

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

In the Matter of )  
)  
Implementation of Section 255 of the )  
Telecommunications Act of 1996 )  
)  
Access to Telecommunications Services, )  
Telecommunications Equipment, and )  
Customer Premises Equipment )  
by Persons with Disabilities )

WT Docket No. 96-198

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**REPLY COMMENTS OF THE**  
**CONSUMER ELECTRONICS MANUFACTURERS ASSOCIATION**

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## SUMMARY OF POSITION

The record in this proceeding strongly supports a reasoned policy approach towards accessibility that *both* advances the production of accessible equipment *and* achieves this goal in a cost-effective manner (*i.e.*, does not unnecessarily retard technological innovation or increase the prices paid by the general public for mass-market equipment.) Many commenters point out that a large variety of accessible telecommunications services and equipment already is being offered through voluntary industry initiatives. For example, CEMA has recently produced a draft "Resource Guide for Accessible Design of Consumer Electronics" which provides manufacturers with informational guidelines for improving equipment accessibility. EIA's efforts to improve accessibility have continued unwaveringly since at least the mid-1970s (a detailed chronology of EIA's main accessibility initiatives over the last 20 years is attached as an appendix to these reply comments).

Given this overwhelming evidence that the free market is already striving to meet the needs of disabled persons, the Commission should be careful that it does not implement regulations pursuant to Section 255 that jeopardize this industry effort. In particular, the Commission should conclude that the Access Board's authority to promulgate guidelines under Section 255 is limited to those *voluntary* in nature. One commenter makes the fallacious argument that Section 255 requires the Commission to establish accessibility regulations. Traditional statutory construction concludes the exact opposite: by excluding the provisions in both the House and Senate bills, as introduced, authorizing the Commission to impose accessibility regulations, Congress expressly and unequivocally decided that the Commission should *not* establish such regulations.

Many of the organizations representing disabled persons recognize the need to take into account cost in determining what equipment modifications are readily achievable (as well as when in the product cycle such modifications should take place). They realize that if production costs are ignored, the amount and variety of accessible and compatible equipment would fall precipitously. *Manufacturers simply will not produce equipment that is unprofitable.* Many commenters (again, including organizations for disabled persons) recognize that accessibility should be judged based on the availability of equipment *as a whole*, not based on the universal accessibility of each individual piece of equipment.

Although some commenters disagree, a proper interpretation of Section 255 does *not* create a new private complaint authority against equipment manufacturers. Sections 207 and 208 of the Communications Act apply only to complaints filed against *common carriers*; the Commission is limited to issuing declaratory rulings and cease-and-desist orders against equipment manufacturers and other non-common carriers. Private complaints against non-common carriers were not authorized under the Communications Act prior to the adoption of Section 255 and, pursuant to Section 255(f), are expressly not authorized now.

The Commission should reject attempts made by telecommunications service providers to avoid their express responsibilities under Section 255(c). Service providers have a responsibility to offer accessible services that are compatible with commonly-available equipment, if readily achievable. Where appropriate, service providers should also be responsible for properly installing equipment; manufacturers should not be held responsible for accessible equipment that is outside of their control and rendered inaccessible due to the careless actions of service providers or others.

Any documentation that a manufacturer files with the Commission regarding accessibility should be part of the normal Part 68 certification process; the Commission should reject calls made by certain parties for creation of a huge new set of paperwork requirements.

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**REPLY COMMENTS OF THE  
CONSUMER ELECTRONICS MANUFACTURERS ASSOCIATION**

The Consumer Electronics Manufacturers Association ("CEMA") hereby replies to the comments filed on October 28, 1996 in response to the Notice of Inquiry ("*Notice*") issued in the above-captioned proceeding.<sup>1</sup> In the *Notice*, the Commission has inquired how best to implement Congress' directives regarding access to telecommunications services and customer premises equipment ("CPE") by persons with disabilities, as set forth in new Section 255 of the Communications Act.<sup>2</sup>

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<sup>1</sup> *Implementation of Section 255 of the Telecommunications Act of 1996: Access to Telecommunications Services, Telecommunications Equipment and Customer Premises Equipment by Persons with Disabilities*, Notice of Inquiry, WT Docket No. 96-198, FCC 96-382 (released Sep. 19, 1996) [hereinafter "*Notice*"].

<sup>2</sup> 47 U.S.C. § 255.

