

APR 23 1 29 AM '98

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)

NOTICE OF PROPOSED RULEMAKING

Adopted: April 2, 1998

Released: April 20, 1998

Comment Date: June 30, 1998
Reply Comment Date: August 14, 1998

By the Commission: Commissioners Furchgott-Roth, Powell and Tristani issuing separate statements.

TABLE OF CONTENTS

	Paragraph
I. INTRODUCTION; SUMMARY	1
II. BACKGROUND	8
A. Legislation	8
B. Commission Notice of Inquiry	11
C. zTelecommunications Access Advisory Committee Report	12
D. Access Board Equipment Guidelines	16

III. STATUTORY AUTHORITY	21
A. Introduction	21
B. Scope of Rulemaking Authority	24
C. Access Board Equipment Guidelines	29
D. Enforcement Authority	31
IV. STATUTORY DEFINITIONS	35
A. Scope of Statutory Coverage	35
1. "Telecommunications" and "Telecommunications Service"	35
2. "Provider of Telecommunications Service"	44
3. "Manufacturer of Telecommunications Equipment or Customer Premises Equipment"	47
a. Equipment	48
b. Manufacturer	57
4. "Network Features, Functions, or Capabilities"	62
B. Nature of Statutory Requirements	67
1. Introduction	67
2. "Disability"	68
3. "Accessible to and Usable by"	71
4. "Compatible with"	81
a. "Peripheral Devices or CPE"	81
b. "Commonly Used"	87
c. Compatibility	91
d. Other Matters	93
5. "Readily Achievable"	94
a. General	94
b. Telecommunications Factors	100
(1) Feasibility	101
(2) Expense	103
(3) Practicality	106
(a) Resources	107
(b) Market Considerations	111
(c) Cost Recovery	115
(d) Timing	118
(4) Other Considerations	122

V.	IMPLEMENTATION PROCESSES	124
A.	Introduction	124
B.	Fast-Track Problem-Solving Phase	126
1.	In General	126
2.	Initial Contact with Commission	128
3.	Provider Contact	132
4.	Solution Period; Report	135
5.	Commission Evaluation	140
C.	Use of Traditional Dispute Resolution Processes	144
1.	Generally; Informal Dispute Resolution Process	144
2.	Formal Dispute Resolution Process	154
3.	Alternative Dispute Resolution Process	157
4.	Defenses to Complaints	162
D.	Penalties for Non-Compliance	172
E.	Additional Implementation Measures	173
VI.	INTERIM TREATMENT OF COMPLAINTS	175
VII.	PROCEDURAL MATTERS	178
A.	Regulatory Flexibility Analysis	178
B.	Paperwork Reduction Analysis	180
C.	Ex Parte Presentations	182
D.	Pleading Dates	183
E.	Further Information	188
VIII.	ORDERING CLAUSES	189
	APPENDIX A: Text of Section 251(a) and Section 255 of the Communications Act	
	APPENDIX B: Pertinent Commission Rules	
	APPENDIX C: Access Board Guidelines	
	APPENDIX D: List of Pleadings	
	APPENDIX E: Initial Regulatory Flexibility Analysis	

I. INTRODUCTION; SUMMARY

1. The Telecommunications Act of 1996¹ paved the way for a new era of greater competition and consumer choice in telecommunications for the American people. But the promise of the 1996 Act was not limited to promoting choice in telecommunications — it was also about ensuring that *all* Americans can gain the benefits of advances in telecommunications services and equipment. One of the key provisions of the Act promoting the goal of universal access is Section 255,² which seeks to increase the accessibility of telecommunications services and equipment to the 54 million Americans with disabilities.³

2. Given the fundamental role that telecommunications has come to play in today's world, we believe the provisions of Section 255 represent the most significant governmental action for people with disabilities since the passage of the Americans with Disabilities Act of 1990.⁴ Inability to use telecommunications equipment and services can be life-threatening in emergency situations, can severely limit educational and employment opportunities, and can otherwise interfere with full participation in business, family, social, and other activities. We must do all we can to ensure that people with disabilities are not left behind in the telecommunications revolution and consequently isolated from contemporary life.

3. In Section 255, Congress set forth a broad but practical mandate: manufacturers and service providers must ensure that their telecommunications equipment and services are accessible to those with disabilities, to the extent that it is readily achievable to do so. Congress gave responsibilities both to the Commission and to the Architectural and Transportation Barriers Compliance Board ("Access Board" or "Board")⁵ to carry out this

¹ Pub. L. 104-104, 110 Stat. 56 (1996) (1996 Act).

² 47 U.S.C. § 255. For the text of Section 255, see Appendix A. Section 255(b) and Section 255(c) establish accessibility and usability requirements, while Section 255(d) establishes compatibility requirements, if accessibility and usability are not readily achievable. For purposes of simplicity, references herein to "accessibility" are intended to include references to accessibility, usability, and compatibility, unless the context requires otherwise.

³ "At the end of 1994, 20.6 percent of the population, about 54 million people, had some level of disability; 9.9 percent or 26 million people had a severe disability." Americans with Disabilities: 1994-95, Current Population Reports, Series P70-61, U.S. Bureau of the Census (Aug. 1997).

⁴ Pub. L. 101-336, 104 Stat. 327 (1990) (codified at 42 U.S.C. §§ 12101-12213) (ADA).

⁵ The Access Board is an independent Federal regulatory agency created under Section 502 of the Rehabilitation Act of 1973, 29 U.S.C. § 792, to enforce the Architectural Barriers Act of 1968, 42 U.S.C.

mandate. We intend to carry out the broad guarantee in a practical, commonsense manner. First and foremost, we must never lose sight of the end goal, which is ensuring that consumers with disabilities have access to telecommunications services and equipment. Critical to achieving this goal, industry must have incentives to consider disability issues at the beginning of the development and design process — and on an ongoing basis. It is our tentative view that we must allow industry the flexibility to innovate and to marshal its resources toward the end goal, rather than focusing on complying with detailed implementation rules. And in a similar vein, we at the Commission must focus our resources efficiently by handling complaints in a streamlined, consumer-friendly manner with an eye toward solving problems quickly.

4. Since Section 255 became effective on February 8, 1996, the Commission's Disabilities Issues Task Force and other staff have spent considerable time discussing accessibility issues with persons with disabilities, consumer groups, equipment manufacturers, service providers, and others. In September 1996 the Commission issued a *Notice of Inquiry*,⁶ and subsequently received responsive comments. The staff also have consulted on an ongoing basis with the Access Board, which in February 1998 issued accessibility guidelines with respect to equipment.⁷ This Notice of Proposed Rulemaking (Notice) draws extensively from all of these sources.

