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	)	

COMMENTS OF SBC COMMUNICATIONS INC.

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EXECUTIVE SUMMARY

SBC Communications Inc. ("SBC") is committed to ensuring that individuals with disabilities can enjoy the benefits of telecommunications service and products. The best way to accomplish this is for the Commission to allow the telecommunications industry the flexibility to innovate and marshal its resources toward that goal. To a fair extent, the FCC has adopted this hands-off approach in implementing Section 255, and, as a result, SBC largely agrees with the proposals in the Notice of Proposed Rulemaking.

SBC commends the FCC's adherence to the plain statutory language and to common sense in defining the terms and scope of the provision. Specifically, while SBC has committed itself and its subsidiaries to designing information services to be accessible to individuals with disabilities, the FCC is correct in concluding that the statute does not mandate such action. By its express terms, Section 255 extends only to telecommunications service and equipment. The FCC however is also correct in reading the terms "telecommunications provider" and "equipment manufacturer" broadly to include resellers and any "final assembler" of a product, whether foreign or domestic.

In addition, SBC supports the Commission's pragmatic approach to defining the terms "accessible to and usable by" and "readily achievable." SBC agrees that the term "accessible to and usable by" expresses the single, basic idea that individuals with disabilities must be able to *actually use* the product or service.

The FCC's interpretation of "readily achievable" likewise should not be overly theoretical. Whether an action is "readily achievable" will, as the FCC concluded, "be driven by the facts of the particular cases" and a consideration of the proposal's feasibility, practicality, and

expense. Notice of Proposed Rulemaking, 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, ¶ 99 (rel. Apr. 20, 1998) ("NPRM"). This analysis should occur only once -- at the time that the product or service is initially developed. "[O]nce a product is introduced in the market without accessibility features that were not readily achievable at the time [of development], Section 255 does not require that the product be modified to incorporate subsequent, readily achievable features." Id. ¶ 120.

SBC respectfully disagrees with some of the FCC's recommendations for implementing subsection (d) of Section 255. That provision requires that a manufacturer or provider ensure that its equipment or service is "compatible" with existing peripheral devices or specialized CPE which are "commonly used" by individuals with disabilities. 47 U.S.C. § 255(d). The FCC should avoid defining "commonly used" with reference to the feature's cost or to its use in a State equipment distribution program. For one thing, cost would be relevant only in comparing devices that serve a similar function. More importantly, by considering cost, the FCC may be placed in the inappropriate position of having individuals without disabilities assess the value of a feature to a person with disabilities.

Whether a product is used by a State's equipment distribution program is also an unreliable indication of the product's use. Some State programs are slow to introduce new and popular devices and slow to take obsolete products out of circulation. SBC therefore recommends that the FCC adhere to the ordinary meaning of "commonly used" -- as a reference to the number of actual users of a product relative to the number of potential users.

SBC also cannot support the FCC's proposal to define "compatib[le]" in terms of narrowly defined "criteria." NPRM ¶¶ 91-92. By prescribing "criteria," the FCC may discourage manufacturers and producers from developing new products that might be equally as compatible, but not within the FCC's rigid standards. The means of achieving compatibility are best left to the industry.

Under the FCC's current proposal, the traditional FCC complaint process will be dramatically altered for Section 255 complaints. While some of the proposed changes are good, SBC thinks others are ill-advised. First, the FCC fails entirely to devise a mechanism for addressing complaints that raise industry-wide, as opposed to company-specific, problems. SBC therefore asks the Commission to consider establishing an interdisciplinary panel of technical experts and disability advocates to whom industry-wide complaints could be referred for resolution.

Second, if the FCC decides to implement its "fast-track" proposal, a provider or manufacturer must be given more than five days to respond to a consumer complaint. The Commission itself acknowledges the "likely complexity of many Section 255 complaints." Id. ¶ 150. It therefore is wholly unrealistic that a solution to such complex problems can be devised and implemented in only five days. The Commission should propose a fifteen- or thirty-day deadline to respond, with an opportunity to extend that deadline if substantial efforts to resolve the dispute are underway.

Third, while the FCC's willingness to allow complainants and respondents to communicate over a variety of media -- including by audio cassette and over the telephone -- is well intended, it may actually harm the individuals it is designed to accommodate. As the

Commission elsewhere recognizes, if the format of a communication is not permanent, the proceeding will lack "an appropriate record for decision-making" (id. ¶ 152) and will be beset by misunderstandings. SBC therefore proposes that the Commission require a permanent written format for all complaints, response reports, and statements by the complainant regarding his or her decision to invoke the formal complaint process.

Fourth, the FCC's proposal to abandon customary standing requirements likewise might do more harm than good. Without any standing requirement, for example, a company could file a complaint against its competitor purely for harassment. Surely, Congress did not intend to allow for such a (mis)use of the complaint process. Rather, as the statutory language shows, Congress was concerned about "individuals with disabilities." SBC recommends, therefore, that the FCC require that a complainant show that he either is an individual who is prevented from accessing or using the respondent's product, or is an association or person acting on behalf of such an individual.

Finally, the FCC should reconsider its decision to discard the traditional pleading requirements for formal complaints. For a respondent properly to reply, a formal complaint must contain a certain degree of specificity, as well as affidavits and documentation to support the allegations. Also, if the Commission is going to impose a filing fee, it must be the same for every complaint -- regardless of the identity of the respondent.

SBC submits that all of its proposals for modifying the complaint process will -- consistent with the Commission's stated objective -- "focus [the FCC's] resources efficiently by handling complaints in a streamlined, consumer-friendly manner with an eye toward solving problems quickly." Id. ¶ 3.

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COMMENTS OF SBC COMMUNICATIONS INC.

