

CPT ¹ HCPCS ²	MOD	Status	Description	Physician work RVUs ³	Fully imple- mented non-fa- cility PE RVUs	Year 2001 transi- tional non-fa- cility PE RVUs	Fully imple- mented facility PE RVUs	Year 2001 transi- tional facility PE RVUs	Mal- prac- tice RVUs	Fully imple- mented non-fa- cility total	Year 2001 transi- tional non-fa- cility total	Fully imple- mented facility total	Year 2001 transi- tional facility total	Global
73720		A	MRI lower extremity w/o & w/ dye	1.76	25.33	22.08	N/A	N/A	0.78	27.87	24.62	N/A	N/A	XXX
73720	26	A	MRI lower extremity w/o & w/ dye	1.76	0.62	0.65	0.62	0.65	0.08	2.46	2.49	2.46	2.49	XXX
73721		A	MRI joint of lwr extre w/o dye	1.10	11.52	11.66	N/A	N/A	0.36	12.98	13.12	N/A	N/A	XXX
73721	26	A	MRI joint of lwr extre w/o dye	1.10	0.39	0.41	0.39	0.41	0.04	1.53	1.55	1.53	1.55	XXX
73722		A	MRI joint of lwr extr w/ dye	1.33	13.82	13.82	N/A	N/A	0.43	15.58	15.58	N/A	N/A	XXX
73722	26	A	MRI joint of lwr extr w/ dye	1.33	0.48	0.48	0.48	0.48	0.04	1.85	1.85	1.85	1.85	XXX
73723		A	MRI joint of lwr extr w/o & w/ dye	1.76	25.34	25.34	N/A	N/A	0.78	27.88	27.88	N/A	N/A	XXX
73723	26	A	MRI joint of lwr extr w/o & w/ dye	1.76	0.63	0.63	0.63	0.63	0.08	2.47	2.47	2.47	2.47	XXX
74181		A	MRI abdomen w/o dye	1.22	11.56	11.77	N/A	N/A	0.41	13.19	13.40	N/A	N/A	XXX
74181	26	A	MRI abdomen w/o dye	1.22	0.43	0.52	0.43	0.52	0.04	1.69	1.78	1.69	1.78	XXX
74182		A	MRI abdomen w/ dye	1.44	13.85	13.85	N/A	N/A	0.48	15.77	15.77	N/A	N/A	XXX
74182	26	A	MRI abdomen w/ dye	1.44	0.51	0.51	0.51	0.51	0.05	2.00	2.00	2.00	2.00	XXX
74183		A	MRI abdomen w/o & w/ dye	1.89	25.38	25.38	N/A	N/A	0.85	28.12	28.12	N/A	N/A	XXX
74183	26	A	MRI abdomen w/o & w/ dye	1.89	0.67	0.67	0.67	0.67	0.09	2.65	2.65	2.65	2.65	XXX
76934	TC	D	Echo guide for chest tap	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	XXX
76938		D	Echo exam for drainage	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	XXX
76938	26	D	Echo exam for drainage	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	XXX
76938	TC	D	Echo exam for drainage	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	XXX
76960		D	Echo guidance radiotherapy	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	XXX
76960	26	D	Echo guidance radiotherapy	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	XXX
76960	TC	D	Echo guidance radiotherapy	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	XXX
87145		D	Culture typing, phage method	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	XXX
87208		D	Smear, stain and interpret	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	XXX
92525		G	Oral function evaluation	1.50	1.55	1.44	0.60	0.59	0.07	3.12	3.01	2.17	2.16	XXX
92597		G	Oral speech device eval	1.35	1.49	1.39	0.54	0.68	0.05	2.89	2.79	1.94	2.08	XXX
92598		G	Modify oral speech device	0.99	0.76	0.75	0.40	0.48	0.04	1.79	1.78	1.43	1.51	XXX
99375		G	Home health care supervision	1.73	1.40	1.40	0.63	0.63	0.06	3.19	3.19	2.42	2.42	XXX
99378		G	Hospice care supervision	1.73	1.73	1.73	0.60	0.60	0.06	3.52	3.52	2.39	2.39	XXX
A0030		I	Air ambulance service	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	XXX
A0040		I	Helicopter ambulance service	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	XXX
A0050		I	Water amb service emergency	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	XXX
A0225		D	Neonatal emergency transport	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	XXX
A0300		I	Ambulance basic non-emerg all	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	XXX
A0302		I	Ambulance basic emergency all	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	XXX
A0304		I	Amb adv non-emerg no serv all	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	XXX
A0306		I	Amb adv non-emerg spec serv all	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	XXX
A0308		I	Amb adv emerg no spec serv all	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	XXX
A0310		I	Amb adv emerg spec serv all	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	XXX
A0320		I	Amb basic non-emerg + supplies	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	XXX
A0322		I	Amb basic emerg + supplies	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	XXX
A0324		I	Adv non-emerg serv sep mileage	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	XXX
A0326		I	Adv non-emerg no serv sep mile	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	XXX
A0328		I	Adv emerg no serv sep mileage	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	XXX
A0330		I	Adv emerg spec serv sep mile	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	XXX
A0340		I	Amb basic non-emerg + mileage	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	XXX
A0342		I	Ambul basic emerg + mileage	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	XXX
A0344		I	Amb adv non-emerg no serv + mile	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	XXX
A0346		I	Amb adv non-emerg serv + mile	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	XXX
A0348		I	Adv emerg no spec serv + mile	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	XXX
A0350		I	Adv emerg spec serv + mileage	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	XXX
A0360		I	Adv non-emerg serv sep mile + sup	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	XXX