## INTRODUCTION

In order to ensure that accessible telecommunications equipment and CPE are widely available and affordably-priced, CEMA urged the Commission to conclude the following:

- (1) The Access Board's formulation of voluntary guidelines is sufficient to promote accessible CPE. Additional FCC guidelines would be both unnecessary and potentially confusing;
- (2) The Access Board's guidelines should be voluntary in nature and take a procedural (*e.g.*, consultations during the design process with organizations for the disabled), not prescriptive (*e.g.*, technical standards), approach. Following such guidelines should provide manufacturers with a "safe harbor" defense against all customer complaints;
- (3) Equipment manufacturers should *not* be required to make each and every individual CPE product accessible to people with every disability. This would be technically impossible in many cases, and generally cause manufacturing inefficiencies that would unnecessarily raise prices for the general public. Equipment manufacturers should be afforded the flexibility to provide accessible equipment in the most cost-effective manner, whether by integrating such features into mass-market equipment or producing specialized equipment specifically designed for persons with disabilities.
- (4) The scope of Section 255 is limited to equipment used *primarily* for telecommunications services; equipment that is used only tangentially in combination with telecommunications services should *not* be made subject to the requirements of Section 255;
- (5) The definition of "readily achievable" should take into account the cost of modifying CPE, as well as a manufacturer's financial resources. Prior to initial compliance, and once a manufacturer has complied with the then-current accessible guidelines for a piece of equipment, the manufacturer should be afforded a grace period equal in length to the production cycle of that equipment before having to retool its assembly line and update to any new or revised guidelines; and
- (6) Any alleged violation of Section 255 by equipment manufacturers is subject only to declaratory rulings or cease-and-desist orders pursuant to Section 4(i) of the Communications Act; Section 208's damage remedy applies only to common carriers.

The record in this proceeding strongly supports a reasoned policy approach towards accessibility that *both* advances the production of accessible equipment *and* achieves this goal in a cost-effective manner (*i.e.*, does not unnecessarily retard technological innovation or increase the prices paid by the general public for mass-market equipment.) Many commenters point out that a large variety of accessible telecommunications services and equipment already is being offered through voluntary industry initiatives. Many of the organizations representing disabled persons recognize the need to take into account cost in determining what equipment modifications are readily achievable (as well as when in the product cycle such modifications should take place). Many commenters (again, including organizations for disabled persons) recognize that accessibility should be judged based on the availability of equipment *as a whole*, not based on the universal accessibility of each individual piece of equipment.

CEMA urges the Commission to agree with those commenters who argue that a proper interpretation of Section 255 does *not* create a new private complaint authority against equipment manufacturers, and that the Commission does *not* have statutory authority to adopt or modify *voluntary* guidelines promulgated by the Access Board as *mandatory* FCC rules.

In addition, the Commission should agree with those commenters that conclude that service providers and equipment manufacturers have *equal* responsibility for accessibility; any documentation filed with the Commission regarding accessibility should be part of the normal Part 68 certification process; and the proper division of responsibility between designers/component manufacturers and final assemblers/distributors should be decided on a case-by-case basis.

**I. THE RECORD SUPPORTS A POLICY APPROACH TOWARDS ACCESSIBILITY THAT *BOTH* ADVANCES THE PRODUCTION OF ACCESSIBLE EQUIPMENT AND ACHIEVES THIS GOAL IN A COST-EFFECTIVE MANNER**

**A. Accessible Products Already Exist in the Marketplace**

After reviewing the comments, it is striking just how much voluntary effort has been expended by telecommunications service providers and equipment manufacturers in pursuit of accessible services and equipment. A non-exclusive list of examples of accessible services already in the marketplace (as well as procedures established to promote accessibility) includes the following:

- AT&T -- Operator Services for the Deaf, Telecommunications Relay Service, Accessible Communications Business Unit, and Consumer Advisory Panel on Disability Issues;<sup>3</sup>
- Pacific Telesis Group -- Deaf & Disabled Services business group, Advisory Group for People with Disabilities, "talking" Caller ID for the visually impaired, and screen readers that work with Windows software for Internet access services;<sup>4</sup>
- NYNEX -- Accessibility and Universal Design Issue Champion (A NYNEX officer), Center for Individuals with Disabilities, Universal Design Committee (consisting of 27 disability advocates), Braille calling cards, and "RingMate" Service for hard-of-hearing individuals;<sup>5</sup>
- MCI -- text telephone calling cards, rate discounts for the hearing impaired, Telephone Relay Service, Two-Line VCO Service.<sup>6</sup>

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<sup>3</sup> AT&T Comments at 4-5, 7-8.

<sup>4</sup> Comments of Pacific Telesis Group at 4, 6-7.

<sup>5</sup> NYNEX Comments at 3-4.

<sup>6</sup> Comments of MCI at 2-3.