Long before the 1996 Act was passed, SBC Communications Inc. ("SBC") and its subsidiaries were dedicating resources and implementing procedures to ensure that individuals with disabilities could use and enjoy the benefits of telecommunications services and equipment. For many years, SBC subsidiary Pacific Bell has conducted a Deaf and Disabled Services internal business group to assist customers with disabilities in meeting their communications needs and to coordinate the company's efforts to develop products for the disability community. In 1993, Pacific Bell convened an outside advisory group, the Advisory Group for People with Disabilities, to meet with product managers and officers and provide recommendations on accessibility issues. A similar, but separate, advisory group counsels the company on accessibility issues relating to wireless service. Building upon the ongoing work of these groups, SBC adopted a Universal Design Policy which requires each of its subsidiaries to design new products and services in a way that makes them accessible to the broadest range of

consumers, including individuals with disabilities, the elderly, and children. (A copy of the Policy is attached as Attachment A.)

SBC views Section 255 of the Telecommunications Act of 1996, and this rulemaking proceeding, as a welcome opportunity to build upon these initiatives. SBC agrees with the Commission that the best way to achieve Congress's objective in Section 255 -- to ensure that individuals with disabilities are able to access and use telecommunications equipment and services -- is for the FCC to "allow industry the flexibility to innovate and to marshal its resources toward the end goal, rather than focusing on complying with detailed implementation rules." NPRM ¶ 3. Rigid rules in the fast-changing world of telecommunications would function only to stifle the innovation that Congress hoped to encourage through the 1996 Act.

Guided by that principle, SBC, on behalf of itself and its subsidiaries, submits the following comments on the NPRM. To the greatest degree possible, the comments address issues in the same order as the NPRM.

DISCUSSION

I. IN DEFINING THE TERMS AND SCOPE OF SECTION 255, THE FCC SHOULD ADHERE TO COMMON SENSE AND THE PLAIN STATUTORY LANGUAGE

A. Section 255 Does Not Apply to Non-Telecommunications Services Such As Information Services [NPRM ¶ 42]

SBC is committed to designing information services to have the accessibility features that Section 255 mandates for telecommunications service and equipment. The Universal Design Policy, which applies to all of SBC's subsidiaries,[1] pledges each company to create new products

[1]The Policy applies to all subsidiaries including SBC's information services providers -- Southwestern Bell Internet Services, Pacific Bell Internet Services, Nevada Bell Internet

and services -- including information services -- that address the needs of customers with disabilities. See Attachment A. SBC believes that this is not only the right thing to do, it is good business. By designing products and services to have the greatest possible access, SBC will reach the greatest number of potential customers. If the company ignored the needs of the disability community, it could forfeit the chance to serve 49 million Americans.[2]

While SBC thinks it is important to make its information services accessible, Section 255 plainly does not require it. By its express terms, Section 255 applies only to "telecommunications equipment," "customer premises equipment," and "telecommunications service." 47 U.S.C. § 255(b), (c). Consistent with that plain language, the Act's legislative history, and past FCC precedent, the FCC tentatively concluded that Section 255 does not apply to "information services," such as voice mail and electronic mail. NPRM ¶ 36 ("'Information services' are excluded from regulation" under Title II); id. ¶ 42 (information services "fall outside the scope of Section 255").

The FCC's interpretation is correct. It is, indeed, the only interpretation that would be consistent with Congress's intent and the FCC's past understanding of the strict dichotomy between "telecommunications service" and "information service." As the FCC explained in a recent report, Congress intended that "the two categories" of services "be separate and distinct, and that information service providers not be subject to telecommunications regulation." Report to Congress, Federal-State Joint Board on Universal Service, CC Dkt. No. 96-45, ¶ 43 (Apr. 10, 1998) (emphasis added). As used in the 1996 Act, the two categories of services "are mutually

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Services, Southwestern Bell Messaging Services Inc., and Pacific Bell Information Services.

[2]FCC Disabilities Issues Task Force Homepage <http://www.fcc.gov/dtf/welcome.html>.

exclusive." Id. ¶¶ 13, 39; id. ¶ 33 ("Commission precedent . . . indicat[es] that telecommunications services and information services are 'separate, non-overlapping categories.'"). Thus, Congress's use of the phrase "telecommunications service" in Section 255 simply cannot be read to include any information service. Id. ¶ 42.

Congress's decision to exclude information services from all Title II regulation (including Section 255) is understandable. The FCC has stated that regulating the information-services market "would only restrict innovation." Report to Congress, Federal-State Joint Board on Universal Service, CC Docket No. 96-45, FCC 98-67, ¶ 26, (rel. Apr. 10, 1998) ("Report to Congress"). Eighteen years ago, in fact, the Commission decided in its Computer II proceeding that the best way to promote a healthy and competitive enhanced-services industry was freedom from regulatory oversight.[3] The exponential growth in that industry has proven the FCC right. Congress recognized this success story when drafting the 1996 Act, and decided to leave information services free of any regulation -- including the obligations of Section 255. Report to Congress ¶¶ 37, 45.

B. Section 255 Applies to All Telecommunications Providers, Including Resellers, and to All Manufacturers, Whether Foreign or Domestic, Who Sell Equipment to the Public [NPRM ¶¶ 45-46, 57-60]

SBC agrees with the Commission's proposed definitions for the terms "telecommunications providers" and "equipment manufacturer." Specifically, SBC agrees that the term "provider," as used in Section 255, means any entity "offering . . . . telecommunications

[3]Final Decision, Amendment of Section 64.702 of the Commission's Rules and Regulations (Computer II), 77 F.C.C.2d 384 (1980), recon., 84 F.C.C.2d 50 (1980), further recon., 88 F.C.C.2d 512 (1981), aff'd sub nom. Computer and Communications Indus. Ass'n v. FCC, 693 F.2d 198 (D.C. Cir. 1982), cert. denied, 461 U.S. 938 (1983).

services to the public," including resellers[4] and "without regard to the accessibility measures taken by the service provider who originates the offering." NPRM ¶ 45. Any reseller of telecommunications service would certainly say that it "provides" telecommunications service; hence it is "[a] provider" of such service within the plain terms of the statute. 47 U.S.C. § 255(c).

