Proceeding: IMPLEMENTATION OF SECTION 255 OF THE TELECOMMUNICATIONS AC Record 1 of 1

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Before the
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Washington, D.C.

In the Matter of	)	
	)	
Implementation of Section 255 of the Telecommunications Act of 1996	)	
	)	WT Docket No. 96-198
Access to Telecommunications Services, Telecommunications Equipment, and Customer Premises Equipment By Persons with Disabilities	)	

COMMENTS OF

THE NATIONAL ASSOCIATION OF THE DEAF

I. Introduction

The National Association of the Deaf (NAD) submits these comments in response to the Federal Communication Commission's (FCC's or Commission's) Notice of Proposed Rulemaking (NPRM) regarding access to telecommunications services, telecommunications equipment, and customer premises equipment (CPE) by persons with disabilities, WT Docket No. 96-198 (released April 20, 1998). The NAD applauds the FCC for having taken this major step toward achieving the effective implementation of Section 255 of the Telecommunications Act of 1996.

The NAD is the nation's largest organization safeguarding the accessibility and civil rights of 28 million deaf and hard of hearing Americans in education, employment, health care, and telecommunications. The NAD is a private, non-profit federation of 51 state association affiliates including the District of Columbia, organizational affiliates, and direct members. The NAD seeks to assure a comprehensive, coordinated system of services that is accessible to

Americans who are deaf and hard of hearing, enabling them to achieve their maximum potential through increased independence, productivity, and integration.

As our society moves toward increasingly advanced telecommunications tools, deaf and hard of hearing people remain unable to access many devices and services that continue to rely on auditory and verbal input and output. Section 255 of the Telecommunications Act of 1996 was intended to change all this, and to bring the benefits of the telecommunications revolution to all Americans, including those who had previously faced physical barriers to telecommunications products and services. The Commission's implementation of this section will have a profound effect on the ability of these new technologies and services to reach Americans with disabilities. We submit the comments below in the interest of achieving this far-reaching goal, so that deaf and hard of hearing individuals can utilize telecommunications advances to expand employment, recreational, and educational opportunities.

II. The FCC has Ample Authority to Adopt Regulations and to Enforce Section 255

The FCC is correct in concluding that it has sufficient authority to adopt regulations to enforce Section 255 under Section 255 itself, as well as Sections 4(i), 201, and 303(r) of the Telecommunications Act. NPRM ¶27[1] We support the Commission's decision not to rely on either policy statements or consumer complaints as the sole means of enforcing Section 255. As a practical matter, reliance on policy statements will not achieve Congress' goal of securing universal telecommunications access for persons with disabilities, and consumers with disabilities do not have the resources to effectively file complaints for all inaccessible products

[1] Additionally, reference to the promulgation of FCC regulations for Section 255 can be found in Section 251(a)(2) of the Act, which states that telecommunications carriers are prohibited from installing network features, functions, or capabilities that do not comply with the guidelines and standards established under Sections 255 and 256 of the Act. 47 U.S.C. §251(a)(2). Insofar as Section 251 affects carriers, it is presumably referring to guidelines for service providers. The only entity charged with issuing guidelines for service providers could be the FCC.

and services. Rather, specific guidance from the Commission is necessary to ensure the most efficient implementation of Section 255's mandates. An approach that provides "an efficient, orderly, and uniform regime governing access to telecommunications services and equipment" will best serve both consumers and industry. NPRM ¶24. It is not clear, however, that the NPRM, as drafted, provides the certainty needed for the effective application of Section 255's mandates. We are hopeful that clear direction on these issues will be offered by the Commission in its final rules, to avoid inconsistency and confusion in the implementation of Section 255.

There is also no doubt that Section 255(f) authorizes the Commission to receive and resolve administrative complaints against both service providers and equipment manufacturers. Indeed, this was the very reason that Congress vested the FCC with exclusive jurisdiction over *all* complaints under Section 255.

III. The FCC Should Adopt and Enforce the Access Board Guidelines

Although there is no question that Congress intended for the FCC to adopt regulations implementing Section 255, the Legislature intended as well that the Architectural and Transportation Barriers Compliance Board (Access Board) would be the primary agency - with the FCC's assistance - to develop guidelines for telecommunications equipment manufacturers. It was for this purpose that, as the FCC notes, the Access Board convened the Telecommunications Access Advisory Committee (TAAC), a committee which contained balanced representation of equipment manufacturers, telecommunications providers, software firms, and individuals with disabilities. See NPRM ¶12. Notwithstanding the very diverse viewpoints represented by the members of the TAAC, the TAAC produced a number of agreements for the effective implementation of Section 255, which then formed the basis for guidelines promulgated by the Access Board on February 3, 1998. These guidelines are further supported by a full administrative record – the product of notice and comment from

approximately sixty one organizations and individuals. Prior to this FCC proceeding, then, there were extensive opportunities for the various parties of interest to participate in the development of and contribute to the final Access Board guidelines. Accordingly, we urge that the FCC adopt these guidelines in whole, and adapt them where necessary, for telecommunications services.

