

part of the normal process of manufacturers providing customer service is wasteful of Commission resources. Moreover, FCC involvement in such “inquiries” needlessly interferes with manufacturers’ provision of meaningful customer services to persons with disabilities, just like other customers.

With regard to issues which are legitimately perceived complaints, the Commission's proposal merely to "encourage" rather than “require” the parties to discuss accessibility disputes before bringing the matter to its attention is counterproductive for two reasons. First, Commission involvement in the process will have a tendency to affect the attitude of the parties involved. Knowing that the FCC is directly involved in the process will cause manufacturers to be more defensive in responding to consumers and to think more about litigation strategy rather than resolving legitimate accessibility disputes. Knowing that the FCC is directly involved in the process will cause consumers to be less responsive to the legitimate explanations of manufacturers since they may believe the Commission’s role is to be an advocate for their interests.

Second, TIA is not convinced that Commission involvement in the fast track process is conducive to the establishment of the type of dialogue between a consumer and a manufacturer that is necessary if the parties are seriously interested in trying to find solutions to asserted accessibility problems. As the Commission notes, many accessibility complaints are likely to be complex issues.¹⁰¹ Due to the lack of general accessibility expertise in existence

¹⁰¹ *NPRM* ¶ 150.

today, it may be difficult for the Commission staff to quickly identify the crux of an accessibility problem and to precisely articulate the nature of the complaint to a manufacturer.¹⁰²

Notwithstanding the acknowledged complexity of issues surrounding Section 255 complaints, a simple example demonstrates how Commission involvement in the fast track process may be counterproductive to the quick resolution of Section 255 issues.

Assume the FCC allows a consumer to submit a fast track complaint before being required to discuss the substance of the complaint with the manufacturer in question. Assume further the consumer states that he or she has a hearing disability and alleges that "Manufacturer A" does not have a cellular phone which he or she can use. Based on the Commission's commitment to distribute complaints to manufacturers within 1 day of receipt, the complaint as stated will be transmitted to the manufacturer.¹⁰³ Under the proposed fast track process the manufacturer will be required to respond to the complaint within 5 business days. But because 5 business days is too short to fully understand the complaint and/or gather facts relative to the complaint, the manufacturer will be forced to answer by stating that it does not have sufficient facts on which to respond. Such an answer will result in the initiation of a more formal complaint at the FCC which could take months to resolve.

¹⁰² This is not to disparage the capabilities of the Commission and the staff but to acknowledge that there is a dearth of expertise with regard to telecommunications accessibility at the present time both within the Commission, in the manufacturing community and in the marketplace generally.

¹⁰³ As will be discussed below, TIA assumes that if the FCC's goal is to distribute complaints to manufacturers within 1 day of receipt, the Commission is not likely to be able to do more than merely transmit the complaint as received.

If, on the other hand, the FCC had required the consumer in question to discuss the matter with the manufacturer in the first instance, a dialogue between the manufacturer and aggrieved consumer would have ensued. Through a series of communications which might take place over the course of a few weeks, the manufacturer would have been able to ascertain the type of hearing loss the consumer has and how significant it is; whether the consumer wears a hearing aid and, if so, what kind; where the consumer purchased, or attempted to purchase, the product or service.¹⁰⁴ Based on a dialogue which would have provided answers to those types of questions, a manufacturer may have been able to: (1) identify one of its products which would have resolved the problem and/or (2) assist the consumer in finding the product. The consumer and manufacturer may thus have resolved the perceived accessibility problem without resorting to the use of the Commission's resources and processes.

To the extent the Commission's view is that more complaints will be similar to the example described in the paragraph immediately above, no efficiency will be gained by the Commission's involvement at this stage of the dispute resolution process. In fact, Commission involvement in the fast track process will have detrimental effects on the ability of parties to resolve accessibility disputes quickly in three respects. First, in its fast track capacity as "intermediary" between a manufacturer and a consumer, the Commission may incorrectly communicate the nuances of a complaint and thereby unintentionally undermine the ability of the

¹⁰⁴ The time frame to engage in this dialogue can take a matter of weeks because parties may not always be available to one another when calls or other types of communications are initiated. Also, if communications need to be translated into or out of accessible formats, some delay will occur.

disputants to understand the other's issues. Second, aside from the accuracy of the information transmitted, Commission participation as an intermediary will simply delay the time it takes to relay information between a manufacturer and a consumer. Third, and most importantly, the FCC may not ask all of the questions necessary to elicit the information the manufacturers need in order to solve the problem.

