist order under section 274; and (3) the level of proof required to establish material financial harm in the context of a section 208 complaint proceeding.

b. Comments. 163. Many of the commenters, including BellSouth, CompTel, PTG, NYNEX, SWBT, and U S West, support the use of the traditional four-prong injunction test articulated in *Virginia Petroleum Jobbers* (i.e., likelihood of success, threat of irreparable harm, no substantial injury to other parties, and the furtherance of the public interest) for issuing cease orders pursuant to sections 260 and 275 and cease and desist orders pursuant to section 274. These commenters claim that this test will minimize the chance of harm to a carrier should the allegations ultimately prove to be groundless. GST, CompTel, KMC, MFS, and PTG also argue that complainants should be required to post a bond to pay for the carrier's damages if the Commission later finds that the complaint was without merit.

164. TRA, ICG and the cable entities argue for more relaxed standards, especially for resellers and small market entrants. They urge the Commission to retain only the elements of the traditional test relating to advancement of the ''public interest'' and ''no substantial injury to other parties.'' ICG contends that the ''likelihood of success'' and ''irreparable harm elements'' inherently favor the status quo, which is contrary to Congress' goal of expediting effective local exchange competition. According to the cable entities, the Commission should require a moving party to show only that it has mounted a ''substantial challenge'' to a carrier's practice. TRA recommends that if the Commission decides to apply the traditional four-part test for injunctive or interim relief, it should define ''irreparable harm'' to include a showing of ''serious damage to a resale carrier's business.''

165. The Alarm Industry Communications Committee (''AICC'') and Voice-Tel argue that a *prima facie* showing of discrimination should be sufficient to warrant issuance of a cease order against an incumbent LEC pursuant to either section 260(b) or section 275(c). ATSI contends that an ''appropriate showing'' for a cease order under section 260 would be a complainant's showing it had requested service or access from an incumbent LEC and that such request was denied or unduly delayed in violation of section 260 on more than one occasion and that such violations would continue absent a cease order. According to ATSI, the Commission should apply the following two presumptions in considering requests for cease orders in such cases: (1) if any incumbent LEC is offering a basic service pursuant to section 260, then any other incumbent LEC should have the capability to do the same; and (2) if an incumbent LEC has the capability to provide telemessaging service, then a telemessager should be able to access the LEC's network for purposes of providing similar telemessaging service.

166. Bell Atlantic argues that a cease or cease and desist order could be issued under sections 260, 274, or 275 only if a complainant produces facts that show that (1) the alleged discriminatory behavior has occurred or will soon occur, (2) that the behavior violates the Act and/or the Commission's rules, and (3) that it has or will cause substantial harm to the complainant. PTG contends that cease orders should be issued pursuant to section 260 only after the complainant has shown by a preponderance of the evidence that an incumbent LEC has violated section 260(a) and that the violation was the proximate cause of the complainant's material financial harm. PTG argued that an order to ''cease engaging'' under sections 260 and 275 should be more difficult to obtain than an order to ''cease and desist'' under section 274 because sections 260 and 275 require a showing of ''material financial harm.'' SWBT contends that the standard under section 274(e), which authorizes any person to ''make application to the Commission'' for a cease-and-desist order, should be at least as demanding as § 1.722 of the Commission's rules, which requires complainants seeking damages to demonstrate or quantify the harm suffered or damages incurred with reasonable certainty. SWBT maintains that cease orders under sections 260(b) and 275(c), on the other hand, should require more stringent proof because those sections direct the Commission to issue such orders upon an appropriate showing of material financial harm in the complaint. Voice-Tel asserts that the Commission's authority under sections 260, 274 and 275 is the same, contending that the language between the two provisions is different only because section 274 gives the complainant the option of obtaining relief in federal court.

167. Several commenters contend that what constitutes material financial harm under sections 260 and 275 should be decided on a case-by-case basis. AICC, ATSI, and Voice-Tel proposed that all cases involving denial of access or delay would always result in material financial harm and that material financial harm need not be quantified in such cases. BellSouth maintains that a showing of material financial harm must establish a causal relationship between the harm and the defendant carrier's actions and should exclude unsupported claims of ''lost opportunity.'' According to PTG, a showing of material financial harm should consist of testimony, supported by affidavit, regarding (1) the magnitude of the alleged harm; (2) the relationship of the harm to the alleged violation, and (3) the impact of the harm on the complainant's business prospects. PTG, SWBT, and USTA all argue that a *prima facie* case of material financial harm must include some quantification of the alleged harm.

168. Finally, none of the commenters, either in this proceeding or in the *Sections 260, 274, 275 NPRM*, addressed the issue of whether a showing of material financial harm, as the term is used in sections 260 and 275, should also be required in order to obtain a cease-and-desist order under section 274, although some argued that the same standards and procedures should (or should not) apply to cease and cease and desist orders.

c. Discussion. 169. Notwithstanding our proposals in the *NPRM*, we conclude that, apart from the specific requirements set forth in the Act and our implementing rules and orders, it is unnecessary at this time to prescribe the legal and evidentiary showings required to obtain cease orders in section 260(b), 275(c), and other section 208 complaint proceedings. We similarly conclude that we need not delineate the showing needed for a cease and desist order under section 274(e)(2). The commenters differ sharply over these issues. Many argue that the four-pronged test set forth in *Virginia Petroleum Jobbers* should be relaxed to promote the pro-competitive goals of the Act, while an equal number contend

that the *Virginia Petroleum Jobbers* standard, or its equivalent, is necessary to protect the due process rights of defendant carriers. After weighing the various comments, we conclude that it is more appropriate to consider requests for interim or injunctive relief on a case-by-case basis. It is impossible to anticipate all of the various factual circumstances that could form the basis of a complaint. Similarly, the level and types of information necessary to sustain or refute allegations of misconduct by carriers is likely to vary widely. We note that the rules we adopt today will foster our ability to consider requests for interim and injunctive relief and to order such relief promptly in appropriate cases. In particular, our pre-filing settlement discussion requirement should promote the ability of both complainants and defendants to ascertain the legal and factual bases of their dispute and submit detailed, fact-based complaints and answers accordingly. Our new format and content requirements are designed to ensure that both complaints and answers contain full legal and factual support for or against the relief requested in the complaint. Thus, as a practical matter, we do not anticipate that the absence of specific legal and evidentiary guidelines in this Report and Order will require complainants and defendant carriers to incur any additional or otherwise unreasonable burdens in presenting and defending against requests for interim injunctive relief.

170. We also conclude that we need not describe the specific showing required of a complainant to establish ''material financial harm'' within the meaning of sections 260 and 275 of the Act. Generally, a complainant alleging material financial harm will be expected to demonstrate some nexus between its financial condition or results and the defendant carriers' allegedly unlawful behavior within the meaning of sections 260 or 275 during the period at issue in the complaint. In addition, the plain language of sections 260 and 275 indicate that Congress sought to enjoin only those activities that would cause material financial harm, rather than any financial harm whatsoever. Beyond these guidelines, we do not believe it necessary or appropriate to delineate specific factual situations that would satisfy this burden since the evidentiary proof of material financial harm will likely vary widely in different cases. We agree with PTG, SWBT, and USTA, however, that allegations of material financial harm should be supported by documentation and affidavits sufficient to enable the Commission to quantify such harm with reasonable certainty.

J. Damages

1. Bifurcation by the Commission and the Supplemental Complaint Process. a. The *NPRM.* 171. In the *NPRM* we sought comment on whether the Commission legally could and/or should bifurcate liability and damages issues on its own motion in certain circumstances. In our experience, the damages phase of the formal complaint process is often cumbersome and protracted largely due to the scope and magnitude of discovery typically requested to substantiate or refute damages claims. The Commission noted that damages discovery is a waste of the time and resources of both the Commission and the parties when no violation or liability is found. The Commission further noted that the deadlines mandated by the new statutory complaint provisions allow very little time for complainants to present evidentiary arguments sufficient to establish both a violation of the Act and a proper measure of damages incurred as a consequence of such violation within the applicable deadlines. We stated in the *NPRM* that our goal was to eliminate or minimize the delay that is often inherent in damages issues.

172. In the *NPRM,* we proposed to encourage complainants to bifurcate voluntarily their liability and damages issues by reserving the right to voluntarily file a supplemental complaint for damages after liability has been determined. This procedure was available under the previous rule § 1.722(b). Where a complainant voluntarily bifurcated a complaint proceeding using the supplemental complaint procedure, the Commission would defer adjudication of all damages issues until after a finding of liability. We proposed that a complainant's use of this provision in a formal complaint proceeding subject to a statutory deadline would enable the Commission to make a liability finding within such deadline and still preserve the complainant's right to establish a damage award under a less pressing schedule. We noted that, while bifurcation could result in a faster complaint proceeding if no liability were found, the overall proceeding could be significantly longer if liability was found and damages were decided in a second, separate proceeding. We emphasized, however, that complainants would want to avail themselves of the supplemental complaint bifurcation approach in most instances to avoid the possibility that the deadlines would not provide them with enough time to develop their damages claims. We noted that bifurcation through the voluntary supplemental complaint process would be particularly appropriate in those cases in which a complainant sought both prospective relief and damages incurred as the consequences of a defendant carrier's violation of the Act or a Commission rule or order. For example, we stated that a decision by the Commission requiring a defendant carrier to terminate a particular practice or to provide service to a complainant under more reasonable terms and conditions would constitute a final, appealable order, as would a decision denying a complainant such relief. This would be the case even if issues of damages remained to be resolved as a result of the complainant's decision to file a supplemental complaint. We sought comment on the relative benefits to be gained by bifurcating liability and damages issues in section 208 proceedings through complainants' voluntary use of the supplemental complaint process. We also asked parties to identify bifurcation standards that might help ensure that both liability and damages issues are fully resolved within the earliest practicable time frame.

b. Comments. 173. Bell Atlantic and NYNEX comment that the Commission currently has the authority to bifurcate a complaint without the complainant's acquiescence. BellSouth argues that not all complaints are appropriate for bifurcation.

174. The majority of commenters support voluntary bifurcation of liability and damages issues. CompTel, GST, ICG, KMC, MCI, MFS, TCG, and TRA support bifurcation only if it is voluntary. CompTel argues that forced bifurcation could impair a complainant's due process rights by causing undue delay. ICG argues that complainants need assurances that their damages claims will be resolved promptly following a finding of liability with expedited discovery. TRA argues that bifurcation should remain voluntary in light of the delay in recovering damages which is inherent in a bifurcated proceeding.

175. CBT argues that bifurcation will reduce the time pressure of resolving claims within five months because each phase of the case will be simpler to deal with and, if liability is not established, the damages claim will no longer be at issue. CBT argues further that such bifurcation will result in a less compressed schedule and, therefore, increase discovery opportunities. CBT contends, however, that the damages phase would still have to be resolved

within the statutory deadline. GTE argues that bifurcation will prevent the domination of discovery with damages issues. GTE and NYNEX assert that once liability is found, a defendant will have more incentives to settle informally. NYNEX argues that the proposed bifurcation rules will make it easier for the Commission to resolve substantive liability issues within the statutory deadlines while preserving the rights of the parties to a full investigation into injury and damages. NYNEX further argues that bifurcation decreases unnecessary costs, as a complainant will not have to go through the expense of quantifying its damages until it has prevailed on liability. TRA asserts that bifurcation benefits the parties because it will speed the resolution of liability issues and preclude unnecessary expenditures of time and resources. SWBT contends that bifurcation will be beneficial to the parties because the substantial time required to resolve damages issues will not be wasted where no liability is found. GST, KMC and MFS argue that bifurcation benefits the parties because the extensive discovery required for damages issues will not be unnecessarily undertaken if no liability is established.

176. MCI argues that the statutory deadline for a particular formal complaint should be applied separately to each phase because otherwise the parties would not have sufficient time to develop their cases fully. TRA asserts that bifurcation effectively waives any statutory deadline with regard to damages issues. TCG argues that bifurcation will enable the Commission to make a liability finding within the statutory deadlines and preserve a complainant's right to a damages award.

177. PTG, GST, and Ameritech seek clarification that a complainant must establish ''injury'' for a finding of liability to proceed to the damages phase in a bifurcated proceeding. PTG argues that ''injury'' is a necessary element of liability, however, it is not interchangeable with ''damages'' which are the quantification of losses that result from an injury.

c. Discussion. 178. We find that the Commission has discretion to bifurcate liability and damages issues on its own motion pursuant to section 208(a) of the Act. Section 208(a) authorizes the Commission ''to investigate . . . matters complained of in such manner and by such means as it shall deem proper.'' We note, however, that the Commission only has such discretion to the extent that such bifurcation will not violate the statutory deadline applicable to the complaint as filed. Therefore, all claims, that are subject to a statutory complaint resolution deadline and include a properly supported request for damages, require that the Commission issue a final order within the deadline on both the liability and damages claims.

179. However, we both permit and encourage complainants to use the supplemental complaint procedures to separate liability and damages issues voluntarily such that damages issues will be resolved in separate formal complaints. By using the term ''bifurcate'' in connection with the supplemental complaint procedures, we contemplate the filing of two separate complaints: (1) the initial complaint for liability and any applicable prospective relief; and (2) the supplemental complaint for damages. Resolution of the liability and prospective relief issues on the complaint that only seeks a determination of those issues complies with the applicable statutory deadline because such a determination resolves all issues properly brought before the Commission. The damages issues will not have been brought before the Commission until, and unless, the supplemental complaint for damages is actually filed. We modify § 1.722 of the rules to clarify this procedure.

180. Given the new complaint provisions, requiring final Commission orders resolving certain complaints within specified time frames, encouraging the parties to separate their liability and damages claims into separate complaints is the most practical means to focus scarce resources on the determination of liability issues and, when necessary, granting prospective relief quickly. In addition, in cases where no liability has been found, significant resources will have been saved as a damages complaint will not have been necessary. Promoting voluntary separation of liability and damages issues is consistent with the pro-competitive goals and policies underlying the 1996 Act's complaint resolution deadlines and will not adversely affect the Commission's ability to resolve complaints raising competitive and other marketplace disputes on an expedited basis. On the contrary, such separation will enable the Commission and the parties to focus initial resources on addressing allegations of anti-competitive conduct and any necessity for prospective injunctive relief.

181. We disagree with CBT's assertion that a complainant should be required to prosecute its liability and damages claims in a single complaint. Nothing in the Act prohibits a complainant from choosing to bring its liability and damages claims in separate complaints. The supplemental complaint process is voluntary and the decision to pursue damages in a separate proceeding is made solely by the complainant. Further, the Commission has no basis on which to make a finding regarding damages if such claims have not yet been presented by the complainant. Thus, a decision on a liability complaint that reserves the right to file a supplemental complaint for damages is a final decision on all matters the complainant has presented to the Commission in its complaint.

182. As a policy matter, we note that a notice of intent to seek damages in a supplemental complaint contained in a complaint for liability has the effect of tolling the statute of limitations for damages claims. Moreover, a complainant may file a supplemental complaint for damages following a finding of liability even if it gave no notice of such intent at the time it filed its original complaint. Thus, the distinction between the treatment of a supplemental complaint for damages when the complainant gave notice of its intent to file such supplemental complaint in its complaint for liability and when the complainant failed to give notice of its intent to file such supplemental complaint in its complaint for liability is solely the period of time for which damages may be assessed against a defendant. Under the circumstances, a rule that would require complainants to prosecute damages within the statutory deadline, regardless of whether the complainant chose to reserve its right to file a supplemental complaint for damages, would, in fact, shorten the statute of limitations for bringing complaints for damages in those complaints that are subject to a statutory resolution deadline. We do not find that it was the intent of Congress to limit the rights of complainants in this manner.

183. We find that complainants will elect to pursue their liability and damages claims in separate proceedings because it will be to their advantage to postpone expending time and money developing proof of their damages claims until after liability and issues of prospective relief have been established. Complainants will also benefit from being provided an extended period within which to support their damages claims factually. Most importantly, complainants will benefit from swifter resolution of liability issues through the filing of separate complaints for the resolution of liability and damages issues, and, therefore, swifter provision of the prospective relief needed to halt allegedly anti-competitive conduct. For this reason, the provision in the rules for complainants to file such separate

complaints is consistent with the Act's goal of timely resolution of competitive issues to open markets for all potential entrants and competitors, not just the parties to the complaint.

184. We also recognize the importance of swift resolution of damages complaints once the liability of a defendant carrier has been established. We agree with commenters who argue that many complainants will bifurcate liability and damages claims only if they expect that the Commission will conclude the damages phase rapidly. While we believe that parties will benefit substantially from complaint bifurcation in many instances, rules and polices must be in place to ensure resolution of damages complaints promptly and effectively. A paramount concern of a complainant seeking damages is to obtain monetary relief for harm suffered as a consequence of the defendant carrier's actions. Similarly, defendant carriers have an interest in quickly resolving any uncertainty about the amount or extent of their damages liability. Therefore, we will endeavor to resolve supplemental damages complaints in the same length of time within which the liability phase was resolved. As a general rule, damages proceedings will be resolved within the same amount of time required to rule on the preceding liability complaint. For example, a provider of alarm monitoring services that elects to file a supplemental complaint for damages, based on a finding by the Commission that the defendant carrier is liable for a violation of section 275 of the Act, can reasonably expect to have its damages claims resolved within a similar 120-day period. In addition, with respect to supplemental complaints for damages that are filed following a finding of liability on a matter that was not subject to a statutory deadline, we will endeavor to resolve such complaints within five months of the date of filing. This approach furthers the intent underlying the deadlines that Congress established for different types of complaints. Establishing rules and policies that promote swift determination of damages claims provides a significant incentive for common carriers to comply with the Act and the Commission's rules and orders. It also gives all complainants reasonable assurances of the length of time a damages phase is likely to take. Such information will help parties that plan to seek damages weigh the benefits of bifurcating the liability and damages aspects of their claims prior to filing a complaint with the Commission.

185. We also recognize that damages complaints often raise issues of extraordinary factual and/or legal complexity, the resolution of which may require substantial expenditures of time and resources by the parties. In the paragraphs below, we discuss rules that are designed to facilitate the computation of damages by complainants and defendants and promote the prompt resolution of damages disputes. We believe that these rules will help us attain our goal of resolving all damages complaints within five months from the date filed. Nonetheless, we believe that cases of extraordinary complexity could require substantially more time. As a general rule, we will endeavor to resolve such complex complaints within twelve months from the date filed.

186. We recognize the distinction commenters make between ''injury'' and ''damages,'' and agree that a party that has not shown that it suffered an injury has not met a threshold requirement for substantiating a claim for damages. We disagree, however, with the assertion by these commenters that a determination of ''injury'' in a liability complaint is necessary to proceed to a supplemental complaint for damages when a complainant chooses to use the supplemental complaint procedures. Contrary to the commenters' claims, proof of ''injury'' is not necessary to establish a violation of the Act within the meaning of section 208. Section 208 of the Act only requires proof that the defendant carrier has violated the Act or a Commission rule or order for a complainant to prevail. Additionally, determining whether an individual complainant has been injured and is entitled to monetary damages does not further the pro-competitive goals and policies underlying the 1996 Act in the same way that addressing allegations of anti-competitive conduct and the need for injunctive relief does. That is, the question of injury goes to the resolution of an individual dispute rather than the resolution of a disputed issue that affects competition in an industry. For that reason, we conclude that, where the fact of injury does not need to be established to prevail on the issue of liability in a complaint proceeding, a prior determination of injury is not a prerequisite to the filing of a supplemental complaint for damages. A complainant must always, however, prove injury and quantify its monetary damages with reasonable certainty to prevail on its claim for damages.