5. At the outset of the Notice, we explore our legal authority under Section 255, and tentatively conclude that the Commission has authority to establish rules to implement Section 255. We also explore other issues related to Commission jurisdiction, including the relationship between the Commission's authority under Section 255 and the guidelines established by the Access Board.⁸

§§ 4151-4157. It consists of 25 members, 12 Federal members and 13 members appointed by the President from the general public. *See infra* para. 9 and n.14.

⁶ Implementation of Section 255 of the Telecommunications Act of 1996: Access to Telecommunications Services, Telecommunications Equipment, and Customer Premises Equipment by Persons with Disabilities, WT Docket No. 96-198, Notice of Inquiry, 11 FCC Rcd 19152 (1996) (*Notice of Inquiry*).

⁷ Telecommunications Act Accessibility Guidelines, 63 Fed. Reg. 5608 (1998) (*Access Board Order*). The guidelines became effective on March 5, 1998, and are codified at 36 C.F.R. Part 1193.

⁸ Under Section 255(e), 47 U.S.C. § 255(e), the Access Board is responsible for "develop[ing] guidelines for accessibility of telecommunications equipment and customer premises equipment in conjunction with the Commission." *See infra* para. 9.

6. We then seek comment on the interpretation of specific statutory terms that are used in Section 255. Many of the terms are defined elsewhere in the Communications Act,⁹ and we seek comment on our tentative view that we are bound by these definitions in the context of Section 255. Other terms have been incorporated from the ADA. We seek comment on how these terms can be made workable in the context of telecommunications services and equipment. In particular, the Notice addresses certain aspects of the term “readily achievable,” contained in Section 255. We propose to adopt the ADA definition, but also propose to establish specific factors related to Section 255 accessibility issues that would be considered in evaluating whether making a telecommunications service or equipment accessible or compatible should be considered “readily achievable.”

7. We next set forth proposals to implement and enforce the requirement of Section 255 that telecommunications offerings be accessible to the extent readily achievable. The centerpiece of these proposals is a “fast-track” process designed to resolve many accessibility complaints informally, providing consumers quick solutions and freeing manufacturers and service providers from the burden of more structured complaint resolution procedures. In cases where fast-track solutions are not possible, however, or where there appears to be an underlying failure to comply with Section 255, we would pursue remedies through more conventional processes. In both cases, in assessing whether service providers and equipment manufacturers have met their accessibility obligations under Section 255, we would look favorably upon demonstrations by companies that they considered accessibility throughout the development of telecommunications services and equipment.

II. BACKGROUND

A. Legislation

8. The 1996 Act became effective when the President signed it on February 8, 1996. Its principal provisions regarding access for persons with disabilities are contained in Section 255:

- Section 255(a) defines the terms “disability” and “readily achievable” by referencing the ADA.

⁹ 47 U.S.C. §§ 151-614. The Communications Act of 1934 is hereinafter referred to as the “Act.”

- Section 255(b) requires that a manufacturer of telecommunications equipment or customer premises equipment (CPE) ensure that the equipment¹⁰ is designed, developed, and fabricated to be accessible to and usable by individuals with disabilities, if readily achievable.
- Section 255(c) requires that a provider of telecommunications service ensure that the service is accessible to and usable by individuals with disabilities, if readily achievable.
- If the accessibility requirements of Sections 255(b) and 255(c) are not readily achievable, Section 255(d) requires manufacturers and service providers to ensure compatibility with existing peripheral devices or specialized CPE commonly used by individuals with disabilities to achieve access, if readily achievable.

A related provision in Section 251(a)(2) of the Act prohibits a telecommunications carrier from installing network features, functions, or capabilities that do not comply with the guidelines and standards established pursuant to Section 255.¹¹

9. Section 255 explicitly assigns the Commission two specific responsibilities: (1) to exercise exclusive jurisdiction with respect to any complaint under Section 255;¹² and (2) to coordinate with the Access Board in the development of guidelines for accessibility of telecommunications equipment and customer premises equipment.¹³ The Access Board's role is significant because the Board is an independent Federal agency whose primary mission is accessibility for persons with disabilities.¹⁴

¹⁰ For purposes of simplicity, references herein to "equipment" are intended to include references to both telecommunications equipment and CPE, unless the context requires otherwise. Similarly, references to "products" are intended to include references to both equipment and services, unless the context requires otherwise.

¹¹ For purposes of simplicity, references herein to Section 255 are intended to include references to both Section 255 and Section 251(a)(2), unless the context requires otherwise.

¹² 47 U.S.C. § 255(f).

¹³ 47 U.S.C. § 255(e). The Access Board's responsibility is limited to accessibility of equipment, whereas the Commission's responsibility includes both equipment and services.

¹⁴ The Access Board's role in the enforcement of accessibility standards for buildings receiving Federal funding under the Architectural Barriers Act of 1968 was expanded by Section 504 of the ADA, 42 U.S.C. § 12204. The original legislation did not delegate responsibility to the Access Board for any guidelines regarding Title IV, the telecommunications portion of the ADA. The Board's role to establish and maintain minimum guidelines under the Architectural Barriers Act was broadened by the ADA to include Titles II and III

10. The broad accessibility mandate of Section 255 is a contrast to other, more targeted portions of the Act that are intended to enhance accessibility for a certain population. Some examples include: (1) Section 225, which governs Telecommunications Relay Services (TRS) for individuals with hearing and speech disabilities; (2) Section 710, requiring hearing aid compatibility (HAC) for wireline telephones; and (3) Section 713, requiring accessibility of video programming (closed captioning).¹⁵ The Commission has promulgated rules implementing each of these three statutory provisions.¹⁶

B. Commission Notice of Inquiry

11. The Commission initiated the implementation of Section 255 by adopting a *Notice of Inquiry* in September 1996. The *Notice of Inquiry* began our examination of three broad areas:

- Threshold jurisdictional issues involving the Commission's authority over telecommunications service providers and equipment manufacturers.
- Statutory definitions, primarily focusing on terms incorporated from the ADA and terms defined by the Communications Act.
- Implementation and enforcement issues, including approaches to service accessibility standards and the relationship between the Access Board guidelines and the Commission's enforcement authority.