In its NPRM, the FCC states that it views the Board's guidelines as its "starting point for the implementation of Section 255." NPRM ¶30. Yet the extent to which these guidelines will form the basis for the FCC's enforcement is vague throughout the NPRM. Although the FCC does propose to adopt the Access Board's definition of accessibility, including its requirements for access to input, output, control, display, and mechanic functions, NPRM ¶¶74-75, the Commission fails to make clear that efforts to achieve such access functions are affirmatively required of all telecommunications companies, and not merely suggested as a means for having achieved compliance only after a complaint has been filed.

The Access Board's guidelines provide the specificity needed to achieve access without stifling innovation or competition. By requiring consideration of individuals with disabilities in market research, product design, testing, pilot demonstrations and product trials *only where such activities are already undertaken*, the guidelines ensure that the needs of individuals with disabilities will be fully considered and incorporated in the design, development, and fabrication of products without being burdensome. 36 C.F.R. §1193.23. These requirements, originally contained in the TAAC recommendations for manufacturers, can easily be adapted to service providers, and should be adopted in the FCC's final rules, for compliance with Section 255 to be fully realized. For similar reasons, we support the FCC's proposal to adopt the Access Board's requirement for the "pass-through of 'cross-manufacturer, non-proprietary, industry-standard codes, translation protocols, formats or other information necessary to provide

telecommunications in an accessible format,'" for *both* manufacturers and service providers. NPRM ¶74.[2]

A. Accessibility and Usability

We are concerned about the FCC's proposal to combine the concepts of "accessibility" and "usability" under the term "accessibility," and to define that term in the "broad sense to refer to the ability of persons with disabilities to actually *use* the equipment or service by virtue of its inherent capabilities and functions." NPRM ¶73. Although the concepts of accessibility and usability are related, and are both directed at ultimately achieving universal access, we disagree with the FCC that Section 255 "does not establish separate requirements for accessibility and usability," NPRM ¶73. In fact, the requirements of usability are quite distinct from those needed to achieve accessibility. As the FCC notes, requiring that a product or service is usable means that individuals must have "access to the full functionality and documentation for the product, including instructions, product information, (including accessible feature information), documentation, and technical support. . ." NPRM ¶72. The importance of such access cannot be overstated. An accessible product has little value to an individual who does not have access to information on how to use that product.

Yet the NPRM is not clear on the extent to which such access to product information will in fact be required. Although the FCC proposes to adopt the Access Board's *definition* of usability, NPRM ¶73, later in the NPRM, the FCC states that after a complaint has been filed, a respondent may demonstrate that it has undertaken good faith efforts to comply with Section 255 by, among other things, providing user information and support features required by the Board's guidelines. NPRM ¶¶164-65. The FCC goes on to state that it does not expect all firms to

[2] We do not oppose the FCC's suggestion that Section 255 reach only those aspects of accessibility over which equipment manufacturers and service providers subject to FCC

adopt all of these usability requirements. Rather, the FCC explains, "each firm should thoughtfully consider the guidelines in light of the situation and the degree to which its products have or lack accessibility features, and then adopt those which will help it provide the accessibility Section 255 requires." NPRM ¶166.

We oppose such an approach. Without clear regulatory requirements for usability, full access to a product cannot be achieved. It is critical that the FCC include, in its final rules, specific regulatory language defining the obligations of manufacturers and service providers to make their offerings usable. Toward that end, we strongly urge adoption, in whole, of the Access Board guidelines contained at 36 C.F.R. §1193.33, requiring access to product and service information and documentation on the product itself and its accessibility features, including information contained in user and installation guides. Among other things, this guideline also requires that to the extent that such information is made available to the general public, it should be made available in accessible formats or modes upon request at no extra charge, and that manufacturers should include the name and contact means for obtaining information about accessibility features, as well as the means of obtaining documents in alternate formats, in general product information. Finally, this section provides guidance for employee training and requires customer and technical support provided at call and service centers to be accessible by people with disabilities. All of these features will be critical to the effective implementation of Section 255 and should be required by the FCC. For people who are deaf and hard of hearing, the Appendix to this Access Board guideline explains that this section might require captioning on video cassettes containing product instructions, direct TTY access to customer service lines, text transcriptions for audio output on Internet postings, and automated

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authority have direct control. NPRM ¶79.