Examples of accessible equipment already in the marketplace (as well as procedures established to promote accessible design) include the following:

- Bell Atlantic NYNEX Mobile -- discounted equipment, custom installations to people with disabilities;<sup>7</sup>
- AT&T Wireless -- individualized customer needs assessments, customer support materials in large print or other alternative formats, individualized orientation to cellular/messaging equipment (*e.g.*, assistance to blind persons who need tactile orientation to a raised dot keypad), customized installation of phones on wheelchairs and in accessible cars and vans;<sup>8</sup>
- United States Cellular -- voice activated phone and headset to a wheelchair, testing Telecommunications Devices for the Deaf ("TDD") compatibility with cellular phones;<sup>9</sup>
- Ericsson -- new wireless digital phones with hearing aid compatibility, developing other equipment solutions in cooperation with Self Help for Hard of Hearing People, Inc.;<sup>10</sup>
- CEMA -- publication of a booklet entitled "*Extend Their Reach*" which provides information on the thousands of specially-designed electronic devices which are currently available to overcome impairment of sight, speech, hearing, motion, and more. CEMA's Assistive Devices Division ("ADD") consists of private companies that produce and sell assistive devices of every kind, including voice input, text telephones, speech synthesis, special software, special needs telephones, OCR/scanners, laser pointers, icon-directed commands, enlarged video display, electronic magnifiers, close caption decoders, and Braille text display.<sup>11</sup>

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<sup>7</sup> Comments of Cellular Telecommunications Industry Association ("CTIA") at 10.

<sup>8</sup> Comments of CTIA at 10.

<sup>9</sup> Comments of CTIA at 10-11.

<sup>10</sup> Comments of CTIA at 11-12; Comments of Telecommunications Industry Association ("TIA") at 8 & Appendix.

<sup>11</sup> Comments of TIA at 8 & Appendix.

- Northern Telecom -- voice caller ID, Braille on telephone keypads, distinctive key sizing, display contrast controls, enhanced volume to 18 decibels, hearing aid compatible, vibration and visual ringing, visual cues (menu driven displays), and autodialers.<sup>12</sup>
- Personal Communications Industry Association -- voice pagers, vibrating text pagers, voice-activated cellular phones attachable to wheelchairs.<sup>13</sup>

This myriad of examples demonstrates that accessibility for disabled persons is moving forward aggressively on a voluntary industry basis. CEMA has recently taken this effort a step further by collaborating with the Electronic Industries Foundation<sup>14</sup> in establishing a "Joint Committee on Product Accessibility" in conjunction with Monterey Technologies of Cary, North Carolina to explore ways for manufacturers to incorporate accessible features into the equipment design process. This effort has produced a draft "Resource Guide for Accessible Design of Consumer Electronics" which provides manufacturers with informational guidelines for improving equipment accessibility. The draft *Resource Guide* describes in detail the types of functions that may help consumers operate and monitor equipment (*e.g.*, control switches, visual displays, auditory displays, and labeling) and explains the many different ways manufacturers can make

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<sup>12</sup> Comments of TIA at 8 & Appendix.

<sup>13</sup> Comments of Personal Communications Industry Association ("PCIA") at 2-3.

<sup>14</sup> The Electronic Industries Foundation is the philanthropic sector of the Electronics Industry Association, the major trade organization representing electronics manufacturers in the United States.

these functions more accessible to persons with disabilities.<sup>15</sup> The draft *Resource Guide* also suggests that increasing product accessibility is in the manufacturer's economic self-interest.<sup>16</sup>

The draft *Resource Guide* is but the latest initiative taken by the Electronic Industries Association ("EIA") and CEMA (a sector of EIA) in its quest to make consumer electronics equipment more accessible to disabled persons. EIA's efforts to improve accessibility

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<sup>15</sup> Among the general design principles discussed are:

- (1) **KNOW THE USER.** Be familiar with a wide range of disabilities so that you can identify ways to make your product accessible to a wider range of people;
- (2) **MAKE IT ADJUSTABLE.** Make various features of the product adjustable (*e.g.*, volume control, contrast brightness, and text-size controls, and height and tilt controls);
- (3) **PROVIDE ALTERNATIVE OR REDUNDANT FUNCTION METHODS AND INFORMATION DISPLAYS.** Examples of alternative methods of performing functions include: (a) using voice or manual input; (b) using simple step-by-step menus or fast shortcut keys; and (c) use dedicated buttons or on-screen controls. Examples of redundant information presentation include: (a) presentation of visual, auditory information, and Braille information; and (b) using both button shape and color to characterize different controls.
- (4) **MAKE FUNCTIONS CONSPICUOUS.** Functions should be immediately apparent (whether it be through sight, hearing or touch);
- (5) **PROVIDE ADEQUATE FEEDBACK.** Products should provide immediate and meaningful feedback (*e.g.*, flashing lights, sound beeps, or button indentations) that a control has been activated or that an error has occurred;
- (6) **MAKE THE DESIGN FORGIVING.** If a user makes an error, simple methods should be provided for undoing the action or for returning the system to the previous state. Examples include warnings, confirmation messages, cancel options, default settings, and an "undo" function.

*Resource Guide for Accessible Design of Consumer Electronics* at 12-16 (draft Sep. 9, 1996).

<sup>16</sup> *Id.* at 8.

have continued unwaveringly since at least the mid-1970s (a detailed chronology of EIA's main accessibility initiatives over the last 20 years is attached as an appendix to these reply comments).