In response to the *Notice of Inquiry*, 61 individuals, organizations, and businesses filed comments, reply comments, or both. A list of pleadings and the short-form references to filing parties used herein is contained in Appendix D.

of the ADA. 29 U.S.C. § 792(b)(3). In addition, the Access Board was charged by the ADA with developing advisory guidelines and providing technical assistance for those with rights or duties under Titles II and III of the ADA. 29 U.S.C. § 792(b)(2).

¹⁵ 47 U.S.C. §§ 225, 610, 613.

¹⁶ See Telecommunications Relay Services and the Americans with Disabilities Act of 1990, CC Docket No. 90-571, Third Report and Order, 8 FCC Rcd 5300, 5300-01 (1993), Second Order on Reconsideration and Fourth Report and Order, 9 FCC Rcd 1637, 1639-40 (1993); Access to Telecommunications Equipment and Services by Persons with Disabilities, CC Docket No. 87-124, Report and Order, 11 FCC Rcd 8249 (1996) (*HAC Order*), Order on Reconsideration, 12 FCC Rcd 10077 (1997); Implementation of Section 305 of the Telecommunications Act of 1996: Closed Captioning and Video Description of Video Programming, MM Docket No. 95-176, Report and Order, FCC 97-279, released Aug. 22, 1997, Further Notice of Proposed Rulemaking, 13 FCC Rcd 5627 (1998).

C. Telecommunications Access Advisory Committee Report

12. Following passage of the 1996 Act, the Access Board convened a Telecommunications Access Advisory Committee,¹⁷ which then met to develop recommended equipment accessibility guidelines for consideration by the Access Board. The TAAC consisted of representatives from equipment manufacturers, software firms, telecommunications providers, organizations representing persons with disabilities, and other persons interested in telecommunications accessibility. Commission staff attended all Committee sessions as non-voting observers, and consulted with the Access Board staff throughout the advisory committee process.

13. The Committee was given the task of making recommendations regarding the following issues:

- Types of equipment to be covered by the Access Board guidelines.
- Barriers to the use of such equipment by persons with disabilities.
- Solutions to such barriers, if known, categorized by disability.
- Terms and conditions that should be included in the Access Board guidelines.

The Committee released its Final Report in January 1997.¹⁸

14. Although the TAAC did not achieve full consensus on compliance and coordination issues, it did succeed in reaching agreement on several innovative measures intended to foster implementation of accessibility features. These recommendations included the development of technical standards for telecommunications accessibility by means of industry consensus,¹⁹ the establishment of a "coordination point" for the exchange of

¹⁷ See Access Board, Telecommunications Act Accessibility Guidelines for Telecommunications Equipment and Customer Premises Equipment, Notice of Appointment of Advisory Committee Members and Notice of First Meeting, 61 Fed. Reg. 13813 (Mar. 28, 1996). We will refer to the Telecommunications Access Advisory Committee herein as the "TAAC" or the "Committee."

¹⁸ Telecommunications Access Advisory Committee, Access to Telecommunications Equipment and Customer Premises Equipment by Individuals with Disabilities, Final Report, Jan. 1997 (*TAAC Report*).

¹⁹ *TAAC Report*, § 6.3, at 27.

information on accessibility implementation,²⁰ and the adoption by manufacturers of an access verification process to provide notice to the consumer on the accessibility or compatibility of various products.²¹

15. The *TAAC Report* also made specific recommendations regarding the handling of complaints by the Commission, including efforts at informal resolution and initial referral of complaints to manufacturers,²² and suggested that the Access Board prepare an annual market monitoring report based on Commission complaint data.²³ The Committee encouraged covered entities to use universal design in manufacturing telecommunications equipment and CPE, while recognizing that “it may not be readily achievable to make every type of product accessible for every type of disability using present technology.”²⁴ The TAAC also recommended process and performance standards, although it recognized that “design, development, and fabrication” processes are unique to individual manufacturers, who would decide how each recommended element of the accessible design process may be integrated into the overall product design effort.²⁵ With respect to performance guidelines, the TAAC concluded that, because no single interface design will accommodate all disabilities, companies must use discretion in choosing among accessibility features.²⁶

²⁰ *Id.*, § 6.4, at 27-29.

²¹ *Id.*, § 6.5, at 29. Because the *TAAC Report* provided a broad overview of accessibility to equipment that was “intended to stand alone as a model for achieving such access,” the report covered issues that exceeded the Access Board’s jurisdiction. See Architectural and Transportation Barriers Compliance Board, Telecommunications Act Accessibility Guidelines, Docket No. 97-1, Notice of Proposed Rulemaking, 62 Fed. Reg. 19178 (36 C.F.R. Part 1193) (Apr. 18, 1997) (*Access Board Notice*). Consequently, the *Access Board Notice* and the guidelines subsequently adopted by the Access Board do not address such matters as the Committee’s proposal to require a manufacturer’s declaration that it has conformed with the statutory accessibility mandate. See *TAAC Report*, § 6.6, at 30-31.

²² *Id.*, § 6.7, at 31-34.

²³ *Id.*, § 6.8, at 34.

²⁴ *Id.*, § 1.3, at 3.

²⁵ *Id.*, § 4.0, at 15.

²⁶ *Id.*, § 5.2.1, at 20. The TAAC noted that “accessibility is likely to be accomplished through product designs which emphasize interface flexibility to maximize user configurability and multiple, alternative and redundant modalities of input and output.” *Id.*

D. Access Board Equipment Guidelines

16. Following its review of the *TAAC Report* and its consideration of comments submitted in response to the *Access Board Notice*, the Access Board adopted Telecommunications Act Accessibility Guidelines for equipment.²⁷ The Access Board guidelines draw heavily on the *TAAC Report* recommendations regarding process and performance guidelines. The guidelines consist of: (1) general accessibility requirements; (2) specific guidance on modes for input and output functions; and (3) standards for compatibility with peripheral devices and specialized CPE.

