EFFECTIVE DATE: August 4, 1998.

FOR FURTHER INFORMATION CONTACT: Martha Caswell, Office of Governmentwide Policy, GSA, telephone 202–501–3828.

SUPPLEMENTARY INFORMATION:

A. Temporary Regulation H–28 published at 61 FR 41352, August 8, 1996, and extended by the notice at 62 FR 68217 on December 31, 1997, is cancelled.

B. In the absence of a known Federal need, agencies should transfer IT equipment directly to eligible schools and nonprofit organizations in accordance with the provisions of Executive Order 12999, Educational Technology: Ensuring Opportunity for All Children in the Next Century. Agencies must report such transfers to GSA as part of the annual Non-Federal Recipients Report.

C. The General Services Administration (GSA) has determined that this rule is not a significant regulatory action for the purposes of Executive Order 12866 of September 30, 1993.

D. Regulatory Flexibility Act

This rule is not required to be published in the **Federal Register** for public comment. Therefore, the Regulatory Flexibility Act does not apply.

E. Paperwork Reduction Act

The Paperwork Reduction Act does not apply because the proposed revisions do not impose recordkeeping or information collection requirements, or the collection of information from offerors, contractors, or members of the public which require the approval of OMB under 44 U.S.C. 3501–3520. This rule also is exempt from Congressional review prescribed under 5 U.S.C. 801 since it relates solely to agency management and personnel.

List of Subjects in 41 CFR Part 101–43

Archives and records, Computer technology, Information technology, Government procurement, Property management, Records Management, and Telecommunications.

Therefore, as set forth in the preamble 41 CFR part 101–43 is amended as follows:

PART 101–43—UTILIZATION OF PERSONAL PROPERTY

1. The authority citation for part 101–43 continues to read as follows:

Authority: Sec. 205(c), 63 Stat. 390; (40 U.S.C. 486(c)).

2. Section 101–43.000 is revised to read as follows:

§ 101–43.000 Scope of part

This part prescribes the policies and methods governing the economic and efficient utilization of personal property located within and outside the United States, the District of Columbia, the Commonwealth of Puerto Rico, American Samoa, Guam, the Commonwealth of the Northern Mariana Islands, the Trust Territory of the Pacific Islands, and the Virgin Islands. Additional guidelines regarding reutilization of hazardous materials are prescribed in part 101–42.

§§ 101–43.600–101–43.603 (Subpart 101–43.6)—[Reserved]

3. Subpart 101–43.6 consisting of §§ 101–43.600 through 101–43.603, is removed and reserved.

Subpart 101–43.48—Exhibits

4. Section 101–43.4801 is amended by removing paragraph (c), redesignating paragraphs (d) and (e) as paragraphs (c) and (d) respectively, and by adding in numerical order in the redesignated paragraph (c) table, the following entry:

§ 101–43.4801 Excess personal property reporting requirements.

*	*	*	*	*	*	*
70	All		Information technology equipment.			
*	*	*	*	*	*	*

Dated: July 7, 1998.

David J. Barram,

Administrator of General Services.

[FR Doc. 98–20693 Filed 8–3–98; 8:45 am]

BILLING CODE 6820–24–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 1

[CC Docket No. 96–238; FCC 98–154]

Procedures to Be Followed When Formal Complaints are Filed Against Common Carriers

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: The Commission adopted a Second Report and Order that created an Accelerated Docket that provides for a decision, within 60 days, of formal complaint proceedings that are accepted onto the Accelerated Docket. The Accelerated Docket will stimulate the growth of competition for telecommunications services by ensuring the prompt resolution of disputes that may arise between market participants as well as allow for the prompt disposal of complaints that are without substantial merit.

DATES: Effective October 5, 1998, except for §§ 1.115, 1.721, 1.724, 1.726, 1.729, 1.730 and 1.733, which contain information collection requirements that are not effective until approved by the Office of Management and Budget. The FCC will publish a document in the **Federal Register** announcing the effective date for those sections. Written comments by the public on the information collections are due September 3, 1998.

FOR FURTHER INFORMATION CONTACT: Dorothy Attwood or Frank Lamancusa (202) 418–0700. For additional information concerning the information collections contained in this Report and Order contact Judy Boley at 202–418–0214, or via the Internet at jboley@fcc.gov. Direct all comments on the information collections to Timothy Fain, Office of Management and Budget, Room 10236 NEOB, Washington, DC 20503, (202) 395–3561 or via internet at fain—t@al.eop.gov, and Judy Boley, Federal Communications Commission, Room 234, 1919 M Street, NW,

Washington, DC 20554 or via internet to jboley@fcc.gov.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's Second Report and Order in CC Docket No. 96–238, adopted on July 9, 1998, and released on July 14, 1998. The full text of the Second Report and Order is available for inspection and copying during normal business hours in the FCC Reference Center, Room 239, 1919 M Street, NW., Washington DC. The complete text of this decision may also be purchased from the Commission's duplicating contractor, International Transcription Services, 1231 20th Street NW, Washington DC 20036, (202) 857–3800.

This Report and Order contains modified information collections subject to the Paperwork Reduction Act of 1995 (PRA). It has been submitted to the Office of Management and Budget (OMB) for review under the PRA. The Commission is requesting emergency OMB review of the information collections with approval by September 11, 1998. Persons wishing to comment on this information collection should submit comments on or before September 11, 1998.

Paperwork Reduction Act

This Second Report and Order contains modified information collections. The Commission, as part of its continuing effort to reduce paperwork burdens, invites the general public to comment on the information collections contained in this Order, as required by the Paperwork Reduction Act of 1995, Pub. L. 104–12. The Commission has requested emergency OMB review of the collections with an approval by September 11, 1998. Persons wishing to comment on this information collection should submit comments on or before September 11, 1998. Comments should address: (1) Whether the new or modified collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall practical utility; (b) the accuracy of the Commission's burden estimates; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on the respondents including the use of automated collection techniques or other forms of information technology.

OMB Approval Number: 3060–0411.

Title: Amendment of Rules Governing Procedures to Be Followed When Formal Complaints are Filed Against Common Carriers.

Form No.: N/A.

Type of Review: Revision.

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

Section/title	Number of respondents	Est. time per respondent (hours)	Total annual burden (hours)
a. Requests for Inclusion on Accelerated Docket	300	0.5	150
b. Pleadings	80	4	320
c. Automatic Document Production Requirements	80	20	1,600
d. Discovery	80	20	1,600
e. Status Conference	80	3	240
f. Proposed Findings of Fact and Conclusions of Law	80	5	400
g. Minitrials Submissions	80	3	240
h. Minitrial Transcript	80	10	800
i. Applications for Review of Staff Decisions	20	15	300

Total Annual Burden: 5,650 hours (for new and/or modified collections only).

Estimated Costs Per Respondent: $150.00 for each respondent that files a complaint against a common carrier that is accepted onto the Accelerated Docket; it is estimated that 40 complaints will be accepted onto the Accelerated Docket in the next year.

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

The Second Report and Order requires any party to a complaint or prospective complaint that wishes to be on the new docket to transmit to the Chief of the Common Carrier Bureau's Enforcement Division a request seeking the inclusion of its dispute on the Accelerated Docket. If the dispute for which inclusion on the docket is sought is the subject of a pending complaint, the request must be in writing, transmitted by facsimile or by hand, with a copy to the other parties by the same mode of transmission. When a complainant has been admitted onto the Accelerated Docket before filing its complaint, it is required to file with its complaint a letter indicating that the complaint has been accepted for treatment on the new docket.

The Second Report and Order requires the complaint to include a detailed explanation of the alleged violation; answers are required to set out fully the nature of any defense, and to respond specifically to all material allegations of the complaint. The rules dispense, in Accelerated Docket proceedings, with the requirement that parties provide extensive legal analysis, proposed findings of fact and conclusions of law with their initial pleadings and with the requirement that they support their initial pleadings with affidavits. Defendants are allowed ten days to file an answer.

The Second Report and Order requires copies of documents within a party's possession, custody or control that are likely to bear significantly on the issues in a complaint proceeding to be produced with that party's complaint, answer or the reply statements in its pre-status-conference filing, if applicable. The rules adopt a production standard that is narrower than all relevant documents with the goal of reducing the number of documents subject to production.

The Second Report and Order requires that parties seeking discovery beyond that available by the automatic document production request such additional discovery in the filing that they are required to make two days before the initial status conference. These requests may include, and Commission staff may order, additional document production, depositions of persons with relevant knowledge and/or responses to interrogatories. Additionally, any party that intends to rely on expert testimony must identify its expert and provide a brief expert statement.

The Second Report and Order requires parties to submit to the staff, two business days, before the initial status conference, a listing of the

stipulations and the discovery issues on which they have reached agreement. If necessary, parties are permitted to submit separate statements of disputed factual and legal issues. Where appropriate, a complainant's pre-status-conference filing may respond to any affirmative defenses that the defendant may have raised in its answer.

The Second Report and Order further requires parties to submit proposed findings of fact and conclusions of law no less than two days before the beginning of the minitrial. Parties may, but are not required to, submit revised proposed findings of fact and conclusions of law within three days after the conclusion of the minitrial. Separate briefs are not permitted in Accelerated Docket proceedings.

Under the Second Report and Order, parties to Accelerated Docket proceedings are required to present evidence and argument in support of their cases to Commission staff during a hearing-type proceeding. Three days before the minitrial, parties are required to exchange exhibits that they may introduce during the proceeding and lists of witnesses whom they may call.

The Second Report and Order requires parties to Accelerated Docket proceedings to arrange for the preparation of, and file with the Commission three days after the minitrial, a stenographic transcript of the minitrial proceedings.

Finally, the Second Report and Order requires parties to Accelerated Docket proceedings that wish to obtain review of the staff's decision or recommended decision to file their application for review or challenge to the initial decision with the Commission within 15 days of the release of the staff decision.

Summary of Second Report and Order

I. Introduction

1. In enacting the Telecommunications Act of 1996 (the ''1996 Act''), Congress stressed the importance of establishing a ''pro-competitive, deregulatory'' national policy framework for the telecommunications industry. In furtherance of that goal, we issued, in this docket's *First Report and Order,* 63 FR 990 (January 7, 1998), revised rules governing formal complaints filed with the Commission that allege unlawful conduct by telecommunications carriers. These new rules grew out of the shortened deadlines for resolution of certain categories of complaints imposed in the 1996 Act, and they had as their goal the prompt resolution of all complaints in order to ''reduce impediments to robust competition in all telecommunications markets.''

