FEDERAL COMMUNICATIONS COMMISSION

47 CFR Parts 0 and 1

[CC Docket No. 96–238; FCC 96–460]

Formal Complaints Filed Against Common Carriers

AGENCY: Federal Communications Commission.

ACTION: Proposed rule.

SUMMARY: The Commission adopted a Notice of Proposed Rulemaking (''NPRM'') seeking comment on proposed changes to the rules for processing formal complaints filed against common carriers. The NPRM proposes rules 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 proposed rules 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 eliminate or modify the discovery process.

DATES: Written comments by the public on the NPRM and the proposed and/or modified information collections are due January 6, 1996. Reply comments are due on January 31, 1996. Written comments by the Office of Management and Budget (OMB) on the proposed and/or modified information collections on or before February 24, 1997.

ADDRESSES: Comments and reply comments should be sent to the Office of the Secretary, Federal Communications Commission, 1919 M Street, N.W., Suite 222, Washington, D.C. 20554, with a copy to Anita Cheng, Federal Communications Commission, Enforcement Division, 2025 M Street, N.W., Room 6008, Washington, D.C. 20554. Parties should also file one copy of any documents filed in this docket with the Commission's copy contractor, International Transcription Services, Inc., 2100 M Street, N.W., Suite 140, Washington, D.C. 20037. In addition to filing comments with the Secretary, a copy of any comments on the information collections contained herein should be submitted to Dorothy Conway, Federal Communications Commission, Room 234, 1919 M Street, N.W., Washington, DC 20554, or via the Internet to dconway@fcc.gov and to Timothy Fain, OMB Desk Officer, 10236 NEOB, 725—17th Street, N.W., Washington, DC 20503 or via the Internet to fain__t@al.eop.gov.

FOR FURTHER INFORMATION CONTACT: Anita Cheng, Enforcement Division, Common Carrier Bureau, (202) 418–0960. For additional information concerning the information collections contained in the NPRM contact Dorothy Conway at (202) 418–0217, or via the Internet at dconway@fcc.gov.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's NPRM in CC Docket No. 96–238, adopted on November 26, 1996 and released November 27, 1996. The full text of the NPRM 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, 2100 M Street, N.W., Suite 140, Washington, D.C. 20037 (202) 857–3800.

Paperwork Reduction Act

The NPRM contains a proposed 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 the NPRM, as required by the Paperwork Reduction Act of 1995, Public Law No. 104–13. Public and agency comments are due at the same time as other comments on the NPRM; OMB notification of action is due February 24, 1997. Comments should address: (a) whether the proposed or modified information collection is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimates; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology.

OMB Control Number: 3060–0411.

Title: Formal Complaints Against Common Carriers, Sections 1.720 - 1.735.

Type of Review: Revised collection.

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

Section/Title	Number of respondents	Est. time per response (hour(s))	Total annual burden (hours)
a. Designation of Agent for Service	4,965	.5	2,482.5
b. Joint Statement of Stipulated Facts and Pleading Content Requirements	760	3	2,280
c. Orders Memorializing Rulings at Status Conferences	760	1	760
d. Complaint Intake Form	760	.5	380
Total Annual Burden:			5,902.5

Estimated cost per respondent: 0.

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 NPRM proposes to require all carriers subject to the Communications Act of 1934, as amended, to file in writing and electronically, a designation of agent for service of process with the Commission, to facilitate service of process in all Commission proceedings.

Regarding changes to the pleading requirements, the NPRM proposes that complaints must contain complete statements of relevant facts and supporting documentation; certification that each complainant has discussed the possibility of settlement with each defendant prior to filing of the complaint; copies or descriptions of documents relevant to the complaint; name, address and telephone number of all individuals with information relevant to the complaint; a computation for any damages claimed. The NPRM also proposes that answers must be filed within 20 days of service of the formal complaint and must contain complete statements of relevant facts and supporting documentation; copies or descriptions of documents

relevant to the pleadings; name, address and telephone number of all individuals with information relevant to the pleadings; and proposes to prohibit general denials. The NPRM proposes to require all pleadings to be accompanied by copies of relevant tariffs. The NPRM proposes to prohibit replies unless authorized by the Commission and when permitted, replies must contain copies or descriptions of documents relevant to the pleadings; name, address and telephone number of all individuals with information relevant to the pleadings. The NPRM proposes to require all motions seeking Commission orders must be accompanied by proposed orders in both hard copy and on computer disk. The NPRM proposes to prohibit amendments to complaints to add new claims or requests for relief. The NPRM further requires parties to submit a joint statement of proposed stipulated facts and key legal issues within 5 days after the answer is filed, as well as requiring all relevant facts and documentation to be contained in each pleading. 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 NPRM also proposes to require parties to memorialize jointly, in writing, Commission rulings made in a status conference and to submit such writing, within 24 hours, to the Commission staff person who made such rulings. This proposal would remove the burden of memorializing oral rulings made in status conferences from the Commission to the parties.

