

FEDERAL STATUTES

47 USC 224: Pole attachments

Text contains those laws in effect on October 6, 2019

From Title 47-TELECOMMUNICATIONS

CHAPTER 5-WIRE OR RADIO COMMUNICATION

SUBCHAPTER II-COMMON CARRIERS

Part I-Common Carrier Regulation

Jump To:[Source Credit](#)[Amendments](#)[Effective Date](#)**§224. Pole attachments****(a) Definitions**

As used in this section:

(1) The term "utility" means any person who is a local exchange carrier or an electric, gas, water, steam, or other public utility, and who owns or controls poles, ducts, conduits, or rights-of-way used, in whole or in part, for any wire communications. Such term does not include any railroad, any person who is cooperatively organized, or any person owned by the Federal Government or any State.

(2) The term "Federal Government" means the Government of the United States or any agency or instrumentality thereof.

(3) The term "State" means any State, territory, or possession of the United States, the District of Columbia, or any political subdivision, agency, or instrumentality thereof.

(4) The term "pole attachment" means any attachment by a cable television system or provider of telecommunications service to a pole, duct, conduit, or right-of-way owned or controlled by a utility.

(5) For purposes of this section, the term "telecommunications carrier" (as defined in section 153 of this title) does not include any incumbent local exchange carrier as defined in section 251(h) of this title.

(b) Authority of Commission to regulate rates, terms, and conditions; enforcement powers; promulgation of regulations

(1) Subject to the provisions of subsection (c) of this section, the Commission shall regulate the rates, terms, and conditions for pole attachments to provide that such rates, terms, and conditions are just and reasonable, and shall adopt procedures necessary and appropriate to hear and resolve complaints concerning such rates, terms, and conditions. For purposes of enforcing any determinations resulting from complaint procedures established pursuant to this subsection, the Commission shall take such action as it deems appropriate and necessary, including issuing cease and desist orders, as authorized by section 312 (b) of this title.

(2) The Commission shall prescribe by rule regulations to carry out the provisions of this section.

(c) State regulatory authority over rates, terms, and conditions; preemption; certification; circumstances constituting State regulation

(1) Nothing in this section shall be construed to apply to, or to give the Commission jurisdiction with respect to rates, terms, and conditions, or access to poles, ducts, conduits, and rights-of-way as provided in subsection (f), for pole attachments in any case where such matters are regulated by a State.

(2) Each State which regulates the rates, terms, and conditions for pole attachments shall certify to the Commission that-

(A) it regulates such rates, terms, and conditions; and

(B) in so regulating such rates, terms, and conditions, the State has the authority to consider and does consider the interests of the subscribers of the services offered via such attachments, as well as the interests of the consumers of the utility services.

(3) For purposes of this subsection, a State shall not be considered to regulate the rates, terms, and conditions for pole attachments-

(A) unless the State has issued and made effective rules and regulations implementing the State's regulatory authority over pole attachments; and

(B) with respect to any individual matter, unless the State takes final action on a complaint regarding such matter-

- (i) within 180 days after the complaint is filed with the State, or
- (ii) within the applicable period prescribed for such final action in such rules and regulations of the State, if the prescribed period does not extend beyond 360 days after the filing of such complaint.

(d) Determination of just and reasonable rates; "usable space" defined

(1) For purposes of subsection (b) of this section, a rate is just and reasonable if it assures a utility the recovery of not less than the additional costs of providing pole attachments, nor more than an amount determined by multiplying the percentage of the total usable space, or the percentage of the total duct or conduit capacity, which is occupied by the pole attachment by the sum of the operating expenses and actual capital costs of the utility attributable to the entire pole, duct, conduit, or right-of-way.

(2) As used in this subsection, the term "usable space" means the space above the minimum grade level which can be used for the attachment of wires, cables, and associated equipment.

(3) This subsection shall apply to the rate for any pole attachment used by a cable television system solely to provide cable service. Until the effective date of the regulations required under subsection (e), this subsection shall also apply to the rate for any pole attachment used by a cable system or any telecommunications carrier (to the extent such carrier is not a party to a pole attachment agreement) to provide any telecommunications service.

(e) Regulations governing charges; apportionment of costs of providing space

(1) The Commission shall, no later than 2 years after February 8, 1996, prescribe regulations in accordance with this subsection to govern the charges for pole attachments used by telecommunications carriers to provide telecommunications services, when the parties fail to resolve a dispute over such charges. Such regulations shall ensure that a utility charges just, reasonable, and nondiscriminatory rates for pole attachments.

(2) A utility shall apportion the cost of providing space on a pole, duct, conduit, or right-of-way other than the usable space among entities so that such apportionment equals two-thirds of the costs of providing space other than the usable space that would be allocated to such entity under an equal apportionment of such costs among all attaching entities.

(3) A utility shall apportion the cost of providing usable space among all entities according to the percentage of usable space required for each entity.

(4) The regulations required under paragraph (1) shall become effective 5 years after February 8, 1996. Any increase in the rates for pole attachments that result from the adoption of the regulations required by this subsection shall be phased in equal annual increments over a period of 5 years beginning on the effective date of such regulations.

(f) Nondiscriminatory access

(1) A utility shall provide a cable television system or any telecommunications carrier with nondiscriminatory access to any pole, duct, conduit, or right-of-way owned or controlled by it.

(2) Notwithstanding paragraph (1), a utility providing electric service may deny a cable television system or any telecommunications carrier access to its poles, ducts, conduits, or rights-of-way, on a non-discriminatory¹ basis where there is insufficient capacity and for reasons of safety, reliability and generally applicable engineering purposes.

(g) Imputation to costs of pole attachment rate

A utility that engages in the provision of telecommunications services or cable services shall impute to its costs of providing such services (and charge any affiliate, subsidiary, or associate company engaged in the provision of such services) an equal amount to the pole attachment rate for which such company would be liable under this section.

(h) Modification or alteration of pole, duct, conduit, or right-of-way

Whenever the owner of a pole, duct, conduit, or right-of-way intends to modify or alter such pole, duct, conduit, or right-of-way, the owner shall provide written notification of such action to any entity that has obtained an attachment to such conduit or right-of-way so that such entity may have a reasonable opportunity to add to or modify its existing attachment. Any entity that adds to or modifies its existing attachment after receiving such notification shall bear a proportionate share of the costs incurred by the owner in making such pole, duct, conduit, or right-of-way accessible.

(i) Costs of rearranging or replacing attachment

An entity that obtains an attachment to a pole, conduit, or right-of-way shall not be required to bear any of the costs of rearranging or replacing its attachment, if such rearrangement or replacement is required as a result of an additional attachment or the modification of an existing attachment sought by any other entity (including the owner of such pole, duct, conduit, or right-of-way).

(June 19, 1934, ch. 652, title II, §224, as added Pub. L. 95-234, §6, Feb. 21, 1978, 92 Stat. 35 ; amended Pub. L. 97-259, title I, §106, Sept. 13, 1982, 96 Stat. 1091 ; Pub. L. 98-549, §4, Oct. 30, 1984, 98 Stat. 2801 ; Pub. L. 103-414, title III, §304(a)(7), Oct. 26, 1994, 108 Stat. 4297 ; Pub. L. 104-104, title VII, §703, Feb. 8, 1996, 110 Stat. 149 .)

AMENDMENTS

1996-Subsec. (a)(1). Pub. L. 104-104, §703(1), inserted first sentence and struck out former first sentence which read as follows: "The term 'utility' means any person whose rates or charges are regulated by the Federal Government or a State and who owns or controls poles, ducts, conduits, or rights-of-way used, in whole or in part, for wire communication."

Subsec. (a)(4). Pub. L. 104-104, §703(2), inserted "or provider of telecommunications service" after "system".

Subsec. (a)(5). Pub. L. 104-104, §703(3), added par. (5).

Subsec. (c)(1). Pub. L. 104-104, §703(4), inserted ", or access to poles, ducts, conduits, and rights-of-way as provided in subsection (f)," after "conditions".

Subsec. (c)(2)(B). Pub. L. 104-104, §703(5), substituted "the services offered via such attachments" for "cable television services".

Subsec. (d)(3). Pub. L. 104-104, §703(6), added par. (3).

Subsecs. (e) to (i). Pub. L. 104-104, §703(7), added subsecs. (e) to (i).

1994-Subsec. (b)(2). Pub. L. 103-414 substituted "The Commission" for "Within 180 days from February 21, 1978, the Commission".

1984-Subsec. (c)(3). Pub. L. 98-549 added par. (3).

1982-Subsec. (e). Pub. L. 97-259 struck out subsec. (e) which provided that, upon expiration of 5-year period that began on Feb. 21, 1978, provisions of subsec. (d) of this section would cease to have any effect.

EFFECTIVE DATE OF 1984 AMENDMENT

Amendment by Pub. L. 98-549 effective 60 days after Oct. 30, 1984, except where otherwise expressly provided, see section 9(a) of Pub. L. 98-549, set out as a note under section 521 of this title.

EFFECTIVE DATE

Section effective on thirtieth day after Feb. 21, 1978, see section 7 of Pub. L. 95-234, set out as an Effective Date of 1978 Amendment note under section 152 of this title.

¹ So in original. Probably should be "nondiscriminatory".

47 USC 226: Telephone operator services

Text contains those laws in effect on October 6, 2019

From Title 47-TELECOMMUNICATIONS

CHAPTER 5-WIRE OR RADIO COMMUNICATION

SUBCHAPTER II-COMMON CARRIERS

Part I-Common Carrier Regulation

Jump To:[Source Credit](#)[References In Text](#)[Amendments](#)[Miscellaneous](#)**§226. Telephone operator services****(a) Definitions**

As used in this section-

(1) The term "access code" means a sequence of numbers that, when dialed, connect the caller to the provider of operator services associated with that sequence.

(2) The term "aggregator" means any person that, in the ordinary course of its operations, makes telephones available to the public or to transient users of its premises, for interstate telephone calls using a provider of operator services.

(3) The term "call splashing" means the transfer of a telephone call from one provider of operator services to another such provider in such a manner that the subsequent provider is unable or unwilling to determine the location of the origination of the call and, because of such inability or unwillingness, is prevented from billing the call on the basis of such location.

(4) The term "consumer" means a person initiating any interstate telephone call using operator services.

(5) The term "equal access" has the meaning given that term in Appendix B of the Modification of Final Judgment entered August 24, 1982, in *United States v. Western Electric*, Civil Action No. 82-0192 (United States District Court, District of Columbia), as amended by the Court in its orders issued prior to October 17, 1990.

(6) The term "equal access code" means an access code that allows the public to obtain an equal access connection to the carrier associated with that code.

(7) The term "operator services" means any interstate telecommunications service initiated from an aggregator location that includes, as a component, any automatic or live assistance to a consumer to arrange for billing or completion, or both, of an interstate telephone call through a method other than-

(A) automatic completion with billing to the telephone from which the call originated; or

(B) completion through an access code used by the consumer, with billing to an account previously established with the carrier by the consumer.

(8) The term "presubscribed provider of operator services" means the interstate provider of operator services to which the consumer is connected when the consumer places a call using a provider of operator services without dialing an access code.

(9) The term "provider of operator services" means any common carrier that provides operator services or any other person determined by the Commission to be providing operator services.

(b) Requirements for providers of operator services**(1) In general**

Beginning not later than 90 days after October 17, 1990, each provider of operator services shall, at a minimum-

(A) identify itself, audibly and distinctly, to the consumer at the beginning of each telephone call and before the consumer incurs any charge for the call;

(B) permit the consumer to terminate the telephone call at no charge before the call is connected;

(C) disclose immediately to the consumer, upon request and at no charge to the consumer-

(i) a quote of its rates or charges for the call;

(ii) the methods by which such rates or charges will be collected; and

(iii) the methods by which complaints concerning such rates, charges, or collection practices will be resolved;

(D) ensure, by contract or tariff, that each aggregator for which such provider is the presubscribed provider of operator services is in compliance with the requirements of subsection (c) and, if applicable, subsection (e)(1);

(E) withhold payment (on a location-by-location basis) of any compensation, including commissions, to aggregators if such provider reasonably believes that the aggregator (i) is blocking access by means of "950" or "800" numbers to interstate common carriers in violation of subsection (c)(1)(B) or (ii) is blocking access to equal access codes in violation of rules the Commission may prescribe under subsection (e)(1);

(F) not bill for unanswered telephone calls in areas where equal access is available;

(G) not knowingly bill for unanswered telephone calls where equal access is not available;

(H) not engage in call splashing, unless the consumer requests to be transferred to another provider of operator services, the consumer is informed prior to incurring any charges that the rates for the call may not reflect the rates from the actual originating location of the call, and the consumer then consents to be transferred; and

(I) except as provided in subparagraph (H), not bill for a call that does not reflect the location of the origination of the call.

(2) Additional requirements for first 3 years

In addition to meeting the requirements of paragraph (1), during the 3-year period beginning on the date that is 90 days after October 17, 1990, each presubscribed provider of operator services shall identify itself audibly and distinctly to the consumer, not only as required in paragraph (1)(A), but also for a second time before connecting the call and before the consumer incurs any charge.

(c) Requirements for aggregators

(1) In general

Each aggregator, beginning not later than 90 days after October 17, 1990, shall-

(A) post on or near the telephone instrument, in plain view of consumers-

(i) the name, address, and toll-free telephone number of the provider of operator services;

(ii) a written disclosure that the rates for all operator-assisted calls are available on request, and that consumers have a right to obtain access to the interstate common carrier of their choice and may contact their preferred interstate common carriers for information on accessing that carrier's service using that telephone; and

(iii) the name and address of the enforcement division of the Common Carrier Bureau of the Commission, to which the consumer may direct complaints regarding operator services;

(B) ensure that each of its telephones presubscribed to a provider of operator services allows the consumer to use "800" and "950" access code numbers to obtain access to the provider of operator services desired by the consumer; and

(C) ensure that no charge by the aggregator to the consumer for using an "800" or "950" access code number, or any other access code number, is greater than the amount the aggregator charges for calls placed using the presubscribed provider of operator services.

