

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)	

REPLY COMMENTS OF THE TELECOMMUNICATIONS
INDUSTRY ASSOCIATION

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EXECUTIVE SUMMARY

The Telecommunications Industry Association (TIA) is an association of over 900 companies who manufacture products for the telecommunications market. TIA member companies make the products that are used by carriers to provide telecommunication services and that initiate, route, and terminate the telephony, data and information that all Americans a majority of the world's citizens receive and use each day.

TIA member companies are committed to ensuring that telecommunications equipment and customer premises equipment (CPE) are "designed, developed and fabricated to be accessible to and usable by individuals with disabilities, if readily achievable." This commitment is evidenced by the full participation of TIA and many of its member companies in all of the proceedings conducted by the FCC and of the Access Board to implement the guidelines and regulatory framework for Section 255. TIA supports Congress' goal of increased access to and ease of use of telecommunications products and services by persons with disabilities, to the extent "readily achievable."

Wise investment of resources for developing products which promote access will be the keystone for each manufacturer and for the telecommunications industry collectively in achieving these goals. All of the recommendations of TIA in its comments and in these replies are predicated on meeting these goals in ways that will use the resources of each manufacturer wisely. Manufacturers today, more than ever before, must stay competitive by achieving and maintaining quality, efficiencies, service and continuous innovation. Investing wisely is essential.

The most fundamental policy decision which the FCC will make in this proceeding is whether it will allow manufacturers to provide telecommunications equipment and CPE using a product line approach rather than a product-by-product approach. TIA and several industry

commentors addressed this bedrock issue in their comments. In these Reply Comments, TIA demonstrates why a product-line approach resulting in product differentiation will be the most effective strategy for increasing accessibility, including providing greater depth of access for particular functional limitations and products that meet access needs for a greater range of disabilities. In contrast, discouraging rules that discourage a product-line approach would favor access features for limitations more common in the population at the expense of features for others and will probably result in only simplistic access solutions, however, in almost every product. In order to achieve these gains for people with disabilities, the FCC must revise its proposed definition for “accessible” such that the accessibility “checklist” can be applied across product lines. TIA’s proposed revision of the “accessible” definition recognizes and endorses manufacturers’ discretion such that consumers could expect (and a manufacturer would be required to provide) the feature or features from the checklist in products across the manufacturer’s own product line, to the extent “readily achievable.” This revision would allow manufacturers to invest resources wisely to achieve results that are coordinated to specific functional limitations and reduce the resources spent on defensive actions for compliance rather than on solutions which promote greater access.

In one critical area, TIA and a majority of advocates for disabled persons agree with respect to another revision to the definition of “accessible.” Usable product information and customer support are necessary for products to be accessible and are required by Section 255. This is a matter which has never really been in dispute and TIA recommends that the FCC clarify the importance of usability in its final order.

With respect to manufacturers’ obligations to provide telecommunications equipment and CPE which is compatible with peripheral devices and SCPE, TIA learned much

from the discussion and concerns raised by many commentors. In light of the comments, TIA has become convinced that the FCC can best ensure that resources are used wisely and effectively by instituting a listing process that provides manufacturers with clear notice of the SCPE for which compatibility must be provided, “if readily achievable,” and permits the FCC to implement policy objectives, such as compliance with industry interoperability standards and the use of a standard connector.

Regarding the definition of “readily achievable,” TIA is pleased that there is agreement that the FCC should adopt the definition to the telecommunications context to include technical feasibility. While not discussed in many of the initial comments, the concepts of cumulative cost and fundamental alteration, adopted from the ADA context, must also be a part of the FCC’s implementation of “readily achievable” for Section 255. As all commentors agree, accessibility can be most effectively and efficiently implemented early in the design process. Therefore, TIA believes that the FCC should take a forward-looking approach to accessibility by adopting a bright line rule that manufacturers are not obligated to incorporate “readily achievable” access features into products that have already been introduced into the market either to comply with Section 255 or as a penalty for noncompliance. Furthermore, TIA agrees with the FCC’s tentative conclusion that technological innovation should not be delayed because accessibility may not be “readily achievable” at the outset. Ultimately, technical access solutions for new technologies, such as digital platforms, should be found and the benefits reaped by all.

TIA agrees with the FCC that it should interpret the scope of Section 255 in a manner consistent with statutory definitions in the Telecommunications Act of 1996. Given the plain language of the Act, information services are not subject to the requirements of Section 255. TIA also agrees with the FCC that “multi-use” equipment should be subject to Section 255 only

to the extent the equipment is intended to serve a telecommunications function, and software should be covered by Section 255 only to the extent that it is integral to the equipment or CPE.

Manufacturers, service providers, individuals with disabilities and advocacy groups all expressed significant concerns with the FCC's proposed complaint resolution process. The comments support TIA's original view that "the fast track process needs to be eliminated" and call for a simpler approach to Section 255 complaints. TIA continues to believe that its proposed Dispute Resolution Process is an appropriate and comprehensive strategy for handling complaints. Therefore, TIA, along with numerous other commentors, recommends that the FCC adopt rules which require manufacturers to have point(s) of contact for consumer; that potential complainants be required to contact the manufacturer before a more formal complaint can be filed; and that 60 days to work with consumers to resolve issues or concerns is realistic given the individualistic and complex nature of many inquiries.

TIA and virtually all industry parties recommend that there should be a statute of limitations imposed for the filing of Section 255 complaints and in these replies, TIA recommends that 6 months from the date of purchase is a reasonable amount of time for any consumer, including those with a disability, to determine if a purchased product is capable of being used in the manner intended.

The overwhelming sense of the comments also support a standing requirement; TIA recommends that the FCC require that a complainant must be: (1) a person with a disability, or someone filing a complaint on behalf of a specific, identifiable individual with a disability (such as a parent or legal guardian or representative organization that meets the legal standing requirements); and (2) who has purchased or used or has attempted to purchase or use a specific, identifiable piece of telecommunications equipment or CPE.

Lastly, TIA agrees with the Commission that it has the authority and it is right to exercise Commission discretion regarding the use of the Access Board's Guidelines.

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I. INTRODUCTION.

The member companies of the Telecommunications Industry Association (“TIA”) are committed to ensuring that telecommunications equipment and customer premises equipment (“CPE”) are “designed, developed and fabricated to be accessible to and usable by individuals with disabilities, if readily achievable.” This strong commitment to increasing the accessibility of telecommunications equipment and CPE is not an empty promise, but a significant one: together TIA’s member companies manufacture or supply most of the products used in global communications networks. TIA’s member companies have been in the forefront of the development of telecommunications equipment and CPE and have, thus, been an integral part of

the telecommunications revolution that has had a dramatic and positive effect on the ability of people, disabled and non-disabled alike, to access telecommunications, improving productivity and the quality of our lives.

To meet the needs of persons with disabilities, TIA, and its member companies have undertaken a number of outreach and education initiatives. TIA and its member companies have attended conferences sponsored by a number of disability organizations, conducted product testing and market research that has included persons with disabilities, and attended several conferences related to access issues. Some of TIA's member companies have established internal committees to oversee and to develop Section 255 implementation programs, while other companies have taken more informal approaches. In our experience, the marketing and engineering personnel responsible for product design and development in our companies are enthusiastic about Section 255 and see it as an opportunity – an opportunity to solve complicated technical problems, develop creative solutions, and make products that are easier to use and better-suited to the needs of the consumers, persons with and without disabilities.

TIA's Reply Comments fall into seven broad categories: (1) the debate concerning whether there has been a "market failure" and its consequences for Section 255 implementation; (2) why a product-line approach to compliance is the best implementation strategy; (3) statutory definitions; (4) what "readily achievable" means in the Section 255 context; (5) the appropriate scope of Section 255 (i.e., its inapplicability to information services and limited application to multi-use equipment and software); (6) implementation processes; and (7) the need for substantive FCC review of the Access Board's guidelines.

II.

THE ISSUE OF WHETHER THERE HAS BEEN A “MARKET FAILURE” HAS BEEN PAINTED WITH TOO BROAD A BRUSH, AND IN SOME RESPECTS, HAS MADE THE AREA OF DISAGREEMENT BETWEEN PERSONS WITH DISABILITIES AND INDUSTRY SEEM BIGGER THAN IT IS IN FACT.

In order to adopt a regulatory framework that will, in the long run, best promote Section 255’s goal of increased accessibility, the FCC must first identify the nature and extent of the problem that Section 255 is intended to solve. In this proceeding, many commentors representing persons with disabilities have suggested that there has been a “market failure” in providing accessible telecommunications equipment and CPE for persons with disabilities.¹ At the same time, many of these same commentors argue that features designed to enhance accessibility will have negligible cost impacts for manufacturers because these features appeal to all consumers.² The vibrating pager, volume controls, and speaker phone are the examples most frequently cited in support of this argument – examples where the popularity of product features in the competitive marketplace prompted manufacturers to include those features in an increasing number of individual products. These criticisms of manufacturers’ past performance, which on the one hand, argue that the market has failed, and on the other hand, argue that based on past experience, the market will work to minimize manufacturers’ costs, appear to be in tension with each other.

¹ National Association of the Deaf (“NAD”) Comments at 26; Self Help for Hard of Hearing People, Inc. (“SHHH”) Comments at 3; Telecommunications for the Deaf, Inc. (“TDI”) Comments at 3.

² NAD Comments at 27; SHHH Comments at 14; TDI Comments at 19.

In TIA's view, the issue of whether there has been a "market failure" has been painted with too broad a brush, and in some respects, has made the area of disagreement between persons with disabilities and industry seem bigger than it is in fact.

In purely economic terms, a "market failure" occurs when there has been an inefficient allocation of resources in the market³ (i.e., supply does not meet demand) because of imperfections such as imperfect competition,⁴ externalities,⁵ or imperfect information.⁶ Therefore, as a matter of economics, it is incorrect to argue that the absence of a product that is accessible to a particular functional limitation in the marketplace in and of itself demonstrates that a "market failure" has occurred. As many of the commentors representing persons with disabilities implicitly concede, where the access needs of persons with disabilities have converged with the preferences of consumers in general, the market has functioned effectively to result in greater inclusion of those features in products.⁷

³ Paul A. Samuelson and William D. Nordhaus, Economics at 274-275 (16th Ed., 1998)

⁴ Imperfect competition arises, for example, where a supplier has a monopoly over a particular market and therefore, is able to charge inflated prices. Id. at 274.

⁵ Externalities are impacts on third parties that are not borne by the purchaser, such as the cost of pollution that harms the public but is not reflected in the cost of a product. Id.

⁶ Id. To date, the process of Section 255 implementation (the TAAC, the comments submitted in response to the FCC's NOI, the Access Board's NPRM, this NPRM, and the outreach efforts conducted by TIA and its member companies) has generated a great deal of information about the access needs of persons with disabilities that manufacturers will be able to consider in the product design process.

⁷ Historically, manufacturers of specialized CPE ("SCPE"), who have greater expertise related to the access needs of persons with particular functional limitations, have specialized and realized efficiencies in providing products to meet these needs that do not converge with the preferences of consumers in general.

TIA recognizes that Section 255 will require manufacturers to include features that increase accessibility if “readily achievable,” even if those features are not economically justifiable on their own.⁸ TIA recognizes that Congress, in enacting Section 255, made a determination that as a matter of social policy, accessibility, “if readily achievable,” is both desirable and required.

In TIA’s view, however, this discussion of the extent to which the market has and has not provided equipment and CPE that is accessible to persons with disabilities has two important consequences for the FCC in determining the kind of regime that is appropriate for implementing Section 255.

First, to the extent that the needs of persons with disabilities converge with the preferences of non-disabled customers, market competition has and will ensure that those features are included in an increasing number of products, typically at an increasingly reduced cost. The FCC does not need to exercise its regulatory authority to ensure that this category of solutions is implemented, but should adopt regulations that encourage such solutions to be developed so that this convergence can be maximized. For this category of features, there is little advantage to be gained by requiring manufacturers to incorporate these features into each and every product, if readily achievable – if the feature is popular, manufacturers will respond to market pressure to include it in more products. Furthermore, for this category of features, an overly rigid, product-by-product “checklist” approach to accessibility has a significant downside: it is likely to stifle

⁸ In this respect, TIA agrees with many of the commentors representing persons with disabilities, who argued that manufacturers are required to provide access, “if readily achievable,” even if manufacturers do not recover any of the costs of providing such access. See, e.g., NAD Comments at 27; SHHH Comments at 17-18; National Council on Disability (“NCD”) Comments at 21; TDI Comments at 20.

innovation. In addition, this type of regime imposes substantial compliance costs that do not result in any tangible gains in accessibility.

Second, where the access needs of persons with disabilities and the preferences of non-disabled consumers do not converge,⁹ the FCC faces a policy question of how the “readily achievable” resources available to provide access for a range of functional limitations can be allocated most effectively and efficiently.¹⁰

As TIA demonstrates in these Reply Comments, a product-line approach, which promotes product differentiation, is the most effective strategy for implementing Section 255. The product-line approach avoids unnecessary FCC regulation for the situations where features that enhance accessibility have broad market appeal, and preserves an environment in which the innovation required to develop access solutions with broad market appeal can flourish. Furthermore, where features that enhance accessibility do not have broad appeal, a product line

⁹ Examples of such features might include a TTY connector, which has no value for a person who does not use a TTY, or big buttons that substantially increase the size of a wireless phone.

¹⁰ Economist Alan S. Blinder challenges public policy makers to consider both equity and efficiency in carrying out their tasks. Alan S. Blinder, Hard Heads - Soft Hearts: Tough-Minded Economics for a Just Society 29 (1987). With respect to Section 255, the Congress has established the equity objective – ensuring that services and equipment are accessible to and usable by individuals with disabilities, to the extent that it can be accomplished “without much difficulty or expense.” 42 U.S.C. § 12181(9). It remains for the Commission to carry out Congress’ equity objective in an efficient manner. Here Blinder urges policy makers to engage in their task with a “respect for efficiency” (ensuring that in making some individuals better off, no one is made worse off), “attention to facts,” “logical” thinking, and “obedience to the laws of arithmetic.” Blinder, at 18, 23. Finally, Blinder admonishes public policy makers to ensure that the costs and benefits of the policies they implement are reasonably in balance, and to avoid policies which involve large and diffuse – essentially hidden – losses (i.e. costs which are spread, in small amounts, over a large population) to provide benefits that are substantially smaller than the costs. Id. at 202.

approach permits manufacturers the flexibility to do what is “readily achievable” to include features that accommodate a range of functional limitations in products with similar functions, features, and price.

Finally, a product-line approach to compliance addresses many of the concerns raised by persons with disabilities in their initial comments. A product-line approach will: (a) permit manufacturers flexibility to provide more meaningful levels of access to particular functional limitations in a given product; (b) increase manufacturer accountability for meeting the range of access needs generated by different functional limitations; and (c) reduce the importance of market considerations in determining what is “readily achievable.”

III. THE FCC SHOULD ADOPT A PRODUCT-LINE APPROACH TO COMPLIANCE AS THE MOST EFFECTIVE STRATEGY FOR PROVIDING MEANINGFUL ACCESS FOR PERSONS WITH DISABILITIES.

As TIA argued in its initial comments, the limits of the readily achievable standard, the inherent complexity of providing access to persons with different functional limitations that frequently generate conflicting access needs, and ADA and FCC precedent dictate a product-line approach to compliance as the most effective strategy for achieving the goals of Section 255. The product-line approach, which has virtually unanimous support within the telecommunications industry,¹¹ will permit innovation to flourish and encourage the product differentiation that is critical to meeting the access needs of persons with disabilities.

¹¹ See, e.g., Cellular Telecommunications Industry Association (“CTIA”) Comments at 12; Multimedia Telecommunications Association (“MMTA”) Comments at 7-8; Nextel Communications, Inc. (“Nextel”) Comments at 6.