¹ CPT codes and descriptions only are copyright 2000 American Medical Association. All Rights Reserved. Applicable FARS/DFARS Apply.

² Copyright 1994 American Dental Association. All rights reserved.

³ + Indicates RVUs are not used for Medicare payment.

Authority: Section 1848 of the Social Security Act (42 U.S.C. 1395w-4).

(Catalog of Federal Domestic Assistance Program No. 93.774, Medicare—Supplementary Medical Insurance Program)

Dated: March 19, 2001.

Brian P. Burns,

Deputy Assistant Secretary for Information Resource Management.

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FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 1

[CC Docket No. 96-238; FCC 01-78]

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

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: This document resolves petitions for reconsideration and/or clarification concerning various aspects of the *First Report and Order* and *Second Report & Order* previously issued in this proceeding. As described, the Commission denies all of the petitions for reconsideration and one of the two requests for clarification

because they present issues fully addressed in the prior orders or because we reject the positions taken by the petitioners. We grant one petition for clarification to clarify that, before a matter is accepted onto the Accelerated Docket, the parties must participate in staff-supervised settlement negotiations. Moreover, on reconsideration on our own motion, we modify or clarify certain procedural rules, consistent with our experience in implementing those rules.

DATES: These rules contain information collections that have not yet been approved by OMB. The Commission will release a document in the **Federal Register** announcing the effective date of the rules. Written comments by the public on the modified information collections are due on or before April 26, 2001. Written comments by OMB on

the modified information collections are due on or before May 29, 2001.

FOR FURTHER INFORMATION CONTACT:

Gilberto de Jesus, Enforcement Bureau, at (202) 418-7331.

SUPPLEMENTARY INFORMATION: This is a summary of the Federal Communications Commission's Order on Reconsideration, FCC 01-78, in CC Docket No. 96-238, adopted on February 26, 2001, and released on March 7, 2001. The full text of this Order on Reconsideration is available for inspection and copying during normal business hours in the FCC Reference Center, Room CY-A257, 445 12th Street, SW., Washington, DC 20554. The complete text may be purchased from the Commission's copy contractor, International Transcription Service, Inc., 1231 20th Street, NW., Washington, DC 20037. The full text may also be downloaded at: <http://www.fcc.gov>. Alternative formats are available to persons with disabilities by contacting Martha Contee at (202) 418-0260 or TTY (202) 418-2555.

Synopsis of the Order on Reconsideration

(1) In the Order on Reconsideration, the Federal Communications Commission (Commission) considered petitions for reconsideration and/or clarification of various parts of the *First Report and Order* (12 FCC Rcd 22497 (1997), 63 FR 990 (January 7, 1997)) and *Second Report & Order* (13 FCC Rcd 17018 (1998), 63 FR 41433 (August 4, 1998)) issued in this proceeding. In the *First Report and Order*, the Commission adopted rules designed, *inter alia*, to expedite the resolution of formal complaints filed against common carriers pursuant to section 208 of the Communications Act of 1934, as amended ("Act"). In the *Second Report & Order*, the Commission established "Accelerated Docket" procedures to help spur the development of competition by adjudicating certain complaints within relatively short timeframes.

(2) Four parties filed petitions for reconsideration and/or clarification of various rules adopted in the *First Report and Order*. MCI Telecommunications Corp. ("MCI") requested reconsideration of certain discovery rules. AirTouch Paging ("AirTouch"), America's Carriers Telecommunication Association ("ACTA"), and MCI requested that the Commission reconsider its interpretation of the scope of the new five-month deadline for resolving certain formal complaints set forth in section 208(b)(1) of the Act. ACTA proposed additional requirements

regarding the service of complaints. AT&T Corp. ("AT&T") requested that the Commission clarify that pre-filing settlement letters should be sent to certain representatives of the defendant. Bell Atlantic Telephone Companies ("Bell Atlantic"), BellSouth Corporation ("BellSouth"), and Telecommunications Resellers Association ("TRA") filed comments in response to the petitions.

