

FCC Streamlines Its Rules for Formal Complaint Proceedings

In an effort to reform and streamline its formal complaint procedures, the Federal Communications Commission has issued a new [uniform set of procedural rules](#). As the FCC acknowledged in its earlier [Notice of Proposed Rulemaking](#), the existing rules have generated "needless" confusion and inefficiency for years due to a variety of ambiguities and inconsistencies. In practice, depending on the nature and complexity of a given dispute, parties often had to expend significant additional time and resources obtaining waivers, clarifications and extensions of often short filing periods, and making other additional procedural filings simply to enable the parties to fully address the actual merits of the dispute. The various uncertainties in the existing rules also often made it difficult for parties to gauge the potential costs and time periods likely to be involved with a particular complaint in advance of the actual filing, which in turn could bear on the prospects for mediation and settlement as well as decisions about whether to pursue particular complaints either at the FCC or in federal court.

In response, the FCC has now simplified the rules for what had been three distinct categories of complaints: (1) pole attachment complaints under Section 224 of the Communications Act of 1934 (the Act), (2) disability access complaints under Sections 255, 717 and 718 of the Act and (3) formal complaints filed under Section 208 of the Act. The new rules will apply prospectively to complaints filed after their effective date (30 days from publication in the Federal Register) and are intended to eliminate inconsistencies, promote fully developed records, dispose of formal complaints in a timely manner and conserve resources. Indeed, many of the changes are consistent with standard waivers and deadline alterations already routinely sought by parties in Section 208 proceedings.

Commissioner Jessica Rosenworcel, however, [dissented](#) based on a view that the FCC was cutting itself out of the process for informal complaints under Section 1.717 by removing language referencing the FCC's "review and disposition" of matters raised in informal complaints, and effectively asking consumers to pay a significant filing fee to then pursue a formal complaint. It remains to be seen whether her concerns will be realized in practice, but as discussed below, the FCC's removal or reduction of various prior requirements that historically had generated confusion and increased costs and delays is likely to benefit both complainants and the FCC itself.

Streamlined Complaint Procedures and an FCC Shot Clock

The FCC expressly modeled the new procedural rules on the existing Section 208 formal complaint rules, which already provided for fact-based pleading, targeted discovery and joint statements of stipulated and disputed facts and key legal issues. At the same time, the FCC also streamlined the Section 208 rules to track ways that parties often previously sought waivers and other case management orders. Particularly noteworthy aspects include:

- The creation of a 270-day deadline (or "shot clock") for final action on (1) Section 208 complaints not governed by Section 208(b)(1) (which instead involve a 5-month clock), (2) for disability access complaints and (3) for pole attachment complaints regarding rates, terms and conditions. The FCC's Enforcement Bureau nonetheless has discretion to pause the shot clock where circumstances outside the Commission's control delay review of the complaint, including when the issues and record are particularly complex.

- For formal complaints instead governed by the 5-month deadline in Section 208(b)(1) of the Act, the parties must work with Commission staff prior to filing in order to narrow the factual and legal issues in dispute, exchange relevant documents and discovery, discuss case management issues and engage in settlement negotiations.
- The FCC particularly emphasized pre-filing settlement efforts, including requiring that Section 208 and disability access formal complaints include a certification of pre-filing settlement efforts that included "executive-level" discussions among representatives with settlement authority. In addition, the FCC reiterated that voluntary staff-supervised mediation remains available at any time while the proceeding remains pending before the FCC.
- Pole attachment complaints now have access to the FCC's Accelerated Docket, potentially affording a more rapid means of resolution, and the FCC's previously scattered rules related to the Accelerated Docket have also been streamlined into a single provision. Proceedings on the Accelerated Docket must be concluded within 60 days, and are subject to shorter deadlines and other procedural modifications.
- The FCC clarified that parties may request bifurcation of liability and damages in the complaint, eliminating language that previously appeared to limit the Commission's discretion to bifurcate proceedings not subject to a statutory deadline.
- The FCC also clarified that motions to dismiss are permitted, although such motions remain disfavored and "rarely warranted." Nonetheless, these motions may allow parties to resolve complaints more quickly, although the Commission retained broad discretion regarding when to act on such motions, which may not be until the conclusion of the proceeding. The FCC also warned that the filing of such a motion does not suspend other pleading requirements.