A. The FCC’s Proposal Recognizes That A Product-line Approach To Compliance Can Result In Greater Accessibility But Should Go Further To Ensure Greater Accessibility.

The FCC's NPRM recognizes that a product-line approach to compliance could result in more accessibility. The FCC acknowledges that:

In the marketplace, providers must decide what features to include and what features to omit. We believe it is reasonable for an informed product development decision to take into account the accessibility features of other functionally similar products the provider offers, provided it can be demonstrated that such a “product line” analysis increases the overall accessibility of the provider’s offerings.¹²

As a result, the FCC proposes to permit manufacturers to adopt a product-line approach to compliance, which manufacturers can then rely upon in defense to a complaint alleging that an individual product is not accessible, so long as the manufacturer can establish that the product-line approach results in an overall increase in accessibility.

The FCC's recognition of the advantages of a product-line approach to compliance is correct as far as it goes, but it does not go far enough. Instead of permitting manufacturers to rely upon product line and an overall increase in accessibility as an uncertain defense in the context of a complaint, the FCC should recognize, as a matter of policy, that the product-line approach to compliance will actually result in more accessible products that are useful to persons

¹² NPRM ¶ 170 (emphasis added). TIA’s proposed product-line approach, like the FCC’s proposed “similar product” defense, would require each manufacturer to identify another accessible product with comparable features, functions and price that it makes. In this respect, TIA’s concept of product line is different from that proposed by the Consumer Electronics Manufacturers Association (“CEMA”), which would allow manufacturers to identify other accessible products in the marketplace as a whole. See CEMA Comments at 13.

with disabilities.¹³ Consequently, the FCC should endorse a product-line approach to compliance "up-front" in defining manufacturers' obligations under Section 255.

B. The Product-Line Approach Is An Alternative Strategy For Section 255 Compliance, Not An Additional Obligation.

Several commentors suggested that the FCC should not consider the accessibility of other comparable products within a product line unless the manufacturer first establishes that it was not "readily achievable" to make the individual product complained of accessible.¹⁴ This suggestion is misplaced. If the FCC adopts the product-by-product approach advocated by some, once a manufacturer establishes that it was not readily achievable to make the individual product accessible – the manufacturer has met its statutory obligation – access is not required. There would not be any secondary inquiry into the accessibility provided in the manufacturer's product line.

As the discussion below demonstrates, a product-line approach to compliance will result in equal or greater accountability to ensure that manufacturers make products that: (1) have real potential to improve the lives of persons with disabilities by providing meaningful levels of access; and (2) accommodate a broad range of functional limitations.

C. A Product-line Approach Will Be Most Effective In Meeting The Access Needs Generated By Different Functional Limitations.

¹³ Since the product-line approach will result in more accessible products, the FCC should not require manufacturers to make any showing of an increase in accessibility in defending against a complaint.

¹⁴ See, e.g., American Council of the Blind ("ACB") Comments at 4; TDI Comments at 7; World Institute on Disability ("WID") Comments at 4; SHHH Comments at 31; NCD Comments at 26.

1. A product-line approach will permit manufacturers to provide greater depth of access for a particular disability within the limits of what is readily achievable.

The FCC should endorse a product-line approach to compliance "up front" to encourage manufacturers to utilize the resources they have dedicated to providing accessibility as effectively as possible to provide meaningful, rather than superficial, levels of access for persons with a variety of functional limitations and access needs.¹⁵ Meaningful access for persons with a given functional limitation entails the accessibility of many product features and functions, not just the most basic ones. The FCC should give manufacturers the flexibility to rise to the challenge of providing products with a meaningful level of access, which will not only be more desirable to persons with disabilities, but will also permit them greater access to telecommunications technology and all of its attendant recreational and job-related benefits.

TIA's member companies accept their obligations under Section 255 to provide telecommunications equipment and CPE that are accessible, or alternatively, compatible, "if readily achievable." As defined by Congress, the efforts that manufacturers must take to comply with Section 255 are limited to those that can be accomplished "without much difficulty or expense." What a manufacturer can accomplish within the parameters of the readily achievable standard to accommodate any single disability is limited -- what can be done to accommodate multiple functional limitations in a single CPE product is even more limited. As TIA has emphasized throughout this proceeding, ADA precedent and the language of Section 255 itself dictate

¹⁵ See TDI Comments at 6 ("TDI is concerned that 'superficial access' that will have limited value will prevail"). While TIA shares TDI's concern, TIA reaches a different conclusion -- that a product-line approach to compliance will provide more meaningful levels of access.

that the FCC consider the cumulative cost of access features to be incorporated into a product to determine what is "readily achievable" and therefore required for compliance.¹⁶

Under the Access Board's definition of "accessible," which the FCC proposes to adopt, a manufacturer would be required to make product inputs, outputs, displays, mechanical and control functions accessible to persons with a variety of functional limitations and combinations of functional limitations.¹⁷ This definitional approach precludes coordinated consideration of the accessibility of product inputs and outputs, and could lead to products with feature combinations not desired by any users.

TIA strongly recommends that the FCC adopt a definition of accessible that will invest manufacturer resources rationally. An approach which authorizes manufacturers to make decisions about how to maximize access given the resources available is consistent with the discretion that manufacturers "must [exercise in] decid[ing] what features to include and what features to omit"¹⁸ in individual products. The FCC's justifiable and well-intended desire to

¹⁶ DOJ Preamble, 28 C.F.R. Part 36, App. B.

¹⁷ The FCC can and should improve the definition proposed by the Access Board. Access Board Guidelines §§ 1193.41, 1193.43. The FCC proposes to adopt the Access Board's definition of "accessibility," which comprises an 18 point checklist of accessible product functions which must be assessed independently. The independent assessment is whether each of the 18 criteria is readily achievable and therefore required under Section 255. In reality, the Access Board's checklist contains more than 18 criteria: for example, in addition to the 18 criteria listed, the Access Board included a requirement that "[t]elecommunications equipment and customer premises equipment . . . pass through cross manufacturer, non-proprietary, industry-standard codes, translation protocols, formats or other information necessary to provide telecommunications in an accessible format." *See NPRM ¶ 75; NPRM App. C at C5.* Thus, the 18 point checklist could actually be considered "18 point-plus." For purposes of this document, reference to the "18 point checklist" includes the 18 points adopted by the Access Board plus the others described above.

¹⁸ NPRM ¶ 170 (emphasis added).

require manufacturers to provide products that are accessible to a range of functional limitations only makes sense when evaluated on a product-line basis.

In the NPRM, the FCC tentatively rejected a product line definition of compliance, tentatively concluding that manufacturers should not be absolved from considering each item on the accessibility checklist for each product,¹⁹ even though the proposed “similar product” defense might ultimately excuse them from having to incorporate an access feature into an individual product. While the FCC urges that the Access Board’s guidelines defining accessibility should not be treated as a “‘laundry list’ of requirements all firms subject to Section 255 must adopt,”²⁰ this is precisely the approach to compliance that the FCC’s proposal encourages. How will manufacturers be able to demonstrate that they considered each item on the checklist? Either they will build a record to document their decision that it was not readily achievable, resulting in no access gains²¹ or show that access features were readily achievable by doing something about it. Faced with the prospect of complaints about every product to every disability, manufacturers seeking to comply in good faith with Section 255 will have an incentive under the FCC’s proposed rules to try to “cover as many bases” (i.e., items on the accessibility checklist) as possible superficially within the prescribed limits of what is “readily achievable.” The result will be inclusion of several relatively inexpensive features that have a minimal impact on the

¹⁹ See NPRM ¶ 169.

²⁰ NPRM ¶ 166.

²¹ As the study by Strategic Policy Research (“SPR”), submitted as Appendix A to TIA’s initial comments demonstrates, the costs of documenting compliance alone (which generate no concrete gains in accessibility) will be substantial.

fundamental nature of the product at issue, and will, in all likelihood, result in only minor increases in the accessibility of the product to persons with disabilities.

In contrast, the inclusion of features that provide meaningful increases in accessibility for persons with disabilities, i.e., voice chips and visual displays, is likely to entail significant cumulative costs and impacts to fundamental product characteristics. As many commentators emphasized,²² making a product with the features and functions to promote full access for even a single disability is extremely complicated. Manufacturers must assess and remedy issues raised by the dozens of input, output, control, and mechanical functions involved in even the most simple CPE products. Every product design effort is constrained by a set amount of product memory, battery life and defined parameters of cost, size and marketability for each product. Any and all features and functions must “fit” in the product’s memory, battery life, and other defined product parameters. Within the parameters of the “readily achievable” standard, TIA’s member companies will make their best efforts to include product features accessible to more than one functional limitation; however, there will be many products where this simply is not possible. Consequently, TIA urges the FCC to adopt a product-line approach to compliance, which encourages manufacturers to focus their efforts on providing representative products within a product line that provide meaningful levels of enhanced access for a range of functional limitations.

Moreover, the product-line approach is likely to minimize the importance of marketability in determining whether an access feature is readily achievable. Many disability

²² E.g., Motorola, Inc. (“Motorola”) Comments at 24-32; Philips Consumer Communications (“Philips”) Comments at 3; United States Telephone Association (“USTA”) Comments at 9.

advocates objected to the FCC recognizing any market considerations in the determination of what is “readily achievable.”²³ In TIA’s view, regardless of whether marketability is expressly identified by the FCC as a separate factor, the concept of marketability is closely intertwined with the concepts of cumulative cost and fundamental alteration, which TIA has advocated should be recognized as factors. A product too costly because of the inclusion of features which promote access, likely will not be marketable. TIA recognizes that features which promote access may also have general market appeal in many instances, e.g., vibrating alert or backlight display. Even where such features have general market appeal, however, product design teams must have discretion to determine whether such features can be included without fundamentally altering the product or rendering it unsuitable for the target market that it was designed to serve. Similarly, the inclusion of access features could fundamentally alter the nature of a product so that it no longer meets the needs of the market segment that it was designed to serve.

Rather than “creating a loophole for evading Section 255 obligations,”²⁴ a product-line approach is likely to make it more difficult for a manufacturer to establish that it was not “readily achievable” to incorporate an access feature anywhere in its product line for marketability reasons related to cost or fundamental alteration.²⁵ If the FCC focuses on the overall market for a family of products, such as two-way pagers, it is far more likely to find that some segment of that

²³ See, e.g., ACB Comments at 4; Advocacy Center Comments at 2; Governor’s Council on Disability (“GCD”) Comments at 1; SHHH Comments at 16; TDI Comments at 16-21.

²⁴ NPRM ¶ 170.

²⁵ In this respect, the product-line approach may strike a more appropriate balance between the understandable concerns expressed by disability advocates that Section 255 not be interpreted in a way that requires access to generate economic benefits, such as cost recovery, and manufacturers’ equally legitimate concern that Section 255 not be implemented in a way that forces them to make products that are not unmarketable and unprofitable.

market would pay more money, or sacrifice some other product feature for an enhanced visual display, for example, than if it focuses on the target market for an individual pager. In this example, the FCC would be more likely to find that providing this access feature was “readily achievable” under a product line analysis than it would under a product-by-product approach.

2. A product-line approach would result in more products that accommodate a range of disabilities.

A product-line approach will generate at least as many, if not more, accessible products than a product-by-product approach by ensuring that manufacturers are making products that meet the needs of a broad range of people with disabilities.

Conflicting needs generated by different disabilities mean that it is not technically feasible, and therefore, not “readily achievable” to make every product accessible to every person.²⁶ A product-by-product approach to compliance is no more likely to ensure that the range of sometimes conflicting access needs is met than a product-line approach. For example, some persons with motor control disabilities need large buttons for accessibility, whereas others with a limited range of motion may need buttons that are curved and placed closely together. Since a manufacturer cannot include two sets of buttons without fundamentally altering the nature of the product, the conflicting access needs for persons with motor control disabilities probably cannot be met within the limits of the “readily achievable” standard. Consequently, it is inevitable that a manufacturer will need to exercise discretion in choosing which of these competing access needs to accommodate. Under a product-by-product regime, the manufacturer could probably

justify a decision to meet only one set of the competing needs (i.e., using curved buttons in all of its products), whereas, in contrast, under a product-line approach to compliance, it would be more difficult for a manufacturer to justify a decision not to make any effort to accommodate people who need big buttons in at least one of the products in the line.

The FCC should adopt a balanced approach not only among differing needs for Access but also between short-term access and innovation.

D. ADA And FCC Precedent Support An Up Front Policy Of Product Line Compliance.

Finally, as TIA and several comments submitted on behalf of manufacturers have pointed out, there is ample support in both ADA and FCC precedent to support adoption of a product-line approach to compliance “up front,” rather than simply as a defense to complaints.²⁷ In adopting regulations related to public accommodations for one particular kind of functional limitation — people who use wheelchairs — the Department of Justice (“DOJ”) did not require that every seat in a public theater or stadium, or every hotel room, be accessible.²⁸ Rather, DOJ

²⁶ See, e.g., Cellular Phone Task Force Comments at 2-4 (pointing out that the visual displays and other features that enhance access for persons with some disabilities actually make products less accessible to persons with electrical sensitivity).

²⁷ See, e.g., Motorola Comments at 21-24; CTIA Comments at 12; Ericsson Comments at 2.

²⁸ Under the guidelines promulgated by the Access Board and adopted by the Department of Justice (“DOJ”), theater and stadium owners are not required to make every single seat wheelchair accessible. Department of Justice Standards for Accessible Design (“JDSAD”), 28 C.F.R., Part 36, App. A, § 4.33.3; 28 C.F.R. § 36.308, DOJ Preamble to Regulation on Non-Discrimination on the Basis of Disability (“DOJ Preamble”), 28 C.F.R. Part 36, App. B (commenting on § 36.308). Instead, the ADA has been interpreted to require that: (1) a certain percentage of accessible seats be provided; (2) the accessible seats must be integrated into the seats available to the general public; and (3) the accessible seating must be dispersed throughout the stadium or arena so that disabled patrons are offered the same general range of choices,

(Continued ...)

examined the competing interests of cost and access and set, as a matter of policy, the number of representative wheelchair accessible seats or rooms required based upon the size of the public accommodation.

Similarly, the FCC in the telecommunications manufacturing context should set a policy that strikes a balance not only among the different access requirements that need to be accommodated within the “readily achievable” standard, but also a balance between accessibility in the short-term and innovation. Innovation is the key to increased access in the long term. As in the Hearing Aid Compatibility (“HAC”) proceeding, the FCC should avoid an overly rigid regulatory regime.²⁹ The FCC should instead adopt a product-line approach to compliance which capitalizes and encourages the trend towards product differentiation in producing CPE products that are increasingly customized and personal to the user, including persons with disabilities.³⁰

IV.

including sight lines and price, that are available to the general public. *Id.*; *Paralyzed Veterans of America v. Ellerbe Beckett Architects & Engineers, P.C.*, 950 F. Supp. 393, 398-405 (D. D.C. 1996) (discussing these requirements and applying them to the MCI arena in the District of Columbia), *aff’d*, 117 F.3d 579 (D. C. Cir. 1997), *cert. denied*, 118 S. Ct. 1184 (1998).

²⁹See *Access to Telecommunications Equipment and Services by Persons With Disabilities (Hearing Aid Compatibility)*, CC Docket No. 87-124, Final Rule, 61 Fed. Reg. 42181 (1996) (requiring most workplace telephones to be hearing aid compatible by January 1, 2000, but declining to require testing or retrofitting of existing telephones, instead permitting a presumption of compliance).

³⁰ In this respect, the trend towards CPE that is increasingly personal to the user’s individual preferences and needs is much like the “plug and play” paradigm described by the Information Technology Industry Council (“ITI”). See ITI Comments at 4-7. Like ITI, TIA believes that the FCC should encourage, rather than discourage this trend towards product differentiation as the most effective strategy for providing access for persons with a range of disabilities, if “readily achievable.”

DEFINITIONS.