(2) Effect of State law or regulation

The requirements of paragraph (1)(A) shall not apply to an aggregator in any case in which State law or State regulation requires the aggregator to take actions that are substantially the same as those required in paragraph (1)(A).

(d) General rulemaking required

(1) Rulemaking proceeding

The Commission shall conduct a rulemaking proceeding pursuant to this subchapter to prescribe regulations to-

(A) protect consumers from unfair and deceptive practices relating to their use of operator services to place interstate telephone calls; and

(B) ensure that consumers have the opportunity to make informed choices in making such calls.

(2) Contents of regulations

The regulations prescribed under this section shall-

(A) contain provisions to implement each of the requirements of this section, other than the requirements established by the rulemaking under subsection (e) on access and compensation; and

(B) contain such other provisions as the Commission determines necessary to carry out this section

and the purposes and policies of this section.

(3) Additional requirements to be implemented by regulations

The regulations prescribed under this section shall, at a minimum-

(A) establish minimum standards for providers of operator services and aggregators to use in the routing and handling of emergency telephone calls; and

(B) establish a policy for requiring providers of operator services to make public information about recent changes in operator services and choices available to consumers in that market.

(e) Separate rulemaking on access and compensation

(1) Access

The Commission,¹ shall require-

(A) that each aggregator ensure within a reasonable time that each of its telephones presubscribed to a provider of operator services allows the consumer to obtain access to the provider of operator services desired by the consumer through the use of an equal access code; or

(B) that all providers of operator services, within a reasonable time, make available to their customers a "950" or "800" access code number for use in making operator services calls from anywhere in the United States; or

(C) that the requirements described under both subparagraphs (A) and (B) apply.

(2) Compensation

The Commission shall consider the need to prescribe compensation (other than advance payment by consumers) for owners of competitive public pay telephones for calls routed to providers of operator services that are other than the presubscribed provider of operator services for such telephones. Within 9 months after October 17, 1990, the Commission shall reach a final decision on whether to prescribe such compensation.

(f) Technological capability of equipment

Any equipment and software manufactured or imported more than 18 months after October 17, 1990, and installed by any aggregator shall be technologically capable of providing consumers with access to interstate providers of operator services through the use of equal access codes.

(g) Fraud

In any proceeding to carry out the provisions of this section, the Commission shall require such actions or measures as are necessary to ensure that aggregators are not exposed to undue risk of fraud.

(h) Determinations of rate compliance

(1) Filing of informational tariff

(A) In general

Each provider of operator services shall file, within 90 days after October 17, 1990, and shall maintain, update regularly, and keep open for public inspection, an informational tariff specifying rates, terms, and conditions, and including commissions, surcharges, any fees which are collected from consumers, and reasonable estimates of the amount of traffic priced at each rate, with respect to calls for which operator services are provided. Any changes in such rates, terms, or conditions shall be filed no later than the first day on which the changed rates, terms, or conditions are in effect.

(B) Waiver authority

The Commission may, after 4 years following October 17, 1990, waive the requirements of this paragraph only if-

(i) the findings and conclusions of the Commission in the final report issued under paragraph (3)(B) (iii) state that the regulatory objectives specified in subsection (d)(1)(A) and (B) have been achieved; and

(ii) the Commission determines that such waiver will not adversely affect the continued achievement of such regulatory objectives.

(2) Review of informational tariffs

If the rates and charges filed by any provider of operator services under paragraph (1) appear upon review by the Commission to be unjust or unreasonable, the Commission may require such provider of operator services to do either or both of the following:

(A) demonstrate that its rates and charges are just and reasonable, and

(B) announce that its rates are available on request at the beginning of each call.

(3) Proceeding required**(A) In general**

Within 60 days after October 17, 1990, the Commission shall initiate a proceeding to determine whether the regulatory objectives specified in subsection (d)(1)(A) and (B) are being achieved. The proceeding shall-

- (i) monitor operator service rates;
- (ii) determine the extent to which offerings made by providers of operator services are improvements, in terms of service quality, price, innovation, and other factors, over those available before the entry of new providers of operator services into the market;
- (iii) report on (in the aggregate and by individual provider) operator service rates, incidence of service complaints, and service offerings;
- (iv) consider the effect that commissions and surcharges, billing and validation costs, and other costs of doing business have on the overall rates charged to consumers; and
- (v) monitor compliance with the provisions of this section, including the periodic placement of telephone calls from aggregator locations.

(B) Reports

- (i) The Commission shall, during the pendency of such proceeding and not later than 5 months after its commencement, provide the Congress with an interim report on the Commission's activities and progress to date.
- (ii) Not later than 11 months after the commencement of such proceeding, the Commission shall report to the Congress on its interim findings as a result of the proceeding.
- (iii) Not later than 23 months after the commencement of such proceeding, the Commission shall submit a final report to the Congress on its findings and conclusions.

(4) Implementing regulations**(A) In general**

Unless the Commission makes the determination described in subparagraph (B), the Commission shall, within 180 days after submission of the report required under paragraph (3)(B)(iii), complete a rulemaking proceeding pursuant to this subchapter to establish regulations for implementing the requirements of this subchapter (and paragraphs (1) and (2) of this subsection) that rates and charges for operator services be just and reasonable. Such regulations shall include limitations on the amount of commissions or any other compensation given to aggregators by providers of operator service.

(B) Limitation

The requirement of subparagraph (A) shall not apply if, on the basis of the proceeding under paragraph (3)(A), the Commission makes (and includes in the report required by paragraph (3)(B)(iii)) a factual determination that market forces are securing rates and charges that are just and reasonable, as evidenced by rate levels, costs, complaints, service quality, and other relevant factors.

(i) Statutory construction

Nothing in this section shall be construed to alter the obligations, powers, or duties of common carriers or the Commission under the other sections of this chapter.

(June 19, 1934, ch. 652, title II, §226, as added Pub. L. 101-435, §3, Oct. 17, 1990, 104 Stat. 987 ; amended Pub. L. 101-555, §4, Nov. 15, 1990, 104 Stat. 2760 ; Pub. L. 102-538, title II, §207, Oct. 27, 1992, 106 Stat. 3543 ; Pub. L. 103-414, title III, §§303(a)(10), 304(a)(8), Oct. 25, 1994, 108 Stat. 4294 , 4297.)

REFERENCES IN TEXT

This chapter, referred to in subsec. (i), was in the original "this Act", meaning act June 19, 1934, ch. 652, 48 Stat. 1064 , known as the Communications Act of 1934, which is classified principally to this chapter. For complete classification of this Act to the Code, see section 609 of this title and Tables.

AMENDMENTS

1994-Subsec. (d)(2) to (4). Pub. L. 103-414, §303(a)(10), redesignated pars. (3) and (4) as (2) and (3), respectively, and struck out heading and text of former par. (2). Text read as follows: "The Commission shall initiate the proceeding required under paragraph (1) within 60 days after

October 17, 1990, and shall prescribe regulations pursuant to the proceeding not later than 210 days after October 17, 1990. Such regulations shall take effect not later than 45 days after the date the regulations are prescribed."

Subsec. (e)(1). Pub. L. 103-414, §304(a)(8), struck out "within 9 months after October 17, 1990," after "The Commission," in introductory provisions.

1992-Subsec. (d)(4)(A). Pub. L. 102-538 inserted "and aggregators" after "operator services".

1990-Subsec. (b)(1). Pub. L. 101-555, §4(a), substituted "90 days" for "30 days".

Subsec. (b)(1)(J). Pub. L. 101-555, §4(b), struck out subpar. (J) which read as follows: "not bill an interexchange telephone call to a billing card number which-

"(i) is issued by another provider of operator services, and

"(ii) permits the identification of the other provider,

unless the call is billed at a rate not greater than the other provider's rate for the call, the consumer requests a special service that is not available under tariff from the other provider, or the consumer expressly consents to a rate greater than the other provider's rate."

Subsecs. (b)(2), (c)(1), (h)(1)(A). Pub. L. 101-555, §4(a), substituted "90 days" for "30 days".

CONGRESSIONAL FINDINGS

Pub. L. 101-435, §2, Oct. 17, 1990, 104 Stat. 986, provided that: "The Congress finds that-

"(1) the divestiture of AT&T and decisions allowing open entry for competitors in the telephone marketplace produced a variety of new services and many new providers of existing telephone services;

"(2) the growth of competition in the telecommunications market makes it essential to ensure that safeguards are in place to assure fairness for consumers and service providers alike;

"(3) a variety of providers of operator services now compete to win contracts to provide operator services to hotels, hospitals, airports, and other aggregators of telephone business from consumers;

"(4) the mere existence of a variety of service providers in the operator services marketplace is significant in making that market competitive only when consumers are able to make informed choices from among those service providers;

"(5) however, often consumers have no choices in selecting a provider of operator services, and often attempts by consumers to reach their preferred long distance carrier by using a telephone billing card, credit card, or prearranged access code number are blocked;

"(6) a number of State regulatory authorities have taken action to protect consumers using intrastate operator services;

"(7) from January 1988 through February 1990, the Federal Communications Commission received over 4,000 complaints from consumers about operator services;

"(8) those consumers have complained that they are denied access to the interexchange carrier of their choice, that they are deceived about the identity of the company providing operator services for their calls and the rates being charged, that they lack information on what they can do to complain about unfair treatment by an operator service provider, and that they are, accordingly, being deprived of the free choice essential to the operation of a competitive market;

"(9) the Commission has testified that its actions have been insufficient to correct the problems in the operator services industry to date; and

"(10) a combination of industry self-regulation and government regulation is required to ensure that competitive operator services are provided in a fair and reasonable manner."

¹ So in original. The comma probably should not appear.

47 USC 251: Interconnection

Text contains those laws in effect on October 6, 2019

From Title 47-TELECOMMUNICATIONS

CHAPTER 5-WIRE OR RADIO COMMUNICATION

SUBCHAPTER II-COMMON CARRIERS

Part II-Development of Competitive Markets

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§251. Interconnection**(a) General duty of telecommunications carriers**

Each telecommunications carrier has the duty-

(1) to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers; and

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

(b) Obligations of all local exchange carriers

Each local exchange carrier has the following duties:

(1) Resale

The duty not to prohibit, and not to impose unreasonable or discriminatory conditions or limitations on, the resale of its telecommunications services.

(2) Number portability

The duty to provide, to the extent technically feasible, number portability in accordance with requirements prescribed by the Commission.

(3) Dialing parity

The duty to provide dialing parity to competing providers of telephone exchange service and telephone toll service, and the duty to permit all such providers to have nondiscriminatory access to telephone numbers, operator services, directory assistance, and directory listing, with no unreasonable dialing delays.

(4) Access to rights-of-way

The duty to afford access to the poles, ducts, conduits, and rights-of-way of such carrier to competing providers of telecommunications services on rates, terms, and conditions that are consistent with section 224 of this title.

(5) Reciprocal compensation

The duty to establish reciprocal compensation arrangements for the transport and termination of telecommunications.

(c) Additional obligations of incumbent local exchange carriers

In addition to the duties contained in subsection (b), each incumbent local exchange carrier has the following duties:

(1) Duty to negotiate

The duty to negotiate in good faith in accordance with section 252 of this title the particular terms and conditions of agreements to fulfill the duties described in paragraphs (1) through (5) of subsection (b) and this subsection. The requesting telecommunications carrier also has the duty to negotiate in good faith the terms and conditions of such agreements.

(2) Interconnection

The duty to provide, for the facilities and equipment of any requesting telecommunications carrier, interconnection with the local exchange carrier's network-

(A) for the transmission and routing of telephone exchange service and exchange access;

(B) at any technically feasible point within the carrier's network;

(C) that is at least equal in quality to that provided by the local exchange carrier to itself or to any subsidiary, affiliate, or any other party to which the carrier provides interconnection; and

(D) on rates, terms, and conditions that are just, reasonable, and nondiscriminatory, in accordance with the terms and conditions of the agreement and the requirements of this section and section 252 of this title.

(3) Unbundled access

The duty to provide, to any requesting telecommunications carrier for the provision of a telecommunications service, nondiscriminatory access to network elements on an unbundled basis at any technically feasible point on rates, terms, and conditions that are just, reasonable, and nondiscriminatory in accordance with the terms and conditions of the agreement and the requirements of this section and section 252 of this title. An incumbent local exchange carrier shall provide such unbundled network elements in a manner that allows requesting carriers to combine such elements in order to provide such telecommunications service.

(4) Resale

The duty-

(A) to offer for resale at wholesale rates any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers; and

(B) not to prohibit, and not to impose unreasonable or discriminatory conditions or limitations on, the resale of such telecommunications service, except that a State commission may, consistent with regulations prescribed by the Commission under this section, prohibit a reseller that obtains at wholesale rates a telecommunications service that is available at retail only to a category of subscribers from offering such service to a different category of subscribers.

(5) Notice of changes

The duty to provide reasonable public notice of changes in the information necessary for the transmission and routing of services using that local exchange carrier's facilities or networks, as well as of any other changes that would affect the interoperability of those facilities and networks.

(6) Collocation

The duty to provide, on rates, terms, and conditions that are just, reasonable, and nondiscriminatory, for physical collocation of equipment necessary for interconnection or access to unbundled network elements at the premises of the local exchange carrier, except that the carrier may provide for virtual collocation if the local exchange carrier demonstrates to the State commission that physical collocation is not practical for technical reasons or because of space limitations.

(d) Implementation

(1) In general

Within 6 months after February 8, 1996, the Commission shall complete all actions necessary to establish regulations to implement the requirements of this section.

(2) Access standards

In determining what network elements should be made available for purposes of subsection (c)(3), the Commission shall consider, at a minimum, whether-

(A) access to such network elements as are proprietary in nature is necessary; and

(B) the failure to provide access to such network elements would impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer.