Finally, the NPRM proposes to require a complainant 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 would help to prevent the filing of procedurally insufficient complaints.

Initial Regulatory Flexibility Analysis

Pursuant to Section 603(a) of the Regulatory Flexibility Act, 5 U.S.C. Section 603(a) (1981), the Commission concluded that the proposals in the NPRM may have some economic impact on small business entities, due to the proposals to require or encourage complainants and defendants to engage in certain pre-filing activities, change service requirements, modify the form of initial pleadings, shorten filing deadlines, eliminate certain pleading opportunities that do not appear useful or necessary, and eliminate or modify the discovery process. Public comment is requested on the Initial Regulatory Flexibility Analysis set forth fully in the NPRM. These comments must be filed in accordance with the same filing deadlines set for comments on the other issues in this NPRM but they must have a separate and distinct heading designating them as responses to the Initial Regulatory Flexibility Analysis.

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

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

Description and Number of Small Entities Which May be Affected: The proposals in this proceeding may have a significant impact on a substantial number of small businesses as defined by Section 601(3) of the Regulatory Flexibility Act. Under the Small Business Act, a ''small business concern'' is one that: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) meets any additional criteria established by the Small Business Administration (SBA). SBA has defined a small business for Standard Industrial Classification (SIC) categories 4812 (Radiotelephone Communications) and 4813 (Telephone Communications, Except Radiotelephone) as those which have fewer than 1,500 employees.

1. Telephone Companies (SIC 481)

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

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

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

Local Exchange Carriers. Neither the Commission nor SBA has developed a definition of small providers of local

exchange services (LECs). The closest applicable definition under SBA rules is for telephone communications companies other than radiotelephone (wireless) companies. The most reliable source of information regarding the number of LECs nationwide of which the Commission is aware appears to be the data that it collects annually in connection with the Telecommunications Relay Service (TRS). According to the Commission's 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, the Commission is unable at this time to estimate with greater precision the number of LECs that would qualify as small business concerns under SBA's definition. Consequently, the Commission estimate that there are fewer than 1,347 small incumbent LECs that may be affected by the decisions and rules adopted in this Order.

Interexchange Carriers. Neither the Commission nor SBA has developed a definition of small entities specifically applicable to providers of interexchange services (IXCs). The closest applicable definition under SBA rules is for telephone communications companies other than radiotelephone (wireless) companies. The most reliable source of information regarding the number of IXCs nationwide of which the Commission is aware appears to be the data collected annually in connection with TRS. According to the Commission's most recent data, 97 companies reported that they were engaged in the provision of interexchange services. Although it seems certain that some of these carriers are not independently owned and operated, or have more than 1,500 employees, the Commission is unable at this time to estimate with greater precision the number of IXCs that would qualify as small business concerns under SBA's definition. Consequently, the Commission estimates that there are fewer than 97 small entity IXCs that may be affected by the decisions and rules adopted in this Order.

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

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

Pay Telephone Operators. Neither the Commission nor SBA has developed a definition of small entities specifically applicable to pay telephone operators. The closest applicable definition under SBA rules is for telephone communications companies other than radiotelephone (wireless) companies. The most reliable source of information regarding the number of pay telephone operators nationwide of which the Commission is aware appears to be the data that it collects annually in connection with the TRS. According to the Commission's most recent data, 197 companies reported that they were engaged in the provision of pay telephone services. Although it seems certain that some of these carriers are not independently owned and operated, or have more than 1,500 employees, the Commission is unable at this time to estimate with greater precision the number of pay telephone operators that would qualify as small business concerns under SBA's definition. Consequently, the Commission estimates that there are fewer than 197 small entity pay telephone operators that may be affected by the decisions and rules adopted in this Order.

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

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

would qualify as small business concerns under SBA's definition. Consequently, the Commission estimates that there are fewer than 789 small entity cellular service carriers that may be affected by the decisions and rules adopted in this Order.

