

compliance with Section 255. We therefore propose to establish a presumption that the resources reasonably available to achieve accessibility are those of the entity (*i.e.*, corporation or equivalent organization) legally responsible for the equipment or service that is subject to the requirements of Section 255. However, we propose that this presumption may be rebutted in a complaint proceeding or other enforcement proceeding in two different respects:

- On the one hand, the assets and revenues of another entity (*e.g.*, parent or affiliate) that is not legally responsible for the equipment or service involved may still be treated as available for purposes of achieving accessibility under Section 255, if it is demonstrated that those assets and revenues are generally available to the entity that does have legal responsibility for the equipment or service. The purpose of this rebuttal option is, for example, to forestall sham organizational arrangements designed to avoid compliance with Section 255. We believe this position embodies the same principles as the Access Board's view that a "readily achievable" determination should take into account "the resources of a parent company . . . only to the extent those resources are available to the subsidiary."²¹⁴
- On the other hand, the general presumption can also be rebutted by a respondent showing that the sub-unit (*e.g.*, corporate division or department) actually responsible for the product or service in question does not have access to the full resources of the corporation or equivalent organization of which it is a part.

110. We tentatively conclude that the presumption we are proposing may potentially serve as an effective guard against evasive practices. In any event, we propose that the Commission will determine what resources are reasonably available on a case-by-case basis in the context of complaint proceedings or other enforcement proceedings, because of our tentative view that the variety of organizational forms and other circumstances make development of quantitative standards by the Commission impracticable. We seek comment on these proposals.

(b) Market Considerations

111. The *Notice of Inquiry* sought comment on the scope of the accessibility requirement in terms of how the provision of either conflicting accommodations for different disabilities, or accommodations that would address multiple disabilities but would make the offering technically or economically impracticable, should be viewed under the "readily

²¹⁴ *Access Board Order*, 63 Fed. Reg. at 5633.

achievable” standard.²¹⁵ Commenters generally recognize the potential in the telecommunications context for conflict between design accommodations and more personalized offerings for different disability groups, in contrast to an accessibility solution under the ADA.

112. Trace submits that the wide variety of products and devices used for telecommunications means that very few detailed specifications will be applicable across all devices.²¹⁶ Nortel contends that the Commission should not focus only on the cost of a desired design feature, but should also consider its utility; guidelines should avoid requiring features that may be technically available but are not efficient solutions for persons with disabilities who will be using the products or services.²¹⁷ Netscape notes that, as with graphical user interfaces (GUI), technology innovations that benefit one group of persons with disabilities may disadvantage another, and observes that the prevalence of GUI is not a “market failure” but a market-driven development that has made accessibility for some persons with disabilities more difficult.²¹⁸ NCD contends that competitive pressures in the telecommunications industry may lead to instances where accessibility costs, though small, necessitate an increase in price that alters the competitive balance between competing products.²¹⁹ The Access Board guidelines could have an effect on this issue of conflicting accommodations because of their prohibition of any net reduction in product accessibility,²²⁰ but the impact of this prohibition could be moderated because it would be subject to the “readily achievable” qualification.

²¹⁵ See *Notice of Inquiry*, 11 FCC Rcd at 19161 (para. 22). The *Notice of Inquiry* also asked commenters to assess the extent to which accessible services and equipment are currently available or in development. The Commission appreciates the comments submitted in response to this request, which provide both the Commission and interested parties invaluable information for better understanding and addressing the needs of consumers with disabilities, industry’s progress in meeting those needs, and areas needing further accessibility improvements. These comments are not discussed in this Notice except to the extent they bear directly on issues that are addressed herein.

²¹⁶ Trace Comments at 13-14.

²¹⁷ Nortel Comments at 7-8.

²¹⁸ Netscape Reply Comments at 7.

²¹⁹ NCD Comments at 16. See also Inclusive Comments at 4; Siemens Comments at 4 (contending that incremental burdens resulting from new requirements may make a difference as to the continued existence of some products and the competitiveness of U.S. businesses in a global marketplace).

²²⁰ 36 C.F.R. § 1193.39.

113. We believe market considerations affect decisions regarding product features, and are thus relevant to a determination whether particular access features are practical. However, by this we do not mean to sanction unfounded arguments that the addition of such features would make products less desirable to mass markets. Indeed, it may frequently be the case that accessibility features will make a product more desirable to mass markets.²²¹ We seek comment on how to incorporate market considerations into an evaluation of whether particular accessibility features are practicable. For example, what is the potential market for the more accessible product? Would the accessibility features make the product more attractive to the general consumer market? How well could the more accessible product compete with other offerings, in terms of both price and features?

114. Related questions are raised by the Access Board guideline providing that “[n]o change shall be undertaken which decreases or has the effect of decreasing the net accessibility, usability, or compatibility of telecommunications equipment or [CPE].”²²² On the one hand, the fact that a product has particular accessibility features is evidence that inclusion of those features in later products from the same producer is readily achievable. On the other hand, it is our tentative view that this general principle should not operate in such a way as to prevent legitimate feature trade-offs as products evolve, nor should it stand in the way of technological advances. We therefore seek comment on how accessibility reductions should be treated.

(c) Cost Recovery

115. We also believe it is appropriate to consider the extent to which an equipment manufacturer or service provider is likely to recover the costs of increased accessibility. This is not to say that the equipment manufacturer or service provider *must* be able to fully recover the incremental cost of the accessibility feature in order for accessibility to be readily achievable. Indeed, the assumption of some cost burden is an explicit element of the definition of “readily achievable.”²²³ We have previously indicated our tentative conclusion that the relevant measure of the “expense” of providing accessibility features is their net

²²¹ We note the frequency with which features envisioned as limited to overcoming disabilities have found broader success, based on their improved ease of use. Examples include telephone amplifiers (useful in noisy areas), closed-captioning (for those wanting to watch television, cable or videotapes either in noisy environments or without creating noise), and hands-free dialing (for motorists).

²²² 36 C.F.R. § 1193.39(a). The rule section further provides that “[d]iscontinuation of a product shall not be prohibited.” 36 C.F.R. § 1193.39(b). See *supra* para. 112.

²²³ See *supra* para. 94 and note 202.

expense.²²⁴ Thus, cost recovery is a factor that a company should weigh in making its determination of what is readily achievable.

116. How could the provider expect to recover the incremental cost of the accessibility feature? To what extent would absorbing all or part of the cost provide a disincentive to offering the product at all? How would passing the cost on to consumers of that particular product affect likely demand for the product? What differences (if any) are there between accessibility features integral to the product in question (*e.g.*, function controls) versus separate product support offerings (*e.g.*, user instructions)? How should we view promotional offers that do not provide comparable savings for users of accessible products?

