OMB Approval date: 03/13/2003.
Expiration Date: 03/31/2006.
Title: Multi-Association Group (MAG) Plan for Regulation of Interstate Services of Non-Price Cap Incumbent Local Exchange Carriers and Interexchange Carriers.

Estimated Annual Burden: 5,555 responses; 31,725 total annual hours; 5.7 hours per respondent.

Needs and Uses: The Commission modified, on its own motion, the data collection and filing procedures for implementation of the Interstate Common Line Support (ICLS) mechanism, in order to ensure timely implementation of the ICLS mechanism on July 1, 2002, as adopted in the MAG Order. The Commission will use the information to determine whether and to what extent non-price cap or rate of return carriers are providing the data eligible to receive universal service support. The tariff data is used to make sure the rates are just and reasonable.

OMB Control No.: 3060–0855.
OMB Approval date: 04/03/2003.
Expiration Date: 04/30/2006.
Title: Telecommunications Reporting Worksheet, CC Docket No. 96–45.
Form No.: FCC–499–A, FCC–499–Q.
Estimated Annual Burden: 15,500 responses; 164,487 total annual hours; 10.6 hours per respondent.

Needs and Uses: Pursuant to the Communications Act of 1934, as amended, telecommunications carriers (and certain other providers of telecommunications services) must contribute to the support and cost recovery mechanisms for telecommunications relay services, numbering administration, number portability, and universal service. The Commission modified the existing methodology used to assess contributions that carriers make to the federal universal service support mechanisms. The modifications adopted, will entail altering to the current revenue reporting requirements to which interstate telecom. carriers are subject under part 54 of the Commission’s rules.

OMB Control No.: 3060–0511.
OMB Approval date: 04/15/2003.
Expiration Date: 04/30/2006.
Title: ARMIS Access Report.
Form No.: FCC–43–04.
Estimated Annual Burden: 84 responses; 13,188 total annual hours; 140.3 hours per respondent.

Needs and Uses: The Access Report is needed to administer the Commission’s accounting, jurisdictional separations and access charge rule; to analyze revenue requirements and rates of return, and to collect financial data from Tier 1 incumbent local exchange carriers.

OMB Control No.: 3060–0496.
OMB Approval date: 04/15/2003.
Expiration Date: 04/30/2006.
Title: The ARMIS Operating Data Report.
Form No.: FCC–43–08.
Estimated Annual Burden: 53 responses; 7,367 total annual hours; 139 hours per respondent.

Needs and Uses: The Operating Data Report collects annual statistical data in a consistent format that is essential for the Commission to monitor network growth, usage, and reliability.

Federal Communications Commission.
Marlene H. Dortch,
Secretary.

For Further Information Contact:
Susan L. Lebeaux, Assistant General Counsel, Office of General Counsel, or Ruth Heilizer, Staff Attorney, 999 E Street, NW., Washington, DC 20445, (202) 604–1650 or (800) 424–9530.

SUPPLEMENTARY INFORMATION:
Background and Hearing Goals

The Commission is currently examining its enforcement practices and procedures. The Commission is conducting this review to determine if issues have arisen that require reexamination or adaptation of enforcement practices and procedures. The Commission will use the comments received to determine whether internal directives or practices should be adjusted, and/or whether rulemaking in this area is advised. The Commission has made no decisions in this area, and may choose to take no action.

The Federal Election Act of 1971, as amended, 2 U.S.C. 431 et seq. ("FECA" or "the Act"), grants to the Commission "exclusive jurisdiction with respect to civil enforcement" of the provisions of the Act and Chapters 95 and 96 of Title 26. 2 U.S.C. 437c(b)(1). Enforcement matters come to the Commission through complaints from the public, referrals from the Reports Analysis and Audit Divisions, referrals from other agencies, sua sponte submissions, and through agency personnel. Enforcement matters are processed, numbered as Matters Under Review (MURs), and assigned to enforcement attorneys. The Commission investigates MURs pursuant to the compliance procedures set forth at 11 CFR part 111, and various internal directives.