(3) Preservation of State access regulations

In prescribing and enforcing regulations to implement the requirements of this section, the Commission shall not preclude the enforcement of any regulation, order, or policy of a State commission that-

(A) establishes access and interconnection obligations of local exchange carriers;

(B) is consistent with the requirements of this section; and

(C) does not substantially prevent implementation of the requirements of this section and the purposes of this part.

(e) Numbering administration

(1) Commission authority and jurisdiction

The Commission shall create or designate one or more impartial entities to administer telecommunications numbering and to make such numbers available on an equitable basis. The Commission shall have exclusive jurisdiction over those portions of the North American Numbering Plan

that pertain to the United States. Nothing in this paragraph shall preclude the Commission from delegating to State commissions or other entities all or any portion of such jurisdiction.

(2) Costs

The cost of establishing telecommunications numbering administration arrangements and number portability shall be borne by all telecommunications carriers on a competitively neutral basis as determined by the Commission.

(3) Universal emergency telephone number

The Commission and any agency or entity to which the Commission has delegated authority under this subsection shall designate 9--1--1 as the universal emergency telephone number within the United States for reporting an emergency to appropriate authorities and requesting assistance. The designation shall apply to both wireline and wireless telephone service. In making the designation, the Commission (and any such agency or entity) shall provide appropriate transition periods for areas in which 9--1--1 is not in use as an emergency telephone number on October 26, 1999.

(f) Exemptions, suspensions, and modifications

(1) Exemption for certain rural telephone companies

(A) Exemption

Subsection (c) of this section shall not apply to a rural telephone company until (i) such company has received a bona fide request for interconnection, services, or network elements, and (ii) the State commission determines (under subparagraph (B)) that such request is not unduly economically burdensome, is technically feasible, and is consistent with section 254 of this title (other than subsections (b)(7) and (c)(1)(D) thereof).

(B) State termination of exemption and implementation schedule

The party making a bona fide request of a rural telephone company for interconnection, services, or network elements shall submit a notice of its request to the State commission. The State commission shall conduct an inquiry for the purpose of determining whether to terminate the exemption under subparagraph (A). Within 120 days after the State commission receives notice of the request, the State commission shall terminate the exemption if the request is not unduly economically burdensome, is technically feasible, and is consistent with section 254 of this title (other than subsections (b)(7) and (c)(1)(D) thereof). Upon termination of the exemption, a State commission shall establish an implementation schedule for compliance with the request that is consistent in time and manner with Commission regulations.

(C) Limitation on exemption

The exemption provided by this paragraph shall not apply with respect to a request under subsection (c) from a cable operator providing video programming, and seeking to provide any telecommunications service, in the area in which the rural telephone company provides video programming. The limitation contained in this subparagraph shall not apply to a rural telephone company that is providing video programming on February 8, 1996.

(2) Suspensions and modifications for rural carriers

A local exchange carrier with fewer than 2 percent of the Nation's subscriber lines installed in the aggregate nationwide may petition a State commission for a suspension or modification of the application of a requirement or requirements of subsection (b) or (c) to telephone exchange service facilities specified in such petition. The State commission shall grant such petition to the extent that, and for such duration as, the State commission determines that such suspension or modification-

(A) is necessary-

- (i) to avoid a significant adverse economic impact on users of telecommunications services generally;
- (ii) to avoid imposing a requirement that is unduly economically burdensome; or
- (iii) to avoid imposing a requirement that is technically infeasible; and

(B) is consistent with the public interest, convenience, and necessity.

The State commission shall act upon any petition filed under this paragraph within 180 days after receiving such petition. Pending such action, the State commission may suspend enforcement of the requirement or requirements to which the petition applies with respect to the petitioning carrier or carriers.

(g) Continued enforcement of exchange access and interconnection requirements

On and after February 8, 1996, each local exchange carrier, to the extent that it provides wireline services, shall provide exchange access, information access, and exchange services for such access to interexchange carriers and information service providers in accordance with the same equal access and nondiscriminatory interconnection restrictions and obligations (including receipt of compensation) that apply to such carrier on the date immediately preceding February 8, 1996, under any court order, consent decree, or regulation, order, or policy of the Commission, until such restrictions and obligations are explicitly superseded by regulations prescribed by the Commission after February 8, 1996. During the period beginning on February 8, 1996, and until such restrictions and obligations are so superseded, such restrictions and obligations shall be enforceable in the same manner as regulations of the Commission.

(h) "Incumbent local exchange carrier" defined

(1) Definition

For purposes of this section, the term "incumbent local exchange carrier" means, with respect to an area, the local exchange carrier that-

(A) on February 8, 1996, provided telephone exchange service in such area; and

(B)(i) on February 8, 1996, was deemed to be a member of the exchange carrier association pursuant to section 69.601(b) of the Commission's regulations (47 C.F.R. 69.601(b)); or

(ii) is a person or entity that, on or after February 8, 1996, became a successor or assign of a member described in clause (i).

(2) Treatment of comparable carriers as incumbents

The Commission may, by rule, provide for the treatment of a local exchange carrier (or class or category thereof) as an incumbent local exchange carrier for purposes of this section if-

(A) such carrier occupies a position in the market for telephone exchange service within an area that is comparable to the position occupied by a carrier described in paragraph (1);

(B) such carrier has substantially replaced an incumbent local exchange carrier described in paragraph (1); and

(C) such treatment is consistent with the public interest, convenience, and necessity and the purposes of this section.

(i) Savings provision

Nothing in this section shall be construed to limit or otherwise affect the Commission's authority under section 201 of this title.

(June 19, 1934, ch. 652, title II, §251, as added Pub. L. 104-104, title I, §101(a), Feb. 8, 1996, 110 Stat. 61 ; amended Pub. L. 106-81, §3(a), Oct. 26, 1999, 113 Stat. 1287 .)

AMENDMENTS

1999-Subsec. (e)(3). Pub. L. 106-81 added par. (3).

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Title 47 → Chapter I → Subchapter A → Part 1 → Subpart J

Title 47: Telecommunication
PART 1—PRACTICE AND PROCEDURE

Subpart J—Pole Attachment Complaint Procedures

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SOURCE: 43 FR 36094, Aug. 15, 1978, unless otherwise noted.

[↑ Back to Top](#)**§1.1401 Purpose.**

The rules and regulations contained in subpart J of this part provide complaint and enforcement procedures to ensure that telecommunications carriers and cable system operators have nondiscriminatory access to utility poles, ducts, conduits, and rights-of-way on rates, terms, and conditions that are just and reasonable. They also provide complaint and enforcement procedures for incumbent local exchange carriers (as defined in 47 U.S.C. 251(h)) to ensure that the rates, terms, and conditions of their access to pole attachments are just and reasonable.

[83 FR 44838, Sept. 4, 2018]

[↑ Back to Top](#)**§1.1402 Definitions.**

(a) The term *utility* means any person that is a local exchange carrier or an electric, gas, water, steam, or other public utility, and who owns or controls poles, ducts, conduits, or rights-of-way used, in whole or in part, for any wire communications. Such term does not include any railroad, any person that is cooperatively organized, or any person owned by the Federal Government or any State.

(b) The term *pole attachment* means any attachment by a cable television system or provider of telecommunications service to a pole, duct, conduit, or right-of-way owned or controlled by a utility.

(c) With respect to poles, the term *usable space* means the space on a utility pole above the minimum grade level which can be used for the attachment of wires, cables, and associated equipment, and which includes space occupied by the utility. With respect to conduit, the term *usable space* means capacity within a conduit system which is available, or which could, with reasonable effort and expense, be made available, for the purpose of installing wires, cable and associated equipment for telecommunications or cable services, and which includes capacity occupied by the utility.

(d) The term *complaint* means a filing by a cable television system operator, a cable television system association, a utility, an association of utilities, a telecommunications carrier, or an association of telecommunications carriers alleging that it has been denied access to a utility pole, duct, conduit, or right-of-way in violation of this subpart and/or that a rate, term, or condition for a pole attachment is not just and reasonable. It also means a filing by an incumbent local exchange carrier (as defined in 47

U.S.C. 251(h)) or an association of incumbent local exchange carriers alleging that a rate, term, or condition for a pole attachment is not just and reasonable.

(e) The term *complainant* means a cable television system operator, a cable television system association, a utility, an association of utilities, a telecommunications carrier, an association of telecommunications carriers, an incumbent local exchange carrier (as defined in 47 U.S.C. 251(h)) or an association of incumbent local exchange carriers who files a complaint.

(f) The term *defendant* means a cable television system operator, a utility, or a telecommunications carrier against whom a complaint is filed.

(g) The term *State* means any State, territory, or possession of the United States, the District of Columbia, or any political subdivision, agency, or instrumentality thereof.

(h) For purposes of this subpart, the term *telecommunications carrier* means any provider of telecommunications services, except that the term does not include aggregators of telecommunications services (as defined in 47 U.S.C. 226) or incumbent local exchange carriers (as defined in 47 U.S.C. 251(h)).

(i) The term *conduit* means a structure containing one or more ducts, usually placed in the ground, in which cables or wires may be installed.

(j) The term *conduit system* means a collection of one or more conduits together with their supporting infrastructure.

(k) The term *duct* means a single enclosed raceway for conductors, cable and/or wire.

(l) With respect to poles, the term *unusable space* means the space on a utility pole below the usable space, including the amount required to set the depth of the pole.

(m) The term *attaching entity* includes cable system operators, telecommunications carriers, incumbent and other local exchange carriers, utilities, governmental entities and other entities with a physical attachment to the pole, duct, conduit or right of way. It does not include governmental entities with only seasonal attachments to the pole.

(n) The term *inner-duct* means a duct-like raceway smaller than a duct that is inserted into a duct so that the duct may carry multiple wires or cables.

(o) The term *make-ready* means the modification or replacement of a utility pole, or of the lines or equipment on the utility pole, to accommodate additional facilities on the utility pole.

(p) The term *complex make-ready* means transfers and work within the communications space that would be reasonably likely to cause a service outage(s) or facility damage, including work such as splicing of any communication attachment or relocation of existing wireless attachments. Any and all wireless activities, including those involving mobile, fixed, and point-to-point wireless communications and wireless internet service providers, are to be considered complex.

(q) The term *simple make-ready* means make-ready where existing attachments in the communications space of a pole could be transferred without any reasonable expectation of a service outage or facility damage and does not require splicing of any existing communication attachment or relocation of an existing wireless attachment.

(r) The term *communications space* means the lower usable space on a utility pole, which typically is reserved for low-voltage communications equipment.

[43 FR 36094, Aug. 15, 1978, as amended at 52 FR 31770, Aug. 24, 1987; 61 FR 43024, Aug. 20, 1996; 61 FR 45618, Aug. 29, 1996; 63 FR 12024, Mar. 12, 1998; 65 FR 31281, May 17, 2000; 66 FR 34560, June 29, 2001; 76 FR 26638, May 9, 2011; 83 FR 44838, Sept. 4, 2018; 83 FR 46836, Sept. 14, 2018]

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§1.1403 Duty to provide access; modifications; notice of removal, increase or modification; petition for temporary stay; and cable operator notice.

(a) A utility shall provide a cable television system or any telecommunications carrier with nondiscriminatory access to any pole, duct, conduit, or right-of-way owned or controlled by it. Notwithstanding this obligation, a utility may deny a cable television system or any telecommunications carrier access to its poles, ducts, conduits, or rights-of-way, on a non-discriminatory basis where there is insufficient capacity or for reasons of safety, reliability and generally applicable engineering purposes.

(b) Requests for access to a utility's poles, ducts, conduits or rights-of-way by a telecommunications carrier or cable operator must be in writing. If access is not granted within 45 days of the request for access, the utility must confirm the denial in writing by the 45th day. The utility's denial of access shall be specific, shall include all relevant evidence and information supporting its denial, and shall explain how such evidence and information relate to a denial of access for reasons of lack of capacity, safety, reliability or engineering standards.

(c) A utility shall provide a cable television system or telecommunications carrier no less than 60 days written notice prior to:

(1) Removal of facilities or termination of any service to those facilities, such removal or termination arising out of a rate, term or condition of the cable television system operator's or telecommunications carrier's pole attachment agreement;

(2) Any increase in pole attachment rates; or

(3) Any modification of facilities by the utility other than make-ready noticed pursuant to §1.1411(e), routine maintenance, or modification in response to emergencies.

(d) A cable television system operator or telecommunications carrier may file a "Petition for Temporary Stay" of the action contained in a notice received pursuant to paragraph (c) of this section within 15 days of receipt of such notice. Such submission shall not be considered unless it includes, in concise terms, the relief sought, the reasons for such relief, including a showing of irreparable harm and likely cessation of cable television service or telecommunication service, a copy of the notice, and certification of service as required by §1.1404(b). The named party may file an answer within 7 days of the date the Petition for Temporary Stay was filed. No further filings under this section will be considered unless requested or authorized by the Commission and no extensions of time will be granted unless justified pursuant to §1.46.

(e) Cable operators must notify pole owners upon offering telecommunications services.

[61 FR 45618, Aug. 29, 1996, as amended at 63 FR 12025, Mar. 12, 1998; 79 FR 73847, Dec. 12, 2014; 83 FR 44839, Sept. 4, 2018; 83 FR 46836, Sept. 14, 2018]

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§1.1404 Pole attachment complaint proceedings.

(a) Pole attachment complaint proceedings shall be governed by the formal complaint rules in subpart E of this part, §§1.720-1.740, except as otherwise provided in this subpart J.

(b) The complaint shall be accompanied by a certification of service on the named defendant, and each of the Federal, State, and local governmental agencies that regulate any aspect of the services provided by the complainant or defendant.

(c) In a case where it is claimed that a rate, term, or condition is unjust or unreasonable, the complaint shall contain a statement that the State has not certified to the Commission that it regulates the rates, terms and conditions for pole attachments. The complaint shall include a statement that the utility is not owned by any railroad, any person who is cooperatively organized or any person owned by the Federal Government or any State.

