

some plan for product testing for accessibility. The plan should be periodically reviewed to determine whether it is resulting in accessibility, and if it is not, then the process itself should be revisited.

Second, every covered entity should maintain records showing how the plan was implemented at each phase of the production process. In the design phase for equipment, for example, records should show what accessibility options were considered, and why they were rejected.

Third, the manufacturer or service provider should certify that it has taken accessibility issues into account, and should further state (using the FCC guidelines) whether it believes that its product is or is not accessible to and usable by persons with specific functional limitations.⁶²

Fourth, the information described in the first and second point above should be provided to a complainant on request.

Complainants will then be able to focus upon whether reasonable efforts have been made to address Section 255. In turn, at the end of the complaint process, it will become simpler for the FCC to determine the appropriate remedy for a particular violation. The FCC will be in a position to distinguish between companies that have made good faith efforts to comply with Section 255. and those which have not.

⁶² The Commission asked whether it should adopt rules similar to its equipment certification rules for purposes of Section 255. AFB believes that this would be helpful. First, it will help people in the disabled community to make decisions about what products to buy. Second, it may help focus complaints. More detailed investigation may be necessary where a product is plainly not accessible. The informal process may be best suited for resolving complaints about products that are certified accessible but which for some reason -- inadequate documentation, correctable code errors, etc. -- are not accessible in fact.

A. **The Informal Process.**

The AFB generally supports the informal procedures outlined by the Commission. It believes that the approach can be flexible, so long as the procedures are clearly understood, publicized, and easily accessible.

At ¶ 132, for example, the Commission asks whether it should permit delegation of contact point responsibility to clearinghouses or to other entities that are not “in-house.” The main goal should be to ensure that the complaint process is seamless to the complainant. So long as one entity is responsible for receiving complaints (as opposed to one entity for engineering issues, one for design, etc.) the process should work whether or not the contact responsibility is delegated. The Commission should permit latitude in contact point designation, so long as the legal responsibility for ensuring that complaint response deadlines are satisfied lies with the entity that is subject to Section 255.

At ¶ 134, the Commission asks whether contact information should be publicly available. The answer is “yes.” If the information is publicly available, secondary information sources will develop that will help potential complainants use the informal process more effectively. Access through the Commission’s own web resources would be helpful in this regard. It may also be helpful to establish an e-mail address for filing complaints.

It may also prove helpful to establish a database of complaints filed. This would simplify processing procedures, and also (a) help equipment and service users to identify what sort of issues are being addressed through the complaint process and (b) help the Commission identify particular problems or particular companies that may be of most significant concern. Further, the database should include information about complaints that were dismissed on the ground that

the service involved was an information service. By collecting data on accessibility of information services, the Commission will be in a better position to gauge the rationality and impact of the telecommunications/information services distinctions that it draws.

At ¶ 135-139, the Commission sets out very strict deadlines for responding to complaints -- too strict for a process that is supposed to be informal and cooperative. While some complaints (such as complaints about documentation for a product) might well be resolved quickly, in other cases (where it appears that a company is not implementing Section 255 in the design process) it is likely to take more time for the company to produce and the complainant to examine information that will help resolve the complaint. It may be that many complaints, for example, will come from organizations that represent a group of individuals that cannot obtain access, and that the appropriate "informal" resolution will result in changes to the process by which Section 255 is implemented within a company. This is likely to take some time.

AFB therefore proposes to adjust the timetables as follows.

The time for forwarding a complaint should be one day, as proposed, though a failure to meet this deadline should not become grounds to excuse subsequent deadlines.

The complaint should be acknowledged, and the procedure the company will follow to address the complaint should be described to the complainant within five business days, in a format accessible to the complainant.

The time for response should be 20 business days from the complaint.

The Commission should issue its decision on the fast-track complaint within 40 days of the submission of the report by the entity covered by Section 255.

The time for response provides a more realistic schedule for discussions between a complainant and a company, and makes it less likely that the Commission will be asked to approve multiple extensions of time. However, just as critical is a deadline for Commission action, particularly for the initial report. Such a deadline is required as a matter of due process.