Mobile Service Carriers. Neither the Commission nor SBA has developed a definition of small entities specifically applicable to mobile service carriers, such as paging companies. The closest applicable definition under SBA rules is for telephone communications companies other than radiotelephone (wireless) companies. The most reliable source of information regarding the number of mobile service carriers nationwide of which the Commission is aware appears to be the data that it collects annually in connection with the TRS. According to the Commission's most recent data, 117 companies reported that they were 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, the Commission is unable at this time to estimate with greater precision the number of mobile service carriers that would qualify under SBA's definition. Consequently, the Commission estimates that there are fewer than 117 small entity mobile service carriers that may be affected by the decisions and rules adopted in this Order.

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. The Commission's 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, B, and C. The Commission does not have sufficient data to determine how many small businesses bid successfully for licenses in Blocks A and B. There were 90 winning bidders that qualified as small entities in the Block C auction. Based on this information, the Commission concludes that the number of broadband PCS licensees affected by the decisions in this Order includes, at a minimum, the 90 winning bidders that qualified as small entities in the Block C broadband PCS auction.

At present, no licenses have been awarded for Blocks D, E, and F of broadband PCS spectrum. Therefore, there are no small businesses currently providing these services. However, a total of 1,479 licenses will be awarded in the D, E, and F Block broadband PCS auctions, which are scheduled to begin on August 26, 1996. Of the 153 qualified bidders for the D, E, and F Block PCS auctions, 105 were small businesses. Eligibility for the 493 F Block licenses is limited to entrepreneurs with average gross revenues of less than $125 million. There are 114 eligible bidders for the F Block. The Commission cannot estimate, however, the number of these licenses that will be won by small entities under this definition, nor how many small entities will win D or E Block licenses. Given that nearly all radiotelephone companies have fewer than 1,000 employees and that no reliable estimate of the number of prospective D, E, and F Block licensees can be made, the Commission assumes for purposes of this IRFA, that all of the licenses in the D, E, and F Block Broadband PCS auctions may be awarded to small entities under the Commission's rules, which may be affected by the decisions and rules adopted in this Order.

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

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

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

2. Cable System Operators (SIC 4841)

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

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

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

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

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

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

Format and Content Requirements and Other Required Submissions: The Commission proposes to require parties to submit a joint statement of stipulated facts and key legal issues five days after the answer is filed. The Commission also proposes to require all pleadings that seek Commission orders, as well as the orders themselves, to contain proposed findings of fact and conclusions of law, with supporting legal analysis, and to require these submissions to be in both hard copy and on computer disks in ''read only'' mode and formatted in WordPerfect 5.1 for Windows, or as otherwise directed by the staff in particular cases. The Commission also proposes to require the complaint, answer, and any authorized reply to include: (1) the name, address and telephone number of each individual likely to have discoverable information relevant to the disputed facts alleged in the pleadings, identifying the subjects of 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. While these proposed rules may place a greater burden on a small business entity to provide better legal and factual support early in the process, the Commission tentatively concludes that it does not significantly alter the level of evidentiary and legal support that would be ultimately required of parties in formal complaint actions pursuant to the current rules. It may, however, make it more difficult for all complainants, including small business, to gather the information needed to prevail on their complaints. Potentially higher initial costs may be somewhat offset by the prompt resolution of complaints and the avoidance of protracted and costly discovery proceedings and briefing requirements. It has been noted, for example, that the overall litigation costs of ''rocket docket'' 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, this proposed rule reduces the need for discovery and other information filings, thereby significantly reducing the burden on small business entities. The Commission seeks comment on this

tentative conclusion and any other potential impact of these proposals on small business entities.

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

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

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

Summary of Notice of Proposed Rule Making

I. Background

1. In February 1996, Congress passed and the President signed the ''Telecommunications Act of 1996'' (''1996 Act''). The 1996 Act prescribes deadlines ranging from 90 days to 5 months for the resolution of certain types of complaints against the Bell Operating Companies (''BOCs'') and other telecommunications carriers that are subject to the 1996 Act's requirements. The complaint provisions added by the 1996 Act that are relevant to this NPRM are Sections 208, 255, 260, 271, 274, and 275. This NPRM proposes rules necessary to implement those complaint resolution provisions.

II. Discussion

2. The NPRM seeks comment on changes to the Commission's current rules for processing formal complaints against carriers that would: (1) require or encourage complainants and defendants to engage in certain pre-filing activities designed to resolve or narrow issues and compile and/or exchange better factual information before resort to the complaint process; (2) eliminate delays in serving complaints on defendant carriers; (3) improve the format and content of complaints, answers and other pleadings filed by parties; (4) eliminate certain pleading opportunities that do not appear useful or necessary; and (5) limit or eliminate discovery.