2. Detailed Computation of Damages.

a. The *NPRM*. 187. In the *NPRM* we proposed to require that any complaint or supplemental complaint seeking an award of damages contain a detailed computation for such claim. That is, every complaint for damages would include a computation for every category of damages claimed, as well as identification of all documents or material on which such computation was based. For example, in cases in which a complainant is challenging the reasonableness of charges or rate levels applied by a carrier to particular services taken by the complainant, the complainant's computations would have to identify clearly the precise nature of the service taken and applicable charges broken down by such factors as minutes of use, traffic mileage and volume, as well as any applicable discounts or other adjustment factors.

b. Comments. 188. ACTA, BellSouth, CBT, GST, KMC, MFS, NYNEX, and U S West support requiring complaints seeking an award of damages to contain a detailed computation of damages claimed. SWBT asserts that such a requirement should reduce the filing of frivolous claims for speculative damages that are not subject to proof. GST, KMC and MFS argue that such a requirement should encourage settlement by clarifying a party's claim. The cable entities and MCI oppose such a requirement, expressing concern that complainants may not have access to sufficient information prior to discovery to prepare and submit detailed damages computations or computation formulas.

189. ICG argues that the proposed detailed computation of damages should only be required to be made in good faith and that complainants should be provided with the opportunity to amend the complaint to reflect an updated computation of damages following discovery. MCI argues that requiring the complaint to contain a detailed computation of damages would violate a complainant's due process rights and suggests, as an alternative, requiring a complainant to outline its damages methodology and identify what damages information it lacks. While they do not oppose the proposed requirement that a complaint contain a detailed computation of damages, U S West argues that the Commission must take into account the reasonable availability of necessary information, and TRA asserts that the Commission must be careful not to impose an overly rigid or binding requirement with regard to a detailed or definitive damages calculation prior to the receipt of an answer and completion of discovery.

c. Discussion. 190. After considering the concerns raised by the commenters, we modify the proposed rule. We require that a complainant seeking damages must file in its complaint or supplemental complaint either a detailed computation of damages or a

detailed explanation of why such a computation is not possible at the time of filing. Commenters raise valid concerns about the ability of complainants to substantiate damages claims at the beginning of a formal complaint proceeding. In light of these considerations, we require all complaints or supplemental complaints seeking an award of damages to contain either:

(a) A detailed computation of damages, including supporting documentation and materials; or

(b) An explanation of:

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

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

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

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

191. This rule strikes the appropriate balance between the need for complainants to be diligent in establishing their claims and our recognition that, in certain instances, a complainant may not possess sufficient facts at the initial stages of a complaint proceeding to prepare a detailed computation of damages alleged. This rule also is consistent with the Commission's adoption of a policy of encouraging complainants to have damages claims resolved separately from liability issues using the supplemental complaint process, because it provides the complainant with the benefit of additional time to develop and support factually an accurate computation of damages following a finding of liability. It would have been unduly burdensome to require a complainant who has been unable to obtain access to substantiating information, after it has made good faith efforts to obtain such information, to support factually its damages claim without providing a means to substantiate such claims. Further, such a rule would have reduced the incentives on defendants to negotiate damages issues in good faith.

3. Ending Adjudication With a Determination of the Sufficiency of a Damages Calculation Method. a. The *NPRM* 192. In the *NPRM* we proposed that the Commission's adjudication of damages should end with a determination of the sufficiency of the computation method submitted by the complainant, instead of making a finding as to the exact amount of damages incurred. We stated that the benefit of such a procedure would be that the Commission would be spared the detailed and time-consuming investigation of the facts necessary to establish an exact amount of damages. As an example of how such a procedure would be implemented, we noted that a similar procedure is used in complaints dealing with pole attachments. We sought comment on this proposal.

b. Comments. 193. CBT, CompTel, GST, and SWBT oppose a rule ending the Commission's adjudication of damages with a determination of the sufficiency of the computation method. CBT and CompTel argue that parties will be unable to resolve issues remaining in dispute, such as the numbers to be plugged into an approved method. CBT argues that such disputes will require further Commission involvement to resolve. GST argues that parties are entitled to a final resolution of all substantive issues, a category it contends includes the actual amount of damages incurred. SWBT argues that because such a procedure would not require a complainant to meet its burden of proof, it would be a denial of a defendant's due process rights. AT&T supports this proposal if the Commission remains available to resolve further disputes among the parties and provide a final resolution if the parties cannot agree to one.

c. Discussion. 194. In cases where liability and damages claims have been severed using the supplemental complaint process, the Commission may end adjudication of damages with a determination of the sufficiency of the damages computation method submitted by the complainant. After considering the concerns raised by the commenters, we modify the proposed rule to reflect that if the Commission finds the damages computation submitted by the complainant unsatisfactory, the Commission may, in its discretion, modify such computation method or require the complainant to resubmit such computation. In addition, the rule specifically prohibits the computation method from incorporating an offset for a claim of a defendant against a complainant. To ensure the parties are diligent in their negotiations to apply the approved calculation method, we shall require that, within thirty days of the date the damages computation method is approved and released, the parties must file with the Commission a joint statement which will do one of the following: (1) detail the parties' agreement as to the amount of damages; (2) state that the parties are continuing to negotiate in good faith and request that the parties be given an extension of time to continue such negotiations, or (3) detail the bases for the continuing dispute and the reasons why no agreement can be reached. In this way, the Commission will monitor the parties' compliance with its directive to negotiate a resolution of the dispute in good faith using the mandated computation method.

195. This rule permits the Commission to avoid the detailed and time-consuming investigation of the facts necessary to establish an exact amount of damages where such investigation may reasonably be delegated to the parties. At the same time, however, it provides a means for parties to return to the Commission for resolution of ongoing disputes if parties are unable to agree to a final amount of damages. This rule encourages good faith negotiation among the parties by requiring parties to provide detailed explanations if they fail to resolve their dispute. We emphasize that the Commission will always retain the right to determine the actual amount of damages in those cases where the establishment of damages does not lend itself to such a means of resolution. We also conclude that requiring parties to reach an agreement within a limited time addresses the concerns raised by some commenters that the parties would have no recourse if they are unable to apply a damages computation method successfully.

4. *Settlement Period.* a. The *NPRM.* 196. In the *NPRM* we proposed, in conjunction with the proposals to resolve liability and damages claims separately using the supplemental complaint process, to set aside a limited period, following a finding of liability and prior to the damages phase, during which the parties could engage in settlement negotiations or submit their damages claims to voluntary ADR mechanisms in lieu of further proceedings before the Commission.

b. Comments. 197. GST, SWBT, TRA and U S West support setting aside a limited time period, following a finding of liability, in which to encourage settlement and/or participation in ADR. SWBT asserts that a finding of liability increases the defendant's incentive to settle. U S West argues that the Commission does not go far enough and that ADR procedures should be used wherever possible to resolve entire complaints.

c. Discussion. 198. In cases where liability and damages claims have been severed using the supplemental complaint process, the Commission may suspend proceedings for a period of fourteen days following the filing of a supplemental complaint for damages, to

allow parties to attempt to negotiate a settlement or use ADR procedures. The staff has the discretion to delay this period until later in the damages phase, when warranted by the facts of an individual case.

199. Encouraging parties to settle their disputes is in the interests of the Commission and the parties. Commenting parties recognize the benefits of settlements reached by the parties and support the establishment of this settlement period to further settlement negotiations. The timing of this settlement period is especially useful because it follows the determination of liability. A finding of liability will increase the parties' incentives to settle, as a major issue formerly in dispute will have been resolved. We recognize, however, that information disclosures may be necessary in some cases for parties to assess adequately the amount of damages incurred. In such cases, a settlement period immediately following the filing of the supplemental complaint for damages may be too early in the proceeding to be useful. Providing the staff with the discretion to delay the settlement period until after information disclosures have been made maximizes the Commission's ability to encourage settlement on a case-by-case basis.

5. Referral of Damages Issues. a. The *NPRM*. 200. In conjunction with the proposals to resolve liability and damages claims separately using the supplemental complaint process, we sought comment on the benefits of referring damages issues to ALJs for either decision following a finding of liability or, by agreement of the parties, mediation. We noted that such referral would be at the discretion of the Commission staff pursuant to delegated authority, depending on the particular facts and circumstances involved. We also sought alternative proposals that would serve to minimize or reduce the need for costly and protracted proceedings on the issue of damages.

b. Comments. 201. Commenters generally support the referral of damages issues to ALJs. ICG compared this procedure to the federal courts' use of special masters. BellSouth suggests that parties should have the option of mediation or referral to a special master. KMC asserts that parties need to have the right to appeal any decision on damages made by an ALJ. GTE argues that the ALJ should have the authority to request production of evidence. GTE seeks clarification that an ALJ's authority would be restricted to the resolution of damages issues.

c. Discussion. 202. We adopt a rule authorizing the Chiefs of the Common Carrier Bureau and Wireless Telecommunications Bureau to refer damages disputes to ALJs for either decision following a finding of liability or, by agreement of the parties, mediation. This rule would work in conjunction with cases in which liability and damages claims have been severed using the supplemental complaint process. The commenters generally support the use of ALJs to resolve damages issues. We conclude, despite GTE's concerns regarding the authority of ALJs in damages hearings, that special rules or procedures are not needed to guide the ALJs in their deliberations given the narrow focus of damages proceedings. The hearing rules provide for the designation of specific issues in the hearing designation order. Once liability has been determined, the question of damages is largely a factual one. ALJs are expert triers of fact well suited to conduct fact-finding proceedings. Regarding appeals of ALJ decisions, we note that the ALJ hearing rules provide the means for parties to seek review of an ALJ decision. If the parties agree to mediation, however, the right to seek review of the ALJ's mediation resolution would be contained within the terms pursuant to which the parties agreed to such mediation.

6. Deposit of Funds into an Escrow Account. a. The NPRM. 203. In the NPRM we proposed that the Commission be given discretion to require a defendant to place a deposit in an interest-bearing escrow account following a finding of liability in cases in which liability and damages claims have been severed using the supplemental complaint process. The purpose of such a deposit would be to cover all or part of the damages for which the defendant carrier may be found liable in order to provide a complainant with some assurance that a judgment can be readily collected. We proposed that, in exercising this discretion, the Commission would apply standards similar to those used to determine whether a preliminary injunction is appropriate. We emphasized that the Commission would not administer any such account. We sought comment on this proposal as well as alternative proposals that would serve to facilitate and expedite the resolution of damages claims.

b. Comments. 204. Commenters are split over whether or not the Commission could or should require the deposit of funds into an escrow account following a finding of liability. AT&T, TRA, GST, KMC and MFS support such a procedure. AT&T, GST, KMC and MFS further support allowing the posting of a bond as an alternative to depositing funds into an escrow account as a means to ensure payment. GST, KMC, and MFS argue that preliminary injunction standards do not need to be met to require such a bond because liability will already have been determined. GST, KMC, and MFS argue that the Commission should require a showing of irreparable harm and the likelihood that the defendant will default on the damages award before requiring the posting of a bond or the deposit of funds into an escrow account.

205. CBT, SWBT, GTE, and PTG oppose the proposal, arguing that the Commission lacks authority to impose such a requirement. CBT, SWBT, and PTG argue that a Commission order for payment of damages pursuant to section 209 of the Act is not an enforceable money judgment. CBT and SWBT argue that prospective money damages are insufficient to justify a preliminary injunction, and that the proper compensation for any delay in a damages award is the payment of interest. PTG asserts that such a rule creates an unnecessary administrative burden in light of the fact that there is no evidence of a problem in collecting damages from carriers.

c. Discussion. 206. In cases in which liability and damages claims have been severed using the supplemental complaint process, following a finding of liability, the Commission shall have discretion to require a defendant either to post a bond for, or place in an escrow account, an amount the Commission determines is likely to be awarded, if such relief is justified following consideration of the following factors:

(a) The likelihood of irreparable injury in the absence of such a deposit;

(b) The extent to which damages can be accurately estimated;

(c) The balance of hardships between complainant and defendant; and

(d) Whether public interest considerations favor the posting of a bond or establishment of an escrow account.

207. Requiring the posting of a bond or the deposit of funds into an escrow account both protects against a defendant's future inability to satisfy an enforceable judgment and removes the benefit a defendant receives from delaying payment in a case. Contrary to what several commenters suggest, neither the posting of a bond nor the deposit of funds into an escrow account is the enforcement of a money judgment. The rule does not provide that a complainant may execute its judgment on the bond or account

following a Commission order of damages. The rule merely requires the bond or account to be set up as a protective measure. Further, this protective measure may only be taken following a finding of liability and a Commission assessment of likely damages.

208. Precedent for the Commission requiring a defendant to deposit funds into an escrow account following a determination of liability is found in *Western Union Telegraph Co.* v. *TRT Telecommunications Corp., and FTC Communications, Inc.*

7. Additional Suggestions From Commenters. a. The *NPRM.* 209. In the *NPRM* we sought alternative proposals that would serve to facilitate and expedite the resolution of damages claims and/or minimize or reduce the need for costly and protracted proceedings on the issue of damages.

b. Comments. 210. ACTA suggests that the Commission codify the procedure for a complainant to litigate damages in federal court following a finding of liability by the Commission.

211. GST suggests providing for targeted discovery during a damages phase, arguing such discovery should be limited to initial disclosures of witnesses, exchange of documents and one deposition for each party.

c. Discussion. 212. We decline to adopt ACTA's proposal to codify a procedure for litigating damages claims in federal court following a finding of liability by the Commission. The Act does not provide the Commission with the authority to establish federal court procedures. Although federal courts occasionally refer cases to the Commission for resolution of liability issues, while retaining authority over damages issues pending the Commission's liability determination, such referrals are initiated by the courts, not the Commission.

213. We decline to adopt GST's proposal to establish special discovery rules for a supplemental complaint proceeding. A supplemental complaint is a formal complaint that is limited to the issue of damages because the issue of liability has already been determined in a separate, prior proceeding. Supplemental complaints are, therefore, subject to the formal complaint discovery rules. We conclude that the formal complaint discovery rules are adequate to address damage claims and the creation of a separate set of discovery rules is unwarranted at this time.

K. Cross-Complaints and Counterclaims

214. The Act imposes new deadlines for actions on certain complaints ranging in length from ninety days to five months from the date of filing. The *NPRM* recognized that the filing of cross-complaints or counterclaims during a complaint proceeding could inhibit the Commission's ability to fully resolve disputes within the mandated time frames.

a. The NPRM. 215. We proposed to allow compulsory counterclaims only if filed concurrently with the answer, such that the failure to file with the answer would bar the defendant from filing such compulsory counterclaim. We also proposed that a defendant electing to file permissive counterclaims and cross-claims would be required to file such pleadings concurrently with its answer, leaving the defendant with the option of filing any barred permissive counterclaims or cross-claims in a separate proceeding, provided that the statute of limitations has not run. We also proposed to revise our rules to clarify the applicability of filing fees to complaints, cross-complaints, and counterclaims.

b. Comment. 216. CompTel and TRA support the Commission's proposals. Most commenters, however, oppose establishing a category of compulsory counterclaims that will be barred if not filed concurrently with an answer. AT&T, BellSouth, PTG, and NYNEX argue that the time to answer (twenty days) is insufficient to allow a defendant to answer the complaint, ascertain all possible counterclaims and prepare such counterclaims for filing and service in accordance with the proposed format and content requirements. GTE further argues that defendants may be reasonably unaware of their counterclaims prior to the date an answer is due. CBT, GST, KMC, and MFS suggest that compulsory counterclaims filed with the answer should not be subjected to the same high levels of evidentiary support as required of the complaint. AT&T and NYNEX support a rule requiring counterclaims and cross-complaints not filed concurrently with the answer to be brought in separate proceedings. CBT and U S West argue that the Commission's jurisdiction over counterclaims is limited to instances where both parties to a proceeding are carriers and the counterclaim involves an allegation of a violation by the complainant that could itself be the subject of a separate complaint before the Commission.

c. Discussion. 217. We require all cross-complaints and counterclaims to be filed as separate, independent actions. While the *NPRM* originally proposed to distinguish between the treatment of compulsory and permissive cross-complaints and counterclaims, we have decided that banning all cross-complaints and counterclaims is necessary in light of the statutory deadlines in the 1996 Act. Cross-complaints and counterclaims would not be filed until twenty days into an ongoing proceeding, thereby shortening the time within which the Commission may adequately consider and resolve such claims. Establishing a category of compulsory counterclaims, furthermore, would have created an inconsistency between the treatment of claims by complainants and counterclaims by defendants. Under such a rule, complainants would be permitted to file separate formal complaints based on claims arising out of the same transaction or occurrence as a pending formal complaint, but defendants would be barred from filing counterclaims once the answer had been filed.

218. The rule we adopt also satisfies the concerns of some commenters that the Commission only has jurisdiction to consider those claims that the defendant could have filed against the complainant independent of the ongoing litigation. That is, the Commission does not have the authority to assert pendent jurisdiction over disputes for which no independent jurisdictional ground exists. In light of both the time constraints within which the Commission must work and the nature of allowable cross-complaints and counterclaims, we conclude that all such claims are better treated as individual complaints. To preclude the possibility of inconsistent rulings on identical facts, a complainant filing a formal complaint that shares any factual basis with another formal complaint to which the complainant is a party, whether ongoing or finally resolved, must include this fact in such formal complaint and its accompanying formal complaint intake form. We note that, under the broad powers of section 208, the Commission always has the authority to consolidate separate complaint cases. Where appropriate, the staff will have discretion to consolidate cases so that all claims arising out of the same transaction or occurrence may be adjudicated in a single proceeding.

219. We decline to adopt our proposal to revise our rules to clarify the applicability of filing fees to cross-complaints and counterclaims. Such a rule would be moot in light of the rule adopted prohibiting all cross-complaints and counterclaims.

L. Replies

a. The NPRM. 220. We proposed to prohibit replies to answers unless specifically authorized by the

Commission. We noted that our rules made filing a reply voluntary, and that failure to reply was not deemed to be an admission of any allegation contained in the answer, except for facts contained in affirmative defenses. We proposed to authorize replies only upon a complainant's motion, filed within five days of service of the answer, showing good cause to reply to any affirmative defenses supported by factual allegations that were different from any denials also contained in the answer. We also proposed to provide that a complainant's failure to file a reply to an answer would be deemed a denial of any affirmative defenses.

