

163. To begin with, Section 255 imposes on manufacturers and service providers the duty to “ensure . . . that [their offerings are] accessible . . . , if readily achievable.”²⁹³ We believe that one consequence of this clear charge is that to the extent an offering subject to Section 255 is not accessible, it is incumbent upon an offeror making a “readily achievable” defense to establish facts to support the claim.

164. Of course, it should be kept in mind that “readily achievable” is not an easy concept to discern.²⁹⁴ This leads us to tentatively conclude that in addition to the factors used to determine whether an accessibility action is readily achievable,²⁹⁵ it is also appropriate to give some weight to evidence that a respondent made good faith efforts to comply with Section 255 by taking actions that would tend to increase the accessibility of its product offerings, both generally and with respect to the particular product that is the subject of the complaint.

165. Examples of the sorts of measures we would credit are set out in the Access Board guidelines and in the Appendix to the *Access Board Order*, and we need not duplicate them at length here. Briefly, however, they can be broadly categorized as:

- A self-assessment of whether accessibility is readily achievable with respect to the product or product line at issue.²⁹⁶
- External outreach efforts to ascertain accessibility needs and possible solutions, such as—
 - including individuals with disabilities in target populations of market research
 - including individuals with disabilities in product design, testing, pilot demonstrations, and product trials
 - working cooperatively with appropriate disability-related organizations

²⁹³ 47 U.S.C. §§ 255(b), 255(c).

²⁹⁴ For example, even if an accessibility solution exists, its incorporation into a particular product may not be readily achievable for a given firm. See *Access Board Order*, 63 Fed. Reg. at 5614-15 (discussing the definition of “readily achievable”).

²⁹⁵ See *supra* paras. 100-123.

²⁹⁶ An assessment with respect to the product line would be appropriate if (1) the products in the product line have similar features, functions, and prices; and (2) a product line approach increases accessibility. See *infra* paras. 168-170.

- Internal management processes to ensure early and continuing consideration of accessibility concerns as product offerings evolve, such as—
 - assignment of responsibility for ensuring consideration of access issues during product development
 - employee training on access by persons with disabilities
 - self-analysis of the degree of existing product accessibility
 - use of checklists or other objective criteria for identifying options for product accessibility
 - documentation of accessibility consideration

- User information and support, such as—
 - descriptions of product accessibility and compatibility features (in accessible modes and formats, as needed)
 - end-user product documentation (in accessible modes and formats, as needed)
 - providing usable customer support and technical support, and providing information on how to obtain such support
 - including in general product information contact methods for obtaining access information
 - disability-oriented training for customer support personnel

166. We would caution that neither we nor the Access Board views the Board's guidelines as a "laundry list" of requirements all firms subject to Section 255 must adopt.²⁹⁷ Rather, each firm should thoughtfully consider the guidelines in light of its situation and the degree to which its products have or lack accessibility features, and then adopt those which will help it provide the accessibility Section 255 requires.

167. We seek comment on these and other accessibility measures that might be suitable for equipment manufacturers. Further, while the Access Board's focus was limited to equipment manufacturers, the measures it describes generally have obvious analogs applicable to service providers.²⁹⁸ We would therefore specifically seek comment on measures suitable for service providers. In addition, we seek comment on whether firms subject to Section 255

²⁹⁷ See *supra* note 33. For example, to the extent it is not readily achievable for small companies to conduct outreach efforts, we would look favorably on their participation in outreach undertaken through consortia or trade associations.

²⁹⁸ To note just one example, the Board defines CPE accessibility as including access to user guides and product support, where readily achievable. 36 C.F.R. § 1193.33. Such information is equally applicable to telecommunications services.

should be required to provide information on how consumers can contact them regarding accessibility issues, and whether such notice should also include information regarding how to contact the Commission in case of accessibility problems, and if so, what information should be required and how it should be provided.