A. As Many Commentors Agreed, The Proposed Definition Of Accessibility In The Context Of Section 255 Should Be Revised And Clarified.

1. TIA agrees with disability advocates that the concept of accessibility includes the ability to use product information and customer support services.

In the NPRM, the FCC proposes to collapse the definitions of “accessible” and “usable.”³¹ In the guidelines, the Access Board had given the term “usable” a distinct definition, to refer to the accessibility of product information and customer support.³² In addition, the guidelines contained express obligations to provide “usability,” such as providing product information in alternative formats and maintaining accessible customer support services and call centers.³³ The status of the Access Board’s “usability” requirements under the FCC’s NPRM is unclear. While the guideline including these requirements is incorporated by reference into the FCC’s proposed definition of “accessible,”³⁴ the NPRM elsewhere suggests that these items are not mandatory by indicating that these activities will be considered in the context of a complaint as evidence of a manufacturer’s good faith.³⁵

TIA believes that CPE cannot legitimately be considered “accessible” unless product information and customer support is provided in a manner that is accessible to persons

³¹ NPRM ¶ 73.

³² 36 C.F.R. § 1193.3.

³³ 36 C.F.R. § 1193.33(a).

³⁴ NPRM ¶¶ 72, 73.

³⁵ See NPRM ¶ 165.

with disabilities. For this reason, TIA agreed to inclusion of these requirements in the TAAC Final Report.³⁶ Consequently, TIA urges the FCC to clarify its statements in the NPRM to reflect that accessible product information and customer support are required by Section 255, to the extent “readily achievable”.³⁷

2. The FCC should adopt the Section 255 definition of “accessible” proposed by TIA.

The FCC should revise its proposed Section 255 definition of “accessible” equipment and CPE to conform to the definition proposed by TIA in its initial comments for three reasons. First, as a matter of law, TIA’s definition is consistent with ADA precedent. Second, TIA’s definition is preferable to the FCC’s proposed definition as a matter of policy, because TIA’s definition recognizes that manufacturers need to exercise discretion in choosing which features to incorporate since it is not “readily achievable” for a single product to meet the needs of every disability. Consequently, TIA’s definition avoids the potentially unproductive requirements that could result from literal application of the FCC’s proposed definition, minimizes compliance costs that produce no gains in access,³⁸ and encourages manufacturers to provide specific information about access features included in products so that persons with disabilities can identify the products that meet their access needs.

³⁶ TAAC Final Report § 4.6.

³⁷ From TIA’s perspective, it is irrelevant whether the FCC accomplishes this clarification as part of the definition of “accessible,” or by adhering to the Access Board’s approach of using a separate term such as “usability” to refer to these requirements.

³⁸ See SPR Study, TIA Comments, App. A.

- a. **To be consistent with ADA precedent, the FCC must adopt a definition of “accessible” for Section 255 that recognizes the cumulative cost, complexity, and impact on fundamental product characteristics of multiple access features.**

As TIA pointed out in its initial comments, the FCC’s proposed definition of “accessible” for Section 255 is inconsistent with ADA precedent because it requires an independent “readily achievable” assessment for each of the 18 items on the “accessible” checklist. Consideration of cumulative cost, consistent with ADA precedent, would permit the cumulative sum of the readily achievable assessment for all of the 18 checklist items to be considered. The proposed definition in contrast precludes consideration of the cumulative costs, complexity, and impacts on fundamental product characteristics that would be involved in incorporating multiple access features to accommodate multiple functional limitations in a single product. As proposed by the FCC and the Access Board, compliance cannot include the sum of the parts for a product. ADA precedent requires that the readily achievable cost be based on the entire product, e.g., the sum of the parts.

The proposed definition of “accessible” is also directly at odds with ADA precedent, where DOJ has recognized the cumulative cost, for example of barrier removal, as a legitimate consideration in determining what additional efforts are “readily achievable” and therefore required.³⁹

³⁹ DOJ Preamble, 28 C.F.R. Part 36, App. B (commenting on § 36.104) (indicating that it is "appropriate to consider the cost of other barrier removal actions as one factor in determining whether a measure is readily achievable").

Moreover, the fragmented assessment of what is “readily achievable” under the FCC’s proposed definition is inconsistent with the factors of technical feasibility, practicality and marketability that the FCC proposes to consider in determining what is “readily achievable.” The difficulty, expense, and impact on product characteristics and marketability of access features cannot be assessed in a vacuum, but only in the context of an actual product destined for sale in the marketplace.

Therefore, to ensure that the requirements imposed by Section 255 stay within the parameters of the “readily achievable” standard, the FCC must, at a minimum, revise the definition of “accessible” to remove the requirement for an independent “readily achievable” assessment for each functional limitation on the checklist and to permit consideration of cumulative costs, complexity, and impacts to products.

- b. TIA’s proposed definition of “accessible” is preferable as a policy matter because it encourages manufacturers to provide information that enables persons with disabilities to purchase products that meet their needs and it endorses the recognized need for manufacturers to exercise discretion in including access features within product lines.**

As a matter of policy, the FCC should adopt a definition of “accessible” that endorses manufacturers’ discretion in incorporating access features because the exercise of such discretion is unavoidable. In spite of the FCC’s recognition that manufacturers “must decide what features to include and what features to omit,”⁴⁰ the FCC proposes to adopt the Access Board’s definition of “accessible,” which effectively requires manufacturers to either: (a) make each

⁴⁰ NPRM ¶ 170 (emphasis added).

product accessible to every functional limitation; or (b) document the inevitable determination of why it was not “readily achievable” to provide universal access in each product.⁴¹ TIA’s definition, which would require manufacturers to achieve one or more of the 18 accessibility criteria, if readily achievable,⁴² but would not make each of the 18 criteria mandatory and therefore the basis for a complaint, recognizes and endorses manufacturers’ exercise of discretion. Under this approach, consumers could expect to see in each manufacturers’ product line a feature or features from the checklist such that all 18 criteria are represented, to the extent “readily achievable.”

TIA recognizes that Section 255 is the law and that it obligates manufacturers to incur compliance costs. TIA objects, however, to compliance costs that are not likely to result in tangible gains in accessibility of products available to persons with disabilities in the marketplace.⁴³ Moreover, by amending the proposed definition to relax the mandatory nature of the 18 access criteria, the FCC will minimize the compliance costs of Section 255. By recognizing manufacturers’ discretion to choose among the 18 accessibility criteria, the FCC will

⁴¹ As pointed out in the discussion of product line, supra, application of the 18 accessibility criteria on a product-line basis would not only reduce the documentation requirements implicitly contained in the 18 point access checklist, but would also promote more meaningful levels of access for a more broad range of disabilities.

⁴² TIA’s proposed definition would not permit a manufacturer to achieve only one item on the checklist for compliance; to the extent that it is “readily achievable” to do more, the manufacturer would be required to do so. As provided by Section 255, what is “readily achievable” would remain the standard for determining what is required.

⁴³ See TAAC Final Report § 5.3 (“There will be cases where manufacturers may not be able to achieve the creation of a single product that addresses all or some combinations of disabilities without sacrificing product usability . . . [T]here will be cases where a company will have to use discretion in choosing among accessibility features.”).

discourage manufacturers from adopting an approach to access features that result in superficial access enhancements for as many disabilities as possible, or to “paper” decisions why certain features were not “readily achievable.”⁴⁴

Furthermore, TIA’s proposed definition of “accessible,” by endorsing manufacturer discretion within product lines,⁴⁵ avoids some of the non-productive and arguably absurd requirements that could be imposed under literal application of the FCC’s proposed definition. The FCC’s proposed definition does not permit any coordinated consideration of the accessibility of product inputs, outputs, control, and mechanical functions for a given disability. Instead, the FCC’s proposed definition requires manufacturers to assess whether it is readily achievable to make product inputs accessible independent of any consideration of whether it is “readily achievable” to make the outputs of the same product accessible to the same functional limitation. Consequently, the FCC’s proposed definition could impose nonproductive requirements to make product inputs, such as a keypad, accessible to a person who is visually impaired, even though it was not readily achievable to make the product output, such as a visual display, accessible. TIA’s definition would avoid such nonproductive results by giving manufacturers discretion to focus their efforts on providing products that are accessible overall to particular functional limitations.

Finally, TIA’s proposed definition of “accessible,” which focuses on the features included in products rather than an abstract legal notion of “accessibility,” will encourage

⁴⁴ See SPR Study, TIA Comments, App. A (criticizing documentation costs associated with Access Board’s proposed guidelines).

⁴⁵ TAAC Final Report § 5.3.

manufacturers to provide information about specific features that promote access included in products. This information will dramatically increase the ability of persons with disabilities to purchase a product that meets their needs. TIA's proposed definition, which recognizes manufacturers' discretion within product lines and thereby insulates them from some risk of complaints, focuses on specific access features such as font size or backlighting, which manufacturers can represent that they have provided without fear of generating a complaint. This is the better approach to increase products with features which promote access in the marketplace, facilitate persons with disabilities in purchasing products that meet their unique access needs, and, in the long run, result in a decrease of complaints because there will be fewer misunderstandings about product features.

3. TIA supports the FCC's tentative conclusion that the prohibition against reductions in accessibility should not operate to preclude legitimate trade-offs as products evolve or to impede technological innovation.

In the NPRM, the FCC tentatively concludes that the general principle against reductions in accessibility reflected in the Access Board's guidelines "should not operate in such a way as to prevent legitimate feature trade-offs as products evolve, nor should it stand in the way of technological advances."⁴⁶ TIA agrees with the FCC's tentative conclusion and urges the FCC to revise its proposal to adopt the Access Board's guideline § 1193.39, which the FCC proposes to adopt as part of its definition of "accessible," to indicate that this prohibition does not apply when either of these conditions is met.

⁴⁶ NPRM ¶ 114.

Some commentators expressed concern that the FCC's interpretation of the guideline prohibiting reduced accessibility could operate to foreclose access to new technologies by persons with disabilities.⁴⁷ TIA members understand this concern; however, it is misplaced. Development of a new technology does not absolve manufacturers of all obligations to provide access. Manufacturers remain subject to the obligation to do what is "readily achievable" to provide access for old and new technologies alike. Therefore, new technologies must include features to promote access to the extent "readily achievable" when first introduced, as well as thereafter, when new products and services are introduced.

Admittedly, with some new technology there may be an adjustment period after the new technology is developed during which access solutions for the new technology will need to be developed or improved. During such an adjustment period, however, older technologies overlap and will remain accessible to the extent readily achievable. Digital wireless telephony and hearing aid compatibility provide a good example. Manufacturers of CPE and hearing aids are still working on a technical solution to the access problem raised by this new technology. The dissemination of this new technology, however, has been gradual. Meanwhile, persons with hearing aids have access to HAC analog cellular phones that are able to access the analog systems that remain in service throughout the country. And, as displayed at the Self Help for Hard of Hearing People convention in Boston in June, several manufacturers have plans to release a new product that increases the compatibility of hearing aids and digital wireless phones. Ultimately, more technical access solutions should be found, and persons with disabilities will be able to reap the benefits of a new (and in the interim, improved) digital technology. The introduction of new

⁴⁷ See, e.g., NAD Comments at 26-27; SHHH Comments at 16.

technology should not be delayed because accessibility may not be “readily achievable” at the outset.

4. Employee training should be left to manufacturers’ discretion.

For the following reasons, TIA opposes any reference to employee training as part of the definition of “accessible.”⁴⁸ As currently drafted, the FCC’s proposed definition does contain a provision that appears to require that manufacturers **consider** addressing access issues when the manufacturer provides employee training.⁴⁹ This language should be clarified by deleting any references to employee training in the a definition of “accessible” even on an advisory basis.

Section 255 applies to the design, development, and fabrication of CPE; it does not require training. Many of TIA’s member companies will elect to train their employees with respect to access issues. A manufacturer’s compliance with Section 255, however should be

⁴⁸ Manufacturers agreed to include a purely advisory provision related to training as part of the give-and-take negotiation process that resulted in the TAAC Final Report. TAAC Final Report § 4.9 (“Manufacturers should also provide employees . . . with periodic training regarding the requirements of Section 255”). The Access Board disregarded the TAAC language and in its guidelines, adopted what could be construed as a mandatory requirement that where training is conducted, manufacturers must consider including access issues as a component of that training. 36 C.F.R. § 1193.33(c) (“Where manufacturers provide employee training, they shall ensure it is appropriate to an employee’s function. In developing or incorporating existing training programs, consideration shall be given to the following [access-related] factors...”).

⁴⁹ NPRM ¶ 73 (implicitly incorporating § 1193.33(c) by reference). Given the apparently mandatory language of this guideline, it is unclear whether a manufacturer would need to document its “consideration” of access training or would be subject to a complaint for its failure to engage in such consideration. Such inquiries and/or complaint clearly fall outside the range of activity – design, development, and fabrication – that Section 255 was intended to regulate.

assessed based upon its outputs – its success or lack of success in increasing accessibility. If a manufacturer can increase accessibility without providing training to any or all of its employees, it should be permitted to do so. The FCC should allow manufacturers to implement Section 255 as effectively and efficiently as possible within their own companies.

Any training efforts undertaken by a manufacturer could appropriately be considered as part of a “good faith” defense to a complaint.⁵⁰

B. Compatibility.

- 1. The FCC should adopt an approach to Section 255 compatibility that defines the universe of SCPE with which manufacturers have an obligation to be compatible and permits the FCC to achieve policy objectives such as compliance with industry standards.**

TIA believes that the compatibility obligation of Section 255 should be implemented by the FCC in a way that clearly defines manufacturers’ obligations and permits the FCC to achieve overarching policy goals related to accessibility. Under Section 255, manufacturers have an obligation when access is not readily achievable, to provide equipment and CPE that is compatible with peripheral devices and SCPE “commonly used” by persons with disabilities, if “readily achievable.” In the NPRM, the FCC proposed an overarching definition of “commonly used” to mean “affordable and widely available,” and a rebuttable presumption that SCPE qualifies as “commonly used” triggering compatibility requirements if the SCPE is distributed by a statewide equipment program for persons with disabilities.⁵¹ Like many other

⁵⁰ See NPRM ¶ 165.

⁵¹ NPRM ¶ 90.

commentors,⁵² TIA is concerned about this proposed approach, particularly the rebuttable presumption.

In TIA's view, the FCC should implement the compatibility requirement in a way that provides manufacturers with clear notice of the SCPE for which compatibility must be provided, "if readily achievable," and permits the FCC to implement policies that will, in the long run, increase accessibility. This approach is preferable to the proposed rebuttable presumption, which does not satisfy either of these objectives and therefore should be abandoned. Instead, the FCC should establish a definition of "commonly used" and a process for "listing" the SCPE that satisfies this definition through a process of notice and comment involving all interested parties.⁵³

While TIA recognizes that this "list" approach will involve substantial monitoring and participation from manufacturers, TIA believes that this effort would be well spent if the FCC were to set criteria for inclusion on the list that included compliance with industry interoperability standards and the use of a standard connector. By establishing these criteria as prerequisites for inclusion on the compatibility list, the FCC would promote increased accessibility and

⁵² See, e.g. Missouri Assistive Technology Council Project ("MATP") Comments at 3; NCD Comments at 18; TDI Comments at 13-16.