221. We also proposed to prohibit replies to oppositions to motions. We stated our belief that such replies seldom aid the Commission in resolving factual or legal issues and were often used to repeat information already contained within the original motion itself. We sought comment on this and any other alternative proposals.

b. Comments. 222. Many commenters, including AT&T, BellSouth, GST, KMC, MFS, GTE, NYNEX, and TRA support our proposals to prohibit, in most instances, replies to defendants' answers. They agree that replies are unnecessary and redundant as long as complainants are deemed to have denied all affirmative defenses and are permitted to respond for good cause, such as a showing that a defendant has misrepresented pertinent facts. ATSI and the cable entities, however, argue that a reply is necessary to give a complainant the opportunity to respond to matters that might be raised for the first time in the answer and to withdraw claims that may have been satisfactorily addressed in the answer. NYNEX argues that a complainant should be permitted to file a reply to an answer if it is replying to an affirmative defense and it is relying on factual allegations that are different from any denials contained in the answer. ICG argues that prohibiting replies would generate more work for the Commission, in the form of responding to motions for leave to file replies.

223. Regarding our proposal to prohibit replies to oppositions to motions, PTG points out that § 1.727(f) of the Commission's existing rules already prohibits replies to oppositions to motions. CompTel, GST, KMC, MFS, and GTE assert that replies to oppositions to motions may be warranted where the opposition distorts facts or where matters are raised for the first time in the opposition.

c. Discussion. 224. We modify our proposed rule and permit complainants to file replies that respond only to affirmative defenses. We shall deem any failure to reply to an asserted affirmative defense as an admission of such affirmative defense and of any facts supporting such affirmative defense that are not specifically contradicted in the complaint. We note that the *NPRM* originally proposed to require parties to move for leave to file replies to affirmative defenses and that failure to reply to an affirmative defense would be deemed a denial of such defense. The rule we adopt departs from our proposal in the *NPRM* because we are persuaded by the commenters that requiring complainants to seek leave to file replies to affirmative defenses is likely to generate unnecessary work for the staff. Instead, we have chosen to limit replies to those that respond to new allegations raised in an answer in the form of affirmative defenses. Complainants will be required to support their replies to affirmative defenses in the same manner that they are required to support their claims in the complaint. This requirement will aid the staff by the presentation of specific evidence regarding each affirmative defense. General replies to answers, however, are often redundant and unnecessary because complainants simply repeat claims that were filed with the original complaint. Such general replies are prohibited. We do not modify the existing rule that prohibits replies to oppositions to motions.

M. Motions

225. The *NPRM* proposed to modify the rules pertaining to motions in order to enhance the efficiency of the formal complaint process, expedite the filing and consideration of motions, and eliminate unnecessary or duplicative pleadings.

1. The Filing of Motions. a. The *NPRM.* 226. In the *NPRM,* we proposed to require a party filing a motion to compel discovery to certify that it had made a good faith attempt to resolve the matter before filing the motion. We also proposed to eliminate motions to make the complaint ''definite and certain,'' stating that, under the proposed rules, complaints would have to be very definite and certain to avoid being dismissed at the outset.

b. Comments. 227. All parties that commented on this issue agree that the Commission should require certification of good faith attempts to resolve discovery disputes informally as a condition to the filing of any motion to compel. Commenters also support the proposal to eliminate motions to make a complaint more definite and certain. BellSouth supports eliminating motions to make complaints ''definite and certain'' as long as the Commission will consider motions to dismiss for failure to state a claim or failure to comply with procedural requirements.

c. Discussion. 228. We require a party that files a motion to compel answers to discovery requests to certify that it has made a good faith attempt to resolve the matter before filing the motion. We conclude, and commenting parties agree, that adoption of this rule will limit Commission involvement in conflicts that may be easily resolved by the parties themselves.

229. Motions to make the complaint ''definite and certain'' are prohibited, as such motions should be superfluous under the new format and content requirements for initial pleadings. BellSouth's suggestion that the Commission consider motions to dismiss is inapposite to our decision to eliminate motions to make a complaint ''definite and certain.'' The rationale for eliminating motions to make complaints more ''definite and certain'' is that our newly-adopted stringent pleading requirements will ensure the filing of complaints that are ''definite and certain.'' We do not intend to prohibit the filing of motions to dismiss a complaint for failure to state a claim or failure to comply with procedural requirements.

2. Oppositions To Motions. a. The *NPRM.* 230. In the *NPRM,* we stated our intent to expedite further formal complaint proceedings by modifying the rules regarding oppositions to motions. We proposed to make failure to file an opposition to a motion possible grounds for granting the motion, although the filing of oppositions to motions would remain permissive. Additionally, we proposed to shorten the deadline for filing oppositions to motions from ten to five business days.

b. Comments. 231. GST, KMC, MFS, NYNEX, and SWBT support the proposal to make failure to file an opposition to a motion possible grounds for granting the motion, arguing that it is reasonable to require a party to articulate its reasons for opposing a motion. ACTA, however, opposes such a proposal, arguing that if the failure to file an opposition can be grounds for granting a motion, the filing of an opposition will not be permissive in any real sense. AT&T warned that failure to file an opposition to a motion should not be an automatic basis for granting the motion.

232. Many commenters, including AT&T, BellSouth, GTE, PTG, SWBT, and TRA, support the shortening of the period to file an opposition to a motion to five business days. GTE suggests that the rules provide a procedure to seek an

extension of time to oppose a motion when circumstances warrant it. PTG suggests that motions be served by facsimile to give parties more time to respond. CBT opposes the shortening of time, arguing that more time is needed to respond to complex motions, and suggests instead that the time for filing be reduced to ten calendar days rather than five business days.

c. Discussion. 233. A party's failure to file an opposition to a motion is possible grounds for granting such motion. We note that the commenters misconstrue the meaning of the statement that it is ''permissive'' to file an opposition to a motion. This statement merely means that the Commission does not require a party to take affirmative steps to oppose a motion against it. This rule does not, however, alleviate any party's burden to represent fully its own interests before the Commission. Any party that chooses not to file an opposition to a motion runs the risk that the motion will be granted without consideration of that party's views. Because the Commission is prohibited from acting in an arbitrary and capricious manner, staff will not grant unopposed motions that are frivolous, inconsistent with the Commission's rules, or that may create unnecessary delay.

234. The deadline to file an opposition to a motion is five business days, with the time running from the date service is effective. Reduction of the number of days a party has to respond to a motion will speed up the motions process. We disagree with CBT's suggestion to use ten calendar days rather than five business days to determine filing due dates because we find that a reduction to ten calendar days will not save sufficient time in light of the statutory deadlines in the Act. Five business days will provide the opposing party with seven calendar days to prepare, file and serve an opposition, with exceptions for when a holiday falls in the five business day period. Ten business days would provide the opposing party with fourteen calendar days to prepare, file and serve an opposition, with exceptions for when a holiday falls in the ten business day period. In contrast to this, CBT's proposed ten calendar days would provide the opposing party with ten to thirteen calendar days, depending on the day of the week the motion is served and filed and the existence of holidays. In response to PTG's suggestion that motions be served by facsimile, we note that this proceeding adopts rules requiring service of motions by hand-delivery, overnight delivery, or facsimile transmission followed by mail delivery.

3. Format, Content, and Specifications of Motions and Orders. a. The *NPRM*. 235. To ease the burden on Commission staff in drafting decisional documents within short time frames, the *NPRM* proposed to require all pleadings seeking Commission orders to contain proposed findings of fact and conclusions of law with supporting legal analysis. The *NPRM* also proposed that all parties submit with their procedural or discovery motions and oppositions to such motions, proposed orders, in both hard copy and disk, that incorporate the legal and factual bases for granting the requested relief. The *NPRM* proposed that the computer disk submissions be formatted in WordPerfect 5.1, the wordprocessing system currently used by the Commission. Furthermore, we proposed to require parties to conform the format of any proposed order to that of a reported FCC order. Such proposals would reduce the burden on Commission staff in drafting orders and letter rulings by enabling the staff to either incorporate relevant portions of the parties' submissions into the required orders or use the parties' submissions in their entirety.

b. Comments. 236. ACTA and BellSouth agree with the proposal to require all pleadings seeking Commission orders to contain proposed findings of fact and conclusions of law with supporting legal analysis. ACTA states that the added cost to the parties of such submissions would be offset by the value of such filing in expediting the resolution of cases. On the other hand, MCI, PTG, and CBT argue that such inclusions would only be appropriate for certain pleadings, such as briefs or motions for summary judgment, because parties may be unprepared to make such conclusions prior to conducting discovery and reviewing opposing pleadings.

237. Commenters generally did not oppose the proposals to require parties making or opposing procedural or discovery motions to submit proposed orders, in both hard copy and disk, that conform to the format of reported FCC orders. CBT additionally suggests that parties be allowed to submit proposed orders in formats other than WordPerfect 5.1. MCI opposes requiring parties to submit proposed orders with their motions and oppositions proposal, arguing that such a rule will be largely inapplicable because most motions will be discovery motions, which are resolved by informal letter orders that are not in the format of Commission orders. NAD argues that this proposal will be too burdensome for consumers with disabilities.

c. Discussion. 238. After consideration of the comments received, we modify the rule proposed and will require only those pleadings seeking dispositive orders to contain proposed findings of fact and conclusions of law with supporting legal analysis. We define a dispositive order as an order that finally resolves one or more claims in a complaint. We conclude that this requirement is justified in these limited circumstances because it will help to ensure that issues and arguments are better framed and presented to the Commission. We agree with MCI, PTG, and CBT that such a requirement would not be appropriate for interlocutory motions, such as those seeking discovery or extensions of time. Requiring complete support for dispositive motions will decrease substantially the number of unnecessary motions filed with the Commission because parties will be reluctant to file motions for which they have no factual or legal basis. This requirement will also give Commission staff the option of incorporating the proposed findings of fact and conclusions of law with supporting legal analysis into orders, thereby easing the burden of drafting orders.

239. To further facilitate the drafting of orders and letter rulings, we adopt our proposals to require parties to submit with their procedural or discovery motions and oppositions to such motions, proposed orders, in both hard copy and disk, that incorporate the legal and factual bases for granting the requested relief. Although some commenters argue that such a requirement may often be inapplicable to discovery and too burdensome for persons with disabilities, we conclude that the benefits of such a rule justify it. The Commission anticipates addressing a large number of complaints on an expedited basis. In light of the Commission's limited resources, it will be of great assistance to Commission staff to have the relief sought or opposed by motion, and the basis therefore, set out clearly and concisely in a proposed order format. Having such a proposed order, in hard copy and on disk, will assist in the timely release of orders or letter rulings on motions. Requiring a party to articulate the relief sought in an order may also produce more clearly focused arguments. We also conclude that this requirement does not overly burden parties, who merely have to transfer a portion of the text of their motions or oppositions into the format of an order. Finally, if submission of such a draft order does place a large

burden on a particular party, the staff retains the discretion to waive this requirement on a case-by-case basis.

240. We modify our proposed rule concerning the submission of proposed orders on disk. We require that computer disk submissions be formatted in the Commission's designated ''wordprocessing program,'' rather than specifically ''WordPerfect 5.1,'' because the Commission may decide to utilize different software in the future. We also decline to adopt CBT's proposal to permit parties to submit documents in alternative wordprocessing formats. Because of conversion difficulties, parties will not be permitted to submit documents in any wordprocessing format not used by the Commission. The staff has discretion to grant waivers of this requirement to parties upon a showing that such wordprocessing program is unavailable to them.

4. Amendments To Complaints. a. The *NPRM*. 241. We stated in the *NPRM* that compliance with deadlines in the Act requires that a complaint be fully developed prior to filing. In furtherance of this goal, we proposed to prohibit the amendment of complaints except for changes necessary under 47 CFR 1.720(g), which requires that information and supporting authority be current and updated as necessary in a timely manner. This would preclude a complainant from introducing new issues late in the development of the case.

b. Comments. 242. BellSouth, PTG, and SWBT support prohibiting amendments to complaints because such a bar will encourage compliance with the proposed pre-filing requirements and result in a fully developed complaint that conforms to format and content requirements. Several commenters, however, oppose the prohibition. ACTA, GTE, ICG, MCI, and TRA suggest allowing complaints to be amended for good cause, *e.g.* if the complainant could not have reasonably ascertained certain facts at the time of filing of the complaint. MCI expresses concern that such a prohibition might reward monopoly carriers who withhold information. CBT and PTG suggest that any amended complaint be treated as a new complaint to restart the statutory resolution deadline.

c. Discussion. 243. The Act requires expedited resolution of certain complaints. An amendment to a complaint subject to a statutory deadline on a showing of good cause would require the resolution of that claim in a shorter period than provided for in the statutory deadline. We believe that the cost of expediting complaint resolutions more than Congress anticipated would outweigh any benefit to be had from allowing such amendments. Further, we are not persuaded by the arguments of ACTA, GTE, ICG, TRA, and MCI that prohibiting amendments to complaints will unduly prejudice complainants to the benefit of defendants. We also decline to adopt the suggestion of CBT and PTG that, instead of prohibiting amendments to complaints, we treat amended complaints as new complaints and restart any statutory deadline on the date of the ''new complaint.'' We are not persuaded that our ''treatment'' of an amended complaint as a new complaint would comply with the statutory deadline requirements. We note that a complainant is not prohibited from filing a separate formal complaint if it discovers a new claim at some later point in the complaint process. In addition, where appropriate, the staff may consolidate two or more complaints to adjudicate all claims arising out of the same transaction or occurrence in one proceeding. Thus, we adopt a rule generally prohibiting all amendments to complaints. We note that this prohibition on amendments in no way relieves the parties of their obligation under § 1.720(g) of the Commission's rules to maintain the accuracy and completeness of all information and supporting authority furnished to the Commission in a pending proceeding. In addition, we note that complainants always have the option of filing their complaints in federal court if they conclude that the Commission's rules will not afford them the pleading opportunities they need. The Commission's rules have long included a fact pleading requirement designed to ensure that a party has sufficient knowledge of its claims before filing its complaint.

5. Additional Suggestions From Commenters. a. The *NPRM*. 244. In the *NPRM*, we sought alternative proposals to modify the rules regarding motions.

b. Comments. 245. BellSouth suggests that any request for an interlocutory ruling be deemed a voluntary waiver of any applicable statutory deadline shorter than five months. BellSouth reasons that, given the Commission's limited resources, such a rule is the only way to discourage the filing of time-consuming motions that will preclude Commission staff from meeting the statutory deadlines.

246. AT&T and ICG suggest requiring parties to give advance notice of motions to be filed.

247. PTG suggests that the Commission make a commitment to decide all motions within thirty days of filing, rather than waiting until the final order is issued.

c. Discussion. 248. We decline to adopt BellSouth's suggestion that a request for an interlocutory ruling be deemed a waiver of the applicability of any statutory deadline shorter than five months. As discussed in the ''Damages'' section, the parties to a formal complaint proceeding do not have the authority to waive statutory deadlines, with the exception of the section 271(d)(6)(B) ninety-day deadline. Even if the parties did have such authority, a rule that allowed a party to waive a statutory deadline by filing any type of interlocutory motion would provide a means for such party to manipulate the deadline and, thereby, eviscerate the intent of the Act to provide expedited resolution for certain complaints.

249. We decline to adopt a rule requiring parties to provide notice of their intent to file a motion because we find that such a requirement would not further the timely resolution of motions. We do require parties to certify in any motions to compel discovery that good faith efforts to resolve the discovery dispute were undertaken prior to the filing of the motion. That rule will provide early notice of a party's intent to file such a motion. Other types of motions do not slow down formal complaint proceedings significantly because, unlike discovery disputes, they generally do not need to be resolved to enable parties to support their claims in briefs. Furthermore, the delivery of all motions will be expedited by our requirement that parties serve all motions by hand delivery, overnight delivery, or facsimile transmission followed by mail delivery.

250. We decline to adopt a rule requiring the Commission to rule on all motions within thirty days. The intent of this rulemaking is to speed up resolution of formal complaints and, to the extent the early disposition of a pending motion would further such intent, the Commission will rule on motions as expeditiously as possible. We do not, however, see the benefit of constraining Commission staff by imposing a requirement that all motions be resolved within thirty days.

N. Confidential or Proprietary Information and Materials

251. In 1993, the Commission revised its rules to require a party asserting the confidentiality of any materials subject to a discovery request to mark clearly the relevant portions as being proprietary information. If the proprietary designation is challenged, that party bears the burden of demonstrating, by a preponderance of

the evidence, that the material falls under the standards for nondisclosure enunciated in the Freedom of Information Act (''FOIA'').

a. The *NPRM.* 252. Because the format and content proposals may require parties to exchange information and materials with their initial pleadings, the Commission proposed to allow parties to designate as confidential or proprietary any materials generated in the course of a formal complaint, and not limit such designation to materials produced in response to discovery requests. We sought comment on this proposal as well as on whether additional procedures were needed in light of the shortened complaint resolution deadlines in the Act and our proposals in the *NPRM* to eliminate certain pleading and discovery opportunities.

b. Comments. 253. All of the parties who commented agree that the proposal will encourage parties to exchange information without fear of public dissemination. While it supports the Commission's goals, ACTA notes that the potential for abuse exists because parties may excessively and unnecessarily label documents and information as confidential or proprietary. MCI requests that the Commission clarify that information considered confidential due to its proprietary, sensitive or competitive nature cannot be withheld from production on that ground.

c. Discussion. 254. We conclude that parties shall be allowed to designate as confidential or proprietary any materials generated in the course of a formal complaint proceeding. The commenters support imposing this requirement. We find that, because all parties may have information that is both relevant to a dispute and competitively sensitive, parties must be assured of protection for their confidential or proprietary information if we want to avoid the time consuming process of resolving disputes over the treatment of documents and information sought to be exchanged, regardless of whether the information is produced in response to discovery requests or not. We disagree with ACTA's contention that this requirement might be more subject to abuse than the prior requirement limiting confidential or proprietary designations to materials produced in response to discovery requests. We emphasize that designating information or materials as confidential or proprietary will not prevent the information or materials from being produced, therefore, parties will have little to gain by falsely claiming that materials are confidential or proprietary. Furthermore, if a proprietary designation is challenged, the party claiming confidentiality will continue to bear the burden of demonstrating, by a preponderance of the evidence, that the material designated as proprietary falls under the FOIA's standards for nondisclosure.

255. The modification of the rule providing for designation of material disclosed in the course of a formal complaint proceedings is merely an extension of the previous rule, which allowed for the designation of materials that were disclosed in response to discovery as confidential and proprietary. In current practice, parties that reference facts in or attach materials to briefs that have been designated as confidential or proprietary serve two copies on opposing parties, a public copy that has had confidential materials redacted and is clearly marked ''Public Copy'' and a confidential copy that contains the material that was redacted from the public copy and is clearly marked ''Confidential Copy.'' In addition, the filing party files the public copy with the Office of the Secretary and files the confidential copy directly with the Commission staff attorney that is handling the matter. This practice will not change. In addition, where a complainant references facts in or attaches materials to its complaint that have been designated as confidential or proprietary, the procedure is substantially the same. A confidential copy of the complaint must be filed under seal directly with the Branch Chief on which it is required to serve two copies of the complaint.