17. Some of the Access Board guidelines are relatively general. The key general guideline specifies a process for manufacturers to review accessibility in the design and development stage. Rather than mandating a particular structure for such a process or imposing a documentation requirement, the guidelines identify key elements the process should contain. Other general guidelines include the provision of information and documentation for customers in accessible formats, employee training, and the preservation of translation protocols and similar information needed to provide accessible telecommunications. The Board also would prohibit changes that would result in a net decrease in the accessibility of telecommunications equipment.²⁸

18. The specific guidelines further define what is necessary to make equipment accessible. The Access Board specifies, to the extent it is readily achievable, that each piece of equipment have "input modes" (e.g., dialing a telephone or turning on a switch) and "output modes" (e.g., a telephone ring or flashing light) that are accessible to persons with different disabilities.²⁹ For example, input functions to accommodate low vision may include tactile indicators on control keys; high-contrast print symbols and visual indicators; legible type-face and type-spacing for labels; and an ability to "freeze" a moving text display. Similarly, output functions to accommodate low vision may include speech output of displayed text and labels; large, high-contrast text and graphics; and an ability to "freeze" a moving text display.³⁰

²⁷ See *supra* note 7. The guidelines are set out in Attachment C hereto.

²⁸ *Access Board Order*, 63 Fed. Reg. at 5620.

²⁹ *Id.* at 5620-23, 5632. The specific capabilities itemized for input functions are closely related to proposals made in the *TAAC Report*, as are capabilities involved in output, display, and control functions. See *id.*; *TAAC Report*, §§ 5.3.1-5.3.2, at 20-23.

³⁰ *Access Board Order*, 63 Fed. Reg. at 5620-21, 5637-40.

19. For compatibility, the guidelines specify that product operation information be provided in a standard electronic text format on a standard cross-industry port, and that products employ “standardized and non-proprietary” formats for information.³¹ The guidelines also specify that products providing auditory output do so at a standard signal level through a standard connector, to enable use of assistive listening devices.³²

20. The *Access Board Order* contains an Appendix which is intended to be advisory in nature, providing expanded descriptions of the guidelines and offering suggestions as to strategies or measurements to assist in achieving accessible design.³³ Other sections of the Appendix provide detailed information on products used by persons with disabilities to enable compatible design. For example, the Appendix suggests that documents prepared for electronic transmission be in ASCII format in order to be usable by the widest range of CPE, and that certain standard formatting instructions be used in order to be properly understood by automated Braille translation software.³⁴ Thus, the Appendix may serve as a compendium of detailed specifications to facilitate the implementation of the Board’s performance standards and process-oriented rule.

III. STATUTORY AUTHORITY

A. Introduction

21. The *Notice of Inquiry* noted that the Commission possesses exclusive authority with respect to complaints under Section 255(f). It also noted that Section 255(f) authorizes the Commission to work in conjunction with the Access Board to develop guidelines for accessibility of telecommunications equipment and CPE.³⁵

³¹ *Id.* at 5619, 5623-25.

³² *Id.* at 5624.

³³ Appendix to 36 C.F.R. Part 1193 (Advisory Guidance). “This appendix provides examples of strategies and notes to assist in understanding the guidelines and are a source of ideas for alternate strategies for achieving accessibility. These strategies and notes are not mandatory.” *Access Board Order*, 63 Fed. Reg. at 5633. In the Appendix, the Board also discusses factors that might be used to evaluate what accessibility is “readily achievable” on an interim basis, until the Commission provides its own guidance. *Id.*

³⁴ *Id.* at 5635.

³⁵ *Notice of Inquiry*, 11 FCC Rcd at 19155 (para. 6).

22. The *Notice of Inquiry* observed that Section 255(f) provides that “[t]he Commission shall have exclusive jurisdiction with respect to any complaint under [Section 255],” and expressed the Commission’s view that Section 255 has established a new statutory right for aggrieved parties to file complaints — a right that is independent of, and in addition to, the right to file complaints against common carriers under Sections 207 and 208.³⁶ Section 207 allows individuals to seek damages either by private actions against carriers in Federal courts, or by recourse to the Commission’s complaint process.³⁷ Section 208 governs complaints against common carriers filed with the Commission.³⁸ The *Notice of Inquiry* sought comment on appropriate procedures for Section 255 complaints, and on the relationships between such procedures and the general common carrier complaint processes developed pursuant to Section 208 of the Communications Act.³⁹

23. In the *Notice of Inquiry*, the Commission also solicited comment on the interpretation that violations of Section 255 are subject only to complaints brought against common carriers under Section 208, so that no complaints could be brought against equipment manufacturers for violations of Section 255(b).⁴⁰ Finally, in light of the prohibition of private rights of action in Section 255(f), the Commission also sought comment on the congressional intent evidenced by the reference in the Statement of Managers accompanying the Conference Report to Section 207, which grants individuals the right to file suit in Federal courts.⁴¹

B. Scope of Rulemaking Authority

24. In the *Notice of Inquiry*, the Commission stated that it has general authority to select from among a variety of approaches to implementing Section 255.⁴² These approaches

³⁶ *Notice of Inquiry*, 11 FCC Rcd at 19165 (para. 36) (quoting Section 255(f) of the Communications Act, 47 U.S.C. § 255(f)).

³⁷ 47 U.S.C. § 207.

³⁸ 47 U.S.C. § 208.

³⁹ *Notice of Inquiry*, 11 FCC Rcd at 19166 (para. 37).

⁴⁰ *Id.* at 19165-66 (para. 36).

⁴¹ *Id.* (citing a Conference Report statement 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.” Telecommunications Act of 1996, Conference Report, Report 104-230, 104th Congress, 2d Sess., Feb. 1, 1996, at 135).

⁴² *Id.* at 19155 (para. 7).

included relying on case by case determinations on complaints, issuing guidelines or a policy statement, or promulgating rules pursuant to existing provisions of the Communications Act.⁴³ We find that, in Section 255, Congress enacted broad principles that require interpretation and implementation in order to ensure an efficient, orderly, and uniform regime governing access to telecommunications services and equipment. As a result, we tentatively conclude that this regime can best be implemented if we adopt specific guidance concerning the requirements of Section 255, which will enable the Commission to carry out its enforcement obligations under the Communications Act effectively and efficiently.

25. We reject the suggestion of some parties that we limit our involvement to complaint proceedings or to non-binding guidelines.⁴⁴ Such an approach could result in inconsistent and uncertain application of the requirements of Section 255, undermining the goal of providing for greater access and availability of telecommunications to Americans with disabilities. Providing further guidance and assistance to the affected parties may also potentially reduce the costs of compliance, because parties could minimize the litigation of individual disputes and interpretive questions arising under Section 255.