The Commission also asks under what circumstances the informal process may be **terminated**.⁶³ Obviously, a complainant should be able terminate the process at any time by withdrawing its complaint. And, so long as there is a deadline for initial Commission action -- and that action may be followed by an appeal of the informal decision, or by initiation of a formal complaint -- once the informal process begins it may continue to the issuance of the initial Commission report. Whether or not the Commission establishes strict deadlines for the issuance of a report, it will be critical to permit a complainant to file a formal complaint at any time. Indeed, the formal and informal processes could proceed **simultaneously**.⁶⁴

Finally, the Commission should recognize that the informal process will only proceed smoothly and soundly if the staff members of the Commission understand disability issues. This requires training on an ongoing basis, and it will behoove the Commission to take steps to ensure that this training can occur.

⁶³ NPRM, ¶ 137.

⁶⁴ in the cable renewal process, for example, the informal resolution procedures and the formal procedures may and often do move forward simultaneously. This can avoid unnecessary delay or duplication of effort.

B. The Formal Process.

AFB's main concern with the Commission's discussion of the formal procedures is the absence of a clear statement indicating that a complainant always has the option of initiating formal procedures. At ¶147, for example, the Commission suggests that the formal proceedings will only be initiated at its discretion. Because the informal procedures in fact provide very limited protection for the complainant as crafted, and no apparent opportunity for participating beyond the initial issuance of a Commission report, and because the Commission has declared that it is the sole forum for hearing complaints, this limitation denies complainant's due process. This is a civil rights statute. The Commission should not be able to refuse to commence formal proceedings (although it can obviously resolve some complaints on a summary judgment basis).

The procedures that the Commission has outlined⁶⁵ will generally work reasonably well in a Section 255 context, so long as the Commission properly allocates the burden of proof. That burden should be squarely placed on the company that is covered by Section 255. In addition, there will be instances where a complaint may actually involve multiple companies (e.g., in considering what resources are available to a Section 255 covered entity), The identity of the companies may not be known to the complainant. It should be clear that once a company receives a formal complaint, it is that company's responsibility to join others who may bear responsibility for providing accessibility. For example, if an equipment manufacturer believes inaccessibility is actually attributable to the service provider, the provider should be joined. The rules should therefore provide for a simple process for joinder, and should ensure that discovery is available from all relevant companies in a product or service chain.

⁶⁵ NPRM, ¶¶ 144-156.

Generally, persons filing Section 255 complaints should not be subject to filing fee requirements. In many cases, filing fees would impose an unreasonable bar to resolution of Section 255 complaints by individuals and the groups that represent them. National statistics indicate that disabled individuals have materially below-average incomes. Filing fees would only exacerbate the difficulties of solving access problems. And, given the Commission's exclusive jurisdiction over such complaints, filing fees could well result in a denial of due process.

In addition, the Commission should make the following modifications to its rules of procedures for Section 255 complaints:

1. Section 1.721(a)(5) generally prohibits allegations from being made on the basis of information and belief and requires a full description of the source of the harm. In this case, however, while a complainant can reasonably be expected to make the fundamental allegation that a piece of equipment is not accessible, a complainant generally will not be able to identify the cause of the inaccessibility, or otherwise detail whether, e.g., inaccessibility is due to flaws in the design process, the development process or the fabrication process.⁶⁶ The Commission must either allow pleadings on information and belief, or more simply make it clear that a Section 255 complaint is stated by an allegation that the equipment or service is subject to Section 255 and is inaccessible. Section 1.721(10) will also require changes to this end.

Section 1.721(a)(8) appears to require that complainants attempt to resolve complaints informally before filing a formal complaint. Given the availability of the fast-track procedures, this requirement should not apply in Section 255 proceedings.

⁶⁶ The Commission's own inquiry as to how to distinguish between inaccessibility problems caused by the equipment and inaccessibility problems caused by the service illustrate the point.

A company that answers a complaint should be required to make as an affirmative defense any claim that the accessibility problem is the responsibility of another company, and the rules should provide for joinder of any company so identified.

The Reply process contemplated in Section 1.726 establishes a strict standard for responses to affirmative defenses. Since complainants are not likely to be in a position within three days of the answer to respond to affirmative defenses, (given the complexity of the “readily achievable” standard). Indeed, no response should be required to affirmative defenses. Rather, the validity of the affirmative defenses should be resolved through the complaint proceeding itself.

As suggested above, records must be maintained and produced if the complaint process is to work. Section 1.730(h) should make it clear that complainants have an absolute right to such documentary materials in the Section 255 process.

Finally, Section 1.733 rules need to be modified so that they do not place an unreasonable burden on disabled individuals, and so that the critical transcripts and recordings are themselves accessible.