**B. Parties Agree that Voluntary Guidelines, Not Rigid Rules, Are Appropriate to Facilitate Accessibility Without Retarding Technological Innovation**

Given this overwhelming evidence that the free market is already striving to meet the needs of disabled persons, the Commission should be careful that it does not implement regulations pursuant to Section 255 that jeopardize this industry effort. In particular, the Commission should recommend that the Access Board's guidelines be *voluntary* in nature and take a procedural (*e.g.*, consultations during the design process with organizations for the disabled), not prescriptive (*e.g.*, technical standards), approach. As a starting point, and to help facilitate productive consultations between industry and organizations for the disabled, the Access Board may provide suggestions on what types of features may help make equipment more accessible for disabled persons. However, any such suggestions included in the Access Board's guidelines should be limited to providing *general* direction towards the goal of accessibility; the *specific* path to reach this goal should be left for manufacturers and the marketplace to determine. To require inflexible, government-developed technical standards would lock manufacturers into specific technologies that may soon become obsolete and deprive consumers

of technologically superior, more cost-effective approaches. Many manufacturers,<sup>17</sup> as well as some organizations representing disabled persons,<sup>18</sup> agree with CEMA on this approach.

One commenter argues that mandatory rules are necessary because the public "should not have to depend on the good will of the telecommunications industry."<sup>19</sup> Given the vast variety of accessible equipment currently available in the marketplace, such disdain is not only unfair, but ignores the significant efforts industry has made to make equipment accessible for disabled persons. Another commenter makes the fallacious argument that Section 255 requires the Commission to establish accessibility regulations -- despite containing no provision saying anything of the sort -- because both the House and Senate bills initially contained such a provision.<sup>20</sup> Traditional statutory construction concludes the exact opposite: by excluding

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<sup>17</sup> *See, e.g.*, Comments of Microsoft at 24 & n.35, 30-32 ("Microsoft strongly urges the Commission to adopt a process-oriented approach rather than a specific technical or performance standard, as such an approach is much less likely to constrain innovation."); Comments of Ericsson at 6 ("[A]doption of a policy statement rather than a detailed set of technical rules . . . will provide manufacturers with greater flexibility in the design process which, in turn, will result in accessible and/or compatible products being deployed more quickly in the marketplace."); Comments of TIA at 2-3; Comments of Lucent Technologies at 3-4.

<sup>18</sup> *See, e.g.*, Comments of Self Help for Hard of Hearing People ("SHHH") at 3-4 ("SHHH is in favor of process guidelines . . . . Consultation with consumers with disabilities in the design and development stage . . . could increase market share by ensuring products that meet consumer needs."); Comments of the American Foundation for the Blind at 16 ("[T]he Commission will find it beneficial to set forth a series of steps or procedures which, if followed by industry, should result in compliance with disability access requirements."); Comments of Massachusetts Assistive Technology Partnership ("MATP") at 5 ("[I]ndustry must have assurance that well-planned and well-implemented development process affords some protection from measures associated with complaints around inaccessible product performance.").

<sup>19</sup> Comments of Consumer Action Network at 13.

<sup>20</sup> Comments of National Association of the Deaf ("NAD") at 3-5.

the provisions in both the House and Senate bills, as introduced, authorizing the Commission to impose accessibility regulations, Congress expressly and unequivocally decided that the Commission should *not* establish such regulations. The Conference Report notes that the requirement for FCC regulations was not present in Section 262(e) of the Senate bill but was "elsewhere" in Section 262(g).<sup>21</sup> The Conference Report then states that the conferees had decided to adopt "subsections (a), (b), (c), (d), and (e) of new section 262."<sup>22</sup> Section 262(g) was expressly *not included*. Similarly, the Conference Report notes that Section 249(c) of the House Bill directs the Commission to establish regulations and then expressly states that the conferees decided to adopt the Senate provision instead of the House provisions with the one exception of Section 249(d) of the House Bill dealing with private rights of action.<sup>23</sup> As was the case with Section 262(g) of the Senate Bill, Section 249(c) of the House Bill was expressly *not included*.<sup>24</sup>

A number of commenters argue that the Commission has statutory authority to modify the Access Board's guidelines if it determines them to be unreasonable or not in accordance with the policy objectives of Section 255.<sup>25</sup> This argument appears to be based on

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<sup>21</sup> H.R. Conf. Rep. No. 104-458, at 134-35 (1996).

<sup>22</sup> *Id.* at 135.

<sup>23</sup> *Id.*

<sup>24</sup> *See* BellSouth Comments at 4 & n.8 ("[T]his provision was deliberately omitted from Section 255."); Southwestern Bell Comments at 2. NAD's cryptic allusion to post-enactment "telephone conversations with members of the Congressional committees" is both irrelevant to statutory interpretation and unsubstantiated hearsay. Comments of National Association for the Deaf at 4.