26. It is well established that the Commission possesses authority to adopt rules to implement the requirements of the Communications Act. Several statutory provisions authorize the Commission to adopt rules it deems necessary or appropriate in order to carry out its responsibilities under the Communications Act, so long as those rules are not otherwise inconsistent with the Act or other law.⁴⁵ Specifically, Section 4(i) of the Communications Act explicitly permits the Commission to “perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with [the] Act, as may be necessary in the execution of its functions.”⁴⁶ Section 201(b) provides that “[t]he Commission may prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this Act.”⁴⁷ Section 303(r) provides that the Commission may “[m]ake such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this Act”⁴⁸

⁴³ *Id.*

⁴⁴ See BellSouth Comments at 4; Pacific Comments at 7; U S WEST Comments at 4.

⁴⁵ See *United States v. Storer Broadcasting*, 351 U.S. 192, 202-03 (1956).

⁴⁶ 47 U.S.C. § 154(i).

⁴⁷ 47 U.S.C. § 201(b).

⁴⁸ 47 U.S.C. § 303(r).

27. Courts repeatedly have held that the Commission's general rulemaking authority is "expansive" rather than limited.⁴⁹ In addition, it is well established that the agency has the authority to adopt rules to administer congressionally mandated requirements.⁵⁰ Nothing in Section 255 bars the Commission from exercising the rulemaking authority granted by Sections 4(i), 201(b), and 303(r) to clarify and implement the requirements of Section 255. Consequently, we find there is ample authority for the Commission's adoption of regulations implementing Section 255.

28. Some parties question our rulemaking authority,⁵¹ but they neither acknowledge the plain language of the statute, nor claim that ambiguities in the wording of the statute compel reliance upon legislative history to discern the intent of Congress. Contrary to arguments advanced by CEMA and SWBT, deletion of language in the Senate bill *requiring* the Commission to promulgate rules removes the mandatory direction, but does not affect the Commission's general authority.⁵² Absent from the language of Section 255 is any limitation on the Commission's authority. To the contrary, the first sentence of Section 255(f), which bars private rights of action "to enforce any requirement of this section *or any regulation thereunder*," expressly contemplates the promulgation of regulations to carry out the section.⁵³

⁴⁹ *National Broadcasting v. United States*, 319 U.S. 190, 219 (1943). *See also* *FCC v. National Citizens Comm. for Broadcasting*, 436 U.S. 775, 793 (1978).

⁵⁰ *See* *Morton v. Ruiz*, 415 U.S. 199, 231 (1974) ("The power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress."). *See also* *Chevron v. Natural Resources Defense Council*, 467 U.S. 837, 843-44 (1984) (footnote omitted):

If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute. Sometimes the legislative delegation to an agency on a particular question is implicit rather than explicit. In such a case, a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.

⁵¹ *See, e.g.*, CEMA Comments at 13 & n.29; ITI Comments at 7; SWBT Comments at 2.

⁵² *See also* *Notice of Inquiry*, 11 FCC Rcd at 19163 (para. 29) (citing S. 652, 104th Cong., 1st Sess., § 262(g)).

⁵³ That sentence in Section 255(f) provides: "Nothing in this section shall be construed to authorize any private right of action to enforce any requirements of this section *or any regulation thereunder*." 47 U.S.C. § 255(f) (emphasis added). In our view, this language makes clear that Congress anticipated the promulgation of implementing regulations under this section.

Thus, the Conference Committee deletion referenced by the parties⁵⁴ cannot reasonably be deemed an implied “prohibition”; rather, it leaves rulemaking discretion to the Commission, to be exercised consistently with other provisions of the Act.

C. Access Board Equipment Guidelines

29. Section 255(e) directs the Access Board to develop equipment accessibility guidelines “in conjunction with” the Commission, and to periodically review and update the guidelines, but the statute does not otherwise specify the role of the guidelines in the Commission’s implementation process.⁵⁵ As we have discussed above, the language of Section 255 indicates that Congress intended to confer upon the Commission broad substantive authority to implement the requirement that telecommunications equipment and services be accessible, and gives the Commission exclusive authority to enforce that mandate.⁵⁶ In the *Access Board Order*, the Board states only that “Congress clearly intended that the FCC’s actions be consistent with the Board’s guidelines.”⁵⁷

30. We view the Board’s guidelines as our starting point for the implementation of Section 255. We note that, as a practical matter, we must strive to interpret Section 255 in a way that ensures that telecommunications services and equipment will be treated consistently. Because the Board’s guidelines address only the accessibility of equipment, we must necessarily adapt the Board’s guidelines to develop a coordinated approach to accessibility for both services and equipment.⁵⁸ This coordination is particularly necessary because technological developments have resulted in a convergence between telecommunications equipment and services, requiring us to consider both as we implement the statute. We

⁵⁴ See *supra* para. 28 and note 52.

⁵⁵ 47 U.S.C. § 255(e). In contrast, the ADA explicitly provides that the Board’s guidelines establish minimum requirements for implementation by other agencies. See, e.g., 42 U.S.C. §§ 12134(c), 12149(b). See also TIA Reply Comments at 7 (the Commission and the Access Board share coequal responsibility for the guidelines because of “in conjunction with” phrase in statutory language); BellSouth Comments at 3 (the Board has primary responsibility for guidelines, and the Commission should not usurp its authority); Omnipoint Comments at 11-14 (statute requires a case-by-case approach, but from a policy perspective it is important for the Commission to work closely with the Board and establish early policy guidance).

⁵⁶ See *supra* para. 28.

⁵⁷ *Access Board Order*, 63 Fed. Reg. at 5609.

⁵⁸ See Motorola Reply Comments at 3 (Commission’s industry-wide Section 255 enforcement authority requires it to extensively review Board guidelines in order to assure their reasonableness, as well as to coordinate actions with respect to service and equipment industries).

therefore tentatively conclude that while we have discretion regarding our use of the Access Board's guidelines in developing our comprehensive implementation scheme, we propose to accord the guidelines substantial weight in developing our own regulations and in our broader structure for implementation.⁵⁹ We seek comment on this approach.

D. Enforcement Authority

31. In response to the *Notice of Inquiry*, CEMA asserts that “[p]rivate complaints against non-common carriers were not authorized under the Communications Act prior to the adoption of Section 255”⁶⁰ and that “Section 255(f) expressly prohibits the creation of any new private rights of action.”⁶¹ CEMA notes that “[t]he final statutory language of Section 255 makes no reference to any new enforcement or complaint authority”⁶² and cites language in the Statement of Managers⁶³ as “suggest[ing] that only existing remedies under the Communications Act are available for enforcement.”⁶⁴ CEMA maintains that the Commission's enforcement authority with respect to equipment manufacturers is thus governed by Section 4(i) of the Act, which, unlike Sections 207 and 208,⁶⁵ “contains no provision for private complaints or assessing damages.”⁶⁶ CEMA concludes that Commission

⁵⁹ See generally 5 U.S.C. § 553(b)(3)(A); *Aulenback, Inc. v. Federal Highway Admin.*, 103 F.3d 156, 168-69 (D.C. Cir. 1997); *Telecommunications Research and Action Center v. FCC*, 800 F.2d 1181 (D.C. Cir. 1986).