TTY response systems that detect whether a caller is using voice or TTY, all features vital to usability for the consumer.[3]

B. Compatibility

Section 255 requires that where accessibility is not readily achievable, telecommunications offerings must be compatible with peripheral devices or specialized CPE commonly used by individuals with disabilities to achieve access, if readily achievable. The FCC proposes to adopt the Access Board's list of five criteria "as a starting point for determining compatibility."

NPRM ¶92. We support this proposal, but urge the Commission to make clear that the factors contained in the Access Board guideline on compatibility contained at 36 C.F.R. §1193.51, *are required, where applicable*, rather than options to be considered in a good faith determination after a complaint has been filed.

The Commission suggests that it is not necessary to distinguish between peripheral devices "commonly used . . . to achieve access" and specialized CPE because both identify products with a specific telecommunications functionality. NPRM ¶84. For the most part, this is consistent with prior constructions of these terms; thus, we support this FCC proposal.

However, the FCC also proposes that devices and specialized CPE should be considered "commonly used" by people with disabilities when they are affordable and widely available. We oppose this definition. First, many specialized devices - e.g. telebrailles (telephone devices for individuals who are deaf and blind) - are not very affordable, costing as much as several

[3] The Commission does state that its evaluation of whether a company has met its accessibility obligations must include not only an individual's use of the equipment itself, but also access to support services, including direct TTY access to customer service and help desk lines, and the use of captioning and video description on tutorial videos. NPRM ¶¶ 75-76. Again, however, it is not clear whether the FCC is proposing these as *requirements*, or as *options* for the covered entity, the provision of which will be looked upon favorably if a complaint is brought.

thousand dollars each. Second, because of the limited populations using these devices, often these devices are not what would commonly be considered "widespread."

In place of the FCC's definition, the NAD proposes that, in determining whether a device or specialized CPE is "commonly used," the FCC should consider whether people with disabilities would use the device if available, and the extent to which the device would be functionally effective among the disability group for which the product was intended. Such a definition would eliminate ineffective "fringe" devices that would not likely be used by individuals with disabilities, yet would also encompass new and efficient technologies which might not yet be widespread. Consistent with this approach, we do support the FCC's proposal that there be a rebuttable presumption that when a device is distributed through a state equipment distribution program, it is commonly used by people with disabilities.

Finally, the Commission asks whether and how a list of "commonly used" components should be maintained so that individuals with disabilities may be apprised of available technologies. NPRM ¶90. The existence of such a list would be very useful for people with disabilities. The pooled expertise of a variety of disability organizations and specialized equipment manufacturers would, with the assistance of the FCC's Disabilities Issues Task Force (DITF), be capable of compiling such a list. Additionally, the recently formed Association of Access Engineering Specialists may be an appropriate mechanism, again in conjunction with DITF, to maintain and update such a list. Notice of the availability of such a list, and the list itself, if posted on the Internet, would provide an invaluable resource for consumers and industry alike.

IV. "Telecommunications Services" Should be Defined in a Manner Consistent with the Objectives of Section 255 to Expand Access to Advanced Telecommunications Services.

The FCC proposes to cover two types of telecommunications services under its Section 255 rules: basic services and adjunct-to-basic services. NPRM ¶¶35-43. The FCC questions,

however, the extent to which enhanced, or information services, fall into the category of "telecommunications services" that must be accessible under Section 255.

A. A Narrow Construction of "Telecommunications" Services Would Defeat the Purposes of Section 255.

Through its passage of Section 255, Congress contemplated that all advanced telecommunications services, including many, if not all, services that have historically been categorized as enhanced or information services, would become accessible to individuals with disabilities, if readily achievable. It was the overarching intent of Congress, through its enactment of this section, to bring Americans with disabilities into the mainstream of the technological age by ensuring access to new telecommunications advances that will be used in our schools, employment and recreational activities. To limit people with disabilities to only basic or adjunct-to-basic services would defeat this very goal. This is evidenced, in part on the Senate's own report on this accessibility provision:

> The Committee recognizes the importance of access to communications for all Americans. The Committee hopes that this requirement will foster the design, development, and inclusion of *new* features in communications technologies that permit more ready accessibility of communications technology by individuals with disabilities. The committee also regards this new section as *preparation for the future* given that a growing number of Americans have disabilities.[4]

That Congress intended for *new*, rather than dated, technologies to be accessible to individuals with disabilities is evidenced as well by the fact that previous federal legislation had already addressed, to a large extent, access to basic voice telephony.[5] Certainly the Legislature intended that the scope of this new law would exceed that of its predecessors.

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[4] S. Rep. No. 104-23, 104th Cong, 1st Sess. 52 (1995) (emphasis added).