⁵³ Several disability advocates endorsed such a list, on either a mandatory or advisory basis. Many of these same commentors suggested that such a list be compiled with the input of disability groups, SCPE manufacturers, and outside "experts" such as AAES. See, e.g. NAD Comments at 9; SHHH Comments at 12; TDI Comments at 13-16. TIA supports any process that would define the universe of SCPE for which manufacturers are responsible to provide readily achievable compatibility with the involvement of all appropriate parties, including manufacturers of CPE and telecommunications equipment. As set out in more detail below, manufacturers have valuable expertise related to interoperability and connection requirements to bring to the table in compiling such a list. In addition, TIA envisions a process that includes oversight by the FCC (with input from the Access Board), as the ultimate authority for enforcing Section 255, not exclusive responsibility for the Access Board to maintain such a list as some disability advocates proposed.

compatibility in the long run. Without a list, manufacturers will spend significant resources and waste repeated effort in trying to identify SCPE that is “commonly used.” Without standard interfaces between CPE and SCPE, manufacturers, will find it very difficult to accommodate in every product the dozens of connectors used by SCPE. As a practical matter, manufacturers will need to exercise discretion to provide compatibility for some kinds of SCPE but not others. Requiring use of a standard connector as a prerequisite for triggering the compatibility obligation will reduce the technical difficulties, costs, and alterations to fundamental product characteristics entailed in providing compatibility, thereby making it more likely that such compatibility will be “readily achievable” and that more products will be “compatible” for consumers with disabilities.

Furthermore, a list approach is consistent with the need for the FCC to adopt policies that encourage, rather than hinder new technologies. As TIA pointed out in its initial comments, at some point in the future, alternative technologies may perform many of the same functions as TTYs, making it appropriate to phase-out these outdated technologies in favor of new ones which will provide people with disabilities with greater access to the mainstream of society. A list approach to compatibility, which contemplates ongoing FCC involvement, would provide a vehicle for implementing a forward-looking approach to compatibility that will increase access in the long run.

2.

The compatibility requirement demonstrates the appropriate role for standards developed by existing standards-setting bodies, with consumer participation, in the future of Section 255 implementation.

Technical interface standards are essential to efficient implementation of the compatibility requirements of Section 255. Standards have been a part of the telecommunications industry for many years, and it is reasonable to expect that they will likewise play a part within the context of Section 255. It is important to understand that adoption of standards involves important trade-offs, for while they ensure consistency and uniformity of performance, they can also inhibit innovation. Therefore, if standards are misapplied in the Section 255 context, they could hinder or block development of creative solutions to access.

Standards play an important role in today's telecommunications systems. Signaling protocols, for instance, must be standardized so that the CPE manufactured by different companies will operate on infrastructure manufactured by yet another company. Without such standards, the large variety of CPE offered by multiple manufacturers would not be possible.

At this stage in the development of Section 255, it is too early to understand fully where standards would make the most sense. At a minimum, there will be a need for technical interface standards. For instance, manufacturers will need standards specifying the technical interface between CPE and peripherals/SCPE in order to fulfill the compatibility requirements of Section 255, and it is possible that interface standards are all that will be required. There may also be performance based standards, e.g. the audio output levels for a piece of CPE to be considered accessible to those individuals with hearing disabilities. These are all positive examples of contributions that standards can bring to the goal of achieving greater access to telecommunications services by persons with disabilities.

Of equal importance as where standards should be applied, is the issue of who should define and develop standards. In the case of Section 255, the standards process should be driven by the telecommunications industry with the participation and collaboration of advocates for persons with disabilities as well as representatives of the peripheral and SCPE manufacturers, as appropriate. Such a collaborative process will insure that the needs of all parties are included in the setting of standards; likewise, without this collaboration, problems will likely result.⁵⁴ Industry has been developing such standards for many decades in voluntary, consensus standards organizations, including TIA and American National Standards Institute (“ANSI”)’s Committee T1. Also, in keeping with the directives of the National Technology Transfer and Advancement Act of 1996,⁵⁵ the proposed accessibility and compatibility guidelines should make use of

⁵⁴ For example, the Access Board guideline Section 1193.43(e) essentially establishes a de facto performance “standard” for the volume control levels in consumer premises equipment. As was pointed out in the comments submitted by Siemens Business Communication Systems, Inc. (“Siemens”):

“This Access Board guideline for volume control with a minimum gain of 20 dB is based on faulty technical premises. The Access Board accepted, without adequate analysis, information submitted to it based upon a very narrow product sampling of three telephone handsets. The derivation of general conclusions for all telecommunications products from a test of only three handsets is exceedingly perilous.”

In the appendix to their comments, Siemens elaborates in significant detail, the problems and conflicts with other requirements created by the Access Board’s attempts to specify performance parameters which they are not qualified to establish.

Siemens Comments at 14-15.

⁵⁵ Pub. L. 104-113 § 12(3), 110 Stat. 775, 782 (1996).

technical specifications and practices established by such private, voluntary standards setting bodies wherever possible.

The telecommunications industry is involved in a number of these private, voluntary standards setting organizations (SDOs), which could serve the needs of Section 255 well. ANSI has established uniform procedures for appropriately conducting the establishment of voluntary based standards that includes all consideration of the views of all parties affected by a standard. Therefore, the use of ANSI accredited SDOs to develop technical interface standards should be given consideration. It should also be noted that, because the existing standards processes are lengthy, in some cases, standards are set by industry consortium. However standards are set for Section 255, the FCC should be sensitive to the fact the telecommunications industry has years of experience in the standards arena. TIA, an ANSI accredited SDO, itself, stands ready to guide and assist the FCC in this area.⁵⁶

C.

⁵⁶ As an ANSI accredited standards body, TIA has been active in standards activities related to issues concerning individuals with disabilities for a number of years. The standard for Hearing Aid Compatibility (HAC) was created by TIA and HIA, and adopted by the FCC well before the release of Section 255. TIA also had a group, TR30, which actively worked on the V.18 (import compatibility for TTY's) modem standard which was later approved by the International Telecommunications Union (ITU). In all of these activities, TIA sought consumer input from representatives of persons with disabilities. TIA also participates in the ANSI Consumer Interest Council, and a TIA staff member was the ANSI delegate to an ISO Working Group on consumer involvement in standardization, which includes the needs for individuals with disabilities.

A “Manufacturer” For The Purposes of Section 255 Should Be The Entity Responsible for the Design, Development and Fabrications of Telecommunications Equipment and CPE.

TIA, in its initial comments, endorsed the FCC’s proposal to define a manufacturer as a “final assembler.”⁵⁷ After reviewing the comments on this issue, TIA has concluded that the proposed “final assembler” definition does not adequately track the language of Section 255, and could, in some cases, violate the FCC’s stated guiding principle of holding manufacturers accountable only for those decisions over which they have direct control.⁵⁸ TIA proposes that the FCC adopt a definition of “manufacturer” that tracks the language of Section 255: a “manufacturer” is the entity responsible for the “design[], develop[ment], and fabricate[ion]” of telecommunications equipment and CPE.

As many of the comments pointed out, the FCC’s proposed definition is not well-suited to address the “branding” arrangements prevalent in the telecommunications industry.⁵⁹ Under these branding arrangements, a carrier or a retailer may direct a manufacturer to place its logo on a CPE product. If a “branded” product is the subject of a complaint, the manufacturer, not the carrier or retailer, should be held accountable for answering the complaint – after all – it is the accessibility of the manufacturer’s design that is being questioned. The manufacturer, not the brand named entity, has access to the information needed to respond to a complaint. Moreover, manufacturers have an interest in defending their designs because an adverse decision in response

⁵⁷ NPRM ¶ 60.

⁵⁸ Id.

⁵⁹ In the NPRM, the FCC sought comment on effective ways of dealing with private brand arrangements. NPRM ¶ 61.

to a complaint about a branded product could have a direct or indirect impact on the viability of other similar designs used by the manufacturer.

In other circumstances, the “final assembler” approach could inappropriately hold manufacturers responsible for design and development decisions that they did not make. Manufacturers occasionally build products according to specifications provided by another entity (such as a carrier or retailer). Since everyone agrees that access is most effectively incorporated early in the design process, the entity responsible for the product design should be held responsible, not the manufacturer, who in this situation does little more than assemble the product pursuant to the direction of the product designer.⁶⁰ In situations where the allocation of responsibility for product design and development is less clear, the FCC should assess Section 255 compliance according to the division of responsibility for design and development provided by the contract between the manufacturer and the product designer.

V. READILY ACHIEVABLE.

A. Manufacturers Should Not Be Required To Include “Readily Achievable” Access Features After A Product Has Been Introduced Into The Market.

- 1. In order to maximize the impact of resources available to provide access, the FCC should adopt a bright-line policy that Section 255 does not require manufacturers to modify products that have already been introduced to the market.**

⁶⁰ Since the retailer would be the “manufacturer” in a build-to-specifications situation, the retailer would be required to maintain a point of contact under the FCC’s proposal.

TIA supports the FCC’s tentative conclusion that “once a product is introduced in the market without features that were not readily achievable at the time, Section 255 does not require that the product be modified to incorporate subsequent, readily achievable access features.”⁶¹ The FCC should adopt this proposal in its final rules because it ensures that the resources available to provide access within the limits of the “readily achievable” standard will be spent as efficiently as possible, thereby maximizing the potential to realize concrete gains in accessibility.

As the TAAC,⁶² the Access Board,⁶³ the FCC,⁶⁴ and many commentors representing both the disability community and industry have recognized,⁶⁵ access features can most easily and inexpensively be incorporated if considered at the outset of the product and design and development process pursuant to the direction of the product designer. As a result, there is a consensus that features that promote access considered early in this process are more likely to be “readily achievable” and therefore required than those considered later (through no fault of the manufacturer). In the NPRM, the FCC correctly recognizes that what is “readily achievable” is likely to change over time as technology and understanding of access issues and solutions advance.⁶⁶ Where new access features become available, the FCC should, as it

⁶¹ NPRM ¶ 120.

⁶² TAAC Final Report § 4.1.

⁶³ Access Board Guidelines § 1193.23.

⁶⁴ NPRM ¶ 120.

⁶⁵ See, e.g., CEMA Comments at 14; SBC Comments at 12; TDI Comments at 12; Trace Research and Development Center (“Trace”) Comments at 7.

⁶⁶ NPRM ¶ 120.

proposes, “take into account reasonable periods of time required to incorporate new accessibility solutions into products under development.”⁶⁷ What is “reasonable” will depend largely upon how far along a product is in the product development process.

TIA would urge the FCC to interpret this “reasonableness” criteria in a way that does not delay product time to market. If a manufacturer cannot rely upon its design being “fixed” at some point far in advance of its introduction in the market, such delays will result. Long before a product is introduced, for example, a manufacturer must design and possibly purchase or reprogram the equipment required for the assembly line to make the product. Manufacturers devote substantial time and effort to design their assembly lines to incorporate components in the most efficient, reliable, and cost-effective manner possible. Inclusion of a new or different feature could require significant difficulty and expense in redesigning the assembly line, which would make the feature not “readily achievable” and therefore, not required. The FCC must be sensitive to these difficulties and expenses which increase the farther along a product is in the design and development process.⁶⁸

Moreover, the short product life cycle of CPE products in particular weighs in favor of the FCC adopting a predominantly forward-looking approach in assessing what is “readily achievable.” In the CPE marketplace, product life cycles have become extremely short, typically 12-24 months, and are pressing toward the shorter cycle on average. As a result, there will almost always be a product in the design process available to include the access feature, if

⁶⁷ Id.

⁶⁸ Similarly, the difficulty and expense of retooling and/or reconfiguring of an assembly line that would be required to include a new access feature in a product that is already in production would almost always exceed the “readily achievable” threshold.

“readily achievable.” By requiring inclusion of the access feature early in the design process, the FCC will minimize the cost of including that feature and thereby, leave more of the limited resources available for the manufacturer to incorporate other access features, if “readily achievable.”

Once a product has been introduced to market, the FCC should adopt the proposed bright-line rule that it is no longer “reasonable” to require manufacturers to consider new access features that have become “readily achievable.” Any other rule would be inefficient and contrary to the goal of increased accessibility for consumers with disabilities in the long run.

2. Similarly, the FCC should not require retrofitting of products as a penalty for noncompliance with Section 255.

For the same reasons that the FCC should not require manufacturers to incorporate new access features into products that have already been introduced to market, the FCC should not require manufacturers to retrofit products as a penalty for violations of Section 255. TIA, like many of the disability advocates who support retrofitting as a penalty, considers violations of Section 255 to be a serious matter. As manufacturers who intend to comply with Section 255’s requirements in good faith, TIA’s member companies believe that violators, particularly willful violators of Section 255 should be penalized. After all, those violators have gained an unfair competitive advantage over compliant companies by failing to incur the difficulty and expense of doing what is readily achievable to provide access.

TIA opposes retrofitting as a penalty because it will yield fewer gains in accessibility than forward looking remedies. Interference with the ordinary life cycle of a product, which is what retrofitting is, will be more likely to delay all products to market, including newer

products with improved benefits. Depending on when a complaint is filed, a CPE product will frequently be out of production or near the end of its life cycle by the time that the FCC resolves a complaint. A manufacturer should not be required to reinitiate manufacture of the product or to extend its life cycle in order to implement a retrofit. Retrofits also often involved “add-ons” which have less appeal for people with disabilities especially when new product generations will soon be on the market. Furthermore, near the end of a product life cycle, the product is not likely to be something that consumers, including persons with disabilities, want; they will want newer versions of the product or entirely new products.

Most importantly, the ultimate goal of increased accessibility would be better furthered by the FCC requiring a manufacturer to incorporate additional access features in a future product that has not yet been released, than to require retrofitting. For the same penalty, in terms of compliance cost, the FCC could generate more access gains by realizing the efficiencies gained if access features are considered early in the design and development process.

B. Readily Achievable Factors.

In opening comments, TIA supported the FCC’s proposal to adapt the definition of “readily achievable,” incorporated from the ADA, to the telecommunications context. TIA endorsed the three factors proposed by the FCC for evaluation of “readily achievable:” (1) feasibility, (2) expense, and (3) practicality. However, TIA asked the FCC to recognize an additional factor: “fundamental alteration.”

1.

Commentors agreed that technical feasibility is an important part of the “readily achievable” determination.

A number of commentors joined TIA in agreement with the FCC that technical feasibility is an essential consideration in the “readily achievable” determination. This consensus was found among members of the disability community as well as industry. The comments voiced recognition that technical feasibility is an issue of special importance in the telecommunications industry. GTE, for example, noted: “technical barriers to accessibility will obviously present some of the most significant challenges to service providers and manufacturers.”⁶⁹

Given the importance of technical feasibility in the telecommunications industry, the FCC should recognize it in adapting the definition of “readily achievable” to the telecommunications context. As stated by the Missouri Assistive Technology Council and Project:

[T]echnical access, unlike most facility access, can be significantly influenced by what is technically feasible. Thus a consideration of technical feasibility and the impact of an accessibility feature on the overall design and function of a product or service is an appropriate part of the determination of readily achievable.⁷⁰

With this broad support from commentors, the FCC should maintain its emphasis on technical feasibility in the “readily achievable” determination.

2.

⁶⁹ GTE Comments at 7.

⁷⁰ MATP Comments at 3.

The FCC should recognize that “expense” requires considering the entire product which includes cumulative costs.

TIA submitted in the initial comments that the FCC should consider the cumulative costs of accessibility features as part of the “readily achievable” determination. Such consideration is supported by the Department of Justice’s interpretation of the requirements of the ADA. TIA pointed out that “costs” include not only money, but the battery life, size of a product, and memory that are affected by a manufacturer’s choice of accessibility features.

There was not much discussion of cumulative costs in the comments. TIA nevertheless reiterates its belief that consideration of cumulative costs is appropriate and necessary to the determination of whether incorporation of a particular feature is “readily achievable.” TIA believes that requiring manufacturers to evaluate the cost of each particular accessibility feature without reference to the costs of other features already incorporated is unrealistic and would downplay the overall costs of compliance with Section 255. The entire product should be considered when determining costs. Such an approach would be, in TIA’s view, tantamount to disregarding cost as a factor altogether. TIA does not believe that Congress, or the FCC, intended such a result. TIA therefore asks the FCC to recognize that cumulative costs for the entire product must be considered in the “readily achievable” determination.

3. The FCC should not require manufacturers to incorporate accessibility features if the product would be fundamentally altered.