168. Finally, comments submitted in response to the *Notice of Inquiry* reflect a wide range of opinions on whether the obligations of Section 255 attach to individual products, or can be considered with respect to groups of similar products.²⁹⁹ Despite the apparent divergence of these views, we believe they can be reconciled by distinguishing two aspects of the product planning and development process, along lines suggested by the Access Board.

169. First, we believe that Section 255 requires manufacturers and service providers to consider providing accessibility features in each product they develop and offer. As the Board aptly notes, “the assessment as to whether it is or is not readily achievable [to provide accessibility in every product] cannot be bypassed simply because another product is already accessible.”³⁰⁰ We therefore would expect the starting point of a readily achievable defense to be a showing of how accessibility features were considered during product development.

170. Nevertheless, the ideal of full accessibility is generally limited by feasibility, expense, or practicality (individually or in combination), especially in the case of CPE offerings, where direct physical interaction between user and equipment is often extensive. In the marketplace, providers must decide what features to include and what features to omit.³⁰¹ We believe it is reasonable for an informed product-development decision to take into account

²⁹⁹ See, e.g., CEMA Comments at 9, 18; Lucent Comments at 14-15; MATP Comments at 4; Microsoft Comments at 19, 28-29; NCD Comments at 20; Nortel Comments at 6; Omnipoint Comments at 9; SHHH Comments at 6-7 (unpaginated); TIA Comments at 7; Trace Comments at 13-14 (unpaginated); AFB Reply Comments at 8, 9; CEMA Reply Comments at 14; Motorola Reply Comments at 5; NAD Reply Comments at 16; Siemens Reply Comments at 7-9; TIA Reply Comments at 10-11; Trace Reply Comments at 4-5, 10-11; Waldron Reply Comments at 5.

³⁰⁰ *Access Board Order*, 63 Fed. Reg. at 5611.

³⁰¹ Such decisions involve not only accessibility features, but other features as well. “The Board [acknowledges] that it may not be readily achievable to make every product accessible or compatible. Depending on the design, technology, or several other factors, it may be determined that providing accessibility to all products in a product line is not readily achievable.” *Id.* at 5611. As a further complication, this decision-making process carries its own costs, which can thus further limit what accessibility features are readily achievable.

the accessibility features of other functionally similar products the provider offers,³⁰² provided it can be demonstrated that such a “product line” analysis increases the overall accessibility of the provider’s offerings. This provides an additional incentive for product developers to consider the widest possible range of accessibility options and to target their resources to maximize overall accessibility, without creating a loophole for evading Section 255 obligations.

171. We seek comment on the issues raised here, and on other matters regarding the showings that would facilitate the resolution of accessibility disputes. Our aim is to provide useful guidance both for manufacturers and service providers assessing their duties under Section 255, and for all parties interested in evaluating their performance.

D. Penalties for Non-Compliance

172. Section 255, on its face, makes no special provision for penalties for manufacturers or service providers found to violate its requirements. Given the importance of the accessibility mandate, we believe that we should employ the full range of penalties available to us under the Communications Act in enforcing Section 255.³⁰³ We believe the Act provides for the following sanctions, which we would propose to apply as appropriate, given the nature and circumstances of a violation:

- Section 503(b) of the Act provides a system of forfeitures for willful or repeated “failure to comply with any of the provisions of [the] Act or of any rule, regulation, or order issued by the Commission under [the] Act”³⁰⁴
- At the end of an adjudication we would usually issue an order setting out our findings and directing prospective corrective measures. It is conceivable these orders might be the result of settlements with respondents, in the nature of consent decrees, if circumstances warrant. In any event, violation of a Section 255 order could result in the imposition of a Section 503(b) forfeiture.

³⁰² We tentatively conclude that we would consider products functionally similar if they provided similar features and functions, and were close in price.

³⁰³ In this proceeding we are considering primarily complaints brought under Section 255. As we discuss *supra* para. 33, we believe that accessibility complaints against common carriers may also be brought under Section 208.

³⁰⁴ 47 U.S.C. § 503(b)(1)(B).