O. Other Required Submissions

1. Joint Statement of Stipulated Facts.

a. The *NPRM.* 256. The *NPRM* proposed to require parties to submit a joint statement of stipulated facts and key legal issues five days after the answer is filed. We noted that the ''rocket docket'' rules in the United States District Court for the Eastern District of Virginia require parties to submit written stipulations of all uncontested facts prior to trial. We stated our belief that requiring the parties to submit a joint statement of stipulated facts and key legal issues at this stage might promote agreement on a significant number of the disputed facts and legal issues, as well as help the Commission to determine whether or to what extent discovery is necessary.

b. Comments. 257. Most parties support this proposal. Many commenters, however, suggest that the joint statement be submitted later in the process to give parties more time to meet and negotiate. U S West additionally suggests requiring a joint statement of facts in dispute. Bechtel & Cole suggest requiring a joint statement that includes an outline of factual claims and legal arguments, and BellSouth suggests permitting parties to file unilateral statements if the parties cannot reach agreement in time. PTG opposes requiring a filing of a joint statement of facts because it believes that parties would never stipulate to facts. CompTel also opposes the proposal, arguing that nothing will be gained because parties will maintain the same positions taken in their fact-based complaints or answers.

c. Discussion. 258. We conclude that parties shall be required to submit a joint statement of stipulated facts and key legal issues. We find that the drafting of such a statement, including the discussions between the parties that are necessary to the drafting of such a document, will promote settlement among the parties or, at the very least, narrow the factual and legal issues the Commission will need to resolve. The joint statement will further assist the Commission in discerning exactly what the parties believe to be the most important issues. We disagree with PTG's argument that the proposal should be rejected because parties will be unable to stipulate to any facts. We find it highly improbable that parties will be unable to stipulate to any facts whatsoever. We further conclude, after consideration of U S West's proposal, that parties shall be required to file a joint statement of disputed facts because such a document will pinpoint the exact facts in dispute. Thus, even where parties are unable to agree on a single fact, that can be made clear to the staff through the joint statement because it will include disputed facts. A clear and unequivocal identification of the issues on which the parties cannot agree will be especially beneficial to Commission staff when it is resolving the need for requested discovery at an initial status conference. We also disagree with CompTel's argument that parties will simply maintain the same positions taken in their complaints and answers. We find that compelling parties to meet after submission of the complaint, answer, and any necessary reply will encourage parties to negotiate their positions, resulting in agreement on some issues and, at a minimum, clarification of the areas in which they disagree. Indeed, we have occasionally required parties to submit stipulations of fact in past complaints, and have found that the parties often are able to reduce significantly the legal and factual issues in dispute.

259. Because several commenters expressed concerns about the timing of the joint statement of stipulated facts, disputed facts and key legal issues, we have extended the time for the filing of the statement. Such joint statement shall be submitted to the Commission by no later than two business days prior to the initial status conference. We conclude that it would provide less of a benefit to the complaint proceeding if we extended the filing date of the joint statement any further. We have timed the filing of the joint statement to coincide with our requirements for interrogatory requests and the ''meet and confer'' conference that must take place prior to the initial status conference. We find that it is important to require the parties to discuss the factual and legal issues at this particular stage. Parties will have just reviewed the opposing parties' initial pleadings, documentation, and interrogatories but will not yet have participated in the more formal initial status conference. Compelling parties to disclose their positions on all issues in an informal manner, prior to the initial status conference, may be more productive in terms of settling or narrowing the issues than if the same discussion took place after the initial status conference. The parties may feel obliged to take firm positions on the issues in dispute after the initial status conference has occurred. Furthermore, we emphasize that the staff has discretion to grant additional time to submit the joint statement where necessary or appropriate.

260. We reject BellSouth's suggestion to allow the filing of unilateral statements. The joint statement is beneficial in large part because it is a single document and does not require the Commission to compare two documents to determine on which facts, each articulated slightly differently in the separate documents, the parties agree and disagree. The other significant benefit arises from requiring the parties to meet and discuss all relevant facts and fully articulate their disagreements. Neither of these benefits would be obtained by allowing the parties to file unilateral documents, which would most likely be highly repetitive of the facts laid out in the complaint, answer and any necessary reply. Although Bechtel & Cole suggests that the joint statement include an outline of factual claims and legal arguments, we conclude that the requirement we adopt here effectively encompasses this suggestion.

2. Briefs. a. The *NPRM*. 261. The *NPRM* sought comment on changes to our current briefing process. First, we sought comment on prohibiting the filing of briefs in cases in which discovery is not conducted and requiring parties to include proposed findings of fact, conclusions of law and legal analysis with their complaints and answers. We sought comment on whether parties could reasonably prepare proposed findings of fact, conclusions of law and legal analysis before reviewing the responses to their pleadings and statements of stipulated facts. Second, we sought comment on continuing to allow parties to file briefs, but permitting the Commission staff to limit the scope of such briefs. This option would add some delay to the process but would enable the parties to review both sides of the case before briefing their legal arguments to the Commission.

262. We also sought comment on whether the staff should be permitted to set the timetable for completion of any briefs to give the staff maximum flexibility and control in order to meet the various statutory resolution deadlines. We also asked parties to identify reasonable timetables for completion of such briefs. The *NPRM* proposed to limit initial briefs to twenty-five pages and reply briefs to ten pages in all cases.

b. Comments. 263. Bell Atlantic and NYNEX support the proposal to prohibit briefs in cases in which discovery is not conducted. Bell Atlantic argues that under the pre-filing procedures, parties will have sufficient notice of the nature and basis of the complaint to argue the legal issues fully in the complaint and answer. NYNEX states that, if the Commission adopts its proposals to require the complainant to include all of the legal and factual support in the initial filing, subsequent briefs would be superfluous. Both Bell Atlantic and NYNEX agree that, while briefs will probably be unnecessary in most cases in which discovery is not conducted, parties should be able to ask, at the initial status conference, for permission to file briefs on certain narrowly-tailored issues. Most of the commenters feel that parties must be allowed to file briefs because parties may lack the requisite information to file findings of fact and conclusions of law in their complaints and answers. For example, GST, MCI, PTG, Sprint, and U S West argue that parties cannot be expected to submit findings of fact, conclusions of law, and legal analysis prior to reviewing their opponents' pleadings. AT&T argues that briefs are necessary to complete the record.

264. AT&T, Bell Atlantic, GST, KMC, MFS, GTE, MCI, and SWBT support the proposal to allow the staff to limit the scope of briefs. GTE states that permitting parties to file briefs but limiting the subjects of those briefs will expedite the complaint process while allowing each party to establish a complete record. MCI argues that the initial status conference will enable the Commission to tailor the briefing process to fit the needs of each individual case. ACTA, ICG, and PTG, however, oppose permitting staff to limit the scope of briefs, arguing that parties must be permitted to argue their cases as they see fit and on the issues they deem relevant. CBT supports allowing the staff to limit the scope of briefs to disputed issues only, but argues that imposing any further limitations might prejudge the outcome of the case.

265. The commenters support the proposal to reduce the time in which briefs must be filed. Several parties suggested specific timetables, while others were comfortable with allowing the Commission to set the timetable at the initial status conference.

266. Most commenters support the proposal to reduce brief page limits to twenty-five pages for initial briefs and ten pages for reply briefs. Several commenters, such as AT&T and PTG, request that the staff be able to set flexible page limits or that the parties be permitted to file for leave to file longer briefs. ACTA, ICG, and the cable entities argue that a twenty-five page limit is insufficient.

c. Discussion. 267. The format and content rules adopted in this proceeding require that complaints, answers, and any necessary replies contain complete legal analysis, full documentary support, and proposed findings of fact, conclusions of law at the time of filing. It has been our experience that parties have used the briefing opportunity to file documents that merely restate the arguments already contained in the complaint, answer, and reply in cases in which discovery is not conducted. In those cases where discovery is conducted and new material facts are introduced into the case as a result of such discovery, briefs are necessary to provide the parties the opportunity to revise or further support their existing analysis in light of the new information disclosed. Eliminating briefs where discovery is not conducted, however, will avoid wasting the Commission's resources reviewing documents that are of little utility, as well as provide parties with incentive to submit complete and fully documented complaints, answers, and replies initially. Thus, we conclude that parties shall be generally prohibited from filing briefs in cases in which no discovery is conducted. The

commenters who oppose this proposal are concerned that parties might lack the information necessary to file findings of fact and conclusions of law in their complaints and answers, or that briefs are needed to complete the record. As noted by Bell Atlantic and NYNEX, however, under the new pre-filing activities and format and content requirements, complainants and defendants alike should have sufficient information with which to prepare and file proposed findings of fact and conclusions of law in their complaints, answers, and necessary replies. We emphasize that this rule is not a complete prohibition on the filing briefs in cases in which discovery is not conducted. The Commission may request briefs where briefing would be helpful or is necessary. Further, where a party believes that briefing is essential to fully present its case, it may request such briefing and explain to the Commission why briefing is necessary in that particular case. We note that parties may still file briefs as a matter of right in cases in which discovery is conducted.

268. In those cases in which briefs are permitted, each party is required to attach all documents upon which it intends to rely to its briefs. Parties are permitted to attach to their briefs documents that were previously identified, and affidavits of persons previously identified, in their information designations, along with a full explanation in the brief of the material's relevance to the issues and matters in dispute. Such materials need not have been attached to the complaint, answer, or necessary reply.

269. In those cases in which briefs are permitted, such briefs are required to include all legal and factual claims and defenses previously set forth in the complaint, answer or any other prior pleading submitted in the proceeding that the parties wish the Commission to consider in rendering its decision. Claims and defenses previously made but not reflected in the briefs shall be deemed abandoned. Where, however, the staff limits the scope of the briefs in a manner that does not permit parties to include claims previously raised, the failure to include claims previously raised will not be deemed to be an abandonment of such claims. Although the *NPRM* did not specifically propose to require briefs to include all claims previously set forth in the proceeding, we find that this requirement will maximize the utility of briefs. Authorized briefs are a means to facilitate the staff's ability to identify readily all legal and factual claims and defenses made by the parties, along with full citations to the law and the evidentiary record. This requirement should minimize the need for the staff to sift through multiple pleadings submitted by the parties in an effort to identify and address each of their respective claims. In addition, this requirement will prevent staff from having to rule on claims of questionable merit that were identified in initial pleadings, but that the parties do not intend to support or rely on in their briefs.

270. The Commission may limit the scope of any authorized briefs where appropriate, and set timetables for the filing of such briefs. Most of the commenters support these requirements, because they understand that the Commission needs such limitations and flexibility to accomplish its goal of meeting the statutory deadlines provided for in the Act and expediting the processing of all formal complaints. ACTA, CBT, ICG, and PTG argue that the staff should not limit the scope of briefs because parties should be permitted to brief the issues that the parties themselves deem relevant. These commenters ignore, however, that parties are given the opportunity to file proposed findings of fact and conclusions of law and a complete legal analysis on the issues they deem relevant with their complaint, answer and any necessary reply. To the extent that discovery discloses new material facts, briefs are allowed as a matter of right. The parties also have several opportunities to explain to the staff why particular issues should be briefed. The staff's decision regarding the scope and timing of briefs will be based on the content of the parties' initial pleadings and their joint statement, as well as on information garnered from discussions with the parties at the initial status conference and any other status conferences held. Through these vehicles, parties have an opportunity to identify issues they feel should be briefed and to explain any special circumstances that may warrant a shorter or longer filing time for briefs. Limiting the scope of briefs, when appropriate, will help avoid unnecessary or redundant pleadings that do not facilitate the decision-making process. The Commission's discretion to set timetables on a case-by-case basis for the completion of briefs will help to tailor schedules to the needs of individual complaints.

271. The page limits for allowed briefs shall be twenty-five pages for initial briefs and ten pages for reply briefs. The statutory deadlines imposed by the Act place great burdens on the Commission to evaluate briefs and prepare recommended decisions within short timeframes. We find that reducing the page limits for initial briefs and reply briefs to twenty-five and ten pages, respectively, should yield more focused and concise legal and factual arguments, as well as discourage the filing of briefs containing unnecessary and redundant information. We adopt the suggestion of several commenters to permit parties to request leave to file longer briefs. This provision should alleviate the concern of certain commenters that the page limits may be insufficient in some cases. Parties shall be granted waivers of these page limits for good cause shown.

3. Commenters' Additional Suggestions. a. The *NPRM.* 272. The *NPRM* asked commenters to identify alternative procedures that would facilitate the preparation and submission of clear and concise briefs within the time constraints imposed by the Act.

b. Comments. 273. AT&T, ICG, MCI, SWBT, and U S West suggest that the briefing process should mirror that used in federal district court, in which the complainant files a single initial brief, followed by the defendant's opposition brief, followed by the complainant's reply brief. They argue that simultaneous briefing forces a defendant to reply to a position not yet articulated, and does not give a complainant an opportunity to reply to a defendant's reply brief, while sequential briefing permits parties to meet each other's arguments directly.

c. Discussion. 274. We decline to adopt the suggestions of AT&T, ICG, MCI, SWBT, and U S West to require a sequential briefing process. Sequential briefing consists of three stages: the complainant's initial brief, the defendant's opposition brief, and the complainant's reply brief. Each party must be provided with sufficient time to respond to the brief filed in the preceding stage. We conclude that simultaneous briefing, which can be accomplished in two stages (initial brief and reply brief) is more appropriate in light of the time constraints imposed by the Act. While sequential briefing is appropriate in a notice-pleading context, in which the parties may lack information regarding the positions of opposing parties, the benefits to be gained by sequential briefing under the Commission's fact-pleading rules are minimal. Under the requirements imposed in this proceeding, parties must submit fact-pleadings and a joint statement of disputed and undisputed facts and key legal issues, as well as attend an early status conference, where the scope of the briefing will be discussed and may be limited. We find

that these requirements will ensure that parties are fully aware of their opponents' positions on all key factual and legal issues by the briefing stage. Simultaneous briefing should not result in parties being prejudiced in any way.

P. Sanctions

275. The *NPRM* proposed rules that will place greater burdens on complainants and defendants to be more diligent when presenting or defending against allegations of misconduct in violation of the Act or the Commission's rules. Such diligence must be enforced in order to meet the complaint resolution deadlines contained in the Act and attain the goal of generally improving the formal complaint process.

a. The NPRM. 276. In the *NPRM*, we outlined the need for sanctions which would provide sufficient incentives to ensure compliance with the new rules. We asked interested parties to provide us with their proposals for appropriate sanctions. We provided several examples of specific sanctions for certain anticipated rules violations, including: (1) summary dismissal of a complaint for a complainant's failure to satisfy format and content requirements; (2) summary ruling or other judgment in favor of the complainant for a defendant's failure to respond fully and with specificity to a complainant's allegations; and (3) the imposition of monetary fines under the Act's forfeiture provisions for failure to file pleadings in accordance with our rules. We asked parties to comment on these and other alternatives that might help to ensure full compliance with the expedited complaint procedures proposed in the *NPRM*.

b. Comments. 277. Most of the parties who commented generally support the proposed sanctions. Most state that failure to satisfy the form and content requirements should result in summary dismissal of the complaint without prejudice. GST, GTE, KMC, MFS and SWBT argue that, in most cases, the imposition of monetary forfeitures would be preferable to summary grant or dismissal, which they contend should be used only for: (1) failure by complainants to set forth allegations with specificity; (2) failure by defendants to respond to the complaint; or (3) failure by either party to certify that they engaged in good faith settlement attempts. CBT, GST, KMC, and MFS suggest issuing a notice of deficiency or show cause order prior to imposing a sanction. MCI suggests that a defendant should be penalized for its failure to cooperate in the pre-filing stages of a complaint proceeding by permitting the complainant to file a complaint without sufficient facts or documentation. MCI also suggests that a complainant should be penalized for its failure to cooperate in the pre-filing stages by permitting general denials where the defendant lacks necessary information. U S West argues that, because parties seldom violate the Commission's rules, the Commission should make quick and decisive rulings in discovery conflicts rather than emphasize sanctions. Communications Venture Services, Inc. (''CVS'') and SWBT suggest imposing sanctions on attorneys as well as clients. ACTA states that the Commission should draw an adverse inference as to material facts to sanction discovery abuses or failure to comply with discovery rulings.

c. Discussion. 278. We conclude that no rule modifications are necessary with regard to sanctions at this time. We have at our disposal a wide range of sanctions to address violations or abuses of our formal complaint rules, including summary grant or dismissal of a complaint (in whole or in part), the drawing of adverse inferences as to material facts, monetary forfeitures, admonishment rulings, and show cause proceedings. Because sanctionable behavior may entail a wide range of conduct by complainants and defendant carriers, the Commission has considerable discretion to tailor sanctions to the individual circumstances of a particular violation. Sanctions for a failure to meet pleading requirements should be directed at the nature of the failure. For example, a complainant that fails to properly support a statement of material fact may have such statement treated as an unproven assertion. Sanctions for discovery abuses should provide sufficient incentives for parties to view full and early disclosure as preferable to any potential benefits from dilatory tactics.

Q. Other Matters

279. The *NPRM* sought comment on the meaning of the term ''act on'' in section 271(d)(6)(B) of the Act pertaining to complaints concerning failures by BOCs to meet conditions required for approval to provide in-region interLATA services. In addition, the Commission stated in the *Sections 260, 274, 275 First Report and Order* and the *Sections 260, 274, 275 Second Report and Order* that certain issues concerning possible evidentiary standards for complaints alleging violations of sections 260, 274, and 275 would be addressed in the Formal Complaints rulemaking proceeding.

a. Section 271. i. The *NPRM.* 280. Section 271(d)(6)(B) of the Act provides that the Commission shall ''act on'' complaints alleging certain violations of the section within ninety days of the date filed, unless otherwise agreed to by the parties. This is in contrast to other complaint provisions added by the 1996 Act which mandate ''final'' action by the Commission within prescribed time periods. We tentatively concluded in the *NPRM* that ''act on'' as used in section 271(d)(6)(B) may be satisfied, where appropriate, by a determination of the Common Carrier Bureau whether a BOC has ceased to meet the conditions required for approval to provide in-region interLATA services, and need not require final action by the full Commission. We sought comment on this tentative conclusion and on the appropriate procedure or mechanism for early notice to the Commission of the parties' agreement to extend or waive the ninety-day resolution deadline.

ii. Comments. 281. Commenters disagree on the meaning of ''act on'' in section 271(d)(6)(B). BellSouth, CompTel, GST, KMC, MFS, and MCI state that a Common Carrier Bureau decision constitutes ''acting on'' within the meaning of section 271(d)(6)(B) because the abbreviated deadline for resolution is a statutory mandate for prompt relief, which would not be fulfilled by waiting for a decision by the entire Commission. In addition, MCI argues that a Common Carrier Bureau decision is sufficient because the right to decide cases under section 271(d)(6)(B) is not specifically reserved to the Commission under § 0.291 of the Commission's rules. CVS, NYNEX, ICG, PTG, and SWBT, however, argue that section 271(d)(6)(B) requires a Commission decision because it would be contrary to Congressional intent to deny parties the immediate right of judicial review. PTG argues that the Commission must decide section 271(d)(6)(B) cases because, under § 0.291, the Commission has not delegated its authority to designate for hearing any formal complaints which present ''novel questions of fact, law or policy[,]'' nor to ''impose, reduce, or cancel forfeitures pursuant to Section 203 or Section 503(b) * * * in amounts of more than $80,000.''