(3) One party, BellSouth, filed a petition for reconsideration and clarification of the Accelerated Docket rules adopted in the *Second Report & Order*. BellSouth requested that the Commission reconsider: (1) the rule requiring the automatic production of documents; and (2) the *ex parte* implications of the requirement for staff-supervised, pre-filing settlement negotiations. BellSouth also requested that the Commission routinely grant requests for extensions of time in Accelerated Docket proceedings. BellSouth also sought clarification on whether staff-supervised pre-filing meetings are required for all Accelerated Docket matters. SBC Communications Inc. ("SBC") and TRA filed comments in response to BellSouth's petition.

(4) *Elimination of Self-Executing Discovery*. The Commission rejects MCI's request that we reinstate the former rules granting self-executing discovery and permitting "extraordinary" discovery. The Commission fully addressed this issue in the *First Report and Order*, and neither the petitioners nor the commenters offer any new information or arguments on this issue to persuade us that our decision was erroneous. Moreover, the new discovery rules have worked well in streamlining proceedings while allowing the parties access to sufficient information to support their claims and defenses. Thus, the Commission denies MCI's petition for reconsideration of the discovery rules in formal complaint proceedings.

(5) *Section 208(b)(1) of the Act*. AirTouch, ACTA, and MCI urge the Commission to interpret section 208(b)(1) of the Act so that the five-month deadline provided therein will apply to all formal complaints filed pursuant to section 208, not just to formal complaints concerning the lawfulness of tariff provisions. The Commission fully addressed this issue in the *First Report and Order*, and neither the petitioners nor the commenters offer any new arguments or information to persuade us that our decision was erroneous. Thus, the Commission denies petitioners' request for reconsideration of our interpretation of section 208(b)(1).

(6) *Rules Regarding Service of Process*. The Commission adopted rules requiring each carrier to designate an agent in the District of Columbia to accept service of Commission process on behalf of the carrier, and permitting each carrier to designate other service agents outside the District of Columbia. Moreover, the Commission adopted a rule requiring the complainant to serve the complaint by hand delivery on either the named defendant or one of the named defendant's registered agents. ACTA maintains that the complaint should also be served, by overnight mail or facsimile, on any other designated service agents. We decline to adopt such a requirement. Additional notification is not necessary to enable defendants to file answers in a timely manner and would impose on a complainant an unduly burdensome task of identifying and serving agents throughout the country. Thus, the Commission denies ACTA's petition for reconsideration of our rules regarding service of process.

(7) *Automatic Production of Documents in Accelerated Docket Proceedings*. BellSouth, supported by SBC, requests reconsideration of the Accelerated Docket rules requiring automatic production of documents, especially by defendants. The Commission fully addressed this issue in the *Second Report & Order*, and the parties offer no new information or arguments to persuade us that the decision was erroneous. Thus, the Commission denies reconsideration of the rules requiring automatic production of documents in Accelerated Docket proceedings.

(8) *Extensions of Time in Accelerated Docket Proceedings*. We reject BellSouth's and SBC's contention that the Commission should routinely grant requests for extensions of time in Accelerated Docket proceedings. Parties should not ordinarily need extensions of time, because they should have a sufficient amount of time during pre-filing discussions to begin preparing their cases in the event a complaint subsequently is filed on the Accelerated Docket. Routinely granting extensions of time in Accelerated Docket proceedings would eviscerate the expedited mechanism that the Commission crafted. In any exceptional case that turns out to be unexpectedly complicated, the staff has discretion to grant extensions of time or modify the process in other respects. Thus, the Commission denies reconsideration of the time requirements for the Accelerated Docket.

(9) *Ex Parte Rules and Accelerated Docket Pre-Filing Procedures*. We reject BellSouth's and SBC's concerns

regarding the propriety of “*ex parte*” discussions in the pre-filing stage of cases being considered for the Accelerated Docket. As the Commission explained in the *Second Report & Order*, our *ex parte* rules restrict the actions of parties only after a complaint has been filed. Staff-supervised settlement discussions that take place prior to the filing of a complaint do not implicate the *ex parte* rules. Moreover, staff involvement during pre-filing meetings will not taint the complaint process or have a chilling effect on settlement discussions. It is the Commission’s role to act as an impartial entity during all formal complaint proceedings, including Accelerated Docket proceedings. We also are not persuaded by BellSouth’s argument that staff members who have contact with parties during the pre-filing phase of a proceeding could later become witnesses subject to deposition. Staff would not permit any party to abuse the Commission’s rules by attempting to introduce into complaint proceedings individual representations made in settlement discussions. Thus, the Commission denies reconsideration of the pre-filing requirements for the Accelerated Docket.