2. Contact Point.

TIA supports the Commission's proposal to require manufacturers to provide the Commission with a point of contact or multiple points of contact for matters relating to Section 255. Having a publicly available list of points of contact will facilitate the ability of the Commission and members of the public to reach the appropriate persons within a manufacturer's organization who can best handle initial queries regarding accessibility matters in a timely manner. It is appropriate for the Commission to require that each manufacturer provide the name of a person or an office which will be primarily responsible for fielding matters related to Section 255. In addition to the name or office, it is appropriate for the FCC to require manufacturers to provide the point of contact's telephone number, e-mail address, TTY number, fax number, and other reasonable information designed to enable the public to easily establish contact with the point of contact.

Manufacturers should have the flexibility to list either a name of an individual or the office which will serve as the point of contact for a given company. The Commission should not require a manufacturer to list a specific individual as a point of contact. A company may

have numerous individuals charged with the responsibility of being the point of contact at any given time. This might be due to a manufacturer's preference to "rotate" persons responsible for being the point of contact or to accommodate business travel, illness, vacation or other situations in which an individual is not able to perform that function for a given period of time.

Similarly, manufacturers should be free to submit to the FCC more than one point of contact. Large companies with many products subject to Section 255 may find it more efficient to have a separate point of contact for separate products or families of products to ensure that queries and/or complaints are distributed to the appropriate personnel within a company as quickly as possible. Other manufacturers may choose to use a single point of contact so they can more closely monitor and maintain control over matters related to Section 255.

The *NPRM* asks for comment on whether the Commission should require the point of contact to be "in-house" or if it should permit companies to delegate the point of contact responsibility to outside agents.¹⁰⁵ TIA's membership consists of large and small companies with a variety of organizational structures and resources at their disposal. While larger companies are likely to have in-house points of contact, smaller companies may choose to use outside agents to serve in that capacity. The resource commitment necessary for each manufacturer to have a point of contact is likely to be substantial. In fact, due to illness, travel, vacation and similar occurrences, it will be necessary for most manufacturers to have more than one designated point of contact to ensure that inquiries regarding accessibility can be handled

¹⁰⁵ *NPRM* ¶ 132.

during normal business hours. As a result, TIA submits that the FCC should allow manufacturers to delegate the point of contact function to outside firms.¹⁰⁶

The *NPRM* also contemplates that the point of contact might be used for purposes other than forwarding complaints filed under Section 255. Specifically, the Commission notes that the point of contact can serve a secondary function as a source of accessibility information for the public. It asks for comment on "...what additional related data, if any, should we collect that would advance this function."¹⁰⁷ TIA opposes Commission adoption of any rule which would require manufacturers to provide the FCC with general accessibility information which would be made available to the public.

Section 255 provides the Commission with limited jurisdiction. The Commission is obligated to develop accessibility guidelines in conjunction with the Access Board and it has been given exclusive jurisdiction to handle complaints brought under Section 255.¹⁰⁸ There is no affirmative statutory requirement for the Commission to engage in the collection of information regarding a company's products. Even assuming the Commission has independent general authority to require the collection of accessibility information not expressly required by the enabling statute, adoption of such a rule would not be good public policy for a variety of reasons. First, it is unclear precisely what information the Commission might require manufacturers to

¹⁰⁶ TIA expects that any manufacturer who chooses to delegate the function to an outside firm will still be held responsible for Section 255 compliance.

¹⁰⁷ *NPRM* ¶ 134.

¹⁰⁸ 47 USC §§ 255(e) and (f).

submit and TIA has concerns that the burden on manufacturers, especially small companies, will be substantial. Second, the collection of such information from the thousands of manufacturers and service providers who are subject to Section 255 would be a substantial burden upon the Commission's own resources. Third, any database or other source of accessibility information would be very difficult to keep up to date, especially given the speed with which products are introduced in the marketplace. Fourth, the public might incorrectly assume that information submitted to, and made available by, the FCC about a company's accessible products (or other information relating to accessibility in general), has been approved or sanctioned by the Commission as fully compliant with Section 255. Fifth, TIA envisions that information about a company's accessible products will be disseminated rapidly throughout the marketplace without need for intrusive and burdensome government regulation. This will occur as a result of the voluntary efforts of individual manufacturers, trade associations and groups representing individuals with disabilities. Thus, there appears to be no legitimate reason for the Commission to engage in an information gathering process whose function is likely to be performed by the private sector as a result of marketplace forces.

3. Fast Track Deadlines are Too Short.

The Commission proposes to distribute fast track complaints within 1 day and to require manufacturers to respond to fast track complaints within 5 business days of the day they

are “forwarded” to manufacturers.¹⁰⁹ These timetables are unrealistic and are counterproductive to the voluntary resolution of Section 255 complaints.