In the course of addressing its administrative obligations, the Commission periodically reviews its programs. For example, the Commission recently reviewed its Alternative Dispute Resolution and Audit procedures and is currently reviewing its Reports Analysis Division procedures. The intent behind this Notice of Inquiry is to examine the...
enforcement practices and procedures, many of which have been in place since the Commission was founded; and to
give the regulated community and representatives of the public an
opportunity to bring general
enforcement policy concerns before the
Commission.
In inviting a constructive dialogue
concerning its enforcement procedures,
the Commission asks those who submit
comments to be cognizant of the fact
that statutory requirements, such as
confidentiality and privacy mandates,
may be implicated by certain proposals.
Thus, the Commission would appreciate
if participants would specify in their
written remarks whether their proposals
are compatible with applicable statutes
or would require legislative action.
The Commission would like to see
addressed the issues that face counsel
who practice before the Commission,
who are compatible with applicable statutes
written remarks whether their proposals
may be implicated by certain proposals.
The Commission asks those who submit
general comments on how the FEC’s
enforcement procedures have been
helpful or unhelpful in working through
cases. The Commission is not
interested in complaints or
compliments about individual FEC
employees, but seeks input on structural
and policy issues. The Commission
would also benefit from hearing about
practices and procedures used by other
environmental law enforcement agencies when
acting in a prosecutorial (i.e., non-
adjudicative) capacity. For example, do
such agencies provide greater or lesser
opportunities exist for presenting or addressing issues,
evidence, or potential claims that might
be the basis of a subsequent adjudicative
proceeding? The Commission would also
be interested in any studies,
SURVEYS, research or other empirical data
that might support changes in its
enforcement procedures.

General Topics for Specific Comments

The Commission welcomes input on
any aspect of its enforcement
procedure, but is particularly interested in the topics on which the Commission will accept
comment are those below. However, the list is not
seen as exhaustive and comments are
encouraged on other issues as well.

1. Designating Respondents in a
Complaint

In addition to respondents named in the complaint, the Commission may
designate additional respondents from information ascertained in the normal
course of carrying out its supervisory
responsibilities. 2 U.S.C. 437(a)(2); 11
CFR 111.8(a). As a simple example, a
complaint may allege that a campaign
accepted an illegal contribution from
Corporation X, but name only the
campaign as a respondent. The
Commission may add the alleged donor
as a respondent. This has been done on
a case-by-case basis. In some cases, the
Commission has been criticized for
designating too many additional
respondents who may only have
tangential interaction with the
allegations in the complaint. At other
times, the Commission has been
considered for failing to give early notice
and an opportunity to address
allegations that give rise to potential
liability to persons who may be
generated as respondents at the reason
to believe stage or after the investigation is
underway. The Commission seeks
comments as to how the Commission
designates respondents. In what
circumstances and at what time is it
appropriate to designate additional
respondents? What criteria should the
Commission apply?

2. Confidentiality Advisement

Under 2 U.S.C. 437(g)(a)(12), an
investigation shall not be made public
without the consent of the respondents.
To ensure the confidentiality of
investigations, including the protection of
respondents from premature
disclosure, Commission staff advises
respondents (usually orally, but sometimes
writing) of this statutory requirement.
The Commission has received
comments in the past from respondents
who claim that the Commission is
interpreted by some third party
witnesses (such as vendors) as preventing them from speaking to
respondents and thus interfering with the
respondent’s own investigation of the
events in question. See generally
MUR 4624 Coalition; Carol F. Lee,
The Federal Election Commission, The First
Amendment, and Due Process, 89 Yale
L.J. 1199, 1209–1210 (1980). Should the
Commission clarify its confidentiality
advisement to address this issue? If so,
how? What, if any, language should be
included in an oral or written
advisement to respondents? Should the
advisement to explicitly exclude
communications with third party
respondents? Is the Commission obliged
to inform witnesses that they can speak to
respondents? Is the Commission
permitted to identify the respondents so
as to convey such permission? Is there
a better way in which to ensure
confidentiality?

3. Motions Before the Commission

Both complainants’ and respondents’
attorneys have occasionally put forward
motions for the Commission to consider,
including motions to dismiss and
reconsider. Although neither the FECA
nor the Commission’s regulations
provide for consideration of such
motions, and the Administrative
Procedure Act, 5 U.S.C. 551 et seq.
(“APA”) does not require that agencies
entertain such motions in
nonadjudicative proceedings,1 the
Commission has reviewed these
motions on a case-by-case basis. The
Commission requests comments on
whether procedures for consideration of
these motions should be formalized in
rulemaking. If yes, what motions
should be considered and what should
the time frame be for consideration?
Should there be a requirement that in
order to trigger the Commission’s
review, the motion must contain
material new that
respondents had no opportunity to
present previous to the subject findings?
Should the motions be considered even
considered though this would extend the time that
a MUR remains active? Should parties
be required to toll the statute of
limitations for periods in which motions
are under consideration by the
Commission?

