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DOCKET FILE COPY ORIGINAL

June 29, 1998

Office of the Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

Re: WT Docket No. 96-198

Dear Office of the Secretary:

Enclosed for filing is the Original and nine copies of the Comments of the Universal Service Alliance Regarding the Notice of Proposed Rulemaking in the above docket.

Sincerely,

Carl K. Oshiro
Attorney for Universal Service Alliance

No. of Copies rec'd 0+9
List A B C D E

Before the Federal Communications Commission

Washington, D.C.

In the Matter of Implementation of Section 255 of the Telecommunications Act of 1996 Access to Telecommunications Services, Telecommunications Equipment, and Customer Premises Equipment by Persons with Disabilities	)))))))))	WT Docket 96-198

Comments of Universal Service Alliance

Regarding Notice of Proposed Rulemaking

Introduction

Universal Service Alliance (USA)[1] applauds the Federal Communications Commission (Commission) for issuing proposed rules to implement Section 255

[1] The Universal Service Alliance is an alliance consisting of diverse organizations and community leaders serving disabled, low income, elderly and rural consumers throughout California. USA's members include the following organizations and individuals: Access Center, Access to Software for All People (ASAP), Advocates for Consumer Equity (ACE), Alliance for Technology Access (ATA), California Association of Nonprofits, California Latino Civil Rights Network, California Small Business Association, California/Nevada Community Action Association, Center for Accessible Technology, Children's Collective, Inc., CompuMentor, Computer Access Center, Consumers First, Digital Queers, Electronic Frontier Foundation, FAME Renaissance, Korean Youth Center, Los Angeles Urban League, Los Angeles Urban League Business & Training Center, MAAC Project, Radio Bilingue, Support Center for Nonprofit Management, World Institute on Disability, Francois Bar (Professor, Department of Communications, Stanford University), Doug Braley (Horizons Foundation), Elliot Brownlee (Professor, Department of History, UC Santa Barbara), Cheri Bryant (ACLU, Northern California), Susan Estrada (Aldea Communications, Inc.), J Craig Fong (Attorney & Community Advocate), Pastor Herrera (Los Angeles County Department of Consumer Affairs), Clyde Hostetter (State Legislative Utilities Subcommittee, AARP), Marvalene Hughes (President, California State University, Stanislaus), June Isaacson Kailes (Disability Policy Consultant), Linda Hamilton Krieger (Professor, Boalt Law School, UC Berkeley), Ibrahim Naeem (Coalition for a Nonviolent City), Helen Nelson

of the Telecommunications Act of 1996. When Congress enacted the Americans with Disabilities Act of 1990 (ADA), it expressly recognized that our society has tended to isolate and segregate individuals with disabilities by discriminating against them in such critical areas as employment, public accommodations, access to public services and communications and that individuals with disabilities continue to encounter various forms of discrimination including the discriminatory effects of architectural, transportation and communication barriers. (42 USC Section 12101(2)(3)(5).)

In enacting Section 255, Congress drew on the ADA requiring manufacturers of telecommunications equipment and providers of telecommunications services to make their products and services accessible to persons with disabilities where readily achievable. To this end, Section 255 gives the Architectural and Transportation Barriers Compliance Board (Access Board) the lead responsibility for developing guidelines for telecommunications equipment and Customer Premises Equipment (CPE) and this Commission exclusive jurisdiction with respect to any complaint brought under the section. Like the ADA, the purpose of Section 255 is to "assure equality of opportunity, full

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(Consumer Research Foundation), Barbara O'Connor (Professor, Communications Studies, California State University, Sacramento), Jennifer C. Pizer (Lambda Legal Defense & Education Fund), Toby Rothschild (Legal Aid Foundation of Long Beach), Peggy Saika (Asian Pacific Environment Network) Don Vial (former President, California Public Utilities Commission). Please note that the institutions and organizations following each individual are for identification purposes only.

participation, independent living, and economic self-sufficiency" for individuals with disabilities. (42 U.S.C. Section 120101(a)(8).)[2]

There are nearly 50 million people with disabilities in this country and this number is increasing as our population grows older. They have a tremendous stake in the outcome of this proceeding. At the most basic level, telecommunications enables a person to call family members, friends and for help in emergency situations. Increasingly, it is also the gateway to education, jobs, commerce, health care, culture and recreation in our society.

If telecommunications equipment and services are designed with the needs of all consumers in mind, we will open up the whole world for adults and children with disabilities. If telecommunications products and services are not universally designed, we will isolate them even more than they are today. Therefore, we strongly urge the Commission to fully implement Section 255 and offer the following comments in response to the Notice of Proposed Rulemaking (NPRM).