The Commission is clearly in control of how quickly it can distribute complaints submitted under the fast track process. With the addition of considerable personnel resources specifically to handle Section 255 complaints in addition to the other complaints it receives on a daily basis, it is theoretically possible for the Commission to meet its one day goal. However, TIA believes the Commission's one day goal is wholly unrealistic in large part due to the nature of Section 255 complaints that will be received. For example, TIA assumes that some complaints will be submitted in alternate formats such as Braille or audiotape. If the Commission is going to translate the complaint into a format which is usable to the manufacturer,¹¹⁰ a substantial amount of time will be devoted to the translation process. Even assuming the translation process is not a major impediment, a one day turn around is unrealistic since TIA assumes the Commission will not merely log in the complaint and forward it to the manufacturer in question, but will engage in some qualitative analysis and evaluation of the complaint.¹¹¹ Any significant analysis of a complaint will take more than one day to complete after the complaint is first received.

¹⁰⁹ *NPRM* ¶ 136.

¹¹⁰ If fast track complaints are not going to be translated into a format useable by a manufacturer then the proposed 5 day response period becomes even more unrealistic since a manufacturer will need spend time translating a complaint into a format it can understand.

¹¹¹ If the Commission does not engage in a qualitative analysis of the complaint's legitimacy, its fast track process will tend to encourage the filing of frivolous complaints. Manufacturers will be forced to waste resources defending against such complaints.

Even more unrealistic than the commitment by the Commission to distribute complaints within 1 day, is the Commission's proposed 5 day response period.

First, the fast track process proposes to require a response to be submitted within 5 business days of the date the complaint was "forwarded." Any response period should be based on the date of receipt of the complaint, especially given the short time period to respond. It is not unusual for documents released by the Commission to be released towards the end of the day. Thus, a fast track complaint may be received by a manufacturer after its business day has ended or the contact point has left the office. Despite the fact that the Commission could send a fax or an e-mail to reduce the time it takes for a complaint to be received by a manufacturer, the Commission's proposal does not take into consideration delaying factors which are likely to occur in the normal business environment. The point of contact may be out of the office sick; the point of contact may be traveling on business; or the fax machine or e-mail system of the point of contact may be out of service. As an example, a complaint may be forwarded to a point of contact on Day 1 but because he or she is out of the office on Day 1, the point of contact would not actually receive the complaint until Day 2. Assuming the complaint had to be sent to Asia for review and was sent to Asia on Day 2, it would not be received in Asia until Day 3 due to the fact that the business day in Asia would have already closed by the commencement of business on Day 2 in the U.S. By that time, the manufacturer would only have 2 days within which to evaluate the complaint and prepare a response to be submitted to the FCC. In order to get the response back to the FCC, similar time frames might be encountered making it virtually

impossible to respond to a fast track complaint within 5 business days, let alone adequately study a complaint and respond substantively thereto.

Even where a manufacturer need not communicate with parties located in far-flung areas of the world, other factors suggest that 5 days is too short a period for a response to a fast track complaint. For example, one of the first steps that a manufacturer would make upon receiving such a complaint is to contact the person issuing the complaint to find out more about the perceived problem. After making such contact (which might take a day or two assuming the complainant is available, which will not always be the case), a substantial number of hours will have to be spent evaluating the complaint, drafting a response, clearing the response with senior management and legal counsel and filing the response with the FCC. This process can take hundreds of hours which may make it virtually impossible to provide a reasoned response within 5 business days of the date of a complaint.

Second, the Commission acknowledges that many Section 255 complaints will be complex. Each and every complaint will have to be thoroughly evaluated whether it is a fast track or other type of complaint. If the complaint is not frivolous and there is no similar or accessible product, a manufacturer will have to engage in research to determine why it made the determination that it was not “readily achievable” to make the product accessible for the disability in question. For companies that make a large quantity of products, the research is likely to take time. The failure of the FCC to impose a statute of limitations on the time for bringing a complaint under Section 255 exacerbates the problem since records on all products will have to be maintained in perpetuity and may be archived for legitimate business reasons.

Third, because the complaint process is adversarial with potentially severe legal consequences to be imposed on manufacturers who are found to have violated the provisions of Section 255, responses to fast track complaints will likely be reviewed internally by management responsible for Section 255 implementation as well as in-house and/or outside counsel.