If a provider of telecommunications service also provides a non-telecommunications service, however, it is subject to Section 255's obligations "only to the extent it is providing telecommunications services." NPRM ¶ 46. This remains true even if the telecommunications service and non-telecommunications service originate from the same facilities. Any other construction would be contrary to both the plain language of the statute and Congress's intention to separate telecommunications services from information services. See discussion supra.

SBC also endorses the definition of "manufacturer" proposed by the Access Board and adopted by the Commission. NPRM ¶¶ 59-60. By defining a manufacturer as "a final assembler" of component parts -- an "entity that sells [telecommunications equipment or CPE] to the public or to vendors that sell to the public," id. ¶ 59 (internal quotations omitted) -- the Commission clearly affixes responsibility for compliance with Section 255.

Finally, SBC agrees that, in order to maintain parity between foreign and domestic manufacturers, Section 255 must apply "to all manufacturers offering equipment for use in the United States, regardless of their location or national affiliation." Id. ¶ 58.

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[4]By "resellers," SBC means those carriers who, in accordance with Section 251(c)(4) of the Act, purchase telecommunications service at wholesale rates from another carrier to resale at retail to subscribers who are not telecommunications carriers.

C. As the FCC Proposes, Section 255's "Accessible To and Usable By" Language Should Be Viewed As Imposing a Single Obligation, Rather Than Two Separate Requirements [NPRM ¶¶ 73-75]

Section 255 provides that all telecommunications equipment, CPE, and telecommunications service must be "accessible to and usable by" individuals with disabilities, if it is "readily achievable" to do so. 47 U.S.C. § 255(b), (c). In the NPRM, the Commission tentatively concludes that "there is no reason to distinguish" between "accessible to" and "usable by" for purposes of Section 255. NPRM ¶ 73. SBC agrees. These overlapping terms can be viewed, as the FCC suggests, to impose a single obligation to ensure that an individual with disabilities may "actually use" the functions of a telecommunications service or piece of equipment. Id. (emphasis in original). SBC also agrees that functional use generally will require accessible "support services," such as product information and instructions. Id. ¶ 75.

In the NPRM, the Commission lists a series of input, output, control, display, and mechanical functions in paragraph 74, stating that they will be used as a "basis for evaluating accessibility obligations," id. ¶ 75. SBC requests that the FCC explain how these functions will be weighed or considered in such evaluations.

D. For Purposes of Section 255(d), the FCC Should Maintain a List of "Commonly Used" Peripheral Devices and Specialized CPE, but Should Not Define "Commonly Used" with Reference to Either the Equipment's Cost or Its Listing on a State's Equipment Distribution Program [NPRM ¶ 90]

Section 255(d) provides that, when compliance with subsections (b) and (c) is not "readily achievable," the manufacturer or provider must "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."

47 U.S.C. § 255(d). In order for providers and manufacturers to meet that obligation, it is imperative that the Commission define "commonly used" in a way that makes it absolutely clear what equipment meets that standard.

SBC submits that the only way to do that—and thereby to ensure satisfactory compliance and prevent endless disputes about whether a particular piece of equipment meets the definition— is for the Commission to maintain an up-to-date list of "commonly used" peripheral devices and specialized CPE. The FCC should develop such a list in cooperation with representatives from the disability community and telecommunications industry, building on the work of organizations like the Trace Center.[5] The list could be accessed easily on the FCC's website.

The FCC should not create a "rebuttable presumption" that a device is "commonly used" if it is used in any State's equipment distribution program for persons with disabilities. NPRM ¶ 90. A "presumption" would not eliminate the potential for disputes; it would simply shift the focus of the dispute to whether the presumption is appropriate in a particular case. More importantly, the State lists are not always well maintained. A new device or piece of equipment can take considerable time to make its way through the local bureaucracy before appearing on a State's list, and devices that are no longer "commonly used" are not promptly removed. While it

[5]The Trace Center is an interdisciplinary research, development, and resource center on technology and disability. It is part of the Waisman Center and the Department of Industrial Engineering at the University of Wisconsin-Madison. Since the early 1980's, the Trace Center has been funded as a Rehabilitation Engineering Research Center ("RERC") through the National Institute on Disability and Rehabilitation Research, U.S. Department of Education. Along with Gallaudet University and the World Institute on Disability, Trace was designated as part of a new RERC on "Telecommunications." See Trace Center Homepage <http://www.trace.wisc.edu>.

is not easy to maintain an updated list in such a dynamic industry, it is essential to do so. A single national list, which would become the focus of the industries' and regulators' attention, is more likely to remain current.

SBC also recommends against the FCC's proposal to consider the cost of the peripheral device or CPE -- or whether it is "affordable" -- in determining whether it is "commonly used." Id. Any attempt to incorporate cost or affordability in determinating whether a product is "commonly used" runs the risk of having individuals without disabilities assess the "value" of a product for an individual with a disability -- something the FCC should not do.

A cost comparison would provide the Commission with little information, in any event. There are countless types of peripheral devices designed to assist individuals with a wide variety of physical disabilities. Comparing the cost of different devices -- e.g., comparing a TTY to TeleBraille -- would be meaningless.

Rather than employing a rebuttable presumption or using cost as a measure for use, the FCC should adhere closely to the commonsense meaning of "commonly used" -- as a reference to the number of users of a product relative to the number individuals who have the disability for which the product was designed.

