Before the

FEDERAL COMMUNICATIONS COMMISSION

Washington, D.C.

In the Matter of	)	
	)	
Implementation of Section 255 of the	)	
Telecommunications Act of 1996	)	
	)	WT Docket No. 96-198
Access to Telecommunications Services,	)	
Telecommunications Equipment, and	)	
Customer Premises Equipment	)	
by Persons with Disabilities	)	

NOTICE OF PROPOSED RULEMAKING

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By the Commission: Commissioners Furchgott-Roth, Powell and Tristani issuing separate statements.

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I. INTRODUCTION; SUMMARY

1. The Telecommunications Act of 1996[1] paved the way for a new era of greater competition and consumer choice in telecommunications for the American people. But the promise of the 1996 Act was not limited to promoting choice in telecommunications — it was also about ensuring that *all* Americans can gain the benefits of advances in telecommunications services and equipment. One of the key provisions of the Act promoting the goal of universal access is Section 255,[2] which seeks to increase the accessibility of telecommunications services and equipment to the 54 million Americans with disabilities.[3]

2. Given the fundamental role that telecommunications has come to play in today's world, we believe the provisions of Section 255 represent the most significant governmental action for people with disabilities since the passage of the Americans with Disabilities Act of 1990.[4] Inability to use telecommunications equipment and services can be life-threatening in emergency situations, can severely limit educational and employment opportunities, and can otherwise interfere with full participation in business, family, social, and other activities. We must do all we can to ensure that people with disabilities are not left behind in the telecommunications revolution and consequently isolated from contemporary life.

3. In Section 255, Congress set forth a broad but practical mandate: manufacturers and service providers must ensure that their telecommunications equipment and services are accessible to those with disabilities, to the extent that it is readily achievable to do so. Congress gave responsibilities both to the Commission and to the Architectural and Transportation Barriers Compliance Board ("Access Board" or "Board")[5] to carry out this mandate. We intend to carry

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[1] Pub. L. 104-104, 110 Stat. 56 (1996) (1996 Act).

[2] 47 U.S.C. § 255. For the text of Section 255, see Appendix A. Section 255(b) and Section 255(c) establish accessibility and usability requirements, while Section 255(d) establishes compatibility requirements, if accessibility and usability are not readily achievable. For purposes of simplicity, references herein to "accessibility" are intended to include references to accessibility, usability, and compatibility, unless the context requires otherwise.

[3] "At the end of 1994, 20.6 percent of the population, about 54 million people, had some level of disability; 9.9 percent or 26 million people had a severe disability." Americans with Disabilities: 1994-95, Current Population Reports, Series P70-61, U.S. Bureau of the Census (Aug. 1997).

[4] Pub. L. 101-336, 104 Stat. 327 (1990) (codified at 42 U.S.C. §§ 12101-12213) (ADA).

[5] The Access Board is an independent Federal regulatory agency created under Section 502 of the Rehabilitation Act of 1973, 29 U.S.C. § 792, to enforce the Architectural Barriers Act of 1968, 42 U.S.C. §§ 4151-4157. It consists of 25 members, 12 Federal members and 13 members appointed by the President from the general public. *See infra* para. 9 and n.14.

out the broad guarantee in a practical, commonsense manner. First and foremost, we must never lose sight of the end goal, which is ensuring that consumers with disabilities have access to telecommunications services and equipment. Critical to achieving this goal, industry must have incentives to consider disability issues at the beginning of the development and design process — and on an ongoing basis. It is our tentative view that we must allow industry the flexibility to innovate and to marshal its resources toward the end goal, rather than focusing on complying with detailed implementation rules. And in a similar vein, we at the Commission must focus our resources efficiently by handling complaints in a streamlined, consumer-friendly manner with an eye toward solving problems quickly.

4. Since Section 255 became effective on February 8, 1996, the Commission's Disabilities Issues Task Force and other staff have spent considerable time discussing accessibility issues with persons with disabilities, consumer groups, equipment manufacturers, service providers, and others. In September 1996 the Commission issued a *Notice of Inquiry*,[6] and subsequently received responsive comments. The staff also have consulted on an ongoing basis with the Access Board, which in February 1998 issued accessibility guidelines with respect to equipment.[7] This Notice of Proposed Rulemaking (Notice) draws extensively from all of these sources.

5. At the outset of the Notice, we explore our legal authority under Section 255, and tentatively conclude that the Commission has authority to establish rules to implement Section 255. We also explore other issues related to Commission jurisdiction, including the relationship between the Commission's authority under Section 255 and the guidelines established by the Access Board.[8]

6. We then seek comment on the interpretation of specific statutory terms that are used in Section 255. Many of the terms are defined elsewhere in the Communications Act,[9] and we seek comment on our tentative view that we are bound by these definitions in the context of Section 255. Other terms have been incorporated from the ADA. We seek comment on how these terms

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[6] Implementation of Section 255 of the Telecommunications Act of 1996: Access to Telecommunications Services, Telecommunications Equipment, and Customer Premises Equipment by Persons with Disabilities, WT Docket No. 96-198, Notice of Inquiry, 11 FCC Rcd 19152 (1996) (*Notice of Inquiry*).

[7] Telecommunications Act Accessibility Guidelines, 63 Fed. Reg. 5608 (1998) (*Access Board Order*). The guidelines became effective on March 5, 1998, and are codified at 36 C.F.R. Part 1193.

[8] Under Section 255(e), 47 U.S.C. § 255(e), the Access Board is responsible for "develop[ing] guidelines for accessibility of telecommunications equipment and customer premises equipment in conjunction with the Commission." *See infra* para. 9.

[9] 47 U.S.C. §§ 151-614. The Communications Act of 1934 is hereinafter referred to as the "Act."

can be made workable in the context of telecommunications services and equipment. In particular, the Notice addresses certain aspects of the term "readily achievable," contained in Section 255. We propose to adopt the ADA definition, but also propose to establish specific factors related to Section 255 accessibility issues that would be considered in evaluating whether making a telecommunications service or equipment accessible or compatible should be considered "readily achievable."

7. We next set forth proposals to implement and enforce the requirement of Section 255 that telecommunications offerings be accessible to the extent readily achievable. The centerpiece of these proposals is a "fast-track" process designed to resolve many accessibility complaints informally, providing consumers quick solutions and freeing manufacturers and service providers from the burden of more structured complaint resolution procedures. In cases where fast-track solutions are not possible, however, or where there appears to be an underlying failure to comply with Section 255, we would pursue remedies through more conventional processes. In both cases, in assessing whether service providers and equipment manufacturers have met their accessibility obligations under Section 255, we would look favorably upon demonstrations by companies that they considered accessibility throughout the development of telecommunications services and equipment.

II. BACKGROUND

A. Legislation

8. The 1996 Act became effective when the President signed it on February 8, 1996. Its principal provisions regarding access for persons with disabilities are contained in Section 255:

- Section 255(a) defines the terms "disability" and "readily achievable" by referencing the ADA.

- Section 255(b) requires that a manufacturer of telecommunications equipment or customer premises equipment (CPE) ensure that the equipment[10] is designed, developed, and fabricated to be accessible to and usable by individuals with disabilities, if readily achievable.

- Section 255(c) requires that a provider of telecommunications service ensure that the service is accessible to and usable by individuals with disabilities, if readily achievable.

[10] For purposes of simplicity, references herein to "equipment" are intended to include references to both telecommunications equipment and CPE, unless the context requires otherwise. Similarly, references to "products" are intended to include references to both equipment and services, unless the context requires otherwise.

- If the accessibility requirements of Sections 255(b) and 255(c) are not readily achievable, Section 255(d) requires manufacturers and service providers to ensure compatibility with existing peripheral devices or specialized CPE commonly used by individuals with disabilities to achieve access, if readily achievable.

A related provision in Section 251(a)(2) of the Act prohibits a telecommunications carrier from installing network features, functions, or capabilities that do not comply with the guidelines and standards established pursuant to Section 255.[11]

9. Section 255 explicitly assigns the Commission two specific responsibilities: (1) to exercise exclusive jurisdiction with respect to any complaint under Section 255;[12] and (2) to coordinate with the Access Board in the development of guidelines for accessibility of telecommunications equipment and customer premises equipment.[13] The Access Board's role is significant because the Board is an independent Federal agency whose primary mission is accessibility for persons with disabilities.[14]

10. The broad accessibility mandate of Section 255 is a contrast to other, more targeted portions of the Act that are intended to enhance accessibility for a certain population. Some examples include: (1) Section 225, which governs Telecommunications Relay Services (TRS) for individuals with hearing and speech disabilities; (2) Section 710, requiring hearing aid compatibility (HAC) for wireline telephones; and (3) Section 713, requiring accessibility of video

[11] For purposes of simplicity, references herein to Section 255 are intended to include references to both Section 255 and Section 251(a)(2), unless the context requires otherwise.

[12] 47 U.S.C. § 255(f).

[13] 47 U.S.C. § 255(e). The Access Board's responsibility is limited to accessibility of equipment, whereas the Commission's responsibility includes both equipment and services.

[14] The Access Board's role in the enforcement of accessibility standards for buildings receiving Federal funding under the Architectural Barriers Act of 1968 was expanded by Section 504 of the ADA, 42 U.S.C. § 12204. The original legislation did not delegate responsibility to the Access Board for any guidelines regarding Title IV, the telecommunications portion of the ADA. The Board's role to establish and maintain minimum guidelines under the Architectural Barriers Act was broadened by the ADA to include Titles II and III of the ADA. 29 U.S.C. § 792(b)(3). In addition, the Access Board was charged by the ADA with developing advisory guidelines and providing technical assistance for those with rights or duties under Titles II and III of the ADA. 29 U.S.C. § 792(b)(2).

programming (closed captioning).[15] The Commission has promulgated rules implementing each of these three statutory provisions.[16]

B. Commission Notice of Inquiry

11. The Commission initiated the implementation of Section 255 by adopting a *Notice of Inquiry* in September 1996. The *Notice of Inquiry* began our examination of three broad areas:

- Threshold jurisdictional issues involving the Commission's authority over telecommunications service providers and equipment manufacturers.

- Statutory definitions, primarily focusing on terms incorporated from the ADA and terms defined by the Communications Act.

- Implementation and enforcement issues, including approaches to service accessibility standards and the relationship between the Access Board guidelines and the Commission's enforcement authority.

In response to the *Notice of Inquiry*, 61 individuals, organizations, and businesses filed comments, reply comments, or both. A list of pleadings and the short-form references to filing parties used herein is contained in Appendix D.

[15] 47 U.S.C. §§ 225, 610, 613.

[16] *See* Telecommunications Relay Services and the Americans with Disabilities Act of 1990, CC Docket No. 90-571, Third Report and Order, 8 FCC Rcd 5300, 5300-01 (1993), Second Order on Reconsideration and Fourth Report and Order, 9 FCC Rcd 1637, 1639-40 (1993); Access to Telecommunications Equipment and Services by Persons with Disabilities, CC Docket No. 87-124, Report and Order, 11 FCC Rcd 8249 (1996) (*HAC Order*), Order on Reconsideration, 12 FCC Rcd 10077 (1997); Implementation of Section 305 of the Telecommunications Act of 1996: Closed Captioning and Video Description of Video Programming, MM Docket No. 95-176, Report and Order, FCC 97-279, released Aug. 22, 1997, Further Notice of Proposed Rulemaking, 13 FCC Rcd 5627 (1998).

C. Telecommunications Access Advisory Committee Report

12. Following passage of the 1996 Act, the Access Board convened a Telecommunications Access Advisory Committee,[17] which then met to develop recommended equipment accessibility guidelines for consideration by the Access Board. The TAAC consisted of representatives from equipment manufacturers, software firms, telecommunications providers, organizations representing persons with disabilities, and other persons interested in telecommunications accessibility. Commission staff attended all Committee sessions as non-voting observers, and consulted with the Access Board staff throughout the advisory committee process.

13. The Committee was given the task of making recommendations regarding the following issues:

- Types of equipment to be covered by the Access Board guidelines.
- Barriers to the use of such equipment by persons with disabilities.
- Solutions to such barriers, if known, categorized by disability.
- Terms and conditions that should be included in the Access Board guidelines.

The Committee released its Final Report in January 1997.[18]

14. Although the TAAC did not achieve full consensus on compliance and coordination issues, it did succeed in reaching agreement on several innovative measures intended to foster implementation of accessibility features. These recommendations included the development of technical standards for telecommunications accessibility by means of industry consensus,[19] the establishment of a "coordination point" for the exchange of information on accessibility

[17] *See* Access Board, Telecommunications Act Accessibility Guidelines for Telecommunications Equipment and Customer Premises Equipment, Notice of Appointment of Advisory Committee Members and Notice of First Meeting, 61 Fed. Reg. 13813 (Mar. 28, 1996). We will refer to the Telecommunications Access Advisory Committee herein as the "TAAC" or the "Committee."

[18] Telecommunications Access Advisory Committee, Access to Telecommunications Equipment and Customer Premises Equipment by Individuals with Disabilities, Final Report, Jan. 1997 (*TAAC Report*).

[19] *TAAC Report*, § 6.3, at 27.

implementation,[20] and the adoption by manufacturers of an access verification process to provide notice to the consumer on the accessibility or compatibility of various products.[21]

15. The *TAAC Report* also made specific recommendations regarding the handling of complaints by the Commission, including efforts at informal resolution and initial referral of complaints to manufacturers,[22] and suggested that the Access Board prepare an annual market monitoring report based on Commission complaint data.[23] The Committee encouraged covered entities to use universal design in manufacturing telecommunications equipment and CPE, while recognizing that "it may not be readily achievable to make every type of product accessible for every type of disability using present technology."[24] The TAAC also recommended process and performance standards, although it recognized that "design, development, and fabrication" processes are unique to individual manufacturers, who would decide how each recommended element of the accessible design process may be integrated into the overall product design effort.[25] With respect to performance guidelines, the TAAC concluded that, because no single interface design will accommodate all disabilities, companies must use discretion in choosing among accessibility features.[26]

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[20] *Id*., § 6.4, at 27-29.

[21] *Id*., § 6.5, at 29. Because the *TAAC Report* provided a broad overview of accessibility to equipment that was "intended to stand alone as a model for achieving such access," the report covered issues that exceeded the Access Board's jurisdiction. *See* Architectural and Transportation Barriers Compliance Board, Telecommunications Act Accessibility Guidelines, Docket No. 97-1, Notice of Proposed Rulemaking, 62 Fed. Reg. 19178 (36 C.F.R. Part 1193) (Apr. 18, 1997) (*Access Board Notice*). Consequently, the *Access Board Notice* and the guidelines subsequently adopted by the Access Board do not address such matters as the Committee's proposal to require a manufacturer's declaration that it has conformed with the statutory accessibility mandate. *See TAAC Report*, § 6.6, at 30-31.

[22] *Id*., § 6.7, at 31-34.

[23] *Id*., § 6.8, at 34.

[24] *Id*., § 1.3, at 3.

[25] *Id*., § 4.0, at 15.

[26] *Id*., § 5.2.1, at 20. The TAAC noted that "accessibility is likely to be accomplished through product designs which emphasize interface flexibility to maximize user configurability and multiple, alternative and redundant modalities of input and output." *Id.*

D. Access Board Equipment Guidelines

16. Following its review of the *TAAC Report* and its consideration of comments submitted in response to the *Access Board Notice*, the Access Board adopted Telecommunications Act Accessibility Guidelines for equipment.[27] The Access Board guidelines draw heavily on the *TAAC Report* recommendations regarding process and performance guidelines. The guidelines consist of: (1) general accessibility requirements; (2) specific guidance on modes for input and output functions; and (3) standards for compatibility with peripheral devices and specialized CPE.

17. Some of the Access Board guidelines are relatively general. The key general guideline specifies a process for manufacturers to review accessibility in the design and development stage. Rather than mandating a particular structure for such a process or imposing a documentation requirement, the guidelines identify key elements the process should contain. Other general guidelines include the provision of information and documentation for customers in accessible formats, employee training, and the preservation of translation protocols and similar information needed to provide accessible telecommunications. The Board also would prohibit changes that would result in a net decrease in the accessibility of telecommunications equipment.[28]

18. The specific guidelines further define what is necessary to make equipment accessible. The Access Board specifies, to the extent it is readily achievable, that each piece of equipment have "input modes" (*e.g.*, dialing a telephone or turning on a switch) and "output modes" (*e.g.*, a telephone ring or flashing light) that are accessible to persons with different disabilities.[29] For example, input functions to accommodate low vision may include tactile indicators on control keys; high-contrast print symbols and visual indicators; legible type-face and type-spacing for labels; and an ability to "freeze" a moving text display. Similarly, output functions to accommodate low vision may include speech output of displayed text and labels; large, high-contrast text and graphics; and an ability to "freeze" a moving text display.[30]

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[27] *See supra* note 7. The guidelines are set out in Attachment C hereto.

[28] *Access Board Order*, 63 Fed. Reg. at 5620.

[29] *Id*. at 5620-23, 5632. The specific capabilities itemized for input functions are closely related to proposals made in the *TAAC Report*, as are capabilities involved in output, display, and control functions. *See id.*; *TAAC Report*, §§ 5.3.1-5.3.2, at 20-23.

[30] *Access Board Order*, 63 Fed. Reg. at 5620-21, 5637-40.

19. For compatibility, the guidelines specify that product operation information be provided in a standard electronic text format on a standard cross-industry port, and that products employ "standardized and non-proprietary" formats for information.[31] The guidelines also specify that products providing auditory output do so at a standard signal level through a standard connector, to enable use of assistive listening devices.[32]

20. The *Access Board Order* contains an Appendix which is intended to be advisory in nature, providing expanded descriptions of the guidelines and offering suggestions as to strategies or measurements to assist in achieving accessible design.[33] Other sections of the Appendix provide detailed information on products used by persons with disabilities to enable compatible design. For example, the Appendix suggests that documents prepared for electronic transmission be in ASCII format in order to be usable by the widest range of CPE, and that certain standard formatting instructions be used in order to be properly understood by automated Braille translation software.[34] Thus, the Appendix may serve as a compendium of detailed specifications to facilitate the implementation of the Board's performance standards and process-oriented rule.

III. STATUTORY AUTHORITY

A. Introduction

21. The *Notice of Inquiry* noted that the Commission possesses exclusive authority with respect to complaints under Section 255(f). It also noted that Section 255(f) authorizes the Commission to work in conjunction with the Access Board to develop guidelines for accessibility of telecommunications equipment and CPE.[35]

22. The *Notice of Inquiry* observed that Section 255(f) provides that "[t]he Commission shall have exclusive jurisdiction with respect to any complaint under [Section 255]," and expressed the Commission's view that Section 255 has established a new statutory right for

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[31] *Id.* at 5619, 5623-25.

[32] *Id*. at 5624.

[33] Appendix to 36 C.F.R. Part 1193 (Advisory Guidance). "This appendix provides examples of strategies and notes to assist in understanding the guidelines and are a source of ideas for alternate strategies for achieving accessibility. These strategies and notes are not mandatory." *Access Board Order*, 63 Fed. Reg. at 5633. In the Appendix, the Board also discusses factors that might be used to evaluate what accessibility is "readily achievable" on an interim basis, until the Commission provides its own guidance. *Id.*

[34] *Id.* at 5635.

[35] *Notice of Inquiry*, 11 FCC Rcd at 19155 (para. 6).

aggrieved parties to file complaints — a right that is independent of, and in addition to, the right to file complaints against common carriers under Sections 207 and 208.[36] Section 207 allows individuals to seek damages either by private actions against carriers in Federal courts, or by recourse to the Commission's complaint process.[37] Section 208 governs complaints against common carriers filed with the Commission.[38] The *Notice of Inquiry* sought comment on appropriate procedures for Section 255 complaints, and on the relationships between such procedures and the general common carrier complaint processes developed pursuant to Section 208 of the Communications Act.[39]

23. In the *Notice of Inquiry*, the Commission also solicited comment on the interpretation that violations of Section 255 are subject only to complaints brought against common carriers under Section 208, so that no complaints could be brought against equipment manufacturers for violations of Section 255(b).[40] Finally, in light of the prohibition of private rights of action in Section 255(f), the Commission also sought comment on the congressional intent evidenced by the reference in the Statement of Managers accompanying the Conference Report to Section 207, which grants individuals the right to file suit in Federal courts.[41]

B. Scope of Rulemaking Authority

24. In the *Notice of Inquiry*, the Commission stated that it has general authority to select from among a variety of approaches to implementing Section 255.[42] These approaches included relying on case by case determinations on complaints, issuing guidelines or a policy statement, or

[36] *Notice of Inquiry*, 11 FCC Rcd at 19165 (para. 36) (quoting Section 255(f) of the Communications Act, 47 U.S.C. § 255(f)).

[37] 47 U.S.C. § 207.

[38] 47 U.S.C. § 208.

[39] *Notice of Inquiry*, 11 FCC Rcd at 19166 (para. 37).

[40] *Id.* at 19165-66 (para. 36).

[41] *Id*. (citing a Conference Report statement that "[t]he remedies available under the Communications Act, including the provisions of sections 207 and 208, are available to enforce compliance with the provisions of section 255." Telecommunications Act of 1996, Conference Report, Report 104-230, 104th Congress, 2d Sess., Feb. 1, 1996, at 135).

[42] *Id*. at 19155 (para. 7).

promulgating rules pursuant to existing provisions of the Communications Act.[43] We find that, in Section 255, Congress enacted broad principles that require interpretation and implementation in order to ensure an efficient, orderly, and uniform regime governing access to telecommunications services and equipment. As a result, we tentatively conclude that this regime can best be implemented if we adopt specific guidance concerning the requirements of Section 255, which will enable the Commission to carry out its enforcement obligations under the Communications Act effectively and efficiently.

25. We reject the suggestion of some parties that we limit our involvement to complaint proceedings or to non-binding guidelines.[44] Such an approach could result in inconsistent and uncertain application of the requirements of Section 255, undermining the goal of providing for greater access and availability of telecommunications to Americans with disabilities. Providing further guidance and assistance to the affected parties may also potentially reduce the costs of compliance, because parties could minimize the litigation of individual disputes and interpretive questions arising under Section 255.

26. It is well established that the Commission possesses authority to adopt rules to implement the requirements of the Communications Act. Several statutory provisions authorize the Commission to adopt rules it deems necessary or appropriate in order to carry out its responsibilities under the Communications Act, so long as those rules are not otherwise inconsistent with the Act or other law.[45] Specifically, Section 4(i) of the Communications Act explicitly permits the Commission to "perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with [the] Act, as may be necessary in the execution of its functions."[46] Section 201(b) provides that "[t]he Commission may prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this Act."[47] Section 303(r) provides that the Commission may "[m]ake such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this Act . . . ."[48]

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[43] *Id.*

[44] *See* BellSouth Comments at 4; Pacific Comments at 7; U S WEST Comments at 4.

[45] *See* United States v. Storer Broadcasting, 351 U.S. 192, 202-03 (1956).

[46] 47 U.S.C. § 154(i).

[47] 47 U.S.C. § 201(b).

[48] 47 U.S.C. § 303(r).

27. Courts repeatedly have held that the Commission's general rulemaking authority is "expansive" rather than limited.[49] In addition, it is well established that the agency has the authority to adopt rules to administer congressionally mandated requirements.[50] Nothing in Section 255 bars the Commission from exercising the rulemaking authority granted by Sections 4(i), 201(b), and 303(r) to clarify and implement the requirements of Section 255. Consequently, we find there is ample authority for the Commission's adoption of regulations implementing Section 255.

28. Some parties question our rulemaking authority,[51] but they neither acknowledge the plain language of the statute, nor claim that ambiguities in the wording of the statute compel reliance upon legislative history to discern the intent of Congress. Contrary to arguments advanced by CEMA and SWBT, deletion of language in the Senate bill *requiring* the Commission to promulgate rules removes the mandatory direction, but does not affect the Commission's general authority.[52] Absent from the language of Section 255 is any limitation on the Commission's authority. To the contrary, the first sentence of Section 255(f), which bars private rights of action "to enforce any requirement of this section *or any regulation thereunder*," expressly contemplates the promulgation of regulations to carry out the section.[53] Thus, the Conference Committee deletion referenced by the parties[54] cannot reasonably be deemed an

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[49] National Broadcasting v. United States, 319 U.S. 190, 219 (1943). *See also* FCC v. National Citizens Comm. for Broadcasting, 436 U.S. 775, 793 (1978).

[50] *See* Morton v. Ruiz, 415 U.S. 199, 231 (1974) ("The power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress."). *See also* Chevron v. Natural Resources Defense Council, 467 U.S. 837, 843-44 (1984) (footnote omitted):

> If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute. Sometimes the legislative delegation to an agency on a particular question is implicit rather than explicit. In such a case, a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.

[51] *See, e.g.*, CEMA Comments at 13 & n.29; ITI Comments at 7; SWBT Comments at 2.

[52] *See also Notice of Inquiry*, 11 FCC Rcd at 19163 (para. 29) (citing S. 652, 104th Cong., 1st Sess., § 262(g)).

[53] That sentence in Section 255(f) provides: "Nothing in this section shall be construed to authorize any private right of action to enforce any requirements of this section *or any regulation thereunder*." 47 U.S.C. § 255(f) (emphasis added). In our view, this language makes clear that Congress anticipated the promulgation of implementing regulations under this section.

[54] *See supra* para. 28 and note 52.

implied "prohibition"; rather, it leaves rulemaking discretion to the Commission, to be exercised consistently with other provisions of the Act.

C. Access Board Equipment Guidelines

29. Section 255(e) directs the Access Board to develop equipment accessibility guidelines "in conjunction with" the Commission, and to periodically review and update the guidelines, but the statute does not otherwise specify the role of the guidelines in the Commission's implementation process.[55] As we have discussed above, the language of Section 255 indicates that Congress intended to confer upon the Commission broad substantive authority to implement the requirement that telecommunications equipment and services be accessible, and gives the Commission exclusive authority to enforce that mandate.[56] In the *Access Board Order*, the Board states only that "Congress clearly intended that the FCC's actions be consistent with the Board's guidelines."[57]

30. We view the Board's guidelines as our starting point for the implementation of Section 255. We note that, as a practical matter, we must strive to interpret Section 255 in a way that ensures that telecommunications services and equipment will be treated consistently. Because the Board's guidelines address only the accessibility of equipment, we must necessarily adapt the Board's guidelines to develop a coordinated approach to accessibility for both services and equipment.[58] This coordination is particularly necessary because technological developments have resulted in a convergence between telecommunications equipment and services, requiring us to consider both as we implement the statute. We therefore tentatively conclude that while we have discretion regarding our use of the Access Board's guidelines in developing our comprehensive implementation scheme, we propose to accord the guidelines substantial weight in

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[55] 47 U.S.C. § 255(e). In contrast, the ADA explicitly provides that the Board's guidelines establish minimum requirements for implementation by other agencies. *See, e.g.*, 42 U.S.C. §§ 12134(c), 12149(b). *See also* TIA Reply Comments at 7 (the Commission and the Access Board share coequal responsibility for the guidelines because of "in conjunction with" phrase in statutory language); BellSouth Comments at 3 (the Board has primary responsibility for guidelines, and the Commission should not usurp its authority); Omnipoint Comments at 11-14 (statute requires a case-by-case approach, but from a policy perspective it is important for the Commission to work closely with the Board and establish early policy guidance).

[56] *See supra* para. 28.

[57] *Access Board Order*, 63 Fed. Reg. at 5609.

[58] *See* Motorola Reply Comments at 3 (Commission's industry-wide Section 255 enforcement authority requires it to extensively review Board guidelines in order to assure their reasonableness, as well as to coordinate actions with respect to service and equipment industries).

developing our own regulations and in our broader structure for implementation.[59] We seek comment on this approach.

D. Enforcement Authority

31. In response to the *Notice of Inquiry*, CEMA asserts that "[p]rivate complaints against non-common carriers were not authorized under the Communications Act prior to the adoption of Section 255 . . ."[60] and that "Section 255(f) *expressly prohibits* the creation of any new private rights of action."[61] CEMA notes that "[t]he final statutory language of Section 255 makes no reference to any new enforcement or complaint authority . . . "[62] and cites language in the Statement of Managers[63] as "suggest[ing] that only *existing* remedies under the Communications Act are available for enforcement."[64] CEMA maintains that the Commission's enforcement authority with respect to equipment manufacturers is thus governed by Section 4(i) of the Act, which, unlike Sections 207 and 208,[65] "contains no provision for private complaints or assessing damages."[66] CEMA concludes that Commission enforcement of Section 255 violations by equipment manufacturers should therefore be limited to declaratory rulings and cease-and-desist orders.[67]

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[59] *See generally* 5 U.S.C. § 553(b)(3)(A); Aulenback, Inc. v. Federal Highway Admin., 103 F.3d 156, 168-69 (D.C. Cir. 1997); Telecommunications Research and Action Center v. FCC, 800 F.2d 1181 (D.C. Cir. 1986).

[60] CEMA Comments at 16-17.

[61] *Id.* at 17 (emphasis in original).

[62] *Id.* at 16.

[63] "The remedies available under the Communications Act, *including the provisions of sections 207 and 208*, are available to enforce compliance with the provisions of section 255." H.R. Conf. Rep. No. 458, 104th Cong., 2d Sess., at 135 (1996), *quoted in* CEMA Comments at 16 (emphasis supplied by CEMA).

[64] CEMA Comments at 16 (emphasis in original).

[65] Sections 207 and 208 provide for the recovery of damages from common carriers, through either a Commission complaint process or a civil lawsuit. *See* 47 U.S.C. §§ 207, 208.

[66] CEMA Comments at 16.

[67] *Id.* Several equipment manufacturers similarly state that private damages claims are limited to complaints against carriers under Sections 207 and 208. Ericsson Comments at 8; Motorola Comments at 6 n.5; Nortel Comments at 11; *see also* Microsoft Comments at 34-35. AT&T agrees that the right of action created by Section 255 supplements rights available solely against common carriers under Sections 206-208, as asserted in the *Notice*

32. CEMA's analysis collides with both established legal terminology and the statute. The language of Section 255(f) — "The Commission shall have exclusive jurisdiction with respect to any complaint under this section"[68] — makes clear that the statute contemplates that complaints may be filed under Section 255 itself. The statement in Section 255(f) that no private rights of action are authorized does not undermine this conclusion. CEMA mistakenly equates a "private right of action" with an administrative complaint. The preclusion of *private litigation* in Section 255(f) compels complainants to seek redress exclusively from the Commission, rather than in Federal courts, but it does not prevent the filing of administrative complaints pursuant to Section 255. Both manufacturers and service providers face obligations under Section 255, and we believe that both are subject to complaints under Section 255. The fact that Sections 207 and 208 provide additional authority for the filing of complaints against common carriers does not alter our view. Had Congress intended to permit complaints under Section 255 only against common carriers, and not manufacturers, we would expect to find this clearly stated in the statute.

33. In addition, we tentatively conclude that the reference in the Statement of Managers to existing "remedies" refers not to the filing of complaints, such that complaints could be filed only if authorized elsewhere in the Act, but to the range of statutory redress available under the Act against parties who are found to have violated Section 255.[69] By including Sections 207 and 208 in the list of available remedies, we believe that Congress intended to make clear that damages may be awarded, pursuant to these sections, for violations of Section 255 by common carriers. We seek comment on this analysis, and on whether there is any basis for concluding that damages, pursuant to Sections 207 and 208 or otherwise, are available with respect to entities other than common carriers.

34. NAD asserts that the preclusion of private rights of action under Section 255 does not foreclose civil actions by consumers for damages under Section 207, noting that the Statement of Managers refers to Sections 207 and 208 as being available to enforce compliance with Section 255.[70] We disagree. The plain language of the statute confers exclusive jurisdiction on the Commission and bars private rights of action. The exclusive jurisdiction established for Commission consideration of complaints, in combination with the preclusion of private rights of action, simply does not allow for private litigation. As noted by CTIA, initial recourse to State or

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of Inquiry, but argues that this does not mandate the adoption of a different set of procedural rules. AT&T Comments at 12-13.

[68] Section 255(f) of the Communications Act, 47 U.S.C. § 255(f).

[69] For a discussion of remedies for violations of Section 255, *see infra* para. 172.

[70] NAD Comments at 32-33.

Federal courts is foreclosed, so that private parties are prohibited from seeking damages under Section 207 in Federal courts.[71] We seek comment on this conclusion.

IV. STATUTORY DEFINITIONS

A. Scope of Statutory Coverage

1. "Telecommunications" and "Telecommunications Service"

35. Section 255 applies to "manufacturer[s] of telecommunications equipment or customer premises equipment" and "provider[s] of telecommunications service," and Section 251(a)(2) applies to "telecommunications carrier[s'] . . . network features, functions, or capabilities."[72] These phrases or their central terms are defined by the Act,[73] and apply to a range of regulatory provisions. Moreover, we find no indication in the legislative history of the 1996 Act that Congress intended these terms to have any different, specialized meaning for purposes of accessibility.