117. We also note that the Commission in its *Universal Service Order* stated that accessibility and affordability issues with respect to people with disabilities would be considered in the context of Section 255.²²⁵ We seek comment on the extent that service providers and manufacturers should consider affordability of accessible products when making cost recovery assessments.²²⁶ What concerns must a manufacturer or service provider balance

²²⁴ See *supra* para. 103.

²²⁵ Federal-State Joint Board on Universal Service, CC Docket No. 96-45, Report and Order, 12 FCC Rcd 8776, 8803-04 (para. 53) (1997) (*Universal Service Order*), as corrected by Federal-State Joint Board on Universal Service, Errata, FCC 97-157, released June 4, 1997, *appeal pending in Texas Office of Public Utility Counsel v. FCC*, No. 97-60421 (5th Cir. 1997); Federal-State Joint Board on Universal Service, CC Docket No. 96-45, Order on Reconsideration, 12 FCC Rcd 10095 (1997); Changes to the Board of Directors of the National Exchange Carrier Association, Federal-State Joint Board on Universal Service, CC Docket Nos. 97-21, 96-45, Report and Order and Second Order on Reconsideration, 12 FCC Rcd 18400 (1997), as corrected by Federal-State Joint Board on Universal Service, CC Docket No. 96-45, Errata, 12 FCC Rcd 22493 (1997); Changes to the Board of Directors of the National Exchange Carrier Association, Federal-State Joint Board on Universal Service, CC Docket Nos. 97-21, 96-45, Order on Reconsideration, Second Report and Order, and Further Notice of Proposed Rulemaking, 12 FCC Rcd 12437 (1997); Federal-State Joint Board on Universal Service, CC Docket No. 96-45, Third Report and Order, 12 FCC Rcd 22485 (1997), as corrected by Federal-State Joint Board on Universal Service, CC Docket Nos. 96-45 and 97-160, Erratum, released Oct. 15, 1997; Changes to the Board of Directors of the National Exchange Carrier Association, Federal-State Joint Board on Universal Service, CC Docket Nos. 97-21, 96-45, Second Order on Reconsideration in CC Docket 97-21, 12 FCC Rcd 22423 (1997); Federal-State Joint Board on Universal Service, CC Docket No. 96-45, Third Order on Reconsideration, 12 FCC Rcd 22801 (1997); Federal-State Joint Board on Universal Service, Access Charge Reform, Price Cap Performance Review for Local Exchange Carriers, Transport Rate Structure and Pricing, End User Common Line Charge, CC Docket Nos. 96-45, 96-262, 94-1, 91-213, 95-72, Fourth Order on Reconsideration, FCC 97-420, released Dec. 30, 1997, as corrected by Federal-State Joint Board on Universal Service, CC Docket Nos. 96-45, 96-262, 94-1, 91-213, 95-72, Errata, 13 FCC Rcd 2372 (1998).

²²⁶ We believe that our proposed definition of product line (*see infra* paras. 168-170) addresses the concern of how to prevent all accessibility features from being incorporated into only one high-end product.

in making accessible products affordable? Are accessibility and affordability always mutually supporting goals, or can an attempt to make a product affordable undercut its accessibility?

(d) Timing

118. Several comments address accessibility obligations over the course of a product life cycle, especially as it relates to improved accessibility technology.²²⁷ Some comments assert that Section 255 requires that *new* equipment and services must conform to accessibility requirements within the limits of what is “readily achievable.”²²⁸ These commenters assert that companies should have a continuing obligation to improve the accessibility of their products and services. Moreover, as applied to existing buildings and structures under the ADA, “readily achievable” does not typically involve issues of technical feasibility as it would for telecommunications.²²⁹ The impact of the inclusion of new products and services, NAD and NCD argue, is that the test of compliance must be whether it would have been readily achievable for a company to have incorporated accessibility at the design stage, and not whether it is readily achievable to modify the product or service once it has been manufactured or deployed.²³⁰

119. The Access Board’s view is that its guidelines are “‘prospective in nature’, intended to apply to future products . . . [with] no requirement to retrofit existing equipment.”²³¹ And while the Board suggests that “net accessibility” should not be reduced,²³²

²²⁷ These questions arise in part due to the ADA’s distinction between modification of existing structures, where accessibility must be provided if “readily achievable,” and construction of new structures, which must be accessible unless “structurally impracticable.” 42 U.S.C. § 12183.

²²⁸ With regard to the rapid introduction of new technology and resulting short-term product and service cycles, for example, commenters contend there is a significant impact on the extent of the obligations of providers and manufacturers under Section 255 that would differ from those in the ADA context. *See* WSAD Reply Comments at 6.

²²⁹ AFB and UCPA assert that Section 255 is different because it applies to the design, development, and fabrication of equipment and the implementation of services. AFB Comments at 8-9; UCPA Reply Comments at 9. UCPA emphasizes that this is a critical conceptual difference. UCPA Reply Comments at 9. *See also* NAD Comments at 23-24.

²³⁰ NAD Comments at 24; NCD Comments at 13. *See also* AT&T Comments at 6 & n.10; Motorola Reply Comments at 11 (emphasis should be on more cost-effective initial design process rather than retrofitting, which may not be readily achievable); PCIA Reply Comments at 8; WID Reply Comments at 6.

²³¹ *Access Board Order*, 63 Fed. Reg. at 5612.

²³² 36 C.F.R. § 1193.39. *See supra* para. 114.

it does not seem to suggest that manufacturers must be obligated to upgrade products already in the marketplace as new access features become readily achievable.

120. Timing issues present several important questions, most of which stem from the fact that technology advances over time. Two examples will illustrate the issue:

- Generally speaking, technological features available at the beginning of a product development cycle can be incorporated more easily (*i.e.*, more “easily accomplishable and able to be carried out without much difficulty or expense”) than those that become available at the end of the development cycle.²³³ Thus it seems that any assessment of the practicality of a particular accessibility feature should take into account reasonable periods of time required to incorporate new accessibility solutions into products under development.
- Turning to the post-development stage, we tentatively conclude that once a product is introduced in the market without accessibility features that were not readily achievable at the time, Section 255 does not require that the product be modified to incorporate subsequent, readily achievable access features. If we ultimately conclude otherwise, however, how should the projected roll-out of an accessible replacement product affect a determination of whether modification of a product already in the marketplace is readily achievable?

To phrase the timing question broadly, how should product life cycles be taken into account in making “readily achievable” determinations?