E. How a Manufacturer or Provider Makes Equipment or Service "Compatible" with Commonly Used Peripheral Devices or Specialized CPE Should Be Left to the Industry [NPRM ¶ 92]

While the FCC is equipped to say whether, on final analysis, a piece of equipment or service is compatible with a commonly used peripheral device or specialized CPE, the FCC should not try to prescribe *how* that compatibility should be achieved. The FCC should focus on

the usability of a product. The specific devices or criteria to achieve that usability is a technical decision that belongs to the industry.

If the FCC prescribed the means of compatibility, as suggested by the "five criteria" listed in the NPRM (¶¶ 91-92), manufacturers and providers would rest upon these accepted means and would be reluctant to develop new technologies for fear they would not be FCC approved. For example, the NPRM proposes to adopt "TTY connectability" and "TTY signal compatibility" as bases for determining compatibility. Id. ¶ 91. If the FCC adopts those as baseline criteria, the criteria may be met, but manufacturers and providers will be less likely to consider adding text-based features, which are quickly becoming more popular than TTY in the deaf and hard of hearing community.

In order to avoid this deterrent on innovation, SBC suggests that manufacturers and providers working together be allowed to develop industry standards and standard interfaces for compatibility, with input from the disability community. Such industry-developed guidelines would not hamper competition and may actually help small companies entering the marketplace by identifying clear standards to be met.

F. The Statutory Definition of "Readily Achievable" Contemplates a Case-By-Case Inquiry [NPRM ¶¶ 94-123]

"Readily achievable" is defined in Section 255 as having "the meaning given to it by section 301(9) of [the Americans with Disabilities Act] (42 U.S.C. [§] 12181(9))." 47 U.S.C. § 255(a)(2). That provision, in turn, provides that "[t]he term 'readily achievable' means easily

accomplishable and able to be carried out without much difficulty or expense." 42 U.S.C. § 12181(9) (emphasis added).[6]

Application of this "broad" definition, the FCC rightly concludes, "will be driven by the facts of particular cases." NPRM ¶¶ 97, 99, 122. While it is worthwhile to formulate factors to be considered in applying the definition, those factors should not become so rigid and formulaic that they defeat the virtues of the simple and flexible definition. The FCC must take care, that is, not to lose sight of the statutory definition, which should always guide the ultimate determination of whether an action is "readily achievable."[7]

The FCC proposes three factors to be considered in determining whether an action is "readily achievable" -- its feasibility, expense, and practicality. See NPRM ¶¶ 100-123. SBC generally endorses the FCC's approach.

As the Commission points out, the starting point for determining whether an action is "readily achievable" is determining whether it is feasible. If it is not technically possible nor legal to incorporate a particular feature in a particular equipment or service, the inquiry ends. See id. ¶ 102.

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[6]See also S. Rep. No. 104-23, at 52 (1995) ("The term 'readily achievable' means 'easily accomplishable and able to be carried out without much difficulty or expense.'").

[7]The term "readily achievable" appears in subsections (b), (c), and (d) of Section 255. The FCC seeks comment regarding the extent to which the term should be interpreted the same way in the different provisions. NPRM ¶ 93. It is a "basic canon of statutory construction" "that identical terms within an Act bear the same meaning." Estate of Cowart v. Nicklos Drilling Co., 505 U.S. 469, 479 (1992). Therefore, the FCC should interpret "readily achievable" in the same manner in each provision, applying the same definition -- "easily accomplishable and able to be carried out without much difficulty or expense" -- and the same factors.

If a feature is feasible, the analysis turns to the feature's expense. As the FCC concluded, "for products offered in the public marketplace, the relevant expense is a 'net' figure," which includes "both the cost of the feature and the additional income the feature will provide." Id. ¶ 103.[8] Accordingly, a manufacturer or service provider must be prepared to produce a financial analysis in order to establish that a feature is not "readily achievable."

Finally, the inquiry should take into consideration whether, given the expenses involved, incorporating the feature is practical. That commonsense analysis requires an appreciation of the resources available to the manufacturer or service provider. As the FCC proposes, the appropriate resources to consider are those of the corporation (or similar entity) that has legal control over the telecommunications product. Id. ¶ 109. The resources of a parent corporation generally should not be considered. See United States v. Bestfoods, No. 97-454, 1998 U.S. LEXIS 3733, at *19-*24 (U.S. June 8, 1998) (a "bedrock principle" of corporate law is the recognition and "respect for corporate distinction[]" between a parent and its subsidiary).[9]

Under the FCC's proposal, whether a feature is practical will also depend upon its effect in the marketplace (i.e., will the modification make the product or service less accessible to persons with other disabilities or to the mass market) and the extent to which the equipment manufacturer or service provider can recover its costs. NPRM ¶¶ 111-117. SBC's Universal

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[8]The FCC also proposes to weigh "the extent to which an equipment manufacturer or service provider is likely to recover the costs" of a proposed feature when considering whether the feature is "practical." See NPRM ¶¶ 115-117. The Commission should clarify the extent to which these factors overlap.

[9]The only time a parent's resources should be considered is if the circumstances (and disregard for corporate form) are such as would justify piercing the corporate veil in assessing liability.

Design Policy attempts to address the marketplace considerations by "designing products so that they are usable by the broadest possible audience." See Attachment A at 1. SBC thereby seeks to avoid the situation in which accessibility for one constituency means the loss of accessibility to another. SBC's Policy also should substantially eliminate the issue of cost recovery. By considering accessibility "at the design stage, [rather] than later at the retrofit stage," id., the costs incurred in developing a new feature would be minimized. Moreover, if the feature is incorporated into a service which is used by the general population -- which should happen in many if not most instances -- the costs would be spread over the entire population of users.