282. Regarding the notification of waiver of the section 271(d)(6)(B) ninety-day deadline, BellSouth suggests that the complainant be required to indicate its willingness to waive the ninety-day resolution deadline in the formal complaint intake form proposed by the Commission to aid in the preparation and filing of formal complaints. GST, KMC, and MFS

suggest that such agreement take place during ''meet and confer'' conferences, which would occur prior to the initial status conferences pursuant to other proposals in the *NPRM*.

iii. Discussion. 283. Notwithstanding our tentative conclusion in the *NPRM* that a decision by the Common Carrier Bureau on the merits of the complaint satisfies the ''act on'' requirement in section 271(d)(6)(B), we conclude that we need not address this issue in this Report and Order. We recognize the importance that Congress assigned to the resolution of complaints alleging violations of the competitive checklist requirements as reflected in the ninety-day ''act on'' requirement. We fully intend to act promptly on all matters pertaining to those requirements to assure that full effect is given to the competitive goals underlying section 271 of the Act.

284. To facilitate our handling of section 271(d)(6)(B) complaints, we adopt a rule requiring parties to indicate whether they are willing to waive the ninety-day deadline in their initial filings to the Commission or, at the very latest, by the date of the initial status conference. Parties will have the opportunity to reach an agreement about waiver of the section 271(d)(6)(B) ninety-day deadline during the pre-filing activities. A complainant should indicate whether or not it is willing to waive the ninety-day deadline in the formal complaint intake form accompanying the complaint. The defendant carrier will have opportunity to respond to the complainant's request for waiver either in its answer or at some earlier date. Parties will have an additional opportunity to discuss the waiver of the ninety-day deadline in their ''meet and confer'' held prior to the initial status conference. Because meeting a resolution deadline of ninety days will require both strong commitment and meticulous preparation at the very start of the complaint process, from the parties and from the Commission, a request by the parties to waive the ninety-day deadline will be not considered after the initial status conference. Permitting parties to waive the ninety-day deadline at any point in the complaint process could result in the wasteful expenditure of time and resources by the staff and the parties. In addition, we note that even if the parties agree to waive the ninety-day deadline in a section 271(d)(6)(B) case, it is our intent to resolve such cases as expeditiously as possible. Thus, parties should not relax their diligence in meeting our format and content requirements to the fullest extent possible as a consequence of having agreed to waive the ninety-day deadline.

b. Sections 260, 274 and 275 of the Act. 285. In the *Sections 260, 274, 275 First Report and Order*, 62 FR 7690 (February 20, 1997), and the *Sections 260, 274, 275 Second Report and Order*, 62 FR 16093 (April 4, 1997), we deferred to the Formal Complaints rulemaking the issue of what specific acts or omissions might be sufficient to state a *prima facie* claim for relief under sections 260, 274, and 275. In that same proceeding, we noted that the complainant has the burden of establishing that a carrier has violated the Act or a Commission rule or order and that burden generally does not shift at any time to the defendant carrier. We also deferred to the Formal Complaints rulemaking the issue of whether shifting the burden of proof from the complainant to the defendant in complaints alleging violations of sections 260, 274, and 275 would advance the pro-competitive goals of the Act.

i. *Prima facie* Claim. (a). The *Sections 260, 274, 275 NPRM*. 286. In the *Sections 260, 274, 275 NPRM*, 61 FR 39385 (July 29, 1996), we asked parties to comment on what *prima facie* showing should be required of a complainant who alleges that an incumbent LEC has violated sections 260 or 275, or that a BOC has violated section 274. Commenters were asked to describe what specific acts or omissions would constitute a *prima facie* claim for relief under those sections of the Act.

(b). Comments. 287. Commenters did not address in this rulemaking the issue of what acts or omissions might constitute a *prima facie* claim in complaints alleging violation of sections 260, 274, and 275. In response to the *Sections 260, 274, 275 NPRM*, however, many parties commented on this issue. Several commenters contend that the same standard for a *prima facie* case should apply to all complaints, including complaints alleging violations of sections 260, 274, or 275; that is, a complainant would establish a *prima facie* case by alleging facts that, if true, would constitute a violation of the Act. Several parties, however, suggest specific standards for stating a *prima facie* claim for relief under sections 260, 274, and 275. ATSI states that a complainant alleging a violation of section 260 should be allowed to establish a *prima facie* case by any showing of denied or delayed access, or any showing of cost or quality differentials between the incumbent's own telemessaging operations and those offered by the complainant. ATSI further suggests that the Commission establish certain safeguards to prevent anti-competitive conduct, and declare that facts demonstrating a violation of these safeguards should be sufficient to state a *prima facie* case of unlawfulness. According to ATSI, because section 260 was not intended to ''mimic a legal proceeding'' complainants should not have to undertake costly or time-consuming preparatory work prior to filing a complaint.

288. A number of commenters oppose ATSI's proposals. U S West argues that a section 260 complaint is a legal proceeding in which both the complainant's and defendant's rights should be respected. BellSouth maintains that a *prima facie* case should include specific allegations of fact showing that a defendant carrier has engaged in prohibited discrimination or cross-subsidization. A number of other commenters argue that ATSI's proposals, if adopted, would open the floodgates for unsubstantiated complaints against the incumbent LECs and their affiliates.

289. NYNEX states that, in order to establish a *prima facie* case pursuant to section 274, the complaint would have to contain a description of the complainant and its interest; be sworn and notarized and state with particularity the facts on which the complaint is based, distinguishing between facts based on personal knowledge and facts based on information and belief; provide a verifiable source of statements based on information and belief; be accompanied by supporting documentation; and identify materials the complainant has been unable to obtain after due inquiry which it asserts are in the possession of the BOC or its separate affiliate.

(c). Discussion. 290. We decline to adopt a rule prescribing specific acts or omissions that would be *prima facie* unlawful under sections 260, 274, and 275. Instead, we will review section 260, 274, or 275 complaints on a case-by-case basis to resolve compliance issues. We believe that, beyond the specific requirements of the Act and the Commission's implementing rules and orders, it would be impracticable to attempt to delineate specific acts or omissions that would constitute violations of sections 260, 274 and 275. Acts or omissions that might raise the specter of violations under sections 260, 274 and 275 are likely to vary widely. Moreover, it is possible that a particular act or omission deemed unlawful in one context may be perfectly reasonable in another. Therefore we will continue our existing practice of requiring that, in the context of a section 208 complaint proceeding, a *prima facie* showing must

include allegations of fact, which if true, would establish that a BOC has violated the Act or any implementing rule or order.

ii. Shifting the Burden of Proof to Defendant Carriers in Complaints Alleging Violations of Sections 260, 274 and 275 of the Act. (a). *The Section 260, 274, 275 NPRM*. 291. In the *Sections 260, 274, 275 NPRM,* we noted that in a formal complaint proceeding the complainant generally has the burden of establishing, by a preponderance of the evidence, that a common carrier has violated the Act or a Commission rule or order. Ordinarily, this burden of proof does not, at any time in the proceeding, shift to the defendant carrier. We sought comment in the *Sections 260, 274, 275 NPRM* on whether, for purposes of complaints arising under Sections 260, 274, 275, shifting the ultimate burden of proof from the complainant to the defendant would advance the pro-competitive goals of the Act.

(b). Comments. 292. Commenters did not address in this rulemaking the issue of shifting the burden of proof from the complainant to the defendant BOC or incumbent LEC in complaints alleging violations of Sections 260, 274, and 275. A number of parties, however, commented on this issue in response to the *Sections 260, 274, 275 NPRM*. The BOCs oppose shifting the burden of proof to the defendant carrier after a complainant establishes a *prima facie* case, arguing that such a practice would force defendants to prove a negative; *e.g.*, lack of undue delay, unavailability of requested services, or technical impossibility. The BOCs assert that the Administrative Procedures Act (''APA'') requires that the burden of persuasion in complaint cases remain on the complainant throughout and that shifting the burden of proof in the manner proposed would encourage the filing of frivolous complaints. SWBT and U S West object to shifting the burden of proof in section 274 cases, claiming that, because section 274 has no statutory resolution deadline and complainants have the option of filing their claims in federal district court, burden shifting would promote ''forum shopping'' by parties wishing to litigate their claims before the Commission under more relaxed standards. In addition, U S West argues that shifting the burden in section 274 cases would be particularly inappropriate because section 274 involves First Amendment (private and commercial speech) issues. BellSouth and PTG state that a defendant would bear the burden of producing evidence only if it asserted an affirmative defense, such as the reasonableness of its actions. Ameritech and PTG concede that, at most, a defendant might be expected to bear the burden of production, but not of persuasion. NYNEX proposes that, rather than shifting the burden of proof to a defendant after a complainant has established a *prima facie* case, a defendant should be required to provide: (1) a sworn and notarized response containing an admission or denial of all allegations in the complaint; (2) a summary of the facts on which the response is based, distinguishing between facts based on personal knowledge and facts based on information and belief; (3) a verifiable source of statements based on information and belief; (4) its defenses; and (5) supporting documentation if available or if it can be reasonably acquired within the time allowed for response.

293. ATSI, AT&T, AICC, MCI, and Voice-Tel all support shifting the burden of proof to defendants once the complainant has established a *prima facie* case. These commenters maintain that burden shifting is appropriate in section 260, 274 and 275 cases because of short resolution deadlines and the fact that the relevant information will generally be in the possession or control of the defendant BOC or incumbent LEC. AICC states that the BOCs' argument that the APA prohibits shifting the burden of proof to a defendant is inapplicable to section 275, because the applicable section of the APA, section 556, only pertains to certain hearings and rulemakings required by sections 553 and 554, respectively, of the APA. AICC adds that the Commission should follow its tentative conclusion in the *BOC In-Region NPRM*, 61 FR 39397 (July 29, 1996), and not adopt a presumption of reasonableness favoring an incumbent LEC or its alarm monitoring affiliate when reviewing complaints alleging violations of section 275.

(c). Discussion. 294. We decline to adopt a rule that would shift the burden of proof to defendant BOCs or incumbent LECs in expedited complaint proceedings pursuant to sections 260, 274 and 275 of the Act. We do not agree with the arguments of many commenters that shifting the burden of proof in such cases is necessary to advance the pro-competitive goals of the 1996 Act. Nor do we agree that a rule is required to formally shift the burden of production to a defendant carrier after a complainant has demonstrated a *prima facie* case of a violation of section 260, 274, or 275. The rules adopted in this proceeding, particularly those pertaining to pre-filing activities and the form and content of pleadings, are designed specifically to require both complainants and defendants to exercise diligence in presenting and defending against alleged violations of sections 260, 274 and 275, as well as other sections of the Act. The new rules require full identification of relevant documents and information in the possession, or within the control, of both the complainant and defendant carrier, along with prompt production or exchange of the information the parties intend to rely on in presenting and defending against claims of unlawfulness under provisions of the Act and the Commission's rules and orders.

295. In addition, the staff retains in all cases the discretion to effectively shift the burden of production in particular cases by directing defendant carriers to produce relevant information deemed to be within their exclusive possession or control. We note that this discretion is conferred under section 208 of the Act which authorizes the Commission to investigate complaints ''by such means and in such manner as it shall deem proper.'' Moreover, even in the absence of such action by the staff, it will be incumbent upon a defendant carrier to respond fully to any *prima facie* showing made by a complainant, with full legal and evidentiary support. A defendant that fails to provide such a response runs the risk of an adverse ruling or an adverse inference on a material fact.

296. We note that our decision not to adopt a rule to formally shift the burden of production to a defendant carrier after a complainant has demonstrated a *prima facie* violation of section 260, 274, or 275 is in contrast to our decision regarding section 271(d)(6)(B) complaints in the *BOC In-Region Order*, 62 FR 2927 (January 21, 1997). There, we concluded that the burden of production with respect to an issue will shift to the defendant BOC after a complainant has made a *prima facie* showing that the BOC has ceased to meet the conditions for its approval to provide interLATA services under section 271(d)(3). The specificity and nature of the competitive checklist requirements that would form the basis of a section 271(d)(6)(B) complaint justify a rule requiring a defendant BOC to come forward with evidence of continued compliance with section 271(d)(3). It would be difficult, however, to attempt to anticipate all of the various factual circumstances that could form the basis of section 260, 274, or 275 complaints. A rule that would automatically shift the burden of production in all cases would be

prejudicial or otherwise unreasonably burdensome on defendant carriers. As discussed in the preceding paragraph, the new rules give Commission staff ample authority to effectively shift the burden of production in cases where it is necessary to promote the full and fair resolution of the matters in dispute.

297. Finally, we conclude, as we did in our *BOC In-Region Order,* that we should not employ a presumption of reasonableness in favor of incumbent LECs in complaint actions under sections 260 and 275, regardless of whether the incumbent LEC is regulated as a dominant or non-dominant carrier. As we pointed out in the *BOC In-Region Order,* the ''presumption of lawfulness given to non-dominant carrier rates and practices is employed in the context of complaints alleging violations of sections 201(b) and 202(a) of the Act, where the complainant must demonstrate that the defendant's rates and practices are '' 'unjust and unreasonable.' '' Sections 260 and 275 contain unqualified prohibitions on discrimination by incumbent LECs and do not require considerations of reasonableness as is the case under sections 201(b) and 202(a).

IV. Conclusion

298. In this *Report and Order,* we amend our rules governing the filing of formal complaints to implement certain complaint provisions added or amended by the 1996 Act, as well as to facilitate the full and fair resolution of all complaints filed against common carriers before the Commission. These rules of practice and procedure will promote competition in all telecommunications markets by providing a forum for the prompt resolution of complaints of unreasonable, discriminatory, or otherwise unlawful conduct by telecommunications carriers.

V. Procedural Matters

A. Petitions for Reconsideration and *Ex Parte* Presentations

299. Parties must file any petitions for reconsideration of this *Report and Order* within thirty days from publication in the **Federal Register**. Parties may file oppositions to the petitions for reconsideration pursuant to § 1.106(g) of the rules.

300. To file a petition for reconsideration in this proceeding, parties must file an original and ten copies of all petitions and oppositions. Petitions and oppositions should be sent to the Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. If parties want each Commissioner to have a personal copy of their documents, an original plus fourteen copies must be filed. In addition, participants should submit two additional copies directly to the Common Carrier Bureau, Enforcement Division, Room 6008, 2025 M Street, N.W., Washington, D.C. 20554. The petitions and oppositions will be available for public inspection during regular business hours in the Dockets Reference Room (Room 230) of the Federal Communications Commission, 1919 M Street, N.W., Washington, D.C. 20554. Copies of the petition and any subsequently filed documents in this matter may be obtained from ITS, Inc., 2100 M Street, N.W., Suite 140, Washington, D.C. 20037, (202) 857–3800.

301. Petitions for reconsideration must comply with § 1.429 and all other applicable sections of the Commission's rules. Petitions also must clearly identify the specific portion of this *Report and Order* for which relief is sought. If a portion of a party's arguments does not fall under a particular topic listed in the outline of this *Report and Order,* such arguments should be included in a clearly labelled section at the beginning or end of the filing.

B. Final Regulatory Flexibility Analysis

302. As required by the Regulatory Flexibility Act (''RFA''), an Initial Regulatory Flexibility Analysis (''IRFA'') was incorporated in the *Implementation of the Telecommunications Act of 1996, Amendment of Rules Governing Procedures to be Followed When Formal Complaints Are Filed Against Common Carriers,* Notice of Proposed Rulemaking. The Commission sought written public comment on the *NPRM,* including comment on the IRFA. The comments received were not specific to the IRFA, but are discussed below to the extent they raise concerns or make suggestions relevant to this analysis. This present Final Regulatory Flexibility Analysis (''FRFA'') conforms to the RFA.

a. Need for and Objectives of the 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, and the Rules Adopted Herein. 303. The Commission is issuing this *Report and Order* to implement certain complaint provisions added or amended by the 1996 Act and to improve generally the speed and effectiveness of our formal complaint process. The 1996 Act added and, in some cases, amended, key complaint provisions that, because of their resolution deadlines, necessitate substantial modification of our current rules and policies for processing formal complaints filed against common carriers pursuant to section 208 of the Act. Some of the requirements adopted in this *Report and Order* may have a significant impact on a substantial number of small businesses as defined by section 601(3) of the RFA. Generally, amended rules will require or encourage complainants and defendants to engage in certain pre-filing activities, change service requirements, modify the form of initial pleadings, shorten filing deadlines, eliminate certain pleading opportunities that do not appear useful or necessary, and modify the discovery process.

b. Summary of Significant Issues raised by the Public Comments in Response to the IRFA. 304. In the IRFA, the Commission found that the rules we proposed to adopt in this proceeding may have a significant impact on a substantial number of small businesses as defined by section 601(3) of the RFA. The IRFA solicited comment on alternatives to our proposed rules that would minimize the impact on small entities consistent with the objectives of this proceeding. No comments were submitted directly in response to the IRFA. However, as described below in Section 5, we have taken into account the comments submitted generally by small entities.

c. Description and Estimate of the Number of Small Entities to Which the Rules Adopted in the Report and Order in CC Docket No. 96–238 Will Apply. 305. The RFA generally defines small entity as having the same meaning as the terms ''small business,'' ''small organization,'' and ''small governmental jurisdictions.'' In addition, the term ''small business'' has the same meaning as the term ''small business concern'' under the Small Business Act, 15 U.S.C. 632, unless the Commission has developed one or more definitions that are appropriate to its activities. Under the Small Business Act, a ''small business concern'' is one that: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) meets any additional criteria established by the Small Business Administration (''SBA''). Moreover, the SBA has defined a small business for Standard Industrial Classification (''SIC'') categories 4812 (''Radiotelephone Communications'') and 4813 (''Telephone Communications, Except Radiotelephone'') to be small entities when they have no more than 1,500 employees. We first discuss the

estimated number of potential complainants, which may include entities that are not telephone companies. Next we discuss generally the estimated number of potential defendants, which would be included in the total number of small telephone companies falling within the SBA's definitions of small business concerns and small businesses. Then, we discuss the number of small businesses within the SIC subcategories, and attempt to refine further those estimates to correspond with the categories of telephone companies that are commonly used under our rules.