121. In a related vein, Gallaudet, ITI, and TIA support a “grace period” for compliance, varying according to factors such as the type of equipment and production cycles.²³⁴ Trace opposes grace periods, arguing that if accessibility is readily achievable from the outset, it is not obvious why it should be deferred or avoided.²³⁵ The Access Board maintains that “[n]o explicit ‘grace period’ is needed since it is built into the determination of

²³³ This is a major reason why our implementation proposals (*see infra* paras. 124-174) aim to encourage the consideration of disability issues at the front end of the development and design process, and on an ongoing basis throughout the process.

²³⁴ Gallaudet Reply Comments at 3; ITI Reply Comments at 5-6; TIA Reply Comments at 13-14. *See also* Microsoft Comments at 9.

²³⁵ Trace Reply Comments at 4.

readily achievable.”²³⁶ Given that Section 255 has been in effect since February 1996, and in light of our tentative conclusion that timing issues should be considered as an element of ready achievability, we believe that a general grace period for compliance is not warranted. However, we seek comment on this view.

(4) Other Considerations

122. The interplay of factors used in determining whether and to what extent the accessibility of telecommunications equipment, CPE, or telecommunications services is readily achievable will be complex. We believe that the factors we have set out above provide a workable framework for this analysis. We further expect that our refinement of these factors in this proceeding will provide substantial initial guidance to all parties who are subject to or affected by Section 255. However, in any given case the ultimate determination of whether it is readily achievable to make a particular product offering accessible to users with a particular disability will depend on the particular circumstances of the case. It is thus inevitable that the nature and extent of the Section 255 obligations will generally have to be evaluated and refined on a case-by-case basis, as we resolve complaints of non-compliance, a process that will in turn foster greater accessibility in future product and service offerings.

123. Some commenters propose consideration of additional factors, such as the utility, or functionality, of products and services for those with disabilities, as well as to society at large.²³⁷ We tentatively do not see how such “social utility” could be quantified with sufficient objectivity to be considered as a separate factor,²³⁸ and note that to some extent it is an implicit component of our proposed “market considerations” factor. That is, to the extent a particular accessibility solution is seen as valuable, it is more likely to succeed in the marketplace. Other commenters suggest factors relating to the relationship between Section 255 and Section 251(a),²³⁹ and differences between a product used by one customer, and a

²³⁶ *Access Board Order*, 63 Fed. Reg. at 5612.

²³⁷ CCD and MATP assert that cost review should consider indirect benefits, such as productivity gains and cost savings for persons with disabilities and society when more expensive accommodations can be replaced, and the benefits of employing persons with disabilities rather than public sector support. CCD Comments at 11; MATP Comments at 3. *See also* WID Reply Comments at 6. Others argue that the compliance standard should not consider the value of accessible products to persons without disabilities, or give credit on some larger “societal balance sheet.” TIA Reply Comments at 3 n.3.

²³⁸ Further, we see no clear analogy to such a factor in the ADA factors.

²³⁹ *See, e.g.*, CCD Comments at 14-15; Pacific Comments at 11-12; UCPA Comments at 5.

product that is part of a network.²⁴⁰ Several commenters observe the increasing convergence in, or blurring of the distinction between, services and equipment that is characteristic of the changing telecommunications marketplace, and state that it should be considered as yet another factor.²⁴¹ We are not persuaded that these additional factors warrant separate consideration, but we seek comment on them, and on other ways to establish useful and usable factors..

V. IMPLEMENTATION PROCESSES

A. Introduction

124. We turn now to the measures that will put Section 255 into action, ensuring that manufacturers and service providers are in compliance with the requirement that their products be accessible, to the extent readily achievable, and providing relief for consumers when there are compliance problems. Our proposals rest on two principles:

- *Responsiveness to consumers* — We recognize that most complaints under Section 255 will arise because a consumer believes he or she is unable to use telecommunications products or services. The first objective of our complaint process will therefore be to assist in the identification and application of current accessibility solutions that will remove the accessibility barrier — whether real or perceived — thereby solving the particular problem without resorting to more formalized procedures. Further, to paraphrase a common expression, we believe that accessibility delayed is accessibility denied. Our proposals therefore start with a mechanism that aims to involve service providers and manufacturers in a process that identifies and solves accessibility problems with minimal government intervention as soon as possible. And the proposals continue by providing incentives to manufacturers and service providers to explore accessibility features “early and often” during the planning and development of new product or service offerings, since doing so increases the availability of accessible products and services to consumers.
- *Efficient allocation of resources* — A process that imposes substantial burdens on parties may be worse than none at all. If our process is not efficient —

²⁴⁰ See generally NAD Comments at 30-31.

²⁴¹ See, e.g., Pacific Comments at 17. Arkenstone asserts that software adaptations for CPE involve minimal-expense solutions in many instances. Arkenstone Comments at 7.

- some potential complainants — particularly those who lack resources and may be intimidated by complex regulatory procedures — would be discouraged from seeking Commission assistance;
- providers would spend substantial resources responding to complaints rather than enhancing accessibility of their offerings; and
- the Commission would be unable to cope with any significant number of complaints in a timely manner.

We are therefore proposing to streamline the process for addressing accessibility issues as much as possible, freeing consumers and industry alike to apply their resources to solving access problems, rather than subjecting them to burdensome procedural requirements. We have made every effort to reduce administrative burdens for all who might be involved in the complaint process, and we invite suggestions for still further improvements.

125. In keeping with these objectives, we propose a two-phase program for dealing with consumers' issues arising under Section 255. In the first phase, consumer inquiries and complaints will be referred to the manufacturer or service provider concerned, who will have a short period of time to solve the complainant's access problem and informally report to the Commission the results of its efforts. This "fast-track" process will overlay and, we believe, frequently render unnecessary our traditional complaint resolution processes, by quickly resolving the consumer's problem. Otherwise, matters or disputes that remain unresolved may proceed to a second-phase dispute resolution process.

B. Fast-Track Problem-Solving Phase

1. In General

126. The heart of our proposal is an informal, "fast-track" process designed to solve access problems quickly and efficiently. We envision that this process would function as follows:

- The process would be initiated by the submission of a complaint, although we would encourage potential complainants to contact the manufacturer or service provider to attempt to resolve the problem before lodging a complaint.²⁴²

²⁴² See *infra* para. 128.