There is no question that trying to retrofit an accessibility feature onto an existing product would be more costly and difficult than incorporating such features into new products. See NPRM ¶ 120. This plain fact raises another consideration in determining whether a feature is practical -- timing. Whether a technically feasible feature is "readily achievable" will depend upon whether it is in the design phase, in production, or in some other stage of the product's life cycle. The FCC has proposed -- we think correctly -- "that once a product is introduced in the market without accessibility features that were not readily achievable at the time [of development], Section 255 does not require that the product be modified to incorporate subsequent, readily achievable features." Id. This conclusion is consistent with the plain, prospective language of Section 255(b) which requires that a manufacturer ensure that its equipment "is designed, developed, and fabricated" to be accessible. 47 U.S.C. § 255(b).[10] It is

[10]SBC agrees with the Commission's conclusion that, because timing is considered in determining whether a product or service feature is readily achievable, there is no need for a general grace period for compliance. NPRM ¶ 121. But a grace period should be allowed for implementing changes to some support services, such as billing, which will require agreements among several service providers and consequently may take a few months to establish.

also consistent with the legislative history which expressly states that the drafters of Section 255(b) and (c) "intend[]" for those "requirement[s] to apply prospectively to such new equipment manufactured after the date for promulgation of regulations by the Commission." S. Rep. No. 104-23, at 53 (emphasis added). Congress, therefore, plainly expected the requirements of Section 255 to be prospective only.

II. EFFICIENCY SHOULD BE THE COMMISSION'S FIRST PRINCIPLE IN DESIGNING AN EFFECTIVE COMPLAINT PROCESS[11]

SBC commends the FCC's effort to develop alternative, informal, and more streamlined processes for resolving consumer complaints under Section 255. SBC believes that the Commission's proposals for introducing a pre-complaint referral, a fast-track phase, and alternative dispute resolution among the available options are positive initial efforts for addressing accessibility problems. SBC, however, has the following concerns about the proposed complaint process, starting with a general concern about the NPRM's failure to consider a means for addressing industry-wide accessibility problems.

A. The Commission Should Propose a Mechanism for Addressing Complaints That Pose Industry-Wide Problems

The FCC addresses the complaint process as a piecemeal process -- a single complainant challenging a single manufacturer's or service provider's product. Although in many situations this approach will be appropriate, in others it will not. In some cases, a complaint will pose an industry-wide problem which needs an industry-wide solution. It makes little sense in those

[11]The FCC is correct in concluding that Section 255 precludes private rights of action to enforce its requirements and, thus, all complaints must be brought through the Commission. NPRM ¶ 34. The statutory language permits no other conclusion. 47 U.S.C. § 255(f) ("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.").

instances to adjudicate an individual complaint over and over again across the country. Such a procedure, SBC submits, would be inefficient and ineffective.

SBC therefore asks the Commission to consider establishing an interdisciplinary panel of experts and disability advocates to whom industry-wide complaints could be referred for resolution. The FCC staff that intakes Section 255 complaints would need to learn which complaints are problems with particular companies and which represent systemic concerns. The FCC could direct the latter to the panel to develop comprehensive solutions. The panel then would report back to the Commission with its recommendations for implementation. Solving problems on an industry-wide basis would better achieve the Commission's stated objective of "focus[ing] [its] resources efficiently by handling complaints in a streamlined, consumer-friendly manner with an eye toward solving problems quickly." NPRM ¶ 3; see also id. ¶ 124.

B. For Individual Complaints, the Best Solution for Both Parties and the Commission Is To Avoid the Complaint Process Entirely By Encouraging the Consumer To Contact the Manufacturer or Provider Directly [NPRM ¶ 128]

The FCC proposes that, when it is first contacted by a consumer with a Section 255-type complaint, it will "encourage the consumer to directly contact the manufacturer or service provider involved." NPRM ¶ 128. Only if the consumer remains unsatisfied after making that contact would it be necessary for the consumer to return to the Commission to initiate the complaint process. Id.

SBC supports this informal approach. It is, without a doubt, the best way to conserve the Commission's resources and to have the consumer's problems resolved quickly and without bureaucratic hassle. In many instances, the manufacturer or service provider will be able to

address the purported problem on the telephone, by providing the consumer with additional information or by instructing the consumer on the use of a product.

The FCC plans to supply consumers with the information needed to contact the right manufacturer or provider. Id. The staff appointed to make these referrals should be well educated about access issues and the industry, so that it can direct the consumer to the correct contact. Nothing would frustrate a consumer more than being told that the contact supplied by the Commission was wrong and that he or she must return to the Commission for another name and number.

C. If Unsatisfied After Directly Contacting the Telecommunications Provider, the Consumer May File a Fast-Track Complaint with the Commission; But the Provider Should Be Allowed More Than Five Days to Resolve the Problem, and All Complaints, Reports, Responses, and Evaluations Should Be in a Permanent Format [NPRM ¶¶ 126-143]

Under the FCC's proposal, if the direct contact with the equipment manufacturer or service provider does not resolve the problem to the consumer's satisfaction, the consumer may return to the Commission to file a complaint, thereby initiating the so-called “fast-track phase” of the complaint process. NPRM ¶¶ 126-143. While SBC generally supports the fast-track process, it has the following specific comments and concerns.

1. The Commission will have its staff obtain certain information from the consumer -- the consumer's name, address, identification of the equipment or service, and a description of how the equipment or service is inaccessible to persons with a particular disability. Id. ¶ 131. SBC requests that the Commission also ascertain the consumer's account number for the telecommunications service.

2. The Commission plans to forward the complaint to the appropriate manufacturer, service provider, or both. Id. ¶ 132. SBC recommends that each telecommunications or manufacturing company be required to establish only one point of contact to which all such complaints will be referred.[12] This will ensure that the FCC is able to notify companies of the complaint in a timely and reliable manner. The Commission should also encourage, but not require, that the name of the company contact be made publicly available. See id. ¶ 134.