<sup>25</sup> *See, e.g.*, Motorola Comments at 4-6; Ericsson Comments at 4-5; Lucent Technologies Comments at 20.

the mistaken impression that the Access Board has the statutory authority to promulgate binding rules instead of guidelines and that such rules potentially could obligate service providers and manufacturers to comply with unreasonable accessibility requirements. Such an impression misses the central point: Section 255 does not authorize the promulgation of mandatory rules by either the Access Board or the Commission; the Access Board's guidelines must be *voluntary*. As discussed above, the Commission does not have the statutory authority to establish its own mandatory accessibility regulations. It logically follows therefore that the Commission does not have the authority to circumvent Congress' intent by unilaterally modifying the Access Board's *voluntary* guidelines and then adopting the modified guidelines as *mandatory* rules. Rather, the Commission must enforce Section 255 on a "rule of reason" case-by-case basis.

**C. The Concept of "Readily Achievable" Must Take Into Account Equipment Modification Costs and Should Recognize that Universal Accessibility for Each Piece of Equipment is not Economically Feasible**

The vast majority of commenters understand that the cost involved in increasing accessibility of equipment is the primary factor in determining what equipment modifications are "readily achievable."<sup>26</sup> Indeed, the very definition of "readily achievable" under the ADA is

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<sup>26</sup> See, e.g., Microsoft Comments at 19 (manufacturers suffer from narrow profit margins); Northern Telecom Comments at 7-8 (a modification that is relatively inexpensive should still not be required if the consumer benefit is negligible); Ericsson Comments at 7 (readily achievable should take into account costs and fierce nature of competition in telecommunications industry); Lucent Technologies Comments at 13-14 (readily achievable should be defined as cost in the aggregate that does not materially increase the cost of manufacturing a product); Motorola Comments at 17-18 (cost is at the heart of the statutory definition of "readily achievable"); Omnipoint Comments at 4; PCIA Comments at 6; Railfone-Amtrak Venture at 3.

"without much difficulty or expense."<sup>27</sup> Importantly, many organizations for disabled persons recognize the primacy of cost considerations. For example, Self Help for Hard of Hearing People concede that retrofitting of existing products is much more expensive than incorporating accessibility considerations at the design stage and therefore retrofitting may not be readily achievable.<sup>28</sup> National Association for the Deaf acknowledges that:

Section 255 employs a case by case analysis which weighs the resources of the telecommunications company *with the cost of access* to determine whether a particular product or service must be made accessible under the Act.<sup>29</sup>

In addition, the Protection and Advocacy Program - University Legal Services points out that if cost is not taken into account, prices will rise and "[t]he statute will be rendered meaningless if services and equipment are 'on the shelf' but too expensive for all but a few."<sup>30</sup>

The Commission should reject the extremist views of a few commenters that argue in favor of accessibility at any price, without any regard for per-unit production costs. If the Commission were to adopt this extremist view, the amount and variety of accessible equipment would fall precipitously.<sup>31</sup> *Manufacturers simply will not produce equipment that is unprofitable.* Furthermore, parent corporations will not subsidize the production of such equipment. Many commenters make this point, including Lucent Technologies:

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<sup>27</sup> 42 U.S.C. § 12181(9) (referenced in 47 U.S.C. § 255(a)(2)).

<sup>28</sup> Comments of SHHH at 2-3.

<sup>29</sup> Comments of National Association for the Deaf at 21 (emphasis added).

<sup>30</sup> Comments of Protection and Advocacy Program - University Legal Services at 5.

<sup>31</sup> The "readily achievable" standard also applies to compatible equipment. 47 U.S.C. § 255(d). Thus, the amount and variety of compatible equipment would also fall precipitously.

Regardless of the size or financial resources of a corporate parent, individual product management teams, like managers of local retail store operations, are provided limited financial resources, and decisions to form such teams to invest in developing a new or innovative technology are largely driven by profit margin projections. The Commission, in evaluating whether a given product adequately incorporates readily achievable accessibility features, must consider whether the costs of incorporating additional features reasonably could have resulted *in a financially driven decision not to introduce the product at all.*<sup>32</sup>

Most commenters also recognize that a requirement that each individual piece of equipment be universally accessible to all types of disabled person would *not* be readily achievable. Although a universal equipment design may be ideal in some cases, in many cases such universal design would be exorbitantly expensive and would result in the equipment not being produced at all. Importantly, organizations for disabled persons recognize this fact. For example, Self Help for Hard of Hearing People states that:

A manufacturer or service provider should aim for the goal of access/usability for persons with various disabilities. If, after a good faith effort, they can demonstrate that this is not readily achievable, then offering equipment and services which are accessible to specific disabilities but not every disability might be an acceptable solution. We recognize that it might not be possible to design every product and service so that they are accessible to every disability . . . .<sup>33</sup>

Commenters from industry provide many examples of accessibility features that are readily achievable in limited quantities but would not be if required universally. For example, Amtrak-

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<sup>32</sup> Lucent Technologies Comments at 16-17 (emphasis added). *See also* Motorola Comments at 13-14; Comments of Information Technology Industry Council ("ITIC") at 12-13; TIA Comments at 6.