- Upon receipt of a complaint, the Commission would promptly forward the complaint to the manufacturer or service provider (or both) whose offerings were the subject of the complaint, and set a deadline for a report of action taken to resolve the complaint.
- During the period prescribed, or during an extension period granted for good cause, the manufacturer or provider would attempt to solve the complainant's problem regarding the accessibility or compatibility of the provider's service or equipment. During this time, the Commission staff would be available to both the complainant and the respondent to provide information and informal assistance upon request.
- By the end of the fast-track phase, the respondent would be expected to informally report to the Commission the results of its efforts to solve the problem involved in the complaint.
- The Commission would evaluate the respondent's report. The matter would be closed if it appeared that the complainant's access problem had been solved and there was no underlying compliance problem, or if the matter were outside the scope of Section 255.
- On the other hand, the matter would proceed to a second phase of dispute resolution processes²⁴³ if the problem remained unsolved and there was a question of whether an accessibility solution was readily achievable, or if it appeared there was an underlying problem regarding the respondent's compliance with its Section 255 accessibility obligations.

127. We believe that the fast-track process we are proposing will frequently permit complainants and respondents to resolve disputes before requiring any use of additional Commission processes. In addition, the burden on all parties is minimal, and the process encourages the rapid, informal solution of access problems. We seek comment on the general outline of this fast-track process, and on the more specific aspects of it discussed below.

2. Initial Contact with Commission

128. The *TAAC Report* recommends that the Commission "encourage consumers to express informally their concerns or grievances about a product to the manufacturer or supplier who brought the product to market before complaining to the [Commission]" and that the Commission assist complainants to resolve their complaints informally.²⁴⁴ We propose to

²⁴³ See *infra* paras. 144-171.

²⁴⁴ *TAAC Report*, §§ 6.7.4.1, 6.7.4.2, at 32.

adopt this TAAC recommendation. Specifically, at the time we are first contacted by a consumer, we would encourage the consumer to directly contact the manufacturer or service provider involved if he or she has not already done so, and we would provide contact information for that purpose. We would also invite the consumer to contact the Commission again if the problem is not resolved satisfactorily. The provision of accessibility information and the fast-track process respond to the TAAC recommendation that we offer our assistance in resolving complaints informally. We seek comment on this proposal.

129. Persons with disabilities may submit their complaints by any accessible means, including, for example, letter, Braille, facsimile, electronic mail, internet, TTY, audio cassette, or telephone call.²⁴⁵

130. Because Section 255 complaints will involve offerings overseen by various Commission bureaus and offices, and because consumers may be unfamiliar with these organizational differences, we anticipate establishing a central Commission contact point for all Section 255 inquiries and complaints. We seek comment on measures the Commission should take to ensure that persons with disabilities are made aware of their opportunity to address inquiries and complaints to a central contact point at the Commission.

131. We propose to make available a complaint form, but not to require its use for the initiation of a Section 255 complaint. In whatever form we receive a complaint, however, we will need to ascertain at least the following information before we can proceed:

- Complainant contact information: Name, mailing address, and preferred contact method (letter, telephone number, TTY number, facsimile number, or electronic mail address).
- Identification of the equipment or service complained of, and the name (and, if known, the address) of its manufacturer or provider.
- A description of how the equipment or service is inaccessible to persons with a particular disability or combination of disabilities.

We seek comment on what additional information, if any, would tend to provide a clearer description of the difficulty complained of, without requiring excessive or irrelevant information. In any event, we would retain discretion to request from complainants additional information that would help us to rapidly address the request.

²⁴⁵ See Section 1.1830 of the Commission's Rules, 47 C.F.R. § 1.1830.

3. Provider Contact

132. Our fast-track proposal envisions initially referring complaints to the manufacturer or service provider (or both, as appropriate). Before we can do this, we will need a list of contact points for each manufacturer and service provider subject to Section 255. How can we efficiently generate and maintain such a list? Should we require a single contact point for each company, or should we permit firms to designate different contact points for different product offerings? Should we require that the contact point be "in-house," or should we permit delegation of the contact responsibility to agents? We also seek comment on whether we should require firms to provide accessibility contact information directly to consumers, and if so, how.

133. We believe that the data we need includes information similar to the contact information we will require of complainants: name or title of the contact person, mailing address, and alternate contact methods (telephone number, TTY number, facsimile number, or electronic mail address). We propose that equipment manufacturers and service providers be required to establish multiple contact methods, accessible to as many disabilities as possible. The contact information should identify all alternatives available. This would give us the greatest flexibility for forwarding the various kinds of complaints we are likely to receive. If we allow the designation of different contact points within a company, we will need to collect additional information that will allow us to identify the appropriate contact point for each complaint. We seek comment on these matters. We also seek comment on whether our process should include a notification to the complainant that the complaint has been referred, and, if so, what information our notification should include.

134. Finally, we note that the contact list we develop will be useful not only in connection with forwarding complaints, but could also serve a valuable, though secondary function as a source of accessibility information for the public.²⁴⁶ Should we make the list publicly available? If so, what additional related data, if any, should we collect that would advance this additional function?²⁴⁷ Commenters suggesting additional data collection should state whether they believe submission of the data should be optional or mandatory, and, if the latter, should explain why the benefits of the requirement would justify the burdens.

²⁴⁶ See *infra* para. 174 for other possible public information measures.

²⁴⁷ For example, lists of new accessible product offerings.

4. Solution Period; Report

135. As noted above, upon receipt of a complaint, the Commission would promptly forward it to the manufacturer or service provider (or both) whose offerings were referenced in the complaint, and set a deadline for a report to the Commission of action taken to resolve the complaint. We would endeavor to forward the complaint within one business day of its receipt, although circumstances such as the format of the complaint²⁴⁸ or Commission staff workloads might cause delays. We seek comment on appropriate customer service standards for complaint forwarding procedures. We also seek comment on whether we should forward complaints submitted as submitted, regardless of format, or whether we should forward "translations" or transcripts of complaints submitted in formats such as Braille.

136. The action report deadline should provide sufficient time for respondents to study the complaint, gather relevant information, identify possible accessibility solutions, and, most importantly, work with the complainant to solve the access problem if possible. At the same time, access must not be unreasonably delayed; we intend the fast-track process to provide quick relief to consumers where possible. We believe a period of five business days strikes a reasonable balance of these concerns, and we propose to specify a deadline of five business days from the time we forward the complaint to the respondent. We seek comment on this proposal.

137. We believe there will be instances where a five-business-day period (for example) may be enough time for a provider to assess a problem and begin to resolve it, but not long enough to complete the resolution. Where substantial efforts are under way, we believe it would be preferable to allow the fast-track process to continue, rather than beginning more resource-intensive traditional dispute resolution processes. Consistent with the nature of the fast-track process, we believe that under these circumstances, providers should be able provide us with an informal progress report and request additional time to continue their problem-solving efforts. At the same time, we do not want to encourage delay in providing access solutions. We therefore seek comment on how we might balance these interests in considering extension requests, and whether there should be an outside limit on the length of the fast-track period. We also seek comment on how to provide a mechanism for either party (or the Commission, for that matter) to terminate the fast-track phase and proceed to traditional dispute resolution processes, where it appears the fast-track process is not leading to a mutually satisfactory resolution.