TIA in opening comments urged the FCC to recognize that what is “readily achievable” is limited by the concept of “fundamental alteration,” adapted from the ADA

context.⁷¹ While the Access Board included the concept of fundamental alteration in its discussion of “readily achievable” under Section 255,⁷² the FCC was not as explicit. TIA proposed the FCC recognize that it is not “readily achievable” to alter core features and price desired by the target market, as well as other fundamental characteristics of a product.

TIA was joined by several industry commentators in the view that the fundamental alteration of a product is not “readily achievable.” Nextel pointed out, and TIA agrees, that the “readily achievable” factor of Section 255 is designed to result in a balanced approach to accessibility, where disabled consumers gain increased access to telecommunications services, yet the needs and desires of other consumers are not jeopardized. Thus, manufacturers should not be required to include accessibility features in their products to the extent such features conflict with the core designs or functions of such products.

TIA strongly believes that recognition of the fundamental alteration concept will not allow manufacturers to avoid their responsibilities under Section 255. Many features can be incorporated into products without resulting in fundamental alteration. TIA just asks the FCC to recognize the common sense notion that manufacturers’ responsibilities to include accessibility features stop short of the fundamental alteration of a product.

VI.

⁷¹ 28 C.F.R. Part 36, App. B (commenting on § 36.104).

⁷² Advisory Guidance, Subpart A, ¶ 3(d), Appendix to 36 C.F.R. Part 1193 (comment 3 on the definition of readily achievable).

THE FCC SHOULD INTERPRET THE SCOPE OF SECTION 255 IN A MANNER THAT IS CONSISTENT WITH THE STATUTORY DEFINITIONS PROVIDED IN THE COMMUNICATIONS ACT AND FCC PRECEDENT.

TIA urges the FCC to interpret the scope of Section 255 in a manner that is consistent with the definitions provided in the Communications Act and developed in FCC precedent. Many of the commentors representing persons with disabilities argued that the FCC should interpret Section 255 to cover information services, multi-use equipment, and software, because, they argue, Section 255 is a civil rights statute that must be broadly interpreted to achieve its remedial purposes.⁷³ Regardless of whether Section 255 can appropriately be construed as a civil rights provision,⁷⁴ the FCC cannot interpret Section 255 in a way that expands its coverage beyond the scope of the statutory definitions.⁷⁵

A. Information Services Are Not Be Subject To The Requirements Of Section 255.

TIA agrees with the Commission and commentors that information or enhanced services should not be subject to the requirements of Section 255.⁷⁶ Indeed, TIA, like other

⁷³ E.g., NAD Comments at 10; NCD Comments at 6.

⁷⁴ TIA objects to this characterization. If Congress had intended Section 255 as a civil rights statute, it would have included it in Title 42 along with other statutes prohibiting discrimination based upon age, race, gender and disability. Instead, Congress included Section 255 in telecommunications legislation.

⁷⁵ Cf. Brown v. 1995 Tenet Paraamerica Bicycle Challenge, 959 F. Supp. 496, 498 (N.D. Ill. 1997) (refusing to expand coverage of the ADA beyond the scope of the “public accommodation” definition; “[a]lthough the ADA certainly was enacted with the intention of prohibiting discrimination against persons with disabilities, the language in question refers to ‘facility’ which appears clearly to be defined as a physical structure.”).

⁷⁶ NPRM ¶ 42 (stating that “[i]nformation services’ are excluded from regulation” under Section 255); TIA Comments at 54; Information Technology Industry Council (“ITI”) Comments (Continued ...)

commentors, believes that the Commission’s precedent, and the plain language of the statute require the Commission to separate information or enhanced services and telecommunications services for purposes of applying Section 255.

Some commentors would like to read Section 255 broadly to encompass information services or enhanced services, as well as telecommunications services. In the words of one commentor, the Commission should “revise the distinction between ‘telecommunications and information services. . . .’”⁷⁷ Another commentor suggests that the Commission change the definition of information services so that “[a]ctions, which primarily constitute transmission of information by a user to a target, would fall into the *telecommunication* definition” while “[t]he offering of a plethora of information that is not targeted at a particular user would fall into the category of an information service.”⁷⁸ In the words of another commentor, “[s]hould the Commission exclude all enhanced or information services from Section 255’s coverage, it will effectively be denying to all Americans with disabilities access to the new and innovative telecommunications services that the rest of America is coming to enjoy. . . .”⁷⁹

at 9; Business Software Alliance (“BSA”) Comments at 6 (“BSA strongly supports the Commission’s tentative conclusion that Section 255 does not apply to ‘enhanced services’ or ‘information services,’ but rather applies to ‘telecommunications services’ only.”).

⁷⁷ MATP Comments at 1.

⁷⁸ Trace Comments at 4.

⁷⁹ NAD Comments at 15-16. See also American Foundation for the Blind (“AFB”) Comments at 5 (“If the Commission were to read Section 255 narrowly, the effect (in conjunction with the Commission’s deferral of the matter in the Universal Service Order) would be to deny universal access to information services to the disabled community.”); TDI Comments at 8-10; MATP Comments at 1 (“[R]evise the distinction between ‘telecommunications’ and ‘information services’ to include those technologies, such as voice mail and voice menu systems, critical to full access and participation of people with disabilities.”).

The Commission should resist the temptation to expand the scope Section 255.

First, the plain language of the statute states that only telecommunications services are subject to Section 255:

*A provider of telecommunications service shall ensure that the service is accessible to and usable by individuals with disabilities, if readily achievable.*⁸⁰

As TIA noted in its opening comments, if “Congress wanted information services to be covered, it would have said so explicitly.”⁸¹ Support for this conclusion is drawn from the fact that telecommunications services and information services are separately defined in the Communications Act.⁸²

The National Association of the Deaf insists that “Congress, too, was aware of the pervasive influence that these advancements [*i.e.*, information services] would have on our daily existence and wished to ensure the inclusion of people with disabilities in the enjoyment of these benefits.”⁸³ The plain language of the statute, however, defies this interpretation.⁸⁴ If Congress

⁸⁰ 47 U.S.C. § 255(c). The Commission has correctly extended this language to limit the type of telecommunications equipment (*i.e.*, that equipment used to provide telecommunications services) that is subject to Section 255. See NPRM at ¶ 53.

⁸¹ TIA Comments at 53.

⁸² See 47 U.S.C. § 153(20), (46).

⁸³ NAD Comments at 10.

⁸⁴ See Fawn Mining Corporation v. Hudson, 80 F.3d 519, 521 (D.C. Cir. 1996) (“When the statute’s text makes its application reasonably clear, the meaning of the text should control.”); Environmental Defense Fund, Inc. v. E.P.A., 82 F.3d 451, 468 (D.C. Cir. 1996) (“The plain meaning, if there is one, controls our interpretation of a statute ‘except in the ‘rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters.’”) (citing United States v. Ron Pair Enterprises, Inc., 489 U.S. 235, 242

(Continued ...)

had wanted both telecommunications services and information services to be subject to Section 255, it would have used both terms in Section 255. It did not, and as a result, only telecommunications service providers and equipment used to provide telecommunications services are subject to Section 255.

Second, for the Commission to apply Section 255 to information services would be entirely inconsistent with the Commission's prior decisions. As commentors have recognized, the Commission has consistently drawn a clear distinction between information services and telecommunications services for purposes of regulation under the Communications Act.⁸⁵ The Commission recently summarized the distinction between information services and telecommunications services best in its Universal Service Report to Congress:

After careful consideration of the statutory language and its legislative history, we affirm our prior findings that the categories

(1989) (quoting Griffin v. Oceanic Contractors, Inc., 458 U.S. 564, 571 (1982)); Detweiler v. Pena, 38 F.3d 591, 596 (D.C. Cir. 1994) (“We require litigants who urge departure from the plain meaning of the statutory language on the basis of congressional intent to shoulder a considerable burden.”).

⁸⁵ See TIA Comments at 53-56; ITI Comments at 9 (“The NPRM tentatively concludes that information services are beyond the scope of Section 255, but seeks comment on whether the Commission should create an exception for widely-used information services such as voice mail and email. The Commission should not give this approach any further consideration, as it would be inconsistent with the statutory interpretations and conclusions that the Commission has already articulated in numerous other dockets.”) (footnote omitted); Business Software Alliance (“BSA”) Comments at 7 (“The Commission recognized again in its recent report to Congress on funding for universal service the continued vitality of the distinction between basic telecommunications service and other services, such as enhanced services, that are not regulated by the Communications Act.”).

of “telecommunications services” and “information service” in the 1996 Act are mutually exclusive.⁸⁶

Indeed, as TIA correctly observes, the clear regulatory distinction between telecommunications services and information services is supported in the legislative history of the Telecommunications Act of 1996.⁸⁷

Several commentors representing persons with disabilities urge the Commission to ignore its precedent and expand the definition of telecommunications services to encompass information services for purposes of Section 255.⁸⁸ According to National Association of the Deaf, the deregulatory justification used by the Commission to separate telecommunications and information services in the past is not applicable to Section 255 because Section 255 is intended to “create *new* regulatory obligations for service providers.”⁸⁹ TIA disagrees.

In previous decisions, the Commission has recognized that subjecting information services to the burdens of Title II regulations (i.e., increased “regulatory obligations”) would have a stifling effect on the “healthy and competitive development” of the information services

⁸⁶ See Federal-State Joint Board on Universal Service, Report to Congress, FCC 98-67 at ¶ 39 (rel. April 10, 1998) [“Universal Service Report”].

⁸⁷ TIA Comments at 55 n. 83. See also Universal Service Report at ¶ 45 (“Accordingly, a decision by Congress to overturn Computer II, and subject those services to regulatory constraints by creating an expanded ‘telecommunications service’ category incorporating enhanced services, would have effected a major change in the regulatory treatment of those services. While we would have implemented such a major change if Congress had required it, our review leads us to conclude that the legislative history does not demonstrate an intent by Congress to do so.”).

⁸⁸ NAD Comments at 11-12; AFB Comments at 5; TDI Comments at 8-10; MATP Comments at 1.

⁸⁹ NAD Comments at 12.

industry.⁹⁰ Accordingly, the Commission has refrained from imposing Title II regulation on information services. Applying Section 255 to information services (regardless of whether the regulatory burden is “access”) would specifically impose an obligation under Title II – a result that the Commission wishes to avoid.

If the Commission includes information services as “telecommunications services” for purposes of Section 255, it will be difficult for it to maintain a distinction between the two for other purposes, such as Universal Service.⁹¹ In the end, the Commission may find itself becoming, as the Business Software Alliance has stated, the “Federal Computer Commission.”⁹² This is a role, however, the Commission has indicated it cannot and does not want to assume.⁹³ Information services should not be subject to the requirements of Section 255.

B. “Multi-Use” Equipment Should Be Subject To Section 255(C) Only If It Is Intended For Use With Telecommunications Services.

With regard to multi-use equipment, TIA generally agrees with the Commission that Section 255(c) should apply “only to the extent the equipment serves a telecommunications

⁹⁰ Universal Service Report at ¶ 46. See also TIA Comments at 54-55.

⁹¹ See Universal Service Order, 12 FCC Rcd. 9179-80 (1997) (“[W]e agree with the Joint Board that information service providers (ISP) and enhanced service providers are not required to contribute to support mechanisms to the extent they provide such services.”). An interpretation that these same information service and enhanced service providers are subject to Section 255 would call into question this definition.

⁹² BSA Comments at 8.

⁹³ See Universal Service Report at ¶ 47 (“Notwithstanding the possibility of forbearance, we are concerned that including information service providers with the ‘telecommunications carrier’ classification would effectively impose a presumption in favor of Title II regulation of such providers.”).

function.” Equipment manufactured for non-telecommunications services or non-common carriers services does not need to be manufactured in accordance with Section 255(c). There are models of equipment which are designed for use with either private systems or telecommunications services. Such equipment should be fully subject to Section 255(c).⁹⁴

However, as TIA explains in its Comments in this proceeding, it is theoretically possible for virtually any equipment intended solely for use with a private network to be used with a telecommunications service.⁹⁵ If the Commission were to impose the requirements of Section 255 on all devices that could even “possibly” be connected to a telecommunications service, virtually all equipment that can transmit and receive data would be fully subject to compliance with Section 255 – whether it was manufactured for use with non-telecommunications service or not.⁹⁶ This constitutes a “possibility” application standard which would exceed both the reasonable purview of the legislation and the intention of the Commission.⁹⁷ TIA believes that the requirements of Section 255 should apply only to the extent the manufacturer intended the equipment to serve a telecommunications function.

In initial comments, TIA offered an example of the inappropriateness of applying an overly inclusive Section 255 compliance standard to multi-use communications equipment: A telephone specifically designed for use with a private network may be produced with customized features not normally expected to function with the PSTN. This non-telecommunications

⁹⁴ To this extent, TIA agrees with ITI’s Comments at 10.

⁹⁵ TIA Comments at 59.

⁹⁶ Id. at 60.

⁹⁷ See TIA Comments at 57-58.

telephone would not (and should not) be subject to Section 255. Conversion for use with the PSTN would not be readily achievable by the manufacturer, technically or economically. However, an errant hobbyist could conceivably fabricate an adapter that would permit the telephone to function, perhaps with only some of its intended features, with the PSTN. Under an overly broad definition of compliance, such a telephone would by definition be fully subject to the requirements of Section 255, *i.e.*, because it is “capable” of functioning with the PSTN.⁹⁸ This is surely not what Congress envisioned or what the Commission suggested in its NPRM.

As TIA observed, if the manufacturer of such a telephone (or any other device not intended for use with a telecommunications service) were required to produce the telephone in compliance with Section 255, competitors who could produce the same product more cheaply without having to comply with Section 255 would force the manufacturer out of that market. Conversely, the U.S. manufacturer attempting to confront foreign competition by not building its line of private network equipment in compliance with Section 255 would risk violation of U.S. law.

The most logical and practical approach to assuring compliance with Section 255 for multi-use telecommunications equipment is to look to the purpose underlying manufacture of the equipment. If it is apparent from the manufacturer’s marketing materials or it is evident from the nature of the device itself that the equipment is reasonably expected to connect to a telecommunications service at any time, it should be fully subject to Section 255. For its part, Trace Research & Development Center, University of Wisconsin-Madison, favors applying Section 255 to equipment that “is manufactured for or marketed as equipment that would be used

⁹⁸ NAD Comments at 17; AFB Comments at 5.

in a telecommunications system.”⁹⁹ TIA agrees with Trace that the intention to manufacture for or market equipment for use with telecommunication service is at the heart of the Section 255 inclusion criterion. TIA does not agree with those who would apply Section 255 to devices that theoretically “can” be used with telecommunications service but were not intended for that purpose. Such an approach is unnecessarily and unfairly inclusive and is not contemplated by Section 255.

C. Software Should Be Covered By Section 255 Only To The Extent That It Is “Integral” To The Functioning of the CPE Or Telecommunications Equipment.

Section 255(b) requires that manufacturers of telecommunications equipment and CPE ensure that it is designed, developed and fabricated to be accessible to and usable by individuals with disabilities, if readily achievable. In modern electronic products, manufacturers select a combination of hardware and software that will enable a product to perform its intended functions. Thus, as TIA pointed out in its Comments, manufacturers should be able to make telecommunications equipment and CPE accessible by whatever means is most practicable, whether through software, hardware, or an alternative approach.¹⁰⁰

Most parties appear to agree with the Commission that Congress has not required software manufacturers to comply with Section 255 where software is not bundled with CPE.¹⁰¹

⁹⁹ Trace Comments at 5 (emphasis added).

¹⁰⁰ TIA Comments at 58 n.90.

¹⁰¹ See, e.g., ITI Comments at 11, BSA Comments at 6, TIA Comments at 58 n.90. Cf. Trace Comments at 5, NAD Comments at 17. NAD asserts that the test for software, bundled or unbundled, is functionality, and that any other standard “may invite manufacturers to unbundle software for the purpose of avoiding their Section 255 obligations.” NAD Comments at (Continued ...)