<sup>33</sup> SHHH Comments at 6. *See also* MATP Comments at 4 ("[O]ffering access features via different models in a given product category should be an acceptable solution.").

Railfone Venture points out that making all payphones text-telephones would not be readily achievable, whereas making 15 percent of payphones accessible would be readily achievable.<sup>34</sup> Similarly, Northern Telecom notes that a telephone handset for a person with hearing loss can be provided at low cost whereas a handset required by someone with both hearing loss and muscular disability would be much more expensive.<sup>35</sup> Not only would universal accessibility be in many cases prohibitively expensive, but it would also be impossible because different disabilities require opposite modifications. For example, CTIA notes that a cellular handset with large numbers for the visually impaired may cause the handset to be too heavy for people with a muscular disability.<sup>36</sup> Thus, CEMA urges the Commission to judge compliance with the accessibility requirements of Section 255 on the basis of a manufacturer's *range of products*, as well as on the equipment marketplace as a whole.<sup>37</sup>

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<sup>34</sup> Railfone-Amtrak Venture Comments at 3. *See also* TIA Comments at 7 (U.S. Justice Department requires that only a percentage of payphone need be of a lower height for a building to satisfy the ADA); Motorola Comments at 20 (ADA does not require that each hotel room be accessible, only that a portion of the rooms be accessible).

<sup>35</sup> Northern Telecom Comments at 6. *See also* PCIA Comments at 6-7 (a blind person can use a voice pager, but not a digital pager, whereas a deaf person can use a digital pager, but not a voice pager); Microsoft Comments at 28-29; Ericsson Comments at 3; Omnipoint Comments at 9; Lucent Technologies Comments at 14-15 & n.7; ITIC Comments at 11-12, 14; Motorola Comments at 19-21.

<sup>36</sup> CTIA Comments at 9. *See also* Lucent Technologies Comments at 14 n.7; TIA Comments at 7 (a payphone at a lower height to accommodate a person in a wheelchair would not be accessible to a tall person with back problems).

<sup>37</sup> *See, e.g.*, Motorola Comments at 21; Omnipoint Comments at 9; Lucent Technologies Comments at 15; Microsoft Comments at 29; cf. AT&T Comments at 10-11 (range of services). CEMA strongly disagrees with Pacific Telesis Group's characterization of specialized, assistive devices as "second class" products. Pacific Telesis Group Comments at 10-11. In many cases, such assistive devices are much more cost-effective for the consumer. Congress' intent to allow stand-alone assistive devices was clearly demonstrated in the House version of Section 255, which stated that "[s]uch regulations

## II. SECTION 255 DOES NOT AUTHORIZE PRIVATE COMPLAINTS AGAINST EQUIPMENT MANUFACTURERS

Surprisingly, some commenters assume that Section 255 authorizes private complaints against equipment manufacturers.<sup>38</sup> *Such an assumption is wholly unsupported.* As CEMA explained in its initial comments, the final statutory language of Section 255 makes no reference to any new enforcement or complaint authority under Section 255. Indeed, the Conference Report states that "[t]he remedies available under the Communications Act, *including the provisions of sections 207 and 208*, are available to enforce compliance with the provisions of section 255."<sup>39</sup> This statement suggests that only *existing* remedies under the Communications Act are available for enforcement. Sections 207 and 208 of the Communications Act apply only to complaints filed against *common carriers*; the Commission is limited to issuing declaratory rulings and cease-and-desist orders against equipment manufacturers and other non-common carriers. Section 255(f) *expressly prohibits* the creation of any new private rights of action: "Nothing in this section shall be construed to authorize any private right of action to enforce any requirement of this section or any regulation thereunder."<sup>40</sup> Private complaints against non-common carriers were not authorized under the

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shall permit the use of both standard and special equipment . . . ." H.R. Rep. No. 104-204, pt. 1, at 14 (1995) (section 249(c)(1)).

<sup>38</sup> See, e.g., Bell Atlantic Comments at 2 n.5; United States Telephone Association Comments at 4; Pacific Telesis Group Comments at 27-28.

<sup>39</sup> H.R. Conf. Rep. No. 104-458, at 135 (1996) (emphasis added).

<sup>40</sup> 47 U.S.C. § 255(f).

Communications Act prior to the adoption of Section 255 and, pursuant to Section 255(f), are expressly not authorized now.