(d) The complaint shall be accompanied by a copy of the pole attachment agreement, if any, between the cable television system operator or telecommunications carrier and the utility. If there is no present pole attachment agreement, the complaint shall contain:

(1) A statement that the utility uses or controls poles, ducts, or conduits used or designated, in whole or in part, for wire communication; and

(2) A statement that the cable television system operator or telecommunications carrier currently has attachments on the poles, ducts, conduits, or rights-of-way.

(e) The complaint shall state with specificity the pole attachment rate, term or condition which is claimed to be unjust or unreasonable and provide all data and information supporting such claim. Data and information supporting the complaint (including all information necessary for the Commission to apply the rate formulas in §1.1406 should be based upon historical or original cost methodology, insofar as possible. Data should be derived from ARMIS, FERC 1, or other reports filed with state or federal regulatory agencies (identify source). The complainant shall also specify any other information and argument relied upon to attempt to establish that a rate, term, or condition is not just and reasonable.

(f) A utility must supply a cable television system operator or telecommunications carrier the information required in paragraph (e) of this section, as applicable, along with the supporting pages from its ARMIS, FERC Form 1, or other report to a regulatory body, and calculations made in connection with these figures, within 30 days of the request by the cable television system operator or telecommunications carrier.

(g) If any of the information and data required in paragraphs (e) and (f) of this section is not provided to the cable television system operator or telecommunications carrier by the utility upon reasonable request, the cable television system operator or telecommunications carrier shall include a statement indicating the steps taken to obtain the information from the utility, including the dates of all requests. No complaint filed by a cable television system operator or telecommunications carrier shall be dismissed where the utility has failed to provide the information required under paragraphs (e) and (f) after such reasonable request.

[83 FR 44839, Sept. 4, 2018]

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§1.1405 Dismissal of pole attachment complaints for lack of jurisdiction.

(a) The complaint shall be dismissed for lack of jurisdiction in any case where a suitable certificate has been filed by a State pursuant to paragraph (b) of this section. Such certificate shall be conclusive proof of lack of jurisdiction of this Commission. A complaint alleging a denial of access shall be dismissed for lack of jurisdiction in any case where the defendant or a State offers proof that the State is regulating such access matters. Such proof should include a citation to state laws and regulations governing access and establishing a procedure for resolving access complaints in a state forum. A complaint against a utility shall also be dismissed if the utility does not use or control poles, ducts, or conduits used or designated, in whole or in part, for wire communication or if the utility does not meet the criteria of §1.1402(a).

(b) It will be rebuttably presumed that the state is not regulating pole attachments if the Commission does not receive certification from a state that:

(1) It regulates rates, terms and conditions for pole attachments;

(2) In so regulating such rates, terms and conditions, the state has the authority to consider and does consider the interests of the consumers of the services offered via such attachments, as well as the interests of the consumers of the utility services, and

(3) It has issued and made effective rules and regulations implementing the state's regulatory authority over pole attachments (including a specific methodology for such regulation which has been made publicly available in the state).

(c) Upon receipt of such certification, the Commission shall give public notice. In addition, the Commission shall compile and publish from time to time, a listing of states which have provided certification.

(d) Upon receipt of such certification, the Commission shall forward any pending case thereby affected to the state regulatory authority, shall so notify the parties involved and shall give public notice thereof.

(e) Certification shall be by order of the state regulatory body or by a person having lawful delegated authority under provisions of state law to submit such certification. Said person shall provide in writing a statement that he or she has such authority and shall cite the law, regulation or other instrument conferring such authority.

(f) Notwithstanding any such certification, jurisdiction will revert to this Commission with respect to any individual matter, unless the state takes final action on a complaint regarding such matter:

(1) Within 180 days after the complaint is filed with the state, or

(2) Within the applicable periods prescribed for such final action in such rules and regulations of the state, if the prescribed period does not extend beyond 360 days after the filing of such complaint.

[83 FR 44839, Sept. 4, 2018]

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§1.1406 Commission consideration of the complaint.

(a) The complainant shall have the burden of establishing a *prima facie* case that the rate, term, or condition is not just and reasonable or that the denial of access violates 47 U.S.C. 224(f). If, however, a utility argues that the proposed rate is lower than its incremental costs, the utility has the burden of establishing that such rate is below the statutory minimum just and reasonable rate. In a case involving a denial of access, the utility shall have the burden of proving that the denial was lawful, once a *prima facie* case is established by the complainant.

(b) The Commission shall determine whether the rate, term or condition complained of is just and reasonable. For the purposes of this paragraph, a rate is just and reasonable if it assures a utility the recovery of not less than the additional costs of providing pole attachments, nor more than an amount determined by multiplying the percentage of the total usable space, or the percentage of the total duct or conduit capacity, which is occupied by the pole attachment by the sum of the operating expenses and actual capital costs of the utility attributable to the entire pole, duct, conduit, or right-of-way. The Commission shall exclude from actual capital costs those reimbursements received by the utility from cable operators and telecommunications carriers for non-recurring costs.

(c) The Commission shall deny the complaint if it determines that the complainant has not established a *prima facie* case, or that the rate, term or condition is just and reasonable, or that the denial of access was lawful.

(d) The Commission will apply the following formulas for determining a maximum just and reasonable rate:

(1) The following formula shall apply to attachments to poles by cable operators providing cable services. This formula shall also apply to attachments to poles by any telecommunications carrier (to the extent such carrier is not a party to a pole attachment agreement) or cable operator providing telecommunications services until February 8, 2001:

$$\text{Maximum Rate} = \text{Space Factor} \times \text{Net Cost of a Bare Pole} \times \text{Carrying Charge Rate}$$

$$\text{Where Space Factor} = \frac{\text{Space Occupied by Attachments}}{\text{Total Usable Space}}$$

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(2) With respect to attachments to poles by any telecommunications carrier or cable operator providing telecommunications services, the maximum just and reasonable rate shall be the higher of the rate yielded by paragraphs (d)(2)(i) or (d)(2)(ii) of this section.

(i) The following formula applies to the extent that it yields a rate higher than that yielded by the applicable formula in paragraph (d)(2)(ii) of this section:

$$\text{Rate} = \text{Space Factor} \times \text{Cost}$$

Where Cost

in Service Areas where the number of Attaching Entities is 5 = 0.66 × (Net Cost of a Bare Pole × Carrying Charge Rate)

in Service Areas where the number of Attaching Entities is 4 = 0.56 × (Net Cost of a Bare Pole × Carrying Charge Rate)

in Service Areas where the number of Attaching Entities is 3 = 0.44 × (Net Cost of a Bare Pole × Carrying Charge Rate)

in Service Areas where the number of Attaching Entities is 2 = 0.31 × (Net Cost of a Bare Pole × Carrying Charge Rate)

in Service Areas where the number of Attaching Entities is not a whole number = N × (Net Cost of a Bare Pole × Carrying Charge Rate), where N is interpolated from the cost allocator associated with the nearest whole numbers above and below the number of Attaching Entities.

$$\text{Where Space Factor} = \frac{\text{Space Occupied by Attachments}}{\text{Total Usable Space}}$$

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(ii) The following formula applies to the extent that it yields a rate higher than that yielded by the applicable formula in paragraph (d)(2)(i) of this section:

$$\text{Rate} = \text{Space Factor} \times \text{Net Cost of a Bare Pole} \times \text{Carrying Charge Rate}$$

$$\text{Where Space Factor} = \frac{\text{Space Occupied by Attachments}}{\text{Total Usable Space}}$$

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(3) The following formula shall apply to attachments to conduit by cable operators and telecommunications carriers:

$$\text{Maximum Rate per Linear Foot} = \left[\frac{1}{\text{Percentage of Conduit Capacity}} \right] \times \left[\frac{\text{No. of Ducts}}{\text{No. of Inner Ducts}} \right] \times \left[\frac{\text{Net Conduit Investment}}{\text{Duct System Duct Length (ft)}} \right] \times \text{Carrying Charge Rate}$$

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simplified as:

$$\text{Maximum Rate per Linear Foot} = \frac{1 \text{ Duct}}{\text{No. of Inner Ducts}} \times \frac{\text{Net Conduit Investment}}{\text{System Duct Length (ft)}} \times \text{Carrying Charge Rate}$$

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(4) If no inner-duct is installed the fraction, "1 Duct divided by the No. of Inner-Ducts" is presumed to be 1/2 .

(e) A price cap company, or a rate-of-return carrier electing to provide service pursuant to §61.50 of this chapter, that opts-out of part 32 of this chapter may calculate attachment rates for its poles, ducts, conduits, and rights of way using either part 32 accounting data or GAAP accounting data. A company using GAAP accounting data to compute rates to attach to its poles, ducts, conduits, and rights of way in any of the first twelve years after opting-out must adjust (increase or decrease) its annually computed GAAP-based rates by an Implementation Rate Difference for each of the remaining years in the period. The Implementation Rate Difference means the difference between attachment rates calculated by the carrier under part 32 and under GAAP as of the last full year preceding the carrier's initial opting-out of part 32 USOA accounting requirements.

[63 FR 44840, Sept. 4, 2018, as amended at 83 FR 67121, Dec. 28, 2018]

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§1.1407 Remedies.

(a) If the Commission determines that the rate, term, or condition complained of is not just and reasonable, it may prescribe a just and reasonable rate, term, or condition and may:

(1) Terminate the unjust and/or unreasonable rate, term, or condition;

(2) Substitute in the pole attachment agreement the just and reasonable rate, term, or condition established by the Commission; and/or

(3) Order a refund, or payment, if appropriate. The refund or payment will normally be the difference between the amount paid under the unjust and/or unreasonable rate, term, or condition and the amount that would have been paid under the rate, term, or condition established by the Commission, plus interest, consistent with the applicable statute of limitations.

(b) If the Commission determines that access to a pole, duct, conduit, or right-of-way has been unlawfully denied or delayed, it may order that access be permitted within a specified time frame and in accordance with specified rates, terms, and conditions.

[83 FR 44841, Sept. 4, 2018]

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§1.1408 Imputation of rates; modification costs.

(a) A utility that engages in the provision of telecommunications services or cable services shall impute to its costs of providing such services (and charge any affiliate, subsidiary, or associate company engaged in the provision of such services) an equal amount to the pole attachment rate for which such company would be liable under this section.

(b) The costs of modifying a facility shall be borne by all parties that obtain access to the facility as a result of the modification and by all parties that directly benefit from the modification. Each party described in the preceding sentence shall share proportionately in the cost of the modification. A party with a preexisting attachment to the modified facility shall be deemed to directly benefit from a modification if, after receiving notification of such modification as provided in subpart J of this part, it adds to or modifies its attachment. Notwithstanding the foregoing, a party with a preexisting attachment to a pole, conduit, duct or right-of-way shall not be required to bear any of the costs of rearranging or replacing its attachment if such rearrangement or replacement is necessitated solely as a result of an additional attachment or the modification of an existing attachment sought by another party. If a party makes an attachment to the facility after the completion of the modification, such party shall share proportionately in the cost of the modification if such modification rendered possible the added attachment.

[61 FR 43025, Aug. 20, 1996; 61 FR 45819, Aug. 29, 1996. Redesignated at 83 FR 44841, Sept. 4, 2018]

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§1.1409 Allocation of Unusable Space Costs.

(a) With respect to the formula referenced in §1.1406(d)(2), a utility shall apportion the cost of providing unusable space on a pole so that such apportionment equals two-thirds of the costs of providing unusable space that would be allocated to such entity under an equal apportionment of such costs among all attaching entities.

(b) All attaching entities attached to the pole shall be counted for purposes of apportioning the cost of unusable space.

(c) Utilities may use the following rebuttable presumptive averages when calculating the number of attaching entities with respect to the formula referenced in §1.1406(d)(2). For non-urbanized service areas (under 50,000 population), a presumptive average number of attaching entities of three. For urbanized service areas (50,000 or higher population), a presumptive average number of attaching entities of five. If any part of the utility's service area within the state has a designation of urbanized (50,000 or higher population) by the Bureau of Census, United States Department of Commerce, then all of that service area shall be designated as urbanized for purposes of determining the presumptive average number of attaching entities.

(d) A utility may establish its own presumptive average number of attaching entities for its urbanized and non-urbanized service area as follows:

(1) Each utility shall, upon request, provide all attaching entities and all entities seeking access the methodology and information upon which the utilities presumptive average number of attachers is based.

(2) Each utility is required to exercise good faith in establishing and updating its presumptive average number of attachers.

(3) The presumptive average number of attachers may be challenged by an attaching entity by submitting information demonstrating why the utility's presumptive average is incorrect. The attaching entity should also submit what it believes should

be the presumptive average and the methodology used. Where a complete inspection is impractical, a statistically sound survey may be submitted.

(4) Upon successful challenge of the existing presumptive average number of attachers, the resulting data determined shall be used by the utility as the presumptive number of attachers within the rate formula.

[63 FR 12026, Mar. 12, 1998, as amended at 66 FR 34581, June 29, 2001. Redesignated and amended at 83 FR 44841, Sept. 4, 2018]

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§1.1410 Use of presumptions in calculating the space factor.

With respect to the formulas referenced in §1.1406(d)(1) and (d)(2), the space occupied by an attachment is presumed to be one foot. The amount of usable space is presumed to be 13.5 feet. The amount of unusable space is presumed to be 24 feet. The pole height is presumed to be 37.5 feet. These presumptions may be rebutted by either party.

[83 FR 44841, Sept. 4, 2018]

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§1.1411 Timeline for access to utility poles.

(a) Definitions.

(1) The term "attachment" means any attachment by a cable television system or provider of telecommunications service to a pole owned or controlled by a utility.

(2) The term "new attacher" means a cable television system or telecommunications carrier requesting to attach new or upgraded facilities to a pole owned or controlled by a utility.

(3) The term "existing attacher" means any entity with equipment on a utility pole.

(b) All time limits in this subsection are to be calculated according to §1.4.