[5] See e.g., Title IV of the Americans with Disabilities Act, Pub. L. No. 101-336, codified at 42 U.S.C. §12101 et. seq. (1990) (requiring nationwide telecommunications relay services); Hearing Aid Compatibility Act of 1988, Pub. L. No. 100-394, codified at 47 U.S.C. §610 (1988) (requiring telephones manufactured or imported into the United States to be hearing aid

The FCC may be concerned about having different interpretations of "telecommunications services" for different FCC proceedings. But the FCC will be acting well within accepted legal doctrines if it chooses to broaden the scope of services that are covered under Section 255 while maintaining other existing interpretations of "telecommunications services." Patterned after the ADA, Section 255 was intended to be a civil rights provision which would end discrimination against individuals with disabilities who, prior to Section 255 could not access telecommunications products and services. Courts have consistently interpreted civil rights statutes liberally, to effectuate the remedial purposes for which these statutes were created. See e.g., Gates v. Collier (liberally construing Civil Rights Attorneys' Fee Awards Act)[6]; United States v. DeRosier (liberally interpreting Civil Rights Act of 1964).[7]

When viewed in this light, one must, first and foremost, consider the objectives for which Section 255 was created. As we move into the 21st century, we are all too aware that advanced telecommunications technologies will continue to change the way we conduct our lives on a daily basis. Congress, too, was aware of the pervasive influence that these advancements would have on our daily existence and wished to ensure the inclusion of people with disabilities in the enjoyment of these benefits.

This would not be the first time that an application of prior FCC rulings needed to be adjusted for the purpose of ensuring access by individuals with disabilities. For example, in the Telecommunications for the Disabled Act of 1982,[8] Congress modified the FCC's decision to

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compatible); and Telecommunications Accessibility Enhancement Act of 1988, Pub. L. No. 100-542, codified at 40 U.S.C. §762 (1988) (expanding, inter alia, the federal relay service).

[6] 616 F. 2d 1268, 1275 (5th Cir. 1980), rehearing granted in part on other grounds, 636 F. 2d 942 (5th Cir. 1981).

[7] 473 F. 2d 749, 751 (5th Cir. 1973)

[8] Pub. L. No. 97-410, codified as amended at 47 U.S.C. §610 (1988)

detariff customer premises equipment (CPE) nationwide, so that individuals with disabilities could continue to afford specialized telecommunications equipment. The 1982 Act was a response to the FCC's ruling in its Second Computer Inquiry (Computer II), one of the proceedings upon which the FCC is again relying in drawing its distinction between telecommunications and enhanced services. In Computer II, the Commission had ordered telephone companies to separate the sale and rental of their equipment from their regulated services.[9] By detariffing CPE and requiring users to pay the full cost of that equipment, the FCC had hoped to create competition among the sellers of CPE which would, in turn, drive down prices. However, because many telephone companies had been offsetting the high costs of providing specialized customer premises equipment with revenues from other services, individuals with disabilities would now be faced with having to pay the full costs when buying this equipment. The 1982 Act reversed the Computer II ruling for equipment used by individuals with disabilities, expressly allowing the states to require carriers to continue providing subsidies for such equipment. The goal was to ensure that individuals with hearing, speech, vision, and mobility disabilities would have continued telecommunications access.

Similarly, the arguments for narrowly defining telecommunications services, to the exclusion of enhanced or information services, cannot withstand scrutiny when applied in the context of telecommunications access for people with disabilities. Indeed when one considers the principal reason for construing telecommunications services narrowly, one can readily see that this reason does not stand up in the context of disability access. Specifically, in its report to Congress on universal service, the FCC established the need to encourage competition as the primary, if not the only reason for excluding information services from its definition of

[9] Second Computer Inquiry (Computer II), 77 FCC 2d 384, 446-47 (1980), *recon.* 84 FCC 2d 50 (1981), *further recon.* 88 FCC 2d 512 (1981), *aff'd sub nom.* Computer & Communications Indus. Assoc. v. FCC, 693 F. 2d 198 (D.C. Cir. 1982), *cert. denied*, 461 U.S. 938 (1983)

telecommunications services.[10] For example, the report quotes Senator McCain as stating that it was "not Congress's intent in enacting the supposedly pre-competitive, deregulatory 1996 Act to *extend* the burdens of current Title II regulation to Internet services."[11] Because a primary goal of the 1996 Act (with the clear exception of Section 255) was to "diminish regulatory burdens as competition grew,"[12] certain U.S. Senators have steadfastly wished to avoid expanding traditional telephone regulation to information services. Along this line, in determining that telecommunications and information services are mutually exclusive, the FCC concluded, in its universal service report, that to subject information services to the "broad range of Title II constraints, could seriously curtail the regulatory freedom that the Commission concluded in Computer II was important to the healthy and competitive development of the enhanced-services industry."[13] As held true with respect to the FCC's decision to detariff CPE in its Computer II ruling, the FCC's reliance upon Computer II for distinguishing between telecommunications and information services falls apart under an analysis that fosters increased access by individuals with disabilities. In contrast to most sections of the 1996 Act, Section 255 was not intended to reduce regulatory burdens or to foster competition by eliminating regulatory constraints. Rather, Section 255, in the interest of expanding telecommunications access, created *new* regulatory obligations for service providers.[14] Indeed, the "deregulatory and procompetitive goals of the