(10) *AT&T’s Petition for Clarification of the Formal Complaint Rules Regarding Pre-Filing Letters*. In the *First Report and Order*, the Commission required complainants to engage in good faith settlement discussions with the defendant prior to filing a formal complaint, including mailing to the defendant a certified letter outlining the allegations that form the basis of the complaint it anticipates filing with the Commission. AT&T argues that the Commission should clarify that the pre-filing letter must be sent to: (1) The defendant’s registered agent in the District of Columbia, and (2) the defendant’s representative that, to the best of the complainant’s knowledge, has decision making authority over the disputed matters or has been designated as the defendant’s attorney regarding those matters. We decline to clarify the rules in such a manner. The Commission deliberately left the determination of the appropriate recipient of the letter to the discretion of the complainant, who must exercise such discretion reasonably and in good faith. If the complainant does know who the defendant has designated as the decision maker or the attorney regarding the disputed matter, we would generally expect the complainant to serve that person. We also share TRA’s concerns that AT&T’s proposal could make a complainant’s choice of correspondent a

matter of routine contention. We do believe, however, that our service rule regarding pre-filing settlement letters should mirror our rule regarding service of complaints. The latter rule permits a complainant to serve a complaint on either “the named defendant or one of the named defendant’s registered agents for service of process * * *.” (47 CFR 1.735(d)). Therefore, to promote consistency and thereby minimize confusion, we amend § 1.721(a)(8) of our rules to permit a complainant to serve the pre-filing settlement letter on the defendant carrier or one of the defendant’s registered agents for service of process. (See § 1.721(a)(8)).

(11) *BellSouth’s Petition for Clarification Regarding Accelerated Docket Pre-Filing Settlement Conferences*. We grant BellSouth’s request for clarification of whether every Accelerated Docket proceeding must involve staff-supervised, pre-filing settlement conferences. We clarify that, before a matter is accepted onto the Accelerated Docket, the parties must participate in staff-supervised settlement negotiations. This does not mean, however, that all requests for inclusion on the Accelerated Docket will result in a staff-supervised settlement conference. Instead, only those matters actually under active consideration for inclusion on the Accelerated Docket must ultimately have such a conference. We also strongly encourage disputing parties to contact Commission staff to assist in the resolution of matters prior to filing any formal complaint, regardless of whether the parties wish to have such complaint placed on the Accelerated Docket. Thus, the Commission grants BellSouth’s Petition for Clarification regarding Accelerated Docket pre-filing settlement conferences.

(12) The Commission has closely monitored the effectiveness of the amended formal complaint rules. We believe, on reconsideration on our own motion, that a few additional modifications to the rules are appropriate to promote further the expedited resolution of formal complaints.

(13) *The Rule Governing Answers Is Modified*. We amend § 1.724(d) of our rules, which currently states that “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.” (47 CFR 1.724 (d)(emphasis added).) We find that requiring a defendant to respond specifically to all averments in a complaint, including those regarding damage amounts, will enhance the

ability of Commission staff to resolve complaints more efficiently. Accordingly, we amend § 1.724(d) to specify that defendants are required to respond to any and all averments raised in both initial and supplemental complaints, including averments relating to damage amounts. Failure by the defendant to respond to any averment in the complaint or supplemental complaint will result in the averment being admitted as true. In addition, we amend § 1.724(b) to require that denials based on information and belief are expressly prohibited unless made in good faith and accompanied by an affidavit explaining the basis for the defendant’s belief and why the defendant could not reasonably ascertain the facts from the complainant or any other source. (See § 1.724(b).) This new requirement regarding denials in answers mirrors an existing requirement regarding averments in complaints. (47 CFR 1.721(a)(5).) This will promote diligence on defendants’ part in gathering all of the relevant facts and documentation, and thereby expedite the development of a complete and substantial record on which the Commission can resolve the dispute.

(14) *The Rule Governing Replies Is Modified*. We amend § 1.726(a) of our rules, which currently permits a complainant to include in a reply only “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.” (47 CFR 1.726(a)) (emphasis added). We find that permitting a complainant to include in the reply both factual statements and legal arguments that respond to both the factual allegations and the legal arguments made by a defendant in support of affirmative defenses will enhance the ability of Commission staff to resolve complaints more efficiently. Therefore, we amend § 1.726(a) to permit complainants to include in replies both factual statements and legal arguments that respond to both the factual allegations and the legal arguments made by defendants in support of their affirmative defenses. (See § 1.726(a).)

(15) *The Payment Verification Requirement Is Modified*. In the *First Report and Order*, the Commission adopted a rule requiring the complainant to include with the complaint a “verification of the filing payment * * *.” (12 FCC Rcd at 22524, ¶ 56). To implement this rule, the Commission explained that a complainant should attach to its complaint a photocopy of its fee payment. We have found, however, that this photocopy requirement does not

serve its verification purpose in all cases. This is largely because, where the complainant pays by wire transfer or with a credit card, there exists no paper record of the transaction that can be contemporaneously photocopied. Thus, in order to create a uniform method of payment verification that will work in all cases, we amend the payment verification requirement set forth in the *First Report and Order* and § 1.721(a)(13) as follows: The complaint shall include a declaration, under penalty of perjury, by complainant or complainant's counsel describing the amount, method, and date of the complainant's payment of the filing fee, and the complainant's 10-digit FCC Registration Number (FRN), if any. (See § 1.721(a)(13).)