3. The Commission plans to allow consumers with disabilities to file their complaints "by any accessible means," including Braille, audio cassette, or telephone call. Id. ¶ 129. The FCC seeks comment on whether it should forward complaints as submitted, regardless of format, or whether it should forward written translations or transcripts of complaints submitted in formats such as audio cassette, Braille, or TTY. Id. ¶ 135. SBC strongly urges the FCC to forward complaints to respondents in written English text, translated if necessary from the complainant's format or media. This approach has at least three advantages over requiring the respondent to translate. First, it allows the FCC to maintain some control over the accuracy of the translation. Second, it prevents the Commission from imposing the often costly burden of translation on small manufacturers and service providers. And third, it ensures that there is a common and verifiable understanding of the complaint and response in a permanent format. See id. ¶ 152 (recognizing that "a permanent format" is necessary to create "an appropriate record for decision-making").

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[12]For example, there would be a point of contact in each of SBC's telecommunications subsidiaries -- Pacific Bell, Nevada Bell, Southwestern Bell, Pacific Bell Mobile Services, Southwestern Bell Mobile Services, and Cellular One.

4. The Commission proposes to allow the manufacturer or provider only five business days (from the date it forwards the complaint) "to study the complaint, gather relevant information, identify possible accessibility solutions, . . . work with the complainant to solve the access problem, if possible," and return to the FCC with its report. Id. ¶ 136. Five days is not realistic.

If a complaint can be resolved within five days, it is likely to have already been resolved during the pre-complaint referral process. See supra Part I.B. Most of the complaints that proceed to the fast-track phase, therefore, will involve more than a lack of communication or simple solution. Indeed, the FCC itself acknowledges the "likely complexity of many Section 255 complaints." NPRM ¶ 150; see also id. ¶ 162 (many complaints "are likely to present formidable difficulties to all concerned"). Section 255 complaints will require considerable analysis, deliberation, and consultation -- both within the company and outside. They often will require discussions with other parties and even consideration on an industry-wide basis. If the FCC wants more than slap-dash band-aid resolutions, it must afford companies more than five days to work through the access issues.

Moreover, if the deadline remains at five days, the FCC will be besieged with requests for extensions. See id. ¶ 137. To avoid taking the Commission's and the respondent's time addressing such extension requests -- and to avoid raising the complainant's expectation for a five-day resolution -- the Commission should propose a fifteen-to-thirty-day deadline to respond

with a final action report or with a request for an extension upon a proper showing that "substantial efforts" to resolve the dispute are underway. Id.[13]

5. Under the FCC's proposal, a respondent may submit its action report "by telephone call" or "other oral" means. Id. ¶¶ 138-139. While SBC appreciates the Commission's attempt to be flexible, see id., we believe that it is in everyone's interest to require that the report be submitted in writing. That is the only way to ensure the creation of a permanent record, id. ¶ 152 (recognizing that "a permanent format" is necessary to create "an appropriate record for decision-making"), to minimize the possibility of misunderstandings, and to guarantee that an accurate "copy" of the report is sent to the complainant, id. ¶ 139 (seeking comment on how a telephonic report might be "copied"). The FCC can read the written text, if necessary, to communicate with the complainant.

6. After the respondent submits its report to the FCC, the agency plans to undertake an evaluation of the matter. Id. ¶ 140. The NPRM emphasizes that, even if the complainant is satisfied with the resolution of the complaint, the FCC may instigate further action against the respondent if "there was an indication of an underlying compliance problem." Id. SBC submits that the FCC should not devote its resources to pursuing matters that have been resolved to the

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[13]The Commission tentatively concluded that the deadline will run "from the time [the FCC] forward[s] the complaint to the respondent." NPRM ¶ 136. In many instances, that date will be the same date the complaint is received by the respondent because the Commission will send it by facsimile or the Internet. In other cases, however, the Commission will elect to send the complaint (which, under the FCC's proposal, may be on audio cassette, id. ¶ 129) by overnight mail or the regular postal service; this would mean that the complaint is not received until one or more days after it is forwarded. SBC requests that the Commission eliminate this disparity -- and ensure that each provider is allowed the same amount of time to respond to the complaint -- by revising its proposal so that the clock will start on the date the complaint is received by the manufacturer or provider.

satisfaction of the parties. Although we recognize that the FCC has a general obligation to ensure compliance with the Communications Act and has the authority to initiate its own investigations, the FCC casts doubt on its stated intention to allow the parties to resolve disputes on their own, without regulatory intervention, and in the most efficient manner possible. See id. ¶ 124. The FCC, therefore, should expressly limit its unsolicited intervention in proceedings to situations in which there is evidence of egregious behavior or systemic noncompliance.

7. Even if the FCC determines that a matter should be closed, the complainant can elect to pursue the complaint to the second-phase dispute resolution. Id. ¶ 143. The FCC proposes "not to require any particular method for complainants to communicate their desire to continue to dispute resolution." SBC urges the Commission not to adopt such an undefined approach. It is, to say the least, an invitation to confusion. In a telephonic conversation, for example, an FCC employee could easily misinterpret a complainant as not wanting to proceed ahead, when in fact the complainant did. And the opposite will also be true. To avoid such inevitable misunderstandings -- and the resulting frustration -- the FCC should require complainants to express their intention to continue proceedings in a permanent written format.

D. The Commission Should Impose a Standing Requirement for Informal and Formal Complaint Proceedings [NPRM ¶ 148]

SBC urges the FCC to reconsider its proposal not to impose a standing requirement for complaints under Section 255. NPRM ¶ 148. Congress drafted Section 255 to ensure that telecommunications equipment and services would be accessible by "individuals with disabilities" or, alternatively, would be compatible with devices and CPE commonly used by "individuals with disabilities." 47 U.S.C. § 255(b), (c), (d). Congress's concern was plainly for

"individuals with disabilities." It makes no sense, in that event, for the FCC to allow all persons or entities -- without regard to their disabled status, alleged injury, or relationship to the manufacturer or service provider at issue -- to complain about violations of Section 255's mandates. Such an approach violates all prudential notions of standing, and is contrary to legislative intent.