⁶⁰ CEMA Comments at 16-17.

⁶¹ *Id.* at 17 (emphasis in original).

⁶² *Id.* at 16.

⁶³ “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.” H.R. Conf. Rep. No. 458, 104th Cong., 2d Sess., at 135 (1996), quoted in CEMA Comments at 16 (emphasis supplied by CEMA).

⁶⁴ CEMA Comments at 16 (emphasis in original).

⁶⁵ Sections 207 and 208 provide for the recovery of damages from common carriers, through either a Commission complaint process or a civil lawsuit. See 47 U.S.C. §§ 207, 208.

⁶⁶ CEMA Comments at 16.

enforcement of Section 255 violations by equipment manufacturers should therefore be limited to declaratory rulings and cease-and-desist orders.⁶⁷

32. CEMA's analysis collides with both established legal terminology and the statute. The language of Section 255(f) — "The Commission shall have exclusive jurisdiction with respect to any complaint under this section"⁶⁸ — makes clear that the statute contemplates that complaints may be filed under Section 255 itself. The statement in Section 255(f) that no private rights of action are authorized does not undermine this conclusion. CEMA mistakenly equates a "private right of action" with an administrative complaint. The preclusion of *private litigation* in Section 255(f) compels complainants to seek redress exclusively from the Commission, rather than in Federal courts, but it does not prevent the filing of administrative complaints pursuant to Section 255. Both manufacturers and service providers face obligations under Section 255, and we believe that both are subject to complaints under Section 255. The fact that Sections 207 and 208 provide additional authority for the filing of complaints against common carriers does not alter our view. Had Congress intended to permit complaints under Section 255 only against common carriers, and not manufacturers, we would expect to find this clearly stated in the statute.

33. In addition, we tentatively conclude that the reference in the Statement of Managers to existing "remedies" refers not to the filing of complaints, such that complaints could be filed only if authorized elsewhere in the Act, but to the range of statutory redress available under the Act against parties who are found to have violated Section 255.⁶⁹ By including Sections 207 and 208 in the list of available remedies, we believe that Congress intended to make clear that damages may be awarded, pursuant to these sections, for violations of Section 255 by common carriers. We seek comment on this analysis, and on whether there is any basis for concluding that damages, pursuant to Sections 207 and 208 or otherwise, are available with respect to entities other than common carriers.

34. NAD asserts that the preclusion of private rights of action under Section 255 does not foreclose civil actions by consumers for damages under Section 207, noting that the

⁶⁷ *Id.* Several equipment manufacturers similarly state that private damages claims are limited to complaints against carriers under Sections 207 and 208. Ericsson Comments at 8; Motorola Comments at 6 n.5; Nortel Comments at 11; *see also* Microsoft Comments at 34-35. AT&T agrees that the right of action created by Section 255 supplements rights available solely against common carriers under Sections 206-208, as asserted in the *Notice of Inquiry*, but argues that this does not mandate the adoption of a different set of procedural rules. AT&T Comments at 12-13.

⁶⁸ Section 255(f) of the Communications Act, 47 U.S.C. § 255(f).

⁶⁹ For a discussion of remedies for violations of Section 255, *see infra* para. 172.

Statement of Managers refers to Sections 207 and 208 as being available to enforce compliance with Section 255.⁷⁰ We disagree. The plain language of the statute confers exclusive jurisdiction on the Commission and bars private rights of action. The exclusive jurisdiction established for Commission consideration of complaints, in combination with the preclusion of private rights of action, simply does not allow for private litigation. As noted by CTIA, initial recourse to State or Federal courts is foreclosed, so that private parties are prohibited from seeking damages under Section 207 in Federal courts.⁷¹ We seek comment on this conclusion.

IV. STATUTORY DEFINITIONS

A. Scope of Statutory Coverage

1. “Telecommunications” and “Telecommunications Service”

35. Section 255 applies to “manufacturer[s] of telecommunications equipment or customer premises equipment” and “provider[s] of telecommunications service,” and Section 251(a)(2) applies to “telecommunications carrier[s] . . . network features, functions, or capabilities.”⁷² These phrases or their central terms are defined by the Act,⁷³ and apply to a range of regulatory provisions. Moreover, we find no indication in the legislative history of the 1996 Act that Congress intended these terms to have any different, specialized meaning for purposes of accessibility.

36. We tentatively conclude that to the extent these phrases are broadly grounded in the Communications Act, they require no further definition, and our sole task here is to elucidate their application in the context of Section 255. However, to the extent specific terms arise solely in connection with Section 255, we will consider whether further definition

⁷⁰ NAD Comments at 32-33.

⁷¹ CTIA Reply at 6 nn. 9-10. CTIA contends that consumer advocates have favored procedures that ensure private rights of action, and asserts that Congress instead intended to limit individuals to filing complaints with the Commission for violations of Section 255. CTIA Reply at 5.

⁷² 47 U.S.C. §§ 255, 251(a)(2). We note that, while these statutory provisions apply only to telecommunications services, equipment, and “network features, functions, or capabilities,” there are other avenues of relief for persons seeking accessibility in other contexts. For example, an employee whose employer fails to provide accessible telecommunications equipment to enable the employee to perform his or her job may seek relief under the ADA.

⁷³ See Sections 3(14), 3(29), 3(43), 3(44), 3(45), and 3(46) of the Communications Act, 47 U.S.C. §§ 153(14), 153(29), 153(43), 153(44), 153(45), 153(46).

or clarification is appropriate. We note that the statute's use of the term "telecommunications" may have the effect of excluding from the coverage of Section 255 a number of services that might be desired by consumers. Only those services which are considered to be "telecommunications services" are subject to regulation under Title II of the Communications Act. "Information" services" are excluded from regulation. We now discuss this regulatory dichotomy further.

37. Section 3 of the Act defines "telecommunications" as:⁷⁴

the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received.

It defines "telecommunications service" as:⁷⁵

the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used.