2. On November 25, 1997, a *Public Notice,* 62 FR 66321 (December 18, 1997), issued seeking further comment on certain issues raised in this proceeding. Specifically, the *Public Notice* sought comment on the creation of an ''Accelerated Docket'' for complaint adjudication that would (1) provide for the presentation of live evidence and argument in a hearing-type proceeding and (2) operate on a 60-day time frame, or on some other schedule that is more compressed than that for a formal complaint proceeding conducted under the new procedures set out in the *First Report & Order.*

3. In this *Second Report and Order,* we adopt rules that will govern the Accelerated Docket. Briefly stated, the new complaint procedures that we adopt today provide for the decision, within 60 days, of formal complaint proceedings that are accepted onto the Accelerated Docket, with the additional possibility of *en banc* hearing, before the full Commission, of applications for review of the staff decision. In order to expedite the complaint process in this manner, we require that parties seeking to place their disputes on the Accelerated Docket first meet for pre-filing settlement discussions supervised by Commission staff. Once a complaint has been filed and accepted onto the Accelerated Docket the defendant will have ten days to file its answer. Both the complainant and the defendant will be required to serve on their opponents, with their respective initial pleadings, those documents that are likely to bear on the issues in the proceeding and a list of individuals likely to have relevant knowledge. Ten days after the answer is filed, Commission staff will hold an initial status conference, at which the parties may request further discovery, including a limited number of depositions, which we expect to play an important role in Accelerated Docket proceedings. Between 40 and 45 days after the filing of a complaint, a minitrial will be held at which the parties will have the opportunity to present evidence and make argument in support of their respective positions. Commission staff shall issue its decision no more than sixty days after the matter is placed on the Accelerated Docket. Review by the full Commission will be available through an application for review. In appropriate cases, the Commission may hold *en banc* hearings to decide applications for review of Accelerated Docket proceedings.

4. As discussed below, the rules that we adopt herein modify certain deadlines and procedural requirements for complaint proceedings accepted onto the Accelerated Docket. In general, the new rules will govern admission onto the Accelerated Docket, procedural and scheduling aspects of Accelerated Docket proceedings, the breadth of discovery available in such proceedings, and the hearing-type procedure in which Accelerated Docket proceedings typically will culminate. To the extent that the rules set out in this *Second Report & Order* do not specifically cover some procedural aspect of a proceeding on the Accelerated Docket, the rules promulgated with the *First Report & Order* will govern.

A. The Need for, and Benefits of, the Accelerated Docket

5. The *Public Notice* sought comment on whether there existed a need for the hearing-type process and the shortened deadline for complaint adjudication that would be available with the Accelerated Docket. Additionally, the *Public Notice* sought comment on how the Commission could work cooperatively with the states to ensure that the interests of both the Commission and the states were protected.

6. We believe that important benefits will flow from the expedition of the complaint process in cases appropriate for inclusion on the Accelerated Docket. The Accelerated Docket will provide prompt resolution of carrier-related disputes and it frequently will allow carriers to obtain more extensive discovery from their opponents than has been routinely available in formal complaint proceedings. Additionally, it will provide for the full and effective presentation of each party's case in a hearing-type proceeding. The Accelerated Docket will minimize the opportunity for carriers to continue to engage in anti-competitive practices because the lawfulness of those practices will be subject to expedited review under our new procedures, and market entrants will be able to obtain adjudication of their complaints much more quickly than in the past. We believe, therefore, that the Accelerated Docket will facilitate the market's continuing movement toward the full competition that Congress envisioned when it enacted the 1996 Act.

7. In addition to the benefits that we envision flowing to competitive market entrants, we believe that in certain instances the incumbent local carriers also are likely to enjoy a substantial benefit from the new docket. The Accelerated Docket will provide the incumbent carriers with a means of obtaining the expedited disposal of certain complaints filed against them. On balance, therefore, we believe that

any additional burdens that may be imposed on parties by the Accelerated Docket are more than offset by the resulting benefits, both to the carriers themselves and to the public.

8. We are unpersuaded by the various commenters' criticisms of the Accelerated Docket. The proposed timeframe for resolving complaints on the Accelerated Docket is not unreasonable or inconsistent with due process. As with the new rules issued in the *First Report & Order,* parties to Accelerated Docket proceedings will have full notice of their opponents' contentions well before the 60-day period for conclusion of the proceeding begins to run. During the mandatory pre-filing settlement discussions, parties will fully explore, under the supervision of Commission staff, the facts surrounding, and legal bases for, each side's claims and defenses. Furthermore, matters not reasonably susceptible to resolution within the sixty-day framework we have established, whether due to factual or legal complexity or any other reason, will not be accepted onto the Accelerated Docket.

9. We also reject the argument that we should refrain from issuing rules for the Accelerated Docket until we have accumulated additional experience under the *First Report & Order.* We do not view the new docket as something that merely builds, with minor modifications, on the generally applicable formal complaint process; rather, we believe that it will give rise to substantial benefits independent of the current process. Extensive examination of proceedings under the general rules, therefore, is not necessarily a prerequisite to setting up the Accelerated Docket. Moreover, we will continue to monitor the experience with both sets of rules. This will allow us to make further improvements in the future as it appears to be appropriate.

B. Subject Matter for the Accelerated Docket

10. Under the rules that we adopt today, we confer on the staff administering the Accelerated Docket broad discretion to determine which formal complaints relating to common carrier services it will accept onto the docket. In exercising this discretion, the Bureau should consider several different factors. First among these is the extent to which it appears that the parties to the dispute have exhausted the reasonable opportunities for settlement during the supervised pre-filing settlement discussions.

11. Second, to the extent that the expedited resolution of a particular dispute appears likely to advance competition in the relevant telecommunications markets, it may be appropriate for inclusion on the Accelerated Docket.

12. Third, the Bureau staff shall also consider whether the issues presented by a particular proceeding appear to be suited for decision under the constraints imposed by the Accelerated Docket. For example, if the dispute appears to involve more distinct questions than may be litigated effectively under the expedited procedures, staff would be within its discretion to refuse the case. Another factor for consideration in this category likely will be whether the complaining party has chosen to bifurcate its liability claims from its damages claims. Similarly, if it appears that factual discovery will be so extraordinarily complex and time-consuming that it cannot effectively be conducted under the compressed schedule of the Accelerated Docket, the staff administering the docket also would be within its discretion to decline the case.

13. Fourth, in determining whether to admit a dispute to the Accelerated Docket, staff shall consider any suggestions that the complaint fails to state a cognizable claim or raises issues outside of the Commission's established jurisdiction.

14. Fifth, the staff administering the Accelerated Docket also has discretion to refuse a complaint proceeding where it appears that one party would be unreasonably limited in its ability effectively to conduct discovery or prepare its case because of an overwhelming resource advantage of the opposing party.

15. Beyond the factors listed above, we expect that, in accepting matters onto the Accelerated Docket, the Bureau staff will consider such other issues as it deems appropriate and conducive to the prompt and fair adjudication of the complaint proceedings before it.

C. Jurisdictional Considerations

16. Nothing in this report and order should be interpreted to expand the Commission's jurisdiction to adjudicate disputes under the Act. We also recognize that the Eighth Circuit's decision on review of our Local Competition Order places limits on the Commission's authority in section 208 enforcement proceedings. Questions of our jurisdiction to adjudicate individual complaint proceedings will be decided on a case-by-case basis as they arise. Furthermore, we are hopeful that contact and careful coordination with the relevant state commissions will reduce the potential for state concerns about jurisdictional issues. Accordingly, we direct that the staff administering the Accelerated Docket take all appropriate steps to inform the appropriate state utility commissions where it appears that such action is appropriate.

II. Pre-Filing Requirements

17. The *Public Notice* sought comment on whether it would be useful for parties on the Accelerated Docket to participate in staff supervised settlement discussions before a complaint was filed. The notice asked whether one criterion for acceptance onto the Accelerated Docket should be adequate notice, through these pre-filing discussions, of the issues a complainant would raise in its complaint. It asked whether such supervised pre-filing settlement discussions would implicate the Commission's *ex parte* rules, and it sought suggestions on how to protect confidential or proprietary information that the parties might exchange during these discussions. Additionally, the *Public Notice* sought comment on which parties to a dispute could seek inclusion on the Accelerated Docket.

A. Staff Supervision of Pre-Filing Discussions

18. We believe that requiring supervision of the parties' pre-filing discussions will provide substantial benefits in the Accelerated Docket. We believe that one way in which the Accelerated Docket will speed the development of competition is by facilitating the informal resolution of many disputes before complaints are even filed. Involvement of Commission staff in the parties' pre-filing discussions will serve to make those talks run more smoothly and be more productive. Staff involvement in the discussions also may help the parties to focus their dispute in a way that will be most conducive to the short schedule of the Accelerated Docket if a complaint ultimately is filed. We are unpersuaded by the argument that staff participation in settlement discussions will unnecessarily prolong that phase of proceedings. Our commitment to the prompt adjudication of disputes affecting competition extends to the pre-filing stage of proceedings. We are confident that requiring staff involvement in the mandatory pre-filing settlement discussions will not slow this phase of proceedings.

19. We do not believe that it would be improper for the individual staff member who conducts the pre-filing discussions to handle the matter after a complaint has been filed. Federal courts repeatedly have held that a judge's participation in settlement discussions,

by itself, provides no basis for recusing the judge from deciding the case; it does not create the kind of personal or extra-judicial knowledge that requires disqualification. Only when a judge conducts himself in a manner that may raise questions about his impartiality is there proper ground for recusal. We see no reason to adopt a stricter rule than that of the federal courts on this issue.

B. Procedure for Acceptance to the Accelerated Docket

20. We conclude that the Accelerated Docket will be most effective if either party to a dispute may request inclusion on it. Requiring mutual agreement of the parties, as suggested by some commenters, would give either party veto power over the process and substantially reduce the docket's effectiveness at stimulating a competitive environment. However, we believe that the ends of the Accelerated Docket would not be well served if the staff had the discretion to place a proceeding on the docket absent a request from at least one party.