(c) Application review and survey—(1) Application completeness. A utility shall review a new attacher's attachment application for completeness before reviewing the application on its merits. A new attacher's attachment application is considered complete if it provides the utility with the information necessary under its procedures, as specified in a master service agreement or in requirements that are available in writing publicly at the time of submission of the application, to begin to survey the affected poles.

(i) A utility shall determine within 10 business days after receipt of a new attacher's attachment application whether the application is complete and notify the attacher of that decision. If the utility does not respond within 10 business days after receipt of the application, or if the utility rejects the application as incomplete but fails to specify any reasons in its response, then the application is deemed complete. If the utility timely notifies the new attacher that its attachment application is not complete, then it must specify all reasons for finding it incomplete.

(ii) Any resubmitted application need only address the utility's reasons for finding the application incomplete and shall be deemed complete within 5 business days after its resubmission, unless the utility specifies to the new attacher which reasons were not addressed and how the resubmitted application did not sufficiently address the reasons. The new attacher may follow the resubmission procedure in this paragraph as many times as it chooses so long as in each case it makes a bona fide attempt to correct the reasons identified by the utility, and in each case the deadline set forth in this paragraph shall apply to the utility's review.

(2) *Application review on the merits.* A utility shall respond to the new attacher either by granting access or, consistent with §1.1403(b), denying access within 45 days of receipt of a complete application to attach facilities to its utility poles (or within 60 days in the case of larger orders as described in paragraph (g) of this section). A utility may not deny the new attacher pole access based on a preexisting violation not caused by any prior attachments of the new attacher.

(3) *Survey.* (i) A utility shall complete a survey of poles for which access has been requested within 45 days of receipt of a complete application to attach facilities to its utility poles (or within 60 days in the case of larger orders as described in paragraph (g) of this section).

(ii) A utility shall permit the new attacher and any existing attachers on the affected poles to be present for any field inspection conducted as part of the utility's survey. A utility shall use commercially reasonable efforts to provide the affected attachers with advance notice of not less than 3 business days of any field inspection as part of the survey and shall provide the date, time, and location of the survey, and name of the contractor performing the survey.

(iii) Where a new attacher has conducted a survey pursuant to paragraph (j)(3) of this section, a utility can elect to satisfy its survey obligations in this paragraph by notifying affected attachers of its intent to use the survey conducted by the new attacher pursuant to paragraph (j)(3) of this section and by providing a copy of the survey to the affected attachers within the time period set forth in paragraph (c)(3)(i) of this section. A utility relying on a survey conducted pursuant to paragraph (j)(3) of

this section to satisfy all of its obligations under paragraph (c)(3)(i) of this section shall have 15 days to make such a notification to affected attachers rather than a 45 day survey period.

(d) *Estimate.* Where a new attacher's request for access is not denied, a utility shall present to a new attacher a detailed, itemized estimate, on a pole-by-pole basis where requested, of charges to perform all necessary make-ready within 14 days of providing the response required by paragraph (c) of this section, or in the case where a new attacher has performed a survey, within 14 days of receipt by the utility of such survey. Where a pole-by-pole estimate is requested and the utility incurs fixed costs that are not reasonably calculable on a pole-by-pole basis, the utility present charges on a per-job basis rather than present a pole-by-pole estimate for those fixed cost charges. The utility shall provide documentation that is sufficient to determine the basis of all estimated charges, including any projected material, labor, and other related costs that form the basis of its estimate.

(1) A utility may withdraw an outstanding estimate of charges to perform make-ready work beginning 14 days after the estimate is presented.

(2) A new attacher may accept a valid estimate and make payment any time after receipt of an estimate, except it may not accept after the estimate is withdrawn.

(3) *Final invoice:* After the utility completes make-ready, if the final cost of the work differs from the estimate, it shall provide the new attacher with a detailed, itemized final invoice of the actual make-ready charges incurred, on a pole-by-pole basis where requested, to accommodate the new attacher's attachment. Where a pole-by-pole estimate is requested and the utility incurs fixed costs that are not reasonably calculable on a pole-by-pole basis, the utility may present charges on a per-job basis rather than present a pole-by-pole invoice for those fixed cost charges. The utility shall provide documentation that is sufficient to determine the basis of all estimated charges, including any projected material, labor, and other related costs that form the basis of its estimate.

(4) A utility may not charge a new attacher to bring poles, attachments, or third-party equipment into compliance with current published safety, reliability, and pole owner construction standards guidelines if such poles, attachments, or third-party equipment were out of compliance because of work performed by a party other than the new attacher prior to the new attachment.

(e) *Make-ready.* Upon receipt of payment specified in paragraph (d)(2) of this section, a utility shall notify immediately and in writing all known entities with existing attachments that may be affected by the make-ready.

(1) For attachments in the communications space, the notice shall:

(i) Specify where and what make-ready will be performed.

(ii) Set a date for completion of make-ready in the communications space that is no later than 30 days after notification is sent (or up to 75 days in the case of larger orders as described in paragraph (g) of this section).

(iii) State that any entity with an existing attachment may modify the attachment consistent with the specified make-ready before the date set for completion.

(iv) State that if make-ready is not completed by the completion date set by the utility in paragraph (e)(1)(ii) in this section, the new attacher may complete the make-ready specified pursuant to paragraph (e)(1)(i) in this section.

(v) State the name, telephone number, and email address of a person to contact for more information about the make-ready procedure.

(2) For attachments above the communications space, the notice shall:

(i) Specify where and what make-ready will be performed.

(ii) Set a date for completion of make-ready that is no later than 90 days after notification is sent (or 135 days in the case of larger orders, as described in paragraph (g) of this section).

(iii) State that any entity with an existing attachment may modify the attachment consistent with the specified make-ready before the date set for completion.

(iv) State that the utility may assert its right to 15 additional days to complete make-ready.

(v) State that if make-ready is not completed by the completion date set by the utility in paragraph (e)(2)(ii) in this section (or, if the utility has asserted its 15-day right of control, 15 days later), the new attacher may complete the make-ready specified pursuant to paragraph (e)(1)(i) of this section.

(vi) State the name, telephone number, and email address of a person to contact for more information about the make-ready procedure.

(3) Once a utility provides the notices described in this section, it then must provide the new attacher with a copy of the notices and the existing attachers' contact information and address where the utility sent the notices. The new attacher shall be responsible for coordinating with existing attachers to encourage their completion of make-ready by the dates set forth by the utility in paragraph (e)(1)(ii) of this section for communications space attachments or paragraph (e)(2)(ii) of this section for attachments above the communications space.

(f) A utility shall complete its make-ready in the communications space by the same dates set for existing attachers in paragraph (e)(1)(ii) of this section or its make-ready above the communications space by the same dates for existing attachers in paragraph (e)(2)(ii) of this section (or if the utility has asserted its 15-day right of control, 15 days later).

(g) For the purposes of compliance with the time periods in this section:

(1) A utility shall apply the timeline described in paragraphs (c) through (e) of this section to all requests for attachment up to the lesser of 300 poles or 0.5 percent of the utility's poles in a state.

(2) A utility may add 15 days to the survey period described in paragraph (c) of this section to larger orders up to the lesser of 3000 poles or 5 percent of the utility's poles in a state.

(3) A utility may add 45 days to the make-ready periods described in paragraph (e) of this section to larger orders up to the lesser of 3000 poles or 5 percent of the utility's poles in a state.

(4) A utility shall negotiate in good faith the timing of all requests for attachment larger than the lesser of 3000 poles or 5 percent of the utility's poles in a state.

(5) A utility may treat multiple requests from a single new attacher as one request when the requests are filed within 30 days of one another.

(h) *Deviation from the time limits specified in this section.* (1) A utility may deviate from the time limits specified in this section before offering an estimate of charges if the parties have no agreement specifying the rates, terms, and conditions of attachment.

(2) A utility may deviate from the time limits specified in this section during performance of make-ready for good and sufficient cause that renders it infeasible for the utility to complete make-ready within the time limits specified in this section. A utility that so deviates shall immediately notify, in writing, the new attacher and affected existing attachers and shall identify the affected poles and include a detailed explanation of the reason for the deviation and a new completion date. The utility shall deviate from the time limits specified in this section for a period no longer than necessary to complete make-ready on the affected poles and shall resume make-ready without discrimination when it returns to routine operations. A utility cannot delay completion of make-ready because of a preexisting violation on an affected pole not caused by the new attacher.

(3) An existing attacher may deviate from the time limits specified in this section during performance of complex make-ready for reasons of safety or service interruption that renders it infeasible for the existing attacher to complete complex make-ready within the time limits specified in this section. An existing attacher that so deviates shall immediately notify, in writing, the new attacher and other affected existing attachers and shall identify the affected poles and include a detailed explanation of the basis for the deviation and a new completion date, which in no event shall extend beyond 60 days from the date the notice described in paragraph (e)(1) of this section is sent by the utility (or up to 105 days in the case of larger orders described in paragraph (g) of this section). The existing attacher shall deviate from the time limits specified in this section for a period no longer than necessary to complete make-ready on the affected poles.

(i) *Self-help remedy*—(1) *Surveys.* If a utility fails to complete a survey as specified in paragraph (c)(3)(i) of this section, then a new attacher may conduct the survey in place of the utility and, as specified in §1.1412, hire a contractor to complete a survey.

(i) A new attacher shall permit the affected utility and existing attachers to be present for any field inspection conducted as part of the new attacher's survey.

(ii) A new attacher shall use commercially reasonable efforts to provide the affected utility and existing attachers with advance notice of not less than 3 business days of a field inspection as part of any survey it conducts. The notice shall include the date and time of the survey, a description of the work involved, and the name of the contractor being used by the new attacher.

(2) *Make-ready.* If make-ready is not complete by the date specified in paragraph (e) of this section, then a new attacher may conduct the make-ready in place of the utility and existing attachers, and, as specified in §1.1412, hire a contractor to complete the make-ready.

(i) A new attacher shall permit the affected utility and existing attachers to be present for any make-ready. A new attacher shall use commercially reasonable efforts to provide the affected utility and existing attachers with advance notice of not less than 5 days of the impending make-ready. The notice shall include the date and time of the make-ready, a description of the work involved, and the name of the contractor being used by the new attacher.

(ii) The new attacher shall notify an affected utility or existing attacher immediately if make-ready damages the equipment of a utility or an existing attacher or causes an outage that is reasonably likely to interrupt the service of a utility or existing attacher. Upon receiving notice from the new attacher, the utility or existing attacher may either:

(A) Complete any necessary remedial work and bill the new attacher for the reasonable costs related to fixing the damage; or

(B) Require the new attacher to fix the damage at its expense immediately following notice from the utility or existing attacher.

(iii) A new attacher shall notify the affected utility and existing attachers within 15 days after completion of make-ready on a particular pole. The notice shall provide the affected utility and existing attachers at least 90 days from receipt in which to inspect the make-ready. The affected utility and existing attachers have 14 days after completion of their inspection to notify the new attacher of any damage or code violations caused by make-ready conducted by the new attacher on their equipment. If the utility or an existing attacher notifies the new attacher of such damage or code violations, then the utility or existing attacher shall provide adequate documentation of the damage or the code violations. The utility or existing attacher may either complete any necessary remedial work and bill the new attacher for the reasonable costs related to fixing the damage or code violations or require the new attacher to fix the damage or code violations at its expense within 14 days following notice from the utility or existing attacher.

(3) *Pole replacements.* Self-help shall not be available for pole replacements.

(j) *One-touch make-ready option.* For attachments involving simple make-ready, new attachers may elect to proceed with the process described in this paragraph in lieu of the attachment process described in paragraphs (c) through (f) and (i) of this section.

(1) *Attachment application.* (i) A new attacher electing the one-touch make-ready process must elect the one-touch make-ready process in writing in its attachment application and must identify the simple make-ready that it will perform. It is the responsibility of the new attacher to ensure that its contractor determines whether the make-ready requested in an attachment application is simple.

(ii) The utility shall review the new attacher's attachment application for completeness before reviewing the application on its merits. An attachment application is considered complete if it provides the utility with the information necessary under its procedures, as specified in a master service agreement or in publicly-released requirements at the time of submission of the application, to make an informed decision on the application.

(A) A utility has 10 business days after receipt of a new attacher's attachment application in which to determine whether the application is complete and notify the attacher of that decision. If the utility does not respond within 10 business days after receipt of the application, or if the utility rejects the application as incomplete but fails to specify any reasons in the application, then the application is deemed complete.

(B) If the utility timely notifies the new attacher that its attachment application is not complete, then the utility must specify all reasons for finding it incomplete. Any resubmitted application need only address the utility's reasons for finding the application incomplete and shall be deemed complete within 5 business days after its resubmission, unless the utility specifies to the new attacher which reasons were not addressed and how the resubmitted application did not sufficiently address the reasons. The applicant may follow the resubmission procedure in this paragraph as many times as it chooses so long as in each case it makes a bona fide attempt to correct the reasons identified by the utility, and in each case the deadline set forth in this paragraph shall apply to the utility's review.

(2) *Application review on the merits.* The utility shall review on the merits a complete application requesting one-touch make-ready and respond to the new attacher either granting or denying an application within 15 days of the utility's receipt of a complete application (or within 30 days in the case of larger orders as described in paragraph (g) of this section).

(i) If the utility denies the application on its merits, then its decision shall be specific, shall include all relevant evidence and information supporting its decision, and shall explain how such evidence and information relate to a denial of access for reasons of lack of capacity, safety, reliability, or engineering standards.

(ii) Within the 15-day application review period (or within 30 days in the case of larger orders as described in paragraph (g) of this section), a utility may object to the designation by the new attacher's contractor that certain make-ready is simple. If the utility objects to the contractor's determination that make-ready is simple, then it is deemed complex. The utility's objection is final and determinative so long as it is specific and in writing, includes all relevant evidence and information supporting its decision, made in good faith, and explains how such evidence and information relate to a determination that the make-ready is not simple.

(3) *Surveys.* The new attacher is responsible for all surveys required as part of the one-touch make-ready process and shall use a contractor as specified in § 1.1412(b).

