



FCC ADJUSTS COMMON CARRIER COMPLAINT AND CALEA RULES

In an effort to eliminate barriers to the competitive telecommunications market that it envisioned, Congress mandated in the Telecommunications Act of 1996 that the FCC speed resolution of complaints against common carriers for purported violations of the Act. While Congress had previously allowed the FCC 12 to 15 months in which to resolve complaints, it now requires decision within five months. The FCC has issued three orders attempting to implement this requirement, the most recent having issued this spring. As these orders indicate, the FCC has attempted to speed dispute resolution by forcing the parties to divulge as much concrete information about the dispute as early in the process as possible, by “streamlining” procedures to avoid delay, and by developing an “accelerated docket” to deal with some complaints.

The FCC requires parties to share relevant information early in the complaint process. It requires parties to hold settlement discussions before filing complaints, and to certify the fact of their discussions to the FCC, in hopes of narrowing or resolving the disputes. If the complaint goes forward, the parties are required to make all factual allegations in their pleading, and to support those allegations with appropriate evidence. Defendants may not make general denials, but must deny all allegations, including allegations as to damage amounts, specifically. Parties may not

make averments “based on information and belief” unless the information is provided, and the belief explained, in an attached affidavit. And while the FCC initially required that parties limit themselves to factual allegations, rather than legal arguments, in their pleadings, it has now reversed itself, so that parties and the FCC can become aware of each party’s legal positions as soon as possible.

The FCC also has attempted to decrease structural opportunities for delay. It has eliminated a variety of procedural devices and pleading opportunities, such as cross-complaints and counterclaims, which it considered unnecessary, and has decreased the time permitted to make some of the responses that remain. It streamlined formal structures such as service of process. And it increased opportunities for the FCC to direct discovery.

Finally, the FCC has established an “accelerated docket,” designed to address situations in which “common carriers [] may be hindering competition in telecommunications markets,” by ending any possible anticompetitive behavior before it can create serious impediments to competition. Complaints accepted for the Accelerated Docket are to be resolved within 60 days. A complainant who wishes to receive accelerated treatment must agree to, and reasonably undertake, FCC supervised pre-settlement negotiations prior to gaining acceleration. Once a complaint has

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been accepted, the defendant must respond within 10 days; following a short discovery period, a mini-trial is held within 40-45 days. Appeal to the full FCC is available. The background rules regulating all common carrier complaints continue to control this “accelerated docket” unless the FCC has articulated specific alternate rules.

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The FCC recently made several minor changes to its rules concerning telephone company compliance with the Communications Assistance for Law Enforcement Act (“CALEA”).

The FCC modified section 64.2104(a)(1) of its rules to require carriers to record “the start date and time that the carrier enables the interception of communications or access to call identifying information.”

The FCC made two minor changes to section 64.2103. The FCC clarified that, while a carrier must have some employee available 24 hours a day as a point of contact for law

enforcement, carriers may staff that position in shifts. The FCC also revised that section to require carriers to put information about responsible personnel in an appendix to their systems security and integrity policies. The FCC noted that it will continue to make that information routinely available to law enforcement agencies.

Finally, the FCC ruled that resellers are *not* exempt from CALEA responsibilities if their underlying facilities providers are not telecommunications carriers. In an earlier order the Commission had stated that, while resellers are subject to the CALEA requirements, their responsibilities are limited to their facilities and they are not accountable for the compliance of the carriers whose services they were reselling. According to the FBI, this language implied that in some situations no carrier could be held responsible for CALEA compliance — if the reseller does not use its own facilities, and the carrier from which it receives service is not technically a “telecommunications carrier” as that term is defined by CALEA, law enforcement authorities might be unable to enforce the CALEA obligations against either party.

This letter is for general informational purposes only and does not represent our legal advice as to any particular set of facts, nor does this letter represent any undertaking to keep recipients advised as to all relevant legal developments. For further information on these or other telecommunications matters, please contact one of the lawyers listed below:

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