36. We tentatively conclude that to the extent these phrases are broadly grounded in the Communications Act, they require no further definition, and our sole task here is to elucidate their application in the context of Section 255. However, to the extent specific terms arise solely in connection with Section 255, we will consider whether further definition or clarification is appropriate. We note that the statute's use of the term "telecommunications" may have the effect of excluding from the coverage of Section 255 a number of services that might be desired by consumers. Only those services which are considered to be "telecommunications services" are subject to regulation under Title II of the Communications Act. "Information" services" are excluded from regulation. We now discuss this regulatory dichotomy further.

37. Section 3 of the Act defines "telecommunications" as:[74]

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[71] CTIA Reply at 6 nn. 9-10. CTIA contends that consumer advocates have favored procedures that ensure private rights of action, and asserts that Congress instead intended to limit individuals to filing complaints with the Commission for violations of Section 255. CTIA Reply at 5.

[72] 47 U.S.C. §§ 255, 251(a)(2). We note that, while these statutory provisions apply only to telecommunications services, equipment, and "network features, functions, or capabilities," there are other avenues of relief for persons seeking accessibility in other contexts. For example, an employee whose employer fails to provide accessible telecommunications equipment to enable the employee to perform his or her job may seek relief under the ADA.

[73] *See* Sections 3(14), 3(29), 3(43), 3(44), 3(45), and 3(46) of the Communications Act, 47 U.S.C. §§ 153(14), 153(29), 153(43), 153(44), 153(45), 153(46).

[74] 47 U.S.C. § 153(43).

> the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received.

It defines "telecommunications service" as:[75]

> the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used.

The Act defines an "information service" as:[76]

> the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing, but does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service.

38. In 1996 the Commission found that all of the services it had previously considered to be "enhanced services"[77] under the regulatory structure it had established in the 1980 *Computer II* proceeding[78] should be considered "information services."[79] Examples of services the Commission has treated as enhanced include voice mail, electronic mail, facsimile store-and-forward, interactive voice response, protocol processing, gateway, and audiotext information

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[75] 47 U.S.C. § 153(46).

[76] 47 U.S.C. § 153(20).

[77] Enhanced services are defined in the Commission's rules as "services, offered over common carrier transmission facilities used in interstate communications, which employ computer processing applications that act on the format, content, code, protocol or similar aspects of the subscriber's transmitted information; provide the subscriber additional, different, or restructured information; or involve subscriber interaction with stored information." Section 64.702(a) of the Commission's Rules, 47 C.F.R. § 64.702(a).

[78] Amendment of Section 64.702 of the Commission's Rules and Regulations (*Computer II*), Docket No. 20828, Final Decision, 77 FCC 2d 384, 435 (1980), *recon.*, 84 FCC 2d 50 (1980), *further recon.*, 88 FCC 2d 512 (1981), *aff'd sub nom.* Computer and Communications Industry Ass'n v. FCC, 693 F.2d 198 (D.C. Cir. 1982), *cert. denied*, 461 U.S. 938 (1983).

[79] *See* Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended, CC Docket No. 96-149, First Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd 21905, 21995 (1996) (*Non-Accounting Safeguards Order*).

services.[80] Other enhanced services include electronic store-and-forward, data processing, gateways to online databases, and alarm monitoring.[81] Similarly, the Commission has deemed reverse directory service to be an information service and, thus, not regulated under Title II of the Act.[82]

39. On the other hand, the Commission has found that services it had previously classified as "adjunct-to-basic" should be classified as telecommunications services.[83] These are services that fall within the literal definition of an "enhanced service" set forth in the Commission's rules, but are basic in purpose and facilitate the completion of calls through utilization of basic telephone service facilities.[84] They include, *inter alia*, speed dialing, call forwarding, computer-provided directory assistance, call monitoring, caller identification, call tracing, call blocking, call return, repeat dialing, and call tracking, as well as certain Centrex features.[85] The Commission found that such "adjunct-to-basic" services facilitated the establishment of a transmission path over which a telephone call may be completed, without altering the fundamental character of the telephone service.[86]

40. The Commission has consistently categorized a service option or feature as adjunct-to-basic, and thus subject to Title II regulation, if that option or feature is clearly basic in purpose

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[80] *See* Bell Operating Companies Joint Petition for Waiver of Computer II Rules, Order, 10 FCC Rcd 13758, 13770-74, App. A (Com. Car. Bur. 1995).

[81] *See* Bell Operating Companies Joint Petition for Waiver of Computer II Rules, Order, 10 FCC Rcd 1724 n.3 (Com. Car. Bur. 1995); Implementation of the Telecommunications Act of 1996: Telemessaging, Electronic Publishing, and Alarm Monitoring Services, CC Docket No. 96-152, Second Report and Order, 12 FCC Rcd 3824 (1997).

[82] *See* Bell Operating Companies Petitions for Forbearance from the Application of Section 272 of the Communications Act of 1934, as amended, to Certain Activities, CC Docket No. 96-149, Memorandum Opinion and Order, 13 FCC Rcd 2627, 2638, 2656-57 (paras. 17, 60) (Com. Car. Bur. 1998).

[83] *See Non-Accounting Safeguards Order*, 11 FCC Rcd at 21958.

[84] *See* North American Telecommunications Association Petition for Declaratory Ruling under Section 64.702 of the Commission's Rules Regarding the Integration of Centrex, Enhanced Services, and Customer Premises Equipment, ENF No. 84-2, Memorandum Opinion and Order, 101 FCC 2d 349 (1985) (*NATA Centrex Order*), *recon*., 3 FCC Rcd 4385 (1988).

[85] *NATA Centrex Order*, 101 FCC 2d at 359-61.

[86] *Id.* at 358-61.

and use, and brings maximum benefit to the public through its incorporation in the network.[87] For example, the Commission has addressed whether access to a database through directory assistance that searches for a listing by name may be offered as an adjunct-to-basic telephone service. Because a subscriber using directory assistance retrieves information stored in a telephone company's computer database, directory assistance appears to fit within the definition of an enhanced service. The Commission, however, found such access to be adjunct-to-basic, rather than enhanced service, because directory assistance provides only that information necessary for a subscriber to place a call.[88] The Commission has also held that electronic directory assistance is an adjunct-to-basic service because, as with operator-assisted directory assistance, the purpose of the service is to facilitate the placement of telephone calls.[89] In contrast, reverse directory service (where a customer knows a telephone number and seeks to learn the name of the number holder) supplies information that is not necessary to complete a call, and is therefore an enhanced service.[90]

41. The Commission has found that Operator Services for the Deaf (OSD), which enable text telephone users to utilize operator assisted services for calls placed to another text telephone (TTY), appear to be within the definition of adjunct-to-basic services.[91] The Commission reasoned that OSD are intended to facilitate the use of traditional telephone services for TTY-to-TTY calls, and do not alter the fundamental character of TTY-to-TTY telephone service. The services provided by OSD, including operator assistance with collect and third-party billing, emergency interrupt, and busy-line verification, are likewise intended to facilitate the completion of TTY-to-TTY calls. As discussed above, directory assistance is already classified as adjunct-to-basic service. The fact that directory assistance is provided through OSD does not alter the nature of the service, or, consequently, its classification as adjunct-to-basic service. The Commission therefore concluded that the services provided through OSD are subject to Title II

[87] *Id.* at 359.

[88] *Id.* at 360.

[89] *See* Southwestern Bell Telephone Co., Petition for Waiver of Section 69.4(b) of the Commission's Rules, Transmittal No. 1741, Memorandum Opinion and Order, 5 FCC Rcd 3792, 3793 (Com. Car. Bur. 1990).

[90] *See* US West Communications, Inc. Petition for Computer III Waiver, CC Docket No. 90-623, Memorandum Opinion and Order on Reconsideration, 11 FCC Rcd 7997, 8004, 8006-07 (paras. 14, 22) (Com. Car. Bur. 1996).

[91] Establishment of a Funding Mechanism for Interstate Operator Services for the Deaf, RM 8585, Memorandum Opinion and Order, 11 FCC Rcd 6808, 6817 (1996). The Commission ultimately declined to establish a funding mechanism for recovery of the costs of providing OSD. *Id.* at 6819-20.

regulation as adjunct-to-basic services.[92] On the other hand, the Commission has decided that the provision of access to a database for purposes other than to obtain the information necessary to place a call will generally be found to be enhanced services,[93] the presumption being that they are information services unless they are shown to be otherwise.[94]

42. Many services are considered telecommunications services and, therefore, are clearly subject to the requirements of Section 255. We recognize, however, that there are some important and widely used services, such as voice mail and electronic mail, which under our interpretation fall outside the scope of Section 255 because they are considered information services. Given the broad objectives Congress sought to accomplish by its enactment of Section 255, we seek comment on whether Congress intended Section 255 to apply to a broader range of services.

43. We also note that the Commission's interpretation of the definitions of these terms continues to be examined and may be modified. Congress has required the Commission to undertake a review of the provisions of the 1996 Act relating to universal service, to be completed and submitted to Congress no later than April 10, 1998. The Commission must review, among other things, the definitions of "information service" and "telecommunications service" in the 1996 Act, and the impact of the Commission's interpretation of those definitions on the current and future provision of universal service to consumers, including consumers in high cost and rural areas.[95] We do not intend, in this proceeding, to foreclose any aspect of that ongoing reexamination. Further, in a recently released Further Notice of Proposed Rulemaking examining the Commission's nonstructural safeguards regime governing the provision of enhanced and information services by the Bell Operating Companies (BOCs), the Commission sought comment on whether the Commission's definition of "basic service" and the definition of "telecommunications service" enacted in the 1996 Act cover the same set of services.[96]

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[92] *Id.* at 6817.

[93] US West Communications, Inc. Petition for Computer III Waiver, CC Docket No. 90-623, Order, 11 FCC Rcd 1195, 1199 (*US West Waiver Order*) (Com. Car. Bur. 1995); *NATA Centrex Order,* 101 FCC 2d at 360.

[94] *US West Waiver Order*, 11 FCC Rcd at 1199; *NATA Centrex Order*, 101 FCC 2d at 360-61.

[95] *See* Pub. L. 105-119, § 623, 111 Stat. 2440 (1997); *see also* Common Carrier Bureau Seeks Comment for Report to Congress on Universal Service under the Telecommunications Act of 1996, CC Docket No. 96-45, Public Notice, 13 FCC Rcd 271 (1998).

[96] Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services, CC Docket No. 95-20, Further Notice of Proposed Rulemaking, 13 FCC Rcd 6040, 6066-67 (para. 41) (1998).

2. "Provider of Telecommunications Service"

44. Because the Act does not define "provider of telecommunications service," we believe it would be helpful to propose some clarifications regarding aspects of this phrase as used in Section 255, beginning with the term "provider." Although "provide" appears frequently in the Act in various forms,[97] the Act does not define "provide" or "provider," either in connection with telecommunications or otherwise. The term "provide," in its ordinary sense, can mean to "[e]quip or fit out with what is necessary for a certain purpose; furnish or supply with something[;] . . . [s]upply or furnish for use; make available . . . ."[98] With respect to Section 255, we believe that Congress intended to use the term "provider" broadly, to include entities that supply or furnish telecommunications services, as well as entities that make available such services. For example, the statute does not exclude resellers — who offer telecommunications services for a fee directly to the public — from the definition of telecommunications service provider. This interpretation is consistent with our view that Congress intended the mandate of Section 255 to be broad.[99]

45. We therefore propose that all entities offering (*i.e.*, whether by sale or by resale) telecommunications services to the public, including aggregators, should be separately subject to Section 255, without regard to accessibility measures taken by the service provider who originates the offering.[100] We seek comment on this proposal.

46. A second question involves entities that offer both telecommunications and non-telecommunications services. For example, local exchange carriers may also provide cable services. We note the plain language of Section 255(c), which states that "[a] provider of

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[97] *See, e.g.*, 47 U.S.C. § 153(44) ("The term 'telecommunications carrier' means any provider of telecommunications services . . ."); 47 U.S.C. § 222(e) ("a telecommunications carrier that provides telephone exchange service . . . in its capacity as a provider of such service . . ."); 47 U.S.C. § 225(c) ("Each common carrier providing telephone voice transmission services shall . . . provide . . . telecommunications relay services . . .").

[98] *New Shorter Oxford English Dictionary* 2393 (4th ed. 1993).

[99] *Cf.* Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-Region, Inter-LATA Services in Michigan, CC Docket No. 97-137, Memorandum Opinion and Order, 12 FCC Rcd 20543, 20600-05 (1997) (holding that a BOC "provides" a checklist item either by actually furnishing the item or, if no competitor is actually using the item, by making the checklist item available as both a legal and a practical matter, where a different interpretation would be contrary to congressional intent).

[100] At *infra* paras. 75-80 we address what accessibility obligations might attach to providers whose telecommunications services are provided by the facilities of others.

telecommunications service shall ensure that *the service* is accessible . . . ."[101] We therefore propose to subject a provider of telecommunications service to the requirements established in Sections 255(c) and 255(d) only to the extent it is providing telecommunications services.[102] We seek comment on whether this proposal is practical if a provider is using the same facilities to offer telecommunications services and services not meeting the statutory definition.

3. "Manufacturer of Telecommunications Equipment or Customer Premises Equipment"

47. Section 255(b) of the Act provides that "[a] manufacturer of telecommunications equipment or customer premises equipment shall ensure that the equipment is designed, developed, and fabricated to be accessible to and usable by persons with disabilities, if readily achievable."[103] In the following sections we present proposals and seek comment on various aspects of these terms used in Section 255(b).

[101] 47 U.S.C. § 255(c) (emphasis added).

[102] This is consistent with the Access Board's approach to manufacturers covered by Section 255. *See infra* paras. 52-54.

[103] 47 U.S.C. § 255(b).

a. Equipment

48. "Telecommunications equipment" and "customer premises equipment" are established terms whose definitions are fixed by the Act and long usage, and thus do not require further interpretation in this proceeding. Section 3 of the Act defines "telecommunications equipment" as "equipment, other than customer premises equipment, used by a carrier to provide telecommunications services, and includes software integral to such equipment (including upgrades)."[104] It defines "customer premises equipment" (CPE) as "equipment employed on the premises of a person (other than a carrier) to originate, route, or terminate telecommunications."[105] The Access Board guidelines repeat the definitions of both terms used by the Act.[106]

49. Section 255 does not set out separate accessibility requirements for telecommunications equipment and CPE. Rather, it requires manufacturers to make both telecommunications equipment and CPE accessible to individuals with disabilities. We tentatively conclude that these terms encompass all equipment used in the provision of telecommunications service, whether collocated with a user (*i.e.*, CPE)[107] or found elsewhere in a telecommunications system (*i.e.*, telecommunications equipment). We tentatively conclude that Section 255 does not distinguish between the two categories, but applies to both categories the same requirement of *functional* accessibility. In short, to the extent end users must interact with equipment to use telecommunications services, Section 255 applies.[108] We seek comment on this view.

50. The *Notice of Inquiry* sought comment on possible differences in treatment between telecommunications equipment and CPE. Several commenters cite difficulties drawing meaningful distinctions for accessibility purposes, citing the link between Section 255

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[104] 47 U.S.C. § 153(45).

[105] 47 U.S.C. § 153(14).

[106] *See* 36 C.F.R. § 1193.3.

[107] CPE may also include wireless handsets. *See* Petition for Declaratory Ruling That GTE Airfone, GTE Railfone, and GTE Mobilnet Are Not Subject to the Telephone Operator Consumer Services Improvement Act of 1990, Declaratory Ruling, 8 FCC Rcd 6171, 6174 (para. 16) (Com. Car. Bur. 1993) (finding that the definition of "premises" includes "locations" such as airplanes, trains, and rental cars, despite the fact that they are mobile), *recon. pending.*

[108] Of course, as a practical matter the remoteness of telecommunications equipment will generally mean less extensive interaction with end users (if any), and therefore correspondingly less need for accessibility features.

(accessibility) and Section 251(a)(2) (interconnection must not impede accessibility).[109] But NCD cautions that, because networks typically have a longer life cycle than CPE, the economic aspect of "readily achievable" will vary between the two sectors.[110] Pacific notes a trend toward more integrated CPE products and warns of the danger that Commission incentives might lead to a separate "second tier" of specialized accessible products, and instead encourages approaches that ensure a menu of choices for persons with disabilities.[111]

51. We agree with TIA that Congress intended generally equivalent treatment of both telecommunications equipment and CPE.[112] We also recognize the practical difficulties presented when inaccessibility may be due to multiple elements of a telecommunications system, as commenters illustrate, and we believe that resolving such situations will generally depend on the particular circumstances of individual cases. However, we seek comment on possible approaches to resolving such situations.

52. The *Notice of Inquiry* also sought comment on the treatment of equipment that can be used both in connection with telecommunications services and otherwise (multi-use equipment). Comments range from urging us to require accessibility for all functions of a product with any telecommunications capabilities,[113] to requiring accessibility only with respect to those telecommunications-specific functions.[114] The Access Board takes the position that "only the functions directly related to a product's operation as telecommunications equipment or [CPE] are covered by the guidelines."[115]

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[109] CCD Comments at 6; Inclusive Comments at 2 (modern telecommunications consist of features and functionalities provided inseparably by combinations of network equipment, network services, and CPE); Trace Comments at 2 (unpaginated) (in some cases service providers supply software for CPE user interfaces); UCPA Comments at 5.

[110] NCD Comments at 8-9.

[111] Pacific Comments at 10.

[112] *See* TIA Comments at 4.

[113] Arkenstone Comments at 5; CAN Comments at 2-3; MATP Comments at 2; Trace Comments at 8 (unpaginated).

[114] AFB Comments at 7; Inclusive Comments at 3; ITI Comments at 9; Mulvany Comments at 2-3 (unpaginated); NCD Comments at 8.

[115] *Access Board Order*, 63 Fed. Reg. at 5612.

53. As with telecommunications services,[116] we propose that Section 255 apply to multi-use equipment only to the extent the equipment serves a telecommunications function. The Commission, for example, regulates varied uses of the spectrum that do not involve the offering of telecommunications for a fee directly to the public. A number of the services whose technical parameters are regulated by the Commission thus do not appear to fall within the scope of Section 255, and consequently neither does the equipment associated with those services. We seek comment on this proposal, and in particular on practical aspects of its application. What, for example, is the obligation of a manufacturer who produces equipment apparently intended for a non-telecommunications application, but that finds use in connection with a telecommunications service subject to Section 255?[117]

54. Several commenters question the extent to which software products are subject to the requirements of Section 255.[118] The Access Board position is that:[119]

> The guidelines do not differentiate between hardware, firmware or software implementations of a product's functions or features, nor do they differentiate between functions and features built into the product and those that may be provided from a remote server over the network. The functions are covered by these guidelines whether the functions are provided by software, hardware, or firmware.

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[116] *See supra* para. 46.

[117] For example, unlicensed devices regulated under Part 15 of the Commission's Rules may be used as part of a telecommunications service, as where a wireless local area network is interconnected with the public switched network and offered to subscribers for a fee. *See* Amendment of the Commission's Rules to Provide for Unlicensed NII/SUPERNet Operations in the 5 GHz Frequency Range, ET Docket No. 96-102, Report and Order, 12 FCC Rcd 1576 (1997).

[118] Several commenters note that CPE is increasingly dependent on software, and that convergence is blurring historical lines between network functions and telecommunications appliances. *See, e.g.*, Mulvany Comments at 2-3 (unpaginated); AFB Reply Comments at 10; MATP-TAP Reply Comments at 2; Netscape Reply Comments at 10; Trace Reply Comments at 8-9; UCPA Reply Comments at 8; WID Reply Comments at 5. Only Microsoft asserts that Congress intended to exempt all software from the scope of CPE covered by Section 255. Microsoft Comments at 10-11. Others maintain instead that software should be subject to accessibility requirements to the extent it provides telecommunications functions. *See, e.g.*, Ericsson Comments at 7-8; AFB Reply Comments at 10-11; ASDC Reply Comments at 1-2; CEMA Reply Comments at 2, 4; ITI Reply Comments at 2 n.2; MATP-TAP Comments at 2-3; NAD Reply Comments at 19; Netscape Reply Comments at 10-11; Trace Reply Comments at 8; UCPA Reply Comments at 7-8; WID Reply Comments at 5.

[119] *Access Board Order*, 63 Fed. Reg. at 5613.

55. We note that the definition of telecommunications equipment includes "software integral to such equipment (including upgrades)."[120] Given our view that the focus of Section 255 should be on functionality, we tentatively view software as simply one method of controlling telecommunications functions. For example, placing a telephone call originally involved announcing the desired party or telephone number to an operator, who manually connected the calling and called lines; this was followed by a system where the user manipulated an electromechanical dial to control remote electromechanical switches that connected the call; now for most calls the user uses an electronic keypad to control electronic switches that rely on stored-memory programs (*i.e.*, software) to operate; and many users also have available speed-dialing or voice-dialing features that rely on software programs located in either CPE or network equipment. There is no *functional* difference between these various methods of placing a call, and we do not believe that Congress intended to distinguish between them in Section 255. We therefore propose to treat software integral to telecommunications equipment the same as equipment or telecommunications services, and seek comment on this proposal.

56. On the other hand, we note that the statutory definition of CPE does not include a corresponding explicit reference to software.[121] Where a CPE manufacturer markets products that include software, we tentatively conclude that there is no reason to treat the bundled software differently from any other component of the equipment.[122] The manufacturer is responsible for the functional accessibility of the product as offered, to the extent it serves a telecommunications function. To the extent the software detracts from or otherwise reduces the accessibility of the product, the manufacturer would be required to alter the software to cure the accessibility problem, to the extent such alteration is readily achievable. However, where software to be used with CPE is marketed separately from the CPE, we believe that the software itself would not be subject to Section 255, and that it could not even be considered to fall within the statutory definition of CPE. Further, we believe that software manufacturers would not be directly subject to Section 255 for software bundled with other manufacturers' CPE. We seek comment on these issues, and in particular on the practical aspects of applying this distinction.

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[120] Section 3(45) of the Communications Act, 47 U.S.C. § 153(45).

[121] Section 3(14) of the Communications Act, 47 U.S.C. § 3(14).

[122] For example, we tentatively conclude that the requirement that CPE products be accessible must be construed as extending to the accessibility of components such as controls, displays, and so forth, even though Section 255 does not expressly list the types of components that it reaches. Otherwise, Section 255 would be meaningless.

b. Manufacturer

57. The Act does not define "manufacturer of telecommunications equipment or customer premises equipment." The *Notice of Inquiry* sought comment regarding how the Commission should apply the accessibility requirement to equipment manufacturers, given such considerations as different accommodations for different disabilities, different protocols and standards for equipment distributed in foreign markets, multiple-source development and manufacture of products, and licensing for manufacture and distribution.[123]

58. There is broad agreement that all equipment marketed in the United States, regardless of national origin, should have uniform accessibility requirements.[124] Further, the Access Board guidelines do not distinguish between foreign and domestic manufacturers.[125] We therefore tentatively conclude that Section 255 should be construed to apply to all manufacturers offering equipment for use in the United States, regardless of their location or national affiliation. Exempting foreign manufacturers, in our tentative view, would create an uneven playing field, to the potential disadvantage of American manufacturers, and would deny the American public the full protection Section 255 offers. We are aware that some foreign manufacturers may be beyond the effective range of some of the enforcement tools available to us, but their imported products certainly are not.[126] We seek comment on this proposal.

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[123] *See Notice of Inquiry*, 11 FCC Rcd at 19157 (paras. 11-12).

[124] AFB Comments at 7; Arkenstone Comments at 5; CAN Comments at 4; CCD Comments at 6; Ericsson Comments at 9-10; Lucent Comments at 7-10; MATP Comments at 2; Microsoft Comments at 13; Motorola Comments at 8; Mulvany Comments at 3 (unpaginated); NAD Comments at 25-26; NCD Comments at 9; Nortel Comments at 7 (urging the Commission to coordinate accessibility requirements with other countries, to the extent possible); SHHH Comments at 6 (accessibility requirements established in the United States could lead to harmonization of international requirements); TIA Comments at 4-5; Trace Comments at 9-10 (unpaginated); UCPA Comments at 6; Waldron Comments at 8, 11; ACB Reply Comments at 5; COR Reply Comments at 7-8; Gallaudet Reply Comments at 4; MATP-TAP Comments at 15; Netscape Reply Comments at 17-18 (because CPE markets are increasingly international, U.S. accessibility requirements will both protect Americans with disabilities and promote universal design abroad, enhancing the competitiveness of American industry). *See also* CAN Comments at 4 (nationality-based exemptions would give manufacturers an "easy out" not to make their products accessible); Microsoft Comments at 12-13; Motorola Comments at 8 (exempting foreign manufacturers would make U.S. products less competitive).

[125] *See* 36 C.F.R. § 1193.3.

[126] We note that all equipment marketed or sold in the United States must meet all applicable technical and operational requirements. *See* Part 2 of the Commission's Rules, Subpart K — Importation of Devices Capable of Causing Harmful Interference, Sections 2.1201-2.1207. 47 C.F.R. §§ 2.1201-2.1207. *See also infra* paras. 172-174.

59. Regarding the question of how Section 255 should apply to manufacturers involved in the production of multiple-source equipment, commenters take two basic positions. Some support looking only to the company that either assembles the final product or offers it for sale.[127] Others favor assigning responsibility to all firms involved, down to the component level.[128] Those commenters who expressly comment on the reseller issue say both manufacturers and resellers should be responsible for accessibility.[129] Beyond these positions, several commenters advocate leaving to private contract the apportionment of responsibility among designers, developers, fabricators, and marketers.[130] The Access Board guidelines define a "manufacturer" as an entity "that sells to the public or to vendors that sell to the public; a final assembler."[131] The Access Board explains that "[t]his would generally be the final assembler of separate subcomponents; that is, the entity whose brand name appears on the product."[132]

60. Equipment commonly consists of components manufactured by several different and possibly unrelated companies. We tentatively believe the "final assembler" approach favored by the Access Board has several advantages. Section 255 perhaps could be interpreted to apply to all component manufacturers, but doing so would certainly increase the complexity of overseeing compliance, and could well be counterproductive by diffusing compliance responsibility too widely. In our view, to some extent at least, every assembler has control over the components it uses. We would expect that clearly fixing responsibility for product accessibility at the final assembly stage would give these manufacturers the greatest incentive to specify accessible components from their suppliers, and to negotiate private arrangements for allocating the costs of compliance. We therefore propose to adopt a definition of "manufacturer" based upon the Access Board guidelines, and we seek comment on this proposal.

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[127] Ericsson Comments at 10; Lucent Comments at 9-10; Microsoft Comments at 13; Nortel Comments at 5.

[128] AFB Comments at 7; CEMA Comments at 17; MATP Comments at 2; NVRC Comments at 2; Pacific Comments at 13; Trace Comments at 10 (unpaginated); Waldron Comments at 8; Trace Reply Comments at 6-8.

[129] AFB Comments at 7; CAN Comments at 5; CCD Comments at 7; MATP Comments at 2; NCD Comments at 10; Trace Comments at 10-11 (unpaginated); UCPA Comments at 6; Waldron Comments at 8; ASDC Reply Comments at 2.

[130] AFB Comments at 7; CAN Comments at 5; Lucent Comments at 9-10; Trace Comments at 10-11 (unpaginated).

[131] 36 C.F.R. § 1193.3.

[132] *Access Board Order*, 63 Fed. Reg. at 5613.

61. We also tentatively conclude that the term "manufacturer" would not generally include post-manufacturing distribution entities such as wholesalers and retailers. However, where the manufacturing and distributing entities are affiliated, or where the distributing entities provide customer support services commonly offered by manufacturers of equipment subject to Section 255,[133] it may be desirable either to treat the distributor as a "manufacturer" or to assign to the final assembler responsibility for the distributor's accessibility efforts. We seek comment on the types of arrangements between manufacturers and distributors that could present these situations, including private brand arrangements, and on effective ways of dealing with them.

4. "Network Features, Functions, or Capabilities"

62. As noted previously,[134] Section 251(a)(2) of the Act requires that a telecommunications carrier not install network features, functions, or capabilities that do not comply with the guidelines and standards established pursuant to Section 255.[135] The Act does not expressly define "network features, functions, and capabilities," but it does provide examples as part of its definition of "network element":[136]

> [Network element] includes features, functions, and capabilities that are provided by means of [a facility or equipment used in the provision of a telecommunications service], including subscriber numbers, databases, signaling systems, and information sufficient for billing and collection or used in the transmission, routing, or other provision of a telecommunications service.

63. We recently explored this area from the standpoint of interconnection in some detail in the *Local Competition First Report and Order*.[137] We therefore tentatively conclude that the phrase "network features, functions, or capabilities" does not require further interpretation in this proceeding. As a general proposition, we view Section 251(a)(2) as a straightforward extension

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[133] *See infra* paras. 75, 165.

[134] *See supra* para. 8.

[135] 47 U.S.C. § 251(a)(2).

[136] 47 U.S.C. § 153(29).

[137] *See* Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98, First Report and Order, 11 FCC Rcd 15499, 16144-45, 16150 (paras. 1328-30, 1342) (1996), *aff'd in part and vacated in part sub nom.* Iowa Utilities Board v. FCC, 109 F3d 418 (8th Cir. 1996), *amended on reh'g on other grounds*, 120 F3d 753 (8th Cir. 1997), *petition for cert.granted sub nom.* AT&T Corp. v. Iowa Utilities Bd., 118 S.Ct. 879 (1998).

of the notion that a telecommunications transmission should be virtually transparent in terms of its interaction with customer supplied information. In the context of Section 255, that is, the telecommunications network should facilitate — not thwart — the employment of accessibility features by end users.[138] Of course, the goal of transparency is not unqualified. For example, the bandwidth of any given service offering is limited, and accessibility enhancements that depend on information that requires more bandwidth than the selected telecommunications channel provides will likely be unreliable.

64. The *Notice of Inquiry* sought comment on the relationship between carriers' duty under Section 251(a)(2) and equipment manufacturers' and service providers' duty under Section 255.[139] CCD urges us to emphasize the link between Section 251(a)(2) and Section 255 and broadly define network features, functions, and capabilities as "installed services."[140] Pacific believes the extent of the Section 251(a)(2) requirements will depend on guidelines and standards established under Section 255; it notes that its proposals to require "documents of conformity" and "customer accessibility impact reports" to demonstrate compliance with universal design principles would ensure that accessibility issues are considered.[141] NAD states that access to a particular telecommunications service includes not only the service, but the manner in which an internal facility or piece of equipment may affect access to the service.[142] The *Access Board Order* does not address this definition, which pertains to telecommunications service offerings rather than equipment.

65. On the basis of these limited comments, we tentatively conclude that Section 251(a)(2) governs carriers' *configuration* of their network capabilities. It does not make them guarantors of service providers' decisions regarding how to assemble services from network capabilities, and it does not impose requirements regarding accessibility characteristics of the underlying components.[143]

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[138] *See infra* para. 74 regarding the pass-through of accessibility information by telecommunications equipment and CPE.

[139] *See Notice of Inquiry*, 11 FCC Rcd at 19157 (para. 10).

[140] CCD Comments at 15.

[141] Pacific Comments at 12.

[142] NAD Comments at 30.

[143] To the extent network processes involve functional interaction with consumers, they would be subject to either Section 255(b) (in the case of equipment) or Section 255(c) (in the case of service). *See supra* para. 49 and note 108.

66. It may be that rules and policies for this complex area will have to be developed on an *ad hoc* basis as we gain experience resolving actual problems that arise under Section 255. However, we invite further comment on the general views presented here, on specific situations that might bring Section 251(a)(2) into play, and on recommended approaches to address likely problems. We also seek comment regarding the relationship between the enforcement procedures established by Section 252 for interconnection agreements and the Commission's exclusive enforcement authority under Section 255. Additionally, how should responsibility for any guidelines or standards for accessibility and compatibility of equipment or services to be adopted in this proceeding be apportioned between (1) the underlying manufacturer or provider of a network element; and (2) the carrier that incorporates that element into its network to provide a feature, function, or capability?

B. Nature of Statutory Requirements

1. Introduction

67. Other essential terms used in Section 255 did not originate in the Communications Act, so we cannot rely on interpretations developed under the Act. Instead, these terms have their roots in the ADA[144] and other disability law, and have been interpreted through years of experience at other agencies. Thus, for the following terms in particular, we take special note of the expertise and recommendations of the Access Board. It is our tentative view, however, that we are bound to interpret Section 255 in light of the broader purposes of the 1996 Act and of the Communications Act itself.

2. "Disability"

68. Section 255(a)(1) of the Act provides that "[t]he term 'disability' has the meaning given to it by section 3(2)(A) of the [ADA]."[145] The ADA defines "disability" as:[146]

- A physical or mental impairment that substantially limits one or more of the major life activities of an individual;

- A record of such an impairment; or

[144] Section 255 expressly defines "disability" and "readily achievable" by reference to the ADA. 47 U.S.C. § 255(a).

[145] Section 255(a)(1) of the Communications Act, 47 U.S.C. § 255(a)(1).

[146] 42 U.S.C. § 12102(a)(2).

Being regarded as having such an impairment.