However, there is considerable disagreement with regard to whether the Commission is authorized to impose Section 255 requirements on software “bundled” with CPE. Some of this controversy may be generated by a lack of clarity regarding what the commentors mean when they refer to “bundled” software. Some commentors have described software as either “bundled” or “unbundled.” Generally, the term “bundling” merely refers to a marketing or pricing arrangement where a “bundle” comprising two or more products, sometimes produced by independent firms, are offered for sale together for a single price.¹⁰² Thus, the term “bundling” is not relevant to describing manufacturers’ obligations under Section 255 for the accessibility of software. Rather, the obligations of manufacturers of telecommunications equipment and CPE hinge on whether the software in question is included within the ambit of the definitions of telecommunications equipment and CPE.¹⁰³ Only to the extent that software is so included, would it be subject to the manufacturer obligations of Section 255. In addition, a manufacturer is responsible for ensuring such software is accessible only to the extent that the software is developed by the manufacturer or by a firm developing such software to the specifications of the manufacturer under its direction and control.

17. The substantial expense and time that would be required to redesign equipment software makes it highly unlikely that any manufacturer would engage in such activity simply to avoid compliance with Section 255.

¹⁰² See Paul A. Argenti, Ed., The Portable MBA Desk Reference at 76 (1994).

¹⁰³ The term “telecommunications equipment” is defined by the 1996 Act as “equipment, other than customer premises equipment, used by a carrier to provide telecommunications services, and includes software integral to such equipment (including upgrades). The term “customer premises equipment is defined as “equipment employed on the premises of a person (other than a carrier) to originate, route, or terminate telecommunications.” 47 U.S.C. § 153 (14), (45).

As TIA pointed out in its Reply Comments in the Commission’s proceeding implementing Section 273 of the 1996 Act, in the case of both telecommunications equipment and CPE, the equipment utilizes a combination of hardware and software to perform these specific functions. Further, TIA described software (whether embedded in integrated circuits or recorded in other media) as a combination of algorithms which “makes the hardware of telecommunications equipment work” and CPE software as being “as much of the manufacturer’s overall product design and development activities as physical design, electrical circuit layout, or radio frequency design.”¹⁰⁴ In the case of CPE, TIA pointed out that software may be embedded in microprocessors that are physically part of the product or “specially designed for and unique to one or more CPE products, and provided separately or as an upgrade to the CPE.” Further, TIA pointed out that the critical terms telecommunications equipment and CPE are defined “to a significant degree in terms of the functions they perform” – respectively, equipment used by a carrier to provide a telecommunications service and equipment on the premises of a person other than a carrier to “originate, route, or terminate telecommunications.”¹⁰⁵ Thus, TIA believes that the only software subject to the requirements of Section 255 is that which, whether embedded in integrated circuits or recorded in other media, enables telecommunications equipment and CPE to perform the specific functions described in their statutory definitions, and, in the case of CPE, is specially designed for specific CPE products. Only such software can be considered “integral” to

¹⁰⁴ See FCC Docket CC - 96-254, TIA Reply Comments, February 24, 1997, at pages 8-11.

¹⁰⁵ Id. at 9-10.

telecommunications equipment or CPE and thus subject to manufacturer obligations of Section 255.¹⁰⁶

To the extent that software performs functions that are not included in the statutory definitions of telecommunications equipment and CPE -- for example, equipment used to provide an information service -- it would not be subject to Section 255. Similarly, if the software in question is not developed by, or for -- but rather independent of -- a manufacturer of telecommunications equipment or CPE (i.e. the creator of the combination of hardware and software), the manufacturer of the CPE would not be responsible for ensuring such independently developed software meets the accessibility obligations of Section 255, regardless of how such software might be marketed or priced.

Finally, TIA notes that this issue is extremely complicated and is the subject of a concurrent, ongoing proceeding in the common carrier bureau.¹⁰⁷ TIA urges the FCC to resolve this software issue in a manner that is consistent with the record and findings in that proceeding.

VII. IMPLEMENTATION PROCESS.

A. Overview.

¹⁰⁶ Because TIA's member companies are committed to providing accessible CPE, to the extent "readily achievable," manufacturers agreed in the TAAC Final Report that software that is "integral" to telecommunications equipment and CPE that is covered by Section 255 even though the statutory definition of CPE omits mention of software. TAAC Final Report § 3.2 (definition of customer premises equipment).

¹⁰⁷ *Implementation of Section 273 of the Communications Act of 1934, As Amended by the Telecommunications Act of 1996*, CC Docket No. 96-254, FCC Docket No. 96-472, Notice of Proposed Rulemaking, 62 Fed. Reg. 3638 (January 24, 1997).

The Commission's express goal for Section 255 implementation is adoption of a process designed to ensure that more accessible telecommunications equipment and CPE is introduced into the marketplace. The process is to be based on (1) resolution of complaints with a minimum of government interference; (2) responsiveness to those aggrieved by a lack of accessibility; and (3) efficient allocation of resources to avoid undue burdens being placed on the Commission, manufacturers and persons with disabilities.¹⁰⁸ A review of the comments filed in this proceeding clearly shows that the process proposed in the NPRM to resolve Section 255 complaints did not accomplish the intended result. With few exceptions,¹⁰⁹ virtually all parties expressed concern with the NPRM's proposed complaint resolution process.

Manufacturers, service providers, individuals with disabilities and advocacy groups representing individuals with disabilities all expressed significant concerns with the FCC's initial proposal. For example, BellSouth stated:

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. The "fast track" proposal, while obviously well-intentioned, is misdirected.¹¹⁰

Individuals with disabilities and those representing their interests also argued that the complaint process in general was confusing and therefore counterproductive to the Commission's original goals. The President's Committee on Employment of People with Disabilities wrote that it "...is confused by the FCC's proposed complaint process, such as when an individual has the right to

¹⁰⁸ NPRM ¶ 124.

¹⁰⁹ See, e.g., David J. Nelson comments at 4 ("I support the FCC's proposal regarding the complaint process. I believe it is fair and reasonable").

¹¹⁰ BellSouth Corporation ("BellSouth") Comments at 10.

move from the 'fast track' to the 'informal' or 'formal' complaint process; or when a complaint would be moved to a alternative dispute resolution process. This needs clarification in the final rules, so that consumers may fully understand the means available to seek redress under Section 255."¹¹¹ Similarly, the State of Connecticut Office of Protection and Advocacy for Persons with Disabilities wrote the "...implementation process is much too cumbersome and without any realistic timeliness for enforcement activities."¹¹² The Wisconsin Association for the Deaf - Telecommunications Advocacy Network Members stated more directly that "(t)he complaint process section is designed for lawyers, and we suspect even lawyers would find it confusing!"¹¹³

These comments fully support TIA's original view that "...the fast track process needs to be eliminated if the Commission is to be successful in meeting its multiple goals of resolving complaints with minimum interference; getting accessible products into the marketplace as quickly as possible; being responsive to persons with disabilities; and conserving the resources of all parties involved."¹¹⁴ The comments call for a simpler approach to Section 255 complaints. In view of the comments submitted and the information provided below, TIA's Dispute Resolution Process should be adopted by the FCC.

¹¹¹ President's Committee on Employment of People with Disabilities ("President's Committee") Comments at 13. See also, virtually identical comments submitted by WID at 5; Access Living of Metropolitan Chicago ("Access Living") Comments at 4; ACB at 4-5; Illinois Deaf and Hard of Hearing Commission ("Illinois Commission") Comments at 4.

¹¹² State of Connecticut Office of Protection and Advocacy for Persons with Disabilities ("Connecticut Office") Comments at 2.

¹¹³ Wisconsin Association for the Deaf - Telecommunications Advocacy Network Members ("Wisconsin Association") Comments at 5.

¹¹⁴ TIA Comments at 64-65.

B. Fast Track Process.

1. Response Period.

The fast track issue which received the most attention was that related to the time within which a respondent would be required to answer a fast track complaint. With the exception of one or two parties that filed comments supporting the FCC's fast track process without change,¹¹⁵ almost every party submitting comments on this issue indicated that a 5 day response time was entirely too short to provide any meaningful chance of providing a substantive response to a fast track complaint. AT&T stated that "...the NPRM's proposed five business day deadline for respondents to initially report to the Commission on their handling of a 'fast-track' complaint is facially insufficient to allow such parties a meaningful opportunity to undertake an investigation of Section 255 complaints, which may frequently raise complex technical and service issues."¹¹⁶ CTIA argued that the five day timeframe given the interests involved, is insufficient to respond to a fast track complaint.¹¹⁷

Comments submitted by the disability community were virtually identical to those submitted by industry. United Cerebral Palsy Association stated that:

A complaint alleging inaccessibility or incompatibility of a key feature or function of a device, if true, may not typically be resolved within 5 days. UCPA believes that five days will not be long

¹¹⁵ See, e.g., Nelson Comments.

¹¹⁶ AT&T Comments at 12.

¹¹⁷ CTIA Comments at 19.

enough for the resolution, or even in many cases for the investigation, of many Sec. 255 complaints.¹¹⁸

Self Help for Hard of Hearing People, Inc. stated:

Even assuming that the company has already set up internal processes for monitoring access, it may well not be possible for a company to assemble the documentation in five days.¹¹⁹

Joan Ireland wrote:

Specifying that a consumer's complaint must be resolved within five days assumes that all complaints are simple ones. Such is not the case, and by limiting the resolution process to five days no consideration is given to a company's need to gather information not only on the complaint itself but also on the possible means available to resolve that complaint.¹²⁰

The Trace Research and Development Center asserted that:

It is believed that this [5 day response period] is too short a period. It is unlikely that companies can gather sufficient information to address a complaint in this period of time unless the company has been regularly receiving complaints about the issue. We appreciate the FCC's concern for rapid response, but feel that this would be difficult.¹²¹

National Association of the Deaf submitted comments which stated:

...given the likely complexity of many Section 255 complaints, the period proposed by the Commission may not provide manufacturers and service providers adequate time to evaluate and address

¹¹⁸ United Cerebral Palsy Association (“UCPA”) Comments at 12.

¹¹⁹ SHHH Comments at 29.

¹²⁰ Joan Ireland Comments at 2.

¹²¹ Trace Comments at 8.

accessibility problems. The result is likely to be endless requests for extension of time, which would defeat the purposes of Section 255.¹²²

The industry and consumer comments on these particular issues are totally consistent with the view originally expressed by TIA that a 5 day response period was not a realistic timeframe for responding to fast-track complaints if the Commission's goal to resolve most issues without resort to more formal litigation processes were to be accomplished. The only significant substantive difference in the comments of those who agreed that a 5 day response time is unrealistic and TIA's proposed Dispute Resolution Process, is the time within which a manufacturer should be required to respond to the query of a person claiming to be aggrieved by a lack of accessibility.

Most parties submitting comments on this issue took the position that a response time of between 10 business days after receipt of a complaint with an outside limit of 30 calendar days, should be sufficient. TIA asserts that even 30 days is not a reasonable amount of time for a manufacturer to respond to a Section 255 complaint. Other than one party who argued the general conclusion that "...if manufacturers and service providers keep accurate records regarding their efforts for ensuring products and service accessibility, they should not need a great deal of time to respond to consumer complaints,"¹²³ no party documented the types of activities which manufacturers may have to undertake to respond adequately to a fast track complaint. TIA, on the other hand, provided concrete examples of the types of factors that would have to be taken into consideration for manufacturers to be able to adequately respond to Section 255 complaints.

¹²² NAD Comments at 35.

¹²³ Id.

While a number of service providers that argued for a 30 day response period, TIA notes that manufacturers need 60 days to respond to Section 255 complaints, because the process of designing, developing and fabricating a given product and conducting the analysis of whether it is “readily achievable” to make the product accessible involves numerous people and many individual factors, all of which are inextricably intertwined. As described in the comments of Motorola, this is a time-consuming and complicated process.¹²⁴ Thus, for manufacturers, it is unrealistic to assume that 10 business days or 30 calendar days is a sufficient time period in which to respond to a complaint filed under Section 255.

As TIA pointed out in its initial comments, there are many factors that go into a response to a Section 255 complaint. One factor which will have a significant influence on the speed with which a manufacturer can respond to a complaint is the level of specificity in the complaint and the ability of the complainant to articulate the accessibility problem.¹²⁵ In its original comments TIA indicated that a manufacturer's likely first response to a complaint would be to make sure it fully understood the nature of the complaint and the disability involved. TIA questioned the type of specificity manufacturers might receive in complaints forwarded by the Commission and whether the Commission would have sufficient resources to fully understand and be able to communicate the nuances of a Section 255 complaint to manufacturers.¹²⁶ An example

¹²⁴ See Motorola Comments at 24-32.

¹²⁵ The need for specificity is one reason why TIA proposed that a standard complaint form be used to file a complaint under Section 255.

¹²⁶ The National Association of the Deaf and Self Help for Hard of Hearing People also believe this is a concern. In its comments, National Association for the Deaf stated that the FCC must have knowledgeable staff familiar with Section 255 and accessibility issues in general, NAD Comments at 34. Self Help for Hard of Hearing People wrote that for the FCC to be responsive to consumers' inquiries, it should have a call center staff capable of handling not only Section 255
(Continued ...)

of the type situation TIA was concerned about can be demonstrated through the comments of Malisa W. Janes, Rh. D. Ms. Janes writes:

I gave a presentation on available technology for people with hearing loss and 95 old folks showed up. I was shock[ed] to find they did not know anything about assessing the quality and function of their hearing aids, the availability of telecommunications compatible hearing equipment, or the services that they should be able to access. They do not know what to ask for and get rude treatment because the sales folks do not know what they need. When they do get equipment that can help them, they don't know how to use it!¹²⁷

TIA does not condone rude treatment of any customers. It also believes that Section 255 and the actions the Commission takes as a result of this proceeding, can serve to reduce, and someday eliminate, the lack of understanding referred to in Ms. Janes' comments. Nonetheless, the foregoing passage demonstrates why a 5 day, 10 business day or even a 30 calendar day response period to an initial complaint is unrealistic and why TIA's proposed Dispute Resolution Process is a more appropriate means of handling complaints than is the fast track process.

TIA can envision a scenario in which a person with a hearing disability who does not know what (s)he needs and who may not know about the equipment (s)he has (or whether the equipment is the appropriate equipment for the disability in question) files a complaint with the FCC. Since the Commission's goal of forwarding complaints within one business day will likely result in the transmission of the complaint without substantive review, it is also likely that the

complaints, but also with expertise in disability access issues and other disability laws. The FCC needs to have staff trained in communicating with consumers with various disabilities and be trained in the use of TTY, relay and Braille. SHHH Comments at 30.

¹²⁷ Malisa W. Janes Comments at 2.

complainant's lack of understanding of the details of his or her hearing aid equipment and its capabilities would necessitate the respondent having to contact the complainant¹²⁸ to ascertain more facts to begin to understand the nature of the problem. Depending on the nature of the complaint, the understanding of the parties involved, and the availability of the complainant, it might take a few weeks for a manufacturer to make contact with the complainant, discuss the nature of the problem and simply start to understand the problem, let alone to respond to it substantively.

2. Extensions of Time.

With regard to filing requests for extension of time to respond to fast track complaints, there were two general themes in the comments. The first relates to the ability of respondents to answer fast track complaints and the second relates to the issue of penalties being imposed on parties who file "frivolous" requests for extension of time.