4. Deposition and Document Production
Practices

When Commission attorneys take a
respondent’s sworn testimony at an
enforcement deposition authorized by
section 437(d)(4), only the deponent
and his or her counsel may attend. The
respondent has the right to review and
sign the transcript, but normally a
respondent is not allowed to obtain a
copy of, or take notes on, his or her own
transcript until the investigation is
complete, i.e., after all depositions have
been taken.
If the General Counsel decides to
recommend that the Commission find
below to cause to believe that a
respondent has violated the Act, the Act
requires that the General Counsel so
notify the respondent, and provide a
brief on the legal and factual issues in the
case. The Act entitles respondents to
submit, within 15 days, a brief stating
their position on the factual and legal
issues of the case. 2 U.S.C. 437(g)(3).
Although nothing in the FECA requires
that documents or deposition transcripts
be provided to respondents at this stage,
respondents are generally provided,
upon request, with the documents and
depositions of other respondents and
third party witnesses that are referred to
in the General Counsel’s brief.

1 Note, however, that unless otherwise prohibited
by law, it is always within the agency’s discretion
to afford more procedure than that required by the
Respondents, however, may deem other information that the Commission does not disclose as valuable to the respondents’ defense. Note that this practice can cause delay because, upon receiving these documents and depositions, respondents’ counsel often seek an extension of time since counsel must submit the reply brief within 15 days of receiving the General Counsel’s probable cause brief. Should counsel have access to all documents prior to the probable cause stage?

The Commission’s practice in providing depositions and documents to respondents contrasts with the practice of some other civil law enforcement agencies during the investigative stage of their proceedings, in which the only deposition transcript supplied to the respondent is the respondent’s own deposition. Further, during the pendancy of an investigation, section 6b of the APA, 5 U.S.C. 555(c), grants investigative agencies the right to deny the request of a witness for copies of transcripts of his or her own testimony based on “good cause,” such as concerns that witnesses still to be examined might be coached.

Commercial Capital Corp. v. SEC, 360 F.2d 856, 858 (7th Cir. 1966). On the other hand, it can be suggested the Commission’s practice contrasts with procedural rights afforded in litigation matters under the Federal Rules of Civil Procedure, which give litigants the right to attend the depositions of all persons deposed in their case and obtain copies of all deposition transcripts.

5. Extensions of Time

Under what circumstances, if any, should extensions of time be granted to respondents to respond to the probable cause brief? Would doing so compromise investigations? Should this be done on a case-by-case basis? Would providing all such materials and allowing time for their review further delay the submission of responsive briefs? Would respondents benefit from hearing about whether other respondents also wishing to appear? The Commission would also like comments on whether all relevant documents that would be required to be disclosed in civil litigation pursuant to Federal Rule of Civil Procedure 26(a) should be provided with the probable cause brief. Would it be practical to do so in cases involving voluminous records and multiple respondents? Who should bear the costs of copying documents and ordering deposition transcripts from court reporters? Providing all such materials and allowing time for their review further delay the submission of responsive briefs? Would this be done on a case-by-case basis?

Similarly, the Commission seeks comments on whether all relevant documents that would be required to be disclosed in civil litigation pursuant to Federal Rule of Civil Procedure 26(a) should be provided with the probable cause brief. Would it be practical to do so in cases involving voluminous records and multiple respondents? Who should bear the costs of copying documents and ordering deposition transcripts from court reporters? Providing all such materials and allowing time for their review further delay the submission of responsive briefs? Would this be done on a case-by-case basis? Would providing all such materials and allowing time for their review further delay the submission of responsive briefs? Would this be done on a case-by-case basis?

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6. Appearance Before the Commission

Pursuant to the FECA, Respondents are permitted to present their position through written submissions in response to the complaint and the General Counsel’s probable cause brief, and may also do so at the reason-to-believe stage pursuant to Commission practice. Neither the FECA nor the APA specifically provide that respondents also be permitted the opportunity to appear and present their positions in person, and the Commission has no procedure allowing such appearances in the context of MURs. The Commission seeks comment on whether respondents should be entitled to appear before the Commission, either pro se or through counsel, at the probable cause stage and on motions to quash subpoenas. If so, should appearances be limited to certain types of hearings and cases? If so, what should be the limiting criteria? What should be the scope and form of the personal appearance? Should the Commission be permitted to draw an adverse inference if respondents decline to answer certain questions or do not fully answer them? Allowing counsel to appear would add an additional procedural right, but would also lengthen the enforcement process. How would this additional step be balanced with the timeliness of completing a MUR? Is the Commission justified in prolonging the process? Would this complicate the process or add unnecessary time constraints? What would respondents achieve that they are not already afforded by the statutory process? Would affording the opportunity to appear in person before the Commission at the probable cause stage diminish respondents’ interest in conciliating at an earlier stage? Would it place respondents with limited resources, or those located far from Washington, at a comparative disadvantage, and if so, is this a valid reason to restrict personal appearances for all respondents? In cases involving multiple respondents, how would the Commission protect the confidentiality of other respondents also wishing to appear? The Commission would also benefit from hearing about whether other civil law enforcement agencies provide for personal appearances before agency decision-makers.