21. A prospective complainant who wishes to have its dispute handled on the Accelerated Docket shall contact the Bureau either by phone or in writing to seek assistance in reaching a negotiated resolution to the matter. If it appears from the preliminary information supplied by the prospective complainant that the dispute may be appropriate for handling under the procedures that we set out today, the staff will schedule the appropriate pre-filing settlement talks. Based on the progress of these negotiations, the nature of the dispute as revealed during the discussions, and other considerations, including those outlined above, Commission staff will determine whether the matter is appropriate for Accelerated Docket treatment. Once the staff determines that a dispute is appropriate for the Accelerated Docket and if the parties remain unable to resolve their differences during the supervised settlement discussions, the complainant shall submit with its complaint a letter indicating that it has gained acceptance onto the docket. So that the staff immediately may begin work on the matter, a complainant shall, at the time it files its complaint, serve a copy on the staff who supervised the settlement talks. Such a complaint, once it is filed and accepted onto the Accelerated Docket, will be handled by the Bureau under the rules set out herein.

22. As some commenters recommend, we believe that it is also important that defendants be able to request that their proceeding be included on the Accelerated Docket. We therefore adopt a rule under which a defendant may seek inclusion on the Accelerated Docket by contacting the Bureau no more than five days after receiving service of a complaint. In order to comply with our *ex parte* rules, such contact shall be by a facsimile or hand-delivered letter of which a copy also is transmitted in the same manner to the complainant. A defendant seeking admission to the Accelerated Docket will be required to file its answer within 10 days of receiving service of the complaint, as required by this *Second Report and Order.* Within two business days of a defendant's request letter, the determination will be made whether to grant the request and accept the proceeding onto the Accelerated Docket. If it appears that the parties have not conducted sufficient pre-filing settlement discussions, the staff may schedule supervised settlement talks, as discussed above. If appropriate, the progress of the matter after the filing of the answer may be postponed during these discussions. Once a proceeding has been accepted onto the Accelerated Docket at the defendant's request, the staff will also set a schedule for both sides' production of documents and the remainder of the proceeding. After the staff has scheduled the production of documents, matters accepted onto the docket at a defendant's request will proceed according to the schedule otherwise applicable to Accelerated Docket proceedings.

23. It appears that certain complaints already pending in the Bureau's Enforcement Division may benefit from, and be appropriate for, the expedited procedures of the new docket. Accordingly, during the thirty days following the effective date of these rules, either party to a complaint proceeding then pending before the Bureau's Enforcement Division and in which an answer previously has been served, or is past due, may contact the staff administering the Accelerated Docket to request inclusion of the matter on the docket. A party making such a request shall do so by facsimile or hand-delivered letter of which a copy is sent contemporaneously to the opposing party or parties by the same mode of transmission.

C. Ex Parte and Confidentiality Issues

24. After reviewing the matter, we believe that staff involvement in the pre-filing discussions poses no potential for a prohibited *ex parte* contact. Our *ex parte* rules restrict the actions of parties to complaint proceedings only after a complaint has been filed. Typically, contacts between a single party and Commission staff under these rules will occur before the filing of a complaint and therefore will not implicate our rules. We believe that the main potential for *ex parte* contact that these rules create is the situation in which a defendant requests the inclusion of its proceeding on the Accelerated Docket. As we note above, however, such requests must be made by letter, a copy of which shall be provided to the complainant at the same time and by the same mode of transmission as used for the Commission staff. This will pose no danger of an improper *ex parte* contact.

25. In the event that parties engaged in the required supervised settlement discussions should have occasion to exchange confidential or proprietary documents, they may negotiate a confidentiality agreement that is acceptable to both sides. If the parties are unable to reach agreement on a confidentiality agreement, they shall be governed by 47 CFR 1.731.

III. Pleading Requirements

26. The *Public Notice* noted the new pleading requirements under the *First Report & Order,* and stated that these requirements likely would also apply to Accelerated Docket proceedings. It requested comment on the reasonableness of requiring that the defendant's answer be filed within seven calendar days of the complaint in order to accommodate the expedited nature of the new docket.

A. Content Requirements for Pleadings

27. After review and careful consideration of the comments on this topic, we have concluded that it is appropriate to modify slightly the content requirements for initial pleadings on the Accelerated Docket. As discussed in the *First Report & Order,* we believe that a full presentation, by both parties, of the relevant facts will ''improve the utility and content of pleadings'' and help to ''speed resolution of'' complaints. We also believe, however, that the key to the success of the Accelerated Docket will be its ability to move the parties to narrow, focused issues as quickly as possible so that evidence on those issues may be presented at the minitrial. Given the opportunity for parties to present evidence at the minitrials, we are less concerned with the formal presentation of evidence through affidavits accompanying the pleadings than we are with having the parties promptly reach issue. Thus, as set out in 47 CFR 1.721(a)(5), promulgated with the *First Report & Order,* the complaint:

shall include a detailed explanation of the manner and time period in which a

defendant has allegedly violated the Act, Commission order, or Commission rule in question, including a full identification or description of the communications, transmissions, services, or other carrier conduct complained of and the nature of any injury allegedly sustained by the complainant.

Similarly, 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.'' As discussed at greater length below, initial pleadings on the Accelerated Docket also shall include that portion of the information designation discussed in the *First Report & Order* which lists individuals believed to have firsthand knowledge of the facts alleged with particularity in the pleadings.

28. Given the relatively rapid pace of the Accelerated Docket, we have decided to dispense with certain pleading requirements set out in the *First Report & Order.* First, we will not require that parties to Accelerated Docket proceedings provide extensive legal analysis, proposed findings of fact and conclusions of law with their initial pleadings. Rather, parties will be required to submit proposed findings of fact and conclusions of law shortly before the minitrial that typically will take place in proceedings on this docket. Similarly, during this minitrial, parties will have the opportunity to present legal argument regarding their claims and defenses, and we therefore believe that this material may be omitted from the initial pleadings without substantially slowing down the process. We emphasize, however, that our decision not to require extensive legal analysis should not be interpreted as sanctioning notice-pleading or a similar omission of the full factual and legal basis for a party's pleadings. Rather, we expect that the complaint and answer will fully set out the facts and legal theories on which the parties premise their claims and defenses.

29. Additionally, we have decided to dispense with the requirement that parties to Accelerated Docket proceedings support their initial pleadings with affidavits, as required in 47 CFR 1.721(a)(5), (a)(11) and 1.724(g). We believe that the opportunity to present live testimony at the minitrial and the more extensive discovery available on the Accelerated Docket will render unnecessary the requirement that parties support their pleadings with affidavits. We have also decided to dispense, in Accelerated Docket proceedings, with the requirement that parties include in their information designations a description of all relevant documents in their possession. As we discuss below, parties will be required automatically to produce with their initial pleadings those documents that bear the appropriate relevance relationship with the issues in the proceeding.

B. Timing of the Answer

30. After consideration of the comments regarding the timing of the answer, we have concluded that an appropriate answer period for the Accelerated Docket is ten days. Thus, a defendant's answer, as well as the discovery documents subject to automatic production discussed below, will be due ten calendar days after the defendant receives service of a complaint on the Accelerated Docket. As noted in the *First Report & Order,* defendants will have substantial advance notice of the facts and legal theories underlying a complaint from the pre-filing settlement discussions that are now required in all complaint proceedings.

31. Notwithstanding the criticisms that several commenters level at the short answer period proposed in the *Public Notice,* we strongly believe that the ten-day period we have adopted is appropriate. First, we note that the Act expressly grants the Commission broad discretion to conduct its ''proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice.'' Courts applying this language in reviewing the Commission's procedural rules regularly have recognized the Commission's wide authority in questions of its own procedures. Thus, in *FCC* v. *Schreiber,* 113 U.S. 279, 290 (1965), the Court noted that the Commission ''should be free to fashion (its) own rules of procedure and to pursue methods of inquiry capable of permitting (it) to discharge (its) multitudinous duties.'' In *Florida Cellular Mobile Communications Corp.* v. *FCC,* 28 F.3d 191, 198 (D.C. Cir. 1994), the court stated, in the context of a licensing dispute, that there ''can be no doubt of the FCC's authority to impose strict procedural rules.''

32. Apart from complying with the relevant statute, the primary limitation on agency procedures is that they must comply with the requirements of due process. Through the supervised pre-filing settlement discussions, potential defendants will have full notice of the likely claims against them substantially in advance of the filing of a complaint. We believe that, when combined with this pre-filing period, the ten-day answer period comports with the requirements of due process. By diligently reviewing their records and conducting the appropriate interviews both before and after the complaint is filed, defendants should have ample opportunity to gather the information necessary both to file their answer and to produce the documents that, as we discuss below, must be served with it. We recognize that an answer period of this short duration will put defendants and their counsel to a greater burden than may exist under the 20-day answer period in the more generally applicable rules. However, defendants in Accelerated Docket proceedings will be required to assemble substantially less information before filing their answer than is required under the rules set out in the *First Report & Order.* Thus, Accelerated Docket defendants will not be required to prepare proposed findings of fact and conclusions of law or affidavits regarding the facts pleaded in their answers. Nor will they be required to create the index of relevant documents required under the *First Report & Order.*

33. Due process analysis focuses on whether a procedural limitation is so severe that a party is prevented from preparing an effective defense. We are aware of no authority, and the commenters cite none, holding that an expedited procedure of the type that we implement today amounts to a denial of due process. Only SBC attempts to cite specific legal authority to support its due process argument, and it relies principally on a decision from 1900 that is plainly inapposite. In *Roller* v. *Holly,* 176 U.S. 398 (1900), the Court found a denial of due process when a summons directed the recipient in Virginia to appear in a Texas court five days later to defend himself. The Court did not hold that, as an absolute matter, five days was too little time to respond effectively to process of the type involved in that case. Rather, the Court relied on the fact that the trip from Virginia to Texas would require four of the five available days and the respondent would have had only one day in which to prepare his case. The Court emphasized that the adequacy of a response period turned on whether it permitted a defendant sufficient time ''to prepare his defense and for his journey.''

34. We find the *Roller* decision, written in the era before commercial automobiles, airplanes, facsimile machines and e-mail, to be of no probity in evaluating the propriety of a 10-day answer period nearly 100 years later. Defendants on the Accelerated Docket will have the full ten-day answer period, as well as the pre-filing period,

to conduct their investigation and prepare their answer. Accordingly, we believe that the answer period we adopt for the Accelerated Docket is adequate.

IV. Discovery

35. The *Public Notice* sought comment on a variety of issues surrounding the conduct of discovery in an expedited process like that proposed for the Accelerated Docket. The *Public Notice* inquired whether parties to Accelerated Docket proceedings should be required automatically to produce documents that bear the appropriate relevance relationship to the issues in the complaint proceeding, and it asked when such production should take place. Furthermore it sought comment on whether the parties should be required to submit all discovery requests and disputes to the responsible staff in advance of the initial status conference, discussed below, so that the staff could issue its decision on these matters at the status conference, after consultation with the parties. The *Public Notice* also asked what measures would be appropriate sanctions for parties that failed to provide discovery as ordered.