With regard to requests for extension of time in general, a number of parties filing comments suggested that the fast track response time should generally be short but extensions of time should be allowed for good cause. TIA noted in its original comments that filing requests for extension of time to respond to fast track complaints would be counterproductive to the Commission's goals since that would merely delay consideration of legitimate complaints and would divert manufacturers' resources from providing accessible products to engaging in the

¹²⁸ TIA's Dispute Resolution Process requires manufacturers to make an initial contact with the aggrieved party within 5 business days after the point of contact has been contacted by the aggrieved party and to provide a complete, detailed response to the aggrieved party with a copy to the FCC as promptly as possible but in no event later than 60 days after receipt of the aggrieved party's initial contact with the manufacturer.

litigation process. TIA expressed the view in its original comments and restates that view here, that the more reasonable approach to fast track and the complaint process in general would be to adopt rules which allow complainants and respondents a sufficient amount of time to discuss the issues and attempt to come to a resolution of the alleged problem without having to request an extension of time. Nothing in the comments submitted in this docket has demonstrated that requests for extension of time serve any useful purpose.

Furthermore, TIA opposes the notion that a party seeking an extension of time be penalized for frivolous requests.¹²⁹ Neither of the two parties filing comments making this proposal has demonstrated that there is any reason to believe that frivolous requests will be filed. Neither of the parties suggests factors that would be used by the Commission to determine whether a request for extension of time were frivolous. Absent evidence of abuse, adoption of such a rule would be counterproductive to the process of resolving complaints amicably and quickly since it would: (1) serve to make the parties even more defensive; and (2) divert resources from making products accessible to the process of justifying a request for extension of time. Nonetheless, to the extent that the Commission sees fit to adopt a rule which would impose penalties on parties who submit "frivolous" requests for extension of time, TIA submits that the Commission should adopt a corresponding rule which would impose penalties on parties who file frivolous complaints under Section 255. If the Commission believes that the threat of penal sanctions will reduce the possibility of abusing Section 255 implementation procedures, the sanctions should be applied equally to complainants and respondents.

¹²⁹ See Universal Service Alliance ("USA") Comments at 13; June Isaacson Kailes ("Isaacson Kailes") Comments at 5 asking the FCC to impose penalties for "frivolous" requests for extension of time.

3. Mandatory Pre-Filing Contact.

In its original comments, TIA argued that the most efficient method of resolving potential complaints and providing more accessibility in a shorter period of time is to require parties with potential complaints first to raise the issue with the manufacturer. Most parties filing comments in this proceeding agreed that informal contact between a potential complainant and respondent would be helpful, but not all parties supported mandatory initial contact. Indeed, even though its comments do not support mandatory pre-filing contact, the comments of the National Association of the Deaf illustrate the value of mandatory initial contact wherein it stated:

By directly contacting the manufacturer or service provider, the consumer may be able to resolve the problem quickly and easily, without involving the Commission. However, to be able to do this, consumers must know whom to contact and how. Manufacturers and service providers should be required to designate representatives to handle Section 255 complaints. Without this list, consumers will be without information vital to the informal resolution of many complaints that need not reach the FCC.¹³⁰

TIA and virtually every party filing comments in this proceeding on this issue agreed that manufacturers and service providers should provide the Commission with a point or points of contact of the persons or offices within their respective organizations that will be responsible for handling Section 255 complaints. Informal resolution of potential complaints without resort to the FCC serves the public interest. Therefore, TIA suggests that the FCC adopt rules which require potential complainants to contact the manufacturer before a more formal complaint can be filed. In this regard, TIA asserts that the procedures established in its Dispute

¹³⁰ NAD Comments at 33.

Resolution Process proposal, which includes a mandatory pre-filing contact requirement, should be adopted.

One party, the Universal Service Alliance, proposed that manufacturers be required to establish a "single point of contact."¹³¹ In its initial comments, TIA explained that different organizations may have different methods and structures for handling Section 255 inquiries. Some manufacturers may find it serves their organizational structure better by having multiple points of contact for different products or families of products, while others may find it more efficient to establish only a single point of contact. TIA submits that as long as potentially aggrieved parties can establish contact quickly with an appropriate responsible person within a manufacturer's organization, the Commission should not adopt a rule which requires only a single point of contact.

C. Penalties.

1. Applicability of Section 207-208 and 312.

TIA's initial comments in this proceeding expressed the view that neither Sections 207-208 (which are applicable only to common carriers) nor Section 312 (which is applicable only to Title III radio licensees) should be deemed applicable to manufacturers of telecommunications equipment or CPE, and that the Commission could not expand the express language of those particular sections of the Communications Act of 1934, as amended, to include manufacturers.¹³² Both the National Association of the Deaf and Self Help for Hard of Hearing People took a

¹³¹ USA Comments at 13.

¹³² TIA Comments at 97-98.

contrary position. The National Association of the Deaf argued that there is no reason to draw a distinction between manufacturers and service providers for purposes of Section 255 with regard to remedies available for noncompliance. Self Help for Hard of Hearing People argued, in addition, that Section 312(b) applies to "anyone" who has violated or failed to observe any provision of the Communications Act. Both parties take the position that damages available pursuant to Sections 207 and 208 are available to be used against manufacturers. Both parties cite to language in the Conference Report of the Telecommunications Act of 1996 which states that "...the remedies available under the Communications Act, including the provisions of Sections 207 and 208, are available to enforce compliance with the provisions of Section 255."¹³³ Self Help for Hard of Hearing People also cites the following remarks of Senator Leahy to support its argument:

I think Congress has been behind the curve in telecommunications. We need to update our laws to take account of the blurring of the formerly distinct separation of cable, telephone, computer and broadcast services.¹³⁴

The arguments made by both the National Association of the Deaf and Self Help for Hard of Hearing People are incorrect as a matter of law and statutory construction.

First, as noted above, Sections 207 and 208 are expressly applicable only to common carriers and Section 312 is expressly applicable only to Title III radio licensees. Except

¹³³ NAD Comments at 39-40; SHHH Comments at 22-25 (citing Conference Report 104-230, 204th Cong., 2nd Sess. 21-22, 135 (1996)).

¹³⁴ SHHH Comments at 25.

in very rare circumstances, manufacturers of telecommunications equipment and CPE are neither common carriers nor Title III licensees.

Second, Section 255 of the Communications Act is applicable to both manufacturers and service providers. The language cited in the Conference Report about Section 207 and 208 remedies being available for enforcement of Section 255, is clearly a reference to remedies that may be available for violations of Section 255 committed by those service providers that are common carriers. There can be no other interpretation since if Congress intended to make all remedies under the Communications Act available for manufacturers' violations of Section 255, the Conference Report would have included mention of Section 312 and other provisions of the Communications Act. There is no such language or suggestion in the Conference Report. As to the remarks made by Senator Leahy, they are clearly and totally irrelevant to the issue of damages and sanctions. Moreover, though it may be time for Congress to deal with the convergence of a variety of different telecommunications technologies for a variety of different reasons, the statement is wholly inapplicable to the case at hand and does nothing to clarify the intent of Congress with regard to remedies available against manufacturers. Furthermore, the Commission has noted that "...the remarks of individual members of Congress during floor debates is narrowly circumscribed [and] are entitled to less weight than other types of legislative history."¹³⁵

Third, it is a fundamental tenet of statutory construction that the legislative history of a statute cannot undermine the plain meaning of a statute unless it clearly and unequivocally

¹³⁵ *Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, To Provide In-Region InterLATA Services in Michigan*, 9 CR 267 n. 73, 1997 FCC Lexis 4454 (August 19, 1997).

expresses a legislative intent contrary to that language. In this instance, the language of the Communications Act of 1934 is clear. Sections 207 and 208 are applicable to common carriers only. Section 312 of the Communications Act of 1934 is applicable to Title III radio licensees only. Contrary to the view of National Association of the Deaf, the failure of the 1996 Act to mention specific remedies to be imposed on manufacturers for violations of Section 255 can not support the conclusion that Congress saw no reason to draw a distinction with regard to remedies available against manufacturers. In fact, the opposite is true. Because Sections 207, 208 and 312 are clear and unequivocal and apply only to common carriers and Title III licensees, respectively, the failure to amend Sections 207, 208 and/or 312 or other provisions of the Communications Act is a clear and strong expression of Congressional intent that sanctions available under those sections were not contemplated to be applicable to manufacturers of telecommunications equipment and CPE. To rule otherwise would substantially alter the basic structure of the Communications Act, especially since the 1996 Act resulted in significant changes to the Communications Act. Had Congress intended to alter the structure of Section 207-208 and 312 it clearly had the opportunity to do so. It did not.

2. Section 251 (a)(2).

In the NPRM, the FCC asked for comment on situations that might bring Section 251(a)(2) into play and on the relationship between enforcement proceedings under Section 252 and the Commission's exclusive enforcement authority under Section 255.¹³⁶ Additionally, some commentors questioned whether accessibility issues might give rise to a complaint for a violation

¹³⁶ NPRM ¶ 66.

of common carrier rules under Sections 207 or 208 independent of Section 255.¹³⁷ To the extent that these commentors suggest that Sections 251 and 252 could serve as the basis for monetary damages for violation of Section 255, this suggestion is foreclosed by case law holding no private right of action for damages exists under Sections 251 and 252.¹³⁸ Furthermore, because Section 251 applies to carriers, and not manufacturers of telecommunications equipment, manufacturers could not be subject to liability under that provision.

D. “Good Faith” Defense.

In the original *NPRM*, the Commission proposed to give substantial weight to the efforts of manufacturers to take actions which show that they have attempted to comply with the mandate of Section 255. TIA supported the Commission's proposal and urged the Commission to provide a rebuttable presumption of compliance with Section 255 to manufacturers that make good faith efforts to comply with the statute. Only one party filing comments in this proceeding took a contrary view. The State of Connecticut Office of Protection and Advocacy for Persons with Disabilities argued that “[t]he defense of ‘good faith’ appears to be inconsistent with access and telecommunications barrier removal provisions”¹³⁹ of the ADA. In point of fact, not only are the State of Connecticut 's conclusions unsupported by any argument or public policy justification

¹³⁷ NCD Comments at 4-5.

¹³⁸ See *Goldwasser v. Ameritech Corp.*, No. 97-6788, 1988 U.S. Dist. LEXIS 1463 (N.D. Ill. Feb. 3, 1998) (dismissing suit brought by individual consumers under Sections 251 and 252, finding those provisions do not establish a duty to consumers but merely to prospective competitors).

¹³⁹ Connecticut Office Comments at 2.

showing why good faith efforts on the part of entities subject to Section 255 should not be given credit for their efforts, they are inconsistent with the facts. In adopting regulations implementing the ADA's barrier removal requirements, the Department of Justice stated that an implementation plan "...if appropriately designed and diligently executed, could serve as evidence of a good faith effort to comply with the requirements of Section 36.104."¹⁴⁰ Since its argument is unsupported as a matter of fact and law and since its argument is contrary to the overwhelming sense of the comments filed in this proceeding, the Commission should disregard this extreme viewpoint.

E. Statute of Limitations.

A number of disability organizations argued that the FCC should not adopt a statute of limitations for filing complaints under Section 255. Specifically, the President's Committee on Employment of People with Disabilities, Wisconsin Association of the Deaf Telecommunications Advocacy Network, Access Living of Metropolitan Chicago, Cape Organization for Rights of the Disabled, and June Isaacson Kailes submitted comments indicating that there should be no time limit for filing complaints, because one never knows when he or she will discover that a product or service is inaccessible.¹⁴¹ Other disability organizations submitted similar comments with only slightly more supporting rationale. United Cerebral Palsy Association indicated that "...given the complexities of the telecommunications system, it may take a while to realize that inaccessibility or incompatibility, rather than one's own lack of skill, is the real

¹⁴⁰ 28 C.F.R. Pt 36, App. B (commenting on § 36.304).

¹⁴¹ President's Committee Comments at 13; Wisconsin Association Comments at 5; Access Living Comments at 4; Cape Organization for the Rights of the Disabled ("CORD") Comments at 2; Isaacson Kailes Comments at 4.

problem"¹⁴² and Self Help for Hard of Hearing People expressed the view that "[a] consumer may not know whether a product or service is fully accessible until they purchase it and start to use it. This may be any length of time after the product or service is introduced."¹⁴³

TIA and virtually all industry parties took the position that there should be a statute of limitations imposed for the filing of complaints under Section 255 since it comports with elemental requirements of due process and avoids unnecessary commitment of resources and "absurd or vexatious results."¹⁴⁴ Industry comments provide the Commission with persuasive reasoning why the lack of a statute of limitations is legally questionable, as contrasted to the comments of the disability community which contain the conclusions that "one never knows when he or she will discover that a product or service is inaccessible" or that the inability may be due to "one's own lack of skill."

In evaluating the need for a statute of limitations TIA considered the fact that it may take some time for an individual with a disability to become aware that a product is inaccessible. It is clearly not good public policy to make a statute of limitations too short. And while TIA is sensitive to the fact that it may take some time to discover that a product or service is inaccessible, it disagrees with the conclusion that there should be no statute of limitations since "one never knows when he or she will discover that a product or service is inaccessible." At some point a consumer, with or without a disability, must take some responsibility for using a product

¹⁴² UCPA Comments at 14.

¹⁴³ SHHH Comments at 24.

¹⁴⁴ See, e.g., Ameritech Comments at 9-10; BellSouth Comments at 11-12; BSA Comments at 12-13; CEMA Comments at 19-20; CTIA Comments at 17-18; and Personal Communications Industry Association ("PCIA") Comments at 15-17.

in a manner in which its accessibility can be determined. TIA submits that 6 months from the date of purchase is a reasonable amount of time for any consumer, including a consumer with a disability, to determine if a purchased product is capable of being used in the manner intended.

If the justification for not imposing a statute of limitations is due to the “complexity of the telecommunications systems” or the “lack of skill of the person with the disability,” the proper remedy is not to refrain from adopting a statute of limitations. Rather the appropriate remedy is to make sure that rules are promulgated which require persons with disabilities to first discuss the alleged inaccessibility with the manufacturer of the product before bringing a complaint. Indeed, the complexity of the nature of telecommunications systems and the recognition that persons with disabilities may have greater problems understanding how to use certain products is a primary reason why TIA suggested that queries regarding products which may appear to be inaccessible be required to be brought to the attention of the manufacturer before a complaint can be lodged with the FCC.

The two year statute of limitations for damages available for actions of a carrier under Section 415 is not relevant to the purchase of a product produced by a manufacturer. It may take some time for a subscriber of a telecommunications service to evaluate a bill to determine if charges levied comport with a carrier's established tariffs or rate plans. In the case of a product, especially one purchased by a person with a disability specifically for the purpose of obtaining an accessible product, one presumes that the product will be put into use in the first few days after purchase. Furthermore, one presumes that it will not take very long for the purchaser of the product to know if the product is or is not accessible. Failure of a consumer to specifically use the product in 6 months time should be evidence of laches on the part of the consumer which should bar complaints brought subsequent thereto.

Because no party arguing for the position that no statute of limitations should be imposed has provided any cogent evidence for the proposition, TIA submits that the FCC should impose a 6 month statute of limitations as discussed in its comments in this proceeding.

F. Standing.

The overwhelming sense of the comments submitted indicate that a standing requirement should be imposed. The support for a standing requirement came not only from manufacturers, service providers and their associations but from the disability organizations as well. For example, Self Help for Hard of Hearing People stated that:

Leaving standing open can encourage complaints by companies against other companies. Section 255 is intended to protect individuals with disabilities against discrimination in telecommunications. There should be a standing requirement for filing complaints.¹⁴⁵

United Cerebral Palsy Association acknowledged that "'standing' is a general requirement for bringing an action or filing a complaint under most civil rights laws....," but chose to oppose a standing requirement based on the "...unique circumstances surrounding telecommunications access..."¹⁴⁶

TIA submits that there has been no demonstration by any party that the circumstances surrounding telecommunications are so unique that the Commission should

¹⁴⁵ SHHH Comments at 23-24. Campaign for Telecommunications Access ("CTA") Comments at 21 ("Standing should be based on the situation of [the]complainant. It is fair to require a complainant to have experienced some real barrier to access created by his disability, but then he should be able to raise claims about all barriers to access related to the product or service regardless of whether he personally is affected by that barrier. On the other hand, competitors should not be able to complain if they are not injured in fact merely to skirmish with one another.") TIA disagrees, however with the specific language of this comment that would permit a complainant, once he or she has experienced a barrier to access, to raise claims about all barriers to access related to the product or service regardless of whether he or she personally is affected by that barrier.