(16) *The Rules Governing Supplemental Complaints for Damages Are Modified.* Our rules enable complainants, and Commission staff under certain circumstances, to bifurcate formal complaints into two separate complaints: (1) An initial complaint for liability and any prospective relief, and (2) a supplemental complaint for damages. Our experience in implementing the rules regarding supplemental complaints for damages indicates that certain revisions are appropriate to clarify and modify how the supplemental complaint process operates.

(17) First, we amend § 1.722 of our rules (47 CFR 1.722), to state expressly what the Commission concluded in the *First Report and Order*: In a proceeding to which no statutory deadline applies, the Commission may, on its own motion, bifurcate the proceeding so that only liability and prospective relief issues are before the Commission initially, and damage issues come before the Commission only if the complainant prevails and later chooses to initiate a separate proceeding seeking damages. (See § 1.722(c).) Consistent with that amendment, we further amend § 1.722 of our rules to clarify that the procedures set forth therein apply to all supplemental complaints for damages, regardless of whether bifurcation was made upon the Commission's own motion or the complainant's request. (See § 1.722(d) through 1.722(i).)

(18) Second, § 1.722(b)(1) presently permits a prevailing complainant to file a subsequent complaint for damages arising from the same facts alleged in the first complaint, even if the first complaint made no mention whatsoever of any intent to seek damages. Upon further consideration of this provision, we believe that it should be stricken, because it conflicts with the principles

of efficiency, notice, and fairness to defendants that underlie the doctrine of *res judicata*. To promote those principles, defendants and the Commission should know as soon as possible whether a dispute may ultimately involve a resolution of damages. Therefore, we amend § 1.722 of our rules to state that, in order to preserve the option of filing a supplemental complaint for damages, a complainant must include in its initial complaint a notice of intent to file such a supplemental complaint, in accordance with the requirements of our rules. (See § 1.722(d).)

(19) Third, we amend § 1.722 to clarify that, except where otherwise stated, the rules governing initial formal complaint proceedings govern supplemental complaint proceedings, as well. (See § 1.722(j)). Fourth, our experience in applying § 1.722 of our rules reveals that its wording can be improved. Accordingly, we modify much of the language of § 1.722, intending to clarify rather than change its meaning (except the intended changes described previously). (See § 1.722(a)–(i).)

(20) Other rules require revisions, as well, because our experience with supplemental complaints indicates that some confusion exists as to whether, and to what extent, the format and content requirements for initial complaints apply to supplemental complaints for damages. We now recognize that our current rules seek more and different information than is needed to evaluate a supplemental complaint for damages. Accordingly, we amend, in relevant part, §§ 1.721 and 1.735 of our rules to specify what is required in supplemental damage complaints. As described further, these changes will streamline the supplemental complaint process by eliminating unnecessary or redundant information, reducing paperwork, and clarifying that additional filing fees are not required.

(21) We amend § 1.735 of our rules to make clear that (1) a filing fee need not be paid in conjunction with filing a supplemental complaint for damages pursuant to § 1.722 of our rules, and (2) a complainant may serve a supplemental complaint for damages in accordance with § 1.735(f) rather than § 1.735(d) of our rules. (See § 1.735(g).) Moreover, we amend the rules so that §§ 1.720(b) and 1.721(a)(4), (5), (8), (9), (12), and (13) do not apply to supplemental complaints for damages filed pursuant to § 1.722 of our rules. (See § 1.721(e)(i).) Thus, supplemental complaints for damages are not required to include the following: (1) A full

description of the statutory violation described previously in the initial complaint; (2) a statement regarding whether a separate action has been filed with the Commission, any court, or another government agency based on the same claim; (3) a formal complaint intake form; or (4) verification of the payment of a filing fee.

(22) We further amend our rules to make clear, however, that a supplemental complaint for damages filed pursuant to § 1.722 must provide a complete statement of facts which, if proven true, would support the complainant's calculations of damages in each category of damages for which recovery is sought. This statement of facts must include a detailed explanation of all matters relevant to the calculation of damages and the nature of any injury alleged to have been sustained by the complainant. Moreover, relevant affidavits and documentation must support this statement of facts. (See § 1.721(e)(ii).)

(23) In addition, although we change the rules so that the requirement of pre-filing settlement efforts set forth in § 1.721(a)(8) does not apply to supplemental complaints, we add a new rule imposing essentially the same requirement on supplemental complainants tailored to the particular deadlines applicable to supplemental complaints. Specifically, the complainant must mail to each defendant, within 30 days of the release of the order on liability, a certified letter describing, *inter alia*, the basis for the damages to be sought in a supplemental complaint. (See § 1.721(e)(iii).) We believe that the order on liability usually will give the parties a strong incentive to resolve on their own any outstanding damages issues, and a 30-day deadline for formally initiating settlement efforts should ensure that the parties have sufficient time to reach a resolution before the 60-day deadline for filing a supplemental complaint. Finally, we note that supplemental complaints must continue to meet the requirements of § 1.722 of our rules.