A. Timing of Automatic Document Production

36. A rule requiring the production of the most central, but not all relevant, documents with the complaint and answer is most likely to lead to the realization of our goal of creating a docket that is both effective and faster than the current system for adjudicating complaints. Furthermore, we believe that the production of documents we require by today's rules actually may make the document portion of the discovery process demand less of the parties' time and move more quickly than the process in the *First Report & Order,* which requires that parties provide their opponents with an index giving substantial information about each discoverable document. We believe that requiring production of the actual documents should reduce the uncertainty and disputes that may arise from the creation of a description of each document. We also believe that parties will expend markedly fewer resources in assembling and producing the appropriate documents than they would in assembling the documents and then preparing the detailed index required under the *First Report & Order.* Thus, our rule for the Accelerated Docket requiring automatic production of documents meeting the appropriate standard will likely increase the speed and effectiveness of the discovery that each party obtains.

B. Content of Automatic Document Production

37. The *Public Notice* sought comment on what standard should be adopted to guide the automatic production of documents on the Accelerated Docket. In particular, the *Public Notice* suggested the possibility of using the standard in the local rule governing automatic disclosure in the U.S. District Court for the Eastern District of Texas. This standard requires the automatic production, early in the discovery phase, of ''all documents, data compilations, and tangible things in the possession, custody, or control of the party that are *likely to bear significantly* on any claim or defense.''

38. After review and consideration of the various comments regarding the appropriate standard, we have determined that, on the Accelerated Docket, the parties' automatic document production will be governed by the ''likely to bear'' standard proposed in the *Public Notice.* Thus, at the time the parties file their initial pleadings in an Accelerated Docket proceeding, they will be required to produce to each other all documents, data compilations, and tangible things ''in the possession, custody, or control of the party that are *likely to bear significantly* on any claim or defense.'' This standard will include materials: (1) That would not support the disclosing party's contentions; (2) that are likely to have an influence on or affect the outcome of a claim or defense; (3) that reflect 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; or (4) that competent counsel would consider reasonably necessary to prepare, evaluate or try a claim or defense. Fundamentally, if a party would expect to proffer a document at the minitrial as an exhibit in support of its case, the party should produce the document. Similarly, if the party would expect its opponent, if it had the document, to proffer it as an exhibit against the party, the document also should be produced.

39. Despite most commenters' lack of enthusiasm for this standard, we adopt it because we believe that it will lead to the most manageable system for the initial, automatic document productions on the Accelerated Docket. We are not persuaded by the comments asserting that the standard is so vague that it will lend itself to abuse by counsel or that it will be difficult to enforce. We have no reason to suspect that the ''likely to bear standard'' is any more susceptible to manipulation by counsel than is the relevance standard. Nor does the standard appear to be inherently more difficult for an adjudicator to apply in deciding discovery disputes or imposing sanctions.

40. What we envision this standard as likely to avoid is the production of every single document that is relevant, even if only tenuously so, to the issues in a complaint proceeding. We believe that the parties' needs for discovery would be poorly served by a rule requiring such broad production in a process that runs as quickly as the new docket will. We are hopeful that the ''likely to bear'' standard will focus both parties'' production efforts on the documents of core relevance to a particular proceeding. Thus, it should reduce the volume of documents produced by each side and ensure that the party receiving a production will be able fully to review the material in the time available in Accelerated Docket proceedings. If necessary, at a later date, we may refine or modify the standard to ensure fair and expeditious completion of the initial document production on the Accelerated Docket.

41. We note that, both with their initial document productions and subsequent productions that may be ordered, parties may have occasion to produce documents for which they wish to request confidential treatment. Production of such documents shall be made in accordance with 47 CFR 1.731. In the rare case in which a producing party believes that 47 CFR 1.731 will not provide adequate protection for its assertedly confidential material, it may request either that the opposing party consent to greater protection, or that the staff supervising the proceeding order greater protection.

C. Depositions and Other Discovery

42. As indicated in the *Public Notice,* we contemplate that, in many instances, parties to Accelerated Docket proceedings will have the opportunity to depose certain key witnesses who have personal knowledge of the relevant issues in dispute. We believe that a limited number of depositions in proceedings on this docket will serve our goal of ensuring that the parties fully may develop their cases so that staff decisions in the proceedings will be both fully informed and rendered with the speed that a complete record allows. In order to facilitate the scheduling of such depositions within the time constraints of the Accelerated Docket, we believe that parties should be required to exchange information about individuals with knowledge relevant to the issues of a proceeding. We require that parties on the

Accelerated Docket provide, with their initial pleadings, a designation containing the name, address, and position of each individual believed to have firsthand knowledge of the facts alleged with particularity in its pleading, along with a general description of the relevant facts within any such individual's knowledge. Alternatively, this designation may refer to the paragraph numbers of the appropriate pleading as a means of describing the scope of an individual's knowledge.

43. In its filings before the initial status conference, a party may request approval to conduct the depositions of individuals with knowledge relevant to a complaint proceeding, including those individuals listed in an opponent's information designation; in their pre-status-conference filings, parties also may request additional document production or, where appropriate, interrogatories. We expect that, where the requested discovery is reasonable and consistent with the applicable time constraints, staff will be inclined to grant it. In order to ensure diligence and completeness in each party's designation of individuals with relevant knowledge, no party, absent a showing of good cause, will be permitted to call as a witness at a minitrial, or otherwise offer evidence from, any individual in that party's employ who does not appear on the party's information designation with a general description of the issues on which the individual will offer evidence.

44. As with fact witnesses, it is important that parties have an opportunity to explore the substance of, and the basis for, expert testimony offered by an opponent. Given the rapid pace of Accelerated Docket proceedings, however, it will be necessary for such witnesses to be identified, and for the substance of their testimony to be disclosed, as quickly as possible. A complainant who plans to introduce expert evidence for a purpose other than to rebut the defendant's expert evidence will be required to identify the witness or witnesses in the information designation accompanying its complaint. In addition to identifying its expert witness, complainants also will be required to provide, at the time they file their complaint, 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, as is required in Federal Rule of Civil Procedure 26(a)(2)(B).

45. We require that defendants who intend to rely on expert testimony identify their experts at the time that they file their answer. Defendants shall also disclose the other material relating to their expert witnesses that is required of complainants; however this disclosure may be made in the defendant's filing that is due two days before the initial status conference. If a complainant chooses to rely on previously unidentified experts to rebut any portion of the defendant's case, the complainant shall identify such experts and make the other required disclosures about their testimony at the initial status conference. By the end of the initial status conference, the parties will have provided full disclosure of any expert testimony on which they intend to rely, and they will be in a position to seek staff approval to depose expert witnesses from whom they may want additional discovery.

46. In light of the numerous tasks that the parties will be required to complete at the beginning of Accelerated Docket proceedings, we see no purpose to routinely allowing the service of interrogatories before the initial status conference. Accordingly, the rules that we adopt today provide that parties to Accelerated Docket proceedings may propound interrogatories only after the initial status conference and with the permission of the staff supervising the proceeding. At the initial status conference, when the parties request leave to take depositions or request additional document production, they may also seek staff approval to serve a limited number of interrogatories on their opponent. The decision of whether to permit such interrogatories shall be within the discretion of the staff administering the proceeding.

D. Sanctions

47. The *Public Notice* sought comment on what types of sanctions would be appropriate for parties who had failed to comply with their discovery obligations in Accelerated Docket proceedings. In a process that will move at the pace of the Accelerated Docket, it will be crucial that staff be able effectively to compel prompt action and adherence to its discovery orders. Without such sanction authority, a recalcitrant party likely would be able to delay a proceeding enough that many of the docket's projected benefits would vanish.

48. We strongly believe that swift and effective sanctions will be necessary to ensure against attempts to prolong Accelerated Docket proceedings through discovery delay or abuse. Appropriate sanctions should also deter attempts to affect the substance of proceedings by improperly withholding information. We believe it will encourage the parties' strict compliance with discovery obligations for us to grant the staff administering the Accelerated Docket broad discretion to respond to discovery violations with the sanction that it deems to be appropriate.

V. Status Conferences

49. The *Public Notice* sought comment on the timing and content requirements for the initial status conference in the Accelerated Docket proceedings. It proposed that, to accommodate the time constraints of the Accelerated Docket, the initial conference take place 15 calendar days after the filing of the complaint and that the parties be required to meet before the conference to discuss a variety of issues to be covered at the conference, including issues in dispute and questions of discovery and scheduling. It also proposed that the parties be required to draft a joint statement summarizing the issues on which they agreed and their remaining disputes, and to submit the statement to the Commission two days before the initial status conference.

A. Timing of Initial Status Conference

50. After careful consideration of the comments on this issue, we direct that the initial status conference in Accelerated Docket proceedings will take place ten calendar days after the answer is due to be filed. This will place the conference twenty days after the service of the complaint, rather than fifteen as proposed in the *Public Notice*. We recognize that this interval of time will require that counsel and parties work with substantial diligence and efficiency. However, we view this short time period as necessary to effectuate the speedy adjudication of disputes that is our main goal for the Accelerated Docket.

B. Issues to Be Addressed At Initial Status Conference

51. The *Public Notice* proposed that, before the status conference, the parties meet and confer about a variety of issues, including settlement prospects, discovery, issues in dispute, stipulations, and a schedule for the remainder of the proceeding. It also proposed that, before the status conference, the parties report jointly in writing to the Commission about the results of their discussions on these issues, including disputed and stipulated facts, and key legal issues.

52. We believe that early discussion of the specific facts in dispute will assist the parties in focusing on the issues of central relevance to the proceeding; it is therefore critical to the overall success

of the Accelerated Docket. We require that, before the initial status conference, the parties discuss, and attempt to reach agreement on, discovery issues and the factual issues to which they can stipulate; they shall submit to the staff, two business days before the initial conference, a listing of these stipulations and the discovery issues on which they have reached agreement. Parties may conduct these meetings either in person or by telephone conference call.

53. Additionally, the complainant's submission before the initial status conference shall respond, as appropriate, to any affirmative defenses that the defendant may have raised in its answer. We believe that, given the constraints of the Accelerated Docket, it will be more efficient to require a complainant to respond to affirmative defenses in this manner than it would be to provide for the filing of a separate reply.