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[10] *In the Matter of Federal-State Joint Board on Universal Service*, Report to Congress, FCC 98-67, CC Dkt. 96-45 (April 10, 1998) (Report to Congress).

[11] Report to Congress ¶37 (emphasis in original).

[12] Report to Congress ¶38 (quoting Senators Ashcroft, Ford, John F. Kerry, Abraham, and Wyden).

[13] Report to Congress ¶46.

[14] Competition was not at issue in the Legislature's consideration of Section 255. In any event, however, competition in the telecommunications industry will not be impeded by a broad

1996 Act,"[15] to which the Commission repeatedly alludes in its universal service report have no place in Section 255.

Other language in the FCC's universal service report also supports a broad interpretation of telecommunications services under Section 255. First, in that report, the Commission left open the issue of whether protocol processing should be treated as an information service.[16] Second, the Commission left open the issue of whether Internet telephony service providers using the network for phone-to-phone service, are actually offering telecommunications services, in that they are creating virtual transmission paths between various points on the public switched telephone network.[17] The FCC's report explains that "an entity offering a simple, transparent transmission path, without the capability of providing enhanced functionality, offers 'telecommunications.'"[18] For many of the services otherwise considered to be information or enhanced services for the general population, access will in fact create only a simple transmission path for people with disabilities. Without Section 255 coverage, there will be no path at all. If these services are excluded, individuals with disabilities will be able to *initiate* calls, but will not be able to complete those calls, thus defeating the purpose and intent of Section 255 to provide telecommunications access for all Americans.

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definition of telecommunications services; rather it will be assisted by such a definition, as this will expand the current pool of telecommunications users.

[15] Report to Congress ¶47.

[16] Report to Congress ¶52.

[17] Report to Congress ¶89-92.

[18] Report to Congress ¶39.

B. The FCC's Definition of Adjunct-to-Basic Services Dictates Inclusion of Additional "Enhanced" Services for Purposes of Section 255.

Even under the FCC's own definition of adjunct-to-basic services, many of the services otherwise considered to be enhanced or information services for the general population necessarily fall within the scope of Section 255's coverage for individuals with disabilities. The FCC defines adjunct-to-basic services as services which facilitate the "establishment of a transmission path over which a telephone call may be completed, without altering the fundamental character of the telephone service," NPRM ¶39, and which "bring[] maximum benefit to the public through its incorporation in the network." NPRM ¶40. Deaf and hard of hearing people are presently unable to complete telephone calls that use interactive voice responses and audiotext information services, two types of services which the FCC says may not be covered by Section 255. These services are not TTY accessible[19] and relay systems are ill-equipped to handle their speed. Thus, despite their proliferation throughout educational, recreational, and governmental services across America, deaf and hard of hearing people remain without access to these types of advanced telecommunications services.[20]

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[19] Although a technology does exist to allow an interface between TTYs and interactive telephone systems, this technology has rarely been utilized.

[20] Repeated efforts by consumer groups to convince the Department of Justice (DOJ) and the FCC to require access to these automated telephone systems have not been successful. For example, in the course of its rulemaking on Title II of the ADA, the DOJ received many comments about the inability of relay systems to provide access to automated telephone systems using touch tone prompts. Acknowledging that the problem existed, the DOJ nevertheless declined to rule on the matter, concluding "that it is more appropriate for the [FCC] to address these issues in its rulemaking under Title IV. 56 Fed. Reg. 35693, 35712. The FCC, however, has consistently held that these "enhanced" services are merely encouraged, but not required, even if they are technically feasible. *In the Matter of Telecommunications Services for Individuals with Hearing and Speech Disabilities, and the Americans with Disabilities Act of 1990*, CC Dkt No. 90-571, Report and Order ¶20 (July 26, 1991).

It cannot be disputed that access to these services would bring "maximum benefit" to deaf and hard of hearing persons wishing to access the network. Indeed, access is needed to bring *any* benefit to these individuals. With access, calls may be completed; without access, calls are effectively blocked for these populations.