306. Consistent with our prior practice, we shall continue to exclude small incumbent LECs from the definition of ''small entity'' and ''small business concerns'' for the purpose of this FRFA. We do this because the small incumbent LECs subject to these rules are either dominant in their field of operations or are not independently owned and operated, they are excluded from the definition of ''small entity'' and ''small business concerns.'' Out of an abundance of caution, however, for regulatory flexibility analysis purposes, we will consider small incumbent LECs within this analysis and use the term ''small incumbent LECs'' to refer to any incumbent LECs that arguably might be defined by SBA as ''small business concerns.''

i. Potential Complainants. 307. Section 208(a) provides that formal complaints against a common carrier may be filed by ''[a]ny person, any body politic or municipal organization.'' Beyond this definition, the FCC has no control or information regarding the filing frequency of complaints, nor identities of parties that will file complaints. The filing of complaints depends entirely upon the complainant's perception that it possesses a cause of action against a common carrier subject to the Act, as amended, and it is the complainant's decision to file its complaint with the FCC. Therefore we are unable at this time to estimate the number of future complainants that would qualify as small business concerns under SBA's definition.

308. As noted, the RFA includes ''small businesses,'' ''small organizations'' (non-profits), and ''small governmental jurisdictions.'' Nationwide, there are 4.44 million small business firms, according to SBA reporting data. A small organization is generally ''any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.'' Nationwide, there are 275,801 small organizations. Last, ''small governmental jurisdiction'' generally means ''governments of cities, counties, towns, townships, villages, school districts, or special districts, with a population of less than 50,000.'' As of 1992, there were 85,006 such jurisdictions in the United States.

ii. Potential Defendants. 309. *Estimate of Potential Defendants that may be Classified as Small Businesses.* Section 208(a) provides for the filing of formal complaints for ''anything done or omitted to be done by any common carrier subject to this Act[.]'' The FCC has no control as to the filing frequency of complaints because such filing depends entirely upon the complainant's perception that it possesses a cause of action against a common carrier subject to the Communications Act of 1934, as amended, and it is the complainant's decision to file its complaint with the FCC. This inability to predict the number of future defendants necessitates conducting this FRFA based on the number of potential small business defendants, which is the number of common carriers that qualify as small business concerns under SBA's definition.

310. *Total Number of Telephone Companies Affected.* The decisions and rules adopted herein may have a significant effect on a substantial number of small telephone companies identified by the SBA. The United States Bureau of the Census (''Census Bureau'') reports that, at the end of 1992, there were 3,497 firms engaged in providing telephone service, as defined therein, for at least one year. This number contains a variety of different categories of carriers, including local exchange carriers, interexchange carriers, competitive access providers, cellular carriers, mobile service carriers, operator service providers, pay telephone operators, PCS providers, covered SMR providers, and resellers. It seems certain that some of those 3,497 telephone service firms may not qualify as small entities or small incumbent LECs because they are not ''independently owned and operated.'' For example, a PCS provider that is affiliated with an interexchange carrier having more than 1,500 employees would not meet the definition of a small business. It seems reasonable to conclude, therefore, that no more than 3,497 telephone service firms are small entity telephone service firms or small incumbent LECs that may be affected by this Order. We estimate below the potential defendants affected by this order by service category.

311. *Wireline Carriers and Service Providers.* The SBA has developed a definition of small entities for telecommunications companies other than radiotelephone (wireless) companies (Telephone Communications, Except Radiotelephone). The Census Bureau reports that there were 2,321 such telephone companies in operation for at least one year at the end of 1992. According to the SBA's definition, a small business telephone company other than a radiotelephone company is one employing no more than 1,500 persons. Of the 2,321 non-radiotelephone companies listed by the Census Bureau, 2,295 companies (or, all but twenty-six) were reported to have no more than 1,000 employees. Thus, at least 2,295 non-radiotelephone companies might qualify as small incumbent LECs or small entities based on these employment statistics. However, because it seems certain that some of these carriers are not independently owned and operated, this figure necessarily overstates the actual number of non-radiotelephone companies that would qualify as ''small business concerns'' under the SBA's definition. Consequently, we estimate using this methodology that there are no more than 2,295 small entity telephone communications companies (other than radiotelephone companies) that may be affected by the actions taken in this *Report and Order.*

312. *Non-LEC wireline carriers.* We next estimate more precisely the number of non-LEC wireline carriers, including interexchange carriers (''IXCs''), competitive access providers (''CAPs''), Operator Service Providers (''OSPs''), Pay Telephone Operators, and resellers that may be affected by these rules. Because neither the Commission nor the SBA has developed definitions for small entities specifically applicable to these wireline service types, the closest applicable definition under the SBA rules for all these service types is for telephone communications companies other than radiotelephone (wireless) companies. However, the TRS data provides an alternative source of information regarding the number of IXCs, CAPs, OSPs, Pay Telephone Operators, and resellers nationwide. According to our most recent data: 130 companies reported that they are engaged in the provision of interexchange services; fifty-seven companies reported that they are engaged in the provision of competitive access services; twenty-five companies reported that they are engaged in the provision of operator services; 271 companies reported that they are engaged in the provision of pay

telephone services; and 260 companies reported that they are engaged in the resale of telephone services and thirty reported being ''other'' toll carriers. Although it seems certain that some of these carriers are not independently owned and operated, or have more than 1,500 employees, we are unable at this time to estimate with greater precision the number of IXCs, CAPs, OSPs, Pay Telephone Operators, and resellers that would qualify as small business concerns under SBA's definition. Firms filing *TRS Worksheets* are asked to select a single category that best describes their operation. As a result, some long distance carriers describe themselves as resellers, some as OSPs, some as ''other,'' and some simply as IXCs. Consequently, we estimate that there are no more than 130 small entity IXCs; fifty-seven small entity CAPs; twenty-five small entity OSPs; 271 small entity pay telephone service providers; and 260 small entity providers of resale telephone service; and thirty ''other'' toll carriers that might be affected by the actions and rules adopted in this *Report and Order.*

313. *Local Exchange Carriers.* Although neither the Commission nor the SBA has developed a definition of small providers of local exchange services, we have two methodologies available to us for making these estimates. The closest applicable definition under SBA rules is for telephone communications companies other than radiotelephone (wireless) companies (SIC 4813) (Telephone Communications, Except Radiotelephone) as previously detailed. Our alternative method for estimation utilizes the data that we collect annually in connection with the Telecommunications Relay Service (''TRS''). This data provides us with the most reliable source of information of which we are aware regarding the number of LECs nationwide. According to our most recent data, 1,347 companies reported that they were engaged in the provision of local exchange services. Although it seems certain that some of these carriers are not independently owned and operated, or have more than 1,500 employees, we are unable at this time to estimate with greater precision the number of incumbent LECs that would qualify as small business concerns under SBA's definition. Consequently, we estimate that there are no more than 1,347 small LECs (including small incumbent LECs) that may be affected by the actions taken in this Report and Order.

314. *Radiotelephone (Wireless) Carriers:* The SBA has developed a definition of small entities for Wireless (Radiotelephone) Carriers. The Census Bureau reports that there were 1,176 such companies in operation for at least one year at the end of 1992. According to the SBA's definition, a small business radiotelephone company is one employing no more than 1,500 persons. The Census Bureau also reported that 1,164 of those radiotelephone companies had no more than 1,000 employees. Thus, even if all of the remaining twelve companies had more than 1,500 employees, there would still be 1,164 radiotelephone companies that might qualify as small entities if they are independently owned and operated. Although it seems certain that some of these carriers are not independently owned and operated, and, we are unable to estimate with greater precision the number of radiotelephone carriers and service providers that would both qualify as small business concerns under SBA's definition. Consequently, we estimate that there are no more than 1,164 small entity radiotelephone companies that might be affected by the actions and rules adopted in this *Report and Order.*

315. *Cellular and Mobile Service Carriers:* In an effort to further refine our calculation of the number of radiotelephone companies affected by the rules adopted herein, we consider the categories of radiotelephone carriers, Cellular Service Carriers and Mobile Service Carriers. Neither the Commission nor the SBA has developed a definition of small entities specifically applicable to Cellular Service Carriers and to Mobile Service Carriers. The closest applicable definition under SBA rules for both services is for telephone companies other than radiotelephone (wireless) companies. The most reliable source of information regarding the number of Cellular Service Carriers and Mobile Service Carriers nationwide of which we are aware appears to be the data that we collect annually in connection with the TRS. According to our most recent data, 792 companies reported that they are engaged in the provision of cellular services and 138 companies reported that they are engaged in the provision of mobile services. Although it seems certain that some of these carriers are not independently owned and operated, or have more than 1,500 employees, we are unable at this time to estimate with greater precision the number of Cellular Service Carriers and Mobile Service Carriers that would qualify as small business concerns under SBA's definition. Consequently, we estimate that there are no more than 792 small entity Cellular Service Carriers and no more than 138 small entity Mobile Service Carriers that might be affected by the actions and rules adopted in this *Report and Order.*

316. *Broadband PCS Licensees:* In an effort to further refine our calculation of the number of radiotelephone companies affected by the rules adopted herein, we consider the category of radiotelephone carriers, Broadband PCS Licensees. The broadband PCS spectrum is divided into six frequency blocks designated A through F. As set forth in 47 CFR 24.720(b), the Commission has defined ''small entity'' in the auctions for Blocks C and F as a firm that had average gross revenues of less than $40 million in the three previous calendar years. Our definition of a ''small entity'' in the context of broadband PCS auctions has been approved by SBA. The Commission has auctioned broadband PCS licenses in Blocks A through F. We do not have sufficient data to determine how many small businesses bid successfully for licenses in Blocks A and B. There were 183 winning bidders that qualified as small entities in the Blocks C, D, E, and F auctions. Based on this information, we conclude that the number of broadband PCS licensees that might be affected by the decisions in this *Report and Order* includes, at a minimum, the 183 winning bidders that qualified as small entities in the Blocks C through F broadband PCS auctions.

d. Description of Projected Reporting, Recordkeeping and other Compliance Requirements. 317. Below, we analyze the projected reporting, recordkeeping, and other compliance requirements that may apply to small entities and small incumbent LECs, and we mention some of the skills needed to meet these new requirements. Overall, we anticipate that the impact of these rules will be beneficial to small businesses and other filers. By requiring better and more complete submissions earlier in the process, these rules will reduce the need for discovery and other information filings, thereby significantly reducing the burden on small entities.

318. *Formal Complaint Intake Form.* Section 1.721 will require all complainants to complete and submit a Formal Complaint Intake Form with their complaints. The intake form requirement is designed to help complainants avoid procedural and substantive defects that might affect the staff's ability to quickly process complaints and delay full responses by defendant carriers to otherwise legitimate complaints. In addition, the completed form will enable the staff and the defendant carriers to quickly identify the specific statutory provisions

under which relief is being sought in the complaint. Because the proposed form would solicit information that would be already contained in the body of the formal complaint, no additional professional skills would be necessary to complete the form. No commenters propose alternatives to the Formal Complaint Intake Form that would both ease the burden of small businesses and accomplish the Commission's objectives.

319. *Pre-Filing Activities.* The amended rules will require a complainant to certify that it discussed the possibility of settlement with the defendant carrier's representative(s) prior to filing the complaint. Although this may delay slightly a complainant's filing of a formal complaint, we conclude that this requirement will serve to settle or narrow disputes, or facilitate the compilation and exchange of relevant documentation or other information prior to the filing of a formal complaint with the Commission. No commenters propose alternatives to the pre-filing activities proposals in the *NPRM* that would both ease the burden of small businesses and accomplish the Commission's objectives.

320. *Service.* The amended rules will require complainants to personally serve complaints directly on defendants or their registered agents for service of process, such that the defendant's time to answer will begin to run upon receipt of the complaint from the complainant. Parties will be required to serve all pleadings subsequent to the complaint by hand delivery, overnight delivery, or by facsimile transmission followed by regular U.S. mail delivery.

321. *Pleadings and Discovery.* The complaint, answer, and any authorized reply must include: (1) full statements of relevant, material facts with all such documents and affidavits that the party intends to rely on to support its claims or defenses; (2) the name and address of each individual likely to have discoverable information relevant to the disputed facts alleged in the pleadings, identifying the subjects of information; (3) a description by category and location of all documents in the possession, custody, or control of the party that are relevant to the matters in dispute; (4) an inventory of all documents and affidavits produced or identified and of all individuals identified; (5) proposed findings of fact, conclusions of law, and legal analysis. Claims based on information and belief will only be accepted if they are made in good faith and the complainant states in an affidavit why the supporting facts could not be reasonably ascertained. Amendments to complaints will be generally prohibited. The defendant must file its answer within twenty days after service of the complaint. General denials are prohibited. Replies will only be permitted to respond to affirmative defenses and failure to reply to an affirmative defense will be considered an admission of the affirmative defense. All motions to compel discovery must contain a certification that a good faith attempt to resolve the dispute was made prior to filing the motion. A party's failure to file an opposition to a motion may constitute grounds for granting the motion. Oppositions to motions must be filed within five business days of the filing of the motion. All pleadings that seek Commission orders, as well as the orders themselves, must contain proposed findings of fact and conclusions of law, with supporting legal analysis, and these submissions must be submitted in both hard copy and on computer disks in ''read only'' mode and formatted in the Commission's wordprocessing program. The parties will be required to submit a joint statement of stipulated facts, disputed facts, and key legal issues two days prior to the initial status conference. Briefs will be generally prohibited in cases in which no discovery is conducted and staff will have discretion to limit the scope and timing of any authorized briefs.

322. Self-executing discovery is eliminated and all discovery requests shall be subject to staff authorization. The complainant must file and serve ten written interrogatory requests concurrently with its complaint and the defendant must file and serve ten written interrogatory requests by the time it serves its answer. The complainant will be permitted to file and serve an additional five written interrogatory requests within three calendar days following service of the answer, provided that such interrogatory requests shall only be directed at specific factual allegations made by a defendant in support of its affirmative defenses. Additional ''extraordinary'' discovery in the form of requests for document production, depositions and additional interrogatories will be generally prohibited. The staff will consider the interrogatory requests propounded, issue rulings and direct the parties accordingly at the initial status conference and retain discretion to limit the scope of permissible interrogatories and modify or otherwise relax the discovery procedures in particular cases (including possible document production, depositions, and additional interrogatories). Staff will have discretion to require the use of scanning or other technology on an individual case basis where review of large numbers of documents is necessary.

323. *Status Conferences.* An initial status conference will take place ten business days after the filing of the answer unless otherwise ordered by the staff. Prior to the initial status conference, the parties must meet and confer regarding: (1) settlement prospects; (2) discovery; (3) issues in dispute; (4) schedules for pleadings; (5) joint statements of stipulated facts, disputed facts, and key legal issues; and (6) in a section 271(d)(6)(B) proceeding, whether the parties agree to waive the section 271(d)(6)(B) ninety-day resolution deadline. All proposals agreed to and disputes remaining after the ''meet and confer'' must be reduced to writing and submitted to the staff two business days prior to the initial status conference. Parties must submit a joint proposed order of the rulings made in a status conference within twenty-four hours of the conference, unless otherwise directed by the staff. Alternatively, if an audio recording or a stenographer's transcription of a status conference is made, the parties must submit, within three business days, unless otherwise directed by the staff, and in lieu of a joint proposed order, either a transcript of such recording and a copy of the audio recording or a copy of the stenographer's transcript.

324. These amended rules may place a greater burden on parties, including small business entities, to decide issues such as discovery within a short time frame. These rules, however, will enable the Commission to resolve many preliminary issues efficiently at the initial status conference and thereby prevent the parties from wasting resources through delay. The Commission retains the discretion to reschedule the status conference to provide more time to parties who are not under statutory deadlines.

325. *Cease, Cease and Desist Orders and Other Forms of Interim Relief.* We will not delineate specific legal and evidentiary standards for issuance of cease and cease and desist orders, but will consider such requests on a case-by-case basis.

326. In the *NPRM,* in conjunction with our proposal to establish legal and evidentiary standards for issuance of cease and cease and desist orders, we had noted that some courts consider the following factors prior to issuing interim relief: (1) likelihood of success on the merits; (2) the threat of irreparable harm absent the injunction; (3) no substantial injury to other parties; and (4) the furtherance of the public interest.

Several commenters stated that a more relaxed standard should apply, especially for resellers and small market entrants. We conclude that it is more appropriate to consider requests for interim or injunctive relief on a case-by-case basis. It is impossible to anticipate all of the various factual circumstances that could form the basis of a complaint. Similarly, the level and types of information necessary to sustain or defend against allegations of misconduct by carriers is likely to vary widely.

327. *Damages.* The Commission may exercise discretion to process a complaint in separate liability and damages complaints on its own motion in cases that do not involve one or more of the statutory resolution deadlines and may also encourage complainants to voluntarily separate their complaints into liability and damages complaints. All complaints or supplemental complaints seeking an award of damages must contain either a detailed computation of damages, including supporting documentation and materials, or an explanation why such computation is not included. The Commission may end its adjudication of damages with the determination of the sufficiency of the damages computation method submitted by the complainant, but retain jurisdiction over the proceeding to the extent that the parties are unable to agree on an exact amount of damages by applying the mandated computation method. Parties may request a fourteen day suspension of the damages proceedings, during which parties may attempt to negotiate a settlement or use ADR procedures. Staff will have discretion to require a defendant to either post a bond for or place in an escrow account the amount the Commission determines is likely to be awarded.

328. *Cross-Complaints and Counterclaims.* All counterclaims and cross-complaints will be required to be filed in separate actions. No commenters propose alternatives to the proposals for cross-complaints and counterclaims in the *NPRM* that would both ease the burden of small businesses and accomplish the Commission's objectives. Although this rule may require small businesses to litigate certain related claims as independent actions, the existence of statutory deadlines makes this necessary. Prohibiting the introduction of counterclaims and cross-complaints late in the complaint proceeding will prevent parties from losing such claims because they did not have sufficient time during which to substantiate their claims.

329. Upon an appropriate showing of financial hardship or other public interest factors, format and content requirements shall be waived. In addition, the staff will retain discretion to take into account the burden of most of these new requirements on a party that is a small business entity. Finally, these rules apply only to section 208 complaints that are filed with the Commission. Complainants wishing to assure themselves of the ability to utilize full discovery, for example, are not precluded from filing their complaints in federal district court.

e. Steps Taken to Minimize Significant Economic Impact on Small Entities, and Significant Alternatives Considered. 330. NAD proposes that consumers, especially *pro se* consumers with disabilities, be permitted to serve complaints by facsimile transmission or Internet. We have rejected NAD's proposal. We decline to authorize service by Internet at this time because we have received insufficient comments on the issue, given the significance of permitting electronic filing or service of complaint pleadings. This issue may be addressed at a later date, following implementation of procedures pursuant to our rulemaking regarding the electronic filing of documents in rulemaking proceedings. We reject NAD's proposal to permit service of complaints by facsimile transmission because we conclude that service of the complaint must be accomplished in the most reliable manner possible. Although we are permitting service of pleadings subsequent to the complaint to be by facsimile transmission, such service must be accompanied by mailed hard copies in the event of faulty transmission. Because we are requiring the defendant to submit its answer within twenty days of receipt of the complaint by the complainant, any delay or uncertainty in the receipt of the complaint would unduly infringe on the defendant's due process rights.