(i) The new attacher shall permit the utility and any existing attachers on the affected poles to be present for any field inspection conducted as part of the new attacher's surveys. The new attacher shall use commercially reasonable efforts to provide the utility and affected existing attachers with advance notice of not less than 3 business days of a field inspection as

part of any survey and shall provide the date, time, and location of the surveys, and name of the contractor performing the surveys.

(ii) [Reserved]

(4) *Make-ready*. If the new attacher's attachment application is approved and if it has provided 15 days prior written notice of the make-ready to the affected utility and existing attachers, the new attacher may proceed with make-ready using a contractor in the manner specified for simple make-ready in §1.1412(b).

(i) The prior written notice shall include the date and time of the make-ready, a description of the work involved, the name of the contractor being used by the new attacher, and provide the affected utility and existing attachers a reasonable opportunity to be present for any make-ready.

(ii) The new attacher shall notify an affected utility or existing attacher immediately if make-ready damages the equipment of a utility or an existing attacher or causes an outage that is reasonably likely to interrupt the service of a utility or existing attacher. Upon receiving notice from the new attacher, the utility or existing attacher may either:

(A) Complete any necessary remedial work and bill the new attacher for the reasonable costs related to fixing the damage; or

(B) Require the new attacher to fix the damage at its expense immediately following notice from the utility or existing attacher.

(iii) In performing make-ready, if the new attacher or the utility determines that make-ready classified as simple is complex, then that specific make-ready must be halted and the determining party must provide immediate notice to the other party of its determination and the impacted poles. The affected make-ready shall then be governed by paragraphs (d) through (i) of this section and the utility shall provide the notice required by paragraph (e) of this section as soon as reasonably practicable.

(5) *Post-make-ready timeline*. A new attacher shall notify the affected utility and existing attachers within 15 days after completion of make-ready on a particular pole. The notice shall provide the affected utility and existing attachers at least 90 days from receipt in which to inspect the make-ready. The affected utility and existing attachers have 14 days after completion of their inspection to notify the new attacher of any damage or code violations caused by make-ready conducted by the new attacher on their equipment. If the utility or an existing attacher notifies the new attacher of such damage or code violations, then the utility or existing attacher shall provide adequate documentation of the damage or the code violations. The utility or existing attacher may either complete any necessary remedial work and bill the new attacher for the reasonable costs related to fixing the damage or code violations or require the new attacher to fix the damage or code violations at its expense within 14 days following notice from the utility or existing attacher.

[76 FR 26640, May 9, 2011. Redesignated and amended at 83 FR 44841, Sept. 4, 2018; 83 FR 46836, Sept. 14, 2018]

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§1.1412 Contractors for survey and make-ready.

(a) *Contractors for self-help complex and above the communications space make-ready*. A utility shall make available and keep up-to-date a reasonably sufficient list of contractors it authorizes to perform self-help surveys and make-ready that is complex and self-help surveys and make-ready that is above the communications space on its poles. The new attacher must use a contractor from this list to perform self-help work that is complex or above the communications space. New and existing attachers may request the addition to the list of any contractor that meets the minimum qualifications in paragraphs (c)(1) through (5) of this section and the utility may not unreasonably withhold its consent.

(b) *Contractors for simple work*. A utility may, but is not required to, keep up-to-date a reasonably sufficient list of contractors it authorizes to perform surveys and simple make-ready. If a utility provides such a list, then the new attacher must choose a contractor from the list to perform the work. New and existing attachers may request the addition to the list of any contractor that meets the minimum qualifications in paragraphs (c)(1) through (5) of this section and the utility may not unreasonably withhold its consent.

(1) If the utility does not provide a list of approved contractors for surveys or simple make-ready or no utility-approved contractor is available within a reasonable time period, then the new attacher may choose its own qualified contractor that meets the requirements in paragraph (c) of this section. When choosing a contractor that is not on a utility-provided list, the new attacher must certify to the utility that its contractor meets the minimum qualifications described in paragraph (c) of this section when providing notices required by §1.1411(i)(1)(ii), (i)(2)(i), (j)(3)(i), and (j)(4).

(2) The utility may disqualify any contractor chosen by the new attacher that is not on a utility-provided list, but such disqualification must be based on reasonable safety or reliability concerns related to the contractor's failure to meet any of the minimum qualifications described in paragraph (c) of this section or to meet the utility's publicly available and commercially reasonable safety or reliability standards. The utility must provide notice of its contractor objection within the notice periods provided by the new attacher in §1.1411(i)(1)(ii), (i)(2)(i), (j)(3)(i), and (j)(4) and in its objection must identify at least one available qualified contractor.

(c) *Contractor minimum qualification requirements.* Utilities must ensure that contractors on a utility-provided list, and new attachers must ensure that contractors they select pursuant to paragraph (b)(1) of this section, meet the following minimum requirements:

(1) The contractor has agreed to follow published safety and operational guidelines of the utility, if available, but if unavailable, the contractor shall agree to follow National Electrical Safety Code (NESC) guidelines;

(2) The contractor has acknowledged that it knows how to read and follow licensed-engineered pole designs for make-ready, if required by the utility;

(3) The contractor has agreed to follow all local, state, and federal laws and regulations including, but not limited to, the rules regarding Qualified and Competent Persons under the requirements of the Occupational and Safety Health Administration (OSHA) rules;

(4) The contractor has agreed to meet or exceed any uniformly applied and reasonable safety and reliability thresholds set by the utility, if made available; and

(5) The contractor is adequately insured or will establish an adequate performance bond for the make-ready it will perform, including work it will perform on facilities owned by existing attachers.

(d) The consulting representative of an electric utility may make final determinations, on a nondiscriminatory basis, where there is insufficient capacity and for reasons of safety, reliability, and generally applicable engineering purposes.

[76 FR 26640, May 9, 2011. Redesignated and amended at 83 FR 44842, Sept. 4, 2018; 83 FR 46839, Sept. 14, 2018]

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§1.1413 Complaints by incumbent local exchange carriers.

(a) A complaint by an incumbent local exchange carrier (as defined in 47 U.S.C. 251(h)) or an association of incumbent local exchange carriers alleging that it has been denied access to a pole, duct, conduit, or right-of-way owned or controlled by a local exchange carrier or that a utility's rate, term, or condition for a pole attachment is not just and reasonable shall follow the same complaint procedures specified for other pole attachment complaints in this part.

(b) In complaint proceedings challenging utility pole attachment rates, terms, and conditions for pole attachment contracts entered into or renewed after the effective date of this section, there is a presumption that an incumbent local exchange carrier (or an association of incumbent local exchange carriers) is similarly situated to an attacher that is a telecommunications carrier (as defined in 47 U.S.C. 251(a)(5)) or a cable television system providing telecommunications services for purposes of obtaining comparable rates, terms, or conditions. In such complaint proceedings challenging pole attachment rates, there is a presumption that incumbent local exchange carriers (or an association of incumbent local exchange carriers) may be charged no higher than the rate determined in accordance with §1.1406(e)(2). A utility can rebut either or both of the two presumptions in this paragraph (b) with clear and convincing evidence that the incumbent local exchange carrier receives benefits under its pole attachment agreement with a utility that materially advantages the incumbent local exchange carrier over other telecommunications carriers or cable television systems providing telecommunications services on the same poles.

[83 FR 46840, Sept. 14, 2018]

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§1.1414 Review period for pole attachment complaints.

(a) *Pole access complaints.* Except in extraordinary circumstances, final action on a complaint where a cable television system operator or provider of telecommunications service claims that it has been denied access to a pole, duct, conduit, or right-of-way owned or controlled by a utility should be expected no later than 180 days from the date the complaint is filed with the Commission. The Enforcement Bureau shall have the discretion to pause the 180-day review period in situations where actions outside the Enforcement Bureau's control are responsible for delaying review of a pole access complaint.

(b) *Other pole attachment complaints.* All other pole attachment complaints shall be governed by the review period in §1.740.

[83 FR 44842, Sept. 4, 2018]

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§1.1415 Overlashing.

(a) *Prior approval.* A utility shall not require prior approval for:

(1) An existing attacher that overlashes its existing wires on a pole; or

(2) For third party overlashing of an existing attachment that is conducted with the permission of an existing attacher.

(b) *Preexisting violations.* A utility may not prevent an attacher from overlashing because another existing attacher has not fixed a preexisting violation. A utility may not require an existing attacher that overlashes its existing wires on a pole to fix preexisting violations caused by another existing attacher.

(c) *Advance notice.* A utility may require no more than 15 days' advance notice of planned overlashing. If a utility requires advance notice for overlashing, then the utility must provide existing attachers with advance written notice of the notice requirement or include the notice requirement in the attachment agreement with the existing attacher. If after receiving advance notice, the utility determines that an overlash would create a capacity, safety, reliability, or engineering issue, it must provide specific documentation of the issue to the party seeking to overlash within the 15 day advance notice period and the party seeking to overlash must address any identified issues before continuing with the overlash either by modifying its proposal or by explaining why, in the party's view, a modification is unnecessary. A utility may not charge a fee to the party seeking to overlash for the utility's review of the proposed overlash.

(d) *Overlashers' responsibility.* A party that engages in overlashing is responsible for its own equipment and shall ensure that it complies with reasonable safety, reliability, and engineering practices. If damage to a pole or other existing attachment results from overlashing or overlashing work causes safety or engineering standard violations, then the overlashing party is responsible at its expense for any necessary repairs.

(e) *Post-overlashing review.* An overlashing party shall notify the affected utility within 15 days of completion of the overlash on a particular pole. The notice shall provide the affected utility at least 90 days from receipt in which to inspect the overlash. The utility has 14 days after completion of its inspection to notify the overlashing party of any damage or code violations to its equipment caused by the overlash. If the utility discovers damage or code violations caused by the overlash on equipment belonging to the utility, then the utility shall inform the overlashing party and provide adequate documentation of the damage or code violations. The utility may either complete any necessary remedial work and bill the overlashing party for the reasonable costs related to fixing the damage or code violations or require the overlashing party to fix the damage or code violations at its expense within 14 days following notice from the utility.

[83 FR 46840, Sept. 14, 2018]

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Title 47: Telecommunication

PART 1—PRACTICE AND PROCEDURE

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

FORMAL COMPLAINTS**§1.720 Purpose.**

The following procedural rules apply to formal complaint proceedings under 47 U.S.C. 208, pole attachment complaint proceedings under 47 U.S.C. 224, and advanced communications services and equipment formal complaint proceedings under 47 U.S.C. 255, 617, and 619, and part 14 of this chapter. Additional rules relevant only to pole attachment complaint proceedings are provided in subpart J of this part.

[83 FR 44832, Sept. 4, 2018]

§1.721 General pleading requirements.

Formal complaint proceedings are generally resolved on a written record consisting of a complaint, answer, reply, and joint statement of stipulated facts, disputed facts and key legal issues, along with all associated evidence in the record. The Commission may also require or permit other written submissions such as briefs, proposed findings of fact and conclusions of law, or other supplementary documents or pleadings.

(a) All papers filed in any proceeding subject to this part must be drawn in conformity with the requirements of §§1.49, 1.50, and 1.52.

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

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

(d) Averred facts, claims, or defenses shall be made in numbered paragraphs and must be supported by relevant evidence. The contents of each paragraph shall be limited as far as practicable to a statement of a single set of circumstances. Each claim founded on a separate transaction or occurrence and each affirmative defense shall be separately stated to facilitate the clear presentation of the matters set forth. Assertions based on information and belief are prohibited unless made in good faith and accompanied by a declaration or affidavit explaining the basis for the party's belief and why the party could not reasonably ascertain the facts from any other source.

(e) Legal arguments must be supported by appropriate statutory, judicial, or administrative authority.

(f) Opposing authorities must be distinguished.

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

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

(i) Specific reference shall be made to any tariff or contract provision relied on in support of a claim or defense. Copies of relevant tariffs, contracts, or relevant portions that are referred to or relied upon in a complaint, answer, or other pleading shall be appended to such pleading.

(j) Pleadings shall identify the name, address, telephone number, and email address for either the filing party's attorney or, where a party is not represented by an attorney, the filing party. Pleadings may be signed by a party's attorney.

(k) All attachments shall be Bates-stamped or otherwise numbered sequentially. Parties shall cite to Bates-stamped page numbers in their pleadings.

(l) Pleadings shall be served on all parties to the proceeding in accordance with §1.734 and shall include a certificate of service.

(m) Each pleading or other submission must contain a written verification that the signatory has read the submission and, to the best of his or her knowledge, information and belief formed after reasonable inquiry, it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification or reversal of existing law; and that it is not interposed for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of the proceeding. If any pleading or other submission is signed in violation of this provision, the Commission may upon motion or upon its own initiative impose appropriate sanctions.

(n) Parties may petition the staff, pursuant to §1.3, for a waiver of any of the rules governing formal complaints. Such waiver may be granted for good cause shown.

(o) A complaint may, on request of the filing party, be dismissed without prejudice as a matter of right prior to the adoption date of any final action taken by the Commission with respect to the complaint. A request for the return of an initiating document will be regarded as a request for dismissal.

(p) Amendments or supplements to complaints to add new claims or requests for relief are prohibited.

(q) Failure to prosecute a complaint will be cause for dismissal.

(r) Any document purporting to be a formal complaint which does not state a cause of action under the Communications Act, or a Commission regulation or order, will be dismissed. In such case, any amendment or supplement to such document will be considered a new filing which must be made within any applicable statutory limitations of actions.

(s) Any other pleading that does not conform with the requirements of the applicable rules may be deemed defective. In such case the Commission may strike the pleading or request that specified defects be corrected and that proper pleadings be filed with the Commission and served on all parties within a prescribed time as a condition to being made a part of the record in the proceeding.

(t) Pleadings shall be construed so as to do justice.

(u) Any party that fails to respond to official correspondence, a request for additional information, or an order or directive from the Commission may be subject to appropriate sanctions.