I. The Commission Should Adopt the Access Board's Guidelines.

Section 255(e) provides that the Access Board "shall develop guidelines for accessibility of telecommunications equipment and customer premises

[2] Section 12101(a)(8) states in its entirety "[T]he Nation's proper goals regarding individuals with disabilities are to assure equality of opportunity, full participation, independent living, and economic self-sufficiency for such individuals;" In interpreting the ADA, courts have stated "It is a familiar canon of statutory construction that remedial legislation such as the ADA should be construed broadly to effectuate its purposes. The fundamental purpose of the ADA is to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." *Arnold v. United Parcel Service*, 136 F.3d 854, 861 (1st Cir. 1998) (citations omitted).

equipment in conjunction with the Commission" and "shall review and update the guidelines periodically." Following the enactment of the Telecommunications Act of 1996, the Access Board commenced an extensive process including the convening of a Telecommunications Access Advisory Panel consisting of representatives from equipment manufacturers, software companies, telecommunications providers, organizations representing persons with disabilities and other persons interested in telecommunications accessibility. Based on its review of the Advisory Panel's report and comments from interested persons, the Access Board adopted its Guidelines for Accessibility of Telecommunications Equipment (Guidelines) [3] The Guidelines require manufacturers to:

- Evaluate the accessibility, usability and compatibility of telecommunications equipment and customer premises equipment (Section 1193.23);
- Incorporate such evaluation throughout the design, development and fabrication stages of their products as early as possible (Section 1193.23);
- Ensure access to information and documentation provided to customers (Section 1193.33);
- Pass through industry-standard codes, translation protocols, formats and other information needed to provide telecommunications in an accessible format (Section 1193.37);
- Avoid changes which decrease the accessibility, usability or compatibility of their equipment (Section 1193.39);
- Meet certain performance standards to promote accessibility, usability and compatibility (Section 1193.41 through 1193.51).

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[3] The Access Board's Guidelines are codified at 36 C.F.R. Part 1193.

These requirements apply to "new products and existing products which undergo substantial change or upgrade, or for which new releases are distributed." They do not apply to "minor or insubstantial changes to existing products that do not affect functionality." (Section 1193.2.)

USA believes that these measures are essential to the implementation of Section 255. We strongly urge the Commission to adopt the Access Board's Guidelines and extend the Guidelines to telecommunications services as well as telecommunications equipment and customer premises equipment. In addition, the Commission should require equipment manufacturers and service providers to:

- Include individuals with disabilities in target populations when conducting market research;
- Include individuals with disabilities in product design, testing, pilot demonstrations and pilot trials;
- Make reasonable efforts to validate new access solutions through testing with individuals with disabilities or consultation with disability-related organizations;

These additional measures will help to ensure that the needs of individuals with disabilities are considered at all stages of the development process. Currently, these measures are optional under the NPRM (NPRM at Para. 164.)

We further urge the Commission not to differentiate between hardware, and software in its final regulations. From the consumer's standpoint, there is no difference in whether a telecommunications function is accomplished through hardware, software, or a combination thereof For this reason, the Access

Board's Guidelines "do not differentiate between hardware, firmware or software implementations of a product's functions or features, nor do they differentiate between functions and features built into the product and those that may be provided from a remote server over the network." (Access Board Order, 63 Fed. Reg. at 5613.) They are all equally subject to the requirements of Section 255.

The NPRM proposes that software used with CPE would be subject to Section 255 depending on how the software is marketed. If a manufacturer markets the software with a CPE product, the software would be subject to Section 255. If the software were marketed separately from the CPE product, the software would not be subject to Section 255. (NPRM at para. 56.) Under this proposal, if a manufacturer bundles a modem with communications software, the manufacturer would be required to make the software accessible if readily achievable. If the same communications software were marketed separately from the modem, the manufacturer would not be required to make the software accessible.

From the standpoint of the consumer, this is an absurd result. If the software does not meet the requirements of Section 255, the disabled consumer is denied access to the telecommunications function regardless of whether the inaccessible software is marketed together or separately from the CPE.

The proposal would also complicate enforcement of Section 255 since the Commission would have to examine details regarding how software was marketed in addition to its functionality—(e.g., Was it truly marketed separately? Would joint advertising, rebates, tie-ins and other promotions trigger Section

255? Could an equipment manufacturer recommend that its CPE be used with particular software without triggering Section 255? Could a software manufacturer advertise that its software is specially designed for a specific CPE without triggering Section 255? etc.) Having to examine and resolve these marketing related questions will require additional resources and make it more difficult for the Commission to address complaints in a timely manner. The proposal would also create an incentive to avoid bundling software with CPE resulting in less convenience for consumers.