54. At the initial status conference, the responsible staff will review the parties' disputed and stipulated issues of fact. Based on the factual issues that appear from this material, the staff will determine what additional discovery, beyond the initial disclosures, the parties may take. Thus, at the status conference, parties should be prepared to demonstrate specifically how the discovery they seek relates to particular issues in dispute. The discovery that the staff may grant at this status conference includes depositions and additional document production. Indeed, in light of the relative efficiency of depositions as a discovery tool, we expect that the staff typically will grant a limited number of depositions appropriate to the issues in, and complexity of, a particular case. Given the truncated nature of the Accelerated Docket, we believe that interrogatories will be of limited usefulness. However, at the initial conference, the staff may grant permission to propound interrogatories if it appears that they will function as an effective alternative to some other form of more time-consuming discovery. As noted elsewhere, where discovery requests are reasonable, we expect that staff will be inclined to grant them.

55. At the initial status conference, the Commission staff also will establish a schedule for the remainder of the proceeding, setting the deadlines for completion of discovery, the pre-hearing submissions discussed below, the minitrial and any post-hearing submissions.

56. Commenters also raise the issue of whether a defendant in an Accelerated Docket proceeding should be required to post a bond or to escrow funds to cover potential damages. Under the *First Report & Order*, the Commission may order a defendant who has lost the liability phase of a bifurcated proceeding to post a bond or escrow funds pending resolution of damages issues. We decline to modify the escrow rules issued with the *First Report & Order.* The staff administering the Accelerated Docket will retain the same discretion as staff does under the *First Report & Order* to require a defendant that has been found liable to post a bond or escrow funds pending a determination of damages.

VI. Minitrials

57. The *Public Notice* sought comment on one of the unique characteristics under consideration for the Accelerated Docket, a hearing-type proceeding or ''minitrial'' to be conducted during each action. The notice stated that such a proceeding likely would offer certain advantages over the all-paper proceeding currently used for formal complaints. It noted that, given the need for dispatch on the Accelerated Docket, the minitrial likely would occur between 40 and 45 days after the filing of a complaint. Furthermore, the *Public Notice* stated that, in order to expedite these minitrials, consideration was being given to allotting to each party a set amount of time in which to present its case.

A. Utility of Minitrial Process

58. We strongly believe that minitrials held at the end of Accelerated Docket proceedings will substantially increase the quality and clarity of the record on which complaints are decided. As commenters note, live testimony will permit Commission staff to gauge credibility in a manner that is impossible in paper proceedings. Furthermore, live testimony will allow the parties and the decision maker to flesh out both factual and legal issues in a way that cannot be accomplished within the static limitations of an all-paper process. A related benefit of live proceedings is that they will permit the decision maker to focus the parties on those issues that it deems to be central to the dispute; the decision maker will not be required simply to accept the dispute in the posture presented by the parties' briefs.

59. Another benefit that we envision as likely to result from minitrials is the direct participation of parties' employees in the adjudicative process. We believe that the experience of testifying during a minitrial may give carriers' employees a more immediate appreciation of their individual roles in effectuating compliance with the Act. Thus, having once been called as a witness to explain their actions, employees whose regular duties may have an impact on their employer's compliance with the Act may be more inclined to consider that impact when executing their daily duties. We believe that this procedure may emphasize the strictures of the Act in a way that cannot be accomplished under a paper process in which carrier employees' involvement with the process typically is restricted to the preparation of an affidavit to be presented by the carrier's counsel.

60. Given the above benefits that we view as likely to arise from minitrials, we believe that, on balance, the advantages of the process outweigh the drawbacks identified by some commenters. We recognize that preparing for a minitrial to be held 40 days after the filing of a complaint may require counsel for both sides to expend some more effort and time than required to prepare and submit a brief under our general complaint rules. However, this increased burden is justified by the more complete record, and the consequently more informed decision, that likely will emerge from the process.

B. Structure of Minitrial

61. Within the time limitations discussed below, minitrials will allow parties to Accelerated Docket proceedings to present all aspects of their case to the decision making authority. As stated in the *Public Notice*, the Accelerated Docket minitrials will not be subject to the on-the-record hearing requirements of the Administrative Procedure Act. Nonetheless, where possible, an Administrative Law Judge (''ALJ'') will preside at each minitrial. The ALJ or other presiding staff will run the minitrial, administer oaths to witnesses, and will be in charge of the timing system discussed below. Additionally, where an ALJ participates in the minitrial process, he will render any necessary procedural rulings in consultation with the staff member administering the proceeding who also will be present during the minitrial. Because the staff's prior participation in the proceeding will have given it substantial familiarity with the relevant issues, the Commission staff will serve as the decision maker in Accelerated Docket proceedings, and it, rather than the ALJ who runs the minitrial, will issue the decision in the proceeding.

62. The rules we adopt provide for a ''chess-clock'' timing method. Thus, the ALJ or other Commission personnel who runs the minitrial will deduct from

each party's allotment any time that the party's counsel spends examining witnesses, otherwise presenting evidence or presenting argument. Additionally, the ALJ may exercise broad discretion in determining any time penalty or deduction that he deems appropriate for a party who appears intentionally to be slowing the process or attempting to delay its opponent's presentation. This timing method should ensure that minitrials are conducted quickly, in keeping with the goals of the Accelerated Docket, while maintaining fairness and allowing both parties an adequate opportunity to present evidence and argument.

63. Under the rules that we adopt today, the Commission staff has broad discretion to allocate the amount of time for a minitrial that it believes to be appropriate based on the complexity of the issues and the amount and type of evidence that appears reasonably necessary for an adequate presentation of each party's case. Under the rules, the staff would be within its discretion to assign either side of a particular dispute more than half of the allowed time, but we expect that such instances will be very rare.

64. We believe that a decision maker's observation of witness demeanor on direct examination is as important and revealing as it is on cross examination. Similarly, we believe that the filing of written direct testimony often would result in parties burdening the record with unnecessary or irrelevant information that simply would slow down the process of reaching a final decision. Accordingly, we decline to permit the introduction of written direct testimony on the Accelerated Docket. Both sides shall rely on live, rather than written, presentations of their cases at minitrials. We note, however, that the precise format of a party's presentation during a minitrial will be a question on which that party has wide latitude.

65. It will aid in the efficient completion of minitrials for the parties to have notified each other, in advance, of the exhibits they may introduce and the witnesses they may call during the minitrial. We therefore require that, three days in advance of the scheduled beginning of the minitrial, each party shall serve by hand or facsimile, on all other parties to the proceeding, a copy of their exhibits and a list of witnesses that they may call. The ALJ presiding at the minitrial may then hear and rule on any witness or exhibit objections before the beginning of the hearing itself. As discussed below, relevance rarely will be an appropriate basis for objection during minitrials; we also expect that, owing to the administrative nature of the proceeding, other objections will be minimal.

66. One commenter suggests that we apply certain portions of the Federal Rules of Evidence to the minitrial process. We decline to adopt the suggested evidentiary rules. Rather, we believe that the strict time limitations under which parties will operate in minitrials should serve to deter and sanction the introduction of extensive amounts of irrelevant material: the introduction of irrelevant evidence merely will reduce the time available for other, more pertinent portions of the proponent's case.

67. We are hopeful that the minitrial process will serve as a more effective and informative alternative to the briefs that typically are filed in complaint proceedings. However, we also believe that it will aid the parties in focusing their presentations, and the responsible staff in promptly rendering a decision, if the parties submit some documentation outlining their arguments. Thus, we require that parties submit proposed findings of fact and conclusions of law two days before the beginning of the minitrial. In length, these shall not exceed 40 pages per party. Additionally, no more than three days after the conclusion of the minitrial, parties may, but are not required to, submit revised proposed findings of fact and conclusions of law to respond to evidence and legal argument raised during the minitrial. This second set of submissions should permit the parties a final opportunity to explain complex technical issues involved in the proceeding and to rebut their opponents' arguments. This second set of submissions shall not exceed 20 pages per party.

VII. Damages

68. The *Public Notice* sought comment on limiting the Accelerated Docket to bifurcated liability claims, with damages claims being handled separately under the procedures in the *First Report & Order.* The overwhelming majority of commenters support our proposal, although certain commenters recommend that Commission staff be permitted to determine damages issues on the Accelerated Docket when it appears to be appropriate.

69. As we stated above, the staff administering the docket may consider a complaining party's decision to bifurcate its damages claims from the liability portion of its case in determining whether to accept a matter onto the Accelerated Docket. We believe that bifurcation of the issues in this manner generally will aid in the decision of complaint proceedings within the expedited timeframe of the new docket. We agree, however, that parties should have the option at least to request adjudication of their damages issues on the Accelerated Docket. Accordingly, the staff administering the docket will retain the discretion to accept a complaint presenting both liability and damages issues. Additionally, a complainant that has prevailed on the question of liability may request Accelerated Docket treatment for its subsequent damages complaint. We agree with the commenters asserting that damages issues should be resolved as quickly as possible after a finding of liability; however, we decline the invitation to set a deadline for the conclusion of the damages phase when the damages phase is not accepted onto the Accelerated Docket.

VIII. Other Issues

70. The *Public Notice* also requested comment on whether it would be necessary to modify any other rules in order to accommodate the time constraints of the Accelerated Docket. Commenters have made several recommendations, including that we: (1) Limit the effect of Accelerated Docket decisions on future cases; (2) allow compulsory counterclaims to be pursued on the Accelerated Docket; and (3) issue a formal notice of proposed rulemaking in this proceeding.

71. *Precedential Value of Accelerated Docket Proceedings:* Bell Atlantic suggests that rulings in Accelerated Docket proceedings be limited to the particular case in question and that they be accorded no preclusive or precedential effect in other proceedings or other forums. We decline to impose such a limit on Accelerated Docket proceedings. Rather, staff rulings on the docket will have the same precedential value as any other adjudicative decision issued under delegated authority.

72. *Counterclaims:* CompTel suggests that counterclaims be permitted in Accelerated Docket proceedings if they arise from the same transaction or occurrence, and would be eligible for the Accelerated Docket if brought separately. In the *First Report & Order,* we prohibited all counterclaims in complaint proceedings, requiring that such claims be filed as separate, independent actions. We took this action to ensure that complaint proceedings would be resolved within the statutory deadlines in the 1996 Act. This reasoning applies with even greater force to the Accelerated Docket proceedings, which we expect to be resolved even more quickly than required by the statutory deadlines.

Defendants will be required to file any counterclaims that they may have as separate actions for which they will be required independently to seek inclusion on the Accelerated Docket.