- Section 312 of the Act provides for the revocation of a station license or construction permit, for the willful or repeated violation of or failure to observe any provision of the Communications Act.³⁰⁵
- Section 312 of the Act also provides for the issuance of a cease and desist order to a station licensee or construction permit holder, for the willful or repeated violation of or failure to observe any provision of the Communications Act.³⁰⁶ We believe Sections 4(i) and 208 of the Act provide a basis for such an order with respect to non-licensees.
- Sections 207 and 208 provide for the award of damages for violations by common carriers, and arguably others.³⁰⁷ We seek comment on the relationship between Sections 207 and 208 and Section 255, and between the implementing rules under each. We ask commenters to specifically address what circumstances would warrant imposition of damages where Section 255 is found to have been violated, and how such damages could be calculated.
- We also seek comment on whether there is a basis for ordering the retrofit of accessibility features into products that were developed without such features, in cases in which we determine that including them was readily achievable.

We seek comment about these and other possible remedies to enforce Section 255.

E. Additional Implementation Measures

173. We note that other existing Commission processes (and associated forms) may provide efficient vehicles for requirements that we may develop in this proceeding, such as information collection,³⁰⁸ or for providing notice to firms dealing with the Commission that they may be subject to Section 255. For example:

³⁰⁵ 47 U.S.C. § 312.

³⁰⁶ *Id.*

³⁰⁷ *See supra* para. 33.

³⁰⁸ Information collection could include data regarding company contact points (*see supra* paras. 132-134) or about products that are or are not subject to Section 255.

- The Commission's equipment authorization processes under Part 2, Subpart J of the Commission's Rules.³⁰⁹
- Equipment import documentation requirements under Part 2, Subpart K of the Rules.³¹⁰
- Licensing proceedings under Section 307 of the Act³¹¹ for various radio services used by entities subject to Section 255 obligations.
- Various common carrier filing processes.³¹²

We seek comment on whether, and if so how, these or other similar existing processes might provide additional options for fostering product accessibility. Further, given that Sections 207 and 208 of the Act provide an alternate vehicle for submitting complaints that Section 255 has been violated, we seek comment on whether we should modify the existing common carrier complaint rules³¹³ with respect to Section 255 complaints so as to incorporate the kinds of processes we have proposed for complaints filed under Section 255.

174. Finally, based upon the work of the Telecommunications Accessibility Advisory Committee, the Access Board, commenters filing responses to our *Notice of Inquiry*, parties who have made informal presentations to us since passage of the 1996 Act, and various Commission staff offices, we believe there are other measures the Commission itself might take, or might encourage others to take, to foster increased accessibility of telecommunications products. These include:

- Establishment of a clearinghouse for current information regarding telecommunications disabilities issues, including product accessibility information,³¹⁴ accessibility solutions, and so forth.

³⁰⁹ 47 C.F.R. §§ 2.901-2.1093.

³¹⁰ 47 C.F.R. §§ 2.1201-2.1207.

³¹¹ 47 U.S.C. § 307.

³¹² 47 C.F.R. §§ 1.701-1.825.

³¹³ See Sections 1.711 and 1.720-1.736 of the Commission's Rules, 47 C.F.R. §§ 1.711, 1.720-1.736. See Appendix B hereto.

³¹⁴ We note in this regard the Access Board's intention to prepare and periodically update a market monitoring report. See *Access Board Order*, 63 Fed. Reg. at 5610.

- Publication of information regarding the performance of manufacturers and service providers in providing accessible products, perhaps based on statistics generated through the fast-track and dispute resolution processes.
- Expansion of the information provided on the Internet at the Commission's Disabilities Issues Task Force Web site (<http://www.fcc.gov/df>). We seek suggestions on what additional information might be useful to consumers and industry.
- Efforts by consumer and industry groups to establish on-going informational and educational programs, product and service certification,³¹⁵ standards-setting,³¹⁶ and other measures aimed at bridging the gap between disabilities needs and telecommunications solutions. With regard to product and service certification, we seek comment regarding whether the Commission should encourage or sanction use of a seal or other imprimatur to signify that particular equipment or services comply with Section 255 requirements.
- Development of peer review processes to complement the implementation measures proposed above.