²⁴⁸ For example, we would generally have to translate a Braille complaint or listen to an audio cassette before determining its appropriate handling.

138. By the end of the fast-track process, we expect the manufacturer or service provider informally to report to the Commission regarding whether the complainant has been provided the access sought, and if not, why it has not been provided. To put the circumstances of the particular accessibility complaint in context, it might also be appropriate for the respondent to report generally its procedures for ensuring product accessibility.²⁴⁹ In order to provide flexibility in this process, we propose that such reports be submitted by telephone call, electronic mail, facsimile or written correspondence. We seek comment on this proposal.

139. Because the most critical element of the fast-track process is the sharing of information between complainant and respondent, we want to ensure that complainants are fully informed of respondents' efforts. To this end, we propose to require that respondents provide copies of their reports to complainants. However, we also want to avoid formalizing and stifling the process, and are not sure how, for example, a telephonic report might be "copied." Thus, we seek comment on our proposal, and how to satisfy this requirement in the case of telephonic or other oral reports.

5. Commission Evaluation

140. At the end of the fast-track process, we propose that the Commission would consider both (1) the success of the respondent in providing an appropriate access solution, if possible, and (2) whether there appeared to be an underlying compliance problem, regardless of whether the particular complainant had been satisfied. That review would determine whether further action was required, as follows:

- If it appeared that the complainant's access problem had been satisfactorily solved (or that accessibility was not readily achievable) and there was no indication of an underlying problem of compliance with Section 255, the matter would be closed by the Commission.
- If it appeared that the complaint did not involve matters subject to Section 255, the matter would be closed.
- If it appeared that the complainant's access problem had been satisfactorily resolved but there was an indication of an underlying compliance problem, the Commission would undertake further dispute resolution efforts to determine the nature and magnitude of the problem, and take appropriate action. Evidence of an underlying compliance problem

²⁴⁹ See *infra* paras. 162-171 for a discussion of the kinds of efforts we would credit in resolving an accessibility dispute.

might consist, for example, of evidence that the respondent had solved the complainant's problem with another entity's products, or that the complaint reflected a pattern of not addressing accessibility issues until complaints were filed.

- If it appeared that the access problem had otherwise not been satisfactorily resolved, or if the respondent failed to submit a timely resolution report, the Commission would initiate further resolution processes.

141. We also propose that the Commission's evaluation of a resolution report not necessarily be limited to the respondent's initial report, but might also include additional information requested from the respondent or the complainant, discussions with accessibility experts from industry, disability groups, or the Access Board, or review of prior or other pending complaints involving the respondent. Further, to the extent a respondent's report asserted that accessibility was not readily achievable, we would evaluate the claim using the same factors we would use to evaluate such a claim during a second-phase dispute resolution proceeding.²⁵⁰ We seek comment on these proposals.

142. We propose that the Commission would communicate its determination to both the complainant and the respondent in writing. If the Commission concluded that no further action was warranted because the matter lies outside the scope of Section 255, we would anticipate including further information that would assist the consumer in seeking relief through other possible avenues. If the determination were to proceed to dispute resolution proceedings, we would include pertinent information relating to initiating those processes. We seek comment on this aspect of our fast-track proposal.

143. Finally, we note that if our fast-track determination were that the matter should be closed, we would anticipate including information that a complainant who disagreed with that determination and wished to pursue the complaint to second-phase dispute resolution could do so. We propose not to require any particular method for complainants to communicate their desire to continue to dispute resolution, but to leave the method to the complainant's discretion, in the same manner as the complaint filing procedures described above.²⁵¹ We seek comment.

²⁵⁰ See *infra* paras. 162-171.

²⁵¹ See *supra* para. 129.

C. Use of Traditional Dispute Resolution Processes

1. Generally; Informal Dispute Resolution Process

144. The Commission's ultimate responsibility under Section 255 stems from our statutory jurisdiction over complaints alleging non-compliance with the requirements of Section 255.²⁵² If questions of compliance remain at the end of the fast-track problem-solving phase, we will resolve them through one of the processes described below.

145. The Commission previously has established a general complaint procedure,²⁵³ though in many cases we have provided specific procedures for particular telecommunications services or subject areas.²⁵⁴ Our common carrier rules, for example, offer complainants the choice of either formal²⁵⁵ or informal²⁵⁶ resolution. Under the formal procedures, a complainant assumes the burden of prosecuting its complaint, much like a plaintiff in a civil judicial proceeding.²⁵⁷ The informal process is no less official than the formal, but does not require the complainant to bear responsibility for pursuing the fact-finding process. Under the informal process, the complainant's responsibilities generally end with the filing of a valid complaint, and the Commission uses its investigative tools²⁵⁸ to ascertain facts relating to the complaint.

²⁵² See Section 255(f) of the Communications Act, 47 U.S.C. § 255(f).

²⁵³ Section 1.41 of the Commission's Rules, 47 C.F.R. § 1.41, provides that: "Except where formal procedures are required under the provisions of this chapter, requests for action may be submitted informally. Requests should set forth clearly and concisely the facts relied upon, the relief sought, the statutory and/or regulatory provisions (if any) pursuant to which relief is sought, and the interest of the person submitting the request."

²⁵⁴ *E.g.*, 47 C.F.R. Part 1, Subpart E (common carriers); 47 C.F.R. Part 1, Subpart J (pole attachments); 47 C.F.R. § 1.1313(b) (environmental matters); 47 C.F.R. § 25.154 (satellite communications).

²⁵⁵ See Sections 1.711 and 1.720-1.736 of the Commission's Rules, 47 C.F.R. §§ 1.711, 1.720-1.736. These rules are set out in Appendix B hereto.

²⁵⁶ See Sections 1.711 through 1.718 of the Commission's Rules, 47 C.F.R. §§ 1.711-1.718. These rules are set out in Appendix B hereto.

²⁵⁷ The existing common carrier formal process is generally selected only when disputes are between parties willing to assume this burden, such as carriers or large customers.

²⁵⁸ The Commission's investigative tools are based on Section 4(i) of the Communications Act. 47 U.S.C. § 154(i). In practice, we rely heavily on written requests for information and documents, supplemented when necessary by equipment tests and on-site inspections.