The Act defines an "information service" as:⁷⁶

the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing, but does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service.

38. In 1996 the Commission found that all of the services it had previously considered to be "enhanced services"⁷⁷ under the regulatory structure it had established in the

⁷⁴ 47 U.S.C. § 153(43).

⁷⁵ 47 U.S.C. § 153(46).

⁷⁶ 47 U.S.C. § 153(20).

⁷⁷ Enhanced services are defined in the Commission's rules as "services, offered over common carrier transmission facilities used in interstate communications, which employ computer processing applications that act on the format, content, code, protocol or similar aspects of the subscriber's transmitted information; provide the subscriber additional, different, or restructured information; or involve subscriber interaction with stored

1980 *Computer II* proceeding⁷⁸ should be considered “information services.”⁷⁹ Examples of services the Commission has treated as enhanced include voice mail, electronic mail, facsimile store-and-forward, interactive voice response, protocol processing, gateway, and audiotext information services.⁸⁰ Other enhanced services include electronic store-and-forward, data processing, gateways to online databases, and alarm monitoring.⁸¹ Similarly, the Commission has deemed reverse directory service to be an information service and, thus, not regulated under Title II of the Act.⁸²

39. On the other hand, the Commission has found that services it had previously classified as “adjunct-to-basic” should be classified as telecommunications services.⁸³ These are services that fall within the literal definition of an “enhanced service” set forth in the Commission’s rules, but are basic in purpose and facilitate the completion of calls through utilization of basic telephone service facilities.⁸⁴ They include, *inter alia*, speed dialing, call forwarding, computer-provided directory assistance, call monitoring, caller identification, call

information.” Section 64.702(a) of the Commission’s Rules, 47 C.F.R. § 64.702(a).

⁷⁸ Amendment of Section 64.702 of the Commission’s Rules and Regulations (*Computer II*), Docket No. 20828, Final Decision, 77 FCC 2d 384, 435 (1980), *recon.*, 84 FCC 2d 50 (1980), *further recon.*, 88 FCC 2d 512 (1981), *aff’d sub nom.* Computer and Communications Industry Ass’n v. FCC, 693 F.2d 198 (D.C. Cir. 1982), *cert. denied*, 461 U.S. 938 (1983).

⁷⁹ See Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended, CC Docket No. 96-149, First Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd 21905, 21995 (1996) (*Non-Accounting Safeguards Order*).

⁸⁰ See Bell Operating Companies Joint Petition for Waiver of Computer II Rules, Order, 10 FCC Rcd 13758, 13770-74, App. A (Com. Car. Bur. 1995).

⁸¹ See Bell Operating Companies Joint Petition for Waiver of Computer II Rules, Order, 10 FCC Rcd 1724 n.3 (Com. Car. Bur. 1995); Implementation of the Telecommunications Act of 1996: Telemessaging, Electronic Publishing, and Alarm Monitoring Services, CC Docket No. 96-152, Second Report and Order, 12 FCC Rcd 3824 (1997).

⁸² See Bell Operating Companies Petitions for Forbearance from the Application of Section 272 of the Communications Act of 1934, as amended, to Certain Activities, CC Docket No. 96-149, Memorandum Opinion and Order, 13 FCC Rcd 2627, 2638, 2656-57 (paras. 17, 60) (Com. Car. Bur. 1998).

⁸³ See *Non-Accounting Safeguards Order*, 11 FCC Rcd at 21958.

⁸⁴ See North American Telecommunications Association Petition for Declaratory Ruling under Section 64.702 of the Commission’s Rules Regarding the Integration of Centrex, Enhanced Services, and Customer Premises Equipment, ENF No. 84-2, Memorandum Opinion and Order, 101 FCC 2d 349 (1985) (*NATA Centrex Order*), *recon.*, 3 FCC Rcd 4385 (1988).

tracing, call blocking, call return, repeat dialing, and call tracking, as well as certain Centrex features.⁸⁵ The Commission found that such “adjunct-to-basic” services facilitated the establishment of a transmission path over which a telephone call may be completed, without altering the fundamental character of the telephone service.⁸⁶

40. The Commission has consistently categorized a service option or feature as adjunct-to-basic, and thus subject to Title II regulation, if that option or feature is clearly basic in purpose and use, and brings maximum benefit to the public through its incorporation in the network.⁸⁷ For example, the Commission has addressed whether access to a database through directory assistance that searches for a listing by name may be offered as an adjunct-to-basic telephone service. Because a subscriber using directory assistance retrieves information stored in a telephone company’s computer database, directory assistance appears to fit within the definition of an enhanced service. The Commission, however, found such access to be adjunct-to-basic, rather than enhanced service, because directory assistance provides only that information necessary for a subscriber to place a call.⁸⁸ The Commission has also held that electronic directory assistance is an adjunct-to-basic service because, as with operator-assisted directory assistance, the purpose of the service is to facilitate the placement of telephone calls.⁸⁹ In contrast, reverse directory service (where a customer knows a telephone number and seeks to learn the name of the number holder) supplies information that is not necessary to complete a call, and is therefore an enhanced service.⁹⁰

41.. The Commission has found that Operator Services for the Deaf (OSD), which enable text telephone users to utilize operator assisted services for calls placed to another text

⁸⁵ *NATA Centrex Order*, 101 FCC 2d at 359-61.

⁸⁶ *Id.* at 358-61.

⁸⁷ *Id.* at 359.

⁸⁸ *Id.* at 360.

⁸⁹ *See Southwestern Bell Telephone Co., Petition for Waiver of Section 69.4(b) of the Commission’s Rules*, Transmittal No. 1741, Memorandum Opinion and Order, 5 FCC Rcd 3792, 3793 (Com. Car. Bur. 1990).