[83 FR 44832, Sept. 4, 2018]

§1.722 Format and content of complaints.

A formal complaint shall contain:

(a) The name of each complainant and defendant;

(b) The occupation, address and telephone number of each complainant and, to the extent known, each defendant;

(c) The name, address, telephone number, and email address of complainant's attorney, if represented by counsel;

(d) Citation to the section of the Communications Act or Commission regulation or order alleged to have been violated; each such alleged violation shall be stated in a separate count;

(e) Legal analysis relevant to the claims and arguments set forth therein;

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

(g) Certification that the complainant has, in good faith, discussed or attempted to discuss the possibility of settlement with each defendant prior to the filing of the formal complaint. In disputes between businesses, associations, or other organizations, the certification shall include a statement that the complainant has engaged or attempted to engage in executive-level discussions concerning the possibility of settlement. Executive-level discussions are discussions among representatives of the parties who have sufficient authority to make binding decisions on behalf of the entity they represent regarding the subject matter of the discussions. Such certification shall include a statement that, prior to the filing of the complaint, the complainant notified each defendant in writing of the allegations that form the basis of the complaint and invited a response within a reasonable period of time. A refusal by a defendant to engage in discussions contemplated by this rule may constitute an unreasonable practice under the Act. The certification shall also include a brief summary of all additional steps taken to resolve the dispute prior to the filing of the formal complaint;

(h) A statement explaining whether a separate action has been filed with the Commission, any court, or other government agency that is based on the same claim or same set of facts, in whole or in part, or whether the complaint seeks prospective relief identical to the relief proposed or at issue in a notice-and-comment rulemaking proceeding that is concurrently before the Commission;

(i) An information designation containing:

(1) The name and, if known, the address and telephone number of each individual likely to have information relevant to the proceeding, along with the subjects of that information, excluding individuals otherwise identified in the complaint or exhibits thereto, and individuals employed by another party; and

(2) A copy----or a description by category and location----of all relevant documents, electronically stored information, and tangible things that the disclosing party has in its possession, custody, or control, excluding documents submitted with the complaint.

(j) A completed Formal Complaint Intake Form;

(k) A declaration, under penalty of perjury, by the complainant or complainant's counsel describing the amount, method, and date of the complainant's payment of the filing fee required under §1.1106 and the complainant's 10-digit FCC Registration Number, as required by subpart W of this part. Submission of a complaint without the FCC Registration Number will result in dismissal of the complaint.

[83 FR 44832, Sept. 4, 2018]

§1.723 Damages.

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

(b) In all cases in which recovery of damages is sought, the complaint must include either:

(1) A computation of each and every category of damages for which recovery is sought, along with an identification of all relevant documents and materials or such other evidence to be used by the complainant to prove the amount of such damages; or

(2) If any information not in the possession of the complainant is necessary to develop a detailed computation of damages, an explanation of:

(i) Why such information is unavailable to the complaining party;

(ii) The factual basis the complainant has for believing that such evidence of damages exists; and

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

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

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

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

(d) If the Commission decides that a determination of damages would best be made in a proceeding that is separate from and subsequent to the proceeding in which the determinations of liability and prospective relief are made, the Commission may at any time bifurcate the case and order that the initial proceeding will determine only liability and prospective relief, and that a separate, subsequent proceeding initiated in accordance with paragraph (e) of this section will determine damages.

(e) If a complainant exercises its right under paragraph (c) of this section, or the Commission invokes its authority under paragraph (d) of this section, the complainant may initiate a separate proceeding to obtain a determination of damages by filing a supplemental complaint within sixty days after public notice (as defined in §1.4(b)) of a decision that contains a finding of liability on the merits of the original complaint. Supplemental complaints filed pursuant to this section need not comply with the requirements in §§1.721(c) or 1.722(d), (g), (h), (j), and (k). The supplemental complaint shall be deemed, for statutory limitations purposes, to relate back to the date of the original complaint.

(f) The Commission may, in its discretion, order the defendant either to post a bond for, or deposit into an interest bearing escrow account, a sum equal to the amount of damages which the Commission finds, upon preliminary investigation, is likely to be ordered after the issue of damages is fully litigated, or some lesser sum which may be appropriate, provided the Commission finds that the grant of this relief is favored on balance upon consideration of the following factors:

(1) The complainant's potential irreparable injury in the absence of such deposit;

(2) The extent to which damages can be accurately calculated;

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

(4) Whether public interest considerations favor the posting of the bond or ordering of the deposit.

(g) The Commission may, in its discretion, end adjudication of damages by adopting a damages computation method or formula. In such cases, the parties shall negotiate in good faith to reach an agreement on the exact amount of damages pursuant to the Commission-mandated method or formula. Within 30 days of the release date of the damages order, parties shall submit jointly to the Commission either:

- (1) A statement detailing the parties' agreement as to the amount of damages;
- (2) A statement that the parties are continuing to negotiate in good faith and a request that the parties be given an extension of time to continue negotiations; or
- (3) A statement detailing the bases for the continuing dispute and the reasons why no agreement can be reached.

(h) In any proceeding to which no statutory deadline applies, the Commission may, in its discretion, suspend ongoing damages proceedings to provide the parties with time to pursue settlement negotiations or mediation under §1.737.

[83 FR 44832, Sept. 4, 2018]

§1.724 Complaints governed by section 208(b)(1) of the Act.

(a) Any party that intends to file a complaint subject to the 5-month deadline in 47 U.S.C. 208(b)(1) must comply with the pre-complaint procedures below. The Enforcement Bureau's Market Disputes Resolution Division will not process complaints subject to the 5-month deadline unless the filer complies with these procedures.

(b) A party seeking to file a complaint subject to 47 U.S.C. 208(b)(1) shall notify the Chief of the Market Disputes Resolution Division in writing of its intent to file the complaint, and provide a copy of the letter to the defendant. Commission staff will convene a conference with both parties as soon as practicable. During that conference, the staff may discuss, among other things:

- (1) Scheduling in the case;
- (2) Narrowing factual and legal issues in dispute;
- (3) Information exchange and discovery necessary to adjudicate the dispute;
- (4) Entry of a protective order governing confidential material; and
- (5) Preparation for and scheduling a mandatory settlement negotiation session at the Commission.

(c) Staff will endeavor to complete the pre-complaint process as expeditiously as possible. Staff may direct the parties to exchange relevant information during the pre-complaint period.

[83 FR 44832, Sept. 4, 2018]

§1.725 Joinder of complainants and causes of action.

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

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

[83 FR 44832, Sept. 4, 2018]

§1.726 Answers.

(a) Any defendant upon which a copy of a formal complaint is served shall answer such complaint in the manner prescribed under this section within 30 calendar days of service of the formal complaint by the complainant, unless otherwise directed by the Commission.

(b) The answer shall advise the complainant and the Commission fully and completely of the nature of any defense, and shall respond specifically to all material allegations of the complaint. Every effort shall be made to narrow the issues in the answer. The defendant shall state concisely its defense to each claim asserted, admit or deny the averments on which the complainant relies, and state in detail the basis for admitting or denying such averment. General denials are prohibited. Denials based on information and belief are prohibited unless made in good faith and accompanied by a declaration or affidavit explaining the basis for the defendant's belief and why the defendant could not reasonably ascertain the facts from the complainant or any other source. If the defendant is without knowledge or information sufficient to form a belief as to the truth of an averment, the defendant shall so state and this has the effect of a denial. When a defendant intends in good faith to deny only part of an averment, the defendant shall specify so much of it as is true and shall deny only the remainder. The defendant may deny the allegations of the complaint as specific denials of either designated averments or paragraphs.

(c) The answer shall include legal analysis relevant to the claims and arguments set forth therein.

(d) Averments in a complaint or supplemental complaint filed pursuant to §1.723(d) are deemed to be admitted when not denied in the answer.

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

(f) The answer shall include an information designation containing:

(1) The name and, if known, the address and telephone number of each individual likely to have information relevant to the proceeding, along with the subjects of that information, excluding individuals otherwise identified in the complaint, answer, or exhibits thereto, and individuals employed by another party; and

(2) A copy—or a description by category and location—of all relevant documents, electronically stored information, and tangible things that the disclosing party has in its possession, custody, or control, excluding documents submitted with the complaint or answer.

(g) Failure to file an answer may be deemed an admission of the material facts alleged in the complaint. Any defendant that fails to file and serve an answer within the time and in the manner prescribed by this part may be deemed in default and an order may be entered against such defendant in accordance with the allegations contained in the complaint.

[83 FR 44832, Sept. 4, 2018]

§1.727 Cross-complaints and counterclaims.

Cross-complaints seeking any relief within the jurisdiction of the Commission against any party (complainant or defendant) to that proceeding are prohibited. Any claim that might otherwise meet the requirements of a cross-complaint may be filed as a separate complaint in accordance with §§1.720 through 1.740. For purposes of this subpart, the term "cross-complaint" shall include counterclaims.

[83 FR 44832, Sept. 4, 2018]

§1.728 Replies.

(a) A complainant shall file and serve a reply within 10 calendar days of service of the answer, unless otherwise directed by the Commission. The reply shall contain statements of relevant, material facts and legal arguments that respond to the factual allegations and legal arguments made by the defendant. Other allegations or arguments will not be considered by the Commission.

(b) Failure to reply will not be deemed an admission of any allegations contained in the responsive pleading, except with respect to any affirmative defense set forth therein. Failure to reply to an affirmative defense shall be deemed an admission of such affirmative defense and of any facts supporting such affirmative defense that are not specifically contradicted in the complaint.

(c) The reply shall include legal analysis relevant to the claims and arguments set forth therein.

(d) The reply shall include an information designation containing:

(1) The name and, if known, the address and telephone number of each individual likely to have information relevant to the proceeding and addressed in the reply, along with the subjects of that information, excluding individuals otherwise identified in the complaint, answer, reply, or exhibits thereto, and individuals employed by another party; and

(2) A copy—or a description by category and location—of all relevant documents, electronically stored information, and tangible things that the disclosing party has in its possession, custody, or control that are addressed in the reply, excluding documents submitted with the complaint or answer.

[83 FR 44832, Sept. 4, 2018]

§1.729 Motions.

(a) A request for a Commission order shall be by written motion, stating with particularity the grounds and authority therefor, including any supporting legal analysis, and setting forth the relief sought.

(b) Motions to compel discovery must contain a certification by the moving party that a good faith attempt to resolve the dispute was made prior to filing the motion.

(c) Motions seeking an order that the allegations in the complaint be made more definite and certain are prohibited.

(d) Motions to dismiss all or part of a complaint are permitted. The filing of a motion to dismiss does not suspend any other filing deadlines under the Commission's rules, unless staff issues an order suspending such deadlines.

(e) Oppositions to motions shall be filed and served within 5 business days after the motion is served. Oppositions shall be limited to the specific issues and allegations contained in the motion; when a motion is incorporated in an answer to a complaint, the opposition to such motion shall not address any issues presented in the answer that are not also specifically raised in the motion. Failure to oppose any motion may constitute grounds for granting the motion.

(f) No reply may be filed to an opposition to a motion, except under direction of Commission staff.

[83 FR 44832, Sept. 4, 2018]

§1.730 Discovery.

(a) A complainant may file with the Commission and serve on a defendant, concurrently with its complaint, up to 10 written interrogatories. A defendant may file with the Commission and serve on a complainant, concurrently with its answer, up to 10 written interrogatories. A complainant may file with the Commission and serve on a defendant, concurrently with its reply, up to five additional written interrogatories. Subparts of any interrogatory will be counted as separate interrogatories for purposes of compliance with this limit. 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. 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 proceeding.

(b) Interrogatories filed and served pursuant to paragraph (a) of this section shall contain an explanation of why the information sought in each interrogatory is both necessary to the resolution of the dispute and not available from any other source.

(c) Unless otherwise directed by the Commission, within seven calendar days, a responding party shall file with the Commission and serve on the propounding party any opposition and objections to interrogatories. The grounds for objecting to an interrogatory must be stated with specificity. Unless otherwise directed by the Commission, any interrogatories to which no opposition or objection is raised shall be answered within 20 calendar days.

(d) Commission staff shall rule in writing on the scope of, and schedule for answering, any disputed interrogatories based upon the justification for the interrogatories properly filed and served pursuant to paragraph (a) of this section, and any objections or oppositions thereto, properly filed and served pursuant to paragraph (c) of this section.

(e) Interrogatories shall be answered separately and fully in writing under oath or affirmation by the party served, or if such party is a public or private corporation or partnership or association, by any officer or agent who shall furnish such information as is available to the party. The answers shall be signed by the person making them, and the attorney who objects must sign any objections. The answers shall be filed with the Commission and served on the propounding party.

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

(g) The Commission may, in its discretion, require parties to provide documents to the Commission in a scanned or other electronic format that:

- (1) indexes the documents by useful identifying information; and
- (2) allows staff to annotate the index so as to make the format an efficient means of reviewing the documents.

(h) A propounding party asserting that a responding party has provided an inadequate or insufficient response to a discovery request may file a motion to compel within ten days of the service of such response, or as otherwise directed by Commission staff, pursuant to the requirements of §1.729.

[83 FR 44832, Sept. 4, 2018]

§1.731 Confidentiality of information produced or exchanged.

(a) Any information produced in the course of a formal complaint proceeding may be designated as confidential by either party to the proceeding or a third party if the party believes in good faith that the materials fall within an exemption to disclosure contained in the Freedom of Information Act (FOIA), 5 U.S.C. 552(b)(1) through (9), and under §0.459 of this chapter. Any party asserting confidentiality for such materials must:

(1) Clearly mark each page, or portion thereof, for which a confidential designation is claimed. The party claiming confidentiality should restrict its designations to encompass only the specific information that it asserts is confidential. If a confidential designation is challenged, the party claiming confidentiality shall have the burden of demonstrating, by a preponderance of the evidence, that the materials designated as confidential fall under the standards for nondisclosure enunciated in the FOIA and that the designation is narrowly tailored to encompass only confidential information.