We particularly invite comment regarding the practical aspects of implementing these or other similar measures.

VI. INTERIM TREATMENT OF COMPLAINTS

175. As noted earlier, Section 255 became effective upon enactment on February 8, 1996.³¹⁷ Until we adopt procedural rules in this proceeding, complaints alleging violations of Section 255 may be filed pursuant to Section 1.41 of the Commission's Rules³¹⁸ and our other

³¹⁵ For example, industry might explore the feasibility of a program similar to the Underwriters Laboratories or Good Housekeeping seal programs.

³¹⁶ With respect to standards setting, we invite attention to Section 273(d) of the Act, 47 U.S.C. § 273(d), and seek comment on its potential impact on such efforts.

³¹⁷ See *supra* para. 8.

³¹⁸ 47 C.F.R. § 1.41.

general procedural rules.³¹⁹ Complaints against common carriers may also be filed pursuant to the common carrier complaint rules set out in Part 1, Subpart E of the Commission's Rules.³²⁰

176. We agree with parties who see no need to adopt interim rules,³²¹ because we have existing complaint processes in place which enable us to address complaints on a case-by-case basis. While we recognize it would be preferable to provide immediate, definitive guidance on specifically what is required under Section 255, we are exploring a number of pivotal issues in this Notice which will require resolution before we can offer such guidance. As a result, we decline to establish interim rules which, ultimately, may confuse parties concerning their obligations. Furthermore, because we anticipate that we will adopt procedural rules implementing Section 255 in a timely fashion, we do not think it is necessary to establish specific interim procedures.

177. Although we recognize that the proposals set forth in this Notice have no binding effect until formally adopted, they may serve as guidance to parties concerning factors we would be likely to consider in a complaint proceeding. We urge potential complainants and respondents to take particular note of our tentative interpretations of key terminology and our emphasis on accessibility analysis throughout the design process. In addition, the Access Board guidelines and the related appendix materials may be instructive to affected entities in determining their obligations under Section 255 during this interim period.

VII. PROCEDURAL MATTERS

A. Regulatory Flexibility Analysis

178. The Initial Regulatory Flexibility Analysis, as required by Section 603 of the Regulatory Flexibility Act,³²² is set forth in Appendix E. The Commission has prepared the Initial Regulatory Flexibility Analysis of the expected impact on small entities of the proposals suggested in this Notice. Written public comments are requested on the Initial Regulatory Flexibility Analysis. In order to fulfill the mandate of the Contract with America Advancement Act of 1996 regarding the Final Regulatory Flexibility Analysis, we ask a

³¹⁹ See, e.g., Sections 1.45-1.52 of the Commission's Rules, 47 C.F.R. §§ 1.45-1.52.

³²⁰ See 47 C.F.R. §§ 1.711 (common carrier complaints generally), §§ 1.716-1.718 (informal complaints), §§ 1.720-1.736 (formal complaints).

³²¹ See SWBT Comments at 2; USTA Comments at 2; AT&T Reply Comments at 5-6.

³²² 5 U.S.C. § 603.

number of questions in our Initial Regulatory Flexibility Analysis regarding the prevalence of small businesses in the affected industries.

179. Comments on the Initial Regulatory Flexibility Analysis must be filed in accordance with the same filing deadlines as comments on this Notice, but they must have a separate and distinct heading designating them as responses to the Initial Regulatory Flexibility Analysis. The Secretary shall send a copy of this Notice, including the Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration in accordance with Section 603(a) of the Regulatory Flexibility Act.³²³

B. Paperwork Reduction Analysis

180. This Notice contains proposed information collection requirements applicable to the public. As part of our continuing effort to reduce paperwork burdens, we invite the general public and the Office of Management and Budget (OMB) to take this opportunity to comment on the information collections contained in this Notice, as required by the Paperwork Reduction Act of 1995.³²⁴

181. Comments submitted on information collections contained in this Notice should address:

- Whether the collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility.
- The accuracy of the Commission's burden estimates.
- Ways to enhance the quality, utility, and clarity of the information collected.
- 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.