(24) *The Parties' Initial Pleadings Must Contain All of the Parties' Supporting Facts, Legal Arguments, and Documentation.* In the *First Report and Order*, the Commission explained at length that, under the amended formal complaint rules, the parties' initial pleadings should not merely provide bare notice of their claims and defenses, but rather should set forth in detail all of the parties' supporting facts, legal arguments, affidavits, and documentation. We reiterate that point here. Complaints and answers filed at the Commission pursuant to section 208

of the Act should not resemble their counterparts filed in federal courts under Fed. R. Civ. P. 8. Instead, if anything, complaints and answers filed here should resemble a *combination* of complaints/answers filed under Fed. R. Civ. P. 8, motions to dismiss (and oppositions thereto) filed under Fed. R. Civ. P. 12(b), and motions for summary judgment (and oppositions thereto) filed under Fed. R. Civ. P. 56. In other words, the parties' initial pleadings should contain every allegation, fact, argument, affidavit, and supporting paper that the parties can muster at that time. Moreover, the parties should support each and every factual statement in their initial pleadings (and in their replies and briefs) with a specific citation to an affidavit(s) and to all other relevant portions of the record. When parties submit such comprehensive initial pleadings, the Commission can resolve the parties' disputes more expeditiously.

(25) *Certain Parties' Practices in Submitting Answers Merit a Few Additional Observations.* First, our rules require the answer to "admit or deny the averments on which the complainant relies and state in detail the basis for admitting or denying such averment." (47 CFR 1.724(b) (emphasis added).) Bald denials and/or refraining from responding to a complaint's averment on the grounds that the averment asserts a legal conclusion are improper. Denials in answers must be accompanied by a thorough explanation of their basis; and if a complaint asserts a legal conclusion, then the answer's corresponding denial should fully explain why the legal conclusion is erroneous. Moreover, in its answer, a defendant must provide affidavits (as well as all supporting documents, data compilations, and tangible things) to support all of the facts on which the answer relies.

(26) *Motions To Dismiss Are Rarely Necessary.* Some defendants file motions to dismiss as separate pleadings. We find this practice of filing a separate motion to dismiss to be unnecessary in virtually all cases. The grounds for a motion to dismiss ordinarily should be raised in the answer alone rather than in a separate pleading.

(27) *The Joint Statement Filed Before the Initial Status Conference Must Be Detailed and Comprehensive.* Parties to a formal complaint must submit a joint statement of stipulated facts, disputed facts, key legal issues, discovery matters, and proposed pleading schedules two days prior to a staff-supervised, initial status conference. The purpose of this procedure is to

promote settlement, narrow and sharpen the relevant factual and legal issues, and otherwise expedite the Commission's resolution of the dispute. In some cases, however, parties have frustrated the accomplishment of this goal by submitting separate statements or joint statements that are vague, cursory, and/or incomplete. We reiterate here that the parties must together file a single, joint statement that is comprehensive, detailed, and specific, providing a thorough description of all stipulated and disputed facts, as well as a productive summary of key legal issues. Finally, in our view, if the parties work together with sufficient diligence, they should be able to stipulate to the bulk of relevant facts and key legal issues in most cases. Therefore, we urge parties to devote substantial and cooperative effort in arriving at stipulated facts and key legal issues.

(28) *We Encourage Disputing Parties To Seek Mediation From Commission Staff Before Filing A Formal Complaint.* Parties seeking placement of their dispute on the Accelerated Docket must participate in a staff-supervised, pre-filing settlement negotiation meeting. These pre-filing discussions have resulted in a substantial number of disputes being resolved without the parties having to resort to litigation. In light of the staff's success in helping parties achieve settlements, we highly recommend that parties avail themselves of the opportunity to use staff-supervised mediation and settlement negotiations prior to filing any formal complaint.

(29) *The Commission Generally Will Rule on Interlocutory Appeals of Staff Rulings Only in Conjunction with Ruling on the Merits.* We emphasize that the Commission generally will not consider applications for review of interlocutory staff rulings pursuant to § 1.115 of the Commission's rules (47 CFR 1.115) in the context of section 208 complaint proceedings except in conjunction with ruling on the merits of the complaint. In the event, however, that the ruling on the merits of the complaint is made pursuant to delegated authority, the application for review will not be considered until after the Enforcement Bureau, acting on delegated authority, has issued its final ruling on the merits of the complaint. This will maximize the efficient use of limited administrative resources.

