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47 CFR Ch. I (10–1–11 Edition)

scanned or other electronic format that provides:

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

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

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

(i) *Discovery in Accelerated Docket proceedings.* (1) Each party to an Accelerated Docket proceeding shall serve, with its initial pleading and with any reply statements in the pre-status-conference filing (see § 1.726(g)(1)), copies of all documents in the possession, custody or control of the party that are likely to bear significantly on any claim or defense. For the purpose of this paragraph (i), document also shall include data compilations and tangible things. A document is likely to bear significantly on a claim or defense if it:

(i) Appears likely to have an influence on, or affect the outcome of, a claim or defense;

(ii) Reflects the relevant knowledge of persons who, if their potential testimony were known, might reasonably be expected to be deposed or called as a witness by any of the parties;

(iii) Is something that competent counsel would consider reasonably necessary to prepare, evaluate or try a claim or defense; or

(iv) Would not support the disclosing party's contentions.

(2) In their § 1.733(i)(4) pre-status-conference filings, parties to Accelerated Docket proceedings may request the production of additional documents. In their § 1.733(i)(4) filings, parties may also seek leave to conduct a reasonable number of depositions, including depositions of expert witnesses, if any. When requesting additional discovery, each party shall be prepared at the status conference to justify its requests by identifying the specific issue or

issues on which it expects to obtain evidence from each request.

(3) Interrogatories shall not be routinely granted in Accelerated Docket proceedings. A party to an Accelerated Docket proceeding that prefers interrogatories to the other forms of available discovery, for reasons of convenience or expense, may seek leave in its § 1.733(i)(4) pre-status-conference filing to propound a limited number of interrogatories.

(4) Expert Witnesses.

(i) Any complainant in an Accelerated Docket proceeding that intends to rely on expert testimony for a purpose other than to rebut a defendant's expert evidence, shall identify its expert witnesses in the information designation required by § 1.721(a)(10)(i). In its § 1.721(a)(10)(i) information designation, such a complainant shall also provide its expert statement. For purposes of this paragraph (i)(4), an expert statement shall include a brief statement of the opinions to be expressed by the expert, the basis and reasons therefor and any data or other information that the witness considered in forming her opinions.

(ii) Any defendant in an Accelerated Docket proceeding that intends to rely on expert testimony shall identify its expert witnesses in the information designation required by § 1.724(f)(1). Such a defendant shall provide its expert statement with its § 1.733(i)(4), pre-status-conference filing.

(iii) Any complainant in an Accelerated Docket proceeding that intends to rely on previously undisclosed expert testimony to rebut any portion of the defendant's case shall identify the expert and provide the appropriate expert statement at the initial status conference.

(iv) Expert witnesses shall be subject to deposition in Accelerated Docket proceedings under the same rules and limitations applicable to fact witnesses.

[63 FR 1038, Jan. 7, 1998, as amended at 63 FR 41447, Aug. 4, 1998]

§ 1.730 The Enforcement Bureau's Accelerated Docket.

(a) Parties to formal complaint proceedings against common carriers

within the responsibility of the Enforcement Bureau (see §§ 0.111, 0.311, 0.314 of this chapter) may request inclusion on the Bureau's Accelerated Docket. As set out in §§ 1.720 through 1.736, proceedings on the Accelerated Docket are subject to shorter pleading deadlines and certain other procedural rules that do not apply to other formal complaint proceedings before the Enforcement Bureau.

(b) Any party that contemplates filing a formal complaint may submit a request to the Chief of the Enforcement Bureau's Market Disputes Resolution Division, either by phone or in writing, seeking inclusion of its complaint, once filed, on the Accelerated Docket. In appropriate cases, Commission staff shall schedule and supervise pre-filing settlement negotiations between the parties to the dispute. If the parties do not resolve their dispute and the matter is accepted for handling on the Accelerated Docket, the complainant shall file its complaint with a letter stating that it has gained admission to the Accelerated Docket. When it files its complaint, such a complainant shall also serve a copy of its complaint on the Commission staff that supervised the pre-filing settlement discussions.

(c) Within five days of receiving service of a complaint, any defendant in a formal complaint proceeding may submit by facsimile or hand delivery, to the Chief of the Enforcement Bureau's Market Disputes Resolution Division, a request seeking inclusion of its proceeding on the Accelerated Docket. Such a defendant contemporaneously shall transmit, in the same manner, a copy of its request to all parties to the proceeding. A defendant submitting such a request shall file and serve its answer in compliance with the requirements of § 1.724(k), except that the defendant shall not be required to serve with its answer the automatic document production required by §§ 1.724(k)(7) and 1.729(i)(1). In proceedings accepted onto the Accelerated Docket at a defendant's request, the Commission staff will conduct supervised settlement discussions as appropriate. After accepting such a proceeding onto the Accelerated Docket, Commission staff will establish a

schedule for the remainder of the proceeding, including the parties' § 1.729(i)(1) automatic production of documents.

(d) During the thirty days following the effective date of these rules, any party to a pending formal complaint proceeding in which an answer has been filed or is past due may seek admission of the proceeding to the Accelerated Docket by submitting a request by facsimile or hand delivery to the Chief of the Enforcement Bureau's Market Disputes Resolution Division, with facsimile copies to all other parties to the proceeding by the same mode of transmission. If a pending proceeding is accepted onto the Accelerated Docket, Commission staff will conduct supervised settlement discussions if appropriate and establish a schedule for the remainder of the proceeding, including the parties' § 1.729(i)(1) automatic production of documents if necessary.