¹⁴⁶ UCPA Comments at 13.

dispense with a baseline requirement of due process. As noted in the comments filed by many parties in the initial round of comments, the failure to impose a basic standing requirement can lead to frivolous complaints which, in turn, can divert resources of manufacturers, the Commission and the disability community from working together to provide greater accessibility than exists at the present time. TIA supports the proposal for standing expressed by Motorola in which it asserted that for an entity to have standing to file a complaint under Section 255 "...the complainant must be: (1) a person with a disability, or someone filing a complaint on behalf of a specific, identifiable individual with a disability (such as a parent or legal guardian or representative organization that meets the legal standing requirements); and (2) who has purchased or used or has attempted to purchase or use a specific, identifiable piece of telecommunications equipment or CPE."¹⁴⁷

G. FCC As Clearinghouse.

The National Association of the Deaf argued that the FCC should establish a clearinghouse for product accessibility information and solutions as well as publication of information on manufacturers' and service providers' accessibility performance.¹⁴⁸ As TIA pointed out in its initial comments, there are a variety of reasons why the FCC should not be a clearinghouse for information on accessibility except to the narrow extent required to make contact point information available and to carry out its complaint adjudication functions. The marketplace will make known which manufacturers and service providers are providing

¹⁴⁷ Motorola Comments at 52.

¹⁴⁸ NAD Comments at 40.

accessibility. Furthermore, the dissemination of flawed statistical information by the Commission could be injurious to manufacturers who otherwise have a good record of providing accessible products and who are subject to very few complaints. In addition, the amount of information that would be required for the Commission's database on accessibility to be kept current and up to date would be staggering and would create a substantial burden on its already limited resources. Rather than diverting resources from the resolution of legitimate complaints, the Commission should allow the marketplace to naturally fill the demand for this type of information.

On a related issue, National Association for the Deaf proposes that “[w]here the FCC determines that a complaint is outside the scope of Section 255, it should also inform consumers about avenues of redress that may be available elsewhere.”¹⁴⁹ TIA submits that other private and/or governmental organizations, not the FCC, should undertake that task. The Commission's resources will be severely taxed by merely complying with the statutory duties required of Section 255. Those resources should not be used to perform functions that can be handled by other organizations which may have more expertise in that regard.

H. Document Submission/Confidentiality.

Universal Service Alliance submitted comments which would provide the complainant with “...all information considered by the Commission in the fast track process including any discussions with accessibility experts from industry, disability groups or the Access Board, or other prior complaints involving the respondent.”¹⁵⁰ Self Help for Hard of Hearing

¹⁴⁹ Id. at 34.

¹⁵⁰ USA Comments at 14.

People argued that respondents should be required “...to provide documents and information that are relevant to the complaint rather than only those documents and information on which they choose to rely.”¹⁵¹

TIA is troubled by such comments. TIA presented valid reasons why certain information submitted to the Commission when responding to a complaint had to be given confidential treatment. In fact, based on the significant adverse impact that may occur as a result of the disclosure of proprietary financial, technical and other information about the design and development process, TIA argued that rules should be adopted which make submission of material submitted to document a “readily achievable” defense prima facie confidential.¹⁵² Indeed, the Commission should require parties to Section 255 complaints to execute a protective order similar to the model protective order recently adopted by the Commission in the Report and Order.¹⁵³ Nothing in the comments of the Universal Service Alliance provides any justification for its expansive request and for the reasons set forth in TIA’s original comments, the FCC should not adopt this proposal.

TIA is similarly opposed to Self Help for Hard of Hearing People’s request to require respondents to provide “all relevant” documentation to the Commission rather than that documentation on which a manufacturer chooses to rely. Besides the problem of evaluating what information is relevant or irrelevant in a given complaint, the production of all relevant

¹⁵¹ SHHH Comments at 26.

¹⁵² TIA Comments at 89-91.

¹⁵³ GC Docket No. 96-55, Examination of Current Policy Concerning the Treatment of Confidential Information Submitted to the Commission.

documentation would be a burden on the part of the respondent and the Commission. Also, since it is the manufacturer against whom a complaint is filed that is at jeopardy for failing to comply with Section 255 and complaints relative thereto, the manufacturer should make the determination of what information is required to support its claim.

I. Declaration of Conformity.

Two parties, Missouri Assistive Technology Council and Project and Oklahoma Assistive Technology Project, both asserted that in addition to the FCC's proposed complaint-driven process, the FCC should consider also requiring manufacturers to provide a declaration of conformity with their products. The express rationale for such a requirement is that a declaration of conformity will avoid inaccessible products and services from reaching the market since there will be a public record of (1) awareness by manufacturers of accessibility standards their products should meet; (2) belief that their products meet those standards; and (3) data to substantiate their belief that their products are accessible.¹⁵⁴

TIA opposes the suggestion that manufacturers be required to provide a declaration of conformity with their products. Manufacturers are keenly aware of the obligations being imposed on them by Section 255 and the need for their products to be accessible to the extent readily achievable. The FCC's proposed complaint procedures will ensure that if aggrieved parties bring legitimate complaints for alleged violations of Section 255, manufacturers will

¹⁵⁴ MATP Comments at 5; Oklahoma Assistive Technology Project ("OATP") Comments at 3-4.

submit appropriate documentation to the Commission attempting to demonstrate why it was not readily achievable or legally necessary to make a product accessible.

Requiring manufacturers to produce a declaration of conformity will serve to increase the regulatory burden on manufacturers; to increase the cost of product (including the cost of product for people with disabilities); and to delay the time it takes to get a product (including accessible products) to market, without providing any corresponding benefit to the public. Furthermore, as TIA discussed in both its initial comments and in these reply comments, it is impossible under the Access Board's guidelines to make every product accessible for every disability. Therefore, it would be impossible for any manufacturer to declare that its product is fully accessible. The public interest would be better served by changing the definition of "accessible" which would then allow manufacturers to provide more information to consumers about the particular accessibility features that may be found in a product.¹⁵⁵

VIII. The Commission Has Discretion To Adapt The Access Board's Guidelines In Its Own Plan For Implementing Section 255.

The Commission stated that it views the Telecommunications Accessibility Guidelines promulgated by the Access Board as a "starting point" for its implementation of Section 255 and concluded that it had "discretion" regarding the use of the Board's Guidelines in developing the Commission's implementation of Section 255.¹⁵⁶ Further, the Commission proposed to accord the Board's guidelines "substantial weight" and proposed to adopt the

¹⁵⁵ See Section IV.A.2.b, *supra*.

¹⁵⁶ NPRM ¶¶ 29-30.

Board's definition of "accessibility" as part of the Commission's definition of the combined term "accessible to and usable by."¹⁵⁷ In spite of the disagreement with the Commission's view of the Board's guidelines expressed in a number of the comments in this proceeding, the Commission should adhere to its original conclusion that it has discretion in the application of the Access Board's guidelines in developing its own implementation of Section 255.

In its Order adopting its guidelines, the Access Board, after acknowledging that the Commission "ultimately will decide" whether to proceed to implement Section 255 by adjudicating complaints on a case-by-case basis or the promulgation of rules after adopting the Board's guidelines "as adopted by the Board or with revisions," opined that, "Congress clearly intended the FCC's actions be consistent with the Board's Guidelines."¹⁵⁸ Subsequently, in comments filed in response to the Commission's NPRM, the Access Board states that the Commission should adopt the Board's guidelines "without change," that the Commission's rules must be "consistent" with the Board's guidelines, and that any departures which provide "less accessibility" would result in Commission rules that are inconsistent. Clearly, the Access Board and a number of organizations representing the interests of individuals with disabilities see the Board as the primary agency in the development of guidelines for accessibility of telecommunications equipment and CPE.¹⁵⁹

¹⁵⁷ NPRM ¶ 75.

¹⁵⁸ Architectural and Transportation Compliance Board, *Telecommunications Act Accessibility Guidelines*, 63 Fed. Reg. 5609 (Feb. 3, 1998).

¹⁵⁹ Access Board Comments at 2-3. This view also is expressed by organizations representing the interests of individuals with disabilities: ". . .the Legislature intended as well that the Architectural and Transportation Barriers Compliance Board (Access Board) would be the primary agency – with the FCC's assistance – to develop guidelines for telecommunications

(Continued ...)

The view that the Access Board is in a superior position to the Commission with respect to the development of accessibility guidelines for telecommunications equipment and CPE is inconsistent with the plain wording of Section 255 which states that “. . . the Architectural and Transportation Barriers Compliance Board shall develop guidelines for accessibility of telecommunications equipment and customer premises equipment in conjunction with the Commission.”¹⁶⁰ The word “conjunction” is defined as “the act of conjoining or the state of being conjoined . . . ,” and the word conjoin means “to join together (as separate entities) for a common purpose or a common end. . . .”¹⁶¹ Clearly, Congress, in directing the Commission and the Access Board to engage in a conjoint effort to develop accessibility guidelines, did not place the Access Board in a superior or directive role relative to the Commission. Had the Congress intended for the Access Board to be in a superior or directive position with respect to the guidelines, it could have specifically provided for the Board to have such a role as it did in specifying the relationship between the guidelines developed by the Board for implementing Title III of the Americans with Disabilities Act and the implementing regulations adopted by the Department of Justice;¹⁶² however, the Congress did not provide for such a directive role here.

equipment manufacturers. NAD Comments at 3. Similar views are expressed by SHHH Comments at 4; WID Comments at 2, and others.

¹⁶⁰ 47 U.S.C. § 255 (e) (emphasis supplied).

¹⁶¹ Merriam-Webster Inc., Webster’s New English Dictionary of the English Language Unabridged at 479-480 (1981).

¹⁶² In the case of the ADA, the Congress specifically directed that the Department of Justice regulations implementing Title III “shall be consistent with the minimum guidelines and requirements issued by the Architectural and Transportation Barriers Compliance Board. . . .” 42 U.S.C. § 12186 (c). Had the Congress intended for the Board to have such a directive role in implementing Section 255, it would have included language to that effect, but it did not.

Rather, the Congress, in the case of Section 255, provided for each agency to contribute its own unique expertise to the development of the guidelines. Thus, while the Commission does not have the authority to ignore the Access Board's guidelines, it also is not required automatically to defer to the Access Board's views.

The Access Board, in its Comments in this proceeding, describes the Commission's role in the development of the guidelines – apparently to argue that the Commission participated in the development of the Board's guidelines which consequently constitute the conjoint effort required by the Congress. According to the Board, the Commission participated in two ways: first, it was “thoroughly involved” in the Telecommunications Accessibility Advisory Committee (“TAAC”) convened by the Board to make recommendations regarding accessibility guidelines for telecommunications equipment and CPE, and the Commission staff “closely coordinated” with the Board in the development of the Board's Notice and Order, had an opportunity to review each draft of those documents, and provided the Board with “valuable input.”¹⁶³

Although members of the Commission staff were present at meetings of the TAAC, they were present as observers and not as individuals “thoroughly involved” in the work of the TAAC. Whatever the inter-agency ex parte role the Commission staff had in developing the Access Board's Notice and Order, the public was never on notice that the Board's proceeding was, in fact, a joint proceeding between the Board and Commission and, consequently, never had either knowledge of the Commission's “valuable input” into the Board's Order or an opportunity to provide comment on that input. This proceeding is the only opportunity that the public has had

¹⁶³ Access Board Comments at 1.

to comment on the Commission's proposed approach to discharging its portion of the conjoint responsibility it shares with the Access Board. Moreover, there is no basis for

considering the inter-agency ex parte communications between the Commission staff and the Access Board staff as constituting an official action by the Commission which clearly would be required if the Board's guidelines were to be construed to be a conjoint action by both agencies.

Additionally, any suggestion in the comments that the Access Board's guidelines must be adopted wholesale because they are based on the TAAC consensus fails to take into account several important factors.

First, in several instances where the TAAC did reach a consensus, the Access Board deviated from that consensus and reached its own significantly different conclusions. Whereas the TAAC recognized that conflicting access needs and the limitations of the "readily achievable" standard would require manufacturers to exercise discretion in choosing among access features, the Access Board eliminated any reference to manufacturer discretion from its final guidelines, and added the additional requirement that each item on the access checklist must be "assessed independently." 36 C.F.R. §§ 1193.41, 1193.43. With these omissions and additions, the Access Board completely altered the definition of this key statutory term from that which was agreed upon by the TAAC. The change is dramatic: the Access Board increases the burden of compliance for manufacturers and decreases the potential for the greatest number of products with meaningful access features to be brought to market. Clearly, the Access Board's guidelines do not reflect the consensus that was reached after long and difficult negotiations, with trade-offs and compromises made by all parties. Instead, the Access Board's guidelines are the product of the Access Board's own independent decisions to pick and choose among the elements of the TAAC Final Report, in effect, resulting in guidelines that do not reflect the TAAC.

A second reason this Access Board's Guidelines should not be immunized from review is that, with respect to several key issues, the Access Board reached its own independent

conclusions because the TAAC could not reach a consensus. Most notably, the TAAC could not reach a consensus concerning whether Section 255 compliance should be assessed on the basis of every single CPE product or across product-lines. See TAAC Final Report § 6.7.4.4. The Access Board reached its own independent conclusion that Section 255 applies to every product, 63 Fed. Reg. 5610-11 (Feb. 3, 1998), thereby rejecting the alternative view endorsed by industry in the TAAC Final Report. Particularly in these two contentious areas, the guidelines are not entitled to deference.

In view of the clear language of the statute regarding the conjoint responsibility of the Commission and the Access Board for developing guidelines for telecommunications equipment and CPE, the lack of an opportunity for public comment on the Commission's input into the Board's development of the guidelines and the absence of any official Commission action to adopt those guidelines, the Commission should adhere to its conclusion that it has the authority to use the guidelines as a "starting point," adapt them to the unique environment in which it has substantial experience and expertise, and harmonize their application to manufacturers of telecommunications equipment and CPE, and providers of telecommunications service.

IX. CONCLUSION.

In enacting Section 255, Congress made a policy decision to require telecommunications equipment and CPE to be accessible to persons with disabilities, "if readily achievable." TIA member companies are fully committed to meeting Section 255's requirements. It is now the FCC's role to adopt a regulatory scheme that will encourage manufacturers to reach the goal set by Congress in the most efficient way. In fulfilling that role, the FCC possesses discretion to modify or change the Access Board's guidelines.

TIA strongly urges the FCC to adopt a product-line, as opposed to a product-by-product approach to the accessibility requirement of Section 255. TIA was joined in this position by a number of other commentors from the telecommunications industry – commentors with the practical experience to understand what truly will be required to meet Congress’ accessibility mandate. TIA and these other commentors are firmly convinced that a product-line approach will lead to the most meaningful increases in accessibility for the widest group of individuals with varied functional limitations.

Along with many other commentors, TIA additionally asks the FCC to adapt the definitions of certain key statutory terms taken from the ADA to the telecommunications context. TIA further submits that, despite the position taken by many advocates for the disability community, the FCC has no authority to extend the scope of Section 255 beyond what is consistent with the Communications Act and FCC precedent.

Given the near consensus among commentors that the FCC’s proposed complaint resolution process, particularly the fast track process, would not lead to efficient and meaningful resolution of complaints, TIA asks the FCC to adopt TIA’s Dispute Resolution Process. TIA further requests that the FCC clarify that damages are not available in actions against manufacturers, under either Sections 207 and 208, Section 312, or Section 251 of the Act.

Finally, TIA suggests that the FCC adopt a reasonable statute of limitations, a standing requirement and confidentiality measures with respect to complaints under Section 255.

Respectfully submitted,

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