73. *Need for Formal Notice of Proposed Rulemaking:* BellSouth contends that the notice provisions of the Administrative Procedure Act (''APA'') require that, before issuing rules to govern the Accelerated Docket, we must issue a formal notice of proposed rulemaking, including specific proposed rules. We disagree. Section 553(b) of the APA requires that an agency afford interested parties adequate notice of, and an opportunity to comment on, the provisions that appear in the agency's final regulations. The *Public Notice* appeared in the **Federal Register**, and it contained adequate notice of the provisions we adopt today. Accordingly, we believe that no further notice is required to comply with the notice provisions of the APA.

IX. Review by the Commission

74. Staff decisions issued on delegated authority after the minitrial will be, pursuant to our rules, immediately effective and binding on the parties. A party to the proceeding that seeks to challenge such a decision may do so by filing its application for review. Applications for review of Accelerated Docket staff decisions based on delegated authority will be due 15 calendar days after the release date of the staff decision. As under our current rules, the opposition to the application for review will be due 15 calendar days after the application for review is filed, and the party seeking review may file its reply 10 calendar days after the due date of the opposition.

75. Alternatively, certain other Accelerated Docket proceedings will raise issues that may not be decided on delegated authority. Such staff decisions, issued after the minitrial, will not be immediately effective. Rather, these decisions will be recommended decisions, which the Commission will either adopt or modify. A party to the proceeding that seeks to challenge the staff decision before the Commission may do so by filing its comments on the recommended decision according to the same schedule as that applicable for applications for review on the Accelerated Docket. Opposition and reply comments similarly are permitted on the same schedule as that for applications for review.

76. In the event that neither party files comments to challenge a recommended staff decision in an Accelerated Docket proceeding, the Commission will issue its order either adopting or modifying the staff decision within forty-five days of its release. If the staff's recommended decision is challenged by any party to the proceeding, the Commission will issue its order either adopting or modifying the decision no more than thirty days after the filing of the final comments on the decision.

77. The Commission may summarily affirm a staff decision from the Accelerated Docket before it for review. Additionally, in cases where it appears that argument would aid in our decision, we may schedule an oral argument before the full Commission.

X. Conclusion

78. In this *Second Report & Order*, we amend our rules governing formal complaint proceedings to create an Accelerated Docket, which will be administered by the Enforcement Division of the Common Carrier Bureau. The rules of practice and procedure relating to the Accelerated Docket will promote competition in all telecommunications markets by providing an expedited process for resolving complaints of unreasonable, discriminatory, or otherwise unlawful conduct by telecommunications carriers.

79. We recognize that many of the procedures we adopt for the Accelerated Docket are, to a substantial extent, new and untried. Accordingly, we expect that both staff and the Commission will accumulate valuable experience in the implementation of these new rules. We will monitor closely the effect and utility of the Accelerated Docket procedures; and we expect to receive periodic reports from the Common Carrier Bureau regarding its administration of the new docket. Based on this information and within a year of the effective dates of these rules, we will consider revisions to these procedures to make them more effective.

XI. Final Regulatory Flexibility Analysis

80. As required by the Regulatory Flexibility Act (''RFA''), an Initial Regulatory Flexibility Analysis (''IRFA'') was incorporated in the notice of proposed rulemaking in this docket. The Commission sought written public comment on the proposals in the NPRM, including comment on the IRFA. The Commission has prepared this Final Regulatory Flexibility Analysis of the possible significant economic impact on small entities of the rules promulgated in this *Second Report & Order.* This present Final Regulatory Flexibility Analysis (''FRFA'') conforms to the RFA.

A. Need for and Objectives of the Implementation of the Telecommunications Act of 1996, Amendment of Rules Governing Procedures to be Followed When Formal Complaints Are Filed Against Common Carriers, Second Report and Order, and the Rules Adopted Herein

81. The Commission is issuing this *Second Report & Order* to create an Accelerated Docket designed to provide for the prompt resolution of carrier-related disputes and to carriers to obtain more extensive discovery from their opponents than has been routinely available in formal complaint proceedings. Additionally, the new docket will provide for the full and effective presentation of each party's case in a hearing-type proceeding. Some of the requirements adopted in this *Second Report & Order* may have a significant impact on a substantial number of small businesses as defined by Section 601(3) of the RFA. Generally, the amended rules will: (1) Require parties to engage in staff-supervised pre-filing settlement discussions, (2) modify the form of initial pleadings, (3) shorten filing deadlines, (4) modify the discovery process, (5) provide for the live presentation of evidence to the decision maker, and (6) require provide for expedited briefing and review of staff decisions.

B. Summary of Significant Issues Raised by the Public Comments in Response to the IRFA

82. In the IRFA, the Commission found that the rules we proposed to adopt in this proceeding may have a significant impact on a substantial number of small businesses as defined by section 601(3) of the RFA. The IRFA solicited comment on alternatives to our proposed rules that would minimize the impact on small entities consistent with the objectives of this proceeding. No comments were submitted directly in response to the IRFA. However, as described below in Section 5, we have taken into account those portions of the rules that appear likely to affect small entities.

C. Description and Estimate of the Number of Small Entities to Which the Rules Adopted in the Report and Order in CC Docket No. 96–238 Will Apply

83. We first discuss the estimated number of potential complainants, which may include entities that are not telephone companies. Next we discuss generally the estimated number of potential defendants, which would be included in the total number of small telephone companies falling within the

SBA definitions of small business concerns and small businesses. Then, we discuss the number of small businesses within the SIC subcategories, and attempt further to refine those estimates to correspond with the categories of telephone companies that are commonly used under our rules.

1. Potential Complainants

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

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

2. Potential Defendants

86. *Estimate of Potential Defendants that may be Classified as Small Businesses.* Section 208(a) provides for the filing of formal complaints for ''anything done or omitted to be done by any common carrier subject to this Act.'' The FCC has no control as to the filing frequency of complaints. This inability to predict the number of future defendants necessitates conducting this FRFA based on the number of potential small business defendants, which is the number of common carriers that qualify as small business concerns under the SBA's definition.

87. *Total Number of Telephone Companies Affected.* The decisions and rules adopted herein may have a significant effect on a substantial number of small telephone companies identified by the SBA. The United States Bureau of the Census (''Census Bureau'') reports that, at the end of 1992, there were 3,497 firms engaged in providing telephone service, as defined therein, for at least one year. It seems reasonable to conclude, therefore, that no more than 3,497 telephone service firms are small entity telephone service firms or small incumbent LECs that may be affected by this Order. We estimate below the potential defendants affected by this order by service category.

88. *Wireline Carriers and Service Providers.* Of the 2,321 non-radiotelephone companies listed by the Census Bureau, 2,295 companies (or, all but twenty-six) were reported to have no more than 1,000 employees. Consequently, we estimate that there are no more than 2,295 small entity telephone communications companies (other than radiotelephone companies) that may be affected by the actions taken in this *Report and Order.*

89. *Non-LEC wireline carriers.* According to our most recent data, we estimate that there are no more than 130 small entity IXCs; fifty-seven small entity CAPs; twenty-five small entity OSPs; 271 small entity pay telephone service providers; and 260 small entity providers of resale telephone service; and thirty ''other'' toll carriers that might be affected by the actions and rules adopted in this *Report and Order.*

90. *Local Exchange Carriers.* According to our most recent data we estimate that there are no more than 1,347 small LECs (including small incumbent LECs) that may be affected by the actions taken in this *Report and Order.*

91. *Radiotelephone (Wireless) Carriers:* We estimate that there are no more than 1,164 small entity radiotelephone companies that might be affected by the actions and rules adopted in this *Report and Order.*

92. *Cellular and Mobile Service Carriers:* We estimate that there are no more than 792 small entity Cellular Service Carriers and no more than 138 small entity Mobile Service Carriers that might be affected by the actions and rules adopted in this *Report and Order.*

93. *Broadband PCS Licensees.* Based on available data, we conclude that the number of broadband PCS licensees that might be affected by the decisions in this *Report and Order* includes, at a minimum, the 183 winning bidders that qualified as small entities in the Blocks C through F broadband PCS auctions.

D. Description of Projected Reporting, Recordkeeping and Other Compliance Requirements

94. Below, we analyze the projected reporting, recordkeeping, and other compliance requirements that may apply to small entities and small incumbent LECs, and we mention some of the skills needed to meet these new requirements. Overall, we anticipate that the impact of these rules will be beneficial to small businesses and other filers. By requiring supervised pre-filing settlement discussions, and offering a faster alternative for the resolution of competitive disputes, these rules will assist in the settlement of disputes without litigation, and they will result in the speedier disposition of complaints that are actually filed. Moreover, Commission staff retains the discretion to refuse to accept a complaint proceeding onto the Accelerated Docket if it appears that such acceptance would place an inordinately high burden on one party, including small business entities.

95. *Supervised Settlement Discussions.* The amended rules will require a prospective complainant to notify Commission staff of its intention to file a complaint and then to participate in staff-supervised, pre-filing settlement discussions before its complaint, once filed, will be accepted onto the Accelerated Docket. Similarly, the amended rules require a defendant seeking admission to the Accelerated Docket to submit its written request to the staff and then to participate in any supervised settlement discussions that the staff deems appropriate. Although these supervised negotiation requirements may delay slightly a complainant's filing of a formal complaint or the progress of a proceeding in which a complaint has already been filed, we conclude that these requirements will serve to settle or narrow disputes, or to facilitate the compilation and exchange of relevant documentation or other information prior to the filing of a formal complaint with the Commission.

96. *Pleadings and Discovery.* The amended rules require complaints and answers to be accompanied by copies of all documents within the filing party's possession, custody or control which are likely to bear significantly on any claim or defense in the proceeding. The defendant must file its answer within ten days after service of the complaint. No separate reply pleading shall be permitted, but complainants that would otherwise file a reply may include that material in their pre-status-conference filing. In addition to the automatic

document production that will accompany both parties' initial pleadings, parties may include in their pre-status-conference filings, requests for additional discovery, including requests for depositions, interrogatories or additional document production.

97. *Status Conferences.* An initial status conference will take place ten calendar days after the filing of the answer unless otherwise ordered by the staff. Before this status conference, the parties shall have conferred regarding: (1) Discovery; (2) issues in dispute; (3) facts to which they can stipulate; (4) factual and legal issues in dispute. The parties shall submit, two days before the initial status conference, a joint statement of stipulated facts and, if possible, joint statements regarding agreed discovery and disputed issues. Where opposing parties cannot agree on discovery issues or on a joint statement of disputed issues, each party shall submit, two days before the status conference, a separate statement on these issues.