The Commission's existing declaratory ruling power under Section 4(i) is sufficient to enforce Section 255 against non-common carriers and its formal complaint process under Sections 207 and 208 is sufficient to enforce Section 255 against common carriers. Manufacturers are not the only parties that have correctly construed Section 255: the American Foundation for the Blind recognizes that Sections 207 and 208 apply only to common carriers and that enforcement against equipment manufacturers is within the Commission's "sole enforcement capability" and based on the investigation of complaints initiated on the Commission's "own motion."<sup>41</sup>

CEMA agrees with Lucent Technologies, TIA, and others that customers should first bring grievances to manufacturers who should be given a reasonable period of time to educate the consumer on accessible alternatives or otherwise remedy the alleged problem. Only if the dispute remains unresolved should the Commission get involved and consider the need for a declaratory ruling or a cease-and-desist order.<sup>42</sup>

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<sup>41</sup> Comments of the American Foundation for the Blind at 17. *See also* CTIA Comments at 7 & n.11 ("The Commission's 'exclusive jurisdiction with respect to' Section 255 complaints refers to government, and not private, rights of action."); Motorola Comments at 6 n.5; Northern Telecom Comments at 11 (Commission enforcement is a last resort and limited to revocation of equipment registration, not private damage claims); Ericsson Comments at 8 (Commission enforcement limited to penalties and does not include private damage claims); Microsoft Comments at 34-35 (Authorization of private damage claims under Section 207 does not apply to equipment manufacturers).

<sup>42</sup> *See, e.g.*, TIA Comments at 9; Lucent Technologies Comments at 4-5; Northern Telecom Comments at 11; PCIA Comments at 10-11.

**III. ANY INFORMATION THAT EQUIPMENT MANUFACTURERS FILE WITH THE COMMISSION REGARDING ACCESSIBILITY SHOULD BE PART OF THE NORMAL PART 68 EQUIPMENT CERTIFICATION PROCESS**

Some commenters advocate imposing burdensome documentation obligations on equipment manufacturers that would require manufacturers to certify to the Commission that each individual product is accessible or explain why it is not.<sup>43</sup> For example, Pacific Telesis Group wants the Commission to create new certification documents called Declarations of Conformity ("DOCs") and Consumer Accessibility Impact Reports ("CAIRs").<sup>44</sup> Some commenters also advocate requiring that manufacturers provide telecommunications service providers with some sort of documentation certifying that each of their products is in compliance with Access Board guidelines.<sup>45</sup> CEMA urges the Commission to reject these calls for creation of huge new paperwork requirements. As discussed above, Congress decided to rely on the Access Board for guidelines and expressly deleted provisions in the final legislation that would have authorized the Commission to establish regulations for enforcement of Section 255. As BellSouth notes: "The structure and history of Section 255 confirm that Congress anticipated that Section 255 would be self-executing and not needing of detailed implementation regulations."<sup>46</sup> Clearly, creating a new set of paperwork requirements would defy Congress' intent.

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<sup>43</sup> *See, e.g.*, Pacific Telesis Group Comments at 25-26; USTA Comments at 3; NAD Comments at 12-13.

<sup>44</sup> *See, e.g.*, Pacific Telesis Group Comments at 25-26; USTA Comments at 3; NAD Comments at 12-13.

<sup>45</sup> *See, e.g.*, USTA Comments at 3; Pacific Telesis Group Comments at 11.

<sup>46</sup> BellSouth Comments at 3.

As a constructive alternative to the extremist approach outlined above, many commenters support a disclosure regime whereby manufacturers submit accessibility information in conjunction with the already-existing Part 68 certification process.<sup>47</sup> Under this approach, a manufacturer registering equipment could certify that the *totality of its equipment offerings* are accessible to persons with disabilities and complies with the Access Board's guidelines. Such certification information would be on file at the Commission and available for inspection by telecommunications service providers and other interested parties. As Northern Telecom points out, utilizing the Part 68 process has worked well in complying with other Commission requirements, including those involving hearing aid compatibility.<sup>48</sup> In addition, manufacturers have a marketing incentive to provide consumers with accessibility information.

It must be emphasized that any Part 68 disclosure should *not* be required on an individual product-by-product basis. CEMA agrees with Motorola that such a product-by-product requirement would be extremely burdensome and unnecessary:

If the Commission were to . . . require a model-by-model demonstration of compliance with Section 255, the Commission might produce little more than a large, costly compliance bureaucracy. Such a system would divert resources from product design and development, and would, over the long-term, detract from the overall services accessible to the disabled.<sup>49</sup>

As discussed above, requiring that each individual product be universally accessible for people of every disability would not be readily achievable and, in fact, would be impossible.

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<sup>47</sup> See 47 C.F.R. §§ 68.200 to 68.226 (1995); Northern Telecom Comments at 5; Sprint Comments at 8 n.3.

<sup>48</sup> See Northern Telecom Comments at 5.

<sup>49</sup> Motorola Comments at 17.

Consequently, requiring a manufacturer to file a DOC or other form of certification for each individual product offering would be equally impossible. Manufacturers must be allowed to make available a variety of different product offerings of varying accessibility and price, provided that their offerings in totality provide accessibility to persons with disabilities in accordance with the Access Board's guidelines.