A. Pre-Filing Procedures and Activities

3. The Commission asks interested parties to identify specific pre-filing activities available to potential complainants and defendants that could serve to settle or narrow disputes, or facilitate the compilation and exchange of relevant documentation or other information prior to the filing of a formal complaint with the Commission. The Commission proposes to require a complainant to certify that it discussed the possibility of settlement with the defendant carrier's representative(s) prior to filing the complaint.

4. The Commission also seeks comment on whether a committee composed of industry members would serve a needed role or useful purpose in addressing disputes over technical and other business disputes, before such disputes are brought before the Commission in the form of formal complaint actions that must be resolved under expedited procedures. Participation in a proceeding before such a committee would be strictly voluntary.

B. Service

5. The primary goal of the Commission in proposing changes to the current service procedures is to prevent the delay caused by those procedures, which implement the Section 208 requirement that the Commission serve formal complaints on defendant carriers. The Commission proposes to authorize or require a complainant to effect service simultaneously on the following persons: the defendant carrier, the Commission, and the appropriate staff office. The complainant would also be required to serve a copy of the complaint and associated attachments directly on the Chief of the division or branch responsible for handling the complaint. The Commission proposes to provide for a separate lock box at the Mellon Bank in Pittsburgh for complaints against wireless telecommunications service providers to help ensure the prompt receipt and handling of such complaints by the Wireless Telecommunications Bureau. The Commission also proposes 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.

6. In applying the requirement in Section 208 of the Act that the Commission serve the complaint on the defendant carrier, the staff routinely reviews complaints in the first instance and determines whether they meet the requirements under the Act and the Commission's rules. To accomplish this objective while eliminating the delay caused by having the Commission serve the defendant, the Commission also proposes to require a complainant to submit a completed intake form with any formal complaint as part of the filing requirement to indicate that the complaint meets the various threshold requirements for stating a cause of action under the Act and the Commission's rules. Finally, the Commission proposes to require parties to serve all subsequent pleadings by facsimile to be followed by mail delivery, or by overnight delivery.

C. Format and Content Requirements

7. The 1996 Act's complaint resolution deadlines necessitate substantial modification of the content requirements for pleadings filed in formal complaint proceedings. These

modifications must have the effect of creating complete records for the disposition of formal complaints. The Commission's overall goals are to improve the utility, quality, and content of the complaint, answer, and other filings submitted by parties in formal complaint cases and to expedite the issuance of orders that resolve procedural and substantive issues.

8. The Commission proposes to require any party to a formal complaint proceeding, in its complaint, answer, or any other pleading required during the complaint process, to include full statements of relevant facts, and to attach to such pleadings supporting documentation and affidavits of persons with knowledge of the facts stated in the pleadings. The Commission also proposes to require all pleadings that seek Commission orders, including complaints, answers, briefs, reply briefs, and motions, as well as the orders themselves, to contain findings of fact and conclusions of law, and to require these submissions to be in both hard copy and on computer disks in ''read only'' mode and formatted in WordPerfect 5.1 for Windows, or as otherwise directed by the staff in particular cases. In recognition of the fact that many of the proposed pleading requirements could be unduly burdensome on certain individuals or parties, the Commission proposes to waive format and content requirements upon an appropriate showing of financial hardship or other public interest factors. The Commission also proposes to require parties to append copies of relevant tariffs or tariff provisions that are relied upon in a pleading.

D. Answers

9. The Commission proposes to reduce the permissible time for a defendant to file an answer to a complaint from 30 to 20 days after service or receipt of the complaint.

E. Status Conferences

10. The Commission proposes to require that, unless otherwise ordered by the staff, an initial status conference take place in all formal complaint proceedings 10 business days after the defendant files its answer to the complaint. At the status conference, the Commission and parties may discuss claims and defenses, settlement possibilities, scheduling, whether discovery shall be permitted, and if so, a discovery plan. The parties would be required to memorialize jointly, in writing, any Commission rulings made during these status conferences.

F. Discovery

11. The Commission's goal in modifying the discovery rules is to limit or eliminate discovery while still permitting parties the opportunity to develop a sufficient record for resolution of their dispute. It is the Commission's belief that while the parties should continue to bear the burden of developing an adequate record, that burden should be borne earlier in the proceeding, upon the filing of the initial pleadings rather than upon discovery. Therefore the Commission seeks comment on limiting or eliminating discovery as a matter of right. It is anticipated that the proposed requirements for complaints, answers, and proposed stipulated facts will, in a majority of cases, present a sufficient factual record to enable the Commission to rely upon the initial pleadings alone to determine the outcome of the case. The Commission also seeks comment on the feasibility of allowing the parties to a complaint proceeding to agree among themselves to a cost-recovery system as a basis for facilitating the prompt identification and exchange of information.