II. The Commission Should Not Exempt Information Services From Section 255.

USA strongly opposes the NPRM's proposal to exempt information services from the requirements of Section 255. (NPRM at para. 42.) This would include services such as voice mail, electronic mail, interactive voice response, gateways to online services and other advanced services that hold the greatest promise for persons with disabilities.

While it may be appropriate for the Commission to distinguish between basic telecommunications services and information services in some contexts, it is inappropriate to do so in implementing Section 255. As discussed above, like the Americans with Disabilities Act on which it is based, Section 255 was enacted to "assure equality of opportunity, full participation, independent living, and economic self-sufficiency" for individuals with disabilities. (42 U.S.C. Section 12101(a)(8).) Like the ADA, Section 255 is remedial legislation that should be broadly construed to effectuate its purpose.

Exempting information services from Section 255 would severely limit access by disabled customers to a narrow set of increasingly outdated telecommunications services. In short, it would isolate and discriminate against individuals with disabilities, which is contrary to our national goal. As Chairman Kennard recently stated:

> "We cannot ignore the needs of those with disabilities. We cannot create a society that leaves out the 26 million Americans with hearing disabilities or the nine million with sight disabilities or the 2.5 million with speech disabilities.
>
> It's just too much a part of America.
>
> It's too important a segment of the American family.
>
> As we look into the future, we must strive to ensure that advances in technology benefit everyone."

(Remarks by Chairman William E. Kennard to American Foundation for the Blind and American Council for the Blind, March 8, 1998, at p. 2.) In light of this goal, the Commission should interpret the term "telecommunications services" broadly to include advanced services.

III. The Commission Should Modify the NPRM's Definition of "Readily Achievable."

Section 255 requires that equipment manufacturers and service providers make their products and services "accessible to and usable by individuals with disabilities, if readily achievable." It further states "readily achievable" shall have the same meaning as under the ADA. (Section 255(a)(2).)

The ADA defines "readily achievable" to mean "easily accomplishable and able to be carried out without much difficulty or expense" and specifies four factors to be considered in making this determination: the nature and cost of making a facility accessible, the financial resources of the facility, the financial resources of the covered entity, and type of operations of the covered entity. (42 U.S.C. Section 12181(9).) Guided by these four ADA factors, the NRPM proposes to consider three factors specific to telecommunications: feasibility, expense and practicality. (NPRM at Para. 100.)

While the telecommunications factors are not objectionable in themselves, when elaborating on these factors, the NPRM injects concepts that are anathema to the ADA. In particular, the NPRM proposes 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 the offerings, in terms of both price and features." (NPRM at para. 113.) In a related vein, the NPRM proposes to consider the "extent to which an equipment manufacturer or service provider is likely to recover the costs of increased accessibility." (Para. 114.)

These are impermissible considerations under the ADA and should not be considered under Section 255. A private entity would ***not*** be excused from complying with the ADA on the grounds that there is no market for making its accommodations accessible. Nor would a private entity be excused from

complying with the ADA on the grounds that it would not recover the cost of making its accommodations accessible. Indeed, the reason Congress enacted the ADA was that market considerations and cost recovery were not sufficient incentives to cause private entities to make their facilities accessible even when such access was readily achievable. If these considerations were allowed to excuse compliance with these laws, individuals with disabilities would continue to be denied access to public accommodations The same is true for Section 255 which is based on the ADA.

We also question how the Commission whose core competencies currently do not include assessing the market for accessible products and services would objectively determine: the potential market for specific products and services, whether accessibility features would make a specific product or service more or less attractive to the general consumer market, how well a more accessible product or service would compete with other offerings in terms of both price and features, and the extent to which an equipment provider or service provider is likely to recover the costs of increased accessibility.[4] While it is relatively easy to identify and document the costs associated with making a product or service accessible, in many instances, the wider market for that product or service will be harder to determine (For example, would the Commission have been able to anticipate and measure the broader market potential for volume amplification on telephones and silent pagers which were initially developed for consumers with disabilities but have made life easier and

[4] The NPRM proposes that the Commission will routinely examine and presumably answer these and other difficult issues as part of its readily achievable analysis.

more convenient for all consumers?) Unless the Commission is able to discern and measure the broader market potential for accessible products and services, its analysis will focus only on the short term costs of making those products and services accessible.