³²³ 5 U.S.C. § 603(a).

³²⁴ 44 U.S.C. § 3506(c)(2).

C. Ex Parte Presentations

182. This Notice is a permit-but-disclose notice and comment rulemaking proceeding. *Ex parte* presentations are permitted, provided they are disclosed as provided in Commission rules.³²⁵

D. Pleading Dates

183. Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's Rules,³²⁶ interested parties may file comments to this Notice on or before June 30, 1998, and reply comments on or before August 14, 1998. Comments and reply comments should be sent to the Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. All relevant and timely comments will be considered by the Commission before final action is taken in this proceeding. To file formally in this proceeding, participants must file an original and five copies of all comments, reply comments, and supporting comments. If participants want each Commissioner to receive a personal copy of their comments, an original and nine copies must be filed.

184. Written comments by the public on the proposed information collections are due on or before June 30, 1998. Written comments by the OMB on the proposed information collections must be submitted on or before 60 days after the date of publication of this Notice in the Federal Register. In addition to filing comments with the Secretary, a copy of any comments on the information collections contained herein should be submitted to Judy Boley, Federal Communications Commission, Room 234, 1919 M Street, N.W., Washington, D.C. 20554, or via the Internet to jboley@fcc.gov, and to Timothy Fain, OMB Desk Officer, 10236 NEOB, 725 - 17th Street, N.W., Washington, D.C. 20503, or via the Internet at fain_t@al.eop.gov. For additional information regarding the information collections contained herein, contact Judy Boley.

185. For purposes of this proceeding, we hereby waive those provisions of our rules that require formal comments to be filed on paper, and encourage parties to file comments electronically. Electronically filed comments that conform to the guidelines of this section will be considered part of the record in this proceeding and accorded the same treatment as comments filed on paper pursuant to our rules. To file electronic comments in this proceeding, you may use the electronic filing interface available on the Commission's World

³²⁵ See generally Sections 1.1202, 1.1203, and 1.1206(a) of the Commission's Rules, 47 C.F.R. §§ 1.1202, 1.1203, 1.1206(a).

³²⁶ 47 C.F.R. §§ 1.415, 1.419.

Wide Web site at <<http://dettifoss.fcc.gov:8080/cgi-bin/ws.exe/beta/ecfs/upload.hts>>. Further information on the process of submitting comments electronically is available at that location and at <<http://www.fcc.gov/e-file/>>.

186. Comments and reply comments will be available for public inspection during regular business hours in the Reference Center (Room 239) of the Federal Communications Commission, 1919 M Street, N.W., Washington, D.C. 20554. Copies of comments and reply comments are available through the Commission's duplicating contractor: International Transcription Service, Inc. (ITS, Inc.), 1231 20th Street, N.W., Washington, D.C. 20036, (202) 857-3800, TTY (202) 293-8810.

187. Alternative formats (computer diskette, large print, audio cassette and Braille) are available to persons with disabilities by contacting Martha Contee at (202) 418-0260, TTY (202) 418-2555, or at mcontee@fcc.gov, or Ruth Dancey at (202) 418-0305, TTY (202) 418-2970, or at rdancey@fcc.gov. The Notice can also be downloaded at <http://www.fcc.gov/dtf/section255.html>.

E. Further Information

188. For further information concerning this rulemaking proceeding, contact the following staff of the Wireless Telecommunications Bureau, Federal Communications Commission, Washington, D.C. 20554: John Spencer, Melinda Littell, or Susan Kimmel, Policy Division, at (202) 418-1310, or TTY at (202) 418-7233. Further information also can be obtained by sending an electronic mail message to 255nprm@fcc.gov.