12. The Commission also proposes to authorize the Bureau, on its own motion, to refer certain disputes to an administrative law judge for expedited hearing on factual issues.

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

13. The Commission sought comment on the legal and evidentiary standards necessary for obtaining cease or cease-and-desist orders pursuant to Title II of the Act and other forms of interim relief in Section 208 formal complaint cases, in order to expedite the issuance of cease or cease-and-desist orders within the 1996 Act's deadlines and to create more certainty regarding the legal and factual basis for granting interim relief.

H. Damages

14. The Commission's goal is to eliminate or minimize the delay endemic to the resolution of damages issues. The Commission proposes to allow bifurcation of liability and damages issues by permitting a complainant to file supplemental complaint for damages after a finding of liability. In such a case, the Commission would defer adjudication of all damages issues until after a finding of liability. This approach would enable the Commission to make a liability finding within the statutory deadline and still preserve the complainant's right to a damage award. The Commission also proposes to require that any complaint seeking an award of damages contain a detailed computation of damages, such that the Commission's adjudication of damages would end with a determination about the sufficiency of the computation formula submitted by the complainant rather than a finding as to the exact amount of damages, if any, owed to the complainant. The Commission also proposes to establish, following a finding of liability, a limited period during which the parties could engage in settlement negotiations or submit their damage claims to voluntary alternative dispute resolution mechanisms in lieu of further proceedings before the Commission. The Commission also seeks comment on a proposal to refer damages issues to an administrative law judge for decision once liability for damages has been determined by the Commission or if the parties agree to mediation by an administrative law judge. The Commission proposes to require, in certain cases after liability has been found, defendants to place a sum of money in an interest-bearing escrow account, to cover part or all of the damages for which they may be found liable.

I. Cross-Complaints and Counterclaims

15. The Commission proposes to allow compulsory counterclaims, those arising out of the same transaction or occurrence that is the subject matter of the opposing party's claim, only if the defendant files them concurrently with the answer. If a defendant fails to file such a compulsory counterclaim with its answer, it will be barred. A defendant may, but is not required to, file permissive counterclaims (those not arising out of the same transaction or occurrence) against the complainant. In addition, a defendant may, but is not required to, file cross-claims that arise out of the same transaction against co-parties. To the extent that the defendant elects to file such permissive counterclaims and cross-claims, it must file these pleadings concurrently with its answer. The defendant always has the option of filing any barred permissive counterclaims or cross-claims in a separate proceeding, provided that the statute of limitations has not run.

16. In addition, the Commission will revise its rules to clarify the applicability of filing fees to both complaints and cross-complaints.

J. Replies

17. The Commission proposes to prohibit replies to oppositions to motions. The Commission also proposes to prohibit replies to answers unless

specifically authorized by the Commission, generally upon a complainant's motion showing that there is good cause to reply to affirmative defenses that are supported by factual allegations that are different from any denials also contained in the answer.

K. Motions

18. In cases where discovery is conducted, the Commission proposes to require parties filing Motions to Compel to certify that they have made a good faith attempt to resolve the matter before filing the motion, in order to limit Commission involvement in conflicts that should be easily resolved. The Commission also proposes to make failure to file an opposition to a motion possible grounds for granting the motion, as well as shorten the deadline for filing oppositions to motions from ten to five business days. Finally, the Commission proposes to prohibit 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.

L. Confidential or Proprietary Information and Materials

19. The Commission proposes to allow parties to designate as proprietary any materials generated in the course of a formal complaint, and not limit such designation to materials produced in response to discovery. The Commission also seeks comment on whether additional protections are needed in light of the short complaint resolution deadlines in the 1996 Act and the Commission's proposals in this NPRM to eliminate certain pleading and discovery opportunities.

M. Other Required Submissions

20. The Commission proposes to require parties to submit a joint statement of stipulated facts and key legal issues five days after the answer is filed. The Commission feels that drafting such a statement would promote agreement on a significant number of the disputed facts and legal issues, and that the statement itself would serve as a guide for the Commission to determine whether discovery is necessary in a particular case. Additionally, the Commission seeks comment on streamlining the current briefing process by prohibiting the filing of briefs in cases where discovery is not conducted, by continuing to allow the parties to file briefs, but permitting the staff to limit the scope of such briefs, or by shortening the deadline by which briefs are due. The Commission proposes to limit the page length of briefs to 25 pages for initial briefs and 10 pages for reply briefs.