98. These amended rules may place a greater burden on parties, including small business entities, to file their answers and provide copies of discoverable documents to their opponents within a short period of time. However, in many other respects, the rules pleading, discovery and status conference rules under the Accelerated Docket are significantly less burdensome than under the rules applicable more generally to formal complaint proceedings. For example, it will be substantially less burdensome for defendant simply to provide copies of the appropriate documents to their opponents than it will be to compile the document inventory required in other formal complaint proceedings. Additionally, in light of the substantial time that it may take to negotiate joint statements of disputed issues, parties on the Accelerated Docket are permitted to submit separate statements containing this information. These rules will enable the Commission to resolve many preliminary issues efficiently at the initial status conference and thereby prevent the parties from wasting resources through delay. Furthermore, the rules will enable the parties quickly to receive substantial discovery through an automatic document production. This should substantially speed parties' preparation of their cases.

99. *Minitrials and Petitions for Review.* Between forty and forty-five days after a complaint is filed in an Accelerated Docket proceeding, the parties will participate in a minitrial proceeding at which they will present their case through live testimony and/or argument of counsel. Parties will be required to file proposed findings of fact and conclusions of law two days before the minitrial; rebuttal proposed findings of fact and conclusions of law may be filed three days after the conclusion of the minitrial. Once the staff has issued a decision, any application for review by the Commission will be due fifteen days after the release of the decision. Oppositions to the application for review will be due fifteen days after the application; and replies in support of the application will be due ten days thereafter.

100. These amended rules may place a burden on parties, including small business entities, to prepare the required proposed findings of fact and conclusions of law and to prepare and present their cases at the minitrial. However, this burden will be offset by a corresponding reduction in the work that the parties would have been required to expend preparing briefs under the generally applicable formal complaint rules. Additionally, the compressed briefing deadlines will impose some additional burden on parties filing applications of review of staff decisions. These rules will permit parties to present their cases directly to the Commission staff and to respond immediately to questions or concerns that the staff may have. Furthermore, the compressed briefing schedule for applications for review will ensure that the review process for Accelerated Docket proceedings progresses quickly, thereby affording the parties a decision by the full Commission in as short a time as possible.

101. As noted above, Commission staff retains the discretion to decline to admit a formal complaint proceeding to the Accelerated Docket where it appears that such admission would place an unreasonable burden on a party to the proceeding, including a small business entity. It is also important to note that these rules apply only to section 208 complaints that are filed with the Commission. Complainants wishing to participate in a less accelerated process, for example, may file their complaints in federal district court.

E. Steps Taken to Minimize Significant Economic Impact on Small Entities, and Significant Alternatives Considered

102. These amended rules may place a greater burden on a small business entity to provide greater discovery early in the process and to litigate their cases more quickly than in the past. However, we conclude that the rules do not significantly alter the level of evidentiary and legal support that would be ultimately required of parties in formal complaint actions pursuant to the past rules. Additionally, potentially higher initial costs may be somewhat offset by the prompt resolution of complaints and the avoidance of protracted and costly discovery proceedings and briefing requirements. It has been noted, for example, that the overall litigation costs of ''rocket docket'' cases in the U.S. District Court for the Eastern District of Virginia are lower than the costs of cases that take longer to resolve. Indeed, by requiring better and more complete submissions earlier in the process, these amended rules reduce the need for discovery and other information filings, thereby significantly reducing the burden on small business entities.

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

F. Report to Congress

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

XII. Ordering Clauses

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

106. It is further ordered that the *Second Report & Order* is adopted and will become effective October 5, 1998, except for §§ 1.115, 1.721, 1.724, 1.726, 1.729, 1.730 and 1.733, which contain information collection requirements that are not effective until approved by the Office of Management and Budget. The FCC will publish a document in the **Federal Register** announcing the effective date for those sections. Written

comments by the public on the information collections are due September 3, 1998.

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

List of Subjects in 47 CFR Part 1

Communications common carriers.

Federal Communications Commission,

Magalie Roman Salas,

Secretary.

Rule Changes

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

PART 1—PRACTICE AND PROCEDURE

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

Authority: 15 U.S.C. 79 *et seq.*; 47 U.S.C. 151, 154(i), 154(j), 155, 225, and 303(r).

2. Section 1.115 is amended by adding paragraph (e)(4) to read as follows:

§ 1.115 Application for review of action taken pursuant to delegated authority.

* * * * *

(e) * * *

(4) Applications for review of final staff decisions issued on delegated authority in formal complaint proceedings on the Common Carrier Bureau's Accelerated Docket (see, e.g., § 1.730) shall be filed within 15 days of public notice of the decision, as that date is defined in § 1.4(b). These applications for review, oppositions and replies in Accelerated Docket proceedings shall be served on parties to the proceeding by hand or facsimile transmission.

* * * * *

3. Section 1.720 is amended by revising the introductory paragraph to read as follows:

§ 1.720 General pleading requirements.

Formal complaint proceedings are generally resolved on a written record consisting of a complaint, answer, and joint statement of stipulated facts, disputed facts and key legal issues, along with all associated affidavits, exhibits and other attachments. Commission proceedings may also require or permit other written submissions such as briefs, written interrogatories, and other supplementary documents or pleadings. Those formal complaint proceedings handled on the Common Carrier Bureau's Accelerated Docket are subject to pleading and procedural rules that differ in some respects from the general rules for formal complaint proceedings.

* * * * *

4. Section 1.721 is amended by revising the section heading and the introductory text of paragraph (a), and by adding paragraph (e) to read as follows:

§ 1.721 Format and content of complaints.

(a) Subject to paragraph (e) of this section governing Accelerated Docket proceedings, a formal complaint shall contain:

* * * * *

(e) Complaints on the Accelerated Docket. For the purpose of this paragraph (e), the term document also shall include data compilations and tangible things.

(1) Formal complaints that have been accepted onto the Accelerated Docket shall conform to the requirements set out in this section with the following listed exceptions:

(i) The requirement in § 1.720(c) and paragraphs (a)(5) and (a)(11) of this section that factual assertions be supported by affidavit shall not apply to complaints on the Accelerated Docket. Nevertheless, allegations of material fact, whether based on personal knowledge or information and belief, that cannot be supported by documentation remain subject to the provisions of § 1.52.

(ii) Complaints on the Accelerated Docket are not required to include proposed findings of fact, conclusions of law, and legal analysis relevant to the claims and arguments set forth in the complaint, as required in paragraph (a)(6) of this section. Nevertheless, complaints on the Accelerated Docket shall fully set out the facts and legal theories on which the complainant premises its claims.

(iii) In light of the requirement for staff-supervised settlement negotiations in § 1.730(b), complaints on the Accelerated Docket are not required to include a certification that the complainant has discussed or attempted to discuss the possibility of settlement with each defendant, as required in paragraph (a)(8) of this section.

(iv) In light of the automatic document production required in § 1.729(i)(1), complaints on the Accelerated Docket are not required to include a description of all relevant documents in the complainant's possession, custody or control, as required in paragraph (a)(10)(ii) of this section.

(v) Complaints on the Accelerated Docket are not required to provide the description, required in paragraph (a)(10)(iii) of this section, of the manner in which the complainant identified persons with knowledge of, and documents relevant to, the dispute.

(2) Formal complaints that have been accepted onto the Accelerated Docket will comply with the following requirements in addition to those requirements generally applicable in formal complaint proceedings:

(i) As required in § 1.729(i)(1), complaints on the Accelerated Docket shall be accompanied, when served on defendants, by copies of documents, within the complainant's possession, custody or control, that are likely to bear significantly on the issues raised in the complaint. Unless otherwise directed, these documents shall not be filed with the Commission.

(ii) Complaints on the Accelerated Docket will bear the following notation in bold typeface above the normal caption on the first page: ''Accelerated Docket Proceeding: Answer Due Within Ten Days of Service Date.''

5. Section 1.724 is amended by revising paragraph (a) and by adding paragraph (k) to read as follows:

§ 1.724 Answers.

(a) Subject to paragraph (k) of this section governing Accelerated Docket proceedings, any carrier upon which a copy of a formal complaint is served shall answer such complaint in the manner prescribed under this section within twenty days of service of the formal complaint by the complainant, unless otherwise directed by the Commission.

* * * * *

(k) Accelerated Docket Proceedings. For the purpose of this paragraph (k), the term document also shall include data compilations and tangible things.

(1) Any party named as a defendant in an Accelerated Docket formal complaint shall answer such complaint in the manner prescribed under this section within ten days of service of the complaint by the complainant, unless otherwise directed by the Commission. Except as set forth in this paragraph (k), answers in Accelerated Docket proceedings shall comply with the requirements of this section.

(2) The requirement in § 1.720(c) and paragraph (g) of this section that factual assertions be supported by affidavit shall not apply to answers in Accelerated Docket proceedings. Nevertheless, allegations of material fact, whether based on personal

knowledge or information and belief, that cannot be supported by documentation remain subject to the provisions of § 1.52.

(3) Answers on the Accelerated Docket are not required to include proposed findings of fact, conclusions of law, and legal analysis relevant to the defenses and arguments set forth in the answer, as required in paragraph (c) of this section. Nevertheless, answers on the Accelerated Docket shall fully set out the facts and legal theories on which the defendant premises its defenses.

(4) In light of the requirement for staff-supervised settlement negotiations required in § 1.730(b), answers on the Accelerated Docket are not required to include a certification that the defendant has discussed, or attempted to discuss, the possibility of settlement with the complainant, as required in paragraph (h) of this section.

(5) As required in § 1.729(i)(1), answers on the Accelerated Docket shall be accompanied, when served on complainants, by copies of documents, within the defendant's possession, custody or control, that are likely to bear significantly on the issues raised in the proceeding. Unless otherwise directed, these documents shall not be filed with the Commission. In light of this automatic document production requirement, answers on the Accelerated Docket are not required to include a description of all relevant documents in the defendant's possession, custody or control, as required in paragraph (f)(2) of this section.

(6) Answers on the Accelerated Docket are not required to provide the description, required in paragraph (f)(3) of this section, of the manner in which the defendant identified persons with knowledge of, and documents relevant to, the dispute.

(7) In Accelerated Docket proceedings, the defendant, as required in § 1.729(i)(1), shall serve, contemporaneously with its answer, the complainant(s) with copies of documents, within the defendant's possession, custody or control, that are likely to bear significantly on the issues raised in the complaint and/or the answer.

