

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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In the Matter of)
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Implementation of the)
Telecommunications Act of 1996:) CC Docket No. 96- 198
)
Access to Telecommunications Services,)
Telecommunications Equipment, and)
Customer Premises Equipment by)
Persons With Disabilities)

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

BELLSOUTH COMMENTS

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In the Matter of)
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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

BELLSOUTH COMMENTS

BellSouth Corporation, on behalf of its affiliated companies (“BellSouth”), submits these Comments in response to the Commission’s *Notice of Proposed Rulemaking*’ in the above captioned proceeding.

I. Introduction and Summary

By its *Notice*, the Commission proposes rules to effectuate the intent of Congress embodied in Section 255² of the Communications Act.³ Section 255 was added to the Telecommunications Act of 1996” to ensure that the millions of individuals with disabilities

¹ *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 Proposed Rulemaking, FCC 98-55 (April 20, 1998) (“*Notice*”).

² 47 U.S.C. § 255.

³ 47 U.S.C. § 15 1 *et seq.*

⁴ Pub. L. 104-104, 110 Stat. 56 (1996) (“1996 Act”).

living in America will share in the benefits of innovation and increased consumer choice promised by the 1996 Act. Indeed, it is the purpose of this section to “foster the design, development, and inclusion of new features in communications technologies that permit more accessibility of communications technology by individuals with disabilities.”

To that end, Section 255 imposes on manufacturers a duty to design and manufacture equipment to be accessible to and usable by individuals with disabilities, if readily achievable.” Similarly, providers of telecommunications services are charged with ensuring that their services are accessible to and usable by individuals with disabilities, if readily achievable.⁷ When these standards cannot be attained, manufacturers and service providers must make their equipment or services compatible with existing devices commonly used by individuals with disabilities, if readily achievable.⁸ In imposing these obligations, Section 255 borrows goals, standards and terminology from the Americans with Disabilities Act of 1990.⁹

In these Comments, BellSouth supports the Commission’s general proposition that the goals of Section 255 must be pursued in a “practical, commonsense manner.” BellSouth also agrees that Section 255’s prospective focus on development and design processes requires a flexible approach to defining carrier and equipment makers’ obligations, rather than detailed implementation rules.¹ Finally, while BellSouth concurs that consumer concerns should be

⁵ S. Rep. No. 230, 104th Cong., 1st Sess. 52 (1995)

⁶ 47 U.S.C. § 255(b).

⁷ 47 U.S.C. § 255(c).

⁸ 47 U.S.C. § 255(d).

⁹ Pub. L. 101-336, 104 Stat. 327 (1990) (“ADA”).

¹⁰ Notice at ¶ 3.

¹¹ Notice at ¶ 3.

addressed in a “consumer-friendly manner with an eye toward solving problems quickly,”¹² BellSouth is concerned that the Commission’s specialized enforcement proposals, particularly the “fast-track” process, will not foster such results and will prove to be inconsistent with the Commission’s other articulated objectives.

Thus, BellSouth welcomes the opportunity through these Comments to work with the Commission and customers with disabilities to develop rules that will further the objective of Section 255 to increase access to telecommunications services and equipment by individuals with disabilities. BellSouth urges the Commission to adopt practical rules and procedures that will allow carriers and equipment providers the flexibility to respond to circumstances that are sure to be fact-specific in the short term, while providing incentives for the consideration of the needs of those with disabilities in longer-term design and development activities.

II. Scope of Coverage

In the *Notice*, the Commission observes that certain of the terms of Section 255 that establish the entities subject to the requirements of Section 255 are also defined and used elsewhere in the Communications Act. The Commission proposes not to apply any new or specialized meanings to these terms. Other terms arise only in the context of Section 255, and the Commission proposes certain meanings or clarifications for these terms, BellSouth comments on the Commission’s proposals regarding a number of these terms below.

¹² *Notice* at ¶ 3.

A. “Telecommunications Service” and “Provider of Telecommunications Service”

The Commission properly notes that Section 255(c) expressly covers “provider[s] of telecommunications service,” but inquires “whether Congress intended Section 255 to apply to a broader range of services,”¹³ such as information services. “Telecommunications service” and “information service” are specifically defined in the Act and are not given any specialized meaning in Section 255. BellSouth believes it would be wrong to attribute to Congress an intent not otherwise evident. Accordingly, the Commission should not gratuitously expand the coverage of Section 255 to include information services.