VIII. ORDERING CLAUSES

189. Accordingly, IT IS ORDERED, pursuant to Sections 1, 4(i), 8(d), 8(g), 201, 202, 207, 208, 251(a)(2), 255, 303(r), 307, 312, 403 and 503(b) of the Communications Act, 47 U.S.C. §§ 151, 154(i), 158(d), 158(g), 201, 202, 207, 208, 251(a)(2), 255, 303(r), 307, 312, 403, 503(b), that NOTICE IS HEREBY GIVEN of the proposed regulatory changes described in this Notice of Proposed Rulemaking, and that COMMENT IS SOUGHT on these proposals.

190. IT IS FURTHER ORDERED that the Commission's Office of Public Affairs, Reference Operations Division, SHALL SEND a copy of this Notice of Proposed Rulemaking, including the Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION



Magalie Roman Salas
Secretary

APPENDIX A

TEXT OF SECTION 251(a) AND SECTION 255
OF THE COMMUNICATIONS ACT

Section 251. Interconnection.

(a) GENERAL DUTY OF TELECOMMUNICATIONS CARRIERS.—Each telecommunications carrier has the duty—

* * * * *

(2) not to install network features, functions, or capabilities that do not comply with the guidelines and standards established pursuant to section 255 or 256.

Section 255. Access by Persons with Disabilities.

(a) DEFINITIONS.—As used in this section—

(1) DISABILITY.—The term “disability” has the meaning given to it by section 3(2)(A) of the Americans with Disabilities Act of 1990 (42 U.S.C. 12102(2)(A)).

(2) READILY ACHIEVABLE.—The term “readily achievable” has the meaning given to it by section 301(9) of that Act (42 U.S.C. 12181(9)).

(b) MANUFACTURING.—A manufacturer of telecommunications equipment or customer premises equipment shall ensure that the equipment is designed, developed, and fabricated to be accessible to and usable by individuals with disabilities, if readily achievable.

(c) TELECOMMUNICATIONS SERVICES.—A provider of telecommunications service shall ensure that the service is accessible to and usable by individuals with disabilities, if readily achievable.

(d) COMPATIBILITY.—Whenever the requirements of subsections (b) and (c) are not readily achievable, such a manufacturer or provider shall ensure that the equipment or service is compatible with existing peripheral devices or specialized customer premises equipment commonly used by individuals with disabilities to achieve access, if readily achievable.

(e) GUIDELINES.—Within 18 months after the date of enactment of the Telecommunications Act of 1996, the Architectural and Transportation Barriers Compliance Board shall develop guidelines for accessibility of telecommunications equipment and customer premises equipment in conjunction with the Commission. The Board shall review and update the guidelines periodically.

(f) NO ADDITIONAL PRIVATE RIGHTS AUTHORIZED.—Nothing in this section shall be construed to authorize any private right of action to enforce any requirement of this section or any regulation thereunder. The Commission shall have exclusive jurisdiction with respect to any complaint under this section.

APPENDIX B

PERTINENT COMMISSION RULES

47 C.F.R., PART 1 — PRACTICE AND PROCEDURE

Selected Provisions of Subpart E — Complaints, Applications, Tariffs, and Reports Involving Common Carriers

- Sec. 1.711 Formal or informal complaints.
- Sec. 1.716 Form.
- Sec. 1.717 Procedure.
- Sec. 1.718 Unsatisfied informal complaints; formal complaints relating back to the filing dates of informal complaints.
- Sec. 1.720 General pleading requirements.
- Sec. 1.721 Format and content.
- Sec. 1.722 Damages.
- Sec. 1.723 Joinder of complainants and causes of action.
- Sec. 1.724 Answers.
- Sec. 1.725 Cross-complaints and counterclaims.
- Sec. 1.726 Replies.
- Sec. 1.727 Motions.
- Sec. 1.728 Formal complaints not stating a cause of action; defective pleadings.
- Sec. 1.729 Discovery.
- Sec. 1.730 Other forms of discovery.
- Sec. 1.731 Confidentiality of information produced or exchanged by the parties.
- Sec. 1.732 Other required written submissions.
- Sec. 1.733 Status conference.
- Sec. 1.734 Specifications as to pleadings, briefs, and other documents; subscription.
- Sec. 1.735 Copies; service; separate filings against multiple defendants.
- Sec. 1.736 Complaints filed pursuant to 47 U.S.C. § 271(d)(6)(B).