IV. CONCLUSION.

AFB's Comments have focused on areas where it believes that the regulations proposed by the NPRM require improvement. Generally, however, the Commission is to be applauded for recognizing that the key to implementing Section 255 is to develop a practical approach that results in functional accessibility. If the Commission adopts the NPRM with the sorts of modifications suggested above, that goal will be achievable.

Nothing that has been proposed by AFB should prove burdensome to industry. The additional planning and record-keeping requirements are in fact relatively minimal, because those requirements can be incorporated into existing product design procedures. For example, companies will already keep records with respect to test performed on products to comply with FCC technical standards; it adds very little to require that the testing records include accessibility testing. Design procedures will already include records; it adds very little to include records regarding accessibility.

On the other hand, the rewards associated with ensuring that equipment is accessible are large, and cascade across society. And, as Congress recognized, in a society that is aging

rapidly, and where the disabled population is increasing rapidly, taking steps now to ensure accessibility is actually vital to the long-term health of the telecommunications infrastructure in this country.

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

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

**SUMMARY OF
COMMENTS OF THE AMERICAN FOUNDATION FOR THE BLIND**

The Commission's Notice of Proposed Rulemaking ("NPRM") has properly recognized that Section 255 of the Telecommunications Act of 1996 was intended to ensure "that **all** Americans can gain the benefits of advances in telecommunications services and equipment;" to this end the scope of Section 255 is both "broad and practical." Thus, in establishing regulations, it is the Commission's obligation to ensure that the rules actually result in access to telecommunications services, equipment and CPE, even as technologies converge and networks evolve to use different or multiple technologies for telecommunications.

The NPRM is aimed in the right direction, and is laudable in several respects, including in its acceptance of key elements of the recommendations of the Access Board. However, the Commission needs to modify its proposed approach in several critical respects. Most notably:

1. In order to ensure that accessibility is achieved, the Commission needs to make it clear that it will read the terms "telecommunications services," telecommunications equipment," and "customer premises equipment" broadly and functionally. APB is concerned that companies

that are now building the most advanced products and networks -- especially those based on packet-switching -- will not take the steps required to make these network features and products fully accessible unless the Commission ensures functional parity and technology neutrality. Further, because the Commission decided to defer universal service issues as they affect the disabilities community to this proceeding, it is critical that the rules adopted here ensure that the services provided pursuant to the universal service mandates are also accessible to the disabled.

2. The Commission adopts some, but not all of the guidelines adopted by the Access Board. The Commission needs to incorporate several additional Access Board guidelines in its final rules.

3. The Commission properly recognizes that accessibility issues arise at every stage of product development, from design through marketing. The Commission also recognized that in a changing environment, companies should have reasonable latitude to address accessibility issues. However, if companies are going to be relied upon to determine the manner in which accessibility will be addressed, it is critical that each company devise a plan for addressing accessibility issues; that each company maintain records **sufficient** to show that accessibility issues are being addressed; and that this information be made available to persons complaining that equipment or services are not accessible. The NPRM does not require companies to establish a plan, nor does it require maintenance of adequate records, nor does it clearly require the production of critical information. The final rules should do so.

4. The efficacy of the Commission's rules may turn in large part on the adequacy of the standards that will be used in formal complaint proceedings to determine whether accessibility is readily achievable. The standards that the Commission proposes are quite

complex. At the very least, the Commission needs to be clear that under certain circumstances, it will presume that access is readily achievable. Effectively, the Access Board intended to establish such a presumption when it concluded that there should be no net **decrease** in accessibility. Likewise, the availability of an accessible product in the marketplace should give rise to a presumption that accessibility was “readily achievable” for similar products.

5. The formal and informal complaint processes needs to be clarified so that it is clear who bears the burden of proof, at what stage of the proceeding. Under the Commission’s approach to Section 255, almost all the information critical to resolving a complaint will be in the control of the company that has allegedly failed to provide the accessible service or equipment. The burden of proving that accessibility is not readily achievable should fall upon the company.

6. The procedural process through which complaints are to be resolved should be practical for both sides. The Commission has opted for a “fast-track” approach that contains deadlines that are likely to be missed for quite innocent reasons...vacations, illness and the like. The deadlines are particularly significant because the informal complaint process is intended to be cooperative, rather than a highly legalistic process. But the deadlines make it less likely that anyone will have the time to cooperate. Realistic deadlines are critical. Those deadlines should include deadlines for FCC action.

7. The FCC’s rules should allow any person to initiate a formal complaint. **And,** the rules for resolving those complaints will need to be amended to take into account some of the unique problems that will arise under Section 255.