69. The *Notice of Inquiry* sought comment on the application of this definition in the context of access to telecommunications services and equipment. Most of the comments on this issue address whether the second and third prongs of the ADA definition are relevant in the telecommunications context.[147] The Access Board does not expressly define "disability," but states that its "guidelines are required to principally address the access needs of individuals with disabilities affecting hearing, vision, movement, manipulation, speech, and interpretation of information."[148]

70. We propose to follow what we consider to be the mandate of Section 255 by using without modification or enhancement the ADA definition of "disability," as set out above.[149] However, in order to provide guidance for equipment manufacturers and service providers seeking to increase accessibility of their offerings, we also propose to use the Access Board's list of categories of common disabilities that should be considered in analyzing equipment and service offerings under Section 255.[150] In so doing, we must note that we do not view the list as either exhaustive or final. To the extent commenters responding to the *Notice of Inquiry* have argued for a more limited definition of "disability" than the plain language of the statute requires, we tentatively conclude that their concerns about possible incremental burdens of compliance are more properly considered in the context of whether the accommodation is "readily achievable." We seek comment on these proposals, and invite suggestions for additional ways of making the definition of "disability" useful to industry and consumers.

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[147] *See, e.g.*, CCD Comments at 7-9; Lucent Comments at 10-11; Microsoft Comments at 17-18; Motorola Comments at 24; Pacific Comments at 14-15; UCPA Comments at 7-9; ACB Reply Comments at 6; Trace Reply Comments at 5-6. *See also* Waldron Comments at 9; ACB Reply Comments at 6.

[148] *Access Board Order*, 63 Fed. Reg. at 5608. By way of example, hearing and vision disabilities may impede use of traditional voice telephone service, the latter by obstructing dialing and the use of visually displayed information. Examples of mental impairments include inability to interact with short-delay, automated answering services, and reading disabilities that affect use of visual displays.

[149] It should be noted, however, that we are not proposing to require a showing of disability as a requirement for the filing of a complaint under Section 255. *See infra* para. 148.

[150] *See supra* para. 69 and note 148. In evaluating the accessibility of their offerings, firms will also find the Board's accessibility guidelines especially useful, since they relate particular disabilities to particular equipment functions. *See infra* para. 74.

3. "Accessible to and Usable by"

71. Section 255 requires that equipment and telecommunications services be "accessible to and usable by individuals with disabilities, if readily achievable."[151] The *Notice of Inquiry* noted that these terms are taken from the ADA context, in which *accessibility* refers to the capability to physically approach a resource or program and *usability* refers to interaction with the resource or program, and that the terms present interpretive difficulties in the telecommunications context.[152]

72. The Access Board guidelines define "usable" as meaning that "individuals with disabilities have access to the full functionality and documentation for the product, including instructions, product information (including accessible feature information), documentation, and technical support functionally equivalent to that provided to individuals without disabilities,"[153] and the guidelines define "accessible" as compliance with Sections 1193.31 through 1193.43 of the rules.[154]

73. We propose to adopt the Access Board's definition of usability as part of our definition of "accessible to and usable by."[155] It is our view that Section 255 does not establish separate requirements for accessibility and usability, but looks toward elimination of all impediments to the *functional* use of telecommunications services and equipment by individuals with disabilities. Thus, we tentatively conclude that there is no reason to distinguish the two terms for purposes of Section 255, and propose to use the term "accessibility" in the broad sense to refer to the ability of persons with disabilities to actually *use* the equipment or service by virtue of its inherent capabilities and functions.

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[151] 47 U.S.C. §§ 255(b), 255(c).

[152] *Notice of Inquiry*, 11 FCC Rcd at 19161 (para. 21).

[153] 36 C.F.R. § 1193.3. The Access Board states that the definition of "usable" is included "to convey the important point that products which have been designed to be accessible are usable only if an individual has adequate information on how to operate the product." *Access Board Order*, 63 Fed. Reg. at 5616.

[154] Section 1193.33 describes information, documentation, and training measures; Section 1193.37 specifies pass-through of information required for access; Section 1193.39 bars net reductions in accessibility; Section 1193.41 describes accessible input, control, and mechanical functions; and Section 1193.43 describes accessible output, display, and control functions. 36 C.F.R. §§ 1193.33, 1193.37, 1193.39, 1193.41, 1193.43.

[155] Whether we consider "usability" as a component of "accessibility" or as a separate requirement is ultimately an academic issue, as it does not affect our tentative conclusion about what Section 255 requires. Our "unified" approach merely renders it unnecessary to distinguish between "accessibility" features and "usability" features.

74. The Access Board has defined equipment accessibility as including the following functions:

- Input, control, and mechanical functions—[156]
  - Operable without vision
  - Operable with low vision and limited or no hearing
  - Operable with little or no color perception
  - Operable without hearing
  - Operable with limited manual dexterity
  - Operable with limited reach or strength
  - Operable without time-dependent controls
  - Operable without speech
  - Operable with limited cognitive skills
- Output, display, and control functions—[157]
  - Availability of visual information
  - Availability of visual information for low vision users
  - Access to moving text
  - Availability of auditory information
  - Availability of auditory information for people who are hard of hearing
  - Prevention of visually-induced seizures
  - Availability of auditory cutoff
  - Non-interference with hearing technologies
  - Hearing aid coupling

In addition, Section 1193.37 of the Access Board's rules calls for pass-through of "cross-manufacturer, non-proprietary, industry-standard codes, translation protocols, formats or other information necessary to provide telecommunications in an accessible format."[158]

75. We believe the Board's definition of accessibility and the related appendix materials provide an appropriate basis for evaluating accessibility obligations under Section 255, and we propose to adopt them as part of the definition of "accessible to and usable by." We also propose

[156] 36 C.F.R. § 1193.41.

[157] 36 C.F.R. § 1193.43.

[158] 36 C.F.R. § 1193.37.

that such an evaluation include not only use of the equipment itself,[159] but also support services (such as consumer information and documentation) akin to what is provided to consumers generally to help them use equipment.[160] We seek comment on this proposal. We also seek specific comment on how we might apply the Access Board's mandate that CPE "pass through" accessibility information.

76. We tentatively conclude that these lists can also guide an evaluation of telecommunications service accessibility. Does the service itself have characteristics that render accessibility difficult? For example, do cuing and control signals (*e.g.*, dial tones, busy signals, intercepts) accommodate the needs of users with disabilities? And does the provider offer essential support services (*e.g.*, service ordering, billing, repair service) that meet the needs of customers with disabilities? For example, does the provider of essential support services provide direct TTY access to customer service and help desk lines? Are tutorial videos provided with captioning and video description? If explanatory materials are provided via the Internet, are the materials in an accessible format? We seek comment on these and other criteria that would constitute service accessibility.

77. The *Notice of Inquiry* stated that physical access to telecommunications equipment and services is a legitimate concern, but suggested that Section 255 reaches only aspects of accessibility under the direct control of manufacturers and service providers. The *Notice of Inquiry* sought comment on the view expressed by the Commission that the physical approachability of such offerings[161] is properly governed by regulations the Department of Justice adopted to implement the ADA, and is the responsibility of those who provide public accommodations, not the manufacturers of the equipment.[162]

78. Several commenters agree that providers are not responsible for physical aspects of accessibility except where they have direct control over siting.[163] MATP argues that the obligation to provide accessible equipment should extend to "how that equipment is deployed." MATP would require that the installation allow use of access features; *e.g.*, a cellular phone

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[159] *See supra* paras. 73-74.

[160] *See supra* para. 72.

[161] For example, the mounting of pay telephones at heights accessible by persons in wheelchairs, or the number of TTYs in a bank of pay telephones.

[162] *Notice of Inquiry*, 11 FCC Rcd at 19161 (para. 21).

[163] AT&T Comments at 10-11 & n.15; Microsoft Comments at 28; NCD Comments at 18; Omnipoint Comments at 8-9; Trace Comments at 13.

manufacturer should require that service providers offer each of its models within a category needed to provide a full complement of access features.[164] Mulvany likewise suggests that manufacturers communicate installation requirements for optimizing accessibility.[165]

79. We continue to believe, as we stated in the *Notice of Inquiry*, that Section 255 reaches only those aspects of accessibility to telecommunications over which equipment manufacturers and service providers subject to our authority have direct control, such as the design of equipment or the manner in which a telecommunications service is delivered to users.[166] Thus, in the example noted above,[167] manufacturers of pay telephones have no control over the height at which their instruments are mounted.[168] In contrast, pay telephones that are inaccessible to persons with disabilities because, *e.g.*, they interfere with hearing aids, or because the visual display itself presents accessibility obstacles to persons with visual disabilities, would present an issue of equipment inaccessibility under Section 255. We seek comment on these views.

80. Similarly, if a person with a disability is able to use CPE such as a screen-reading terminal, but finds that a telecommunications service is not usable because the terminal cannot generate a screen display from the data provided through the service, this would also present an issue of inaccessibility, but the cause of the inaccessibility might be the service, or the equipment, or both. We also seek comment on what accessibility obstacles are encountered by persons with disabilities that are attributable to telecommunications service or equipment characteristics. To the extent that service accessibility is determined by network equipment, including integral software, how should the Commission distinguish between accessibility obstacles attributable to network equipment, and those attributable to service providers?

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[164] MATP Comments at 4.

[165] Mulvany Comments at 4 (unpaginated).

[166] *See Notice of Inquiry*, 11 FCC Rcd at 19161 (para. 21). Product accessibility is readily achievable for a manufacturer only to the extent the manufacturer has control over the product.

[167] *See supra* note 161.

[168] Of course, in the unusual case of a design that precluded installation at an accessible height, there might well be an issue of whether the manufacturer is in compliance with Section 255.

4. "Compatible with"

a. "Peripheral Devices or Specialized CPE"

81. Where accessibility is not readily achievable, Section 255(d) requires that telecommunications offerings be compatible with "existing peripheral devices or specialized [CPE] commonly used by individuals with disabilities to achieve access, if readily achievable."[169] The *Notice of Inquiry* asked commenters to address the definitions of "existing peripheral devices" and "specialized CPE," and to provide examples.[170]

82. Several commenters provide such examples.[171] The Access Board defines "peripheral devices" as "[d]evices employed in connection with telecommunications equipment or customer premises equipment to translate, enhance, or otherwise transform telecommunications into a form accessible to individuals with disabilities."[172] It defines specialized CPE as "[e]quipment, employed on the premises of a person (other than a carrier) to originate, route, or terminate telecommunications, which is commonly used by individuals with disabilities to achieve access."[173]

83. The Board further explains its definitions as follows:[174]

> [T]he term peripheral devices commonly refers to audio amplifiers, ring signal lights, some TTYs, refreshable Braille translators, text-to-speech synthesizers and similar devices. These devices must be connected to a telephone or other customer premises equipment to enable an individual

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[169] 47 U.S.C. § 255(d).

[170] *Notice of Inquiry*, 11 FCC Rcd at 19162 (para. 25).

[171] For example, NAD lists as examples of specialized CPE currently in use, TTYs, flashing light signalers, volume controls, caption decoders, tactile vibrating devices, artificial larynxes, and FM or infrared assistive listening devices. NAD characterizes as peripheral devices computer software, hardware, modems, and keyboards. NAD states that some of the devices used to access telecommunications are typically telecommunications-related, while others are not thought of in this sense. NAD Comments at 31. ASDC submits that specialized CPE used by deaf and hard of hearing people includes listening systems such as FM devices, volume controls, caption decoders, TTYs, and flashing lights to indicate sound, for example, the ringing of a phone. ASDC Reply Comments at 4.

[172] 36 C.F.R. § 1193.3.

[173] *Id.*

[174] *Access Board Order*, 63 Fed. Reg. at 5613, 5616.

> with a disability to originate, route, or terminate telecommunications. Peripheral devices cannot perform these functions on their own.
>
> [Specialized CPE] should be considered a subset of [CPE], and . . . manufacturers of specialized [CPE] should make their products accessible to all individuals with disabilities, including the disability represented by their target market, where readily achievable.

84. We seek comment on these definitions, but tentatively conclude that it is not necessary to distinguish between peripheral devices and specialized CPE. We tentatively conclude that the reference in Section 255(d) to equipment and devices "commonly used . . . to achieve access" identifies products with a specific telecommunications functionality. Thus, for example, equipment used in direct conjunction with CPE, such as amplifiers for persons with hearing disabilities, or screen readers for persons with visual disabilities, would be considered either peripheral devices or specialized CPE. In contrast, devices such as hearing aids, which have a broad application outside the telecommunications context, may be used in conjunction with peripheral equipment or specialized CPE, but are not themselves considered specialized CPE or peripheral devices under the 1996 Act. We seek comment on this issue.

85. For example, it is our tentative view that, if a telecommunications product can be used by a person with a hearing aid[175] without any need to employ a peripheral device or specialized CPE, then the product has complied with the *accessibility* requirements of Section 255. If the product is usable by a person using a hearing aid only through the application of a peripheral device or CPE, then the product meets the *compatibility* criteria of Section 255. We believe this view is consistent with the plain language of Section 255, and does not conflict with the FDA's requirements regarding hearing aids.

86. In the case of telecommunications equipment, we note that the 1996 Act definition of compatibility constitutes a significant departure from the sense in which Section 710 of the Communications Act, the Hearing Aid Compatibility Act of 1988 (HAC Act),[176] uses the same term. Section 710 is limited in scope to telephones — it does not consider how to accommodate the needs of persons with disabilities with respect to other CPE, network equipment, or the range of telecommunications services. Section 710 also explicitly requires *internal* compatibility (*i.e.*, within the handset) to establish compliance with its compatibility requirement.[177] And Section 710

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[175] The Food and Drug Administration (FDA) has jurisdiction over hearing aids.

[176] 47 U.S.C. § 610.

[177] Section 710(b)(1) of the Communications Act, 47 U.S.C. § 610(b)(1).

specifies absolute requirements; unlike Section 255, it is not qualified by considerations of what is "readily achievable." The Commission adopted Section 68.4 of its Rules,[178] specifying telecoil technical characteristics, to implement Section 710.

b. "Commonly Used"

87. The *Notice of Inquiry* also asked for comment on criteria for determining when equipment subject to Section 255 is "commonly used."[179]

88. Arkenstone asserts that the limited sales of braille displays (fewer than 1,000 per year) are not inconsistent with their common use for persons with blindness, since they are the only option for persons both deaf and blind.[180] Waldron surveys existing peripherals, and suggests that the definition of "commonly used" should be somewhat closed, to give industry reasonable confidence that they know what is required, while allowing sufficient choice to address the majority of needs within the community of persons with disabilities.[181] Trace references an overview of commonly used peripherals on Internet sites it maintains.[182]

89. Rather than focus on a definition of "commonly used," which involves existing devices, NCD recommends that the Commission concern itself with "basic design measures that equipment manufacturers and service providers can employ that will facilitate access and seamless use of both current and future access peripherals and specialized CPE." NCD maintains that principles of open architecture or design, also pertinent to interconnectivity and other provisions of Act, offer a principal means for ensuring compatibility.[183] Inclusive calls for a census to determine commonly used specialized CPE, which manufacturers and service providers could use to develop compatibility standards.[184]

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[178] 47 C.F.R. § 68.4.

[179] *Notice of Inquiry*, 11 FCC Rcd at 19162 (para. 25).

[180] Arkenstone Comments at 9.

[181] Waldron Comments at 15-16.

[182] Trace Comments at 15-16 (unpaginated).

[183] NCD Comments at 22-23.

[184] Inclusive Comments at 8.

90. In light of the specific definitions set out in the Access Board guidelines,[185] we seek further comment with regard to when devices and CPE should be considered "commonly used," as described in the statute. For example, we solicit comment on whether we should establish a rebuttable presumption that a device is commonly used where a State has incorporated the device into its statewide equipment distribution programs for persons with disabilities. We also seek comment regarding whether and to what extent the cost of CPE or peripheral devices should be considered in determining whether the CPE or peripheral device may be deemed to be commonly used by persons with disabilities. Our tentative view is that the CPE or peripheral device must be affordable and widely available in order to be considered "commonly used" by persons with disabilities. We seek comment on this tentative view. We also note that in addition to informing industry of its obligation with respect to compatibility, a listing of such "commonly used" components could be a valuable source of information to apprise persons with disabilities of the available technologies; we seek comment regarding whether and how a listing could be maintained.[186]

c. Compatibility

91. Several commenters note that ensuring compatibility requires coordination among, *e.g.*, manufacturers of specialized CPE, network equipment and CPE manufacturers, and service providers.[187] The Access Board lists five criteria for determining compatibility, subject to applicability:[188]

- External access to all information and control mechanisms;
- Connection point for external audio processing devices;
- Compatibility of controls with prosthetics;
- TTY connectability; and
- TTY signal compatibility.

[185] *See supra* para. 82.

[186] *See infra* para. 174 regarding information clearinghouses.

[187] *See, e.g.*, NAD Reply Comments at 11-14; Siemens Reply Comments at 6. *See also* SHHH Comments at 12 (unpaginated); Winters Comments at 2-3.

[188] 36 C.F.R. § 1193.51.

92. We propose to adopt these five criteria as a starting point for determining compatibility.[189] However, we recognize that these criteria might need to be broadened to account for likely technological advances in both telecommunications and accessibility products, either now or in the future, as developments warrant. We believe this is an area where processes involving other entities, or industry and consumer groups (such as negotiated rulemakings), might be useful in developing appropriate further criteria.[190] We seek comment on our proposal, and on these views.

d. Other Matters

93. Finally, we request commenters to address how the definition of "readily achievable" should apply to the obligations of manufacturers and service providers to provide compatibility pursuant to Section 255(d). We note that compatibility requirements apply only when accessibility is not "readily achievable." Therefore, we seek comment regarding the extent to which the same factors that are used to determine whether accessibility is readily achievable can or should also be used to determine whether compatibility is readily achievable. Commenters should also address how the goal of compatibility can be met without hampering competition or the development of new technologies.

5. "Readily Achievable"

a. General

94. Section 255 requires accessibility to the extent it is "readily achievable." Section 255(a)(2) provides that "[t]he term 'readily achievable' has the meaning given to it by section 301(9) of [the ADA],"[191] which states:[192]

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[189] We note that any equipment that has achieved *internal compatibility* for purposes of Section 710 of the Act would also appear to have achieved *accessibility* within the meaning of Section 255. This would appear to be so because any such equipment would be usable by a person with disabilities without the need also to employ any peripheral device or specialized CPE. Unless otherwise specified, therefore, we propose to use the term "compatibility" in the sense that contemplates the use of external apparatus to achieve access to telecommunications.

[190] *See infra* para. 174.

[191] Section 255(a)(2) of the Communications Act, 47 U.S.C. § 255(a)(2).

[192] 42 U.S.C. § 12181(9).

> The term "readily achievable" means easily accomplishable and able to be carried out without much difficulty or expense. In determining whether an action is readily achievable, factors to be considered include—
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> (A) the nature and cost of the action needed under [the ADA];
>
> (B) the overall financial resources of the facility or facilities involved in the action; the number of persons employed at such facility; the effect on expenses and resources, or the impact otherwise of such action upon the operation of the facility;
>
> (C) the overall financial resources of the covered entity; the overall size of the business of a covered entity with respect to the number of its employees; the number, type, and location of its facilities; and
>
> (D) the type of operation or operations of the covered entity, including the composition, structure, and functions of the workforce of such entity; the geographic separateness, administrative or fiscal relationship of the facility or facilities in question to the covered entity.

95. The *Notice of Inquiry* sought comment on the application of this definition to telecommunications equipment and services in a way that will take advantage of market and technological developments, without constraining competitive innovation.[193] Commenters, on the whole, contend that there are significant differences that the Commission should consider between the application of the term "readily achievable" to public accommodations under Title III of the ADA and its application to telecommunications under Section 255. Commenters urge caution in transferring the ADA definition and factors, due to their origins for remedial purposes to existing buildings and facilities, and argue that it is necessary for the Commission to adapt them for telecommunications.[194]

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[193] *Notice of Inquiry*, 11 FCC Rcd at 19160 (para. 16).

[194] For example, Ericsson lists nine factors that it contends distinguish the telecommunications marketplace from entities or facilities subject to the ADA context. Ericsson Comments at 7. Pacific submits that while ADA cost factors can be applied to a "particular facility" or "covered entity," in the telecommunications context, there are additional factors and ramifications that need to be considered for persons with disabilities and the firms involved. Pacific Comments at 18-19. Other parties point out that, while the ADA often involves retrofitting existing structures, the accessibility requirement of Section 255 applies to new products and services, and therefore determinations of what is readily achievable must be made at the design stage. NAD Comments at 23-24; NCD

96. The Access Board guidelines define "readily achievable" in the telecommunications context simply as "[e]asily accomplishable and able to be carried out without much difficulty or expense."[195] Moreover, the Access Board states that "[n]ot all of the factors cited in the ADA or the Department of Justice (DOJ) implementing regulations (July 26, 1991) are easy to translate to the telecommunications context . . . ."[196] The *Access Board Notice* stated even more directly that "[t]he factors which apply in the ADA context may not be appropriate [in the context of the Communications Act]."[197]

97. We tentatively conclude that "readily achievable," as defined by the ADA and incorporated by Section 255, simply means "easily accomplishable and able to be carried out without much difficulty or expense." We believe that this broad definition is applicable to telecommunications equipment and services.

98. It is also our tentative view that the four factors set out with the ADA definition of "readily achievable" should be construed as the ADA describes them: factors to be considered in applying the definition in the ADA setting, *e.g.*, the removal of architectural barriers in buildings and facilities. Given the differences between architectural barriers and telecommunications barriers, it is our tentative view that the ADA factors should guide, though not constrain, our development of factors that more meaningfully reflect pertinent issues and considerations relevant to telecommunications equipment and services.[198]

99. The telecommunications-specific factors we propose herein therefore reflect the ADA factors, but are tailored to the circumstances of the Section 255 setting. Our goal is to establish factors that are true to the letter and spirit of both the ADA definition and the objectives of Congress in enacting Section 255. We also stress that, while we believe this objective of establishing durable and pertinent factors for evaluating the "readily achievable" standard in the telecommunications field is important, we also expect that determinations regarding whether accessibility is readily achievable will be driven by the facts of particular cases. We intend that

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Comments at 12-13 (unpaginated); UCPA Reply Comments at 9.

[195] 36 C.F.R. § 1193.3.

[196] *Access Board Order*, 63 Fed. Reg. at 5633.

[197] *Access Board Notice*, 62 Fed. Reg. at 19181.

[198] We also note that the ADA factors do not appear to exclude consideration of additional factors that may be relevant in particular situations. Thus, even assuming *arguendo* that the ADA factors were binding upon Section 255 determinations, we do not believe they would preclude our consideration of telecommunications-specific factors not enumerated in the ADA.

any factors we develop in this rulemaking will be applied appropriately to the facts of particular cases, and will not operate so as to inadvertently impede our efforts to arrive at reasonable judgments in each case. We seek comment on these tentative conclusions.

b. Telecommunications Factors

100. We believe a useful framework for analyzing whether a particular telecommunications accessibility feature is "readily achievable" involves looking at three areas:

- Is the feature feasible?
- What would be the expense of providing the feature?
- Given its expense, is the feature practical?

We seek comment on these proposed factors, as discussed more fully below. We especially seek comment on the practical implications of options we may be urged to adopt: their effect on the development and marketing of accessibility features, on the pace of innovation, and on the administrative costs associated with implementation and enforcement measures (discussed in the remainder of this Notice).

(1) Feasibility

101. Feasibility is equivalent to achievability, and is thus an inherent component of the term "readily achievable."[199] There are various reasons why a particular feature might not be feasible. For example, it might be physically impossible to fit large keypad buttons onto a small wireless telephone handset. Available technology may not be able to easily develop solutions for some accessibility problems.[200] Conceivably there might be legal impediments to implementing some features. Or implementing features to improve accessibility for one disability might limit the ability to address accessibility for another.

102. The Access Board acknowledges that "technological feasibility is inherent in the determination of what is readily achievable," but for that reason saw no need to explicitly state

[199] Feasibility also seems implicit in the first factor to be considered in determining whether an accessibility solution under the ADA is readily achievable: "the nature . . . of the action needed . . . ." *See supra* para. 94.

[200] Although existing accessibility solutions are, by definition, feasible, we do not propose to determine that a solution is infeasible simply because the solution has not yet been found.

it.[201] Although feasibility may seem to be an obvious element of "readily achievable," not requiring special attention, we believe that identifying it as a separate analytical component serves a useful purpose. For manufacturers and service providers, it serves as a reminder of the need to carefully examine cases of apparent infeasibility, an exercise that may lead to the discovery of new accessibility solutions. For consumers, it highlights the fact that despite advances in technology, some features are still not possible. We therefore tentatively conclude that feasibility should be one factor to be considered in determining whether a particular accessibility feature is readily achievable, and we seek comment on how to further elaborate this factor in the telecommunications context.

(2) Expense

103. After a determination is made that a particular feature is feasible, further analysis must generally start with consideration of the expense of making the feature available.[202] We tentatively conclude that for products offered in the public marketplace, the relevant expense is a "net" figure, including both the cost of the feature and the additional income the feature will provide.[203] The *Notice of Inquiry* stated that cost is an important aspect of the "readily achievable" standard, and sought data on types and levels of costs incurred to achieve accessibility of existing offerings and on estimates of the savings associated with achieving accessibility at the initial design stage.[204] Many commenters address the issue of cost as a factor in determining whether a particular accessibility or compatibility feature or component is readily achievable.[205] Inclusive contends that cost factors that are recognized for this purpose should include research and development, production, and marketing costs (and customer support), over the life of the

[201] *Access Board Order*, 63 Fed. Reg. at 5615.

[202] We would emphasize that Section 255 does not excuse inaccessibility when accessibility entails expense; the test is whether accessibility can be provided "without much difficulty or expense." *See supra* para. 94. The purpose of the telecommunications-specific "readily achievable" factors is to guide a determination of whether accessibility is readily achievable in the circumstances of each case.

[203] *See infra* paras. 115-117. The more a provider can recover the cost of providing an accessibility feature, the more likely the feature can be provided "without much . . . expense." *See supra* para. 94.

[204] *Notice of Inquiry*, 11 FCC Rcd at 19160 (para. 17). Cost is also a component of the first factor to be considered in determining whether an accessibility solution under the ADA is readily achievable: "the . . . cost of the action needed . . . ." 42 U.S.C. § 12181(9). *See supra* para. 94.

[205] *See, e.g.*, Lucent Comments at 13; PCIA Comments at 5; CEMA Reply Comments at 11, 12 & n.31.

product.[206] Microsoft asserts that it will often be difficult to separate accessibility costs from operating expenses.[207] AFB asserts that the cost of accessible technology drops when required by regulation.[208]

104. While expense is most often thought of in terms of a dollar figure, it can also include the cost of other resources, as well as opportunity costs. For example, if there are technological barriers to implementing an accessibility feature, what engineering staff would the provider need in order to develop solutions? What fabrication facilities would be required to produce the more accessible product? Opportunity costs could reflect the fact that adding an accessibility feature with respect to one disability might decrease product or service accessibility with respect to another disability, or reduce product or service performance in some other way.

105. We seek comment on these issues. We also ask commenters to supply pertinent information regarding:

- The types and levels of expenses that have been incurred to achieve or improve accessibility of existing offerings, and the extent to which they may serve as a basis for anticipating expenses associated with accessibility standards to be developed.

- Expeditious processes that the Commission could establish to determine expenses in situations where anticipated expenses relating to accessibility (or compatibility) are disputed.

- Savings when accessibility is achieved at the design stage.

(3) Practicality

106. Perhaps the most difficult aspect of determining whether a particular accessibility feature is readily achievable involves determining whether it is practical, given the expenses involved.[209] For example:

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[206] Inclusive Comments at 4. *See also* NCD Comments at 14-15; WID Reply Comments at 6 (arguing that cost of learning accessible design is part of overall research and development spending).

[207] Microsoft Comments at 26.

[208] AFB Comments at 10.

[209] These practicality considerations are similar to the second, third, and fourth factors under the ADA. *See supra* para. 94.

- The resources (financial, staff, facilities, and otherwise) available to the provider to meet the expenses associated with accessibility.

- The potential market for the product or service, taking into account the manner and extent to which the product or service is altered or changed in connection with making it accessible.

- The degree to which the provider would recover the incremental cost of the accessibility feature.

- Issues regarding product life cycles.

(a) Resources

107. The *Notice of Inquiry* sought comment on ways to consider the resources of firms of varying characteristics, in a manner which would not distort competitive incentives, including the relationship between parent and subsidiary corporations. The Commission also asked commenters to consider the estimation and determination of costs associated with a specific technical or performance standard, as well as more process-oriented standards.[210]

108. A number of industry comments state that the *Notice of Inquiry* fails to reflect corporate divisions and financial structures commonly used by equipment manufacturers. These commenters argue that guidelines should consider only financial resources directly controlled by the unit responsible for design and production of equipment.[211] Several comments note that DOJ rules implementing the ADA provide that the scope of resources to be considered available is potentially broad, and is determined on a case-by-case basis.[212] On the other hand, Waldron warns that if all resources are not considered, subsidiaries will "buy off" accessibility obligations.[213]

109. We tentatively find most compelling the view that the financial resources of the organization that has legal responsibility for, and control over, a telecommunications product

[210] *Notice of Inquiry*, 11 FCC Rcd at 19160-61 (para. 17-20).

[211] ITI Comments at 12; Motorola Comments at 12; NCD Comments at 10; Pacific Comments at 17-18; TIA Comments at 6; Motorola Reply Comments at 5, 9.

[212] *See, e.g.*, Motorola Comments at 13; AFB Reply Comments at 12; WID Reply Comments at 6.

[213] Waldron Comments at 11. *See also* ACB Reply Comments at 7.

(service or equipment) should be presumed to be available to make that product accessible in compliance with Section 255. We therefore propose to establish a presumption that the resources reasonably available to achieve accessibility are those of the entity (*i.e.*, corporation or equivalent organization) legally responsible for the equipment or service that is subject to the requirements of Section 255. However, we propose that this presumption may be rebutted in a complaint proceeding or other enforcement proceeding in two different respects:

- On the one hand, the assets and revenues of another entity (*e.g.*, parent or affiliate) that is not legally responsible for the equipment or service involved may still be treated as available for purposes of achieving accessibility under Section 255, if it is demonstrated that those assets and revenues are generally available to the entity that does have legal responsibility for the equipment or service. The purpose of this rebuttal option is, for example, to forestall sham organizational arrangements designed to avoid compliance with Section 255. We believe this position embodies the same principles as the Access Board's view that a "readily achievable" determination should take into account "the resources of a parent company . . . only to the extent those resources are available to the subsidiary."[214]

- On the other hand, the general presumption can also be rebutted by a respondent showing that the sub-unit (*e.g.*, corporate division or department) actually responsible for the product or service in question does not have access to the full resources of the corporation or equivalent organization of which it is a part.

110. We tentatively conclude that the presumption we are proposing may potentially serve as an effective guard against evasive practices. In any event, we propose that the Commission will determine what resources are reasonably available on a case-by-case basis in the context of complaint proceedings or other enforcement proceedings, because of our tentative view that the variety of organizational forms and other circumstances make development of quantitative standards by the Commission impracticable. We seek comment on these proposals.

(b) Market Considerations

111. The *Notice of Inquiry* sought comment on the scope of the accessibility requirement in terms of how the provision of either conflicting accommodations for different disabilities, or accommodations that would address multiple disabilities but would make the offering technically or economically impracticable, should be viewed under the "readily achievable" standard.[215]

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[214] *Access Board Order*, 63 Fed. Reg. at 5633.

[215] *See Notice of Inquiry*, 11 FCC Rcd at 19161 (para. 22). The *Notice of Inquiry* also asked commenters to assess the extent to which accessible services and equipment are currently available or in development. The

Commenters generally recognize the potential in the telecommunications context for conflict between design accommodations and more personalized offerings for different disability groups, in contrast to an accessibility solution under the ADA.

112. Trace submits that the wide variety of products and devices used for telecommunications means that very few detailed specifications will be applicable across all devices.[216] Nortel contends that the Commission should not focus only on the cost of a desired design feature, but should also consider its utility; guidelines should avoid requiring features that may be technically available but are not efficient solutions for persons with disabilities who will be using the products or services.[217] Netscape notes that, as with graphical user interfaces (GUI), technology innovations that benefit one group of persons with disabilities may disadvantage another, and observes that the prevalence of GUI is not a "market failure" but a market-driven development that has made accessibility for some persons with disabilities more difficult.[218] NCD contends that competitive pressures in the telecommunications industry may lead to instances where accessibility costs, though small, necessitate an increase in price that alters the competitive balance between competing products.[219] The Access Board guidelines could have an effect on this issue of conflicting accommodations because of their prohibition of any net reduction in product accessibility,[220] but the impact of this prohibition could be moderated because it would be subject to the "readily achievable" qualification.