Sec. 1.711 Formal or informal complaints.

Complaints filed against carriers under section 208 of the Communications Act may be either formal or informal.

Sec. 1.716 Form.

An informal complaint shall be in writing and should contain: (a) The name, address and telephone number of the complaint, (b) the name of the carrier against which the complaint is made, (c) a complete statement of the facts tending to show that such carrier did or omitted to do anything in contravention of the Communications Act, and (d) the specific relief of satisfaction sought.

Sec. 1.717 Procedure.

The Commission will forward informal complaints to the appropriate carrier for investigation. The carrier will, within such time as may be prescribed, advise the Commission in writing, with a copy to the complainant, of its satisfaction of the complaint or of its refusal or inability to do so. Where there are clear indications from the carrier's report or from other communications with the parties that the complaint has been satisfied, the Commission may, in its discretion, consider a complaint proceeding to be closed, without response to the complainant. In all other cases, the Commission will contact the complainant regarding its review and disposition of the matters raised. If the complainant is not satisfied by the carrier's response and the Commission's disposition, it may file a formal complaint in accordance with § 1.721 of this part.

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

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

Sec. 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:

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

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

(c) Facts must be supported by relevant documentation or affidavit.

(d) Legal arguments must be supported by appropriate judicial, Commission, or statutory authority.

(e) Opposing authorities must be distinguished.

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

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

(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.

(i) All statements purporting to summarize or explain Commission orders or policies must cite, in standard legal form, the Commission ruling upon which such statements are based.

(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.

Sec. 1.721 Format and content.

- (a) A formal complaint shall contain:
- (1) The name of each complainant and defendant;
 - (2) The occupation, address and telephone number of each complainant and, to the extent known, each defendant;
 - (3) The name, address, and telephone number of complainant's attorney, if represented by counsel;
 - (4) Citation to the section of the Communications Act and/or order and/or regulation of the Commission alleged to have been violated.
 - (5) A complete statement of facts which, if proven true, would constitute such a violation. All material facts must be supported, pursuant to the requirements of § 1.720(c) of the rules and subparagraph (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 47 C.F.R. § 1.1105(1)(c) or (d);

and

(14) A certificate of service.

(b) The following format may be used in cases to which it is applicable, with such modifications as the circumstances may render necessary:

BEFORE THE FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, DC 20554

In the matter of

Complainant,

v.

Defendant.

File No. (To be inserted by the Common Carrier Bureau)

Complaint

To: The Commission.

The complainant (here insert full name of each complainant and, if a corporation, the corporate title of such complainant) shows that:

1. (Here state occupation, post office address, and telephone number of each complainant).
2. (Here insert the name, occupation and, to the extent known, address and telephone number of defendants).
3. (Here insert fully and clearly the specific act or thing complained of, together with such facts as are necessary to give a full understanding of the matter, including relevant legal and documentary support).

Wherefore, complainant asks (here state specifically the relief desired).

(Date)

(Name of each complainant)

(Name, address, and telephone number of attorney, if any)

(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 of the rules.

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

Sec. 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 subpart (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 subpart (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 complaint must be filed within, and recovery is limited to, the statutory limitations contained in § 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 the Commission's rules) 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 subpart (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 subpart (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 subpart (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.

Sec. 1.723 Joinder of complainants and causes of action.

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

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

Sec. 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.

(d) Averments in a pleading to which a responsive pleading is required, other than those as to the amount of damages, are deemed to be admitted when not denied in this responsive pleading.

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

(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 of the rules.

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

Sec. 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 §§ 1.720-1.736 of the rules. For purposes of this subpart, the term "cross-complaint" shall include counterclaims.

Sec. 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) of the rules, 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