Furthermore, when Congress wanted the FCC to abandon standing requirements in the Communications Act, it has said so explicitly. In Section 208 of the Act, Congress expressly stated that "[n]o complaint shall . . . be dismissed because of the absence of direct damage to the complainant." 47 U.S.C. § 208(a). The lack of a similar provision in Section 255 demonstrates that Congress intended for some standing requirement to be imposed. See Gozlon-Peretz v. United States, 498 U.S. 395, 404 (1991) ("'[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.'" (quoting Russello v. United States, 464 U.S. 16, 23 (1983)); Beach v. Ocwen Federal Bank, 118 S. Ct. 1408, 1413 (1998) (same).

Contrary to the FCC's assumption, the purposes of Section 255 are not "best served" by allowing any person or entity to file an accessibility complaint. NPRM ¶ 148. Such a policy would invite companies to file baseless complaints against their competitors for simple harassment value. It also would allow parties to file complaints seeking access to certain equipment or services when, in reality, there may be no demand for such access. These abusive and misguided (although perhaps well intended) complaints would only serve to consume the scarce resources of the FCC and to distract the attention of responding manufacturers and

providers, thereby leaving less resources to devote to proper complaints by "individuals with disabilities." With these concerns in mind, SBC proposes that the Commission require that a complainant show that he either is someone who is prevented from accessing or using the respondent's product or service, or is an association or individual acting on behalf of such a person. This approach, we believe, is consistent with the FCC's aim to not overly restrict the process and to avoid burdensome disputes over whether an individual is in fact disabled.[14]

E. Generally Thirty Days To Answer an Informal Complaint Will Be Sufficient [NPRM ¶ 150]

Recognizing the "likely complexity of many Section 255 complaints," the Commission proposes to allow thirty-calendar days for a respondent to answer an informal complaint. NPRM ¶ 150.[15] Generally speaking, this amount of time will be adequate to reply.

The FCC, however, should willingly extend the deadline upon request, if the parties can demonstrate that they are making significant progress toward resolution. This approach would allow parties to resolve their disputes without taxing the Commission's limited resources.

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[14]At a minimum, the Section 255 complaint process should be restricted to consumers, or representatives of consumers, of the product or service being challenged. The FCC implicitly suggests an intent to so limit these complaint proceedings in its discussion of the fast-track process. See, e.g., NPRM ¶ 128 (discussing contact "by a consumer"). A standing requirement, of course, will not limit the FCC's general authority to investigate alleged violations of Section 255. Cf. id. ¶ 140 (even if "the complainant's access problem [is] satisfactorily resolved," the FCC will continue its investigation if "there is an indication of an underlying compliance problem").

[15]A respondent will also have thirty days to answer a formal Section 255 complaint. See NPRM ¶ 154; 47 C.F.R. § 1.724(a). Strangely, however, the FCC seems tentatively to allow fifteen days for a complainant to reply in an informal proceeding, NPRM ¶ 154, while allowing only ten days in a formal one, id.; 47 C.F.R. § 1.726.

F. The FCC Should Require That a Complainant File a Formal Complaint and Should Ensure Parity with Respect to a Filing Fee [NPRM ¶¶ 154-155]

The formal complaint process, which affords the complainant the right to conduct discovery, NPRM ¶ 147 n.260, is more "burdensome" on both the parties and the Commission than the informal process, id. ¶ 146. In recognition of the added rights and burdens, the Commission traditionally required the complainant to plead formal complaints with "specificity" and to support all claims with affidavits and documentation. 47 C.F.R. § 1.720. In the NPRM, the FCC proposes to abandon these pleading requirements for Section 255 formal complaints, by allowing a complainant to move into formal proceedings at the end of the informal process, without re-filing a complaint. NPRM ¶ 154. The FCC also proposes not to require its customary filing fee for Section 255 complaints against non-common carriers. Id. ¶ 155. The FCC should reconsider these proposals.

At the end of the informal process, the complaint will contain minimal information: the complainant's name, address, an identification of the equipment or service, and a description of how the equipment or service is inaccessible to persons with a particular disability. See id. ¶ 131. Without more detail than this, a company simply will not be able to respond with any precision. Moreover, since formal complaints are "generally resolved on a written record consisting of a complaint, answer and reply" (and without independent investigation by the Commission), 47 C.F.R. § 1.720, the complainant will -- eventually -- have to provide the supporting affidavits and documentation traditionally required up-front. There seems to be little reason to delay the introduction of such materials, which are designed to focus the proceeding on the specific issues in dispute.

To avoid needlessly drawing out the complaint process, a complainant should also be required to request formal proceedings within six months of the date that the respondent filed its answer in the informal proceeding. See NPRM ¶ 154. Such a requirement would be consistent with the standard that applies to Section 208 complaints. 47 C.F.R. § 1.718.[16]

Finally, in determining whether to impose a filing fee, the FCC must ensure that there is parity among the defendants to the Section 255 complaint. As the Commission notes, NPRM ¶ 155, Section 8 of the Communications Act imposes a filing fee on all formal complaints against common carriers. 47 U.S.C. § 158(g). A substantial portion of Section 255 complaints will be against such carriers and hence subject to this fee (absent a waiver under Section 8(d)(2)). It would create an arbitrary disparity between common carriers on the one hand, and all others who are subject to Section 255 on the other, to require filing fees to raise a claim against the former but not the latter. Moreover, if a disparity persists, complainants may attempt to "game" the system by filing against a non-common carrier, when the real complaint is against the carrier -- the complainant knowing full well that the respondent will then join the true target in the proceeding.