Procedural Matters

Paperwork Reduction Act of 1995

(30) This Order on Reconsideration has been analyzed with respect to the Paperwork Reduction Act of 1995 (the

"1995 Act") and found to impose slightly modified information collection requirements on the public.¹ These rules contain information collections that have not yet been approved by OMB. The Commission will release a document in the **Federal Register** announcing the effective date of the rules.

(31) Written comments by the public on the modified information collections are due on or before April 26, 2001. Written comments by OMB on the modified information collections are due on or before May 29, 2001. In addition to filing comments with the Secretary, a copy of any comments on the modified information collections contained herein should be submitted to Judy Boley, Federal Communications Commission, Room 1-C804, 445 12th Street, SW., Washington, DC 20554, or via the Internet to jboley@fcc.gov and to Edward Springer, OMB Desk Officer, Room 10236 NEOB, 725 17th Street, NW., Washington, DC 20503, or via the Internet to edward.springer@omb.eop.gov.

Regulatory Flexibility Act

(32) The Regulatory Flexibility Act ("RFA")² requires that an agency prepare a regulatory flexibility analysis for notice-and-comment rulemaking proceedings. In the *First Report and Order* and *Second Report & Order*, the Commission included a Final Regulatory Flexibility Analysis³ and a supplemental Final Regulatory Flexibility Analysis,⁴ respectively. In this Order, however, neither the clarifications to the rules nor the rule changes adopted on our own motion require a regulatory flexibility analysis.

Ordering Clauses

(33) Pursuant to sections 1, 4(i), 4(j), 201-205, 208, 260, 271, 274, and 275 of the Communications Act of 1934, as amended, 47 U.S.C. 151, 154(i), 154(j), 201-205, 208, 260, 271, 274, and 275, and § 1.429 of the Commission's rules, 47 CFR 1.429, that the petitions for reconsideration filed by AirTouch Paging, America's Carriers Telecommunication Association, and MCI Telecommunications Corporation are *Denied*, the Petition for Clarification filed by AT&T Corporation is *Denied*,

¹ See §§ 18, 19, 20, 21, 24, 28, 29, *supra*.

² The RFA, see 5 U.S.C. § 601 *et seq.*, has been amended by the Contract with America Advancement Act of 1996, Pub. L. No. 104-121, 110 Stat. 847 (1996) ("CWAAA"). Title II of the CWAAA is the Small Business Regulatory Enforcement Fairness Act of 1996 ("SBREFA").

³ See First Report and Order, 12 FCC Rcd at 22619-33, §§ 333-340.

⁴ See Second Report & Order, 13 FCC Rcd at 17073-17085, §§ 108-134.

and the Petition for Reconsideration and Clarification filed by BellSouth Corporation is *Granted in Part* and *Denied in Part*.

(34) Sections 1.721, 1.722, 1.724, 1.726, and 1.735 of the Commission's rules, 47 CFR 1.721, 1.722, 1.724, 1.726, and 1.735, *Are Amended* as set forth in the rules changes. These rules contain information collections that have not yet been approved by OMB. The Commission will release a document in the **Federal Register** announcing the effective date of the rules.

Federal Communications Commission.

Magalie Roman Salas,
Secretary.

Rule Changes

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

1. The authority citation for part 1 continues to read:

Authority: 47 U.S.C. 151, 154(i), 154(j), 155, 225, 303(r), 309 and 325(e).

2. In § 1.721, paragraphs (a) introductory text, (a)(8), and (a)(13) are revised, paragraph (e) is redesignated as paragraph (f) and a new (e) is added to read as follows:

§ 1.721 Format and content of complaints.

(a) Subject to paragraph (e) of this section governing supplemental complaints filed pursuant to § 1.722, and paragraph (f) of this section governing Accelerated Docket proceedings, a formal complaint shall contain:

* * * * *

(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 or one of the defendant's registered agents for service of process 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;

* * * * *

(13) A declaration, under penalty of perjury, by the complainant or complainant's counsel describing the amount, method, and date of the

complainant's payment of the filing fee required under § 1.1105(1)(c) or (d), and the complainant's 10-digit FCC Registration Number, if any; and

* * * * *

(e) *Supplemental complaints.* (1) Supplemental complaints filed pursuant to § 1.722 shall conform to the requirements set out in this section and § 1.720, except that the requirements in §§ 1.720(b), 1.721(a)(4), (a) (5), (a)(8), (9), (a)(12), and (a)(13) shall not apply to such supplemental complaints;

(2) In addition, supplemental complaints filed pursuant to § 1.722 shall contain a complete statement of facts which, if proven true, would support complainant's calculation of damages for each category of damages for which recovery is sought. All material facts must be supported, pursuant to the requirements of § 1.720(c) and paragraph (a)(11) of this section, by relevant affidavits and other documentation. The statement of facts shall include a detailed explanation of the matters relied upon, including a full identification or description of the communications, transmissions, services, or other matters relevant to the calculation of damages 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 complainant's belief and why the complainant could not reasonably ascertain the facts from the defendant or any other source;