Similarly, the NPRM states that "[t]he Commission has consistently categorized a service option or feature as adjunct-to-basic, and thus subject to Title II regulation if that option or feature is clearly basic in purpose and use." NPRM ¶40. Again, it cannot be more obvious that access to advanced service features is basic in purpose and use for individuals with disabilities. This holds true for interactive and audiotext telephone services as well as for other services labeled as enhanced, such as voice mail and electronic mail. If the Commission's test for adjunct services is whether or not "the service provides the information necessary for a subscriber to place a call" (as holds true for directory assistance services and Operator Services for the Deaf) then various services which are considered "enhanced" for other purposes must fall within the FCC's definition of "adjunct to basic" services for the purposes of Section 255. See NPRM ¶40-41. The test, then, for purposes of Section 255 coverage, should be whether access to a service is needed to achieve communication by people with disabilities, i.e., whether access to a service is needed to achieve the objectives of Section 255.

In sum, the Commission should not base its final Section 255 rules on interpretations made in proceedings - such as the Second Computer Inquiry and the Implementation of the Non-Accounting Safeguards[21] - which were decided without accessibility in mind. Rather, it should create rules which respond to the objectives of Section 255. Should the Commission exclude all enhanced or information services from Section 255's coverage, it will effectively be denying to

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

all Americans with disabilities access to the new and innovative telecommunications services that the rest of America is coming to enjoy - hardly a result that could have been contemplated by Section 255.

V. Definitions and Other Issues Affecting Scope of Coverage

A. Providers of Telecommunications Services

The FCC proposes to define providers of telecommunications services as "all entities offering (i.e., whether by sale or by resale) telecommunications services to the public, in addition to the service provider who originates the offering." NPRM ¶43. We urge that the FCC make clear that subproviders who offer services to providers, who in turn make those services available to the public, are covered under this definition. This would avoid defenses by providers who receive inaccessible services from hiding behind those subproviders.

The FCC proposes to apply its rules to a service provider only to the extent that that provider offers telecommunications services, if that provider offers both telecommunications and non-telecommunications services. NPRM ¶46. We support this application of the rules.

B. Telecommunications Equipment

The FCC has stated that Section 255 requires *functional* accessibility of all equipment used in the provision of a telecommunications service, whether that equipment is used by an individual (CPE) or found elsewhere in a telecommunications system (telecommunications equipment). NPRM ¶49. Again, we support this principle.

The FCC has proposed that Section 255 apply to multi-use equipment only to the extent that the equipment serves a telecommunications function. NPRM ¶53. We support this approach, but urge that the FCC apply this test whether or not the equipment was originally intended for a telecommunications application. Stated otherwise, it is the functionality of the equipment, not the intent of the manufacturer that should determine the equipment's coverage. Similarly, we support the FCC's conclusion that CPE covered under Section 255 includes wireless handsets. NPRM ¶49 n. 107.

C. Software

The FCC has tentatively concluded that software integral to telecommunications equipment is covered by Section 255. NPRM ¶55. As the FCC notes, software provides a means of controlling telecommunications functions. It is for this reason that we disagree with the FCC's decision to only include software that is bundled with telecommunications products. See NPRM ¶56. As holds true for all telecommunications equipment, the test should be one of functionality, not whether the software is marketed separately from the CPE. Indeed, it is likely that more and more software will not be bundled in the future, as software may increasingly control CPE functions from distant locations through the network. Moreover, any other standard may invite manufacturers to unbundle software for the sole purpose of avoiding their Section 255 obligations.

D. Manufacturers

The FCC proposes that Section 255 apply to all manufacturers offering equipment for use in the U.S., regardless of their national affiliation. NPRM ¶58. We support this application and believe that it is consistent with prior FCC rulings requiring accessible features on imported telephones (i.e., hearing aid compatibility) and imported televisions (i.e., decoder circuitry for closed captioning).

The FCC proposes to fix responsibility for product accessibility on the final assembler of the product. NPRM ¶60. We agree that this "would give manufacturers the greatest incentive to specify accessible components from their suppliers, and to negotiate private arrangements for allocating the costs of compliance." Id. This will also make the point of contact for consumers concerned about lack of access easier to locate.

E. Network Features, Functions, or Capabilities

The FCC seeks comment on the relationship between the enforcement procedures under Section 251 for interconnection agreements and the Commission's enforcement authority under Section 255. NPRM ¶66. In comments to the FCC in its interconnection proceeding, the NAD had, in fact, asked the FCC to condition approval of interconnection agreements upon compliance with accessibility standards.[22] . The FCC declined to address access issues in its final rule, noting that it would address these questions in a further notice of proposed rulemaking, after the Section 255 rules had been issued.[23] Once again, we reiterate our concerns

[22] *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Dkt. No. 96-98, Reply Comments of the NAD at 6 (May 30, 1996).