USA agrees with the NPRM's tentative conclusion that a "general grace period for compliance is not warranted." (NPRM at para. 121.) In addition to the reasons cited by the NPRM, a general grace period would delay the benefits of Section 255 to individuals with disabilities. A grace period would also favor manufacturers and providers that have not made any effort to make their products and services accessible by giving them additional time to catch up with manufacturers and providers that have been leaders in universal design. The Commission should allow the latter to retain their competitive advantage.

IV. The Commission Should Not Use Affordability as a Criteria in Determining Which Peripheral Devices and Specialized Devices are "Commonly Used" by Persons with Disabilities.

Where accessibility is not readily achievable, Section 255(d) requires that telecommunications equipment and services be compatible with "existing peripheral devices or specialized devices commonly used by individuals with disabilities to achieve access. . .." USA is not opposed to the NPRM's suggestion that the Commission establish a rebuttable presumption that a device is commonly used when a state has incorporated the device into a statewide equipment distribution program for persons with disabilities. However, this alone is not sufficient to meet the requirements of Section 255. While state distribution

programs perform a valuable service, many programs focus only on a specific type of disability (e.g., hearing loss). In addition, these programs include only the most commonly used devices and it can take years to add a device to the program even after its usefulness to disabled customers has been widely recognized.

USA supports the NPRM's suggestion of establishing a listing (or clearinghouse) of commonly used devices. Such a listing or clearinghouse should draw on the extensive knowledge and experience of the disability community, be regularly reviewed and updated, and made widely available to industry, government and consumers. (For example, the list of commonly used devices should be posted on the Commission's website.)

USA opposes the NRPM's suggestion that the Commission consider the cost of peripheral devices in deciding whether they are commonly used by persons with disabilities. In considering the cost of a device, the Commission would implicitly be judging its value to persons with disabilities. (For example, an individual requiring a screenreader and voice synthesizer costing $1,000 to $1,500 might decide that it is a good value because it enables him or her to attend college, have a career or live independently. Looking at the cost alone, a regulator might deem it "unaffordable." Video conferencing is another example of a technology that allows for both sign language interpreting as well as TTY messaging among the participants. This capacity to communicate among hearing and non-hearing communicators makes this technology extremely important although it might be deemed "too expensive" by someone not aware of

its value.[5]) We believe that these decisions are best left to individual consumers not regulators.

V. The Commission Should Modify its Proposed Complaint Procedure.

USA agrees that any complaint procedure established to enforce Section 255 should be (a) responsive to consumers and (b) not impose substantial burden on parties or the Commission. We would add a third principle: The process must be one that is understandable and fair to consumers.

With regard to the "fast-track" process, we commend the Commission for proposing a process that: allows consumers to submit their complaints by any accessible means (NPRM at para. 129), anticipates a central Commission contact point for all Section 255 inquiries and complaints (Para. 130), proposes to make available a complaint form but not to require its use (Para. 131), sets strict limits for forwarding complaints to manufacturers and providers and for return of an action report (Para. 135-136), requires sharing of information with the complainant (Para. 139) and calls for a Commission evaluation and written determination at the end of the process (Para. 140). To strengthen this process, USA recommends that the Commission:

- Require manufacturers and providers to establish a single point of contact in their companies for accessibility matters including complaints under Section 255;
- Limit manufacturers and providers to a single request for an extension of time and impose a penalty for a frivolous request for an extension;

[5] See "Breaking the Sound Barrier: Videophones Let the Deal Communicate in Whole New Way," ***San Francisco Chronicle,*** June 9, 1998.

- Establish a time limit of 30 days for the fast track process which may be extended only with the consent of all parties;

- Specify that ***all*** information provided to the Commission by the manufacture or provider shall be furnished at the same time to the complainant;

- Require that the Commission contact the complainant to determine whether the matter had been resolved to his or her satisfaction before closing the matter.

- Require that the complainant have access to all information considered by the Commission in the fast track process including any discussions with accessibility experts from industry, disability groups, or the Access Board, or prior or other pending complaints involving the respondent.

Regarding the second stage, the consumer should have the right to file a formal or informal complaint. While many consumers might choose the informal procedures for the reasons cited in the NPRM, the Commission should not curtail a consumer's right to the formal complaint process if that is what he or she chooses. There should be no filing fees for informal or formal complaints. (To promote compliance with Section 255, the Commission should waive the $150 filing fee for formal complaints directed against common carriers.) We agree that the Commission should not establish any time limit for the filing of a complaint. The Commission should clarify how and when consumers may proceed from the fast track process to the (formal or informal) complaint process and how and when parties may invoke and terminate alternative dispute resolution procedures.