(2) File with the Commission, using the Commission's Electronic Comment Filing System, a public version of the materials that redacts any confidential information and clearly marks each page of the redacted public version with a header stating

"Public Version." The redacted document shall be machine-readable whenever technically possible. Where the document to be filed electronically contains metadata that is confidential or protected from disclosure by a legal privilege (including, for example, the attorney-client privilege), the filer may remove such metadata from the document before filing it electronically.

(3) File with the Secretary's Office an unredacted hard copy version of the materials that contains the confidential information and clearly marks each page of the unredacted confidential version with a header stating "Confidential Version." The unredacted version must be filed on the same day as the redacted version.

(4) Serve one hard copy of the filed unredacted materials and one hard copy of the filed redacted materials on the attorney of record for each party to the proceeding, or, where a party is not represented by an attorney, each party to the proceeding either by hand delivery, overnight delivery, or email, together with a proof of such service in accordance with the requirements of §§1.47(g) and 1.734(f).

(b) An attorney of record for a party or a party that receives unredacted materials marked as confidential may disclose such materials solely to the following persons, only for use in prosecuting or defending a party to the complaint action, and only to the extent necessary to assist in the prosecution or defense of the case:

- (1) Support personnel for counsel of record representing the parties in the complaint action;
- (2) Officers or employees of the receiving party who are directly involved in the prosecution or defense of the case;
- (3) Consultants or expert witnesses retained by the parties; and
- (4) Court reporters and stenographers in accordance with the terms and conditions of this section.

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

(d) Parties may make copies of materials marked confidential solely for use by the Commission or persons designated in paragraph (b) of this section. Each party shall maintain a log recording the number of copies made of all confidential material and the persons to whom the copies have been provided.

(e) The Commission may adopt a protective order with further restrictions as appropriate.

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

[83 FR 44832, Sept. 4, 2018]

§1.732 Other required written submissions.

(a) The Commission may, in its discretion, require the parties to file briefs summarizing the facts and issues presented in the pleadings and other record evidence and presenting relevant legal authority and analysis. The Commission may limit the scope of any briefs to certain subjects or issues. Unless otherwise directed by the Commission, all briefs shall include all legal and factual claims and defenses previously set forth in the complaint, answer, or any other pleading submitted in the proceeding.

(b) Claims and defenses previously made but not reflected in the briefs will be deemed abandoned.

(c) The Commission may require the parties to submit any additional information it deems appropriate for a full, fair, and expeditious resolution of the proceeding.

[83 FR 44832, Sept. 4, 2018]

§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. A status conference may include discussion of:

- (1) Simplification or narrowing of the issues;
- (2) The necessity for or desirability of additional pleadings or evidentiary submissions;
- (3) Obtaining admissions of fact or stipulations between the parties as to any or all of the matters in controversy;
- (4) Settlement of all or some of the matters in controversy by agreement of the parties;

- (5) Whether discovery is necessary and, if so, the scope, type, and schedule for such discovery;
- (6) The schedule for the remainder of the case and the dates for any further status conferences; and
- (7) Such other matters that may aid in the disposition of the complaint.

(b)(1) 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

(2) Parties shall submit a joint statement of all proposals agreed to and disputes remaining as a result of such meeting to Commission staff on a date specified by the Commission.

(c) In addition to the initial status conference referenced in paragraph (a) of this section, any party may also request that a conference be held at any time after the complaint has been filed.

(d) During a status conference, the Commission staff may issue oral rulings pertaining to a variety of matters relevant to the conduct of a formal complaint proceeding including, *inter alia*, procedural matters, discovery, and the submission of briefs or other evidentiary materials.

(e) Status conferences will be scheduled by the Commission staff at such time and place as it may designate to be conducted in person or by telephone conference call.

(f) The failure of any attorney or party, following reasonable notice, to appear at a scheduled conference will be deemed a waiver by that party and will not preclude the Commission staff from conferring with those parties or counsel present.

[83 FR 44832, Sept. 4, 2018]

§1.734 Fee remittance; electronic filing; copies; service; separate filings against multiple defendants.

(a) Complaints may not be brought against multiple defendants unless they are commonly owned or controlled, are alleged to have acted in concert, are alleged to be jointly liable to complainant, or the complaint concerns common questions of law or fact. Complaints may, however, be consolidated by the Commission for disposition.

(b) The complainant shall remit separately the correct fee electronically, in accordance with part 1, subpart G (see §1.1106 of this chapter) and shall file an original copy of the complaint using the Commission's Electronic Comment Filing System. If a complaint is addressed against multiple defendants, the complainant shall pay a separate fee for each additional defendant.

(c) The complainant shall serve the complaint by hard delivery on either the named defendant or one of the named defendant's registered agents for service of process on the same date that the complaint is filed with the Commission in accordance with the requirements of paragraph (b) of this section.

(d) Upon receipt of the complaint by the Commission, the Commission shall promptly send, by email, to each defendant named in the complaint, notice of the filing of the complaint. The Commission shall additionally send by email, to all parties, a schedule detailing the date the answer and any other applicable pleading will be due and the date, time, and location of the initial status conference.

(e) Parties shall provide hard copies of all submissions to staff in the Enforcement Bureau upon request.

(f) All subsequent pleadings and briefs filed in any formal complaint proceeding, as well as all letters, documents, or other written submissions, shall be filed using the Commission's Electronic Comment Filing System, excluding confidential material as set forth in §1.731. In addition, all pleadings and briefs filed in any formal complaint proceeding, as well as all letters, documents, or other written submissions, shall be served by the filing party on the attorney of record for each party to the proceeding, or, where a party is not represented by an attorney, each party to the proceeding either by hand delivery, overnight delivery, or email, together with a proof of such service in accordance with the requirements of §1.47(g). Service is deemed effective as follows:

(1) Service by hand delivery that is delivered to the office of the recipient by 5:30 p.m., local time of the recipient, on a business day will be deemed served that day. Service by hand delivery that is delivered to the office of the recipient after 5:30 p.m., local time of the recipient, on a business day will be deemed served on the following business day;

(2) Service by overnight delivery will be deemed served the business day following the day it is accepted for overnight delivery by a reputable overnight delivery service; or

(3) Service by email that is fully transmitted to the office of the recipient by 5:30 p.m., local time of the recipient, on a business day will be deemed served that day. Service by email that is fully transmitted to the office of the recipient after 5:30 p.m., local time of the recipient, on a business day will be deemed served on the following business day.

(g) Supplemental complaints filed pursuant to §1.723 shall conform to the requirements set forth in this section, except that the complainant need not submit a filing fee.

[83 FR 44832, Sept. 4, 2018, as amended at 84 FR 8618, Mar. 11, 2019]

§1.735 Conduct of proceedings.

(a) The Commission may issue such orders and conduct its proceedings as will best conduce to the proper dispatch of business and the ends of justice.

(b) The Commission may decide each complaint upon the filings and information before it, may request additional information from the parties, and may require one or more informal meetings with the parties to clarify the issues or to consider settlement of the dispute.

[83 FR 44832, Sept. 4, 2018]

§1.735 Accelerated Docket Proceedings.

(a) With the exception of complaint proceedings under 47 U.S.C. 255, 617, and 619, and part 14 of this chapter, parties to a formal complaint proceeding against a common carrier, or a pole attachment complaint proceeding against a cable television system operator, a utility, or a telecommunications carrier, may request inclusion on the Accelerated Docket. Proceedings on the Accelerated Docket must be concluded within 60 days, and are therefore subject to shorter pleading deadlines and other modifications to the procedural rules that govern formal complaint proceedings.

(b) A complainant that seeks inclusion of a proceeding on the Accelerated Docket shall submit a request to the Chief of the Enforcement Bureau's Market Disputes Resolution Division, by phone and in writing, prior to filing the complaint.

(c) Within five days of receiving service of any formal complaint against a common carrier, or a pole attachment complaint against a cable television system operator, a utility, or a telecommunications carrier, a defendant may submit a request seeking inclusion of the proceeding on the Accelerated Docket to the Chief of the Enforcement Bureau's Market Disputes Resolution Division. The defendant shall submit such request by phone and in writing, and contemporaneously transmit a copy of the written request to all parties to the proceeding.

(d) Commission staff has discretion to decide whether a complaint, or portion of a complaint, is suitable for inclusion on the Accelerated Docket.

(e) In appropriate cases, Commission staff may require that the parties participate in pre-filing settlement negotiations or mediation under §1.737.

(f) If the parties do not resolve their dispute and the matter is accepted for handling on the Accelerated Docket, staff will establish the schedule and process for the proceeding.

(g) 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.

(h) In Accelerated Docket proceedings, the Commission may conduct a minitrial, or a trial-type hearing, as an alternative to deciding a case on a written record. Minitrials shall take place no later than between 40 and 45 days after the filing of the complaint. A Commission Administrative Law Judge ("ALJ") or staff may preside at the minitrial.

(i) 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 Accelerated Docket proceedings which raise issues that may not be decided on delegated authority (see 47 U.S.C. 155(c)(1); 47 CFR 0.331(c)), the staff decision 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 shall do so by filing comments challenging the decision within 15 days of its release. Opposition comments, shall be filed within 15 days of the comments challenging the decision; reply comments shall may be filed 10 days thereafter and shall be limited to issues raised in the opposition comments.

(j) 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.

[83 FR 44832, Sept. 4, 2018]

§1.737 Mediation.

(a) The Commission encourages parties to attempt to settle or narrow their disputes. To that end, staff in the Enforcement Bureau's Market Disputes Resolution Division are available to conduct mediations. Staff will determine whether a matter is appropriate for mediation. Participation in mediation is generally voluntary, but may be required as a condition for including a matter on the Accelerated Docket.

(b) Parties may request mediation of a dispute before the filing of a complaint. After a complaint has been filed, parties may request mediation as long as a proceeding is pending before the Commission.

(c) Parties may request mediation by: Calling the Chief of the Enforcement Bureau's Market Disputes Resolution Division; submitting a written request in a letter addressed to the Chief of the Market Disputes Resolution Division; or including a mediation request in any pleading in a formal complaint proceeding, or an informal complaint proceeding under §1.717. Any party requesting mediation must verify that it has attempted to contact all other parties to determine whether they are amenable to mediation, and shall state the response of each party, if any.

(d) Staff will schedule the mediation in consultation with the parties. Staff may request written statements and other information from the parties to assist in the mediation.

(e) In any proceeding to which no statutory deadline applies, staff may, in its discretion, hold a case in abeyance pending mediation.

(f) The parties and Commission staff shall keep confidential all written and oral communications prepared or made for purposes of the mediation, including mediation submissions, offers of compromise, and staff and party comments made during the course of the mediation (Mediation Communications). Neither staff nor the parties may use, disclose or seek to disclose Mediation Communications in any proceeding before the Commission (including an arbitration or a formal complaint proceeding involving the instant dispute) or before any other tribunal, unless compelled to do so by law. Documents and information that are otherwise discoverable do not become Mediation Communications merely because they are disclosed or discussed during the mediation. Unless otherwise directed by Commission staff, the existence of the mediation will not be treated as confidential. A party may request that the existence of the mediation be treated as confidential in a case where this fact has not previously been publicly disclosed, and staff may grant such a request for good cause shown.

(g) Any party or Commission staff may terminate a mediation by notifying other participants of their decision to terminate. Staff shall promptly confirm in writing that the mediation has ended. The confidentiality rules in paragraph (f) of this section shall continue to apply to any Mediation Communications. Further, unless otherwise directed, any staff ruling requiring that the existence of the mediation be treated as confidential will continue to apply after the mediation has ended.

(h) For disputes arising under 47 U.S.C. 255, 617, and 619, and the advanced communications services and equipment rules, parties shall submit the Request for Dispute Assistance in accordance with §14.32 of this chapter.

[83 FR 44837, Sept. 4, 2018]

§1.738 Complaints filed pursuant to 47 U.S.C. 271(d)(6)(B).

(a) Where a complaint is filed pursuant to 47 U.S.C. 271(d)(6)(B), parties shall indicate whether they are willing to waive the 90 day resolution deadline contained in 47 U.S.C. 271(d)(6)(B) in the following manner:

(1) The complainant shall so indicate in both the complaint itself and in the Formal Complaint Intake Form, and the defendant shall so indicate in its answer; or

(2) The parties shall indicate their agreement to waive the 90 day resolution deadline to the Commission staff at the initial status conference, to be held in accordance with §1.733.

(b) Requests for waiver of the 90 day resolution deadline for complaints filed pursuant to 47 U.S.C. 271(d)(6)(B) will not be entertained by the Commission staff subsequent to the initial status conference, absent a showing by the complainant and defendant that such waiver is in the public interest.

[83 FR 44837, Sept. 4, 2018]

§1.739 Primary jurisdiction referrals.

(a) Any party to a case involving claims under the Act that has been referred to the Commission by a court pursuant to the primary jurisdiction doctrine must contact the Market Disputes Resolution Division of the Enforcement Bureau for guidance before filing any pleadings or otherwise proceeding before the Commission.

(b) Based upon an assessment of the procedural history and the nature of the issues involved, the Market Disputes Resolution Division will determine the procedural means by which the Commission will handle the primary jurisdiction referral.

(c) Failure to contact the Market Disputes Resolution Division prior to filing any pleadings or otherwise proceeding before the Commission, or failure to abide by the Division's determinations regarding the referral, may result in dismissal.

[83 FR 44837, Sept. 4, 2018]

§1.740 Review period for section 208 formal complaints not governed by section 208(b)(1) of the Act.

(a) Except in extraordinary circumstances, final action on a formal complaint filed pursuant to section 208 of the Act, and not governed by section 208(b)(1), should be expected no later than 270 days from the date the complaint is filed with the Commission.

(b) The Enforcement Bureau shall have the discretion to pause the 270-day review period in situations where actions outside the Commission's control are responsible for unreasonably delaying Commission review of a complaint referenced in paragraph (a) of this section.

[83 FR 44837, Sept. 4, 2018]

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