Indeed, to do so would result in competitive disparities between entities that provide both information services and telecommunications services and entities that are pure information service providers. Unless the Commission continues to recognize the statutory distinction between telecommunication services and information services, entities in the first category would be subjected to disparate regulatory mandates not imposed on their information service competitors. Accordingly, BellSouth supports the Commission’s tentative conclusion that Section 255 should apply only to providers of telecommunications services and only to the extent the subject entity is providing a telecommunications service.¹⁴

B. “Manufacturer of Telecommunications Equipment or Customer Premises Equipment”

Section 255(b) applies by its terms to manufacturers of “telecommunications equipment” or “customer premises equipment.” Although these terms are separately defined in the Act, Section 255 recognizes no distinction between them for purposes of the obligations established

¹³ Notice at ¶ 42.

¹⁴ Notice at ¶ 46.

in that section. BellSouth thus supports the Commission’s tentative conclusion that Section 255 “applies to both categories the same requirement of *functional* accessibility.”¹⁵ Similarly, BellSouth agrees with the Commission that resolution of the potential “practical difficulties” of assigning responsibility when inaccessibility may be due to multiple elements of a telecommunications system should be addressed in the context of the particular circumstances of individual cases.¹⁶

Similar practical difficulties are presented by the question of how Section 255 should apply to manufacturers involved in the production of multi-source equipment.” Generally, BellSouth concurs in the Commission’s proposal to address this issue by adopting the Access Board’s definition of “manufacturer” as the “final assembler” of the product.* Such a definition appropriately identifies the final assembler as the focal point of control over the components that go into the product.

BellSouth is concerned, however, that the Access Board’s definition appears inappropriately to equate the “final assembler of subcomponents” with the “entity whose brand name appears on the product.” It is not uncommon for an entity that is not a manufacturer to license its brands to manufacturers, but to have no direct involvement in the manufacturing or “final assembly” process itself. Since Congress specifically intended to capture manufacturers’ design and development processes within the scope of Section 255, the Commission should be

¹⁵ Notice at ¶ 49 (emphasis in original).

¹⁶ Notice at ¶ 51.

¹⁷ Notice at ¶ 59.

¹⁸ Notice at ¶ 59.

¹⁹ Notice at ¶ 59 citing Telecommunications Act Accessibility Guidelines, 63 Fed. Reg. 5608. 5613 (1998).

careful not to adopt a definitional interpretation that would have the effect of shifting the compliance burden from the true manufacturer to an entity with whom the manufacturer has a mere licensing agreement. Accordingly, BellSouth urges the Commission to conclude that an entity is not a manufacturer or final assembler under Section 255 merely because the entity's brand name appears on a product.

C. “Network Features, Functions, or Capabilities”

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 255.²⁰ BellSouth concurs with the Commission's assessment that these terms do not require further definition.*

BellSouth also agrees with the Commission's view that the obligation imposed on carriers in Section 251(a)(2) attaches only to a carrier's own configuration of network capabilities.²² The obligation does not establish carriers as guarantors that other service providers' assemblage of network features, functions, or capabilities provided under Section 251 will meet Section 255 standards. Nor does it impose requirements regarding accessibility of the underlying components. BellSouth believes that this view appropriately recognizes the difference between carriers' obligations with respect to their services and manufacturers' obligations with respect to the underlying equipment components.

²⁰ 47 U.S.C. §251(a)(2).

²¹ *Notice* at § 63.

²² *Notice* at ¶ 65.

III. Compliance Standards

The operative standard that both carriers and manufacturers must meet under Section 255 is that they must take appropriate action to make their product or services “accessible and usable,” if doing so is “readily achievable.” These standards are borrowed from the ADA, and the Commission has proposed in the Notice to adapt them for the telecommunications context. BellSouth addresses the Commission’s proposals with respect to these standards below.