113. We believe market considerations affect decisions regarding product features, and are thus relevant to a determination whether particular access features are practical. However, by this we do not mean to sanction unfounded arguments that the addition of such features would

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Commission appreciates the comments submitted in response to this request, which provide both the Commission and interested parties invaluable information for better understanding and addressing the needs of consumers with disabilities, industry's progress in meeting those needs, and areas needing further accessibility improvements. These comments are not discussed in this Notice except to the extent they bear directly on issues that are addressed herein.

[216] Trace Comments at 13-14.

[217] Nortel Comments at 7-8.

[218] Netscape Reply Comments at 7.

[219] NCD Comments at 16. *See also* Inclusive Comments at 4; Siemens Comments at 4 (contending that incremental burdens resulting from new requirements may make a difference as to the continued existence of some products and the competitiveness of U.S. businesses in a global marketplace).

[220] 36 C.F.R. § 1193.39.

make products less desirable to mass markets. Indeed, it may frequently be the case that accessibility features will make a product more desirable to mass markets.[221] We seek comment on how to incorporate market considerations into an evaluation of whether particular accessibility features are practicable. For example, what is the potential market for the more accessible product? Would the accessibility features make the product more attractive to the general consumer market? How well could the more accessible product compete with other offerings, in terms of both price and features?

114. Related questions are raised by the Access Board guideline providing that "[n]o change shall be undertaken which decreases or has the effect of decreasing the net accessibility, usability, or compatibility of telecommunications equipment or [CPE]."[222] On the one hand, the fact that a product has particular accessibility features is evidence that inclusion of those features in later products from the same producer is readily achievable. On the other hand, it is our tentative view that this general principle should not operate in such a way as to prevent legitimate feature trade-offs as products evolve, nor should it stand in the way of technological advances. We therefore seek comment on how accessibility reductions should be treated.

(c) Cost Recovery

115. We also believe it is appropriate to consider the extent to which an equipment manufacturer or service provider is likely to recover the costs of increased accessibility. This is not to say that the equipment manufacturer or service provider *must* be able to fully recover the incremental cost of the accessibility feature in order for accessibility to be readily achievable. Indeed, the assumption of some cost burden is an explicit element of the definition of "readily achievable."[223] We have previously indicated our tentative conclusion that the relevant measure of the "expense" of providing accessibility features is their net expense.[224] Thus, cost recovery is a factor that a company should weigh in making its determination of what is readily achievable.

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[221] We note the frequency with which features envisioned as limited to overcoming disabilities have found broader success, based on their improved ease of use. Examples include telephone amplifiers (useful in noisy areas), closed-captioning (for those wanting to watch television, cable or videotapes either in noisy environments or without creating noise), and hands-free dialing (for motorists).

[222] 36 C.F.R. § 1193.39(a). The rule section further provides that "[d]iscontinuation of a product shall not be prohibited." 36 C.F.R. § 1193.39(b). *See supra* para. 112.

[223] *See supra* para. 94 and note 202.

[224] *See supra* para. 103.

116. How could the provider expect to recover the incremental cost of the accessibility feature? To what extent would absorbing all or part of the cost provide a disincentive to offering the product at all? How would passing the cost on to consumers of that particular product affect likely demand for the product? What differences (if any) are there between accessibility features integral to the product in question (*e.g.*, function controls) versus separate product support offerings (*e.g.*, user instructions)? How should we view promotional offers that do not provide comparable savings for users of accessible products?

117. We also note that the Commission in its *Universal Service Order* stated that accessibility and affordability issues with respect to people with disabilities would be considered in the context of Section 255.[225] We seek comment on the extent that service providers and manufacturers should consider affordability of accessible products when making cost recovery assessments.[226] What concerns must a manufacturer or service provider balance in making accessible products affordable? Are accessibility and affordability always mutually supporting goals, or can an attempt to make a product affordable undercut its accessibility?

(d) Timing

[225] Federal-State Joint Board on Universal Service, CC Docket No. 96-45, Report and Order, 12 FCC Rcd 8776, 8803-04 (para. 53) (1997) (*Universal Service Order*), *as corrected by* Federal-State Joint Board on Universal Service, Errata, FCC 97-157, released June 4, 1997, *appeal pending in* Texas Office of Public Utility Counsel v. FCC, No. 97-60421 (5th Cir. 1997); Federal-State Joint Board on Universal Service, CC Docket No. 96-45, Order on Reconsideration, 12 FCC Rcd 10095 (1997); Changes to the Board of Directors of the National Exchange Carrier Association, Federal-State Joint Board on Universal Service, CC Docket Nos. 97-21, 96-45, Report and Order and Second Order on Reconsideration, 12 FCC Rcd 18400 (1997), *as corrected by* Federal-State Joint Board on Universal Service, CC Docket No. 96-45, Errata, 12 FCC Rcd 22493 (1997); Changes to the Board of Directors of the National Exchange Carrier Association, Federal-State Joint Board on Universal Service, CC Docket Nos. 97-21, 96-45, Order on Reconsideration, Second Report and Order, and Further Notice of Proposed Rulemaking, 12 FCC Rcd 12437 (1997); Federal-State Joint Board on Universal Service, CC Docket No. 96-45, Third Report and Order, 12 FCC Rcd 22485 (1997), *as corrected by* Federal-State Joint Board on Universal Service, CC Docket Nos. 96-45 and 97-160, Erratum, released Oct. 15, 1997; Changes to the Board of Directors of the National Exchange Carrier Association, Federal-State Joint Board on Universal Service, CC Docket Nos. 97-21, 96-45, Second Order on Reconsideration in CC Docket 97-21, 12 FCC Rcd 22423 (1997); Federal-State Joint Board on Universal Service, CC Docket No. 96-45, Third Order on Reconsideration, 12 FCC Rcd 22801 (1997); Federal-State Joint Board on Universal Service, Access Charge Reform, Price Cap Performance Review for Local Exchange Carriers, Transport Rate Structure and Pricing, End User Common Line Charge, CC Docket Nos. 96-45, 96-262, 94-1, 91-213, 95-72, Fourth Order on Reconsideration, FCC 97-420, released Dec. 30, 1997, *as corrected by* Federal-State Joint Board on Universal Service, CC Docket Nos. 96-45, 96-262, 94-1, 91-213, 95-72, Errata, 13 FCC Rcd 2372 (1998).

[226] We believe that our proposed definition of product line (*see infra* paras. 168-170) addresses the concern of how to prevent all accessibility features from being incorporated into only one high-end product.

118. Several comments address accessibility obligations over the course of a product life cycle, especially as it relates to improved accessibility technology.[227] Some comments assert that Section 255 requires that *new* equipment and services must conform to accessibility requirements within the limits of what is "readily achievable."[228] These commenters assert that companies should have a continuing obligation to improve the accessibility of their products and services. Moreover, as applied to existing buildings and structures under the ADA, "readily achievable" does not typically involve issues of technical feasibility as it would for telecommunications.[229] The impact of the inclusion of new products and services, NAD and NCD argue, is that the test of compliance must be whether it would have been readily achievable for a company to have incorporated accessibility at the design stage, and not whether it is readily achievable to modify the product or service once it has been manufactured or deployed.[230]

119. The Access Board's view is that its guidelines are "'prospective in nature', intended to apply to future products . . . [with] no requirement to retrofit existing equipment."[231] And while the Board suggests that "net accessibility" should not be reduced,[232] it does not seem to suggest that manufacturers must be obligated to upgrade products already in the marketplace as new access features become readily achievable.

120. Timing issues present several important questions, most of which stem from the fact that technology advances over time. Two examples will illustrate the issue:

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[227] These questions arise in part due to the ADA's distinction between modification of existing structures, where accessibility must be provided if "readily achievable," and construction of new structures, which must be accessible unless "structurally impracticable." 42 U.S.C. § 12183.

[228] With regard to the rapid introduction of new technology and resulting short-term product and service cycles, for example, commenters contend there is a significant impact on the extent of the obligations of providers and manufacturers under Section 255 that would differ from those in the ADA context. *See* WSAD Reply Comments at 6.

[229] AFB and UCPA assert that Section 255 is different because it applies to the design, development, and fabrication of equipment and the implementation of services. AFB Comments at 8-9; UCPA Reply Comments at 9. UCPA emphasizes that this is a critical conceptual difference. UCPA Reply Comments at 9. *See also* NAD Comments at 23-24.

[230] NAD Comments at 24; NCD Comments at 13. *See also* AT&T Comments at 6 & n.10; Motorola Reply Comments at 11 (emphasis should be on more cost-effective initial design process rather than retrofitting, which may not be readily achievable); PCIA Reply Comments at 8; WID Reply Comments at 6.

[231] *Access Board Order*, 63 Fed. Reg. at 5612.

[232] 36 C.F.R. § 1193.39. *See supra* para. 114.

- Generally speaking, technological features available at the beginning of a product development cycle can be incorporated more easily (*i.e.*, more "easily accomplishable and able to be carried out without much difficulty or expense") than those that become available at the end of the development cycle.[233] Thus it seems that any assessment of the practicality of a particular accessibility feature should take into account reasonable periods of time required to incorporate new accessibility solutions into products under development.

- Turning to the post-development stage, we tentatively conclude that once a product is introduced in the market without accessibility features that were not readily achievable at the time, Section 255 does not require that the product be modified to incorporate subsequent, readily achievable access features. If we ultimately conclude otherwise, however, how should the projected roll-out of an accessible replacement product affect a determination of whether modification of a product already in the marketplace is readily achievable?

To phrase the timing question broadly, how should product life cycles be taken into account in making "readily achievable" determinations?

121. In a related vein, Gallaudet, ITI, and TIA support a "grace period" for compliance, varying according to factors such as the type of equipment and production cycles.[234] Trace opposes grace periods, arguing that if accessibility is readily achievable from the outset, it is not obvious why it should be deferred or avoided.[235] The Access Board maintains that "[n]o explicit 'grace period' is needed since it is built into the determination of readily achievable."[236] Given that Section 255 has been in effect since February 1996, and in light of our tentative conclusion that timing issues should be considered as an element of ready achievability, we believe that a general grace period for compliance is not warranted. However, we seek comment on this view.

(4) Other Considerations

[233] This is a major reason why our implementation proposals (*see infra* paras. 124-174) aim to encourage the consideration of disability issues at the front end of the development and design process, and on an ongoing basis throughout the process.

[234] Gallaudet Reply Comments at 3; ITI Reply Comments at 5-6; TIA Reply Comments at 13-14. *See also* Microsoft Comments at 9.

[235] Trace Reply Comments at 4.

[236] *Access Board Order*, 63 Fed. Reg. at 5612.

122. The interplay of factors used in determining whether and to what extent the accessibility of telecommunications equipment, CPE, or telecommunications services is readily achievable will be complex. We believe that the factors we have set out above provide a workable framework for this analysis. We further expect that our refinement of these factors in this proceeding will provide substantial initial guidance to all parties who are subject to or affected by Section 255. However, in any given case the ultimate determination of whether it is readily achievable to make a particular product offering accessible to users with a particular disability will depend on the particular circumstances of the case. It is thus inevitable that the nature and extent of the Section 255 obligations will generally have to be evaluated and refined on a case-by-case basis, as we resolve complaints of non-compliance, a process that will in turn foster greater accessibility in future product and service offerings.

123. Some commenters propose consideration of additional factors, such as the utility, or functionality, of products and services for those with disabilities, as well as to society at large.[237] We tentatively do not see how such "social utility" could be quantified with sufficient objectivity to be considered as a separate factor,[238] and note that to some extent it is an implicit component of our proposed "market considerations" factor. That is, to the extent a particular accessibility solution is seen as valuable, it is more likely to succeed in the marketplace. Other commenters suggest factors relating to the relationship between Section 255 and Section 251(a);[239] and differences between a product used by one customer, and a product that is part of a network.[240] Several commenters observe the increasing convergence in, or blurring of the distinction between, services and equipment that is characteristic of the changing telecommunications marketplace, and state that it should be considered as yet another factor.[241] We are not persuaded that these additional factors warrant separate consideration, but we seek comment on them, and on other ways to establish useful and usable factors..

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[237] CCD and MATP assert that cost review should consider indirect benefits, such as productivity gains and cost savings for persons with disabilities and society when more expensive accommodations can be replaced, and the benefits of employing persons with disabilities rather than public sector support. CCD Comments at 11; MATP Comments at 3. *See also* WID Reply Comments at 6. Others argue that the compliance standard should not consider the value of accessible products to persons without disabilities, or give credit on some larger "societal balance sheet." TIA Reply Comments at 3 n.3.

[238] Further, we see no clear analogy to such a factor in the ADA factors.

[239] *See, e.g.*, CCD Comments at 14-15; Pacific Comments at 11-12; UCPA Comments at 5.

[240] *See generally* NAD Comments at 30-31.

[241] *See, e.g.*, Pacific Comments at 17. Arkenstone asserts that software adaptations for CPE involve minimal-expense solutions in many instances. Arkenstone Comments at 7.

V. IMPLEMENTATION PROCESSES

A. Introduction

124. We turn now to the measures that will put Section 255 into action, ensuring that manufacturers and service providers are in compliance with the requirement that their products be accessible, to the extent readily achievable, and providing relief for consumers when there are compliance problems. Our proposals rest on two principles:

- *Responsiveness to consumers* — We recognize that most complaints under Section 255 will arise because a consumer believes he or she is unable to use telecommunications products or services. The first objective of our complaint process will therefore be to assist in the identification and application of current accessibility solutions that will remove the accessibility barrier — whether real or perceived — thereby solving the particular problem without resorting to more formalized procedures. Further, to paraphrase a common expression, we believe that accessibility delayed is accessibility denied. Our proposals therefore start with a mechanism that aims to involve service providers and manufacturers in a process that identifies and solves accessibility problems with minimal government intervention as soon as possible. And the proposals continue by providing incentives to manufacturers and service providers to explore accessibility features "early and often" during the planning and development of new product or service offerings, since doing so increases the availability of accessible products and services to consumers.

- *Efficient allocation of resources* — A process that imposes substantial burdens on parties may be worse than none at all. If our process is not efficient —

  - some potential complainants — particularly those who lack resources and may be intimidated by complex regulatory procedures — would be discouraged from seeking Commission assistance;

  - providers would spend substantial resources responding to complaints rather than enhancing accessibility of their offerings; and

  - the Commission would be unable to cope with any significant number of complaints in a timely manner.

  We are therefore proposing to streamline the process for addressing accessibility issues as much as possible, freeing consumers and industry alike to apply their resources to solving access problems, rather than subjecting them to burdensome procedural requirements. We

have made every effort to reduce administrative burdens for all who might be involved in the complaint process, and we invite suggestions for still further improvements.

125. In keeping with these objectives, we propose a two-phase program for dealing with consumers' issues arising under Section 255. In the first phase, consumer inquiries and complaints will be referred to the manufacturer or service provider concerned, who will have a short period of time to solve the complainant's access problem and informally report to the Commission the results of its efforts. This "fast-track" process will overlay and, we believe, frequently render unnecessary our traditional complaint resolution processes, by quickly resolving the consumer's problem. Otherwise, matters or disputes that remain unresolved may proceed to a second-phase dispute resolution process.

B. Fast-Track Problem-Solving Phase

1. In General

126. The heart of our proposal is an informal, "fast-track" process designed to solve access problems quickly and efficiently. We envision that this process would function as follows:

- The process would be initiated by the submission of a complaint, although we would encourage potential complainants to contact the manufacturer or service provider to attempt to resolve the problem before lodging a complaint.[242]

- Upon receipt of a complaint, the Commission would promptly forward the complaint to the manufacturer or service provider (or both) whose offerings were the subject of the complaint, and set a deadline for a report of action taken to resolve the complaint.

- During the period prescribed, or during an extension period granted for good cause, the manufacturer or provider would attempt to solve the complainant's problem regarding the accessibility or compatibility of the provider's service or equipment. During this time, the Commission staff would be available to both the complainant and the respondent to provide information and informal assistance upon request.

- By the end of the fast-track phase, the respondent would be expected to informally report to the Commission the results of its efforts to solve the problem involved in the complaint.

[242] *See infra* para. 128.

- The Commission would evaluate the respondent's report. The matter would be closed if it appeared that the complainant's access problem had been solved and there was no underlying compliance problem, or if the matter were outside the scope of Section 255.

- On the other hand, the matter would proceed to a second phase of dispute resolution processes[243] if the problem remained unsolved and there was a question of whether an accessibility solution was readily achievable, or if it appeared there was an underlying problem regarding the respondent's compliance with its Section 255 accessibility obligations.

127. We believe that the fast-track process we are proposing will frequently permit complainants and respondents to resolve disputes before requiring any use of additional Commission processes. In addition, the burden on all parties is minimal, and the process encourages the rapid, informal solution of access problems. We seek comment on the general outline of this fast-track process, and on the more specific aspects of it discussed below.

2. Initial Contact with Commission

128. The *TAAC Report* recommends that the Commission "encourage consumers to express informally their concerns or grievances about a product to the manufacturer or supplier who brought the product to market before complaining to the [Commission]" and that the Commission assist complainants to resolve their complaints informally.[244] We propose to adopt this TAAC recommendation. Specifically, at the time we are first contacted by a consumer, we would encourage the consumer to directly contact the manufacturer or service provider involved if he or she has not already done so, and we would provide contact information for that purpose. We would also invite the consumer to contact the Commission again if the problem is not resolved satisfactorily. The provision of accessibility information and the fast-track process respond to the TAAC recommendation that we offer our assistance in resolving complaints informally. We seek comment on this proposal.

129. Persons with disabilities may submit their complaints by any accessible means, including, for example, letter, Braille, facsimile, electronic mail, internet, TTY, audio cassette, or telephone call.[245]

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[243] *See infra* paras. 144-171.

[244] *TAAC Report*, §§ 6.7.4.1, 6.7.4.2, at 32.

[245] *See* Section 1.1830 of the Commission's Rules, 47 C.F.R. § 1.1830.

130. Because Section 255 complaints will involve offerings overseen by various Commission bureaus and offices, and because consumers may be unfamiliar with these organizational differences, we anticipate establishing a central Commission contact point for all Section 255 inquiries and complaints. We seek comment on measures the Commission should take to ensure that persons with disabilities are made aware of their opportunity to address inquiries and complaints to a central contact point at the Commission.

131. We propose to make available a complaint form, but not to require its use for the initiation of a Section 255 complaint. In whatever form we receive a complaint, however, we will need to ascertain at least the following information before we can proceed:

- Complainant contact information: Name, mailing address, and preferred contact method (letter, telephone number, TTY number, facsimile number, or electronic mail address).

- Identification of the equipment or service complained of, and the name (and, if known, the address) of its manufacturer or provider.

- A description of how the equipment or service is inaccessible to persons with a particular disability or combination of disabilities.

We seek comment on what additional information, if any, would tend to provide a clearer description of the difficulty complained of, without requiring excessive or irrelevant information. In any event, we would retain discretion to request from complainants additional information that would help us to rapidly address the request.

3. Provider Contact

132. Our fast-track proposal envisions initially referring complaints to the manufacturer or service provider (or both, as appropriate). Before we can do this, we will need a list of contact points for each manufacturer and service provider subject to Section 255. How can we efficiently generate and maintain such a list? Should we require a single contact point for each company, or should we permit firms to designate different contact points for different product offerings? Should we require that the contact point be "in-house," or should we permit delegation of the contact responsibility to agents? We also seek comment on whether we should require firms to provide accessibility contact information directly to consumers, and if so, how.

133. We believe that the data we need includes information similar to the contact information we will require of complainants: name or title of the contact person, mailing address, and alternate contact methods (telephone number, TTY number, facsimile number, or electronic mail address). We propose that equipment manufacturers and service providers be required to establish multiple contact methods, accessible to as many disabilities as possible. The contact information should identify all alternatives available. This would give us the greatest flexibility for forwarding the various kinds of complaints we are likely to receive. If we allow the designation of different contact points within a company, we will need to collect additional information that will allow us to identify the appropriate contact point for each complaint. We seek comment on these matters. We also seek comment on whether our process should include a notification to the complainant that the complaint has been referred, and, if so, what information our notification should include.

134. Finally, we note that the contact list we develop will be useful not only in connection with forwarding complaints, but could also serve a valuable, though secondary function as a source of accessibility information for the public.[246] Should we make the list publicly available? If so, what additional related data, if any, should we collect that would advance this additional function?[247] Commenters suggesting additional data collection should state whether they believe submission of the data should be optional or mandatory, and, if the latter, should explain why the benefits of the requirement would justify the burdens.

[246] *See infra* para. 174 for other possible public information measures.

[247] For example, lists of new accessible product offerings.

4. Solution Period; Report

135. As noted above, upon receipt of a complaint, the Commission would promptly forward it to the manufacturer or service provider (or both) whose offerings were referenced in the complaint, and set a deadline for a report to the Commission of action taken to resolve the complaint. We would endeavor to forward the complaint within one business day of its receipt, although circumstances such as the format of the complaint[248] or Commission staff workloads might cause delays. We seek comment on appropriate customer service standards for complaint forwarding procedures. We also seek comment on whether we should forward complaints submitted as submitted, regardless of format, or whether we should forward "translations" or transcripts of complaints submitted in formats such as Braille.

136. The action report deadline should provide sufficient time for respondents to study the complaint, gather relevant information, identify possible accessibility solutions, and, most importantly, work with the complainant to solve the access problem if possible. At the same time, access must not be unreasonably delayed; we intend the fast-track process to provide quick relief to consumers where possible. We believe a period of five business days strikes a reasonable balance of these concerns, and we propose to specify a deadline of five business days from the time we forward the complaint to the respondent. We seek comment on this proposal.

137. We believe there will be instances where a five-business-day period (for example) may be enough time for a provider to assess a problem and begin to resolve it, but not long enough to complete the resolution. Where substantial efforts are under way, we believe it would be preferable to allow the fast-track process to continue, rather than beginning more resource-intensive traditional dispute resolution processes. Consistent with the nature of the fast-track process, we believe that under these circumstances, providers should be able provide us with an informal progress report and request additional time to continue their problem-solving efforts. At the same time, we do not want to encourage delay in providing access solutions. We therefore seek comment on how we might balance these interests in considering extension requests, and whether there should be an outside limit on the length of the fast-track period. We also seek comment on how to provide a mechanism for either party (or the Commission, for that matter) to terminate the fast-track phase and proceed to traditional dispute resolution processes, where it appears the fast-track process is not leading to a mutually satisfactory resolution.

138. By the end of the fast-track process, we expect the manufacturer or service provider informally to report to the Commission regarding whether the complainant has been provided the

[248] For example, we would generally have to translate a Braille complaint or listen to an audio cassette before determining its appropriate handling.

access sought, and if not, why it has not been provided. To put the circumstances of the particular accessibility complaint in context, it might also be appropriate for the respondent to report generally its procedures for ensuring product accessibility.[249] In order to provide flexibility in this process, we propose that such reports be submitted by telephone call, electronic mail, facsimile or written correspondence. We seek comment on this proposal.

139. Because the most critical element of the fast-track process is the sharing of information between complainant and respondent, we want to ensure that complainants are fully informed of respondents' efforts. To this end, we propose to require that respondents provide copies of their reports to complainants. However, we also want to avoid formalizing and stifling the process, and are not sure how, for example, a telephonic report might be "copied." Thus, we seek comment on our proposal, and how to satisfy this requirement in the case of telephonic or other oral reports.

5. Commission Evaluation

140. At the end of the fast-track process, we propose that the Commission would consider both (1) the success of the respondent in providing an appropriate access solution, if possible, and (2) whether there appeared to be an underlying compliance problem, regardless of whether the particular complainant had been satisfied. That review would determine whether further action was required, as follows:

- If it appeared that the complainant's access problem had been satisfactorily solved (or that accessibility was not readily achievable) and there was no indication of an underlying problem of compliance with Section 255, the matter would be closed by the Commission.

- If it appeared that the complaint did not involve matters subject to Section 255, the matter would be closed.

- If it appeared that the complainant's access problem had been satisfactorily resolved but there was an indication of an underlying compliance problem, the Commission would undertake further dispute resolution efforts to determine the nature and magnitude of the problem, and take appropriate action. Evidence of an underlying compliance problem might consist, for example, of evidence that the respondent had solved the complainant's problem with another entity's products, or that the complaint reflected a pattern of not addressing accessibility issues until complaints were filed.

[249] *See infra* paras. 162-171 for a discussion of the kinds of efforts we would credit in resolving an accessibility dispute.

- **#** If it appeared that the access problem had otherwise not been satisfactorily resolved, or if the respondent failed to submit a timely resolution report, the Commission would initiate further resolution processes.

141. We also propose that the Commission's evaluation of a resolution report not necessarily be limited to the respondent's initial report, but might also include additional information requested from the respondent or the complainant, discussions with accessibility experts from industry, disability groups, or the Access Board, or review of prior or other pending complaints involving the respondent. Further, to the extent a respondent's report asserted that accessibility was not readily achievable, we would evaluate the claim using the same factors we would use to evaluate such a claim during a second-phase dispute resolution proceeding.[250] We seek comment on these proposals.

142. We propose that the Commission would communicate its determination to both the complainant and the respondent in writing. If the Commission concluded that no further action was warranted because the matter lies outside the scope of Section 255, we would anticipate including further information that would assist the consumer in seeking relief through other possible avenues. If the determination were to proceed to dispute resolution proceedings, we would include pertinent information relating to initiating those processes. We seek comment on this aspect of our fast-track proposal.

143. Finally, we note that if our fast-track determination were that the matter should be closed, we would anticipate including information that a complainant who disagreed with that determination and wished to pursue the complaint to second-phase dispute resolution could do so. We propose not to require any particular method for complainants to communicate their desire to continue to dispute resolution, but to leave the method to the complainant's discretion, in the same manner as the complaint filing procedures described above.[251] We seek comment.

[250] *See infra* paras. 162-171.

[251] *See supra* para. 129.

C. Use of Traditional Dispute Resolution Processes

1. Generally; Informal Dispute Resolution Process

144. The Commission's ultimate responsibility under Section 255 stems from our statutory jurisdiction over complaints alleging non-compliance with the requirements of Section 255.[252] If questions of compliance remain at the end of the fast-track problem-solving phase, we will resolve them through one of the processes described below.

145. The Commission previously has established a general complaint procedure,[253] though in many cases we have provided specific procedures for particular telecommunications services or subject areas.[254] Our common carrier rules, for example, offer complainants the choice of either formal[255] or informal[256] resolution. Under the formal procedures, a complainant assumes the burden of prosecuting its complaint, much like a plaintiff in a civil judicial proceeding.[257] The informal process is no less official than the formal, but does not require the complainant to bear responsibility for pursuing the fact-finding process. Under the informal process, the complainant's responsibilities generally end with the filing of a valid complaint, and the Commission uses its investigative tools[258] to ascertain facts relating to the complaint.

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[252] *See* Section 255(f) of the Communications Act, 47 U.S.C. § 255(f).

[253] Section 1.41 of the Commission's Rules, 47 C.F.R. § 1.41, provides that: "Except where formal procedures are required under the provisions of this chapter, requests for action may be submitted informally. Requests should set forth clearly and concisely the facts relied upon, the relief sought, the statutory and/or regulatory provisions (if any) pursuant to which relief is sought, and the interest of the person submitting the request."

[254] *E.g.*, 47 C.F.R. Part 1, Subpart E (common carriers); 47 C.F.R. Part 1, Subpart J (pole attachments); 47 C.F.R. § 1.1313(b) (environmental matters); 47 C.F.R. § 25.154 (satellite communications).

[255] *See* Sections 1.711 and 1.720-1.736 of the Commission's Rules, 47 C.F.R. §§ 1.711, 1.720-1.736. These rules are set out in Appendix B hereto.

[256] *See* Sections 1.711 through 1.718 of the Commission's Rules, 47 C.F.R. §§ 1.711-1.718. These rules are set out in Appendix B hereto.

[257] The existing common carrier formal process is generally selected only when disputes are between parties willing to assume this burden, such as carriers or large customers.

[258] The Commission's investigative tools are based on Section 4(i) of the Communications Act. 47 U.S.C. § 154(i). In practice, we rely heavily on written requests for information and documents, supplemented when necessary by equipment tests and on-site inspections.

146. The informal process provides us greater flexibility to tailor our procedural requirements to the particular matters at hand, since the absence of a statutory mandate for formal adjudication leaves us broad discretion to determine appropriate procedures.[259] It thus has the considerable advantage of being less burdensome, both for parties and for the Commission. Yet complainants may sometimes prefer a formal process.

147. For those Section 255 complaints that are not resolved under fast-track procedures, we propose to resolve most under informal, investigative procedures, which we consider to be more efficient and flexible than formal procedures. To accommodate special circumstances,[260] however, we also propose to establish formal adjudicatory procedures, to be employed only where the complainant requests such resolution and the Commission, in its discretion, permits the complainant to invoke the formal procedures. This procedural framework is similar in some respects to the framework applicable to common carrier complaints generally, except that under our proposal here, the Commission will apply formal procedures only when both the complainant and the Commission agree that this is appropriate. However, we believe the differences between typical common carrier complaints and Section 255 complaints require specifically tailored procedural rules for Section 255 complaints. Finally, we also propose to allow use of alternative dispute resolution procedures, in cases in which the Commission and all parties agree that such procedures are appropriate. We seek comment on this general procedural framework, and on the specific issues discussed below.

148. We propose not to impose a standing requirement for complaints under Section 255, whether by virtue of being a person with a disability, being a customer of the entity that is the subject of the complaint, or otherwise.[261] Section 255 itself does not impose such a requirement, and we believe the purposes of the statute are best served by not restricting complaints about accessibility problems. Moreover, we want to avoid burdening the complaint process with disputes relating to standing. We seek comment on this proposal.

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[259] *See Notice of Inquiry*, 11 FCC Rcd at 19155 (para. 7), citing Sections 4(i), 201, 303(b), and 303(r) of the Communications Act, 47 U.S.C. §§ 154(i), 201, 303(b), 303(r). *See also* Section 403 of the Communications Act, 47 U.S.C. § 403, which gives the Commission broad discretion to enforce Communications Act requirements even in the absence of a complaint.

[260] For example, a complainant may wish to invoke formal complaint processes in order to expend its own resources in taking advantage of discovery, deposition, and other adjudicatory complaint rules in bringing a complaint against a covered entity under Section 255.

[261] "Standing" refers to a complainant's direct interest in the matter that is the subject of the complaint.

149. We propose not to establish any time limit for the filing of a complaint under Section 255. We note, however, that Section 415(b) of the Communications Act limits the filing of certain claims against common carriers for money damages to "within two years from the time the cause of action accrues, and not after . . . ."[262] We seek comment on our proposal, on the relationship of Section 415 to our complaint authority in Section 255, and on the need for regulatory parity in this respect as between equipment manufacturers and service providers.

150. Given the likely complexity of many Section 255 complaints, we propose generally to allow 30 days for a respondent to answer a complaint, rather than the ten days provided for in our general pleading rules.[263] We would, however, retain the discretion to specify a shorter or longer response date based upon the nature of the complaint and the totality of the circumstances. We propose to compute the deadline for the answer from the date of our written notice initiating the dispute resolution phase.[264] We also propose to require that a respondent serve a copy of the answer on the complainant and on any other entity it implicates in its answer.[265] We seek comment on these proposals.

151. Our general pleading rules provide that the person who filed the original pleading may reply to answers within five days after the time for filing answers has expired, and prohibit additional pleadings unless specifically requested or authorized by the Commission.[266] Some service-specific rules make different provisions. We propose a 15-calendar-day reply period, subject to Commission adjustment in specific cases, and seek comment on what other provisions are appropriate for Section 255 proceedings.

152. We wish to ensure that our dispute resolution processes for Section 255 are as accessible as possible, so we propose not to require any particular format for submissions from complainants or respondents. However, because we believe that telephonic and other non-permanent oral presentations would not provide an appropriate record for decision-making, we

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[262] 47 U.S.C. § 415(b).

[263] Section 1.45(a) of the Commission's Rules, 47 C.F.R. § 1.45(a); *see also* Section 1.4 of the Commission's Rules, 47 C.F.R. § 1.4.

[264] *See supra* para. 142.

[265] The filing date of the answer implicating another manufacturer or service provider would be considered the date of the complaint with respect to that entity, for purposes of both the fast-track and the dispute resolution processes.

[266] Sections 1.45(b) and 1.45(c) of the Commission's Rules, 47 C.F.R. §§ 1.45(b), 1.45(c).

propose to require that submissions be in a permanent format. We seek comment on these proposals, and on any other related issues.

153. Commission consideration of Section 255 complaints — both during the fast-track phase and during dispute resolution — may often involve evaluation of information which may be considered proprietary business data, including a company's resources available to achieve accessibility.[267] We are sensitive to the need to protect the confidentiality of such information, and do not want to discourage its submission where relevant to our decision-making. Our rules already provide confidentiality for proprietary information in certain cases.[268] We seek comment on whether, in the particular context of Section 255, our existing rules and procedures for review of confidentiality requests strike the best balance between reasonable expectations of confidentiality and open decision-making.