146. The informal process provides us greater flexibility to tailor our procedural requirements to the particular matters at hand, since the absence of a statutory mandate for formal adjudication leaves us broad discretion to determine appropriate procedures.²⁵⁹ It thus has the considerable advantage of being less burdensome, both for parties and for the Commission. Yet complainants may sometimes prefer a formal process.

147. For those Section 255 complaints that are not resolved under fast-track procedures, we propose to resolve most under informal, investigative procedures, which we consider to be more efficient and flexible than formal procedures. To accommodate special circumstances,²⁶⁰ however, we also propose to establish formal adjudicatory procedures, to be employed only where the complainant requests such resolution and the Commission, in its discretion, permits the complainant to invoke the formal procedures. This procedural framework is similar in some respects to the framework applicable to common carrier complaints generally, except that under our proposal here, the Commission will apply formal procedures only when both the complainant and the Commission agree that this is appropriate. However, we believe the differences between typical common carrier complaints and Section 255 complaints require specifically tailored procedural rules for Section 255 complaints. Finally, we also propose to allow use of alternative dispute resolution procedures, in cases in which the Commission and all parties agree that such procedures are appropriate. We seek comment on this general procedural framework, and on the specific issues discussed below.

148. We propose not to impose a standing requirement for complaints under Section 255, whether by virtue of being a person with a disability, being a customer of the entity that is the subject of the complaint, or otherwise.²⁶¹ Section 255 itself does not impose such a requirement, and we believe the purposes of the statute are best served by not restricting complaints about accessibility problems. Moreover, we want to avoid burdening the complaint process with disputes relating to standing. We seek comment on this proposal.

149. We propose not to establish any time limit for the filing of a complaint under Section 255. We note, however, that Section 415(b) of the Communications Act limits the

²⁵⁹ See *Notice of Inquiry*, 11 FCC Rcd at 19155 (para. 7), citing Sections 4(i), 201, 303(b), and 303(r) of the Communications Act, 47 U.S.C. §§ 154(i), 201, 303(b), 303(r). See also Section 403 of the Communications Act, 47 U.S.C. § 403, which gives the Commission broad discretion to enforce Communications Act requirements even in the absence of a complaint.

²⁶⁰ For example, a complainant may wish to invoke formal complaint processes in order to expend its own resources in taking advantage of discovery, deposition, and other adjudicatory complaint rules in bringing a complaint against a covered entity under Section 255.

²⁶¹ "Standing" refers to a complainant's direct interest in the matter that is the subject of the complaint.

filing of certain claims against common carriers for money damages to “within two years from the time the cause of action accrues, and not after”²⁶² We seek comment on our proposal, on the relationship of Section 415 to our complaint authority in Section 255, and on the need for regulatory parity in this respect as between equipment manufacturers and service providers.

150. Given the likely complexity of many Section 255 complaints, we propose generally to allow 30 days for a respondent to answer a complaint, rather than the ten days provided for in our general pleading rules.²⁶³ We would, however, retain the discretion to specify a shorter or longer response date based upon the nature of the complaint and the totality of the circumstances. We propose to compute the deadline for the answer from the date of our written notice initiating the dispute resolution phase.²⁶⁴ We also propose to require that a respondent serve a copy of the answer on the complainant and on any other entity it implicates in its answer.²⁶⁵ We seek comment on these proposals.

151. Our general pleading rules provide that the person who filed the original pleading may reply to answers within five days after the time for filing answers has expired, and prohibit additional pleadings unless specifically requested or authorized by the Commission.²⁶⁶ Some service-specific rules make different provisions. We propose a 15-calendar-day reply period, subject to Commission adjustment in specific cases, and seek comment on what other provisions are appropriate for Section 255 proceedings.

152. We wish to ensure that our dispute resolution processes for Section 255 are as accessible as possible, so we propose not to require any particular format for submissions from complainants or respondents. However, because we believe that telephonic and other non-permanent oral presentations would not provide an appropriate record for decision-making, we propose to require that submissions be in a permanent format. We seek comment on these proposals, and on any other related issues.

²⁶² 47 U.S.C. § 415(b).

²⁶³ Section 1.45(a) of the Commission’s Rules, 47 C.F.R. § 1.45(a); *see also* Section 1.4 of the Commission’s Rules, 47 C.F.R. § 1.4.

²⁶⁴ *See supra* para. 142.

²⁶⁵ The filing date of the answer implicating another manufacturer or service provider would be considered the date of the complaint with respect to that entity, for purposes of both the fast-track and the dispute resolution processes.

²⁶⁶ Sections 1.45(b) and 1.45(c) of the Commission’s Rules, 47 C.F.R. §§ 1.45(b), 1.45(c).

153. Commission consideration of Section 255 complaints — both during the fast-track phase and during dispute resolution — may often involve evaluation of information which may be considered proprietary business data, including a company's resources available to achieve accessibility.²⁶⁷ We are sensitive to the need to protect the confidentiality of such information, and do not want to discourage its submission where relevant to our decision-making. Our rules already provide confidentiality for proprietary information in certain cases.²⁶⁸ We seek comment on whether, in the particular context of Section 255, our existing rules and procedures for review of confidentiality requests strike the best balance between reasonable expectations of confidentiality and open decision-making.

2. Formal Dispute Resolution Process

154. While we anticipate that most complaints not resolved under fast-track procedures will be adjudicated pursuant to the informal procedures discussed above, we propose to reserve the right to apply a more formal, adjudicatory mechanism in which complainants accept the primary burden of pursuing relevant facts, with attendant rights (such as the right of discovery) and obligations.²⁶⁹ We are not proposing specific language for Section 255 adjudicatory process rules, but we propose to model them on the common carrier formal complaint procedures set out in Sections 1.720 through 1.736 of the Commission's Rules,²⁷⁰ modified somewhat to take into account the inherent differences between traditional common carrier complaint issues and accessibility issues under Section 255. Specifically, we seek comment on the following variations.

- What showing (if any) should be required to support a request for formal resolution?
- How should our decision whether to grant a request for formal resolution take into account the possibility of multiple complaints involving the same equipment or service?

²⁶⁷ This issue is to some extent interrelated with our request for comment on whether a respondent should provide a copy of its fast-track report to the complainant. *See supra* para. 139.

²⁶⁸ *See, e.g.*, Sections 0.457(d), 0.457(g), and 0.459 of the Commission's Rules, 47 C.F.R. §§ 0.457(d), 0.457(g), 0.459. *See also* Section 1.731 of the Commission's Rules, 47 C.F.R. § 1.731. *See also* Examination of Current Policy Concerning Treatment of Confidential Information Submitted to the Commission, GC Docket No. 96-55, Notice of Inquiry and Notice of Proposed Rulemaking, 11 FCC Rcd 12406 (1996) (initiating a proceeding to analyze Commission practices and policies concerning treatment of competitively sensitive information that has been provided to the Commission).