331. Some commenters suggest alternatives to the rules adopted regarding format and content and discovery. The *NPRM* had proposed that information and belief allegations be prohibited. ACTA, ATSI, Bechtel & Cole, KMC, MFS, and NAD propose that complainants be permitted to submit allegations based on information and belief because some small complainants and small businesses would be unable to obtain information in the possession of large defendants. We agreed with these commenters and the rule we adopt will permit information and belief allegations if they are made in good faith and the complainant states in an affidavit why the supporting facts could not be reasonably ascertained.

332. ATSI proposes that different, less rigorous complaint procedures be implemented for complainants alleging violations of section 260, pertaining to the provision of telemessaging service, because many of those complainants would be fledgling small businesses. TRA proposes special expedited procedures for resale carrier complainants, who may be dwarfed in size and resources by their underlying network service providers. For the following reasons, we decline to adopt the proposals of ATSI and TRA to establish separate complaint procedures for small business complainants. First, we conclude that having separate sets of procedures for certain types of complaints would create confusion for parties who might be unclear as to which rules to follow and might even lead to continuous and inadvertent violations of our procedural rules. Second, we conclude that separate complaint procedures would permit parties to exploit our rules by alleging certain violations in order to manipulate the time frame or level of evidentiary support required in a particular complaint. For example, a complainant alleging that a BOC has violated certain provisions of the Act might be tempted to add an allegation that the BOC has also failed to meet a condition required for approval for provision of interLATA services in violation of section 271, in order to take advantage of the ninety-day resolution deadline mandated by section 271(d)(6)(B). Third, to the extent that certain commenters contend that subjecting all complaints to expedited procedures will unnecessarily work hardships on complainants and defendants in cases without statutory deadlines, we note that the Commission will retain considerable discretion to accommodate the needs of parties in cases where no statutory deadline applies. Finally, separate sets of procedures would be administratively burdensome for the Commission. Not only would it be cumbersome to promulgate separate sets of procedures, but it would decrease staff efficiency to apply different procedural rules to different complaints.

333. Several commenters object to the complete prohibition on discovery that was mentioned in the *NPRM,* on the grounds that small complainants might be unable to obtain information in the sole possession of large defendant carriers. We have taken these concerns into account in our rule which permits parties to submit discovery requests to be ruled upon by the initial status conference. This rule gives parties,

including small businesses, an opportunity to make their cases for or against limited discovery early in the proceedings and also limits each party's ability to use discovery for delay or other purposes unrelated to the merits of the dispute. This abbreviation of the discovery process and subsequent expedited complaint resolution is necessary to enable the Commission to foster the pro-competitive policies of the 1996 Act by resolving promptly marketplace issues that could impede the development of competition in the telecommunications field.

334. Although these amended rules may place a greater burden on a small business entity to provide better legal and factual support early in the process, we conclude that it does not significantly alter the level of evidentiary and legal support that would be ultimately required of parties in formal complaint actions pursuant to the past rules. It may, however, make it more difficult for complainants, including small businesses, to gather the information needed to prevail on their complaints. Potentially higher initial costs may be somewhat offset by the prompt resolution of complaints and the avoidance of protracted and costly discovery proceedings and briefing requirements. It has been noted, for example, that the overall litigation costs of ''rocket docket'' cases in the U.S. District Court for the Eastern District of Virginia are lower than the costs of cases that take longer to resolve. Indeed, by requiring better and more complete submissions earlier in the process, these amended rules reduce the need for discovery and other information filings, thereby significantly reducing the burden on small business entities. Although the requirement for certification of attempted settlement of discovery disputes may delay slightly the filing of a motion to compel, we conclude that this requirement will serve to settle or narrow many discovery disputes.

335. CBT suggests that parties be permitted to attend status conferences by telephone conference call to decrease burdens and expenses for parties located outside of Washington, D.C. We agree and will permit parties to attend by telephone conference call.

336. No commenters propose alternatives to the damages proposals in the *NPRM* that would both ease the burden of small businesses and accomplish the Commission's objectives. Although these damages rules may require small business entities to postpone litigation of damages issues, any increased costs will be somewhat offset by the prompt resolution of the liability issues in complaints and the avoidance of protracted and costly discovery proceedings and briefing requirements in the initial proceeding. Permitting parties with a settlement period during a damages phase can contribute to parties reaching a mutually satisfactory solution. The bond and escrow account requirements would only be implemented in certain situations, based upon staff consideration of several factors, including the balance of hardships between the complainant and defendant.

337. As noted, upon an appropriate showing of financial hardship or other public interest factors, format and content requirements shall be waived. APCC and NYNEX propose specific revenue levels that would qualify a party to be eligible for a good cause waiver. GST, KMC, and MFS suggest having parties complete a ''waiver'' form which would contain a statement of financial hardship. We conclude that waiver requests shall be considered on a case-by-case-basis and should not be limited to financial hardship reasons. Such discretion to grant waivers of the format and content requirements based on financial hardship and other public interest factors will ensure, pursuant to section 208, that ''any person'' has the right to complain to the Commission about acts or omissions by a carrier that contravene the Act. For this reason, we do not agree with APCC or NYNEX that financial hardship should be determined solely based on set revenue or asset levels. The range of potential complainants under section 208 is broad and may include individuals, state commissions, municipalities, associations, and other entities of all forms and sizes. Likewise, the size and makeup of defendant carriers will vary greatly. Thus we conclude that waiver determinations should be made on a case-by-case basis. The Commission shall make every effort to apply its discretion in a consistent and fair manner to strike an appropriate balance between strict compliance with the rules and the needs of certain parties for more lenient requirements and timetables. APCC also suggests that a party that receives a good cause waiver should also be granted relief from discovery limitations. We conclude that the Commission shall have discretion to waive or modify some or all of its rules as appropriate when a waiver is granted for good cause shown.

338. MFS, GST, and USTA additionally suggest that the Commission promulgate model or form complaints or pleadings for *pro se* parties. We find that § 1.721(b) of the rules contains a suggested format for formal complaints that is clear and explicit and that no further form complaints or model pleadings for *pro se* complainants are necessary. Furthermore, the Enforcement Division of the Common Carrier Bureau currently provides, via the Internet, direct mailings, and public reference room access, a fact sheet designed to instruct consumers on how to file a formal complaint with the Commission. Finally, we conclude that the range of subjects that could conceivably be contained within a pleading is too broad for a model pleading form to be of much utility to *pro se* parties.

339. Overall, we conclude that there will be a significant positive economic impact on small entity carriers that, as a result of this rulemaking, will find their complaints resolved expeditiously. The establishment of these rules of practice and procedure shall, by providing a forum for prompt resolution of complaints of unreasonable, discriminatory, or otherwise unlawful conduct by BOCs and other telecommunications carriers, will foster robust competition in all telecommunications markets.

f. Report to Congress. 340. The Commission will send a copy of the *Amendment of Rules Governing Procedures To Be Followed When Formal Complaints Are Filed Against Common Carriers,* Report and Order, including this FRFA, in a report to be sent to Congress pursuant to the Small Business Regulatory Enforcement Fairness Act of 1996, *see* 5 U.S.C. 801 (a)(1)(A). A summary of this *Report and Order* and this FRFA will also be published in the **Federal Register**, *see* 5 U.S.C. 604(b), and will be sent to the Chief Counsel for Advocacy of the Small Business Administration.

V. Ordering Clauses

341. Accordingly, *It is ordered that* pursuant to sections 1, 4, 201–205, 208, 260, 271, 274, and 275 of the Communications Act of 1934, as amended, 47 U.S.C. 151, 154, 201–205, 208, 260, 271, 274, and 275, the policies, rules, and requirements set forth herein are adopted.

342. It is further ordered that 47 CFR Parts 0 *and 1, Are amended* as set forth below effective March 18, 1998.

343. *It is further ordered* that the Commission's Office of Public Affairs *Shall send* a copy of this *Report and Order,* including the FRFA, to the Chief Counsel for Advocacy of the Small Business Administration in accordance with paragraph 603(a) of the Regulatory Flexibility Act Pub. L. 96–354, 94 Stat. 1164, 5 U.S.C. 601, *et seq.* (1981).

344. The *Report and Order* Is adopted, and the requirements contained herein will become effective March 18, 1998.

List of Subjects

47 CFR Part 0

Organization and functions (Government agencies).

47 CFR Part 1

Communications common carriers.

Federal Communications Commission.

Magalie Roman Salas,

Secretary.

Rule Changes

Parts 0 and 1 of title 47 of the Code of Federal Regulations are amended as follows:

PART 0—COMMISSION ORGANIZATION

1. The authority citation for Part 0 continues to read as follows:

Authority: Sec. 5, 48 Stat. 1068, as amended, 47 U.S.C. 155, 225, unless otherwise noted.

2. Section 0.291 is amended by revising paragraph (d) to read as follows:

§ 0.291 Authority delegated.

* * * * *

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

* * * * *

PART 1—PRACTICE AND PROCEDURE

3. The authority citation for Part 1 continues to read as follows:

Authority: 47 U.S.C. 151, 154, 303, and 309(j) unless otherwise noted.

4. Section 1.47 is amended by revising paragraphs (b) and (d), and adding new paragraph (h) to read as follows:

§ 1.47 Service of documents and proof of service.

* * * * *

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

* * * * *

(d) Except in formal complaint proceedings against common carriers under §§ 1.720 through 1.736, 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. *See* § 1.736.

* * * * *

(h) Every common carrier subject to the Communications Act of 1934, as amended, shall designate an agent in the District of Columbia, and may designate additional agents if it so chooses, upon whom service of all notices, process, orders, decisions, and requirements of the Commission may be made for and on behalf of said carrier in any proceeding before the Commission. Such designation shall include, for both the carrier and its designated agents, a name, business address, telephone or voicemail number, facsimile number, and, if available, Internet e-mail address. The carrier shall additionally list any other names by which it is known or under which it does business, and, if the carrier is an affiliated company, the parent, holding, or management company. Such information shall be filed with the Formal Complaints and Investigations Branch of the Common Carrier Bureau. Carriers must notify the Commission within one week of any changes in their information. A paper copy of this designation list shall be maintained in the Office of the Secretary of the Commission. Service of any notice, process, orders, decisions or requirements of the Commission may be made upon such carrier by leaving a copy thereof with such designated agent at his office or usual place of residence. If a carrier fails to designate such an agent, service of any notice or other process in any proceeding before the Commission, or of any order, decision, or requirement of the Commission, may be made by posting such notice, process, order, requirement, or decision in the Office of the Secretary of the Commission.

5. Section 1.720 is amended by revising the introductory paragraph and paragraph (h) and adding paragraph (j) to read as follows:

§ 1.720 General pleading requirements.

Formal complaint proceedings are generally resolved on a written record consisting of a complaint, answer, and joint statement of stipulated facts, disputed facts and key legal issues, along with all associated affidavits, exhibits and other attachments. Commission proceedings may also require or permit other written submissions such as briefs, written interrogatories, and other supplementary documents or pleadings. All written submissions, both substantively and procedurally, must conform to the following standards:

* * * * *

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

* * * * *

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

6. Section 1.721 is amended by revising paragraphs (a)(5), (a)(6), (a)(7), (a)(8) and adding paragraphs (a)(9), (a)(10), (a)(11), (a)(12), (a)(13), (a)(14), (c) and (d) to read as follows:

§ 1.721 Format and content.

(a) * * *

(5) A complete statement of facts which, if proven true, would constitute such a violation. All material facts must be supported, pursuant to the requirements of § 1.720(c) and paragraph (a)(11) of this section, by relevant affidavits and documentation, including copies of relevant written agreements, offers, counter-offers, denials, or other related correspondence. The statement of facts shall include a detailed explanation of the manner and time period in which a defendant has allegedly violated the Act, Commission order, or Commission rule in question, including a full identification or description of the communications, transmissions, services, or other carrier conduct complained of and the nature of any injury allegedly sustained by the complainant. Assertions based on information and belief are expressly prohibited unless made in good faith and accompanied by an affidavit explaining the basis for the plaintiff's belief and why the complainant could not reasonably ascertain the facts from the defendant or any other source;

(6) Proposed findings of fact, conclusions of law, and legal analysis relevant to the claims and arguments set forth in the complaint;

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

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

(9) 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 proceeding that is concurrently before the Commission;

(10) An information designation containing:

(i) The name, address, and position of each individual believed to have firsthand knowledge of the facts alleged with particularity in the complaint, along with a description of the facts within any such individual's knowledge;

(ii) A description of all documents, data compilations and tangible things in the complainant's possession, custody, or control, that are relevant to the facts alleged with particularity in the complaint. Such description shall include for each document:

(A) The date it was prepared, mailed, transmitted, or otherwise disseminated;

(B) The author, preparer, or other source;

(C) The recipient(s) or intended recipient(s);

(D) Its physical location; and

(E) A description of its relevance to the matters contained in the complaint; and

(iii) A complete description of the manner in which the complainant identified all persons with information and designated all documents, data compilations and tangible things as being relevant to the dispute, including, but not limited to, identifying the individual(s) that conducted the information search and the criteria used to identify such persons, documents, data compilations, tangible things, and information;

(11) Copies of all affidavits, documents, data compilations and tangible things in the complainant's possession, custody, or control, upon which the complainant relies or intends to rely to support the facts alleged and legal arguments made in the complaint;

(12) A completed Formal Complaint Intake Form;

(13) Verification of the filing payment required under § 1.1105(1)(c) or (d); and

(14) A certificate of service.

* * * * *

(c) Where the complaint is filed pursuant to § 47 U.S.C. § 271(d)(6)(B), the complainant shall clearly indicate whether or not it is willing to waive the ninety-day resolution deadline contained within 47 U.S.C. 271(d)(6)(B), in accordance with the requirements of § 1.736.

(d) The complainant may petition the staff, pursuant to § 1.3, for a waiver of any of the requirements of this section. Such waiver may be granted for good cause shown.

Section 1.722 is revised to read as follows:

§1.722 Damages.

(a) In a case where recovery of damages is sought, the complaint shall contain a clear and unequivocal request for damages and appropriate allegations in support of such claim in accordance with the requirements of paragraph (c) of this section.

(b) Damages will not be awarded upon a complaint unless specifically requested. Damages may be awarded, however, upon a supplemental complaint that complies fully with the requirement of paragraph (c) of this section, based upon a finding of liability by the Commission in the original proceeding. *Provided that:*

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

(2) If recovery of damages is clearly and unequivocally requested in the original complaint, by identification of the claim giving rise to the damages and a general statement of the nature of the injury suffered, such claim for damages shall relate back to the filing date of the original formal complaint if:

(i) The complainant clearly states in the original complaint that it chooses to have liability and prospective relief issues resolved prior to the consideration of damages issues; and

(ii) The complainant files its supplemental complaint for damages within sixty days after public notice (as defined in § 1.4(b)) of a decision on the merits of the original complaint.

(3) Where a complainant voluntarily elects to seek the recovery of damages upon a supplemental complaint in accordance with the requirements of paragraph (b)(2) of this section, the Commission will resolve the liability complaint within any applicable complaint resolution deadlines contained in the Act and defer adjudication of the damages complaint until after the liability complaint has been resolved.

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

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

(2) An explanation of:

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

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

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

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

(d) Where a complainant voluntarily elects to seek the recovery of damages upon a supplemental complaint in accordance with the requirements of paragraph (b)(2) of this section, the following procedures *may* apply in the event that the Commission determines that the defendant is liable based upon its review of the original complaint:

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

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

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

(2) The Commission may, in its discretion, order the defendant either to post a bond for, or deposit into an interest bearing escrow account, a sum

equal to the amount of damages which the Commission finds, upon preliminary investigation, is likely to be ordered after the issue of damages is fully litigated, or some lesser sum which may be appropriate, provided the Commission finds that the grant of this relief is favored on balance upon consideration of the following factors:

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

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

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

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

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

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

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

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

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

8. Section 1.724 is amended by revising paragraphs (a), (b), and (c) and adding new paragraphs (f), (g), (h), (i), and (j) to read as follows:

§ 1.724 Answers.

(a) Any carrier upon which a copy of a formal complaint is served shall answer such complaint in the manner prescribed under this section within twenty 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 defenses to each claim asserted and shall 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. 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 contain proposed findings of fact, conclusions of law, and legal analysis relevant to the claims and arguments set forth in the answer.

* * * * *

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

(1) The name, address, and position of each individual believed to have firsthand knowledge of the facts alleged with particularity in the answer, along with a description of the facts within any such individual's knowledge;

(2) A description of all documents, data compilations and tangible things in the defendant's possession, custody, or control, that are relevant to the facts alleged with particularity in the answer. Such description shall include for each document:

(i) The date it was prepared, mailed, transmitted, or otherwise disseminated;

(ii) The author, preparer, or other source;

(iii) The recipient(s) or intended recipient(s);

(iv) Its physical location; and

(v) A description of its relevance to the matters in dispute.

(3) A complete description of the manner in which the defendant identified all persons with information and designated all documents, data compilations and tangible things as being relevant to the dispute, including, but not limited to, identifying the individual(s) that conducted the information search and the criteria used to identify such persons, documents, data compilations, tangible things, and information;

(g) The answer shall attach copies of all affidavits, documents, data compilations and tangible things in the defendant's possession, custody, or control, upon which the defendant relies or intends to rely to support the facts alleged and legal arguments made in the answer.

(h) The answer shall contain certification that the defendant has, in good faith, discussed or attempted to discuss, the possibility of settlement with the complainant prior to the filing of the formal complaint. Such certification shall include a brief summary of all steps taken to resolve the dispute prior to the filing of the formal complaint. If no such steps were taken, such certificate shall state the reason(s) why the defendant believed such steps would be fruitless;

(i) Where the complaint is filed pursuant to 47 U.S.C. 271(d)(6)(B), the defendant shall clearly indicate its willingness to waive the 90-day resolution deadline contained within 47 U.S.C. 271(d)(6)(B), in accordance with the requirements of § 1.736.

(j) The defendant may petition the staff, pursuant to § 1.3, for a waiver of any of the requirements of this section. Such waiver may be granted for good cause shown.

9. Section 1.725 is revised to read as follows:

§ 1.725 Cross-complaints and counterclaims.

Cross-complaints seeking any relief within the jurisdiction of the Commission against any carrier that is a party (complainant or defendant) to that proceeding are expressly 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 1.736. For purposes of this subpart, the term ''cross-complaint'' shall include counterclaims.

10. Section 1.726 is revised to read as follows:

§ 1.726 Replies.

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

(b) 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 contain proposed findings of fact, conclusions of law, and legal analysis relevant to the claims and arguments set forth in the reply.

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

(1) The name, address and position of each individual believed to have firsthand knowledge about the facts alleged with particularity in the reply, along with a description of the facts within any such individual's knowledge.

(2) A description of all documents, data compilations and tangible things in the complainant's possession, custody, or control that are relevant to the facts alleged with particularity in the reply. Such description shall include for each document:

(i) The date prepared, mailed, transmitted, or otherwise disseminated;

(ii) The author, preparer, or other source;

(iii) The recipient(s) or intended recipient(s);

(iv) Its physical location; and

(v) A description of its relevance to the matters in dispute.