(3) Supplemental complaints filed pursuant to § 1.722 shall contain a certification that the complainant has, in good faith, discussed or attempted to discuss the possibility of settlement with respect to damages for which recovery is sought with each defendant prior to the filing of the supplemental complaint. Such certification shall include a statement that, no later than 30 days after the release of the liability order, the complainant mailed a certified letter to the primary individual who represented the defendant carrier during the initial complaint proceeding outlining the allegations that form the basis of the supplemental complaint it anticipates filing with the Commission and inviting a response from the carrier within a reasonable period of time. The certification shall also contain a brief summary of all additional steps taken to resolve the dispute prior to the filing of the supplemental complaint. If no additional steps were taken, such certification shall state the reason(s)

why the complainant believed such steps would be fruitless.

* * * * *

3. Section 1.722 is revised to read as follows:

§ 1.722 Damages.

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

(b) If a complainant wishes a determination of damages to be made in the same proceeding as the determinations of liability and prospective relief, the complaint must contain the allegations and information required by paragraph (h) of this section.

(c) Notwithstanding paragraph (b) of this section, in any proceeding to which no statutory deadline applies, if the Commission decides that a determination of damages would best be made in a proceeding that is separate from and subsequent to the proceeding in which the determinations of liability and prospective relief are made, the Commission may at any time order that the initial proceeding will determine only liability and prospective relief, and that a separate, subsequent proceeding initiated in accordance with paragraph (e) of this section will determine damages.

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

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

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

(e) If a complainant proceeds pursuant to paragraph (d) of this section, or if the Commission invokes its authority under paragraph (c) of this section, the complainant may initiate a separate proceeding to obtain a determination of damages by filing a supplemental complaint that complies with § 1.721(e) and paragraph (h) of this section within sixty days after public notice (as defined in § 1.4(b) of this chapter) of a decision that contains a finding of liability on the merits of the original complaint.

(f) If a complainant files a supplemental complaint for damages in accordance with paragraph (e) of this section, the supplemental complaint

shall be deemed, for statutory limitations purposes, to relate back to the date of the original complaint.

(g) Where a complainant chooses to seek the recovery of damages upon a supplemental complaint in accordance with the requirements of paragraph (e) of this section, the Commission will resolve the separate, preceding liability complaint within any applicable complaint resolution deadlines contained in the Act.

(h) 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 supplemental complaint for damages filed in accordance with paragraph (e) 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;

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

(i) Where a complainant files a supplemental complaint for damages in accordance with paragraph (e) of this section, the following procedures may apply:

(1) Issues concerning the amount, if any, of damages may be either designated by the Enforcement 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.

(j) Except where otherwise indicated, the rules governing initial formal complaint proceedings govern supplemental formal complaint proceedings, as well.

4. In § 1.724, paragraphs (b) and (d) are revised to read as follows:

§ 1.724 Answer.

* * * * *

(b) The answer shall advise the complainant and the Commission fully and completely of the nature of any defense, and shall respond specifically to all material allegations of the complaint. Every effort shall be made to narrow the issues in the answer. The defendant shall state concisely its defense to each claim asserted, admit or deny the averments on which the complainant relies, and state in detail the basis for admitting or denying such

averment. General denials are prohibited. Denials based on information and belief are expressly prohibited unless made in good faith and accompanied by an affidavit explaining the basis for the defendant's belief and why the defendant could not reasonably ascertain the facts from the complainant or any other source. If the defendant is without knowledge or information sufficient to form a belief as to the truth of an averment, the defendant shall so state and this has the effect of a denial. When a defendant intends in good faith to deny only part of an averment, the defendant shall specify so much of it as is true and shall deny only the remainder. The defendant may deny the allegations of the complaint as specific denials of either designated averments or paragraphs.

* * * * *

(d) Averments in a complaint or supplemental complaint filed pursuant to § 1.722 are deemed to be admitted when not denied in the answer.

* * * * *

5. In § 1.726, paragraph (a) is revised to read as follows:

§ 1.726 Replies.

(a) Subject to paragraph (g) of this section governing Accelerated Docket proceedings, within three days after service of an answer containing affirmative defenses presented in accordance with the requirements of § 1.724(e), a complainant may file and serve a reply containing statements of relevant, material facts and legal arguments that shall be responsive to only those specific factual allegations and legal arguments 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.

* * * * *

6. In § 1.735, paragraph (g) is added to read as follows:

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

* * * * *

(g) Supplemental complaint proceedings. Supplemental complaints filed pursuant to section 1.722 shall conform to the requirements set out in this section, except that the complainant need not submit a filing fee, and the complainant may effect service pursuant to paragraph (f) of this section rather than paragraph (d) of this section numerals.

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