N. Sanctions

21. The Commission seeks comment on what sanctions and/or remedies would be necessary or appropriate to ensure full compliance with and satisfaction of the proposed rule requirements.

O. Other Matters

22. The Commission seeks comment on two matters presented by certain language in Section 271 relative to other complaint provisions in the Act. First, the Commission sought comment on its tentative conclusion that the phrase ''act on'' as used in Section 271(d)(6)(B) encompasses actions taken by the Bureau and need not necessarily be final action by the Commission. Second, the Commission noted that the 90-day complaint resolution deadline for Section 271(d) complaints applies only in the absence of an agreement otherwise by the parties to the complaint action. The Commission sought comment on specific procedures and timetables that could be employed to ensure early notification to the Commission of waivers or extension agreements under Section 271(d)(6)(B) and to avoid the unnecessary expenditure of time and resources by the staff and parties to such a complaint action.

III. Comments and Ex Parte Requirements

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

24. To file formally in this proceeding, participants must file an original and six copies of all comments, reply comments, and supporting comments. If participants want each Commissioner to receive a personal copy of their comments, they must file an original and nine copies. In addition, participants are encouraged to submit two additional copies directly to the Common Carrier Bureau, Enforcement Division, Room 6008, 2025 M Street, N.W., Washington, D.C. 20554. Comments and reply comments should be sent to the Office of the Secretary, Federal Communications Commission, 1919 M Street, N.W., Room 222, Washington, D.C. 20554. Parties should also file one copy of any documents filed in this docket with the Commission's copy contractor, International Transcription Services, Inc., 2100 M Street, N.W., Suite 140, Washington, D.C. 20037. Comments and reply comments will be available for public inspection during regular business hours in the FCC Reference Center, 1919 M Street, N.W., Room 239, Washington, D.C. 20554.

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

26. Parties are also asked to submit comments and reply comments on diskette. Such diskette submissions would be in addition to the formal filing requirements addressed above. Parties submitting diskettes should submit them to Anita Cheng, Common Carrier Bureau, Enforcement Division, Room 6008, 2025 M Street, N.W., Washington, D.C. 20554. Each disk must be a standard 3½'' magnetic disk, formatted to be readable by high-density 1.44 MB floppy drives operating under MS-DOS (3.X or later versions). Participants are encouraged to submit documents formatted in WordPerfect 5.1 for Windows. Otherwise, parties must submit the documents formatted in both ASCII and any word processing program. The diskette should be submitted in ''read only'' mode. The diskette should be clearly labelled with the party's name, proceeding, type of pleading (comment or reply comments) and date of submission. The diskette should be accompanied by a cover letter.

27. This is a non-restricted notice and comment rule making proceeding. Ex parte presentations are permitted, except during the Sunshine Agenda period, provided they are disclosed as provided in Commission rules. See

generally 47 CFR §§ 1.1202, 1.1203, and 1.1206(a).

IV. Conclusion

28. In this NPRM, the Commission proposes to amend its rules governing the filing of formal complaints to implement certain complaint provisions in the 1996 Act and establish procedures necessary to facilitate the full and fair resolution of complaints filed under such provisions within the deadlines established by the Telecommunications Act of 1996. The Commission's goal is to establish rules of practice and procedure which, by providing a forum for prompt resolution of complaints of unreasonable, discriminatory, or otherwise unlawful conduct by telecommunications carriers, will foster rather than impede robust competition in all telecommunications markets.

VI. Ordering Clauses

29. Accordingly, *it is ordered* that pursuant to Sections 1, 4, 201–205, 208, 215, 218, 220 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154, 201–205, 208, 215, 218 and 220, a *notice of proposed rulemaking* is hereby *adopted*.

30. *It is further ordered* that the Chief of the Common Carrier Bureau is delegated authority to require the submission of additional information, make further inquiries, and modify the dates and procedures if necessary to provide for a more complete record and a more efficient proceeding.

31. *It is further ordered* that the Secretary shall cause a copy of this NPRM, including the Initial Regulatory Flexibility Analysis, to be sent to the Chief Counsel for Advocacy of the Small Business Administration in accordance with Section 603(a) of the Regulatory Flexibility Act, 5 U.S.C. Section 603(a) (1981). The Secretary shall also cause a summary of this Notice to appear in the Federal Register.

List of Subjects

47 CFR Part 0

Organization and functions (Government agencies).