²⁶⁹ As noted previously, we would not impose formal dispute resolution procedures on a complainant that had not requested them. *See supra* para. 147.

²⁷⁰ 47 C.F.R. §§ 1.720-1.736. *See Appendix B hereto.*

- The existing common carrier regulations provide that a complainant can request formal resolution either as an initial matter, or when the complainant is not satisfied by the carrier's response and the Commission's disposition of the complaint informally. In the latter case, the formal complaint is deemed to relate back to the filing date of the original complaint.²⁷¹ For complaints under Section 255, we have proposed that complainants need submit their complaints only once, with no requirement for re-filing at the end of an informal process as a condition for moving to formal dispute resolution. We seek comment on whether we should establish a deadline for a complainant desiring formal or alternative dispute resolution to make its request — perhaps in the initial complaint filing, or at some point in early stages of the dispute resolution phase — or whether we should permit such a request at any time. In any event, upon receipt of such a request, the Commission would determine what procedures will be followed (*i.e.*, informal, formal, or alternative procedures) based in part on the stated preferences of the parties, with the agreement of the parties, as necessary.²⁷²
- Under recent amendments to the rules governing complaints against common carriers, complaints and responsive pleadings subject to formal dispute resolution processes are now required to contain full statements of relevant, material facts with supporting documentation.²⁷³ We tentatively conclude that this requirement should apply to complaints and any other pleadings filed pursuant to Section 255, regardless of the format chosen by complainant. We seek comment on how such a requirement should be incorporated into the mechanism for initiating a formal dispute resolution process under Section 255.
- The existing common carrier regulations generally limit complaints to individual respondents, and include no specific provision for joinder of defendants.²⁷⁴ For Section 255 complaints, we propose to recognize the possible involvement of service providers and equipment manufacturers by provisions requiring that motions for joinder specify

²⁷¹ Sections 1.717 and 1.718 of the Commission's Rules, 47 C.F.R. §§ 1.717, 1.718.

²⁷² See *supra* para. 147.

²⁷³ See 47 C.F.R. § 1.721(a)(5); Implementation of the Telecommunications Act of 1996: Amendment of Rules Governing Procedures to Be Followed When Formal Complaints Are Filed Against Common Carriers, CC Docket No. 96-238, Report and Order, 12 FCC Rcd 22497, 22534 (paras. 81-82) (1997) (*Complaint Streamlining Order*). In the *Complaint Streamlining Order*, the Commission revised its Section 208 formal complaint resolution procedures to implement the 1996 Act requirement for the accelerated resolution of certain complaints, and otherwise to improve procedures governing complaints of unlawful conduct by telecommunications carriers.

²⁷⁴ Section 1.735(a) of the Commission's Rules, 47 C.F.R. § 1.735(a).

either that the counterpart covered entity is in part responsible for allegedly deficient accessibility, or that an effective solution to the alleged deficiency requires review of both service and equipment providers' involvement in the telecommunications capability at issue.

- The existing common carrier regulations provide for joinder of complainants and causes of action when the actions that are the subject of the complaint involve the same defendant, and “substantially the same” facts and alleged violation of the Communications Act.²⁷⁵ In the case of Section 255 complaints, we propose no restriction on the submission of joint complaints, or of complaints involving different accessibility aspects of the same products. Further, complainants would be free to request joinder by the Commission, after investigative review, with the initial complaints. However, we propose to reserve the right to separate complaints where we believe it would expedite dispute resolution or otherwise better serve the public interest.

155. We do not propose to require a filing fee for informal resolution of complaints, or for formal resolution of complaints directed at equipment manufacturers and service providers that are not common carriers. Under the Communications Act, however, we are required to impose a filing fee for formal complaints directed against common carriers,²⁷⁶ unless we can show that waiving the fee would be in the public interest.²⁷⁷ We seek comment on the circumstances under which we should waive or lower this fee, and on the following questions:

- Is there any basis for requiring a filing fee for Section 255 complaints against manufacturers or service providers who are not common carriers, requesting formal dispute resolution? If so, *should* we require a filing fee?
- How should we deal with fees where an initial complaint does not require a filing fee, but subsequent developments (*e.g.*, a subsequent request for formal resolution, or the subsequent addition of a common carrier respondent) trigger a fee?
- How should we deal with filing fees in cases where we subsequently deny the request for formal dispute resolution?

²⁷⁵ Section 1.723 of the Commission's Rules, 47 C.F.R. § 1.723.

²⁷⁶ Section 8(g) of the Communications Act, 47 U.S.C. § 158(g). This fee is presently \$150. Section 1.1105 of the Commission's Rules, 47 C.F.R. § 1.1105.

²⁷⁷ Section 8(d)(2) of the Communications Act, 47 U.S.C. § 158(d)(2).

156. We disagree with commenters who assert that Section 255 complaints must be resolved within the five-month deadline established in Section 208(b).²⁷⁸ In the *Complaint Streamlining Order*, the Commission concluded that the deadline specified in Section 208(b) applies only to complaints relating to the lawfulness of those matters required to be in tariffs.²⁷⁹ Moreover, because we conclude that Section 255 establishes Commission authority to promulgate complaint procedures, separate from our authority under Section 208, we also conclude that any time limits for resolving complaints under Section 208 do not apply.

3. Alternative Dispute Resolution Process

157. Finally, we propose to make available alternative dispute resolution (ADR) procedures such as arbitration, conciliation, facilitation, mediation, settlement negotiation, and other consensual methods of dispute resolution for resolving Section 255 complaints not resolved under the fast-track process. The Administrative Dispute Resolution Act (ADRA)²⁸⁰ encourages use of ADR processes when the parties involved consent to their use and where, as here, such practice is consistent with statutory mandates. At the same time, Congress emphasized that ADR procedures are not necessarily appropriate in every case, including specifically:

- Precedent setting cases,
- Cases bearing on significant new policy questions,
- Cases where maintaining established policies is of special importance,
- Cases significantly affecting persons or organizations who are not parties to the proceeding,
- Cases where a formal record is essential, and

²⁷⁸ See 47 U.S.C. § 208(b)(1).