7. Releasing Documents or Filing Suit Before an Election

The Commission’s practice is to release to the public closed enforcement matters in the normal course of business, even if this occurs immediately prior to, or following, an election that may involve one of the respondents in the matter. Upon resolution of an enforcement matter, the Commission could not deny a FOIA request for disclosure of conciliation agreements or other dispositions simply because of the proximity of an upcoming election. Furthermore, the FECA provides for expedited conciliation immediately prior to an election, which allows voters to...
consider a Commission determination that a campaign has not violated the FECA as alleged in a complaint, or alternatively, that a campaign has accepted responsibility for an election law violation. 2 U.S.C. 437g(a)(4)(A)(ii).

On the other hand, the Commission is sensitive to the fact that releasing documents or filing suit before an election, even when it occurs in the normal course of business, may influence election results. The Commission seeks comment on whether consideration of an upcoming election should or should not be considered when releasing documents. In particular, should the Commission adopt a policy of not releasing outcomes of cases for some period immediately preceding an election? If so, should that policy apply only to violations from a previous cycle? Would such a policy invite respondents to employ dilatory tactics for the apparent purpose of keeping information confidential until the election is over? Should the same considerations apply to when the Commission has completed the administrative process and is prepared to file an enforcement action in federal court? What if the statute of limitations is due to run before or shortly after the election?


In an effort to assure greater uniformity in sentencing, the Federal courts in the 1980s adopted sentencing guidelines. Should the Commission make public its penalty guidelines in a similar manner? Do other civil law enforcement agencies do so? If the Commission publishes such guidelines, would they be applicable without exception or with only a few specified exceptions? Should the Commission give up its discretion and flexibility to depart from its guidelines in instances when it feels that fairness or public policy requires another result? Would such guidelines minimize or even eliminate negotiations over what constitutes an appropriate penalty? Are there other directives that should be publicly available, including those pertaining to enforcement procedures? Should more procedural information be available via the Web site and other publications?

9. Timeliness

Though the Commission in recent years has reduced its case backlog, it has still been criticized in some quarters for lack of timeliness. Are there specific practices or procedures that the Commission could implement, consistent with the FECA and the APA, that could reduce the time it takes to process MURs? Does the agency have too few staff assigned to handle its workload? Can the Commission afford respondents with more procedural rights without sacrificing its goal of conducting timely investigations? Should respondents be afforded more process than is required by the FECA or the APA when the likely result will be longer proceedings? How should a respondent’s timeliness in responding to discovery requests and subpoenas and orders, or the lack thereof, be weighed in the balance? Has any particular stage of the enforcement procedure been a source of timeliness problems?

10. Prioritization

The Commission has adopted an Enforcement Priority System to focus resources on cases that most warrant enforcement action. Should the Commission give lesser or greater priority to cases that require complex investigations and/or raise issues where there is little consensus about the application of the law—such as coordination, qualified non-profit corporation status, and express advocacy/issue ad analysis? Since cases involving these issues often involve large amounts of spending, and hence large potential violations, should these be the cases given high priority?

11. Memorandum of Understanding With the Department of Justice

The Commission for years has divided responsibility for the enforcement of FECA with the Department of Justice. A 1977 Memorandum of Understanding has dictated that the Department of Justice should handle “significant and substantial knowing and willful” violations and the Commission should handle the rest. Is this still a valid demarcation of responsibility? Does anything in BCRA suggest a different approach is appropriate?

12. Dealing With 3–3 Votes at “Reason To Believe” Stage

On some occasions the six commissioners split 3–3 on whether to find “reason to believe” and hence whether to conduct an investigation of the alleged violations in a complaint. Should the Commission adopt a policy of proceeding with an investigation in such circumstances where the Office of General Counsel has so recommended? Would a legislative change be required to permit an investigation in such circumstances?

13. Other Issues

As noted above, the Commission welcomes comments on other issues relevant to the processing of MURs.


David M. Mason,
Commissioner, Federal Election Commission.
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