47 CFR Part 1

Communications common carriers.

Federal Communications Commission.

Shirley S. Suggs,

Chief, Publications Branch.

Rule Changes

Parts 0 and 1 of Title 47 of the Code of Federal Regulations are proposed to be 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 proposed to be 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 proposed to be amended by revising paragraph (b) 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.

* * * * *

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

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

§ 1.720 General pleading requirements.

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

* * * * *

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

* * * * *

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

§ 1.721 Format and content.

(a) * * *

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

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

complained of and nature of the injury sustained;

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

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

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

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

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

(12) A completed Formal Complaint Intake Form.

* * * * *

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

Section 1.722 is proposed to be amended by revising the introductory text of paragraph (b) and adding paragraphs (c) and (d) to read as follows:

§ 1.722 Damages.

* * * * *

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

* * * * *

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

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

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

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

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

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

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

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

(2) After the defendant has been determined to be liable in such bifurcated proceeding, the Commission may order the defendant to deposit into an interest bearing escrow account a sum equal to the amount of damages which it finds, upon preliminary investigation, is likely to be ordered after the issue of damages is fully litigated, or some lesser sum which may be appropriate, provided the Commission finds that the grant of this relief is favored on balance upon consideration of the following factors:

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

(ii) The likelihood that the amount of damages ordered at the conclusion of litigation will be equal to or greater than the amount deposited;

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

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

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

§ 1.724 Answers.

(a) Any carrier upon which a copy of a formal complaint is served under this subpart shall answer within 20 days of service of the formal complaint, unless otherwise directed by the Commission.

(b) The answer shall advise the complainant and the Commission fully and completely of the nature of any defense, and shall respond specifically to all material allegations of the complaint. Every effort should be made to narrow the issues in the answer. Any defendant failing to file and serve an answer within the time and in the manner prescribed by this part may be deemed in default and an order may be entered against the defendant in accordance with the allegations contained in the complaint.

(c) The defendant shall state concisely its defenses to each claim asserted and shall admit or deny the averments on which the complainant relies. If the defendant is without knowledge or information sufficient to form a belief as to the truth of an averment, the defendant shall so state and this has the effect of a denial. When a defendant intends in good faith to deny only part of an averment, the defendant shall specify so much of it as is true and shall deny only the remainder. The defendant may make its denials as specific denials of designated averments or paragraphs. General denials are prohibited.

* * * * *

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

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

in the pleadings, identifying the subjects of information.

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

9. Section 1.725 is proposed to be revised to read as follows:

§ 1.725 Cross-complaints and counterclaims.

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

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

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

10. Section 1.726 is proposed to be revised to read as follows:

§ 1.726 Replies.

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

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

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

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

§ 1. 727 Motions.

* * * * *

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

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

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

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

* * * * *

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

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

§ 1.730 [Removed]

12. Section 1.730 is proposed to be removed.

13. Section 1.731 is proposed to be 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.

* * * * *

Section 1.732 is proposed to be amended by revising paragraphs (b), (c), and (d) and adding new paragraph (h) to read as follows:

§ 1.732 Other required written submissions.

* * * * *

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

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

(d) Reply briefs may be submitted by either party within 20 days from the

date initial briefs are due. Reply briefs shall be no longer than 10 pages.

* * * * *

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

15. Section 1.733 is proposed to be amended by revising paragraphs (a) introductory text, (a)(2), (a)(4), (a)(5), (a)(6), (b), and (c) to read as follows:

§ 1.733 Status conference.

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

* * * * *

(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 any discovery;

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

* * * * *

(b) In addition to the 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.

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

* * * * *

16. Section 1.734 is proposed to be 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 that party, or by the party's attorney. The signing party shall state his or her address, telephone number, facsimile number and the date on which the document was signed. Copies should be conformed to the original. Except when otherwise specifically provided by rule or statute, pleadings need not be verified. The signature of an attorney or party shall be a certificate that the attorney or party has read the pleading, motion, or other paper; that to the best of his or her knowledge, information, and belief formed after reasonable inquiry, it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; and that it is not interposed solely for purposes of delay or for any other improper purpose.

(d) All proposed orders shall be submitted both as hard copies and on a 3.5 inch diskette formatted in an IBM compatible form using MS-DOS 5.0 and WordPerfect 5.1 software. The diskette should be submitted in ''read only'' mode. The diskette should be clearly labelled with the party's name, proceeding, type of pleading, and date of submission. The diskette should be accompanied by a cover letter. Parties who have submitted copies of tariffs or reports with their hard copies need not include such tariffs or reports on the magnetic disk.