[23] See *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Dkt. No. 96-98, First Report and Order, ¶998, 11 FCC Rcd 15499 (1996).

that such agreements not be permitted to go forward if a party to such agreement is not in compliance with Section 255.

The FCC also asks how responsibility for compliance with the accessibility and compatibility guidelines should be apportioned between network equipment and service providers that incorporate that equipment into the network. NPRM ¶80. It would seem that this should be dealt with on a case-by-case basis, considering carefully, in each instance, the source of the failure to provide access. Where the source is both, both should be held accountable.

F. Disability

We support use of the ADA's definition of disability, as well as the Access Board's list of categories of common disabilities. See NPRM ¶70.

VI. Application of the Readily Achievable Standard Should Parallel Application of this Standard Under the ADA, Taking into Consideration Telecommunications-Specific Factors Only.

Under Section 255, manufacturers and service providers must make their offerings accessible or compatible if it is readily achievable to do so. As the FCC notes in its NPRM, Section 255(a)(2) provides that "[t]he term 'readily achievable' has the meaning given to it by section 301(9) of [the ADA]." NPRM ¶94. The FCC's NPRM offers an extensive analysis of the term "readily achievable," noting that the existence of ADA factors does not appear to "preclude [its] consideration of telecommunications-specific factors not enumerated in the ADA." NPRM ¶98 n.198.

We agree that the telecommunications context may warrant consideration of certain factors that were not applicable under an ADA analysis of structural accessibility. However, many, if not most of the newly proposed factors now proposed for the Section 255 readily achievable standard are *not* telecommunications-specific. In fact, many of the new factors suggested could have easily been applied in the ADA context.

When Congress incorporated the readily achievable standard in Section 255, it did so fully aware of the long line of agency interpretations, administrative decisions, and court cases that had already applied this standard under the ADA. For the most part, the analyses applied by these various forums compared the costs of providing access with the overall resources of the entities covered by the ADA's provisions. With a few exceptions, the same test should be applied here.

A. Feasibility

The FCC offers several reasons why a particular access feature may not be feasible: 1) technical feasibility: i.e., physical impossibility or where technology is not available to develop an access solution; 2) legal impediments; or 3) where implementing features to improve access for one disability might limit access for another. NPRM ¶101. A discussion of each of these factors follows.

1. **Technical feasibility**

The extent to which adding an access feature is technically feasible, or the extent to which technology is available to achieve accessibility, are legitimate considerations in the telecommunications context. First and foremost, however, in permitting this defense, the FCC should insist upon proof of technical infeasibility, rather than unsupported assertions that a technical solution is unavailable. Second, this defense should only be permitted to the extent that technical feasibility could not be achieved during the design and development of the product or service. Indeed, the FCC itself notes the greater difficulties that arise when trying to incorporate accessibility past these early stages. Under its discussion of timing, the FCC acknowledges that "technological features available at the beginning of a product development cycle can be incorporated more easily . . . than those that become available at the end of the development

defense" if the access problem could have been avoided through incorporation of access features early in the design processes.

2. **Legal impediments** - While unclear in the NPRM, it would seem that the FCC's decision to permit the existence of a legal impediment as a defense to providing access is designed to protect companies that are unable to obtain licenses for access solutions, or where contracts otherwise prevent the incorporation of such solutions. We request that the FCC elaborate on the use of this defense, so that its meaning is fully understood, and so that it is not abused in any way.[24] Additionally, we urge the FCC not to permit this defense unless the company asserting this factor is able to demonstrate that it has undertaken, though unsuccessfully, whatever efforts may have been necessary to eliminate the legal obstacles impeding access.

3. **Impeding other types of accessibility** - Consumers with disabilities most certainly have an interest in not curtailing one type of access for another. Nevertheless, this concern, although legitimate, would be more appropriately considered elsewhere in the FCC's rules, as it is separate and apart from the extent to which it is readily achievable to make a product or service accessible.

B. Expense

We agree that it is reasonable to consider any tangible and actual costs that must be incurred in achieving accessibility. See NPRM ¶103-104. The costs of engineering staff, fabrication facilities, and licensing fees are examples of costs that companies may incur in achieving access, and which legitimately may be considered in a readily achievable analysis.

[24] For example, contracts specifically designed to avoid Section 255 compliance should not be tolerated.

We disagree, however, that companies should be able to consider "opportunity costs," loosely defined by the FCC as the costs associated with decreasing access with respect to another disability, or otherwise reducing product or service performance in another way. These "costs" are highly subjective. Without clearly defined and objective measures for determining these costs, consumers are left at the mercy of companies who, on their own, may determine that the "opportunity costs" for achieving a certain type of access are prohibitive.