#### **IV. TELECOMMUNICATIONS SERVICE PROVIDERS AND EQUIPMENT MANUFACTURERS SHARE *EQUAL* RESPONSIBILITY FOR ACCESSIBILITY**

Section 255 requires that *both* telecommunications services and equipment be accessible to persons with disabilities, if readily achievable.<sup>50</sup> Yet, some service providers try to shirk their responsibilities by making the unfounded claim that accessibility is primarily the responsibility of manufacturers. For example, MCI states that "the 'accessibility' issue is largely related only to the piece of equipment that connects the user to the service provider's network" and "most technological advances developed by service providers have no bearing on the accessibility of service."<sup>51</sup> Similarly, Sprint states that "the initial -- and perhaps primary -- responsibility for ensuring that individuals with disabilities gain such access and the capability to utilize a carrier's services lies with equipment manufacturers."<sup>52</sup>

The Commission should reject these attempts by telecommunications service providers to avoid their express responsibilities under Section 255(c). As discussed above, many service providers are providing services accessible to disabled persons including operator

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<sup>50</sup> See 47 U.S.C. §§ 255(b) (equipment), 255(c) (services).

<sup>51</sup> MCI Comments at 5.

<sup>52</sup> Sprint Comments at 3.

services for the deaf, telecommunications relay service, "talking" caller ID, distinctive ringing, and Braille calling cards. Such services are just as important to persons with disabilities as is accessible equipment. Equipment manufacturers cannot shoulder the accessibility obligation alone; they need the cooperation of service providers to make accessibility a reality.<sup>53</sup> For example, service providers should be required to inform manufacturers of their accessible service offerings so that manufacturers know what types of equipment is needed to take advantage of the offerings available.<sup>54</sup> Manufacturers should not be held responsible for producing "talking" Caller ID equipment if they were not informed that "talking" ID was an available service offering. Similarly, service providers have a responsibility to offer accessible services that are compatible with commonly-available equipment, if readily achievable. A carrier should not be allowed to satisfy its accessibility obligations by offering a service that in actuality is accessible only to the tiny fraction of disabled persons who utilize an obscure type of accessory when the service could easily have been made compatible with standard, off-the-shelf equipment.<sup>55</sup>

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<sup>53</sup> The precise methodology for dividing responsibility between service providers and manufacturers is an open question that needs to be explored more fully.

<sup>54</sup> Such a requirement is arguably already within the scope of the existing network information disclosure requirements that apply to all telecommunications carriers. *See Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry)*, 84 F.C.C.2d 50, 82-83 (1980) ("[W]e will extend to all carriers owning basic transmission facilities the requirement that all information relating to network design be released to all interested parties on the same terms and conditions, insofar as such information affects either intercarrier interconnection or the manner in which interconnected CPE operates."); *Furnishing of Customer Premises Equipment by Bell Operating Telephone Companies and the Independent Telephone Companies*, 2 FCC Rcd 143, *modified on recon.*, 3 FCC Rcd 22 (1987); 47 C.F.R. § 64.702(d)(2); 47 C.F.R. § 68.110(b).

<sup>55</sup> The Commission should reject MCI's assertion that it has unfettered discretion to select the type of equipment compatible with its "accessible" services. *See MCI Comments at 4.* As Ultratec aptly states: "[C]onsideration must be given to the CPE provider from

Trace Research and Development Center points out that the interface on CPE may not be under the control of the CPE manufacturer but instead is defined by software downloaded from the telecommunications services provider. In such a case, Trace recommends that responsibility for the accessibility of the interface created by service providers be with the service provider, *not* with the CPE manufacturer.<sup>56</sup> Similarly, where appropriate, service providers should be responsible for properly installing equipment; manufacturers should not be held responsible for accessible equipment that is outside of their control and rendered inaccessible due to the careless actions of service providers or others.<sup>57</sup>

In cases where a product is manufactured by more than one company, commenters differ on whether liability should be jointly apportioned between designers/component manufacturers and "downstream" distributors (*e.g.*, final assemblers, retailers, and resellers). Some commenters advocate imposing joint liability on both designers/component manufacturers

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the service provider . . . to allow existing and new technology to accomplish the accessibility that may be required (*e.g.*, digital lines that are diversified and unique disallowing TTY's and other analog devices to be directly connected). Service providers should not be allowed to install features that compromise the accessibility of existing technology for those with disabilities . . . ." Ultratec Comments at 3.

<sup>56</sup> Comments of Trace Research and Development Center at 1-2.

<sup>57</sup> *See* Comments of Microsoft at 28 ("Accessibility and usability are properly distinguishable and the requirement for physical accessibility should reach only those aspects of a service or piece of equipment over which companies have *direct control*.") (emphasis in original); Comments of Trace Research and Development Center at 12 ("[E]quipment manufacturers and service providers are subject to the Commission's authority only for those aspects which they have control over. If they design a piece of equipment which is in itself accessible and they provide instructions with the equipment as to how it should be positioned or mounted . . . then, if someone else does not follow those directions, the company would not be held accountable.").