2. Formal Dispute Resolution Process

154. While we anticipate that most complaints not resolved under fast-track procedures will be adjudicated pursuant to the informal procedures discussed above, we propose to reserve the right to apply a more formal, adjudicatory mechanism in which complainants accept the primary burden of pursuing relevant facts, with attendant rights (such as the right of discovery) and obligations.[269] We are not proposing specific language for Section 255 adjudicatory process rules, but we propose to model them on the common carrier formal complaint procedures set out in Sections 1.720 through 1.736 of the Commission's Rules,[270] modified somewhat to take into account the inherent differences between traditional common carrier complaint issues and accessibility issues under Section 255. Specifically, we seek comment on the following variations.

- What showing (if any) should be required to support a request for formal resolution?

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[267] This issue is to some extent interrelated with our request for comment on whether a respondent should provide a copy of its fast-track report to the complainant. *See supra* para. 139.

[268] *See, e.g.*, Sections 0.457(d), 0.457(g), and 0.459 of the Commission's Rules, 47 C.F.R. §§ 0.457(d), 0.457(g), 0.459. *See also* Section 1.731 of the Commission's Rules, 47 C.F.R. § 1.731. *See also* Examination of Current Policy Concerning Treatment of Confidential Information Submitted to the Commission, GC Docket No. 96-55, Notice of Inquiry and Notice of Proposed Rulemaking, 11 FCC Rcd 12406 (1996) (initiating a proceeding to analyze Commission practices and policies concerning treatment of competitively sensitive information that has been provided to the Commission).

[269] As noted previously, we would not impose formal dispute resolution procedures on a complainant that had not requested them. *See supra* para. 147.

[270] 47 C.F.R. §§ 1.720-1.736. *See* Appendix B hereto.

- How should our decision whether to grant a request for formal resolution take into account the possibility of multiple complaints involving the same equipment or service?

- The existing common carrier regulations provide that a complainant can request formal resolution either as an initial matter, or when the complainant is not satisfied by the carrier's response and the Commission's disposition of the complaint informally. In the latter case, the formal complaint is deemed to relate back to the filing date of the original complaint.[271] For complaints under Section 255, we have proposed that complainants need submit their complaints only once, with no requirement for re-filing at the end of an informal process as a condition for moving to formal dispute resolution. We seek comment on whether we should establish a deadline for a complainant desiring formal or alternative dispute resolution to make its request — perhaps in the initial complaint filing, or at some point in early stages of the dispute resolution phase — or whether we should permit such a request at any time. In any event, upon receipt of such a request, the Commission would determine what procedures will be followed (*i.e.*, informal, formal, or alternative procedures) based in part on the stated preferences of the parties, with the agreement of the parties, as necessary.[272]

- Under recent amendments to the rules governing complaints against common carriers, complaints and responsive pleadings subject to formal dispute resolution processes are now required to contain full statements of relevant, material facts with supporting documentation.[273] We tentatively conclude that this requirement should apply to complaints and any other pleadings filed pursuant to Section 255, regardless of the format chosen by complainant. We seek comment on how such a requirement should be incorporated into the mechanism for initiating a formal dispute resolution process under Section 255.

- The existing common carrier regulations generally limit complaints to individual respondents, and include no specific provision for joinder of defendants.[274] For Section 255

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[271] Sections 1.717 and 1.718 of the Commission's Rules, 47 C.F.R. §§ 1.717, 1.718.

[272] *See supra* para. 147.

[273] *See* 47 C.F.R. § 1.721(a)(5); Implementation of the Telecommunications Act of 1996: Amendment of Rules Governing Procedures to Be Followed When Formal Complaints Are Filed Against Common Carriers, CC Docket No. 96-238, Report and Order, 12 FCC Rcd 22497, 22534 (paras. 81-82) (1997) (*Complaint Streamlining Order*). In the *Complaint Streamlining Order*, the Commission revised its Section 208 formal complaint resolution procedures to implement the 1996 Act requirement for the accelerated resolution of certain complaints, and otherwise to improve procedures governing complaints of unlawful conduct by telecommunications carriers.

[274] Section 1.735(a) of the Commission's Rules, 47 C.F.R. § 1.735(a).

complaints, we propose to recognize the possible involvement of service providers and equipment manufacturers by provisions requiring that motions for joinder specify either that the counterpart covered entity is in part responsible for allegedly deficient accessibility, or that an effective solution to the alleged deficiency requires review of both service and equipment providers' involvement in the telecommunications capability at issue.

- The existing common carrier regulations provide for joinder of complainants and causes of action when the actions that are the subject of the complaint involve the same defendant, and "substantially the same" facts and alleged violation of the Communications Act.[275] In the case of Section 255 complaints, we propose no restriction on the submission of joint complaints, or of complaints involving different accessibility aspects of the same products. Further, complainants would be free to request joinder by the Commission, after investigative review, with the initial complaints. However, we propose to reserve the right to separate complaints where we believe it would expedite dispute resolution or otherwise better serve the public interest.

155. We do not propose to require a filing fee for informal resolution of complaints, or for formal resolution of complaints directed at equipment manufacturers and service providers that are not common carriers. Under the Communications Act, however, we are required to impose a filing fee for formal complaints directed against common carriers,[276] unless we can show that waiving the fee would be in the public interest.[277] We seek comment on the circumstances under which we should waive or lower this fee, and on the following questions:

- Is there any basis for requiring a filing fee for Section 255 complaints against manufacturers or service providers who are not common carriers, requesting formal dispute resolution? If so, *should* we require a filing fee?

- How should we deal with fees where an initial complaint does not require a filing fee, but subsequent developments (*e.g.*, a subsequent request for formal resolution, or the subsequent addition of a common carrier respondent) trigger a fee?

- How should we deal with filing fees in cases where we subsequently deny the request for formal dispute resolution?

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[275] Section 1.723 of the Commission's Rules, 47 C.F.R. § 1.723.

[276] Section 8(g) of the Communications Act, 47 U.S.C. § 158(g). This fee is presently $150. Section 1.1105 of the Commission's Rules, 47 C.F.R. § 1.1105.

[277] Section 8(d)(2) of the Communications Act, 47 U.S.C. § 158(d)(2).

156. We disagree with commenters who assert that Section 255 complaints must be resolved within the five-month deadline established in Section 208(b).[278] In the *Complaint Streamlining Order*, the Commission concluded that the deadline specified in Section 208(b) applies only to complaints relating to the lawfulness of those matters required to be in tariffs.[279] Moreover, because we conclude that Section 255 establishes Commission authority to promulgate complaint procedures, separate from our authority under Section 208, we also conclude that any time limits for resolving complaints under Section 208 do not apply.

3. Alternative Dispute Resolution Process

157. Finally, we propose to make available alternative dispute resolution (ADR) procedures such as arbitration, conciliation, facilitation, mediation, settlement negotiation, and other consensual methods of dispute resolution for resolving Section 255 complaints not resolved under the fast-track process. The Administrative Dispute Resolution Act (ADRA)[280] encourages use of ADR processes when the parties involved consent to their use and where, as here, such practice is consistent with statutory mandates. At the same time, Congress emphasized that ADR procedures are not necessarily appropriate in every case, including specifically:

- Precedent setting cases,
- Cases bearing on significant new policy questions,
- Cases where maintaining established policies is of special importance,
- Cases significantly affecting persons or organizations who are not parties to the proceeding,
- Cases where a formal record is essential, and

[278] *See* 47 U.S.C. § 208(b)(1).

[279] *See Complaint Streamlining Order*, 12 FCC Rcd at 22513-14 (para. 37). Specifically, the Commission noted that the deadline applies to any complaint about the lawfulness of matters included in tariffs filed with the Commission, and those matters that would have been included in tariffs but for the Commission's forbearance from tariff regulation. *Id.*

[280] Pub. L. 101-552, 104 Stat. 2736 (1990), codified at 5 U.S.C. §§ 571-584. The ADRA was reauthorized and amended by the Administrative Dispute Resolution Act of 1996, Pub. L. 104-320, 110 Stat. 3870 (1996).

- Cases where the agency must maintain continuing jurisdiction with authority to alter its disposition in light of changed circumstances.[281]

158. Following enactment of the ADRA, the Commission adopted a rule providing for ADR processes,[282] adopted an ADR Initial Policy Statement that supports and encourages the use of ADR procedures,[283] and took other steps to foster the use of ADR mechanisms in both rulemaking and adjudicatory situations. Since then we have employed ADR in both contexts, and continue to evaluate how to encourage its wider use. We tentatively conclude that ADR could be an effective tool for dealing with conflicts arising under Section 255, while avoiding the expense and the delay of adversarial proceedings. First, accessibility complaints could involve complex questions of technology, economics, and medicine, which outside experts might be able to analyze more efficiently than the Commission. Further, ADR could foster settlement by providing disputants with greater incentives to move from adversarial positions to cooperation. We therefore propose to use ADR as the third tool in our Section 255 dispute resolution structure, subject to the agreement of all parties, and subject to our discretion to grant or deny requests for ADR.

159. We seek comment on these views generally, and on the following specific questions:

- Should we establish a deadline for parties desiring alternative dispute resolution to make their request, or should we permit such a request at any time?[284]

- More generally, are there circumstances where we should permit parties to move from one mechanism to another? If so, what limits should we impose to ensure the efficient resolution of complaints?

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[281] 5 U.S.C. § 582(b).

[282] Section 1.18 of the Commission's Rules, 47 C.F.R. § 1.18. *See Complaint Streamlining Order*.

[283] Use of Alternative Dispute Resolution Procedures in Commission Proceedings and Proceedings in which the Commission is a Party, GC Docket No. 91-119, Initial Policy Statement and Order, 6 FCC Rcd 5669 (1991) (*ADR Initial Policy Statement*). *See also* Use of Alternative Dispute Resolution Procedures in Commission Proceedings and Proceedings in which the Commission is a Party, GC Docket No. 91-119, Memorandum Opinion and Order, 7 FCC Rcd 4679 (1992).

[284] *See supra* para. 154.

- # Should we prescribe a particular method or methods for selecting neutral parties who will have the responsibility of overseeing the ADR process,[285] or should we leave that to be worked out by the disputants?

- # The Commission has adopted broad rules requiring Commission activities to be accessible to people with disabilities pursuant to Section 504 of the Rehabilitation Act of 1973.[286] Are any special measures needed to ensure that ADR processes are similarly accessible to consumers with disabilities? What provisions might be made to ensure the availability of interpreters, alternative-format materials, and other similar resources, as necessary?

- # What role should the Commission take during a Section 255 ADR process? How should the Commission enforce a decision reached through ADR?

- # Section 1.18 of the Commission's Rules and the *ADR Initial Policy Statement* provide generally for ADR. Are they sufficient for purposes of Section 255 ADR, or are additional requirements needed? In particular, should we make special provisions to ensure that ADR processes are accessible to all parties?

160. Apart from their role in an ADR process, there may be other ways in which neutral parties with special expertise in accessibility matters could help us resolve complaints. Outside experts and committees can perform a valuable consultative function, helping businesses and consumers to develop accessibility solutions as telecommunications products and services are being developed. For example, in the preamble to its Final Rules, the Access Board recognizes the Association of Accessibility Engineering Specialists (AAES), formed by the National Association of Radio and Telecommunications Engineers to train and eventually certify accessibility specialists or engineers.[287] The AAES is expected to sponsor conferences and workshops, disseminate information, and suggest course curricula for future training and certification. We seek comment on the role that groups such as the AAES could serve to help speed resolution of complaints.

161. Other groups with accessibility expertise may well develop out of the process by which Section 255 is being implemented and as accessibility efforts become more widespread.

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[285] The ADRA defines a neutral as "an individual who, with respect to an issue in controversy, functions specifically to aid the parties in resolving the controversy." 5 U.S.C. § 571(9). *See ADR Initial Policy Statement*, 6 FCC Rcd at 5671 (para. 21).

[286] 47 C.F.R. §§ 1.1801-1.870; 29 U.S.C. § 794.

[287] *Access Board Order*, 63 Fed. Reg. at 5609.

Similarly, the *TAAC Report* suggests that "[t]he FCC may at its discretion refer inquiries and complaints to a joint industry/disability advisory panel for opinion."[288] Thus, we might rely on outside experts to gather and evaluate data needed to resolve accessibility questions. We believe such a role could be useful, and seek comment on this view and on what provisions we might make for it. Would such quasi-ADR processes be permissible under the ADRA absent consent of the disputants?[289]

4. Defenses to Complaints

162. In response to an accessibility complaint[290] or an investigation conducted on the Commission's initiative without a prior complaint,[291] it seems likely that the most common defenses mounted by a manufacturer or service provider would involve a claim that:

- the product in question lies beyond the scope of Section 255,
- the product in question is in fact accessible, or
- accessibility is not readily achievable.

The first two defenses are relatively straightforward, although we recognize that weighing such claims may present difficult factual or legal questions. However, as our discussion of the term "readily achievable" suggests,[292] claims of the third kind are likely to present formidable difficulties to all concerned. We believe it would be useful to set out for comment some tentative views on use of a "readily achievable" defense.

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[288] *TAAC Report*, § 6.7.5, at 33.

[289] "An agency may use a dispute resolution proceeding for the resolution of an issue in controversy that relates to an administrative program, if the parties agree to such proceeding." 5 U.S.C. § 582(a). "'[D]ispute resolution proceeding' means any process in which an alternative means of dispute resolution is used to resolve an issue in controversy in which a neutral is appointed and specified parties participate." 5 U.S.C. § 581(6).

[290] We note again that we are using the term "accessible" as a shorthand reference to the phrases "accessible to and usable by" and "compatible with," as appropriate. *See supra* note 2.

[291] *See* Section 403 of the Communications Act, 47 U.S.C. § 403.

[292] *See supra* paras. 94-123.

163. To begin with, Section 255 imposes on manufacturers and service providers the duty to "ensure . . . that [their offerings are] accessible . . . , if readily achievable."[293] We believe that one consequence of this clear charge is that to the extent an offering subject to Section 255 is not accessible, it is incumbent upon an offeror making a "readily achievable" defense to establish facts to support the claim.

164. Of course, it should be kept in mind that "readily achievable" is not an easy concept to discern.[294] This leads us to tentatively conclude that in addition to the factors used to determine whether an accessibility action is readily achievable,[295] it is also appropriate to give some weight to evidence that a respondent made good faith efforts to comply with Section 255 by taking actions that would tend to increase the accessibility of its product offerings, both generally and with respect to the particular product that is the subject of the complaint.

165. Examples of the sorts of measures we would credit are set out in the Access Board guidelines and in the Appendix to the *Access Board Order*, and we need not duplicate them at length here. Briefly, however, they can be broadly categorized as:

- A self-assessment of whether accessibility is readily achievable with respect to the product or product line at issue.[296]

- External outreach efforts to ascertain accessibility needs and possible solutions, such as—

  - including individuals with disabilities in target populations of market research
  - including individuals with disabilities in product design, testing, pilot demonstrations, and product trials
  - working cooperatively with appropriate disability-related organizations

- Internal management processes to ensure early and continuing consideration of accessibility concerns as product offerings evolve, such as—

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[293] 47 U.S.C. §§ 255(b), 255(c).

[294] For example, even if an accessibility solution exists, its incorporation into a particular product may not be readily achievable for a given firm. *See Access Board Order*, 63 Fed. Reg. at 5614-15 (discussing the definition of "readily achievable").

[295] *See supra* paras. 100-123.

[296] An assessment with respect to the product line would be appropriate if (1) the products in the product line have similar features, functions, and prices; and (2) a product line approach increases accessibility. *See infra* paras. 168-170.

- assignment of responsibility for ensuring consideration of access issues during product development
- employee training on access by persons with disabilities
- self-analysis of the degree of existing product accessibility
- use of checklists or other objective criteria for identifying options for product accessibility
- documentation of accessibility consideration

User information and support, such as—

- descriptions of product accessibility and compatibility features (in accessible modes and formats, as needed)
- end-user product documentation (in accessible modes and formats, as needed)
- providing usable customer support and technical support, and providing information on how to obtain such support
- including in general product information contact methods for obtaining access information
- disability-oriented training for customer support personnel

166. We would caution that neither we nor the Access Board views the Board's guidelines as a "laundry list" of requirements all firms subject to Section 255 must adopt.[297] Rather, each firm should thoughtfully consider the guidelines in light of its situation and the degree to which its products have or lack accessibility features, and then adopt those which will help it provide the accessibility Section 255 requires.

167. We seek comment on these and other accessibility measures that might be suitable for equipment manufacturers. Further, while the Access Board's focus was limited to equipment manufacturers, the measures it describes generally have obvious analogs applicable to service providers.[298] We would therefore specifically seek comment on measures suitable for service providers. In addition, we seek comment on whether firms subject to Section 255 should be required to provide information on how consumers can contact them regarding accessibility issues, and whether such notice should also include information regarding how to contact the

[297] *See supra* note 33. For example, to the extent it is not readily achievable for small companies to conduct outreach efforts, we would look favorably on their participation in outreach undertaken through consortia or trade associations.

[298] To note just one example, the Board defines CPE accessibility as including access to user guides and product support, where readily achievable. 36 C.F.R. § 1193.33. Such information is equally applicable to telecommunications services.

Commission in case of accessibility problems, and if so, what information should be required and how it should be provided.

168. Finally, comments submitted in response to the *Notice of Inquiry* reflect a wide range of opinions on whether the obligations of Section 255 attach to individual products, or can be considered with respect to groups of similar products.[299] Despite the apparent divergence of these views, we believe they can be reconciled by distinguishing two aspects of the product planning and development process, along lines suggested by the Access Board.

169. First, we believe that Section 255 requires manufacturers and service providers to consider providing accessibility features in each product they develop and offer. As the Board aptly notes, "the assessment as to whether it is or is not readily achievable [to provide accessibility in every product] cannot be bypassed simply because another product is already accessible."[300] We therefore would expect the starting point of a readily achievable defense to be a showing of how accessibility features were considered during product development.

170. Nevertheless, the ideal of full accessibility is generally limited by feasibility, expense, or practicality (individually or in combination), especially in the case of CPE offerings, where direct physical interaction between user and equipment is often extensive. In the marketplace, providers must decide what features to include and what features to omit.[301] We believe it is reasonable for an informed product-development decision to take into account the accessibility features of other functionally similar products the provider offers,[302] provided it can be demonstrated that such a "product line" analysis increases the overall accessibility of the

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[299] *See, e.g.*, CEMA Comments at 9, 18; Lucent Comments at 14-15; MATP Comments at 4; Microsoft Comments at 19, 28-29; NCD Comments at 20; Nortel Comments at 6; Omnipoint Comments at 9; SHHH Comments at 6-7 (unpaginated); TIA Comments at 7; Trace Comments at 13-14 (unpaginated); AFB Reply Comments at 8, 9; CEMA Reply Comments at 14; Motorola Reply Comments at 5; NAD Reply Comments at 16; Siemens Reply Comments at 7-9; TIA Reply Comments at 10-11; Trace Reply Comments at 4-5, 10-11; Waldron Reply Comments at 5.

[300] *Access Board Order*, 63 Fed. Reg. at 5611.

[301] Such decisions involve not only accessibility features, but other features as well. "The Board [acknowledges] that it may not be readily achievable to make every product accessible or compatible. Depending on the design, technology, or several other factors, it may be determined that providing accessibility to all products in a product line is not readily achievable." *Id*. at 5611. As a further complication, this decision-making process carries its own costs, which can thus further limit what accessibility features are readily achievable.

[302] We tentatively conclude that we would consider products functionally similar if they provided similar features and functions, and were close in price.

provider's offerings. This provides an additional incentive for product developers to consider the widest possible range of accessibility options and to target their resources to maximize overall accessibility, without creating a loophole for evading Section 255 obligations.

171. We seek comment on the issues raised here, and on other matters regarding the showings that would facilitate the resolution of accessibility disputes. Our aim is to provide useful guidance both for manufacturers and service providers assessing their duties under Section 255, and for all parties interested in evaluating their performance.

D. Penalties for Non-Compliance

172. Section 255, on its face, makes no special provision for penalties for manufacturers or service providers found to violate its requirements. Given the importance of the accessibility mandate, we believe that we should employ the full range of penalties available to us under the Communications Act in enforcing Section 255.[303] We believe the Act provides for the following sanctions, which we would propose to apply as appropriate, given the nature and circumstances of a violation:

- Section 503(b) of the Act provides a system of forfeitures for willful or repeated "failure to comply with any of the provisions of [the] Act or of any rule, regulation, or order issued by the Commission under [the] Act . . . ."[304]

- At the end of an adjudication we would usually issue an order setting out our findings and directing prospective corrective measures. It is conceivable these orders might be the result of settlements with respondents, in the nature of consent decrees, if circumstances warrant. In any event, violation of a Section 255 order could result in the imposition of a Section 503(b) forfeiture.

- Section 312 of the Act provides for the revocation of a station license or construction permit, for the willful or repeated violation of or failure to observe any provision of the Communications Act.[305]

[303] In this proceeding we are considering primarily complaints brought under Section 255. As we discuss *supra* para. 33, we believe that accessibility complaints against common carriers may also be brought under Section 208.

[304] 47 U.S.C. § 503(b)(1)(B).

[305] 47 U.S.C. § 312.

- Section 312 of the Act also provides for the issuance of a cease and desist order to a station licensee or construction permit holder, for the willful or repeated violation of or failure to observe any provision of the Communications Act.[306] We believe Sections 4(i) and 208 of the Act provide a basis for such an order with respect to non-licensees.

- Sections 207 and 208 provide for the award of damages for violations by common carriers, and arguably others.[307] We seek comment on the relationship between Sections 207 and 208 and Section 255, and between the implementing rules under each. We ask commenters to specifically address what circumstances would warrant imposition of damages where Section 255 is found to have been violated, and how such damages could be calculated.

- We also seek comment on whether there is a basis for ordering the retrofit of accessibility features into products that were developed without such features, in cases in which we determine that including them was readily achievable.

We seek comment about these and other possible remedies to enforce Section 255.

E. Additional Implementation Measures

173. We note that other existing Commission processes (and associated forms) may provide efficient vehicles for requirements that we may develop in this proceeding, such as information collection,[308] or for providing notice to firms dealing with the Commission that they may be subject to Section 255. For example:

- The Commission's equipment authorization processes under Part 2, Subpart J of the Commission's Rules.[309]

- Equipment import documentation requirements under Part 2, Subpart K of the Rules.[310]

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[306] *Id*.

[307] *See supra* para. 33.

[308] Information collection could include data regarding company contact points (*see supra* paras. 132-134) or about products that are or are not subject to Section 255.

[309] 47 C.F.R. §§ 2.901-2.1093.

[310] 47 C.F.R. §§ 2.1201-2.1207.

- Licensing proceedings under Section 307 of the Act[311] for various radio services used by entities subject to Section 255 obligations.

- Various common carrier filing processes.[312]

We seek comment on whether, and if so how, these or other similar existing processes might provide additional options for fostering product accessibility. Further, given that Sections 207 and 208 of the Act provide an alternate vehicle for submitting complaints that Section 255 has been violated, we seek comment on whether we should modify the existing common carrier complaint rules[313] with respect to Section 255 complaints so as to incorporate the kinds of processes we have proposed for complaints filed under Section 255.

174. Finally, based upon the work of the Telecommunications Accessibility Advisory Committee, the Access Board, commenters filing responses to our *Notice of Inquiry*, parties who have made informal presentations to us since passage of the 1996 Act, and various Commission staff offices, we believe there are other measures the Commission itself might take, or might encourage others to take, to foster increased accessibility of telecommunications products. These include:

- Establishment of a clearinghouse for current information regarding telecommunications disabilities issues, including product accessibility information,[314] accessibility solutions, and so forth.

- Publication of information regarding the performance of manufacturers and service providers in providing accessible products, perhaps based on statistics generated through the fast-track and dispute resolution processes.

- Expansion of the information provided on the Internet at the Commission's Disabilities Issues Task Force Web site (http://www.fcc.gov/dtf). We seek suggestions on what additional information might be useful to consumers and industry.

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[311] 47 U.S.C. § 307.

[312] 47 C.F.R. §§ 1.701-1.825.

[313] *See* Sections 1.711 and 1.720-1.736 of the Commission's Rules, 47 C.F.R. §§ 1.711, 1.720-1.736. *See* Appendix B hereto.

[314] We note in this regard the Access Board's intention to prepare and periodically update a market monitoring report. *See Access Board Order*, 63 Fed. Reg. at 5610.

- Efforts by consumer and industry groups to establish on-going informational and educational programs, product and service certification,[315] standards-setting,[316] and other measures aimed at bridging the gap between disabilities needs and telecommunications solutions. With regard to product and service certification, we seek comment regarding whether the Commission should encourage or sanction use of a seal or other imprimatur to signify that particular equipment or services comply with Section 255 requirements.

- Development of peer review processes to complement the implementation measures proposed above.

We particularly invite comment regarding the practical aspects of implementing these or other similar measures.

VI. INTERIM TREATMENT OF COMPLAINTS

175. As noted earlier, Section 255 became effective upon enactment on February 8, 1996.[317] Until we adopt procedural rules in this proceeding, complaints alleging violations of Section 255 may be filed pursuant to Section 1.41 of the Commission's Rules[318] and our other general procedural rules.[319] Complaints against common carriers may also be filed pursuant to the common carrier complaint rules set out in Part 1, Subpart E of the Commission's Rules.[320]

176. We agree with parties who see no need to adopt interim rules,[321] because we have existing complaint processes in place which enable us to address complaints on a case-by-case basis. While we recognize it would be preferable to provide immediate, definitive guidance on

[315] For example, industry might explore the feasibility of a program similar to the Underwriters Laboratories or Good Housekeeping seal programs.

[316] With respect to standards setting, we invite attention to Section 273(d) of the Act, 47 U.S.C. § 273(d), and seek comment on its potential impact on such efforts.

[317] *See supra* para. 8.

[318] 47 C.F.R. § 1.41.

[319] *See, e.g.*, Sections 1.45-1.52 of the Commission's Rules, 47 C.F.R. §§ 1.45-1.52.

[320] *See* 47 C.F.R. §§ 1.711 (common carrier complaints generally), §§ 1.716-1.718 (informal complaints), §§ 1.720-1.736 (formal complaints).

[321] *See* SWBT Comments at 2; USTA Comments at 2; AT&T Reply Comments at 5-6.

specifically what is required under Section 255, we are exploring a number of pivotal issues in this Notice which will require resolution before we can offer such guidance. As a result, we decline to establish interim rules which, ultimately, may confuse parties concerning their obligations. Furthermore, because we anticipate that we will adopt procedural rules implementing Section 255 in a timely fashion, we do not think it is necessary to establish specific interim procedures.

177. Although we recognize that the proposals set forth in this Notice have no binding effect until formally adopted, they may serve as guidance to parties concerning factors we would be likely to consider in a complaint proceeding. We urge potential complainants and respondents to take particular note of our tentative interpretations of key terminology and our emphasis on accessibility analysis throughout the design process. In addition, the Access Board guidelines and the related appendix materials may be instructive to affected entities in determining their obligations under Section 255 during this interim period.

VII. PROCEDURAL MATTERS

A. Regulatory Flexibility Analysis

178. The Initial Regulatory Flexibility Analysis, as required by Section 603 of the Regulatory Flexibility Act,[322] is set forth in Appendix E. The Commission has prepared the Initial Regulatory Flexibility Analysis of the expected impact on small entities of the proposals suggested in this Notice. Written public comments are requested on the Initial Regulatory Flexibility Analysis. In order to fulfill the mandate of the Contract with America Advancement Act of 1996 regarding the Final Regulatory Flexibility Analysis, we ask a number of questions in our Initial Regulatory Flexibility Analysis regarding the prevalence of small businesses in the affected industries.

179. Comments on the Initial Regulatory Flexibility Analysis must be filed in accordance with the same filing deadlines as comments on this Notice, but they must have a separate and distinct heading designating them as responses to the Initial Regulatory Flexibility Analysis. The Secretary shall send a copy of this Notice, including the Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration in accordance with Section 603(a) of the Regulatory Flexibility Act.[323]

B. Paperwork Reduction Analysis

[322] 5 U.S.C. § 603.

[323] 5 U.S.C. § 603(a).

180. This Notice contains proposed information collection requirements applicable to the public. As part of our continuing effort to reduce paperwork burdens, we invite the general public and the Office of Management and Budget (OMB) to take this opportunity to comment on the information collections contained in this Notice, as required by the Paperwork Reduction Act of 1995.[324]

181. Comments submitted on information collections contained in this Notice should address:

- Whether the collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility.
- The accuracy of the Commission's burden estimates.
- Ways to enhance the quality, utility, and clarity of the information collected.
- Ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology.

[324] 44 U.S.C. § 3506(c)(2).

C. Ex Parte Presentations

182. This Notice is a permit-but-disclose notice and comment rulemaking proceeding. *Ex parte* presentations are permitted, provided they are disclosed as provided in Commission rules.[325]

D. Pleading Dates

183. Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's Rules,[326] interested parties may file comments to this Notice on or before June 30, 1998, and reply comments on or before August 14, 1998. Comments and reply comments should be sent to the Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. All relevant and timely comments will be considered by the Commission before final action is taken in this proceeding. To file formally in this proceeding, participants must file an original and five copies of all comments, reply comments, and supporting comments. If participants want each Commissioner to receive a personal copy of their comments, an original and nine copies must be filed.

184. Written comments by the public on the proposed information collections are due on or before June 30, 1998. Written comments by the OMB on the proposed information collections must be submitted on or before 60 days after the date of publication of this Notice in the Federal Register. In addition to filing comments with the Secretary, a copy of any comments on the information collections contained herein should be submitted to Judy Boley, Federal Communications Commission, Room 234, 1919 M Street, N.W., Washington, D.C. 20554, or via the Internet to jboley@fcc.gov, and to Timothy Fain, OMB Desk Officer, 10236 NEOB, 725 - 17th Street, N.W., Washington, D.C. 20503, or via the Internet at fain_t@al.eop.gov. For additional information regarding the information collections contained herein, contact Judy Boley.

185. For purposes of this proceeding, we hereby waive those provisions of our rules that require formal comments to be filed on paper, and encourage parties to file comments electronically. Electronically filed comments that conform to the guidelines of this section will be considered part of the record in this proceeding and accorded the same treatment as comments filed on paper pursuant to our rules. To file electronic comments in this proceeding, you may use the electronic filing interface available on the Commission's World Wide Web site at <http://dettifoss.fcc.gov:8080/cgi-bin/ws.exe/beta/ecfs/upload.hts>. Further information on the

[325] *See generally* Sections 1.1202, 1.1203, and 1.1206(a) of the Commission's Rules, 47 C.F.R. §§ 1.1202, 1.1203, 1.1206(a).

[326] 47 C.F.R. §§ 1.415, 1.419.

process of submitting comments electronically is available at that location and at <http://www.fcc.gov/e-file/>.

186. Comments and reply comments will be available for public inspection during regular business hours in the Reference Center (Room 239) of the Federal Communications Commission, 1919 M Street, N.W., Washington, D.C. 20554. Copies of comments and reply comments are available through the Commission's duplicating contractor: International Transcription Service, Inc. (ITS, Inc.), 1231 20th Street, N.W., Washington, D.C. 20036, (202) 857-3800, TTY (202) 293-8810.

187. Alternative formats (computer diskette, large print, audio cassette and Braille) are available to persons with disabilities by contacting Martha Contee at (202) 418-0260, TTY (202) 418-2555, or at mcontee@fcc.gov, or Ruth Dancey at (202) 418-0305, TTY (202) 418-2970, or at rdancey@fcc.gov. The Notice can also be downloaded at http://www.fcc.gov/dtf/section255.html.

E. Further Information

188. For further information concerning this rulemaking proceeding, contact the following staff of the Wireless Telecommunications Bureau, Federal Communications Commission, Washington, D.C. 20554: John Spencer, Melinda Littell, or Susan Kimmel, Policy Division, at (202) 418-1310, or TTY at (202) 418-7233. Further information also can be obtained by sending an electronic mail message to 255nprm@fcc.gov.

VIII. ORDERING CLAUSES

189. Accordingly, IT IS ORDERED, pursuant to Sections 1, 4(i), 8(d), 8(g), 201, 202, 207, 208, 251(a)(2), 255, 303(r), 307, 312, 403 and 503(b) of the Communications Act, 47 U.S.C. §§ 151, 154(i), 158(d), 158(g), 201, 202, 207, 208, 251(a)(2), 255, 303(r), 307, 312, 403, 503(b), that NOTICE IS HEREBY GIVEN of the proposed regulatory changes described in this Notice of Proposed Rulemaking, and that COMMENT IS SOUGHT on these proposals.

190. IT IS FURTHER ORDERED that the Commission's Office of Public Affairs, Reference Operations Division, SHALL SEND a copy of this Notice of Proposed Rulemaking, including the Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas
Secretary

APPENDIX A

TEXT OF SECTION 251(a) AND SECTION 255 OF THE COMMUNICATIONS ACT

Section 251. Interconnection.

(a) GENERAL DUTY OF TELECOMMUNICATIONS CARRIERS.—Each telecommunications carrier has the duty—

* * * * *

(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.

Section 255. Access by Persons with Disabilities.