In addition, the new rules establish several bright line filing deadlines and procedural requirements, whereas in the past parties often had to seek waivers or modified scheduling orders in order to establish an appropriately tailored process and pleading cycle for a given proceeding. Answers to formal complaints are now subject to a uniform 30-day response period, and replies to the answer are now subject to a longer 10-day deadline. The requirement that the complaint, answer and reply include proposed findings of fact and conclusions of law has been eliminated, which should simplify the pleadings, and information designations no longer need to identify when each document was mailed and its physical location.

However, the FCC retained the requirement that the complaint, answer and reply include a description of individuals with firsthand knowledge of facts and documents relevant to the allegations in the pleadings. The FCC also adopted a uniform approach to discovery in all formal complaint matters, including permitting interrogatories without request, and confirming that the FCC has the discretion to allow additional discovery, including depositions and document discovery, as appropriate.

Potential Issues Related to Informal Complaints

Under the prior Section 1.717, the FCC would forward informal complaints from consumers or other parties to the appropriate carrier for investigation, and the carrier was required to "advise the Commission in writing" of its "satisfaction of the complaint or of its refusal or inability to do so." Unless the informal complaint was satisfied, the FCC would then contact the complainant "regarding its review and disposition of the matters raised," after which the party could pursue a formal complaint under Section 1.718 if the informal complaint remained unsatisfied.

Notably, in the new rules, the FCC revised Section 1.717 to remove the language concerning the Commission's "review and disposition of the matters raised" in the informal complaint. Commissioner Rosenworcel, currently

the lone Democratic commissioner following Commissioner Mignon Clyburn's departure, [strongly dissented](#) from the order based primarily on this issue. She argued that this change effectively cuts the FCC out of the informal complaint review process, reducing the agency to "merely a conduit for the exchange of letters between consumers and their carriers," and needlessly pushing more customers into the formal complaint process.

Two House Democrats also sent a [letter](#) to Chairman Ajit Pai, saying the change would "eliminate the agency's traditional and important role of helping consumers in the informal complaint process." In his accompanying [statement to the order](#), based on information from Enforcement Bureau staff, Chairman Pai responded that no commenter had objected to the proposed change in the text of the informal complaint rule during the Notice of Proposed Rulemaking process, and asserted that the modification would not have any impact on how the Commission deals with informal complaints (in which the informal complaint "facilitates a dialogue and negotiation, but does not result in a formal Commission ruling"). Rather, the proposed modification "would in no way impede the Commission's ability to take enforcement actions on the basis of informal complaints" and reports that consumers would have to pay a fee to file a complaint with the FCC are "blatantly false."

It remains to be seen whether the FCC's revised informal complaint process merely "clarifies" existing practice, or if it materially changes the way the FCC engages with consumers and carriers regarding such informal complaints. Despite the prior Section 1.717 language, in practice the FCC typically did not provide a formal review and disposition of informal complaints, but rather left it to the parties to assess whether the informal complaint was satisfied following the carrier's response, and if a formal complaint was thus warranted. There remains no fee for informal complaints, while those pursuing unsatisfied informal complaints via the formal complaint process will still be subject to various fees depending on the type of formal complaint lodged. In light of the FCC's past practices regarding informal complaints, Commissioner Rosenworcel's concerns may be more focused on the optics of the FCC appearing to back away from even its prior limited role in the informal complaint process, but the resolution of this debate will only become clear in time as the FCC begins operating under the new rules.

© 2018 Perkins Coie LLP

Authors



[Marc S. Martin](#)

Partner

MMartin@perkinscoie.com [202.654.6351](tel:202.654.6351)

Explore more in

[Technology Transactions & Privacy Law](#) [Communications](#)

Related insights

Update

Employers and Immigration Under Trump: What You Need To Know

Update

'Tis the Season... for Cybercriminals: A Holiday Reminder for Retailers