⁹⁰ *See US West Communications, Inc. Petition for Computer III Waiver*, CC Docket No. 90-623, Memorandum Opinion and Order on Reconsideration, 11 FCC Rcd 7997, 8004, 8006-07 (paras. 14, 22) (Com. Car. Bur. 1996).

telephone (TTY), appear to be within the definition of adjunct-to-basic services.⁹¹ The Commission reasoned that OSD are intended to facilitate the use of traditional telephone services for TTY-to-TTY calls, and do not alter the fundamental character of TTY-to-TTY telephone service. The services provided by OSD, including operator assistance with collect and third-party billing, emergency interrupt, and busy-line verification, are likewise intended to facilitate the completion of TTY-to-TTY calls. As discussed above, directory assistance is already classified as adjunct-to-basic service. The fact that directory assistance is provided through OSD does not alter the nature of the service, or, consequently, its classification as adjunct-to-basic service. The Commission therefore concluded that the services provided through OSD are subject to Title II regulation as adjunct-to-basic services.⁹² On the other hand, the Commission has decided that the provision of access to a database for purposes other than to obtain the information necessary to place a call will generally be found to be enhanced services,⁹³ the presumption being that they are information services unless they are shown to be otherwise.⁹⁴

42. Many services are considered telecommunications services and, therefore, are clearly subject to the requirements of Section 255. We recognize, however, that there are some important and widely used services, such as voice mail and electronic mail, which under our interpretation fall outside the scope of Section 255 because they are considered information services. Given the broad objectives Congress sought to accomplish by its enactment of Section 255, we seek comment on whether Congress intended Section 255 to apply to a broader range of services.

43. We also note that the Commission's interpretation of the definitions of these terms continues to be examined and may be modified. Congress has required the Commission to undertake a review of the provisions of the 1996 Act relating to universal service, to be completed and submitted to Congress no later than April 10, 1998. The Commission must review, among other things, the definitions of "information service" and "telecommunications service" in the 1996 Act, and the impact of the Commission's interpretation of those definitions on the current and future provision of universal service to consumers, including

⁹¹ Establishment of a Funding Mechanism for Interstate Operator Services for the Deaf, RM 8585, Memorandum Opinion and Order, 11 FCC Rcd 6808, 6817 (1996). The Commission ultimately declined to establish a funding mechanism for recovery of the costs of providing OSD. *Id.* at 6819-20.

⁹² *Id.* at 6817.

⁹³ US West Communications, Inc. Petition for Computer III Waiver, CC Docket No. 90-623, Order, 11 FCC Rcd 1195, 1199 (*US West Waiver Order*) (Com. Car. Bur. 1995); *NATA Centrex Order*, 101 FCC 2d at 360.

⁹⁴ *US West Waiver Order*, 11 FCC Rcd at 1199; *NATA Centrex Order*, 101 FCC 2d at 360-61.

consumers in high cost and rural areas.⁹⁵ We do not intend, in this proceeding, to foreclose any aspect of that ongoing reexamination. Further, in a recently released Further Notice of Proposed Rulemaking examining the Commission's nonstructural safeguards regime governing the provision of enhanced and information services by the Bell Operating Companies (BOCs), the Commission sought comment on whether the Commission's definition of "basic service" and the definition of "telecommunications service" enacted in the 1996 Act cover the same set of services.⁹⁶

2. "Provider of Telecommunications Service"

44. Because the Act does not define "provider of telecommunications service," we believe it would be helpful to propose some clarifications regarding aspects of this phrase as used in Section 255, beginning with the term "provider." Although "provide" appears frequently in the Act in various forms,⁹⁷ the Act does not define "provide" or "provider," either in connection with telecommunications or otherwise. The term "provide," in its ordinary sense, can mean to "[e]quip or fit out with what is necessary for a certain purpose; furnish or supply with something[;] . . . [s]upply or furnish for use; make available"⁹⁸ With respect to Section 255, we believe that Congress intended to use the term "provider" broadly, to include entities that supply or furnish telecommunications services, as well as entities that make available such services. For example, the statute does not exclude resellers — who offer telecommunications services for a fee directly to the public — from the definition of telecommunications service provider. This interpretation is consistent with our view that Congress intended the mandate of Section 255 to be broad.⁹⁹

⁹⁵ See Pub. L. 105-119, § 623, 111 Stat. 2440 (1997); see also Common Carrier Bureau Seeks Comment for Report to Congress on Universal Service under the Telecommunications Act of 1996, CC Docket No. 96-45, Public Notice, 13 FCC Rcd 271 (1998).

⁹⁶ Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services, CC Docket No. 95-20, Further Notice of Proposed Rulemaking, 13 FCC Rcd 6040, 6066-67 (para. 41) (1998).

⁹⁷ See, e.g., 47 U.S.C. § 153(44) ("The term 'telecommunications carrier' means any provider of telecommunications services . . ."); 47 U.S.C. § 222(e) ("a telecommunications carrier that provides telephone exchange service . . . in its capacity as a provider of such service . . ."); 47 U.S.C. § 225(c) ("Each common carrier providing telephone voice transmission services shall . . . provide . . . telecommunications relay services . . .").

⁹⁸ *New Shorter Oxford English Dictionary* 2393 (4th ed. 1993).

⁹⁹ Cf. Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-Region, Inter-LATA Services in Michigan, CC Docket No. 97-137, Memorandum Opinion and Order, 12 FCC Rcd 20543, 20600-05 (1997) (holding that a BOC "provides" a checklist item either

45. We therefore propose that all entities offering (*i.e.*, whether by sale or by resale) telecommunications services to the public, including aggregators, should be separately subject to Section 255, without regard to accessibility measures taken by the service provider who originates the offering.¹⁰⁰ We seek comment on this proposal.

46. A second question involves entities that offer both telecommunications and non-telecommunications services. For example, local exchange carriers may also provide cable services. We note the plain language of Section 255(c), which states that “[a] provider of telecommunications service shall ensure that *the service* is accessible”¹⁰¹ We therefore propose to subject a provider of telecommunications service to the requirements established in Sections 255(c) and 255(d) only to the extent it is providing telecommunications services.¹⁰² We seek comment on whether this proposal is practical if a provider is using the same facilities to offer telecommunications services and services not meeting the statutory definition.

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

47. Section 255(b) of the Act provides that “[a] manufacturer of telecommunications equipment or customer premises equipment shall ensure that the equipment is designed, developed, and fabricated to be accessible to and usable by persons with disabilities, if readily achievable.”¹⁰³ In the following sections we present proposals and seek comment on various aspects of these terms used in Section 255(b).

by actually furnishing the item or, if no competitor is actually using the item, by making the checklist item available as both a legal and a practical matter, where a different interpretation would be contrary to congressional intent).

¹⁰⁰ At *infra* paras. 75-80 we address what accessibility obligations might attach to providers whose telecommunications services are provided by the facilities of others.

¹⁰¹ 47 U.S.C. § 255(c) (emphasis added).

¹⁰² This is consistent with the Access Board’s approach to manufacturers covered by Section 255. *See infra* paras. 52-54.

¹⁰³ 47 U.S.C. § 255(b).