(a) DEFINITIONS.—As used in this section—

(1) DISABILITY.—The term "disability" has the meaning given to it by section 3(2)(A) of the Americans with Disabilities Act of 1990 (42 U.S.C. 12102(2)(A)).

(2) READILY ACHIEVABLE.—The term "readily achievable" has the meaning given to it by section 301(9) of that Act (42 U.S.C. 12181(9)).

(b) MANUFACTURING.—A manufacturer of telecommunications equipment or customer premises equipment shall ensure that the equipment is designed, developed, and fabricated to be accessible to and usable by individuals with disabilities, if readily achievable.

(c) TELECOMMUNICATIONS SERVICES.—A provider of telecommunications service shall ensure that the service is accessible to and usable by individuals with disabilities, if readily achievable.

(d) COMPATIBILITY.—Whenever the requirements of subsections (b) and (c) are not readily achievable, such a manufacturer or provider shall ensure that the equipment or service is compatible with existing peripheral devices or specialized customer premises equipment commonly used by individuals with disabilities to achieve access, if readily achievable.

(e) GUIDELINES.—Within 18 months after the date of enactment of the Telecommunications Act of 1996, the Architectural and Transportation Barriers Compliance Board shall develop guidelines for accessibility of telecommunications equipment and customer premises equipment in conjunction with the Commission. The Board shall review and update the guidelines periodically.

(f) NO ADDITIONAL PRIVATE RIGHTS AUTHORIZED.—Nothing in this section shall be construed to authorize any private right of action to enforce any requirement of this section or any regulation thereunder. The Commission shall have exclusive jurisdiction with respect to any complaint under this section.

APPENDIX B

PERTINENT COMMISSION RULES

47 C.F.R., PART 1 — PRACTICE AND PROCEDURE

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

Sec. 1.711 Formal or informal complaints.
Sec. 1.716 Form.
Sec. 1.717 Procedure.
Sec. 1.718 Unsatisfied informal complaints; formal complaints relating back to the filing dates of informal complaints.
Sec. 1.720 General pleading requirements.
Sec. 1.721 Format and content.
Sec. 1.722 Damages.
Sec. 1.723 Joinder of complainants and causes of action.
Sec. 1.724 Answers.
Sec. 1.725 Cross-complaints and counterclaims.
Sec. 1.726 Replies.
Sec. 1.727 Motions.
Sec. 1.728 Formal complaints not stating a cause of action; defective pleadings.
Sec. 1.729 Discovery.
Sec. 1.730 Other forms of discovery.
Sec. 1.731 Confidentiality of information produced or exchanged by the parties.
Sec. 1.732 Other required written submissions.
Sec. 1.733 Status conference.
Sec. 1.734 Specifications as to pleadings, briefs, and other documents; subscription.
Sec. 1.735 Copies; service; separate filings against multiple defendants.
Sec. 1.736 Complaints filed pursuant to 47 U.S.C. § 271(d)(6)(B).

Sec. 1.711 Formal or informal complaints.

Complaints filed against carriers under section 208 of the Communications Act may be either formal or informal.

Sec. 1.716 Form.

An informal complaint shall be in writing and should contain: (a) The name, address and telephone number of the complaint, (b) the name of the carrier against which the complaint is made, (c) a complete statement of the facts tending to show that such carrier did or omitted to do anything in contravention of the Communications Act, and (d) the specific relief of satisfaction sought.

Sec. 1.717 Procedure.

The Commission will forward informal complaints to the appropriate carrier for investigation. The carrier will, within such time as may be prescribed, advise the Commission in writing, with a copy to the complainant, of its satisfaction of the complaint or of its refusal or inability to do so. Where there are clear indications from the carrier's report or from other communications with the parties that the complaint has been satisfied, the Commission may, in its discretion, consider a complaint proceeding to be closed, without response to the complainant. In all other cases, the Commission will contact the complainant regarding its review and disposition of the matters raised. If the complainant is not satisfied by the carrier's response and the Commission's disposition, it may file a formal complaint in accordance with § 1.721 of this part.

Sec. 1.718 Unsatisfied informal complaints; formal complaints relating back to the filing dates of informal complaints.

When an informal complaint has not been satisfied pursuant to § 1.717, the complainant may file a formal complaint with this Commission in the form specified in § 1.721. Such filing will be deemed to relate back to the filing date of the informal complaint: *Provided,* That the formal complaint: (a) Is filed within 6 months from the date of the carrier's report, (b) makes reference to the date of the informal complaint, and (c) is based on the same cause of action as the informal complaint. If no formal complaint is filed within the 6-month period, the complainant will be deemed to have abandoned the unsatisfied informal complaint.

Sec. 1.720 General pleading requirements.

Formal complaint proceedings are generally resolved on a written record consisting of a complaint, answer, and joint statement of stipulated facts, disputed facts and key legal issues, along with all associated affidavits, exhibits and other attachments. Commission proceedings may also require or permit other written submissions such as briefs, written interrogatories, and other

supplementary documents or pleadings. All written submissions, both substantively and procedurally, must conform to the following standards:

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

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

(c) Facts must be supported by relevant documentation or affidavit.

(d) Legal arguments must be supported by appropriate judicial, Commission, or statutory authority.

(e) Opposing authorities must be distinguished.

(f) 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.

(g) 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 at any time before a decision is rendered on the merits of the complaint.

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

(i) All statements purporting to summarize or explain Commission orders or policies must cite, in standard legal form, the Commission ruling upon which such statements are based.

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

Sec. 1.721 Format and content.

(a) A formal complaint shall contain:

(1) The name of each complainant and defendant;

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

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

(4) Citation to the section of the Communications Act and/or order and/or regulation of the Commission alleged to have been violated.

(5) A complete statement of facts which, if proven true, would constitute such a violation. All material facts must be supported, pursuant to the requirements of § 1.720(c) of the rules and subparagraph (11) of this section, by relevant affidavits and documentation, including copies of relevant written agreements, offers, counter-offers, denials, or other related correspondence. The statement of facts shall include a detailed explanation of the manner and time period in which a defendant has allegedly violated the Act, Commission order, or Commission rule in question, including a full identification or description of the communications, transmissions, services, or other carrier conduct complained of and the nature of any injury allegedly sustained by the complainant. Assertions based on information and belief are expressly prohibited unless made in good faith and accompanied by an affidavit explaining the basis for the plaintiff's belief and why the complainant could not reasonably ascertain the facts from the defendant or any other source;

(6) Proposed findings of fact, conclusions of law, and legal analysis relevant to the claims and arguments set forth in the complaint;

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

(8) 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. Such certification shall include a statement that, prior to the filing of the complaint, the complainant mailed a certified letter outlining the allegations that form the basis of the complaint it anticipated filing with the Commission to the defendant carrier that invited a response within a reasonable period of time and a brief summary of all additional steps taken to resolve the dispute prior to the filing of the formal complaint. If no additional steps were taken, such certificate shall state the reason(s) why the complainant believed such steps would be fruitless;

(9) 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 proceeding that is concurrently before the Commission;

(10) An information designation containing:

(i) The name, address, and position of each individual believed to have firsthand knowledge of the facts alleged with particularity in the complaint, along with a description of the facts within any such individual's knowledge;

(ii) A description of all documents, data compilations and tangible things in the complainant's possession, custody, or control, that are relevant to the facts alleged with particularity in the complaint. Such description shall include for each document: (A) the date it was prepared, mailed, transmitted, or otherwise disseminated; (B) the author, preparer, or other source; (C) the recipient(s) or intended recipient(s); (D) its physical location; and (E) a description of its relevance to the matters contained in the complaint; and

(iii) A complete description of the manner in which the complainant identified all persons with information and designated all documents, data compilations and tangible things as being relevant to the dispute, including, but not limited to, identifying the individual(s) that conducted the information search and the criteria used to identify such persons, documents, data compilations, tangible things, and information;

(11) Copies of all affidavits, documents, data compilations and tangible things in the complainant's possession, custody, or control, upon which the complainant relies or intends to rely to support the facts alleged and legal arguments made in the complaint;

(12) A completed Formal Complaint Intake Form;

(13) Verification of the filing payment required under 47 C.F.R. § 1.1105(1)(c) or (d); and

(14) A certificate of service.

(b) The following format may be used in cases to which it is applicable, with such modifications as the circumstances may render necessary:

BEFORE THE FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, DC 20554

In the matter of

_____

Complainant,

v.

_____

Defendant.

File No. (To be inserted by the Common Carrier Bureau)

Complaint

To: The Commission.

The complainant (here insert full name of each complainant and, if a corporation, the corporate title of such complainant) shows that:

1. (Here state occupation, post office address, and telephone number of each complainant).
2. (Here insert the name, occupation and, to the extent known, address and telephone number of defendants).
3. (Here insert fully and clearly the specific act or thing complained of, together with such facts as are necessary to give a full understanding of the matter, including relevant legal and documentary support).

Wherefore, complainant asks (here state specifically the relief desired).

_____

(Date)

_____

(Name of each complainant)

_____

(Name, address, and telephone number of attorney, if any)

(c) Where the complaint is filed pursuant to 47 U.S.C. § 271(d)(6)(B), the complainant shall clearly indicate whether or not it is willing to waive the ninety-day resolution deadline contained within 47 U.S.C. § 271(d)(6)(B), in accordance with the requirements of § 1.736 of the rules.

(d) The complainant may petition the staff, pursuant to § 1.3 of the rules, for a waiver of any of the requirements of this section. Such waiver may be granted for good cause shown.

Sec. 1.722 Damages.

(a) In a case where recovery of damages is sought, the complaint shall contain a clear and unequivocal request for damages and appropriate allegations in support of such claim in accordance with the requirements of subpart (c) of this section.

(b) Damages will not be awarded upon a complaint unless specifically requested. Damages may be awarded, however, upon a supplemental complaint that complies fully with the requirement of subpart (c) of this section, based upon a finding of liability by the Commission in the original proceeding. Provided that:

(1) If recovery of damages is first sought by supplemental complaint, such supplemental complaint must be filed within, and recovery is limited to, the statutory limitations contained in § 415 of the Communications Act;

(2) If recovery of damages is clearly and unequivocally requested in the original complaint, by identification of the claim giving rise to the damages and a general statement of the nature of the injury suffered, such claim for damages shall relate back to the filing date of the original formal complaint if:

(i) The complainant clearly states in the original complaint that it chooses to have liability and prospective relief issues resolved prior to the consideration of damages issues; and

(ii) The complainant files its supplemental complaint for damages within sixty days after public notice (as defined in § 1.4(b) of the Commission's rules) of a decision on the merits of the original complaint.

(3) Where a complainant voluntarily elects to seek the recovery of damages upon a supplemental complaint in accordance with the requirements of subpart (b)(2) of this section, the Commission will resolve the liability complaint within any applicable complaint resolution deadlines contained in the Act and defer adjudication of the damages complaint until after the liability complaint has been resolved.

(c) In all cases in which recovery of damages is sought, it shall be the responsibility of the complainant to include, within either the complaint or the supplemental complaint for damages filed in accordance with subpart (b) of this section, 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 determine the amount of such damages; or

(2) An explanation of:

(i) The information not in the possession of the complaining party that is necessary to develop a detailed computation of damages;

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

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

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

(d) Where a complainant voluntarily elects to seek the recovery of damages upon a supplemental complaint in accordance with the requirements of subpart (b)(2) of this section, the following procedures may apply in the event that the Commission determines that the defendant is liable based upon its review of the original complaint:

(1) Issues concerning the amount, if any, of damages may be either designated by the Bureau for hearing before, or, if the parties agree, submitted for mediation to, a Commission Administrative Law Judge. Such Administrative Law Judge shall be chosen in the following manner:

(i) By agreement of the parties and the Chief Administrative Law Judge; or

(ii) In the absence of such agreement, the Chief Administrative Law Judge shall designate the Administrative Law Judge.

(2) 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:

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

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

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

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

(3) The Commission may, in its discretion, suspend ongoing damages proceedings for fourteen days, to provide the parties with a time within which to pursue settlement negotiations and/or alternative dispute resolution procedures.

(4) The Commission may, in its discretion, end adjudication of damages with a determination of the sufficiency of a damages computation method or formula. No such method or formula shall contain a provision to offset any claim of the defendant against the complainant.

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 thirty days of the release date of the damages order, parties shall submit jointly to the Commission either:

(i) A statement detailing the parties' agreement as to the amount of damages;

(ii) 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

(iii) A statement detailing the bases for the continuing dispute and the reasons why no agreement can be reached.

Sec. 1.723 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.

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

Sec. 1.724 Answers.

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

(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 defenses to each claim asserted and shall 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. 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 contain proposed findings of fact, conclusions of law, and legal analysis relevant to the claims and arguments set forth in the answer.

(d) Averments in a pleading to which a responsive pleading is required, other than those as to the amount of damages, are deemed to be admitted when not denied in this responsive pleading.

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

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

(1) The name, address, and position of each individual believed to have firsthand knowledge of the facts alleged with particularity in the answer, along with a description of the facts within any such individual's knowledge;

(2) A description of all documents, data compilations and tangible things in the defendant's possession, custody, or control, that are relevant to the facts alleged with particularity in the answer. Such description shall include for each document: (i) the date it was prepared, mailed, transmitted, or otherwise disseminated; (ii) the author, preparer, or other source; (iii) the recipient(s) or intended recipient(s); (iv) its physical location; and (v) a description of its relevance to the matters in dispute.

(3) A complete description of the manner in which the defendant identified all persons with information and designated all documents, data compilations and tangible things as being relevant to the dispute, including, but not limited to, identifying the individual(s) that conducted the information search and the criteria used to identify such persons, documents, data compilations, tangible things, and information;

(g) The answer shall attach copies of all affidavits, documents, data compilations and tangible things in the defendant's possession, custody, or control, upon which the defendant relies or intends to rely to support the facts alleged and legal arguments made in the answer.

(h) The answer shall contain certification that the defendant has, in good faith, discussed or attempted to discuss, the possibility of settlement with the complainant prior to the filing of the formal complaint. Such certification shall include a brief summary of all steps taken to resolve the dispute prior to the filing of the formal complaint. If no such steps were taken, such certificate shall state the reason(s) why the defendant believed such steps would be fruitless;

(i) Where the complaint is filed pursuant to 47 U.S.C. § 271(d)(6)(B), the defendant shall clearly indicate its willingness to waive the 90-day resolution deadline contained within 47 U.S.C. § 271(d)(6)(B), in accordance with the requirements of § 1.736 of the rules.

(j) The defendant may petition the staff, pursuant to § 1.3 of the rules, for a waiver of any of the requirements of this section. Such waiver may be granted for good cause shown.

Sec. 1.725 Cross-complaints and counterclaims.

Cross-complaints seeking any relief within the jurisdiction of the Commission against any carrier that is a party (complainant or defendant) to that proceeding are expressly prohibited. Any claim that might otherwise meet the requirements of a cross-complaint may be filed as a separate complaint in accordance with §§ 1.720-1.736 of the rules. For purposes of this subpart, the term "cross-complaint" shall include counterclaims.

Sec. 1.726 Replies.

(a) Within three days after service of an answer containing affirmative defenses presented in accordance with the requirements of § 1.724(e) of the rules, a complainant may file and serve a reply containing statements of relevant, material facts that shall be responsive to only those specific factual allegations made by the defendant in support of its affirmative defenses. Replies which contain other allegations or arguments will not be accepted or considered by the Commission.

(b) 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 contain proposed findings of fact, conclusions of law, and legal analysis relevant to the claims and arguments set forth in the reply.

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

(1) The name, address and position of each individual believed to have firsthand knowledge about the facts alleged with particularity in the reply, along with a description of the facts within any such individual's knowledge.

(2) A description of all documents, data compilations and tangible things in the complainant's possession, custody, or control that are relevant to the facts alleged with particularity in the reply. Such description shall include for each document (i) the date prepared, mailed, transmitted, or otherwise disseminated; (ii) the author, preparer, or other source; (iii) the recipient(s) or intended recipient(s); (iv) its physical location; and (v) a description of its relevance to the matters in dispute.

(3) A complete description of the manner in which the complainant identified all persons with information and designated all documents, data compilations and tangible things as being relevant to the dispute, including, but not limited to, identifying the individual(s) that conducted

the information search and the criteria used to identify such persons, documents, data compilations, tangible things, and information;

(e) The reply shall attach copies of all affidavits, documents, data compilations and tangible things in the complainant's possession, custody, or control upon which the complainant relies or intends to rely to support the facts alleged and legal arguments made in the reply.

(f) The complainant may petition the staff, pursuant to § 1.3 of the rules, for a waiver of any of the requirements of this section. Such waiver may be granted for good cause shown.

Sec. 1.727 Motions.

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

(b) All dispositive motions shall contain proposed findings of fact and conclusions of law, with supporting legal analysis, relevant to the contents of the pleading. 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. All facts relied upon in motions must be supported by documentation or affidavits pursuant to the requirements of § 1.720(c) of the rules, except for those facts of which official notice may be taken.

(c) The moving party shall provide a proposed order for adoption, which appropriately incorporates the basis therefor, including proposed findings of fact and conclusions of law relevant to the pleading. The proposed order shall be clearly marked as a "Proposed Order." The proposed order shall be submitted both as a hard copy and on computer disk in accordance with the requirements of § 1.734(d) of the rules. Where appropriate, the proposed order format should conform to that of a reported FCC order.

(d) Oppositions to any motion shall be accompanied by a proposed order for adoption, which appropriately incorporates the basis therefor, including proposed findings of fact and conclusions of law relevant to the pleading. The proposed order shall be clearly captioned as a "Proposed Order." The proposed order shall be submitted both as a hard copy and on computer disk in accordance with the requirements of § 1.734(d) of the rules. Where appropriate, the proposed order format should conform to that of a reported FCC order.

(e) Oppositions to motions may be filed and served within five business days after the motion is filed and served and not after. Oppositions shall be limited to the specific issues and allegations contained in such 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 of the motion.

(f) No reply may be filed to an opposition to a motion.

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

(h) Amendments or supplements to complaints to add new claims or requests for relief are prohibited. Parties are responsible, however, for the continuing accuracy and completeness of all information and supporting authority furnished in a pending complaint proceeding as required under § 1.720(g) of the rules.

Sec. 1.728 Formal complaints not stating a cause of action; defective pleadings.

(a) Any document purporting to be a formal complaint which does not state a cause of action under the Communications Act will be dismissed. In such case, any amendment or supplement to such document will be considered a new filing which must be made within the statutory periods of limitations of actions contained in section 415 of the Communications Act.

(b) Any other pleading filed in a formal complaint proceeding not in conformity with the requirements of the applicable rules in this part 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.

Sec. 1.729 Discovery.

(a) A complainant may file with the Commission and serve on a defendant, concurrently with its complaint, a request for up to ten written interrogatories. A defendant may file with the Commission and serve on a complainant, during the period starting with the service of the complaint and ending with the service of its answer, a request for up to ten written interrogatories. A complainant may file with the Commission and serve on a defendant, within three calendar days of service of the defendant's answer, a request for up to five written interrogatories. Subparts of any interrogatory will be counted as separate interrogatories for purposes of compliance with this limit. Requests for interrogatories filed and served pursuant to this procedure may be used to seek discovery of any non-privileged matter that is relevant to the

material facts in dispute in the pending proceeding, provided, however, that requests for interrogatories filed and served by a complainant after service of the defendant's answer shall be limited in scope to specific factual allegations made by the defendant in support of its affirmative defenses. This procedure may not be employed for the purpose of delay, harassment or obtaining information that is beyond the scope of permissible inquiry related to the material facts in dispute in the pending proceeding.

(b) Requests for interrogatories filed and served pursuant to subpart (a) of this rule shall contain a listing of the interrogatories requested and 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) A responding party shall file with the Commission and serve on the propounding party any opposition and objections to the requests for interrogatories as follows: (1) by the defendant, within ten calendar days of service of the requests for interrogatories served simultaneously with the complaint and within five calendar days of the requests for interrogatories served following service of the answer; (2) by the complainant, within five calendar days of service of the requests for interrogatories; and (3) in no event less than three calendar days prior to the initial status conference as provided for in § 1.733(a) of the rules.

(d) Commission staff will consider the requests for interrogatories, properly filed and served pursuant to subpart (a) of this section, along with any objections or oppositions thereto, properly filed and served pursuant to subpart (b) of this section, at the initial status conference, as provided for in § 1.733(a)(5) of the rules, and at that time determine the interrogatories, if any, to which parties shall respond, and set the schedule of such response.

(e) The interrogatories ordered to be answered pursuant to subpart (d) of this section are to 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. The answers shall be filed with the Commission and served on the propounding party.

(f) A propounding party asserting that a responding party has provided an inadequate or insufficient response to Commission-ordered 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 § 1.727 of the rules.

(g) The Commission may, in its discretion, require parties to provide documents to the Commission in a scanned or other electronic format that provides (1) indexing by useful

identifying information about the documents; and (2) technology that allows staff to annotate the index so as to make the format an efficient means of reviewing the documents.

(h) The Commission may allow additional discovery, including, but not limited to, document production, depositions and/or additional interrogatories. In its discretion, the Commission 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.

Sec. 1.731 Confidentiality of information produced or exchanged by the parties.

(a) Any materials generated in the course of a formal complaint proceeding may be designated as proprietary by that 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). Any party asserting confidentiality for such materials shall so indicate by clearly marking each page, or portion thereof, for which a proprietary designation is claimed. If a proprietary designation is challenged, the party claiming confidentiality shall have the burden of demonstrating, by a preponderance of the evidence, that the material designated as proprietary falls under the standards for nondisclosure enunciated in the FOIA.

(b) Materials marked as proprietary may be disclosed 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) Counsel of record representing the parties in the complaint action and any support personnel employed by such attorneys;

(2) Officers or employees of the opposing party who are named by the opposing party as being directly involved in the prosecution or defense of the case;

(3) Consultants or expert witnesses retained by the parties;

(4) The Commission and its staff; and

(5) Court reporters and stenographers in accordance with the terms and conditions of this section.

(c) These individuals shall not disclose information designated as proprietary 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 individual who is provided access to the information shall sign a notarized statement affirmatively stating that the individual has personally reviewed the Commission's rules and understands the limitations they impose on the signing party.

(d) No copies of materials marked proprietary may be made except copies to be used by persons designated in paragraph (b) of this section. Each party shall maintain a log recording the number of copies made of all proprietary material and the persons to whom the copies have been provided.

(e) Upon termination of a formal complaint proceeding, including all appeals and petitions, all originals and reproductions of any proprietary 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 complaint proceeding, any notes or other work product derived in whole or in part from the proprietary materials of an opposing or third party shall be destroyed.

Sec. 1.732 Other required written submissions.

(a) The Commission may, in its discretion, or upon a party's motion showing good cause, require the parties to file briefs summarizing the facts and issues presented in the pleadings and other record evidence.

(b) 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. Claims and defenses previously made but not reflected in the briefs will be deemed abandoned. The Commission may, in its discretion, limit the scope of any briefs to certain subjects or issues. A party shall attach to its brief copies of all documents, data compilations, tangible things, and affidavits upon which such party relies or intends to rely to support the facts alleged and legal arguments made in its brief and such brief shall contain a full explanation of how each attachment is relevant to the issues and matters in dispute. All such attachments to a brief shall be documents, data compilations or tangible things, or affidavits made by persons, that were identified by any party in its information designations filed pursuant to Sections 1.721 (a)(10)(i), (10)(ii), 1.724 (f)(1), (f)(2), and 1.726 (d)(1), (d)(2). Any other supporting documentation or affidavits that is attached to a brief must be accompanied by a full explanation of the relevance of such materials and why such materials were not identified in the information designations. These briefs shall contain the proposed findings of fact and conclusions of law which the filing party is urging the Commission to adopt, with specific citation to the record, and supporting relevant authority and analysis.

(c) In cases in which discovery is not conducted, absent an order by the Commission that briefs be filed, parties may not submit briefs. If the Commission does authorize the filing of briefs in cases in which discovery is not conducted, briefs shall be filed concurrently by both the complainant and defendant at such time as designated by the Commission staff and in accordance with the provisions of this section.

(d) In cases in which discovery is conducted, briefs shall be filed concurrently by both the complainant and defendant at such time designated by the Commission staff.

(e) Briefs containing information which is claimed by an opposing or third party to be proprietary under § 1.731 shall be submitted to the Commission in confidence pursuant to the requirements of § 0.459 of this chapter and clearly marked Not for Public Inspection. An edited version removing all proprietary data shall also be filed with the Commission for inclusion in the public file. Edited versions shall be filed within five days from the date the unedited brief is submitted, and served on opposing parties.

(f) Initial briefs shall be no longer than twenty-five pages. Reply briefs shall be no longer than ten pages. Either on its own motion or upon proper motion by a party, the Commission staff may establish other page limits for briefs.

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

(h) The parties shall submit a joint statement of stipulated facts, disputed facts, and key legal issues no later than two business days prior to the initial status conference, scheduled in accordance with the provisions of section 1.733(a) of these rules.

Section 1.733 Status conference.

(a) In any complaint proceeding, the Commission may, in its discretion, direct the attorneys and/or the parties to appear before it for a status conference. Unless otherwise ordered by the Commission, an initial status conference shall take place, at the time and place designated by the Commission staff, ten business days after the date the answer is due to be filed. A status conference may include discussion of:

(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) Parties shall meet and confer prior to the initial status conference to discuss (1) settlement prospects; (2) discovery; (3) issues in dispute; (4) schedules for pleadings; (5) joint statement of stipulated facts, disputed facts, and key legal issues; and (6) in a 47 U.S.C. § 271(d)(6)(B) proceeding, whether or not the parties agree to waive the 47 U.S.C. § 271(d)(6)(B) 90-day resolution deadline. Parties shall submit a joint statement of all proposals agreed to and disputes remaining as a result of such meeting to Commission staff at least two business days prior to the scheduled initial status conference.

(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 interlocutory 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) Parties may make, upon written notice to the Commission and all attending parties at least three business days prior to the status conference, an audio recording of the Commission staff's summary of its oral rulings. Alternatively, upon agreement among all attending parties and written notice to the Commission at least three business days prior to the status conference, the parties may make an audio recording of, or use a stenographer to transcribe, the oral presentations and exchanges between and among the participating parties, insofar as such communications are "on-the-record" as determined by the Commission staff, as well as the Commission staff's summary of its oral rulings. A complete transcript of any audio recording or stenographic transcription shall be filed with the Commission as part of the record, pursuant to the provisions of subpart (f)(2) of this section. The parties shall make all necessary arrangements for the use of a stenographer and the cost of transcription, absent agreement to the contrary, will be shared equally by all parties that agree to make the record of the status conference.

(f) The parties in attendance, unless otherwise directed, shall either:

(1) Submit a joint proposed order memorializing the oral rulings made during the conference to the Commission by 5:30 pm, Eastern Time, on the business day following the date of the status conference, or as otherwise directed by Commission staff. In the event the parties in attendance cannot reach agreement as to the rulings that were made, the joint proposed order shall include the rulings on which the parties agree, and each party's alternative proposed rulings for those rulings on which they cannot agree. Commission staff will review and make revisions, if necessary, prior to signing and filing the submission as part of the record. The proposed order shall be submitted both as hard copy and on computer disk in accordance with the requirements of § 1.734(d) of the rules; or

(2) Pursuant to the requirements of subpart (e) of this section, submit to the Commission by 5:30 pm., Eastern Time, on the third business day following the status conference or as otherwise directed by Commission staff either:

(i) A transcript of the audio recording of the Commission staff's summary of its oral rulings;

(ii) A transcript of the audio recording of the oral presentations and exchanges between and among the participating parties, insofar as such communications are "on-the-record" as determined by the Commission staff, and the Commission staff's summary of its oral rulings; or

(iii) A stenographic transcript of the oral presentations and exchanges between and among the participating parties, insofar as such communications are "on-the-record" as determined by the Commission staff, and the Commission staff's summary of its oral rulings.

(g) 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.

(h) 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 and/or counsel present.

Sec. 1.734 Specifications as to pleadings, briefs, and other documents; subscription.

(a) All papers filed in any formal complaint proceeding must be drawn in conformity with the requirements of §§ 1.49 and 1.50.

(b) All averments of claims or defenses in complaints and answers shall be made in numbered paragraphs. 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.

(c) The original of all pleadings and other submissions filed by any party shall be signed by that party, or by the party's attorney. The signing party shall state his or her address and telephone number and the date on which the document was signed. Copies should be conformed to the original. Except when otherwise specifically provided by rule or statute, pleadings need not be verified. The signature of an attorney or party shall be a certificate that the attorney or party has read the pleading, motion, or other paper; that 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.

Sec. 1.735 Copies; service; separate filings against multiple defendants.

(a) Complaints may generally be brought against only one named carrier; such actions may not be brought against multiple defendants unless the defendant carriers 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 file an original copy of the complaint, accompanied by the correct fee, in accordance with Part I, subpart G (*see* 47 CFR 1.1105(1)(c)-(d)) and, on the same day:

(1) File three copies of the complaint with the Office of the Commission Secretary;

(2) If the complaint is filed against a carrier concerning matters within the responsibility of the Common Carrier Bureau (*see* 47 C.F.R § 0.291), serve two copies on the Chief, Formal Complaints and Investigations Branch, Enforcement Division, Common Carrier Bureau;

(3) If the complaint is filed against a wireless telecommunications carrier concerning matters within the responsibility of the Wireless Telecommunications Bureau (*see* 47 C.F.R. § 0.331), serve two copies on the Chief, Compliance and Litigation Branch, Enforcement and Consumer Information Division, Wireless Telecommunications Bureau;

(4) If the complaint is filed against a carrier concerning matters within the responsibility of the International Bureau (see 47 C.F.R. § 0.261), serve a copy on the Chief, Telecommunications Division, International Bureau, and serve two copies on the Chief, Formal Complaints and Investigations Branch, Enforcement Division, Common Carrier Bureau; and

(5) If a complaint is addressed against multiple defendants, pay a separate fee, in accordance with Part I, subpart G (*see* 47 CFR 1.1105(1)(c)-(d)), and file three copies of the complaint with the Office of the Commission Secretary for each additional defendant.

(c) Generally, a separate file is set up for each defendant. An original plus two copies shall be filed of all pleadings and documents, other than the complaint, for each file number assigned.

(d) The complainant shall serve the complaint by hand 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 subpart (b) of this section.

(e) Upon receipt of the complaint by the Commission, the Commission shall promptly send, by facsimile transmission to each defendant named in the complaint, notice of the filing of the complaint. The Commission shall send, by regular U.S. mail delivery, to each defendant named in the complaint, a copy of the complaint. The Commission shall additionally send, by regular U.S.

mail to all parties, a schedule detailing the date the answer will be due and the date, time and location of the initial status conference.

(f) All subsequent 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 by facsimile transmission followed by regular U.S. mail delivery, together with a proof of such service in accordance with the requirements of § 1.47(g) of the rules. Service is deemed effective as follows:

(1) Service by hand delivery that is delivered to the office of the recipient by 5:30 pm, 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 pm, 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 such as, or comparable to, the US Postal Service Express Mail, United Parcel Service or Federal Express; or

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

Section 1.736 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 ninety-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 ninety-day resolution deadline to the Commission staff at the initial status conference, to be held in accordance with § 1.733 of the rules.

(b) Requests for waiver of the ninety-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.

APPENDIX C

ACCESS BOARD GUIDELINES

36 C.F.R., PART 1193 — TELECOMMUNICATIONS ACT ACCESSIBILITY GUIDELINES

Subpart A — General

Sec.
1193.1 Purpose.
1193.2 Scoping.
1193.3 Definitions.

Subpart B — General Requirements

1193.21 Accessibility, usability, and compatibility.
1193.23 Product design, development, and evaluation.

Subpart C — Requirements for Accessibility and Usability

1193.31 Accessibility and usability.
1193.33 Information, documentation, and training.
1193.35 Redundancy and selectability. [Reserved]
1193.37 Information pass through.
1193.39 Prohibited reduction of accessibility, usability, and compatibility.
1193.41 Input, control, and mechanical functions.
1193.43 Output, display, and control functions.

Subpart D — Requirements for Compatibility With Peripheral Devices and Specialized Customer Premises Equipment

1193.51 Compatibility.

Subpart A — General

Sec. 1193.1 Purpose.

This part provides requirements for accessibility, usability, and compatibility of telecommunications equipment and customer premises equipment covered by the Telecommunications Act of 1996 (47 U.S.C. 255).

Sec. 1193.2 Scoping.

This part provides requirements for accessibility, usability, and compatibility of new products and existing products which undergo substantial change or upgrade, or for which new releases are distributed. This part does not apply to minor or insubstantial changes to existing products that do not affect functionality.

Sec. 1193.3 Definitions.

Terms used in this part shall have the specified meaning unless otherwise stated. Words, terms and phrases used in the singular include the plural, and use of the plural includes the singular.

ACCESSIBLE. Telecommunications equipment or customer premises equipment which comply with the requirements of subpart C of this part.

ALTERNATE FORMATS. Alternate formats may include, but are not limited to, Braille, ASCII text, large print, and audio cassette recording.