(e) In determining whether to admit a proceeding onto the Accelerated Docket, Commission staff may consider factors from the following, non-exclusive list:

(1) Whether it appears that the parties to the dispute have exhausted the reasonable opportunities for settlement during the staff-supervised settlement discussions.

(2) Whether the expedited resolution of a particular dispute or category of disputes appears likely to advance competition in the telecommunications market.

(3) Whether the issues in the proceeding appear suited for decision under the constraints of the Accelerated Docket. This factor may entail, *inter alia*, examination of the number of distinct issues raised in a proceeding, the likely complexity of the necessary discovery, and whether the complainant bifurcates any damages claims for decision in a separate proceeding. See § 1.722(b).

(4) Whether the complainant states a claim for violation of the Act, or Commission rule or order that falls within the Commission's jurisdiction.

(5) Whether it appears that inclusion of a proceeding on the Accelerated Docket would be unfair to one party

because of an overwhelming disparity in the parties' resources.

(6) Such other factors as the Commission staff, within its substantial discretion, may deem appropriate and conducive to the prompt and fair adjudication of complaint proceedings.

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

(g) Minitrials.

(1) In Accelerated Docket proceedings, the Commission may conduct a minitrial, or hearing-type proceeding, as an alternative to requiring that parties submit briefs in support of their cases. Minitrials typically will take place between 40 and 45 days after the filing of the complaint. A Commission Administrative Law Judge ("ALJ") typically will preside at the minitrial, administer oaths to witnesses, and time the parties' presentation of their cases. In consultation with the Commission staff, the ALJ will rule on objections or procedural issues that may arise during the course of the minitrial.

(2) Before a minitrial, each party will receive a specific time allotment in which it may present evidence and make argument during the minitrial. The ALJ or other Commission staff presiding at the minitrial will deduct from each party's time allotment any time that the party spends presenting either evidence or argument during the proceeding. The presiding official shall have broad discretion in determining any time penalty or deduction for a party who appears to be intentionally delaying either the proceeding or the presentation of another party's case. Within the limits imposed by its time allotment, a party may present evidence and argument in whatever manner or format it chooses, provided, however, that the submission of written testimony shall not be permitted.

(3) Three days before a minitrial, each party to a proceeding shall serve on all other parties a copy of all exhibits that the party intends to introduce during the minitrial and a list of all witnesses, including expert witnesses,

that the party may call during the minitrial. Service of this material shall be accomplished either by hand or by facsimile transmission. Objections to any exhibits or proposed witness testimony will be heard before the beginning of the minitrial.

(4) No party will be permitted to call as a witness in a minitrial, or otherwise offer evidence from, an individual in that party's employ, unless the individual appears on the party's information designation (see §§1.721(a)(10)(i) or 1.724(f)(1)) with a general description of the issues on which she will offer evidence. No party will be permitted to present expert evidence unless the party has complied fully with the expert-disclosure requirements of §1.729(i)(4). The Commission may permit exceptions to the rules in this paragraph (g)(4) for good cause shown.

(5) Two days before the beginning of the minitrial, parties shall file proposed findings of fact and conclusions of law. These submissions shall not exceed 40 pages per party. Within three days after the conclusion of the minitrial, parties may submit revised proposed findings of fact and conclusions of law to meet evidence introduced or arguments raised at the minitrial. These submissions shall not exceed 20 pages per party.

(6) The parties shall arrange for the stenographic transcription of minitrial proceedings so that transcripts are available and filed with the Commission no more than three days after the conclusion of the minitrial. Absent an agreement to the contrary, the cost of the transcript shall be shared equally between the parties to the proceeding.

(h) Applications for review of staff decisions issued on delegated authority in Accelerated Docket proceedings shall comply with the filing and service requirements in §1.115(e)(4). In those Accelerated Docket proceedings which raise issues that may not be decided on delegated authority (see 47 U.S.C. 155(c)(1); 47 CFR 0.291(d)), the staff decision issued after the minitrial will be a recommended decision subject to adoption or modification by the Commission. Any party to the proceeding that seeks modification of the recommended decision may do so by

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filing comments challenging the decision within 15 days of its release by the Commission's Office of Media Relations. (Compare §1.4(b)(2).) Opposition comments may be filed within 15 days of the comments challenging the decision; reply comments may be filed 10 days thereafter and shall be limited to issues raised in the opposition comments.

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

[63 FR 41448, Aug. 4, 1998, as amended at 64 FR 60725, Nov. 8, 1999]

§ 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.

(b) Materials marked as proprietary may be disclosed solely to the following persons, only for use in prosecuting or defending a party to the complaint action, and only to the extent necessary to assist in the prosecution or defense of the case:

(1) Counsel of record representing the parties in the complaint action and any support personnel employed by such attorneys;

(2) Officers or employees of the opposing party who are named by the opposing party as being directly involved in the prosecution or defense of the case;

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

(4) The Commission and its staff; and

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

(c) These individuals shall not disclose information designated as proprietary to any person who is not authorized under this section to receive such information, and shall not use the information in any activity or function other than the prosecution or defense in the case before the Commission. Each individual who is provided access to the information shall sign a notarized statement affirmatively stating that the individual has personally reviewed the Commission's rules and understands the limitations they impose on the signing party.

(d) No copies of materials marked proprietary may be made except copies to be used by persons designated in paragraph (b) of this section. Each party shall maintain a log recording the number of copies made of all proprietary material and the persons to whom the copies have been provided.

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

[58 FR 25573, Apr. 27, 1993, as amended at 63 FR 1039, Jan. 7, 1998]

§ 1.732 Other required written submissions.

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