A. “Accessible and Usable”

The Commission noted that in the ADA context “accessibility” and “usability” have different connotations. The former refers to “the capability to physically approach a resource or program,” while the latter term refers to “interaction with the resource or program.”²³

Recognizing that these terms “present interpretive difficulties in the telecommunications context,” the Commission suggests that these difficulties may be overcome by not distinguishing between the terms for purposes of Section 255, but by using “accessibility” in the broad sense to refer to the ability of persons with disabilities actually to use the equipment or service.²⁴

BellSouth agrees that this interpretive accommodation is consistent with the principal objective of Section 255 to remove impediments to the *functional* characteristics of telecommunications services and equipment by individuals with disabilities.

BellSouth also supports the Commission’s view that Section 255 addresses only aspects of accessibility under the direct control of manufacturers and service providers and does not extend to attributes of physical approachability of their offerings.²⁵ Thus, contrary to the

²³ Notice at ¶ 71.

²⁴ Notice at ¶ 71.

²⁵ Notice at ¶ 77.

suggestion cited in the *Notice*,²⁶ the Commission should confirm that physical approachability of such offerings is governed by regulations the Department of Justice previously adopted to implement the ADA. Such confirmation is particularly desirable for entities, such as BellSouth's payphone entity, which have spent significant time and money upgrading or replacing phones to meet accessibility requirements of the ADA, as applied by the Department of Justice. Since accessibility of payphones has already been considered and addressed in the context of ADA implementation, and since the feasible and practical features have already been identified and deployed, no additional physical approachability requirements are warranted under Section 255.²⁷

B. “Readily Achievable”

Section 255 defines “readily achievable” by reference to the ADA, which in turn defines the term to mean “easily accomplishable and able to be carried out without much difficulty or expense.”²⁸ The ADA also enumerates certain factors to be considered when applying this standard. In the *Notice*, the Commission has proposed to retain the ADA broad statement that “readily achievable” means “easily accomplishable and able to be carried out without much difficulty or expense,” but has proposed to adapt the consideration factors of the ADA to more accurately reflect a telecommunications context.” BellSouth believes that this flexible approach

²⁶ *Notice* at ¶ 78.

²⁷ At a minimum, the Commission must conclude that public payphones that meet applicable ADA requirements are also “accessible,” as that term is proposed under Section 255, since such payphones are designed to ensure that persons with disabilities can “actually use the equipment or service by virtue of its inherent capabilities.” *Notice* at ¶ 73.

²⁸ 42 U.S.C. § 12181(a).

²⁹ *Notice* at ¶ 97-98.

to applying the “readily achievable” standard on the basis of characteristics unique to the telecommunications industry will serve the goals of Section 255 well.

In applying the “readily achievable” standard, the Commission proposes to consider three factors: feasibility, expense, and practicality.³⁰ Regarding the first factor, the Commission correctly recognizes that feasibility is not simply a question of technological capability, but also may be constrained by legal or regulatory considerations, physical attributes of the product (*e.g.*, large buttons on a small phone), conflicts in feature interaction, or other conditions.³¹ The Commission’s recognition of these aspects of the feasibility factor will be important to application of Section 255 in an appropriately flexible manner.

With respect to expense, the Commission tentatively proposes to adopt a “net” figure approach, considering both the cost of the feature and the additional income the feature may be expected to provide.³² While BellSouth agrees with the Commission that “costs” should include consideration of both direct and indirect costs as well as opportunity costs,³³ BellSouth disagrees that assumption of a “cost burden” is an explicit element of the readily achievable standard.” Rather, the readily achievable standard requires that the desired action be “accomplishable . . . without much . . . expense.” Accordingly, the Commission was correct to acknowledge that “cost recovery is a factor that a company should weigh in making its determination of what is readily achievable.”³⁵

³⁰ Notice at ¶ 100.

³¹ Notice at ¶ 101.

³² Notice at ¶ 103.

³³ Notice at ¶ 103-04.

³⁴ Notice at ¶ 115.

³⁵ Notice at ¶ 115.

The third factor of the readily achievable standard, practicality, lends itself to the reality that many issues of accessibility are likely to be fact- and circumstance-specific inquiries. Thus, practicality as a factor allows for consideration of such aspects as resources, market conditions, cost recovery, timing, and other miscellaneous conditions.” BellSouth concurs that such flexibility will be necessary to resolve complex questions of whether and to what extent the accessibility of telecommunications equipment, CPE, or telecommunications services is readily achievable.