²⁷⁹ See *Complaint Streamlining Order*, 12 FCC Rcd at 22513-14 (para. 37). Specifically, the Commission noted that the deadline applies to any complaint about the lawfulness of matters included in tariffs filed with the Commission, and those matters that would have been included in tariffs but for the Commission's forbearance from tariff regulation. *Id.*

²⁸⁰ Pub. L. 101-552, 104 Stat. 2736 (1990), codified at 5 U.S.C. §§ 571-584. The ADRA was reauthorized and amended by the Administrative Dispute Resolution Act of 1996, Pub. L. 104-320, 110 Stat. 3870 (1996).

- Cases where the agency must maintain continuing jurisdiction with authority to alter its disposition in light of changed circumstances.²⁸¹

158. Following enactment of the ADRA, the Commission adopted a rule providing for ADR processes,²⁸² adopted an ADR Initial Policy Statement that supports and encourages the use of ADR procedures,²⁸³ and took other steps to foster the use of ADR mechanisms in both rulemaking and adjudicatory situations. Since then we have employed ADR in both contexts, and continue to evaluate how to encourage its wider use. We tentatively conclude that ADR could be an effective tool for dealing with conflicts arising under Section 255, while avoiding the expense and the delay of adversarial proceedings. First, accessibility complaints could involve complex questions of technology, economics, and medicine, which outside experts might be able to analyze more efficiently than the Commission. Further, ADR could foster settlement by providing disputants with greater incentives to move from adversarial positions to cooperation. We therefore propose to use ADR as the third tool in our Section 255 dispute resolution structure, subject to the agreement of all parties, and subject to our discretion to grant or deny requests for ADR.

159. We seek comment on these views generally, and on the following specific questions:

- Should we establish a deadline for parties desiring alternative dispute resolution to make their request, or should we permit such a request at any time?²⁸⁴
- More generally, are there circumstances where we should permit parties to move from one mechanism to another? If so, what limits should we impose to ensure the efficient resolution of complaints?

²⁸¹ 5 U.S.C. § 582(b).

²⁸² Section 1.18 of the Commission's Rules, 47 C.F.R. § 1.18. *See Complaint Streamlining Order.*

²⁸³ Use of Alternative Dispute Resolution Procedures in Commission Proceedings and Proceedings in which the Commission is a Party, GC Docket No. 91-119, Initial Policy Statement and Order, 6 FCC Rcd 5669 (1991) (*ADR Initial Policy Statement*). *See also* Use of Alternative Dispute Resolution Procedures in Commission Proceedings and Proceedings in which the Commission is a Party, GC Docket No. 91-119, Memorandum Opinion and Order, 7 FCC Rcd 4679 (1992).

²⁸⁴ *See supra* para. 154.

- Should we prescribe a particular method or methods for selecting neutral parties who will have the responsibility of overseeing the ADR process,²⁸⁵ or should we leave that to be worked out by the disputants?
- The Commission has adopted broad rules requiring Commission activities to be accessible to people with disabilities pursuant to Section 504 of the Rehabilitation Act of 1973.²⁸⁶ Are any special measures needed to ensure that ADR processes are similarly accessible to consumers with disabilities? What provisions might be made to ensure the availability of interpreters, alternative-format materials, and other similar resources, as necessary?
- What role should the Commission take during a Section 255 ADR process? How should the Commission enforce a decision reached through ADR?
- Section 1.18 of the Commission's Rules and the *ADR Initial Policy Statement* provide generally for ADR. Are they sufficient for purposes of Section 255 ADR, or are additional requirements needed? In particular, should we make special provisions to ensure that ADR processes are accessible to all parties?

160. Apart from their role in an ADR process, there may be other ways in which neutral parties with special expertise in accessibility matters could help us resolve complaints. Outside experts and committees can perform a valuable consultative function, helping businesses and consumers to develop accessibility solutions as telecommunications products and services are being developed. For example, in the preamble to its Final Rules, the Access Board recognizes the Association of Accessibility Engineering Specialists (AAES), formed by the National Association of Radio and Telecommunications Engineers to train and eventually certify accessibility specialists or engineers.²⁸⁷ The AAES is expected to sponsor conferences and workshops, disseminate information, and suggest course curricula for future training and certification. We seek comment on the role that groups such as the AAES could serve to help speed resolution of complaints.

161. Other groups with accessibility expertise may well develop out of the process by which Section 255 is being implemented and as accessibility efforts become more widespread.

²⁸⁵ The ADRA defines a neutral as "an individual who, with respect to an issue in controversy, functions specifically to aid the parties in resolving the controversy." 5 U.S.C. § 571(9). See *ADR Initial Policy Statement*, 6 FCC Rcd at 5671 (para. 21).

²⁸⁶ 47 C.F.R. §§ 1.1801-1.870; 29 U.S.C. § 794.

²⁸⁷ *Access Board Order*, 63 Fed. Reg. at 5609.

Similarly, the *TAAC Report* suggests that “[t]he FCC may at its discretion refer inquiries and complaints to a joint industry/disability advisory panel for opinion.”²⁸⁸ Thus, we might rely on outside experts to gather and evaluate data needed to resolve accessibility questions. We believe such a role could be useful, and seek comment on this view and on what provisions we might make for it. Would such quasi-ADR processes be permissible under the ADRA absent consent of the disputants?²⁸⁹

4. Defenses to Complaints

162. In response to an accessibility complaint²⁹⁰ or an investigation conducted on the Commission’s initiative without a prior complaint,²⁹¹ it seems likely that the most common defenses mounted by a manufacturer or service provider would involve a claim that:

- the product in question lies beyond the scope of Section 255,
- the product in question is in fact accessible, or
- accessibility is not readily achievable.

The first two defenses are relatively straightforward, although we recognize that weighing such claims may present difficult factual or legal questions. However, as our discussion of the term “readily achievable” suggests,²⁹² claims of the third kind are likely to present formidable difficulties to all concerned. We believe it would be useful to set out for comment some tentative views on use of a “readily achievable” defense.

²⁸⁸ *TAAC Report*, § 6.7.5, at 33.

²⁸⁹ “An agency may use a dispute resolution proceeding for the resolution of an issue in controversy that relates to an administrative program, if the parties agree to such proceeding.” 5 U.S.C. § 582(a). “[D]ispute resolution proceeding’ means any process in which an alternative means of dispute resolution is used to resolve an issue in controversy in which a neutral is appointed and specified parties participate.” 5 U.S.C. § 581(6).

²⁹⁰ We note again that we are using the term “accessible” as a shorthand reference to the phrases “accessible to and usable by” and “compatible with,” as appropriate. *See supra* note 2.

²⁹¹ *See* Section 403 of the Communications Act, 47 U.S.C. § 403.

²⁹² *See supra* paras. 94-123.