ALTERNATE MODES. Different means of providing information to users of products including product documentation and information about the status or operation of controls. Examples of alternate modes may include, but are not limited to, voice, fax, relay service, TTY, Internet posting, captioning, text-to-speech synthesis, and video description.

COMPATIBLE. Telecommunications equipment or customer premises equipment which comply with the requirements of subpart D of this part.

CUSTOMER PREMISES EQUIPMENT. Equipment employed on the premises of a person (other than a carrier) to originate, route, or terminate telecommunications.

MANUFACTURER. A manufacturer of telecommunications equipment or customer premises equipment that sells to the public or to vendors that sell to the public; a final assembler.

PERIPHERAL DEVICES. Devices employed in connection with telecommunications equipment or customer premises equipment to translate, enhance, or otherwise transform telecommunications into a form accessible to individuals with disabilities.

PRODUCT. Telecommunications equipment or customer premises equipment.

READILY ACHIEVABLE. Easily accomplishable and able to be carried out without much difficulty or expense.

SPECIALIZED CUSTOMER PREMISES EQUIPMENT. Equipment, employed on the premises of a person (other than a carrier) to originate, route, or terminate telecommunications, which is commonly used by individuals with disabilities to achieve access.

TELECOMMUNICATIONS. The transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received.

TELECOMMUNICATIONS EQUIPMENT. Equipment, other than customer premises equipment, used by a carrier to provide telecommunications services, and includes software integral to such equipment (including upgrades).

TELECOMMUNICATIONS SERVICE. The offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used.

TTY. An abbreviation for teletypewriter. Machinery or equipment that employs interactive text based communications through the transmission of coded signals across the standard telephone network. TTYs can include, for example, devices known as TDDs (telecommunication display devices or telecommunication devices for deaf persons) or computers with special modems. TTYs are also called text telephones.

USABLE. Means that individuals with disabilities have access to the full functionality and documentation for the product, including instructions, product information (including accessible feature information), documentation, and technical support functionally equivalent to that provided to individuals without disabilities.

Subpart B — General Requirements

Sec. 1193.21 Accessibility, usability, and compatibility.

Where readily achievable, telecommunications equipment and customer premises equipment shall comply with the requirements of subpart C of this part. Where it is not readily achievable to comply with subpart C of this part, telecommunications equipment and customer premises equipment shall comply with the requirements of subpart D of this part, if readily achievable.

Sec. 1193.23 Product design, development, and evaluation.

(a) Manufacturers shall evaluate the accessibility, usability, and compatibility of telecommunications equipment and customer premises equipment and shall incorporate such evaluation throughout product design, development, and fabrication, as early and consistently as possible. Manufacturers shall identify barriers to accessibility and usability as part of such a product design and development process.

(b) In developing such a process, manufacturers shall consider the following factors, as the manufacturer deems appropriate:

(1) Where market research is undertaken, including individuals with disabilities in target populations of such research;

(2) Where product design, testing, pilot demonstrations, and product trials are conducted, including individuals with disabilities in such activities;

(3) Working cooperatively with appropriate disability-related organizations; and

(4) Making reasonable efforts to validate any unproven access solutions through testing with individuals with disabilities or with appropriate disability-related organizations that have established expertise with individuals with disabilities.

Subpart C — Requirements for Accessibility and Usability

Sec. 1193.31 Accessibility and usability.

When required by Sec. 1193.21, telecommunications equipment and customer premises equipment shall be accessible to and usable by individuals with disabilities and shall comply with Secs. 1193.33 through 1193.43 as applicable.

Sec. 1193.33 Information, documentation, and training.

(a) Manufacturers shall ensure access to information and documentation it provides to its customers. Such information and documentation includes user guides, installation guides for end-user installable devices, and product support communications, regarding both the product in general and the accessibility features of the product. Manufacturers shall take such other steps as necessary including:

(1) Providing a description of the accessibility and compatibility features of the product upon request, including, as needed, in alternate formats or alternate modes at no additional charge;

(2) Providing end-user product documentation in alternate formats or alternate modes upon request at no additional charge; and

(3) Ensuring usable customer support and technical support in the call centers and service centers which support their products at no additional charge.

(b) Manufacturers shall include in general product information the contact method for obtaining the information required by paragraph (a) of this section.

(c) Where manufacturers provide employee training, they shall ensure it is appropriate to an employee's function. In developing, or incorporating existing training programs, consideration shall be given to the following factors:

(1) Accessibility requirements of individuals with disabilities;
(2) Means of communicating with individuals with disabilities;
(3) Commonly used adaptive technology used with the manufacturer's products;
(4) Designing for accessibility; and
(5) Solutions for accessibility and compatibility.

Sec. 1193.35 Redundancy and selectability. [Reserved]

Sec. 1193.37 Information pass through.

Telecommunications equipment and customer premises equipment shall pass through cross-manufacturer, non-proprietary, industry-standard codes, translation protocols, formats or other information necessary to provide telecommunications in an accessible format. In particular, signal compression technologies shall not remove information needed for access or shall restore it upon decompression.

Sec. 1193.39 Prohibited reduction of accessibility, usability, and compatibility.

(a) No change shall be undertaken which decreases or has the effect of decreasing the net accessibility, usability, or compatibility of telecommunications equipment or customer premises equipment.

(b) Exception: Discontinuation of a product shall not be prohibited.

Sec. 1193.41 Input, control, and mechanical functions.

Input, control, and mechanical functions shall be locatable, identifiable, and operable in accordance with each of the following, assessed independently:

(a) OPERABLE WITHOUT VISION. Provide at least one mode that does not require user vision.

(b) OPERABLE WITH LOW VISION AND LIMITED OR NO HEARING. Provide at least one mode that permits operation by users with visual acuity between 20/70 and 20/200, without relying on audio output.

(c) OPERABLE WITH LITTLE OR NO COLOR PERCEPTION. Provide at least one mode that does not require user color perception.

(d) OPERABLE WITHOUT HEARING. Provide at least one mode that does not require user auditory perception.

(e) OPERABLE WITH LIMITED MANUAL DEXTERITY. Provide at least one mode that does not require user fine motor control or simultaneous actions.

(f) OPERABLE WITH LIMITED REACH AND STRENGTH. Provide at least one mode that is operable with user limited reach and strength.

(g) OPERABLE WITHOUT TIME-DEPENDENT CONTROLS. Provide at least one mode that does not require a response time. Alternatively, a response time may be required if it can be by-passed or adjusted by the user over a wide range.

(h) OPERABLE WITHOUT SPEECH. Provide at least one mode that does not require user speech.

(i) OPERABLE WITH LIMITED COGNITIVE SKILLS. Provide at least one mode that minimizes the cognitive, memory, language, and learning skills required of the user.

Sec. 1193.43 Output, display, and control functions.

All information necessary to operate and use the product, including but not limited to, text, static or dynamic images, icons, labels, sounds, or incidental operating cues, shall comply with each of the following, assessed independently:

(a) AVAILABILITY OF VISUAL INFORMATION. Provide visual information through at least one mode in auditory form.

(b) AVAILABILITY OF VISUAL INFORMATION FOR LOW VISION USERS. Provide visual information through at least one mode to users with visual acuity between 20/70 and 20/200 without relying on audio.

(c) ACCESS TO MOVING TEXT. Provide moving text in at least one static presentation mode at the option of the user.

(d) AVAILABILITY OF AUDITORY INFORMATION. Provide auditory information through at least one mode in visual form and, where appropriate, in tactile form.

(e) AVAILABILITY OF AUDITORY INFORMATION FOR PEOPLE WHO ARE HARD OF HEARING. Provide audio or acoustic information, including any auditory feedback tones that are important for the use of the product, through at least one mode in enhanced auditory fashion (i.e., increased amplification, increased signal-to-noise ratio, or combination). For transmitted voice signals, provide a gain adjustable up to a minimum of 20 dB. For incremental volume control, provide at least one intermediate step of 12 dB of gain.

(f) PREVENTION OF VISUALLY-INDUCED SEIZURES. Visual displays and indicators shall minimize visual flicker that might induce seizures in people with photosensitive epilepsy.

(g) AVAILABILITY OF AUDIO CUTOFF. Where a product delivers audio output through an external speaker, provide an industry standard connector for headphones or personal listening devices (e.g., phone-like handset or earcup) which cuts off the speaker(s) when used.

(h) NON-INTERFERENCE WITH HEARING TECHNOLOGIES. Reduce interference to hearing technologies (including hearing aids, cochlear implants, and assistive listening devices) to the lowest possible level that allows a user to utilize the product.

(i) HEARING AID COUPLING. Where a product delivers output by an audio transducer which is normally held up to the ear, provide a means for effective wireless coupling to hearing aids.

Subpart D — Requirements for Compatibility With Peripheral Devices and Specialized Customer Premises Equipment

Sec. 1193.51 Compatibility.

When required by subpart B of this part, telecommunications equipment and customer premises equipment shall be compatible with peripheral devices and specialized customer premises equipment commonly used by individuals with disabilities to achieve accessibility, and shall comply with the following provisions, as applicable:

(a) EXTERNAL ELECTRONIC ACCESS TO ALL INFORMATION AND CONTROL MECHANISMS. Information needed for the operation of products (including output, alerts, icons, on-line help, and documentation) shall be available in a standard electronic text format on a cross-industry standard port and all input to and control of a product shall allow for real time operation by electronic text input into a cross-industry standard external port and in cross-industry standard format. The cross-industry standard port shall not require manipulation of a connector by the user.

(b) CONNECTION POINT FOR EXTERNAL AUDIO PROCESSING DEVICES. Products providing auditory output shall provide the auditory signal at a standard signal level through an industry standard connector.

(c) COMPATIBILITY OF CONTROLS WITH PROSTHETICS. Touchscreen and touch-operated controls shall be operable without requiring body contact or close body proximity.

(d) TTY CONNECTABILITY. Products which provide a function allowing voice communication and which do not themselves provide a TTY functionality shall provide a standard non-acoustic connection point for TTYs. It shall also be possible for the user to easily turn any microphone on and off to allow the user to intermix speech with TTY use.

(e) TTY SIGNAL COMPATIBILITY. Products, including those providing voice communication functionality, shall support use of all cross-manufacturer non-proprietary standard signals used by TTYs.

APPENDIX D

LIST OF PLEADINGS

Due dates specified by the *Notice of Inquiry* for comments and reply comments were October 28, 1996, and November 27, 1996, respectively. Unless accompanied by a motion to accept a late-filed pleading, filings made after those dates are listed in this Appendix as informal comments. All comments and informal comments followed by an asterisk were also submitted on diskette or filed electronically and posted on the Commission's Internet Web Site.

Comments

AFB (American Foundation for the Blind)*
Arkenstone*
ASHA (American Speech-Language-Hearing Association)*
AT&T (AT&T Corp.)*
Barkley (Michael J. Barkley)*
Bell Atlantic (Bell Atlantic Telephone Companies)*
BellSouth (BellSouth Corporation)*
CAN (Consumer Action Network)
CCD (Consortium for Citizens with Disabilities Task Force on Communications Access & Telecommunications)*
CEMA (Consumer Electronics Manufacturers Association)*
CTIA (Cellular Telecommunications Industry Association)*
Ericsson (Ericsson Inc.)*
Inclusive (Inclusive Technologies)*
ITI (Information Technology Industry Council)*
Lucent (Lucent Technologies Inc.)*
MATP (Massachusetts Assistive Technology Partnership)*
MCI (MCI Telecommunications Corporation)*
Microsoft (Microsoft Corporation)*
Motorola (Motorola, Inc.)*
Mulvany (Dana Mulvany)*
NAD (National Association of the Deaf)*
National Coalition (National Coalition for Blind and Visually Impaired Persons for Increased Video Access)

NCD (National Council on Disability)*
Nortel (Northern Telecom Inc.)*
NTN (Narrative Television Network)*
NYNEX (NYNEX Telephone Companies)*
Omnipoint (Omnipoint Corporation)*
Pacific (Pacific Telesis Group)*
PCIA (Personal Communications Industry Association)*
Prosser (Annie Kate Prosser)
P&A-ULS (Protection and Advocacy Program - University Legal Services, Inc.)*
Railfone-Amtrak (Railfone-Amtrak Venture)*
SHHH (Self Help for Hard of Hearing People, Inc.)*
Siemens (Siemens Business Communication Systems, Inc.)*
Sprint (Sprint Corporation)*
SWBT (Southwestern Bell Telephone Company)*
TIA (Telecommunications Industry Association)*
Trace (Trace Research and Development Center)*
Tulsa (Tulsa Junior College)
UCPA (United Cerebral Palsy Associations)*
USTA (United States Telephone Association)*
U S WEST (U S WEST, Inc.)*
Waldron (Jo Waldron)*

Informal Comments

AAA (American Academy of Audiology)*
Langlois (Brian Langlois)
NVRC (Northern Virginia Resource Center for Deaf and Hard of Hearing Persons)
Orton (Rebecca Orton)
Torczyner (Jerome Torczyner)
Utratec (Ultratec, Inc.)
Winters (Michael A. Winters)

Reply Comments

AAA (American Academy of Audiology)*
AAAD (American Athletic Association of the Deaf, Inc.)
ACB (American Council of the Blind)*
AFB (American Foundation for the Blind)*

ALDA (Association of Late-Deafened Adults)
ASDC (American Society for Deaf Children)
AT&T (AT&T Corp.)*
CEMA (Consumer Electronics Manufacturers Association)*
COR (Council of Organizational Representatives)*
CTIA (Cellular Telecommunications Industry Association)*
Gallaudet (Gallaudet University)*
GTE (GTE Service Corporation)
ITI (Information Technology Industry Council)*
Lucent (Lucent Technologies Inc.)*
MATP-TAP (Massachusetts Assistive Technology Partnership and Tech Act Projects)*
MCI (MCI Telecommunications Corporation)*
MOD (Massachusetts Office on Disability)*
Motorola (Motorola, Inc.)*
NAD (National Association of the Deaf)*
Nelson (David J. Nelson)
Netscape (Netscape Communications Corporation)*
Pacific (Pacific Telesis Group)*
PCIA (Personal Communications Industry Association)*
SHHH (Self Help for Hard of Hearing People, Inc. and Gene A. Bechtel)
Siemens (Siemens Business Communications Systems, Inc.)*
Sprint (Sprint Corporation)*
TIA (Telecommunications Industry Association)*
Trace (Trace Research and Development Center)*
UCPA (United Cerebral Palsy Associations)
WID (World Institute on Disability)*
WSAD (Washington State Association of the Deaf)

Informal Replies

AAA (American Academy of Audiology)
Alaska (Alaska Association of the Deaf)
NCD (National Council on Disability)*
RID (The Registry of Interpreters for the Deaf, Inc.)
Statewide (Statewide Independent Living Council of Tennessee)
Waldron (Jo Waldron)*

APPENDIX E

INITIAL REGULATORY FLEXIBILITY ANALYSIS

As required by the Regulatory Flexibility Act (RFA),[1] the Commission has prepared this Initial Regulatory Flexibility Analysis (IRFA) of the expected significant economic impact on small entities of the policies and rules proposed in this Notice of Proposed Rulemaking (Notice). Written public comments are requested on this IRFA. Comments must be identified as responses to the IRFA and must be filed by the deadlines for comments on the Notice provided in the Procedural Matters Section of the Notice.[2] The Commission will send a copy of the Notice, including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration (SBA).[3] In addition, the Notice and IRFA (or summaries thereof) will be published in the Federal Register.[4]

A. Need for, and Objectives of, Proposed Action

This rulemaking proceeding was initiated to propose means of implementing and enforcing Section 255 of the Communications Act, as added by the Telecommunications Act of 1996.[5] This section is intended to ensure that telecommunications equipment and services will be accessible to persons with disabilities, if such accessibility is readily achievable. If accessibility is not readily achievable, then the telecommunications equipment and services are to be made compatible with specialized customer premises equipment or peripheral devices to the extent that so doing is readily achievable.

Given the fundamental role that telecommunications has come to play in today's world, we believe the provisions of Section 255 represent the most significant governmental action for people with disabilities since the passage of the Americans with Disabilities Act of 1990. Pub. L. 101-336, 104 Stat. 327 (1990) (codified at 42 U.S.C. §§ 12102(2)(A), 12181(9)) (ADA).

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[1] 5 U.S.C. §§ 601-612. The RFA has been amended by the Contract with America Advancement Act of 1996, Pub. L. No. 104-121, 110 Stat. 847 (1996) (CWAAA). Title II of the CWAAA is the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA).

[2] *See* Notice at para. 184.

[3] *See* 5 U.S.C. § 603(a).

[4] *See id*.

[5] Pub. L. 104-104, 110 Stat. 56 (1996) (1996 Act).

Inability to use telecommunications equipment and services can be life-threatening in emergency situations, can severely limit educational and employment opportunities, and can otherwise interfere with full participation in business, family, social, and other activities. We must do all we can to ensure that people with disabilities are not left behind in the telecommunications revolution and consequently isolated from contemporary life.

We set forth proposals to implement and enforce the requirement of Section 255 that telecommunications offerings be accessible to the extent readily achievable. The centerpiece of these is a "fast-track" process designed to resolve many accessibility complaints informally, providing consumers quick solutions and freeing manufacturers and service providers from the burden of more structured complaint resolution procedures. In cases where fast-track solutions are not possible, however, or where there appears to be an underlying noncompliance with Section 255, we would pursue remedies through more conventional processes. In both cases, in assessing whether service providers and equipment manufacturers have met their accessibility obligations under Section 255, we would look favorably upon demonstrations by companies that they considered accessibility throughout the development of telecommunications products.

B. Legal Basis

The proposed action is authorized under Sections 1, 4(i), 10, 201, 202, 207, 208, 255, 303(b), 303(g), 303(j), 303(r) and 403 of the Communications Act, 47 U.S.C. §§ 151, 154(i), 160, 201, 202, 207, 208, 255, 303(b), 303(g), 303(j), 303(r) and 403.

C. Description and Number of Small Entities Involved

The Notice will apply to manufacturers of telecommunications equipment and customer premises equipment (CPE). In addition, telecommunications service providers of many types will be affected, including wireline common carriers and commercial mobile radio service (CMRS) providers.[6] To the extent that software is integral to a telecommunication function, software developers or manufacturers may also be affected.[7]

Commenters are requested to provide information regarding how many entities (overall) and how many small entities would be affected by the proposed rules in the Notice. It should be noted that the resources of the regulated entity are taken into account in the determination of whether accessibility of a given product or service is readily achievable. Thus, there is an inherent

[6] *See* Notice at paras. 44-46.

[7] *See id.* at paras. 54-56.

consideration of the financial burden on the entity in its obligation to provide accessibility: if not readily achievable, the legal obligation is removed. However, all regulated entities are required to assess whether providing accessibility is readily achievable. Thus, an important issue for RFA purposes is not the absolute cost of providing accessibility, but, rather, the extent to which the cost of performing an assessment as to whether an accessibility feature is readily achievable is unduly burdensome on small entities.

The RFA directs agencies to provide a description of and, where feasible, an estimate of the number of small entities that may be affected by the proposed rules, if adopted.[8] The RFA generally defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction."[9] In addition, the term "small business" has the same meaning as the term "small business concern" under the Small Business Act.[10] A small business concern is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration (SBA).[11] A small organization is generally "any not-for-profit enterprise which is independently owned and operated and is not dominant in its field."[12] Nationwide, as of 1992, there were approximately 275,801 small organizations.[13] Below, we further describe and estimate the number of small entity licensees and other covered entities that may be affected by the proposed rules, if adopted.

1. Equipment Manufacturers

The following chart contains estimated numbers of domestic entities that may be affected by this rulemaking. The data from which this chart was developed includes firm counts that

[8] 5 U.S.C. § 603(b)(3).

[9] *Id.*, § 601(6).

[10] 5 U.S.C. § 601(3) (incorporating by reference the definition of "small business concern" in 15 U.S.C. § 632). Pursuant to the RFA, the statutory definition of a small business applies "unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register." 5 U.S.C. § 601(3).

[11] Small Business Act, 15 U.S.C. § 632 (1996).

[12] 5 U.S.C. § 601(4).

[13] 1992 Economic Census, U.S. Bureau of the Census, Table 6 (special tabulation of data under contract to Office of Advocacy of the U.S. Small Business Administration).

reflect product lines not involved in telecommunications, as defined by the 1996 Act, and also includes overlapping firm counts and firms deliberately commingled to avoid disclosing the value of individual firms' equipment shipments for the reporting period.

PRODUCT CLASS/CODE	PRODUCT DESCRIPTION	ESTIMATED FIRM COUNT	COMMENTS
36611	Switching and switchboard equipment	84	Includes central office switching equipment, PBX equipment, cellular mobile switching equipment.
36613	Carrier line equipment and modems	89	Includes repeaters, multiplex equipment, channel ba subscriber loop and carrier line equipment, and mod
36614	Other telephone and telegraph equipment	215	Includes single line, ISDN, key and public pay teleph sets, cordless handsets, data communications equipment, video conferencing equipment, voice an message processing equipment, call distributors, facsimile equipment.
36631	Communications systems and equipment	346	Includes mobile cellular equipment, conventional an trunked system equipment, SONET-standard equipm
36632	Broadcast, studio and related electronic equipment	172	Includes cable equipment possibly used to provide telephone service, such as subscriber equipment.
35715	Personal computers and workstations	89	Includes personal computers with CPE capabilities.
35716	Portable computers	35	Typically with attached display.
35771	Computer peripheral equipment, not elsewhere classified	259	Excludes common storage, scanning, and other peripherals itemized in census source document. Intended to include peripherals used for telecommunication function, and specialized CPE use conjunction with computers. Includes keyboards, manual input devices such as mouses and scanners, voice recognition equipment (88 firms).
36798	Printed circuit assemblies	648	Includes communications printed board assemblies (firms) and “other electronics,” including office equipr and point of sales (182 firms) that would commonly involve telecommunications functions.

PRODUCT CLASS/CODE	PRODUCT DESCRIPTION	ESTIMATED FIRM COUNT	COMMENTS
35751	Computer terminals	57	Includes remote batch terminals, displays, etc. For distributed computer systems involved in telecommunications, remote terminals and other components are probably essential to ensuring accessible telecommunications capabilities.
35772	Parts and subassemblies for computer peripherals and input/output equipment	72	Includes funds transfer devices and point of sale terminals (29 firms).

2. Software

Due to the convergence between telecommunications equipment, telecommunications services and the software used to control and regulate each, software developers and producers may be viewed as regulated entities under Section 255. This is particularly true of software that is used to make traditional telecommunications devices operate with CPE designed for specific disabilities.[14] We seek comment on the impact of our proposed rules on the small businesses within this industrial category.

3. Telecommunications Service Entities

a. Introduction

Commenters are requested to provide information regarding how many providers of telecommunications services, existing and potential, will be considered small businesses. The SBA has defined a small business for Radiotelephone Communications (SIC 4812) and Telephone Communications, Except Radiotelephone (SIC 4813), to be small entities when they have fewer than 1,500 employees.

We seek comment as to whether this definition is appropriate in this context. Additionally, we request each commenter to identify whether it is a small business under this

[14] *See* Notice at paras. 81-85.

definition. If the commenter is a subsidiary of another entity, this information should be provided for both the subsidiary and the parent corporation or entity.

The United States Bureau of the Census reports that, at the end of 1992, there were 3,497 firms engaged in providing telephone services, for at least one year. This number contains a variety of different categories of carriers, including local exchange carriers, interexchange carriers, competitive access providers, cellular carriers, other mobile service carriers, operator service providers, pay telephone providers, personal communications services (PCS) providers, covered specialized mobile radio providers, and resellers. It seems certain that some of those 3,497 telephone service firms may not qualify as small entities or small incumbent local exchange carriers (LECs)[15] because they are not "independently owned and operated." For example, a PCS provider that is affiliated with an interexchange carrier (IXC) having more than 1,500 employees would not meet the definition of a small business. We tentatively conclude that fewer than 3,497 telephone service firms are small entity telephone service firms or small incumbent local exchange carriers.

According to the Telecommunications Industry Revenue: Telecommunications Relay Service Fund Worksheet Data (*TRS Worksheet*), there are 3,459 interstate carriers.[16] These carriers include, *inter alia*, local exchange carriers, wireline carriers and service providers, interexchange carriers, competitive access providers, operator service providers, pay telephone providers, providers of telephone toll service, providers of telephone exchange service, and resellers.

b. Wireline Carriers and Service Providers

The SBA has developed a definition of small entities for telephone communications companies except radiotelephone (wireless) companies. The Census Bureau reports that, there were 2,321 such telephone companies in operation for at least one year at the end of 1992.[17] According to the SBA definition, as we have noted, a small business telephone company other than a radiotelephone company is one employing fewer than 1,500 persons. All but 26 of the 2,321 non-radiotelephone companies listed by the Census Bureau were reported to have fewer than 1,000 employees.

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[15] *See infra* Section C.3.b.(1).

[16] Federal Communications Commission, Common Carrier Bureau, Industry Analysis Division, Carrier Locator: Interstate Service Proiders, Figure 1 (Types of Interstate Service Providers) (Nov. 1997) (*TRS Data).*

[17] U.S. Department of Commerce, Bureau of the Census, 1992 Census of Transportation, Communications, and Utilities: Establishment and Firm Size, at Firm Size 1-123 (1995) (1992 Census).

Thus, even if all 26 of those companies had more than 1,500 employees, there would still be 2,295 non-radiotelephone companies that might qualify as small entities or small incumbent LECs. We do not have information regarding the number of carriers that are not independently owned and operated, and thus are unable at this time to estimate with greater precision the number of wireline carriers and service providers that would qualify as small business concerns under the SBA definition. Consequently, we estimate that there are fewer than 2,295 small telephone communications companies other than radiotelephone companies.

(1) Incumbent Local Exchange Carriers

Neither the Commission nor SBA has developed a definition for small providers of local exchange services. The closest applicable definition under the SBA rules is for telephone communications companies other than radiotelephone (wireless) companies.[18] The most reliable source of information regarding the number of LECs nationwide of which we are aware appears to be the data that we collect annually in connection with the *TRS Worksheet*. According to our most recent data, 1,376 companies reported that they were engaged in the provision of local exchange services.[19] Although it seems certain that some of these carriers are not independently owned and operated, or have more than 1,500 employees, we are unable at this time to estimate with greater precision the number of LECs that would qualify as small business concerns under the SBA definition. Consequently, we estimate that there are fewer than 1,376 small incumbent LECs.

Because the small incumbent LECs subject to these rules are either dominant in their field of operations or are not independently owned and operated, they are excluded (consistent with our prior practice) from the definition of "small entity" and "small business concerns."[20] Accordingly, our use of the terms "small entities" and "small businesses" does not encompass small incumbent LECs.[21] Out of an abundance of caution, however, for regulatory flexibility analysis purposes, we will consider small incumbent LECs within this analysis and use the term

[18] 13 C.F.R. § 121.201 (SIC 4813).

[19] *TRS Data*.

[20] *See* Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98, First Report and Order, 11 FCC Rcd 15499, 16144-45, 16150 (paras. 1328-30, 1342) (1996), *aff'd in part and vacated in part sub nom.* Iowa Utilities Board v. FCC, 109 F3d 418 (8th Cir. 1996), *amended on reh'g on other grounds*, 120 F3d 753 (8th Cir. 1997), *petition for cert.granted sub nom.* AT&T Corp. v. Iowa Utilities Bd., 118 S.Ct. 879 (1998).

[21] *See id.* at 16150 (para. 1342).

"small incumbent LECs" to refer to any incumbent LEC that arguably might be defined by SBA as a "small business concern."

(2) Interexchange Carriers

Neither the Commission nor SBA has developed a definition of small entities specifically applicable to providers of interexchange services. The closest applicable definition under the SBA rules is for telephone communications companies except radiotelephone (wireless) companies. The most reliable source of information regarding the number of IXCs nationwide is the data that we collect annually in connection with the *TRS Worksheet*. According to our most recent data, 149 companies reported that they were engaged in the provision of interexchange services.[22] We do not have information on the number of carriers that are not independently owned and operated, nor have more than 1,500 employees, and thus we are unable at this time to estimate with greater precision the number of IXCs that would qualify as small business concerns under the SBA definition. Consequently, we estimate that there are fewer than 149 small entity IXCs.

(3) Competitive Access Providers and Competitive Local Exchange Carriers

Neither the Commission nor SBA has developed a definition of small entities specifically applicable to providers of competitive access services (CAPs) and competitive local exchange carriers (CLECs). The closest applicable definition under the SBA rules is for telephone communications companies except radiotelephone (wireless) companies. The most reliable source of information regarding the number of CAPs and CLECs nationwide is the data that we collect annually in connection with the *TRS Worksheet*. According to our most recent data, 119 companies reported that they were engaged in the provision of competitive access services.[23] We do not have information on the number of carriers that are not independently owned and operated, nor have more than 1,500 employees, and thus are unable at this time to estimate with greater precision the number of CAPs that would qualify as small business concerns under the SBA definition. Consequently, we estimate that there are fewer than 119 small CAPs.

(4) Operator Service Providers

Neither the Commission nor SBA has developed a definition of small entities specifically applicable to providers of operator services. The closest applicable definition under the SBA rules is for telephone communications companies except radiotelephone (wireless) companies.

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[22] *TRS Data*.

[23] *Id.*

The most reliable source of information regarding the number of operator service providers nationwide is the data that we collect annually in connection with the *TRS Worksheet*. According to our most recent data, 27 companies reported that they were engaged in the provision of operator services.[24] We do not have information on the number of carriers that are not independently owned and operated, nor have more than 1,500 employees, and thus are unable at this time to estimate with greater precision the number of operator service providers that would qualify as small business concerns under the SBA definition. Consequently, we estimate that there are fewer than 27 small operator service providers.

(5) Pay Telephone Providers

Neither the Commission nor SBA has developed a definition of small entities specifically applicable to pay telephone providers. The closest applicable definition under SBA rules is for telephone communications companies except radiotelephone (wireless) companies. The most reliable source of information regarding the number of pay telephone providers nationwide is the data that we collect annually in connection with the *TRS Worksheet*. According to our most recent data, 533 companies reported that they were engaged in the provision of pay telephone services.[25] We do not have information on the number of carriers that are not independently owned and operated, nor have more than 1,500 employees, and thus are unable at this time to estimate with greater precision the number of pay telephone providers that would qualify as small business concerns under SBA definition. Consequently, we estimate that there are fewer than 533 small pay telephone providers.

(6) Resellers (Including Debit Card Providers)

Neither the Commission nor SBA has developed a definition of small entities specifically applicable to resellers. The closest applicable SBA definition for a reseller is a telephone communications company except radiotelephone (wireless) companies. However, the most reliable source of information regarding the number of resellers nationwide is the data that the Commission collects annually in connection with the *TRS Worksheet*. According to our most recent data, 345 companies reported that they were engaged in the resale of telephone service.[26] We do not have information on the number of carriers that are not independently owned and operated, nor have more than 1,500 employees, and thus we are unable at this time to estimate with greater precision the number of resellers that would qualify as small entities or small

[24] *Id.*

[25] *Id.*

[26] *Id.*

incumbent LEC concerns under the SBA definition. Consequently, we estimate that there are fewer than 345 small entity resellers.

c. International Service Providers

The Commission has not developed a definition of small entities applicable to licensees in the international services. Therefore, the applicable definition of small entity is the definition under the SBA rules applicable to Communications Services, Not Elsewhere Classified (NEC).[27] This definition provides that a small entity is expressed as one with $11.0 million or less in annual receipts. According to the Census Bureau, there were a total of 848 communications services, NEC, in operation in 1992, and a total of 775 had annual receipts of less than $9.999 million.[28] The Census report does not provide more precise data. Many of these services do not have specified uses and it is uncertain, at this point in time, if they will ultimately provide telecommunications services.

(1) International Public Fixed Radio (Public and Control Stations)

There are 15 licensees in this service.[29] We do not request or collect annual revenue information, and thus are unable to estimate the number of international public fixed radio licensees that would constitute a small business under the SBA definition.

(2) Fixed Satellite Transmit/Receive Earth Stations

There are approximately 4,200 earth station authorizations, a portion of which are Fixed Satellite Transmit/Receive Earth Stations.[30] We do not request or collect annual revenue information, and thus are unable to estimate the number of the earth stations that would constitute a small business under the SBA definition.

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[27] 13 C.F.R. § 120.21 (SIC 4899). *See also* FCC News Release, "Broadcast Station Totals as of December 31, 1997," released Jan. 23, 1998.

[28] Economic Census Industry and Enterprise Receipts Size Report, Table 2D, SIC 4899 (U.S. Bureau of the Census data under contract to the Office of Advocacy of the U.S. Small Business Administration). The amount of $10 million was used to estimate the number of small business establishments because there was no Census category closer to $11 million. Thus, the number is as accurate as it is possible to calculate with the available information.

[29] *See* Assessment and Collection of Regulatory Fees for Fiscal Year 1997, MD Docket No. 96-186, Notice of Proposed Rulemaking, 12 FCC Rcd 7168, 7197 (Att. A, Initial Regulatory Flexibility Analysis) (1997).