IV. **Implementation Processes**

Although Section 255 does not require it, the Commission proposes to adopt special measures to ensure that equipment and service providers are in compliance with the accessibility standards of Section 255.³⁷ While the Commission has proposed enforcement processes on the basis of its goals of customer responsiveness and efficient use of resources, BellSouth believes that the detailed nature of the requirements will undermine the Commission’s goals. In particular, the “fast track” proposal is rife with procedural rules that will themselves tend to become the compliance objective, thus not serving consumers’ interests. Accordingly, BellSouth urges the Commission not to adopt such “fast track” procedures.

The “fast track” proposal, while obviously well-intended, is misdirected. That is, the Commission has recognized that compliance issues arising under Section 255 are likely to be complex;³⁸ will generally have to be evaluated and refined on a case-by-case basis;³⁹ and are

³⁶ Notice at ¶ 106-123.

³⁷ Notice at ¶ 124.

³⁸ Notice at ¶ 122.

³⁹ Notice at ¶ 122.

likely to present practical difficulties due to the potential presence of multiple elements or providers associated with a given service.⁴⁰ These conditions significantly diminish the possibility that the fast track process could lead to anything other than false expectations.”

Indeed, the anticipated complexity of issues arising under Section 255 was the precise reason offered by the Commission for *extending* the timeframes for answers (from ten to thirty days) and for replies (from five to fifteen days) for complaints that could not be resolved under the fast track mechanism.⁴² Rather than introducing an initial procedural hurdle for consumers to get over before reaching the Commission’s general complaint procedures, the Commission should handle Section 255 complaints under its existing procedures.

BellSouth also urges the Commission to include reasonable standards of due process if it adopts special complaint procedures under Section 255. First, the Commission should adopt a reasonable standing requirement as a condition of complaints brought under Section 255.⁴³ The complainant should be a customer of the service or equipment provider and should be the individual whose disability raises questions of the accessibility of the desired product. Contrary to the Commission’s suggestion, such a reasonable and objective standing requirement is not likely to lead to undue procedural delays over standing. Similarly, the Commission should

⁴⁰ Notice at ¶ 5 1.

⁴¹ BellSouth also believes that the proposal unnecessarily, undesirably, and prematurely casts consumers and respondent service or equipment providers in an adversarial posture. To the extent the Commission desires to craft a process in which consumers can pursue their accessibility concerns, the Commission should focus on processes that encourage and facilitate informal and flexible communication, rather than resort to adversarial procedures involving complaints, deadlines, reports, extensions of time, evaluations of responses, information requirements, etc. – processes that the Commission has already noted will require organizational changes at the Commission to handle all such proceedings.

⁴² Notice at ¶ 150.

⁴³ Notice at ¶ 148.

establish a reasonable statute of limitations (no more than two years) for claims of violations of Section 255. Service providers and manufacturers should not be exposed indefinitely for “accessibility” or “readily achievable” assessments made years earlier.

Further, BellSouth urges the Commission to recognize the availability of similar products as satisfaction of the readily achievable test.⁴⁴ Although BellSouth agrees with the Commission that the readily achievable test cannot be bypassed simply because another product is available, neither can the Commission simply presume that accessibility for one product is readily achievable merely because accessibility for a functionally similar product is readily achievable. Thus, the readily achievable test must take into account the aggregate effects of making accessible multiple products that all provide the same basic functionality. As the Commission acknowledges, full accessibility will be limited by feasibility, expense, and practicality. Not all products in the marketplace can be equipped with all features. BellSouth thus urges the Commission to conclude that a “product line” approach in many cases will increase the overall accessibility of a company’s offerings.

Finally, the Commission should be judicious with respect to its collateral use of any information collected in the course of a complaint proceeding. The Commission first should ensure that any such information that a respondent asserts is confidential will be subject to the same protections afforded other confidential submissions to the Commission. The Commission also should remain mindful of the likely fact-specific nature of many “accessibility” and “readily achievable” inquiries and should not allow the resolution of individual complaints to become

⁴⁴ Notice at ¶ 168.

defacto benchmarks or rebuttable presumptions of “accessibility” or “readily achievable” standards for other equipment or service providers.

CONCLUSION

BellSouth supports the Commission’s initiative to implement Section 255 in a “practical, commonsense manner.” Except for the limited instances discussed herein, **BellSouth** believes that the Commission’s proposals live up to that objective.

Respectfully submitted,
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