Similarly, we oppose consideration of the additional income that an access feature will provide in a readily achievable analysis. Although we understand the FCC's well-intended objective to have companies consider the additional income they will bring in as the result of adding access, in fact this factor may result in providing companies with an added excuse not to incorporate access, where it is expected that such access is *not* likely to bring in much income. This might occur, for example, where the market of individuals with disabilities is small, as may be true for products or services designed for individuals with multiple disabilities, such as deaf-blindness. Although the ADA permits consideration of a wide variety of expenses, no cases or agency interpretations to date have used opportunity costs or projected income as permissible factors in a readily achievable determination.[25] Nor has the FCC justified the need for consideration of this factor in the telecommunications context only.

C. Practicality

Under the Section 255 readily achievable standard, the FCC proposes to allow consideration of whether an access feature is practical, given the expenses involved. NPRM ¶106. Here, the FCC lists a number of factors:

[25] Nondiscrimination on the basis of disability by public accommodations and in commercial facilities. 56 Fed. Reg. 35543, 35594 (July 26, 1991); 28 C.F.R. Part 36.104; see also discussion of court cases on readily achievable below.

1. **Resources** - A provider should be permitted to consider its resources, including, but not limited to, its financial resources, staff resources, and the facilities that it has available to meet the expenses associated with accessibility. See NPRM ¶106. The FCC proposes to establish "a presumption that the resources reasonably available to achieve accessibility are those of the entity . . . legally responsible for the equipment or service that is subject to the requirements of Section 255." NPRM ¶109. It goes on to state that this presumption may be rebutted where either the assets and revenues of a parent or affiliate are available to the provider (and may thus be taken into consideration) or where a respondent may show that a sub-unit does not have access to the full resources of the legally bound corporation. We support the FCC's analysis on these points, as it is consistent with that of the Department of Justice under the ADA,[26] and case law interpreting the ADA. For example, in Arnold v. United Artists Theater Circuit Inc. (United Artists), plaintiffs had challenged conditions at several movie theater locations all owned by the same corporate defendant, United Artists. The court concluded that

> whether a proposed change is deemed "readily achievable" under the ADA depends on the defendant firm's "overall financial resources." 42 U.S.C.§12181(9)(b)[B]; 28 C.F.R. §36.104. For multi-site companies such as UA, the ADA expressly requires that defendant assess the financial condition, not just of the sites involved, but of the entire corporation.[27]

2. **Market Considerations**

The FCC proposes to allow companies to consider the potential market for the more accessible product, and the extent to which the more accessible product could compete with other offerings in terms of price and features. NPRM ¶115. While obviously not intended to do

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[26] 56 Fed. Reg. at 35553-54. The Department of Justice's analysis explained that "in some instances, resources beyond those of the local facility where the barrier must be removed may be relevant in determining whether an action is readily achievable," and that the resources of the parent corporation should be considered to the extent those resources may be allocated to the local facility. Id.

[27] 7 ADD 1165, 1187 (1994), citing 42 U.S.C. §12181(9)(C); 28 C.F.R. §36.104.

so, consideration of this "market" factor may well defeat the entire purpose of Section 255. Long ago - indeed in its very first piece of federal legislation expanding telecommunications access for individuals with hearing disabilities, the Telecommunications for the Disabled Act of 1982 - Congress acknowledged the problems of relying on competition in the marketplace as a means of achieving accessibility. As noted above, the 1982 Act was designed to permit continued cross-subsidization of specialized telephone equipment with service revenues, notwithstanding the FCC's Computer II prohibition against such subsidies. Congress explained that reliance on market forces to keep the costs of such equipment down would not work for individuals with disabilities:

> For most ratepayers, deregulation may indeed ensure a competitive market in telephone sets and eliminate subsidies for such sets from local rates. For the disabled, however, the ban on cross-subsidization could mean unregulated price increases on the costly devices that are necessary for them to have access to the telephone network. Disabled persons who are unable to afford the full costs of this equipment will lose access to telephone service.[28]

Indeed, the very reason that Section 255 - as well as the ADA and other disability laws - have been needed at all has been that the marketplace has not responded to the needs of individuals with disabilities. To now suggest that manufacturers may not be required to create accessible products where such products are not likely to receive a great reception in the market negates the whole purpose of Section 255. Moreover, the FCC's proposal to permit consideration of the extent to which an accessible product can compete with other, inaccessible products simply sanctions the sale of inaccessible products that are more likely to bring in a greater share of the market.

The FCC should remember that even if this market factor is eliminated, there will be no competitive disadvantage for companies complying with Section 255. Because the law is evenly

[28] H. Rep. No. 97-888, 97th Cong. 2d Sess. 3-4 (1992).