While Congress requires that the FCC recover the costs of formal complaint proceedings through filing fees, see Report and Order, Establishment of a Fee Collection Program to Implement the Provisions of the Consolidated Omnibus Budget Reconciliation Act of 1985, 2 FCC Rcd 947, 948 (1987) (FCC must charge the users of FCC services what it costs the agency to take certain regulatory actions), Congress also created a mechanism through which

[16]When a complainant elects to move from the informal to the formal process, the thirty-day deadline for the respondent to file its answer should start anew.

those fees can be waived. See 47 U.S.C. § 158(d)(2) (FCC can waive the fee for formal complaints "in any specific instance for good cause shown, where such action would promote the public interest."). The FCC should notify the disability community that this waiver process is in place and should exercise its authority to waive fees on a case-by-case basis for consumer complaints where such actions would promote the public interest.[17]

G. A Motion for Joinder Should Be Pleaded with Specificity [NPRM ¶ 154]

The FCC proposes to allow joinder of respondents, so that a service provider could join an equipment manufacturer, or vice versa, if the other "is in part responsible for allegedly deficient accessibility" or if an effective solution would require the participation of the other entity. NPRM ¶ 154. SBC agrees with the proposal in principle, but is concerned that such motion to joinder will become routine, and applied when the circumstances do not warrant it. To avoid its improper use, SBC recommends that the Commission require that a motion for joinder contain a full statement of the relevant facts, including supporting documentation, that demonstrate a clear link between the action complained of and the joined party.

[17]The Commission has ruled it will grant waivers "on a case-by-case basis in extraordinary and compelling circumstances upon a showing that a waiver or deferment would override the public interest in reimbursing the Commission for its regulatory costs." NPRM, Implementation of Section 9 of the Communications Act, 9 FCC Rcd 6957, 6970 (1994). See also Report and Order, 2 FCC Rcd at 948 ("The legislative history [of Section 8(d)(2)] unequivocally states that our discretion to waive or defer fees shall be narrowly defined.").

H. Alternative Dispute Resolution Will Be a Productive Method of Resolving Accessibility Issues [NPRM ¶¶ 157-161]

SBC agrees that alternative dispute resolution ("ADR") can be an effective tool for addressing accessibility concerns. Once the parties mutually agree to its use,[18] and the FCC consents, the FCC need not further involve itself in the process. NPRM ¶ 159. The statute, 5 U.S.C. §§ 571-584, and the FCC regulations implementing the statute, anticipate that the ADR process will operate without agency intervention.

I. Evidence That a Respondent Has Made Good-Faith Efforts To Comply with Section 255 Should Be Considered in Evaluating a Complaint [NPRM ¶¶ 162-171]

SBC strongly supports the FCC's decision to consider a respondent's good-faith efforts to comply with Section 255 in evaluating a complaint. NPRM ¶¶ 164-166. In considering a good-faith-effort defense, the Commission would take into consideration all actions by the respondent "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." Id. ¶ 164. As the FCC explained, the examples listed (e.g., those set forth in paragraph 165, in the Access Board guidelines, and in the Appendix to the Access Board Order) would not be mandatory requirements, but would be evidence of an intent to comply with Section 255. NPRM ¶ 166 (the "guidelines" are not a "'laundry list' of requirements all firms . . . must adopt").

J. The FCC Should Not Order a Respondent To Retrofit Equipment or Service As a Penalty for Non-Compliance [NPRM ¶ 172]

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[18] 5 U.S.C. § 572 ("if the parties agree"); id. § 575(a)(1) ("whenever all parties consent"); see also Air Line Pilots Ass'n v. Miller, No. 97-428, 1998 U.S. LEXIS 3403, at *19 (U.S. May 26, 1998) ("'a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit'" (quoting Steelworkers v. Warrior & Gulf Nav. Co., 363 U.S. 574, 582 (1960)).

Basically SBC agrees with the FCC's proposed penalties for non-compliance with Section 255. NPRM ¶ 172. The penalties traditionally available for violations of the Communications Act should be applicable for a violation of Section 255; and penalties against manufacturers and service providers should be similar. SBC further agrees that the most onerous sanctions -- an order of forfeiture, to revoke a license, or to cease and desist -- should be reserved for willful or repeated violations of law. Id.

The Commission should not, however, require a respondent to retrofit a piece of equipment or service. Id. It makes no sense to require a company to retrofit equipment to meet the standards of technology that applied when equipment was first manufactured. By the time the FCC orders such retrofitting, technological innovations will likely have made the old standard obsolete. And requiring improvements on an out-of-date model will only stifle future improvements. The cost of retrofitting, in addition, will often exceed any reasonable penalty. Therefore, the Commission should require a manufacture or provider to modify its equipment or service only when the company substantially changes or upgrades its product. Such an approach would be consistent with the recommendation of the Telecommunications Access Advisory Committee. See Telecommunications Access Advisory Committee, Final Report, Access to Telecommunications Equipment and Customer Premises Equipment by Individuals with Disabilities, January 1997, at § 4.2.

K. The FCC Should Encourage the Telecommunications Industry To Develop Other Measures To Increase Accessibility to Individuals with Disabilities [NPRM ¶ 174]

In the NPRM, the FCC asks whether there are other measures that it might take to increase accessibility to telecommunications products and services -- for example, by establishing a clearinghouse of information on telecommunications disabilities issues, publishing information regarding a company's performance, and developing a peer review process to complement the implementation measures. SBC thinks that these are important initiatives that should be implemented. But they should be implemented not by the FCC, but by the industry working together with consumer groups. The Commission can effectively encourage such activities by making a company's participation in these efforts evidence of a good-faith effort to comply with Section 255. See NPRM ¶¶ 164-166.

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/s/

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