(3) A complete description of the manner in which the complainant identified all persons with information and designated all documents, data compilations and tangible things as being relevant to the dispute, including, but not limited to, identifying the individual(s) that conducted the information search and the criteria used to identify such persons, documents, data compilations, tangible things, and information;

(e) The reply shall attach copies of all affidavits, documents, data compilations and tangible things in the complainant's possession, custody, or control upon which the complainant relies or intends to rely to support the facts alleged and legal arguments made in the reply.

(f) The complainant may petition the staff, pursuant to § 1.3, for a waiver of any of the requirements of this section. Such waiver may be granted for good cause shown.

Section 1.727 is amended by revising paragraphs (b), (c), (d), and (e) and adding new paragraphs (g) and (h) to read as follows:

§ 1. 727 Motions.

* * * * *

(b) All dispositive motions shall contain proposed findings of fact and conclusions of law, with supporting legal analysis, relevant to the contents of the pleading. 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. All facts relied upon in motions must be supported by documentation or affidavits pursuant to the requirements of § 1.720(c), except for those facts of which official notice may be taken.

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

(d) Oppositions to any motion shall be accompanied by a proposed order for adoption, which appropriately incorporates the basis therefor, including proposed findings of fact and conclusions of law relevant to the pleading. The proposed order shall be clearly captioned as a ''Proposed Order.'' The proposed order shall be submitted both as a hard copy and on computer disk in accordance with the requirements of § 1.734(d). Where appropriate, the proposed order format should conform to that of a reported FCC order.

(e) Oppositions to motions may be filed and served within five business days after the motion is filed and served and not after. Oppositions shall be limited to the specific issues and allegations contained in such 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 of the motion.

* * * * *

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

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

2. Section 1.729 is revised to read as follows:

§ 1.729 Discovery.

(a) A complainant may file with the Commission and serve on a defendant, concurrently with its complaint, a request for up to ten written interrogatories. A defendant may file with the Commission and serve on a complainant, during the period starting with the service of the complaint and ending with the service of its answer, a request for up to ten written interrogatories. A complainant may file with the Commission and serve on a defendant, within three calendar days of service of the defendant's answer, a request for up to five written interrogatories. Subparts of any interrogatory will be counted as separate interrogatories for purposes of compliance with this limit. Requests for 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, provided, however, that requests for interrogatories filed and served by a complainant after service of the defendant's answer shall be limited in scope to specific factual allegations made by the defendant in support of its affirmative defenses. 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 pending proceeding.

(b) Requests for interrogatories filed and served pursuant to paragraph (a) of this section shall contain a listing of the interrogatories requested and 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) A responding party shall file with the Commission and serve on the propounding party any opposition and objections to the requests for interrogatories as follows:

(1) By the defendant, within ten calendar days of service of the requests for interrogatories served simultaneously with the complaint and within five calendar days of the requests for interrogatories served following service of the answer;

(2) By the complainant, within five calendar days of service of the requests for interrogatories; and

(3) In no event less than three calendar days prior to the initial status conference as provided for in § 1.733(a).

(d) Commission staff will consider the requests for interrogatories, properly filed and served pursuant to paragraph (a) of this section, along with any objections or oppositions thereto, properly filed and served pursuant to paragraph (b) of this section, at the initial status conference, as provided for in § 1.733(a)(5), and at that time

determine the interrogatories, if any, to which parties shall respond, and set the schedule of such response.

(e) The interrogatories ordered to be answered pursuant to paragraph (d) of this section are to 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. The answers shall be filed with the Commission and served on the propounding party.

(f) A propounding party asserting that a responding party has provided an inadequate or insufficient response to Commission-ordered 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 § 1.727.

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

(1) Indexing by useful identifying information about the documents; and

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

(h) The Commission may allow additional discovery, including, but not limited to, document production, depositions and/or additional interrogatories. In its discretion, the Commission 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.

13. Section 1.730 is removed.

14. Section 1.731 is amended by revising the section heading and paragraph (a) to read as follows:

§ 1.731 Confidentiality of information produced or exchanged by the parties.

(a) Any materials generated in the course of a formal complaint proceeding may be designated as proprietary by that party if the party believes in good faith that the materials fall within an exemption to disclosure contained in the Freedom of Information Act (FOIA), 5 U.S.C. 552(b)(1) through (9). Any party asserting confidentiality for such materials shall so indicate by clearly marking each page, or portion thereof, for which a proprietary designation is claimed. If a proprietary designation is challenged, the party claiming confidentiality shall have the burden of demonstrating, by a preponderance of the evidence, that the material designated as proprietary falls under the standards for nondisclosure enunciated in the FOIA.

* * * * *

15. Section 1.732 is amended by revising paragraphs (a), (b), (c), (d), (f), and adding new paragraph (h) to read as follows:

§ 1.732 Other required written submissions.

(a) The Commission may, in its discretion, or upon a party's motion showing good cause, require the parties to file briefs summarizing the facts and issues presented in the pleadings and other record evidence.

(b) 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. Claims and defenses previously made but not reflected in the briefs will be deemed abandoned. The Commission may, in its discretion, limit the scope of any briefs to certain subjects or issues. A party shall attach to its brief copies of all documents, data compilations, tangible things, and affidavits upon which such party relies or intends to rely to support the facts alleged and legal arguments made in its brief and such brief shall contain a full explanation of how each attachment is relevant to the issues and matters in dispute. All such attachments to a brief shall be documents, data compilations or tangible things, or affidavits made by persons, that were identified by any party in its information designations filed pursuant to §§ 1.721(a)(10)(i), (a)(10)(ii), 1.724(f)(1), (f)(2), and 1.726(d)(1), (d)(2). Any other supporting documentation or affidavits that is attached to a brief must be accompanied by a full explanation of the relevance of such materials and why such materials were not identified in the information designations. These briefs shall contain the proposed findings of fact and conclusions of law which the filing party is urging the Commission to adopt, with specific citation to the record, and supporting relevant authority and analysis.

(c) In cases in which discovery is not conducted, absent an order by the Commission that briefs be filed, parties may not submit briefs. If the Commission does authorize the filing of briefs in cases in which discovery is not conducted, briefs shall be filed concurrently by both the complainant and defendant at such time as designated by the Commission staff and in accordance with the provisions of this section.

(d) In cases in which discovery is conducted, briefs shall be filed concurrently by both the complainant and defendant at such time designated by the Commission staff.

* * * * *

(f) Initial briefs shall be no longer than twenty-five pages. Reply briefs shall be no longer than ten pages. Either on its own motion or upon proper motion by a party, the Commission staff may establish other page limits for briefs.

* * * * *

(h) The parties shall submit a joint statement of stipulated facts, disputed facts, and key legal issues no later than two business days prior to the initial status conference, scheduled in accordance with the provisions of § 1.733(a).

16. Section 1.733 is amended by revising paragraphs (a) introductory text, (a)(2), (a)(4), (a)(5), (a)(6), (b), (c), (d), and (e) and adding new paragraphs (f), (g), and (h) to read as follows:

§ 1.733 Status conference.

(a) In any complaint proceeding, the Commission may, in its discretion, direct the attorneys and/or the parties to appear before it for a status conference. Unless otherwise ordered by the Commission, an initial status conference shall take place, at the time and place designated by the Commission staff, ten business days after the date the answer is due to be filed. A status conference may include discussion of:

* * * * *

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

* * * * *

(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

* * * * *

(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

(vi) In a 47 U.S.C. 271(d)(6)(B) proceeding, whether or not the parties agree to waive the 47 U.S.C. 271(d)(6)(B) 90-day resolution deadline.

(2) Parties shall submit a joint statement of all proposals agreed to and disputes remaining as a result of such meeting to Commission staff at least two business days prior to the scheduled initial status conference.

(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 interlocutory matters relevant to the conduct of a formal complaint proceeding including, *inter alia,* procedural matters, discovery, and the submission of briefs or other evidentiary materials.

(e) Parties may make, upon written notice to the Commission and all attending parties at least three business days prior to the status conference, an audio recording of the Commission staff's summary of its oral rulings. Alternatively, upon agreement among all attending parties and written notice to the Commission at least three business days prior to the status conference, the parties may make an audio recording of, or use a stenographer to transcribe, the oral presentations and exchanges between and among the participating parties, insofar as such communications are ''on-the-record'' as determined by the Commission staff, as well as the Commission staff's summary of its oral rulings. A complete transcript of any audio recording or stenographic transcription shall be filed with the Commission as part of the record, pursuant to the provisions of paragraph (f)(2) of this section. The parties shall make all necessary arrangements for the use of a stenographer and the cost of transcription, absent agreement to the contrary, will be shared equally by all parties that agree to make the record of the status conference.

(f) The parties in attendance, unless otherwise directed, shall either:

(1) Submit a joint proposed order memorializing the oral rulings made during the conference to the Commission by 5:30 pm, Eastern Time, on the business day following the date of the status conference, or as otherwise directed by Commission staff. In the event the parties in attendance cannot reach agreement as to the rulings that were made, the joint proposed order shall include the rulings on which the parties agree, and each party's alternative proposed rulings for those rulings on which they cannot agree. Commission staff will review and make revisions, if necessary, prior to signing and filing the submission as part of the record. The proposed order shall be submitted both as hard copy and on computer disk in accordance with the requirements of § 1.734(d); or

(2) Pursuant to the requirements of paragraph (e) of this section, submit to the Commission by 5:30 pm., Eastern Time, on the third business day following the status conference or as otherwise directed by Commission staff either:

(i) A transcript of the audio recording of the Commission staff's summary of its oral rulings;

(ii) A transcript of the audio recording of the oral presentations and exchanges between and among the participating parties, insofar as such communications are ''on-the-record'' as determined by the Commission staff, and the Commission staff's summary of its oral rulings; or

(iii) A stenographic transcript of the oral presentations and exchanges between and among the participating parties, insofar as such communications are ''on-the-record'' as determined by the Commission staff, and the Commission staff's summary of its oral rulings.

(g) 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.

(h) 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 and/or counsel present.

17. Section 1.734 is amended by revising paragraph (c) and adding new paragraph (d) to read as follows:

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

* * * * *

(c) The original of all pleadings and other submissions filed by any party shall be signed by the party, or by the party's attorney. The signing party shall include in the document his or her address, telephone number, facsimile number and the date on which the document was signed. Copies should be conformed to the original. Unless specifically required by rule or statute, pleadings need not be verified. The signature of an attorney or party shall be a certificate that the attorney or party has read the pleading, motion, or other paper; that to the best of his or her knowledge, information, and belief formed after reasonable inquiry, it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; and that it is not interposed solely for purposes of delay or for any other improper purpose.

(d) All proposed orders shall be submitted both as hard copies and on computer disk formatted to be compatible with the Commission's computer system and using the Commission's current wordprocessing software. Each disk should be submitted in ''read only'' mode. Each disk should be clearly labelled with the party's name, proceeding, type of pleading, and date of submission. Each disk should be accompanied by a cover letter. Parties who have submitted copies of tariffs or reports with their hard copies need not include such tariffs or reports on the disk. Upon showing of good cause, the Commission may waive the requirements of this paragraph.

18. Section 1.735 is amended by revising paragraphs (b), (d), (e), and (f) to read as follows:

§ 1.735 Copies; service; separate filings against multiple defendants.

* * * * *

(b) The complainant shall file an original copy of the complaint, accompanied by the correct fee, in accordance with part I, subpart G (*see* § 1.1105(1)(c) and (d)) and, on the same day:

(1) File three copies of the complaint with the Office of the Commission Secretary;

(2) If the complaint is filed against a carrier concerning matters within the responsibility of the Common Carrier Bureau (*see* § 0.291 of this chapter), serve two copies on the Chief, Formal Complaints and Investigations Branch, Enforcement Division, Common Carrier Bureau;

(3) If the complaint is filed against a wireless telecommunications carrier concerning matters within the responsibility of the Wireless Telecommunications Bureau (*see* § 0.331 of this chapter), serve two copies on the Chief, Compliance and Litigation Branch, Enforcement and Consumer Information Division, Wireless Telecommunications Bureau;

(4) If the complaint is filed against a carrier concerning matters within the responsibility of the International Bureau (*see* § 0.261 of this chapter), serve a copy on the Chief, Telecommunications Division, International Bureau, and serve two copies on the Chief, Formal Complaints and Investigations Branch, Enforcement Division, Common Carrier Bureau; and

(5) If a complaint is addressed against multiple defendants, pay a separate fee, in accordance with part I, subpart G (*see*

§ 1.1105(1)(c) and (d)), and file three copies of the complaint with the Office of the Commission Secretary for each additional defendant.

* * * * *

(d) 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.

(e) Upon receipt of the complaint by the Commission, the Commission shall promptly send, by facsimile transmission to each defendant named in the complaint, notice of the filing of the complaint. The Commission shall send, by regular U.S. mail delivery, to each defendant named in the complaint, a copy of the complaint. The Commission shall additionally send, by regular U.S. mail to all parties, a schedule detailing the date the answer will be due and the date, time and location of the initial status conference.

(f) All subsequent 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 by facsimile transmission followed by regular U.S. mail delivery, 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 pm, 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 pm, 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 such as, or comparable to, the US Postal Service Express Mail, United Parcel Service or Federal Express; or

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

19. Section 1.736 is added under the undesignated center heading ''Formal Complaints'' to read as follows:

§ 1.736 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 ninety-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 ninety-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 ninety-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.

20. Section 1.1105 is amended by revising (1)(c) and adding (1)(d) to read as follows:

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

Action	FCC form No.	Fee amount	Payment type code	Address
1. * * *				
c. Formal Complaints and Pole Attachment Complaints, except those relating to wireless telecommunications services, Filing Fee.	Corr. & 159	150	CIZ	Federal Communications Commission, Common Carrier Enforcement, P.O. Box 358120, Pittsburgh, PA 15251–5120.
d. Formal Complaints relating to wireless telecommunications services, including cellular telephone, paging, personal communications services, and other commercial mobile radio services, Filing Fee.	Corr. & 159	150	CIZ	Federal Communications Commission, Wireless Telecommunications Bureau, P.O. Box 358128, Pittsburgh, PA 15251–5120.

* * * * *

Note: This attachment will not be published in the Code of Federal Regulations

Attachment

[Approved by OMB; 3060–XXXX; Expires XX/XX/XX; Est. Avg. Burden: 30 min.]

Formal Complaint Intake Form—FCC Form 485

1. Case Name _____

2. Complainant's Name, Address, Phone and Facsimile Number, e-mail address (if applicable):

_____

_____

_____

_____

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

_____

4. Complaint is subject to the following statutory resolution deadlines:

_____

_____

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

_____ 5. Complaint conforms to the specifications prescribed by 47 CFR §§ 1.49, 1.734.

_____ 6. Complaint complies with the pleading requirements of 47 CFR § 1.720.

_____ 7. Complaint conforms to the format and content requirements of 47 CFR § 1.721:

_____ a. Complaint contains a complete statement of facts, including a detailed explanation of the manner in which the defendant is alleged to have violated the provisions of the Communications Act of 1934, as

amended, or Commission rules or Commission orders.

_____ b. Relevant documentation and/or affidavits are attached, including agreements, offers, counter-offers, denials, or other relevant documentation.

_____ c. If damages are sought, contains specified amount and nature of damages claimed.

_____ d. Contains certification that complainant mailed a certified letter outlining the allegations that form the basis of the complaint it anticipated filing with the Commission to the defendant carrier that invited a response within a reasonable period of time and has, in good faith, discussed or attempted to discuss, the possibility of settlement with each defendant prior to the filing of the formal complaint.

_____ e. Suit has been filed with the Commission, in another court, or government agency on the basis of the same cause of action or the same set of facts, in whole or in part. If yes, please explain:

_____

_____

_____ f. Seeks prospective relief identical to the relief proposed or at issue in a notice-and-comment proceeding that is concurrently before the Commission. If yes, please explain:

_____

_____

_____ g. Includes an information designation that contains:

_____ (1) A description by category and location, of all documents, data compilations and tangible things in the complainant's possession, custody, or control that are relevant to the facts alleged with particularity in the complaint; and

_____ (2) The name, address, and position of each individual believed to have firsthand knowledge of the facts alleged with particularity in the complaint, along with a description of the facts within any such individual's knowledge.

_____ h. Attached are copies of all documents, data compilations and tangible things in the complainant's possession, custody, or control, upon which the complainant relies or intends to rely to support the facts alleged and legal arguments made in the complaint.

_____ i. Certificate of service is attached.

_____ j. Copy of payment of $150.00 filing fee, in accordance with 47 CFR § 1.1105(1)(c), is attached.

_____ 8. If complaint is filed pursuant to 47 U.S.C. 271(d)(6)(B), complainant requests waiver of the ninety day complaint resolution deadline.

_____ 9. All reported FCC orders relied upon have been properly cited in accordance with 47 CFR § 1.14.

_____ 10. Copy of complaint has been served on defendant's registered agent for service in accordance with 47 CFR § l.47 (b), (d), (h) and 47 CFR § 1.735(d).

_____ 11. If more than ten pages, the complaint contains a table of contents as specified in 47 CFR § 1.49(b).

_____ 12. The correct number of copies, required by 47 CFR § 1.51(c), if applicable, and 47 CFR § 1.735(b) have been filed.

_____ 13. Complaint has been properly signed and verified in accordance with 47 CFR § 1.52.

_____ 14. If complaint is by multiple complainants, it conforms with the requirements of 47 CFR § 1.723(a).

_____ 15. If complaint involves multiple grounds, it complies with the requirements of 47 CFR § 1.723(b).

_____ 16. If complaint is directed against multiple defendants, it complies with the requirements of 47 CFR § 1.735 (a)–(b).

Notice: Sections 206 to 209 of the Communications Act of 1934, as amended, provide the statutory framework for rules for resolving formal complaints filed against common carriers. Section 208(a) authorizes complaints by any person ''complaining of anything done or omitted to be done by any common carrier'' subject to the provisions of the Act. Complainant must submit a completed FCC form 485 with any formal complaint to indicate that the complaint satisfies the procedural and substantive requirements under the Act and our rules. The information will be used to determine the sufficiency of the complaint and to resolve the merits of the dispute between the parties. We have estimated that each response to this collection of information will take, on average, 30 minutes. Our estimate includes the time to read the instructions, look through existing records, gather and maintain required data, and actually complete and review the form or response. If you have any comments on this estimate, or how we can improve the collection and reduce the burden it causes you, please write the Federal Communications Commission, AMD–PERM, Paperwork Reduction Project (3060–0411), Washington, D.C. 20554. We will also accept your comments via the Internet if you send them to jboley@fcc.gov. PLEASE DO NOT SEND COMPLETED FORMS TO THIS ADDRESS.

Remember—You are not required to respond to a collection of information sponsored by the Federal government, and the government may not conduct or sponsor this collection, unless it displays a currently valid OMB control number or if we fail to provide you with this notice. This collection has been assigned an OMB control number of 3060–XXXX).

The Foregoing Notice is Required by the Privacy Act of 1974, Pub. L. 93–579, December 31, 1994, 5 U.S.C. 552a(E)(3), and the Paperwork Reduction Act of 1995, Pub. L. 104–13, October 1, 1995, 44 U.S.C. 3507.

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