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

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

* * * * *

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

* * * * *

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

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

* * * * *

18. Section 1.1105 is proposed to be amended by revising the entry (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/Cross-Complaints and Pole Attachment Compaints/Cross-Complaints, except those relating to wireless telecommunications services, Filing Fee..	Corr. and 159	150	.....	CIZ Federal Communication Commission, Common Carrier Enforcement, P.O. Box 358120, Pittsburgh, PA 15251-5120.

Action	FCC form No.	Fee amount	Payment type code	Address
d. Formal Complaints/Cross-Complaints relating to wireless telecommunications services, including cellualr telephone, paging, personal communications services, and other commercial mobile radio services, Filing Fee..	Corr. and 159	150	CIZ	Federal Communications Commission, Wireless Telecommunications Bureau, P.O.Box 358128, Pittsburgh, PA 15251–5120.

* * * * * *

Attachment to the Proposed Rule

FORMAL COMPLAINT INTAKE FORM

Case Name: _____

Complainant Name, Address, Phone and Facsimile Number:

_____

_____

_____

_____

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

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

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

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

____ Complaint conforms to the format and content requirements of 47 CFR § 1.721:

____ Complaint contains a detailed explanation of the manner in which the defendant violated the provisions of the Communications Act of 1934, as amended.

____ Relevant documentation and/or affidavits is attached, including agreements, offers, counter-offers, denials, or other relevant correspondence.

____ Contains certification that complainant has discussed the possibility of settlement with each defendant prior to the filing of the formal complaint.

____ Suit has been filed in another court or government agency on the basis of the same cause of action. If yes, please explain: _____

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

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

____ Contains a copy of, or a description by category and location of all documents, data compilations and tangible things in the complainant's possession, custody or control that are relevant to the disputed facts alleged with particularity in the complaint.

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

____ All reported FCC orders relied upon have been properly cited in accordance with Section 1.14 of the Commission's Rules, Title 47 Code of Federal Regulations, 47 CFR § 1.14.

____ Copies of cited non-FCC authority are attached.

____ Copy of complaint has been served on defendant's registered agent for service in accordance with [to be amended] 47 CFR § 1.47(b).

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

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

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

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

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

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

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

[FR Doc. 96–32322 Filed 12–24–96; 8:45 am]

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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 679

[Docket No. 961203339–6339–01; I.D. 111896B]

RIN 0648–AI88

Fisheries of the Exclusive Economic Zone Off Alaska; Scallop Fishery Off Alaska; Scallop Vessel Moratorium

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Proposed rule; request for comments.

SUMMARY: NMFS proposes a temporary moratorium on the entry of additional vessels into the scallop fishery off Alaska. This action would implement Amendment 2 to the Fishery Management Plan for the Scallop Fishery off Alaska (FMP) as recommended by the North Pacific Fishery Management Council (Council). The intended effect of Amendment 2 is to curtail increases in fishing capacity and to provide stability for industry while the Council develops a long-term limited access system for this fishery. This action is necessary to promote the conservation and management objectives of the FMP.

DATES: Comments must be received at the following address by February 10, 1997.

ADDRESSES: Comments on the proposed rule must be sent to Ronald J. Berg, Chief, Fisheries Management Division, Alaska Region, NMFS, P.O. Box 21668, Juneau, AK 99802, Attn: Lori J. Gravel. Copies of Amendment 2 and the Environmental Assessment/Regulatory Impact Review/Initial Regulatory Flexibility Analysis (EA/RIR/IRFA) prepared for this action may be obtained from the same address. Send comments regarding burden estimates or any other aspect of the data requirements, including suggestions for reducing the burdens, to NMFS and to the Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), Washington, D.C. 20503, Attn: NOAA Desk Officer.

FOR FURTHER INFORMATION CONTACT: Kent Lind, 907–586–7228.

SUPPLEMENTARY INFORMATION:

Management Authority

The scallop fishery in the exclusive economic zone (EEZ) off Alaska is managed by NMFS under the FMP. The FMP was prepared by the Council under the Magnuson-Stevens Act and approved by NMFS on July 26, 1995. Regulations implementing the FMP are set out at 50 CFR part 679. General regulations that also affect fishing in the EEZ are set out at 50 CFR part 600.

The Council is authorized by the Magnuson-Stevens Act to establish a system for limiting access to a fishery in order to achieve optimum yield if, in developing such a system, the Council and NMFS take into account: (1) Present participation in the fishery, (2)