VI. The FCC has the Authority to Adopt Regulations to Implement Section 255.

USA agrees that the Commission has the authority to adopt rules to

implement Section 255. Section 4 of the Communications Act provides "The Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act." Courts have repeatedly stated that this provision gives the Commission expansive authority to adopt rules to carry out the purposes of the Act. There is nothing in Section 255 or the Telecommunications Act of 1996 that repeals the Commission's broad rulemaking authority. To the contrary, Section 255(f) explicitly gives the Commission jurisdiction to "enforce any requirement of this section *or any regulation thereunder.*"

VII. Technology Has Immense Power to Improve the Lives of People with Disabilities.

In this proceeding, the Commission will be asked to address a number of legal and technical issues. However, in addressing these questions, we ask that the Commission not lose sight of the immense power technology has to improve the lives of people with disabilities. In preparing these comments, we asked USA members to send us examples of how technology is helping people learn, work and be part of our society. The following are some of the responses that we received:

- Michael is 27 years old and has had cerebral palsy since birth. He cannot use his hands and his speech is extremely difficult for those who are unfamiliar with him. Michael uses a Head Mouse (a small magnetic dot on his nose) to use a computer and a Speech Enhancer to clarify his speech.

Recently, he received his Bachelor's degree in 3-D experimental computer animation from the California Institute for the Arts. Michael is taking a short break after graduation but already has job interviews lined up with DreamWorks and other firms that are interested in his talents.

- Jason who has had cerebral palsy since birth cannot speak at all. Using a Litewriter to communicate, he has a Bachelor's Degree in Office Administration and is on the staff of a nonprofit organization where his duties include maintaining a webpage, publishing a newsletter, updating the organization's database, and making presentations to large numbers of people. Jason is also the President of the Unrecables, a social organization whose activities include snow skiing, water-skiing and other sports.

- Chris is 22 years old and uses a Liberator to communicate and a motorized wheelchair for mobility. Chris wrote us that before she had this technology she was in a special program where she watched movies, looked at magazines and was on the computer about 45 minutes a day. "I was bored out of my mind because I had nothing to do." For the past four years, she has been in regular school programs. Chris writes, "Technology changed my life and it is still changing my life. ... I can do and be whatever I want too. I just may be a little slower."

- Dave is 29 years old, was born in Chile and moved the U.S. when he was 14

years old. He was born with cerebral palsy and is hard of hearing. Dave uses a hearing aid and an extra attachment to control the volume on the telephone at work where he conducts a Spanish language outreach program for people with disabilities.

- Due to cerebral palsy and low vision, Marcy is able to use the telephone for the first time through her computer and adapted keyboard. She can now call family members, work as an administrative assistant making regular phone calls, and order items through mail order catalogs. Although use of the phone has improved her quality of life, she is limited to the most basic phone use. Thus, when she encounters choice making (e.g., dial 1 to reach one person, dial 2 for another, etc.) she is not able to complete her calls. This makes her use of the phone extremely limited. Marcy is interested but as yet unable to use the Internet for communication and research. She is also stuck when she encounters voice mail choices. She is looking forward to the day when products are designed more accessibly

- Dr. Robert Segalman is a researcher with the Department of Rehabilitation. He has a speech disability and uses speech-to-speech where he uses an 800 number to call a specially trained operator with excellent hearings. The operator makes a three-way call to a person Dr. Segalman wants to reach and repeats exactly what he says. Dr. Segalman told us "I have cerebral palsy and without speech to-speech, my wife had to do all of the family

business that required telephone use. Now I can order my own pizza, arrange for car repairs and call the IRS myself."

Technology can empower people with disabilities but only if they are able to use it. People with vision loss cannot use products that rely only on visual displays. People with hearing loss cannot use products or services that provide only auditory cues. Many people who have disabilities that limit their mobility or dexterity cannot use products that require users to manipulate intricate controls. Many people with speech, motor or cognitive disabilities cannot use services because they "time out" too quickly. By fully implementing Section 255, this Commission will help to ensure that telecommunications equipment manufacturers and telecommunications service providers make their products and services flexible enough to be used by people with disabilities. Michael, Jason, Chris, Dave, Marcy and Dr. Segalman have shown us what can happen if the Commission carries out this important statute.

Conclusion

For the reasons set forth above, USA urges the Commission to fully implement Section 255 of the Telecommunications Act of 1996.

Dated: June 29, 1998

Respectfully submitted,

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