6. Section 1.726 is amended by revising paragraph (a) and adding paragraph (g) 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 that shall be responsive to only those specific factual allegations made by the defendant in support of its affirmative defenses. Replies which contain other allegations or arguments will not be accepted or considered by the Commission.

* * * * *

(g) Accelerated Docket Proceedings. For the purpose of this paragraph (g), the term document also shall include data compilations and tangible things.

(1) The filing of a separate pleading to reply to affirmative defenses is not permitted in Accelerated Docket proceedings. Complainants in such proceedings may include, in the § 1.733(i)(4) pre-status-conference filing, those statements that otherwise would have been the subject of a reply.

(2) In Accelerated Docket proceedings, the failure to reply, in the pre-status-conference filing, to an affirmative defense shall be deemed an admission of such affirmative defense and of any facts supporting such affirmative defense that are not specifically contradicted in the complaint.

(3) If a complainant replies to an affirmative defense in its § 1.733(i)(4), pre-status-conference filing, it shall include in that filing the information, required by paragraph (d)(1) of this section, identifying individuals with firsthand knowledge of the facts alleged in the reply.

(4) An Accelerated Docket complainant that replies to an affirmative defense in its § 1.733(i)(4), pre-status-conference filing also shall serve on the defendant, at the same time as that filing, those documents in the complainant's possession, custody or control that were not previously produced to the defendant and that are likely to bear significantly on the issues raised in the reply. Such a complainant is not required to comply with the remainder of the requirements in paragraphs (d) and (e) of this section.

7. Section 1.727 is amended by revising paragraph (a) to read as follows:

§ 1.727 Motions.

(a) A request to the Commission for an order shall be by written motion, stating with particularity the grounds and authority therefor, and setting forth the relief or order sought.

* * * * *

8. Section 1.729 is amended by revising paragraph (a) and adding paragraph (i) to read as follows:

§ 1.729 Discovery.

(a) Subject to paragraph (i) of this section governing Accelerated Docket proceedings, a complainant may file with the Commission and serve on a defendant, concurrently with its complaint, a request for up to ten written interrogatories. A defendant may file with the Commission and serve on a complainant, during the period starting with the service of the complaint and ending with the service of its answer, a request for up to ten written interrogatories. A complainant may file with the Commission and serve on a defendant, within three calendar days of service of the defendant's answer, a request for up to five written interrogatories. Subparts of any interrogatory will be counted as separate interrogatories for purposes of compliance with this limit. Requests for interrogatories filed and served pursuant to this procedure may be used to seek discovery of any non-privileged matter that is relevant to the material facts in dispute in the pending proceeding, provided, however, that requests for interrogatories filed and served by a complainant after service of the defendant's answer shall be limited in scope to specific factual allegations made by the defendant in support of its affirmative defenses. This procedure may not be employed for the purpose of delay, harassment or obtaining information that is beyond the scope of permissible inquiry related to the material facts in dispute in the pending proceeding.

* * * * *

(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.

9. Section 1.730 is revised to read as follows:

§ 1.730 The Common Carrier Bureau's Accelerated Docket.

(a) Parties to formal complaint proceedings within the responsibility of the Common Carrier Bureau (see § 0.291 of this chapter) may request inclusion on the Bureau's Accelerated Docket. As set out in §§ 1.720—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 Common Carrier Bureau.

(b) Any party that contemplates filing a formal complaint may submit a request to the Chief of the Common Carrier Bureau's Enforcement 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 Common Carrier Bureau's Enforcement 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 Common Carrier Bureau's Enforcement 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 filing comments challenging the decision within 15 days of its release by the Commission's Office of Public Affairs. (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.

10. Section 1.733 is amended by revising paragraphs (a) introductory text and (b) and adding paragraph (i) 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, and with the exception of Accelerated Docket proceedings, governed by paragraph (i) of this section, an initial status conference shall take place, at the time and place designated by the Commission staff, ten business days after the date the answer is due to be filed. A status conference may include discussion of:

* * * * *

(b)(1) Subject to paragraph (i) of this section governing Accelerated Docket proceedings, parties shall meet and confer prior to the initial status conference to discuss:

(i) Settlement prospects;

(ii) Discovery;

(iii) Issues in dispute;

(iv) Schedules for pleadings;

(v) Joint statement of stipulated facts, disputed facts, and key legal issues; and

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

(2) Subject to paragraph (i) of this section governing Accelerated Docket proceedings, parties shall submit a joint statement of all proposals agreed to and disputes remaining as a result of such meeting to Commission staff at least two business days prior to the scheduled initial status conference.

* * * * *

(i) Accelerated Docket Proceedings.

(1) In Accelerated Docket proceedings, the initial status conference will be held 10 days after the answer is due to be filed.

(2) Prior to the initial status conference, the parties shall confer, either in person or by telephone, about:

(i) Discovery to which they can agree;

(ii) Facts to which they can stipulate; and

(iii) Factual and legal issues in dispute.

(3) Two days before the status conference, parties shall submit to Commission staff a joint statement of:

(i) The agreements that they have reached with respect to discovery;

(ii) The facts to which they have agreed to stipulate; and

(iii) The disputed facts or legal issues of which they can agree to a joint statement.

(4) Two days before the status conference, each party also shall submit to Commission staff a separate statement which shall include, as appropriate, the party's statement of the disputed facts and legal issues presented by the complaint proceeding and any additional discovery that the party seeks. A complainant that wishes to reply to a defendant's affirmative defense shall do so in its pre-status-conference filing. To the extent that this filing contains statements replying to an affirmative defense, the complainant shall include, and/or serve with the statement, the witness information and documents required in § 1.726(g)(3)–(4). A defendant that intends to rely on

expert evidence shall include its expert statement in its pre-status conference filing. (See § 1.729(i)(4)(ii).)

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ENVIRONMENTAL PROTECTION AGENCY

48 CFR Parts 1511, 1515, and 1552

[FRL–6135–5]

Acquisition Regulation: Administrative Amendments

AGENCY: Environmental Protection Agency.

ACTION: Final rule.

SUMMARY: The Environmental Protection Agency (EPA) is adopting as final an interim rule that amended the EPA Acquisition Regulation (EPAAR) (48 CFR Chapter 15) to include a requirement that any report prepared under an Agency contract identify the contract under which it was prepared and the name of the contractor who prepared the report, and to make an administrative change in the approval levels for Source Selection.

DATES: This final rule is effective on August 4, 1998.

FOR FURTHER INFORMATION CONTACT: Louise Senzel, U.S. Environmental Protection Agency, Office of Acquisition Management (3802R), 401 M Street, SW, Washington, D.C. 20460, Telephone: (202) 564–4367.

SUPPLEMENTARY INFORMATION:

A. Background

This final rule includes a requirement that any report prepared under an Agency contract identify the contract under which it was prepared and the name of the contractor who prepared the report as required by section 411 of Public Law 105–65, October 27, 1997, and makes an administrative change in the approval levels for Source Selection.

Section 411 of P.L. 105–65 (EPA's appropriation act) states ''except as otherwise provided by the law, no part of any appropriation contained in this Act shall be obligated or expended by any executive agency, as referred to in the Office of Federal Procurement Policy Act (41 U.S.C. 401 et. seq), for a contract for services unless such executive agency: (1) has awarded and entered into such contract in full compliance with such Act and the regulations promulgated thereunder; and (2) requires any report prepared pursuant to such contract, including plans, evaluations, studies, analyses and manuals, and any report prepared by the agency which is substantially derived from or substantially includes any report pursuant to such contract, to contain information concerning: (A) the contract pursuant to which the report was prepared; and (B) the contractor who prepared the report to such contract.'' Because immediate compliance was essential for EPA contracting activities, urgent and compelling circumstances existed that made it impracticable for EPA to promulgate this rule using notice and comment procedures. Therefore, pursuant to 41 U.S.C. § 418b(d), EPA promulgated these revisions on an interim basis and provided for a public comment period of 60 days from the date on which this rule was published, March 4, 1998.

Only one public comment was received. The comment suggested many more detailed requirements for submission of reports in paper and other electronic or information technology media, distribution requirements, and publication requirements. After considering the comment received, no change was made because we believe that the level of specificity of these requirements should be considered on a case-by-case basis for a particular contract action and not specified as a standard requirement for all contracts.

B. Executive Order 12866

The final rule is not a significant regulatory action for the purposes of Executive Order 12866; therefore, no review was required by the Office of Information and Regulatory Affairs within the Office of Management and Budget (OMB).

C. Paperwork Reduction Act

The Paperwork Reduction Act does not apply because this final rule does not contain information collection requirements that require the approval of OMB under the Paperwork Reduction Act of 1980 (44 U.S.C. 3501 *et seq.*)

D. Regulatory Flexibility Act

The EPA certifies that this final rule does not exert a significant economic impact on a substantial number of small entities. The requirements to contractors under the rule impose no reporting, record keeping, or any compliance costs.

E. Unfunded Mandates

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), Public Law 104–4, establishes requirements for Federal agencies to assess their regulatory actions on State, local, and tribal governments, and the private sector. This final rule does not contain a Federal mandate that may result in expenditures of $100 million or more for State, local, and tribal governments, in the aggregate, or the private sector in one year. Any private sector costs for this action relate to paperwork requirements and associated expenditures that are far below the level established for UMRA applicability. Thus, the rule was not subject to the requirements of sections 202 and 205 of the UMRA.

F. Submission to Congress and the General Accounting Office

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives and the Comptroller General of United States prior to publication of the rule in the **Federal Register**. This rule is not a ''major rule'' as defined by 5 U.S.C. 804(2).

G. Executive Order 13045

Protection of Children from Environmental Health Risks and Safety Risks (62 FR 19885, April 23, 1997), applies to any rule that: (1) is determined to be ''economically significant'' as defined under Executive Order 12866, and (2) concerns an environmental health or safety risk that EPA has reason to believe may have a disproportionate effect on children. If the regulatory action meets both criteria, the Agency must evaluate the environmental health or safety effects of the planned rule on children, and explain why the planned regulation is preferable to other potentially effective and reasonably feasible alternatives considered by the Agency.

This rule is not subject to E.O. 13045 because it is not an economically significant rule as defined by E.O. 12866, and because it does not involve decisions on environmental health or safety risks.

List of Subjects in 48 CFR Parts 1511, 1515, and 1552

Government procurement.

Authority: The provisions of this regulation are issued under 5 U.S.C. 301; Sec. 205(c), 63 Stat. 390, as amended, 40 U.S.C. 486(c).