[30] *Id.*

(3) Fixed Satellite Small Transmit/Receive Earth Stations

There are 4.200 earth station authorizations, a portion of which are Fixed Satellite Small Transmit/Receive Earth Stations.[31] We do not request or collect annual revenue information, and thus are unable to estimate the number of fixed satellite transmit/receive earth stations may constitute a small business under the SBA definition.

(4) Fixed Satellite Very Small Aperture Terminal (VSAT) Systems

These stations operate on a primary basis, and frequency coordination with terrestrial microwave systems is not required. Thus, a single "blanket" application may be filed for a specified number of small antennas and one or more hub stations. The Commission has processed 377 applications.[32] We do not request or collect annual revenue information, and thus are unable to estimate of the number of VSAT systems that would constitute a small business under the SBA definition.

(5) Mobile Satellite Earth Stations

There are two licensees.[33] We do not request or collect annual revenue information, and thus are unable to estimate whether either of these licensees would constitute a small business under the SBA definition.

(6) Space Stations (Geostationary)

Commission records reveal that there are 37 space station licensees.[34] We do not request or collect annual revenue information, and thus are unable to estimate of the number of geostationary space stations that would constitute a small business under the SBA definition.

(7) Space Stations (Non-Geostationary)

[31] *Id.*

[32] *Id.*

[33] *Id.*

[34] *Id.*

There are six Non-Geostationary Space Station licensees, of which only one system is operational.[35] We do not request or collect annual revenue information, and thus are unable to estimate of the number of non-geostationary space stations that would constitute a small business under the SBA definition.

d. Wireless Telecommunications Service Providers

The Commission has not yet developed a definition of small entities with respect to the provision of CMRS services. Therefore, for entities not falling within other established SBA categories (i.e., Radiotelephone Communications or Telephone Communications, Except Radiotelephone), the applicable definition of small entity is the definition under the SBA rules applicable to the "Communications Services, Not Elsewhere Classified" category. This definition provides that a small entity is one with $11.0 million or less in annual receipts.[36] The Census Bureau estimates indicate that of the 848 firms in the "Communications Services, Not Elsewhere Classified" category, 775 are small businesses. It is not possible to predict which of these would be small entities (in absolute terms or by percentage) or to classify the number of small entities by particular forms of service.

(1) Cellular Radio Telephone Service

The Commission has not developed a definition of small entities applicable to cellular licensees. Therefore, the applicable definition of small entity is the definition under the SBA rules applicable to radiotelephone companies. This definition provides that a small entity is a radiotelephone company employing no more than 1,500 persons.[37] The size data provided by SBA does not enable us to make a meaningful estimate of the number of cellular providers which are small entities because it combines all radiotelephone companies with 500 or more employees.[38]

We therefore have used the 1992 Census of Transportation, Communications, and Utilities, conducted by the Bureau of the Census, which is the most recent information available. That census shows that only 12 radiotelephone firms out of a total of 1,178 such firms which

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[35] *Id.*

[36] 13 C.F.R. § 120.21 (SIC 4899).

[37] 13 C.F.R. § 121.201 (SIC 4812).

[38] U.S. Small Business Administration 1992 Economic Census Employment Report, Bureau of the Census, U.S. Department of Commerce, SIC Code 4812 (radiotelephone communications industry data adopted by the SBA Office of Advocacy).

operated during 1992 had 1,000 or more employees.[39] Therefore, even if all 12 of these large firms were cellular telephone companies, all of the remainder were small businesses under the SBA definition. We assume that, for purposes of our evaluations and conclusions in this IRFA, all of the current cellular licensees are small entities, as that term is defined by SBA. In addition, although there are 1,758 cellular licenses, we do not know the number of cellular licensees, since a cellular licensee may own several licenses.

(2) Broadband Personal Communications Service

The broadband PCS spectrum is divided into six frequency blocks designated A through F. Pursuant to Section 24.720(b) of the Commission's Rules,[40] the Commission has defined "small entity" for Block C and Block F licensees as firms that had average gross revenues of less than $40 million in the three previous calendar years. This regulation defining "small entity" in the context of broadband PCS auctions has been approved by SBA.[41]

The Commission has auctioned broadband PCS licenses in all of its spectrum blocks A through F. We do not have sufficient data to determine how many small businesses under the Commission's definition bid successfully for licenses in Blocks A and B. As of now, there are 89 non-defaulting winning bidders that qualify as small entities in the Block C auction and 93 non-defaulting winning bidders that qualify as small entities in the D, E, and F Block auctions. Based on this information, we conclude that the number of broadband PCS licensees that would be affected by the proposals in the Notice includes the 182 non-defaulting winning bidders that qualify as small entities in the C, D, E, and F Block broadband PCS auctions. Note that the number of successful bidders is not necessarily equivalent to the number of licensees, yet it is the best indicator that is currently available.

(3) Specialized Mobile Radio

[39] U.S. Bureau of the Census, U.S. Department of Commerce, 1992 Census of Transportation, Communications, and Utilities, UC92-S-1, Subject Series, Establishment and Firm Size, Table 5, Employment Size of Firms: 1992, SIC 4812 (issued May 1995).

[40] 47 C.F.R. § 24.720(b).

[41] *See* Implementation of Section 309(j) of the Communications Act — Competitive Bidding, PP Docket No. 93-253, Fifth Report and Order, 9 FCC Rcd 5532, 5581-84 (1994).

Pursuant to Section 90.814(b)(1) of the Commission's Rules,[42] the Commission has defined "small entity" for geographic area 800 MHz and 900 MHz Specialized Mobile Radio (SMR) licenses as firms that had average gross revenues of less than $15 million in the three previous calendar years. This regulation defining "small entity" in the context of 800 MHz and 900 MHz SMR has been approved by SBA.[43]

The proposals set forth in the Notice may apply to SMR providers in the 800 MHz and 900 MHz bands. We do not know how many firms provide 800 MHz or 900 MHz geographic area SMR service, or how many of these providers have annual revenues of less than $15 million.

The Commission recently held auctions for geographic area licenses in the 900 MHz SMR band. There were 60 winning bidders who qualified as small entities under the Commission's definition in the 900 MHz auction. Based on this information, we conclude that the number of geographic area SMR licensees affected by the proposals set forth in the Notice includes these 60 small entities.

Based on the auctions held for 800 MHz geographic area SMR licenses, there were 10 small entities currently holding 38 of the 524 licenses for the upper 200 channels of this service. However, the Commission has not yet determined how many licenses will be awarded for the lower 230 channels in the 800 MHz geographic area SMR auction. There is no basis to estimate, moreover, how many small entities within the SBA definition will win these licenses. Given the facts that nearly all radiotelephone companies have fewer than 1,000 employees and that no reliable estimate of the number of prospective 800 MHz SMR licensees can be made, we assume, for purposes of our evaluations and conclusions in this IRFA, that all of the licenses will be awarded to small entities, as that term is defined by SBA.

(4) 220 MHz Service

Licensees for 220 MHz services that meet the definition of CMRS may be providers of telecommunications service. The Commission has classified providers of 220 MHz service into

[42] 47 C.F.R. § 90.814(b)(1).

[43] *See* Amendment of Parts 2 and 90 of the Commission's Rules to Provide for the Use of 200 Channels Outside the Designated Filing Areas in the 896-901 MHz and the 935-940 MHz Bands Allotted to the Specialized Mobile Radio Pool, PR Docket No. 89-553, Second Order on Reconsideration and Seventh Report and Order, 11 FCC Rcd 2639, 2693-2702 (1995); Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band, PR Docket No. 93-144, GN Docket No. 93-252, PP Docket No. 93-253, First Report and Order, Eighth Report and Order, and Second Further Notice of Proposed Rulemaking, 11 FCC Rcd 1463 (1995).

Phase I and Phase II licensees. There are approximately 3,800 non-nationwide Phase I licensees and 4 nationwide licensees currently authorized to operate in the 220 MHz band.[44] The Commission has estimated that there are approximately 900 potential Phase II licensees.[45] These licenses were scheduled to be auctioned in May 1998, but the auction has been delayed pending resolution of petitions for reconsideration.[46]

At this time, however, there is no basis upon which to estimate definitively the number of 220 MHz service licensees, either current or potential, that are small businesses. To estimate the number of such entities that are small businesses, we apply the definition of a small entity under SBA rules applicable to radiotelephone companies. This definition provides that a small entity is a radiotelephone company employing no more than 1,500 persons.[47] However, the size data provided by the SBA do not allow us to make a meaningful estimate of the number of 220 MHz providers that are small entities because they combine all radiotelephone companies with 500 or more employees.[48]

We therefore use the 1992 Census of Transportation, Communications, and Utilities, conducted by the Bureau of the Census, which is the most recent information available. Data from the Census Bureau's 1992 study indicate that only 12 out of a total 1,178 radiotelephone firms which operated during 1992 had 1,000 or more employees — and these may or may not be small entities, depending on whether they employed more or less than 1,500 employees.[49] But 1,166 radiotelephone firms had fewer than 1,000 employees and, therefore, under the SBA definition, are small entities. However, we do not know how many of these 1,166 firms are likely to be involved in the provision of 220 MHz service.

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[44] *See* Amendment of Part 90 of the Commission's Rules to Provide for the Use of the 220-222 MHz Band by the Private Land Mobile Radio Service, PR Docket No. 89-552, GN Docket No. 93-252, PP Docket No. 93-253, Third Report and Order, Fifth Notice of Proposed Rulemaking, 12 FCC Rcd 10943 (1997) at 11095 (*220 MHz Third Report and Order*).

[45] Public Notice, "FCC Announces Delay of 220 MHz Service Auction," DA 98-526, released March 17, 1998.

[46] *Id.*

[47] 13 C.F.R. § 121.201 (SIC 4812).

[48] 1992 Economic Census Employment Report, Bureau of the Census, U.S. Department of Commerce, Table 3, SIC Code 4812 (industry data adapted by the Office of Advocacy for the U.S. Small Business Administration).

[49] U.S. Bureau of the Census, U.S. Department of Commerce, 1992 Census of Transportation, Communications, and Utilities, UC92-S-1, Subject Series, Establishment and Firm Size, Table 5, Employment Size of Firms; 1992, SIC 4812 (issued May 1995).

(5) Mobile Satellite Services (MSS)

Mobile Satellite Services or Mobile Satellite Earth Stations are intended to be used while in motion or during halts at unspecified points. These stations operate as part of a network that includes a fixed hub or stations. The stations that are capable of transmitting while a platform is moving are included under Section 20.7(c) of the Commission's Rules[50] as mobile services within the meaning of Sections 3(27) and 332 of the Communications Act.[51] Those MSS services are treated as CMRS if they connect to the Public Switched Network (PSN) and also satisfy other criteria of Section 332. Facilities provided through a transportable platform that cannot move when the communications service is offered are excluded from Section 20.7(c).[52]

The MSS networks may provide a variety of land, maritime and aeronautical voice and data services. There are eight mobile satellite licensees.[53] At this time, we are unable to make a precise estimate of the number of small businesses that are mobile satellite earth station licensees and could be considered CMRS providers of telecommunications service.

(6) Paging

Private and Common Carrier Paging. The Commission has proposed a two- tier definition of small businesses in the context of auctioning licenses in the Common Carrier Paging and exclusive Private Carrier Paging services. Under the proposal, a small business will be defined as either (1) an entity that, together with its affiliates and controlling principals, has average gross revenues for the three preceding years of not more than $3 million, or (2) an entity that, together with affiliates and controlling principals, has average gross revenues for the three preceding calendar years of not more than $15 million. Because the SBA has not yet approved this definition for paging services, we will utilize the SBA's definition applicable to radiotelephone companies, i.e., an entity employing no more than 1,500 persons.[54] At present, there are approximately 24,000 Private Paging licenses and 74,000 Common Carrier Paging licenses. According to the most recent Telecommunications Industry Revenue data, 364 carriers reported that they were engaged in the provision of either paging or other mobile services, which are

[50] 47 C.F.R. § 20.7(c).

[51] 47 U.S.C. §§ 153(27), 332.

[52] 47 C.F.R. § 20.7(c).

[53] *TRS Data*.

[54] 13 CFR § 121.201 (SIC 4812).

placed together in the data.[55] We do not have data specifying the number of these carriers that are not independently owned and operated or have more than 1,500 employees, and thus are unable at this time to estimate with greater precision the number of paging carriers that would qualify as small business concerns under the SBA's definition. Consequently, we estimate that there are fewer than 364 small paging carriers that may be affected by the proposed rules, if adopted. We estimate that the majority of private and common carrier paging providers would qualify as small entities under the SBA definition.

(7) Narrowband PCS

The Commission has auctioned nationwide and regional licenses for narrowband PCS. The Commission does not have sufficient information to determine whether any of these licensees are small businesses within the SBA-approved definition. At present, there have been no auctions held for the MTA and Basic Trading Area (BTA) narrowband PCS licenses. The Commission anticipates a total of 561 MTA licensees and 2,958 BTA licensees will be awarded in the auctions. Those auctions, however, have not yet been scheduled. Given that nearly all radiotelephone companies have fewer than 1,500 employees and that no reliable estimate of the number of prospective MTA and BTA narrowband licensees can be made, we assume that all of the licensees will be awarded to small entities, as that term is defined by the SBA.[56]

(8) Air-Ground Radiotelephone Service

The Commission has not adopted a definition of small business specific to the Air-Ground Radiotelephone Service, which is defined in Section 22.99 of the Commission's rules.[57] Accordingly, we will use the SBA definition applicable to radiotelephone companies, *i.e.*, an entity employing no more than 1,500 persons.[58] There are approximately 100 licensees in the Air-Ground Radiotelephone Service, and we estimate that almost all of them qualify as small under the SBA definition.

(9) Local Multipoint Distribution Service (LMDS)

[55] *TRS Data*.

[56] 13 C.F.R. § 121.201 (SIC 4812).

[57] *See* Section 22.99 of the Commission's Rules, 47 C.F.R. § 22.99.

[58] 13 C.F.R. § 121.201 (SIC 4812).

LMDS licensees may use spectrum for any number of services. It is anticipated that the greatest intensity of use will be for either radio telephone or pay television services. SBA has developed definitions applicable to each of these services, however, because pay television is not a telecommunications service subject to Section 255, it is not relevant to this IRFA.

The Commission has not developed a definition of small entities applicable to LMDS licensees, which is a new service.[59] In the *LMDS Order* we adopt criteria for defining small businesses for determining bidding credits in the auction, but we believe these criteria are applicable for evaluating the burdens imposed by Section 255. We define a small business as an entity that, together with affiliates and controlling principals, has average gross revenues not exceeding $40 million for the three preceding years.[60] Additionally, small entities are those which together with affiliates and controlling principals, have average gross revenues for the three preceding years of more than $40 million but not more than $75 million.[61]

Upon completion of the auction 93 of the 104 bidder qualified as small entities, smaller businesses, or very small businesses. These 93 bidders won 664 of the 864 licenses. We estimate that all of these 93 bidders would qualify as small under the SBA definitions, but we cannot yet determine what percentage would be offering telecommunications services.

(10) Rural Radiotelephone Service

The Commission has not adopted a definition of small entity specific to the Rural Radiotelephone Service. A significant subset of the Rural Radiotelephone Service is the Basic Exchange Telephone Radio Systems (BETRS).[62] We will use the SBA's definition applicable to radiotelephone companies, i.e., an entity employing no more than 1,500 persons.[63] There are approximately 1,000 licensees in the Rural Radiotelephone Service, and we estimate that almost all of them qualify as small entities under the SBA's definition.

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[59] Rulemaking to Amend Parts 1, 2, 21, and 25 of the Commission's Rules to Redesignate the 27.5-29.5 GHz Frequency Band, to Establish Rules and Policies for Local Multipoint Distribution Service and for Fixed Satellite Services, CC Docket No. 92-297, Second Report and Order, Order on Reconsideration, and Fifth Notice of Proposed Rulemaking, 12 FCC Rcd 12545 (1997) (*LMDS Order*).

[60] *See LMDS Order*, 12 FCC Rcd at 12690 (para. 348).

[61] *Id*.

[62] BETRS is defined in Sections 22.757 and 22.759 of the Commission's Rules, 47 C.F.R. §§ 22.757, 22.759.

[63] 13 C.F.R. § 121.201 (SIC 4812).

(11) Wireless Communications Services

This service can be used for fixed, mobile, radiolocation and digital audio broadcasting satellite uses. The Commission defined small business for the wireless communications services (WCS) auction as an entity with average gross revenues of $40 million for each of the three preceding years, and a very small business as an entity with average gross revenues of $15 million for each of the three preceding years. The Commission auctioned geographic area licenses in the WCS service. In the auction, there were seven winning bidders that qualified as very small business entities, and one that qualified as a small business entity. We conclude that the number of geographic area WCS licensees affected includes these eight entities.

(12) 39 GHz Band

The Commission has not developed a definition of small entities applicable to 39 GHz band licensees. Therefore, the applicable definition of small entity is the definition under the SBA rules applicable to radiotelephone companies. This definition provides that a small entity is a radiotelephone company employing no more than 1,500 persons.[64] Since the Regulatory Flexibility Act amendments were not in effect until the record in this proceeding was closed, the Commission was unable to request information regarding the potential number of small businesses interested in the 39 GHz frequency band and is unable at this time to determine the precise number of potential applicants which are small businesses.

The size data provided by SBA does not enable us to make a meaningful estimate of the number of cellular providers which are small entities because it combines all radiotelephone companies with 500 or more employees.[65] We therefore have used the 1992 Census of Transportation, Communications, and Utilities, conducted by the Bureau of the Census, which is the most recent information available. That census shows that only 12 radiotelephone firms out of a total of 1,178 such firms which operated during 1992 had 1,000 or more employees.[66] Therefore, a majority of 39 GHz entities providing radiotelephone services could be small businesses under the SBA definition.

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[64] *Id.*

[65] U.S. Small Business Administration 1992 Economic Census Employment Report, Bureau of the Census, U.S. Department of Commerce, SIC 4812 (radiotelephone communications industry data adopted by the SBA Office of Advocacy).

[66] U.S. Bureau of the Census, U.S. Department of Commerce, 1992 Census of Transportation, Communications, and Utilities, UC92-S-1, Subject Series, Establishment and Firm Size, Table 5, Employment Size of Firms: 1992, SIC 4812 (issued May 1995).

However in the *39 GHz Band NPRM and Order*,[67] we proposed to define a small business as an entity that, together with affiliates and attributable investors, has average gross revenues for the three preceding years of less than $40 million. We have not yet received approval by the SBA for this definition. We assume, for purposes of our evaluations, that nearly all of the 39 GHz licensees will be small entities, as that term is defined by the SBA.[68]

D. Reporting, Recordkeeping, and Other Compliance Requirements

As we have noted, the objective of Section 255 is for persons with disabilities to have increased access to telecommunications. Both equipment manufacturers and telecommunications service providers are obligated to provide accessibility for persons with any one or more of different disabilities to the extent that it is readily achievable for them to do so. So, in the broadest sense, compliance consists of the on-going, disciplined, and systematic effort to provide the greatest level of accessibility. Much of the Notice deals with behaviors which demonstrate that such effort and would be looked upon favorably in the event of a filed complaint.

The only actual recordkeeping requirement that the Commission proposes is for each covered entity to provide a point of contact for referral of consumer problems. This person would represent the covered entity during the "fast-track problem-solving" phase which would precede the filing of any form of complaint. In the Notice we suggest and seek comment on a one-week period in which the manufacturer or service provider should resolve the customer's problem. Although we wish to encourage speedy responses, we recognize that there may be circumstances which call for an extension of the time period. In such instances, the Commission reserves the discretion to grant requests. We seek comment on whether the one-week time period, and whether the informal means of requesting extensions would be disproportionately burdensome on small businesses.

Despite the lack of any formal recordkeeping requirement, in order to respond to "fast-track" inquiries, companies may chose to keep records at their own discretion on the way the company has chosen to implement its own disability initiatives. This self-imposed recordkeeping will enable them to respond in a more timely fashion. Likewise we seek comment on whether this

[67] Amendment of the Commission's Rules Regarding the 37.0-38.6 GHz and 38.6-40.0 GHz Bands, ET Docket No. 95-183, Notice of Proposed Rulemaking and Order, 11 FCC Rcd 4930, 4971-72 (paras. 87-88) (1996) (*39 GHz Band NPRM and Order*).

[68] Amendment of the Commission's Rules Regarding the 37.0-38.6 GHz and 38.6-40.0 GHz Bands, ET Docket No. 95-183, Report and Order and Second Notice of Proposed Rulemaking, at 18677-79 (App. B, Regulatory Flexibility Analysis) (1997).

implicit burden needs to be recognized, and, if so, whether there is a disproportionate impact on small businesses.

An additional recordkeeping requirement for which we seek comment would be to have equipment manufacturers acknowledge their Section 255 obligations on the same form used for filing for equipment authorization with the Office of Engineering and Technology.[69] Similarly, we seek comment on which of the filings for telecommunications service providers would provide a comparable opportunity to indicate awareness of their own Section 255 obligations. Another option, beyond the scope of Section 255 and thus requiring a separate rulemaking, might be to design a consolidated form to be used by service providers for reporting *all* required information to the Commission and including awareness of entities' Section 255 obligations as one small part. Although we perceive the Section 255 reporting burden to be minimal, as in checking off a box on a form required for other purposes, we request comment on how such requirements can be modified to reduce the burden on small entities and still meet the objectives of this proceeding.

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

In the *Notice of Inquiry*, we sought comment on three possible approaches for implementing and enforcing the provisions of Section 255: (1) rely on case-by-case determinations; (2) issue guidelines or a policy statement; or (3) promulgate rules setting forth procedural or performance requirements intended to promote accessibility.[70]

The Notice principally proposes procedural requirements as a practical, commonsense means to ensure that consumers with disabilities have access to telecommunications services and equipment.

The use of case-by-case determinations exclusively, in lieu of any rules, was considered but tentatively discarded in the Notice because it was believed that in a rapidly changing market with unpredictable technological breakthroughs, the slow development of case law would not be sufficient to guide covered entities to an understanding of their accessibility obligations.

The issuance of guidelines or a policy statement was also considered but tentatively discarded, because of our view that a greater degree of regulatory and administrative certainty

[69] *See* Subpart J of Part 2 of the Commission Rules, 47 C.F.R. §§ 2.901-2.1093.

[70] Implementation of Section 255 of the Telecommunications Act of 1996: Access to Telecommunications Services, Telecommunications Equipment, and Customer Premises Equipment by Persons with Disabilities, WT Docket No. 96-198, Notice of Inquiry, 11 FCC Rcd 19152, 19163 (para. 7) (1996) (*Notice of Inquiry*).

will best serve the interests of both consumers and businesses (including covered entities) that must comply with Section 255. Guidelines or a policy statement might serve the purpose of informing case-by-case determinations in complaint proceedings and lending some predictability of outcomes in these proceedings. Moreover, the Commission tentatively decided that, in order for accessibility to be addressed in a pro-active manner, equipment manufacturers and service providers should have clear expressions of the demands Section 255 places on their operations before the beginning of the design process. The Commission tentatively concluded, however, that the potential drawbacks of exclusive reliance on case-by-case determinations as a means of implementing Section 255 would not be sufficiently diminished by the adoption of guidelines or a policy statement.

Also considered and tentatively rejected by the Commission was the option of promulgating specific performance requirements. Such an approach — under which the Commission would attempt to establish an array of specific parameters for features and functions across a broad range of telecommunications services and equipment — was viewed as potentially burdensome to covered entities, as well as being fraught with other potential problems. For example, rapid changes in technology could make Commission performance requirements obsolete in rapid fashion. This would make it necessary for the Commission to frequently revise its performance requirements in order to attempt to keep pace with these technological changes. These frequent revisions would impose burdens on covered entities and potentially cause confusion in the telecommunications marketplace. In addition, we tentatively have decided that the promulgation of rules governing the design process, would impose burdens on covered entities whose resources would be better spent in achieving and improving accessibility.

As a result of our tentative decision to rely primarily on procedural rules, we have taken several steps to minimize burdens on all regulated entities. First, we have sought to provide incentives to industry for early and on-going consideration of accessibility issues. In particular, we will look favorably upon efforts to implement the Access Board's guidelines such as formalizing self-assessment, external outreach, internal management, and user information and support to address accessibility issues.[71] Second, we have attempted to unravel the statutory terminology to give guidance on the interpretation of key language within the telecommunications context. For example, “readily achievable” is explored in great depth to explicate feasibility, expense, and practicality elements.[72] Third, we have intended to fashion efficient, consumer-friendly means of dealing with problems. By instituting a pre-complaint process in a fast-track, problem-solving phase, we are attempting to implement the objectives of the statute in a

[71] *See* Notice at paras. 164-166.

[72] *See* Notice at Section IV.B.5.b (paras. 100-123).

cooperative, as opposed to adversarial, manner.[73] We welcome comments on the extent to which the tentative approach we have adopted in the Notice is likely to further the goals of Section 255 without creating an unfair economic impact on small entities.

We believe we have reduced burdens wherever possible. For burdens imposed by achieving accessibility, the structure of the statute inherently acknowledges varying degrees of economic impact. The "readily achievable" standard is proportional, not absolute, thereby adjusting the burden of providing accessible features to be commensurate with the resources of the covered entity.

For burdens associated with enforcement, the innovation of the "fast-track" problem solving phase is an outgrowth of the desire to find immediate, practical solutions to consumers' problems in obtaining accessible or compatible equipment and services. It is anticipated that the pre-complaint process will significantly reduce the number of complaints, thus minimizing the burden on all covered entities of providing a legal defense. Furthermore, the range of choices for resolving complaints is designed to reduce costs to the opposing parties. Encouraging the use of streamlined informal complaints or alternative dispute resolution processes is primarily to benefit individual plaintiffs who may be persons with disabilities with limited financial resources, but should similarly enable covered entities to defend at lesser cost.

To minimize any negative impact, however, we seek comment on the nature of incentives for small entities, which will redound to their benefit. We will continue to examine alternatives in the future with the objectives of eliminating unnecessary regulations and minimizing significant economic impact on small entities. We seek comment on significant alternatives interested parties believe we should adopt.

F. Federal Rules Which Overlap, Duplicate, or Conflict with These Rules

As stated above, Section 255(e) directs the Access Board to develop equipment accessibility guidelines "in conjunction with" the Commission, and to periodically review and update the guidelines. We view these guidelines as a starting point for the implementation of Section 255, but because they do not cover telecommunications services, we must necessarily adapt these guidelines in our comprehensive implementation scheme. As such, it is our tentative view that our proposed rules do not overlap, duplicate, or conflict with the Access Board Final Rule, 36 C.F.R. Part 1193.

[73] *See* Notice at Section V.B (paras. 126-143).

Separate Statement of Commissioner Harold W. Furchtgott-Roth

In re: Notice of Proposed Rulemaking

Implementation of Section 255 of the Telecommunications Act of 1996 -- Access to Telecommunications Service, Telecommunications Equipment, and Customer Premises Equipment by Persons with Disabilities.

Today we initiate a proceeding to adopt rules to implement yet another important section of the Telecommunications Act of 1996. I support this action.

In this proceeding, the Commission will develop new rules to enable persons with disabilities to participate in the telecommunications revolution that has become such an important facet of our society and economy. I look forward to adopting these rules later this year.

My support for new regulations may be somewhat surprising, for I have the well-deserved reputation of one who often favors *de*-regulation. A more accurate characterization of my views, however, is that I favor *rational* regulation. This rationality is achieved only when the benefits of our rules significantly outweigh the costs of our rules.

Undoubtedly, the new rules we eventually adopt in this proceeding will impose some costs on industry and consumers. Nevertheless, I am confident that, in meeting the requirements of the Telecommunications Act, we will adopt rules that have benefits that significantly exceed these costs. In addition, this particular area of regulation may well be a rare instance of where the involvement of federal government introduces efficiencies unlikely to develop in the market. Thus, we have here an opportunity for rational regulation and an appropriate role for the federal government.

SEPARATE STATEMENT OF COMMISSIONER MICHAEL POWELL

Re: **Implementation of Section 255 of the Telecommunications Act of 1996 -- Access to Telecommunications Services, Telecommunications Equipment, and Customer Premises Equipment by Persons with Disabilities, Notice of Proposed Rulemaking (WT Docket No. 96-198)**

It is the law, and should be the law, that manufacturers of telecommunications equipment and customer premises equipment (CPE) and providers of telecommunications services shall ensure that such equipment and services are accessible to and usable by individuals with disabilities. If accessibility is not "readily achievable," manufacturers and service providers are required to ensure that their equipment or service is compatible with existing peripheral devices or specialized customer premises equipment commonly used by individuals with disabilities to achieve access. It is the Commission's job (exclusively) to enforce this law, which Congress in its wisdom included in the historic 1996 Telecommunications Act.

It is only right that Congress included this provision (section 255) in the Act. It understood that as it unleashed a largely unregulated and highly competitive telecommunications industry, it needed to ensure that people with disabilities were not strewn aside in the battle for customers and subscribers. It is only right that manufacturers and service providers should be ready, willing and able to step up to welcome and accept this task to ensure that a significant portion of their customers are properly accommodated -- without the need for significant government intrusion into their businesses. And, it is only right that this Commission must set forth rules, guidelines and enforcement procedures so that the industry and, especially, individuals with disabilities, know how to comply with the law and what to expect from the agency tasked to enforce it.

I fully expect (and will demand) that every industry participant will comply with the letter and the spirit of this law. I know that this is an area where free market forces alone are unlikely to address the specific needs of individuals, who solely because of life's unpredictability and randomness find themselves restricted by physical adversity. This is an area where government can help this community enjoy the fruits of independence that the seeds of telecommunications can yield and that the Act envisioned. The principle of universal service is ultimately inclusion, and the disabled community should not be overlooked.

I know personally the frustrations of being relegated to the outskirts of "normal" society because of the inability to access the necessary instruments of daily life, for I suffer from physical limitations that resulted from a serious jeep accident. I recall vividly the feelings of helplessness brought on by the inability to help myself with basic life functions. I recall during my year-long convalescence, preferring the hospital over my home: home was

the real world of difficult stairways to navigate, rather than the ramps of the hospital, it was bathrooms that were a nightmare to get to and use, and it was inhospitable beds and chairs. It was a place where I watched fully functional people move easily in and out of every day, living normal unencumbered lives. I can easily imagine how it must feel to be unable to even make a phone call.

As the Commission seeks to accommodate the needs of the disabled, however, we must be careful in our zeal not to stigmatize those that section 255 was designed to help, and we must be careful to avoid creating disincentives for those in industry that actually can help. This is why I strongly support the proposed "fast-track" problem solving process and guiding principles laid out in this Notice. This process emphasizes timely and informal resolution, with the promise that the vast majority of accessibility problems will be resolved by the manufacturer or service provider without the need for resort to formal "complaints."

I look forward to reviewing the comments in this proceeding and welcome any and all suggestions on how the Commission can improve upon the enforcement procedures we propose so that this important law we are tasked with enforcing will be subject to the fullest compliance.

Statement of Commissioner Gloria Tristani
on the Adoption of a Notice of Proposed Rulemaking
on Access to Telecommunications Services,
Telecommunications Equipment, and Customer Premises Equipment
by Persons with Disabilities

April 2, 1998

Today we take concrete steps to assure that the tremendous benefits of the telecommunications sector will be available to people with disabilities. Telecommunications is at the core of our society -- it is, increasingly, how we communicate with one another, how we learn, how we work. To be denied access to those activities would be, in essence, to be relegated to the sidelines of our national life. Congress wisely acknowledged this in enacting Section 255, mandating that telecommunications services and equipment be accessible to people with disabilities, where readily achievable.

I firmly believe that few actions we take as commissioners could be as important as those promoting real, meaningful access to telecommunications for all Americans. So we have worked, for example, to facilitate access for people in rural and high cost areas, to connect our schools and libraries, and to guarantee that wireless callers -- including TTY users -- have the benefit of E-911 services.

In my mind, this NPRM is long overdue. I believe that the guidelines and procedural rules we propose will have substantial impact in the lives of the 54 million Americans with disabilities. Imagine, for example, the frustration felt by someone using a voice board (an augmentative or alternative communications device) when they call emergency or directory assistance (911 or 411), only to be disconnected because the person answering does not understand that this is a real call. Imagine someone with cerebral palsy or multiple sclerosis, who then faces the prospect of using a TTY device, yet may not have the manual dexterity necessary to do so. Imagine doing that in an emergency.

These are striking examples. But they portend larger social and economic realities. Unemployment among people with disabilities is roughly 73 percent. And those who are employed earn on average only one-third the income of the non-disabled population. In our world today, access to telecommunications services and equipment translates into opportunity and participation.

I am committed to doing all I can to make that access happen. Today we set forth a number of proposals, relating to both the substantive mandates of Section 255 and the procedures for enforcing it. I believe we have proposed a workable framework for cooperation and creativity in finding innovative access solutions. I recognize that this is a beginning, and I look forward to working with both industry and consumers to build on this framework.