For the foregoing reasons, the predominant response to a fast track complaint is likely to be that there was insufficient time to adequately review, research and respond to the complaint. This will result in the Commission moving to the next level of complaint process, even if more time to respond may have enabled the parties to come to closure on a given issue. The Commission's proposal to extend the time within which to answer a fast track complaint if "substantial efforts" to respond are under way is not a suitable cure for the dilemma described above. Because most fast track complaints will require extensions of time for the reasons described above, the Commission will be inundated with requests for extension of time. The requests may have to be translated into accessible formats and, they will have to be evaluated by and responded to by the Staff thereby consuming more resources of the Commission and other affected parties.

It is important for complaints to be handled quickly and to provide relief to aggrieved parties when necessary. However, TIA disagrees with the Commission's tentative conclusion that the fast track process accomplishes the result in the most efficient manner. Rather than arbitrarily insisting on unreasonably short response times under the fast track process, the Commission should require dialogue between affected parties without government intervention in the first instance.

4. Standing.

The Commission proposes not to impose a standing requirement for complaints filed under Section 255 based on the fact that it does not want to burden the complaint process with disputes relating to standing.¹¹² Though it is possible that there will be disputes over standing if the Commission adopts a standing requirement, those disputes should be few and far between. On the contrary, the Commission's tentative conclusion to refrain from imposing a standing requirement is likely to create significant disruption of the orderly functioning of the Section 255 complaint process.

Due process requires that a complaint contain sufficient specificity in order to allow a manufacturer to adequately prepare a defense. This can only occur if a manufacturer has specific facts from a specific complainant about the specific manner in which a product is alleged to be inaccessible based on the complainant's specific disability and his or her inability to use a device given the disability in question.

In addition to denying a manufacturer due process, the lack of a standing requirement will result in frivolous complaints being filed against manufacturers. For example, the absence of a standing requirement might encourage the filing of target complaints, i.e., complaints against a specific manufacturer designed only to hassle that manufacturer as a result

¹¹² *NPRM* ¶ 148.

of some past action or attitude, or to coerce a manufacturer into taking action it would not otherwise take.

Similarly, the lack of a standing requirement might result in complaints being filed by persons without any "interest" in disability issues but merely as fishing expeditions to obtain material from manufacturers that would otherwise be kept confidential. For example, manufacturers' competitors could use the complaint process to try and discover a company's internal equipment design and/or product development processes which are matters wholly irrelevant to the intent of Section 255 but which could have immense commercial value in a competitive equipment marketplace.

Without a standing requirement, there is no way the Commission can nip such abusive and anti-competitive actions in the bud, especially given the fact that the Commission's one day turn around proposal is not likely to provide the Commission with sufficient time to engage in any qualitative review of a Section 255 fast track complaint. The Commission's ultimate goal in developing rules for the implementation of Section 255 should be to get more accessible product into the market at the earliest possible time.

The Commission should not institute procedures which deny manufacturers due process by creating impediments to preparing adequate defenses to complaints or by creating incentives to abuse the complaint process, since resources devoted to defending against complaints filed by persons who are not directly aggrieved serves only to takes resources away from the development of accessibility solutions.

5. Complaint Format.

The Commission does not propose a specific complaint format but instead proposes to require at a minimum that the fast track complainant identify the equipment, name and address of the manufacturer and a description of how the equipment is inaccessible to persons with a disability.¹¹³ TIA believes the better course of action is for the FCC to adopt a specific complaint format and require complaints filed to follow the uniform format.

The basic requirements proposed in the *NPRM* do not provide a manufacturer with sufficient facts upon which it can make a reasonable response. In fact, what the Commission would require as a minimum to be included in a complaint denies the respondent due process since the information is unreasonably vague. The basic requirements for alleging a violation of Section 255 should include not only the information proposed in the *NPRM*, but a detailed description of (1) the complainant's disability and (2) the efforts made, if any, to acquire product from a retail outlet or service provider. Only when a manufacturer has sufficiently precise information on which to respond, can the manufacturer adequately investigate the complaint and respond in a meaningful manner.

6. FCC Decisionmaking Process.

The Commission proposes to use a respondent's "resolution report" as well as other sources of information to render its decision on a fast track process complaint.

¹¹³ *NPRM* ¶ 131.

Specifically, the Commission indicates that it "...might also include information requested from the respondent or the complainant, discussions with accessibility experts from industry, disability groups or the Access Board, or review prior or other pending complaints involving the respondent."¹¹⁴ TIA asserts that the Commission's proposed decisionmaking process is deficient in two respects.

First, as noted above, the 5 day response period is entirely too short and will not lead to the Commission receiving the type of detailed, substantive information that will enable it to make a decision on the merits. As a result, more often than not, the Commission's fast track process will not lead to the rapid resolution of a complaint, but will lead to the initiation of a complaint under the Commission's more traditional complaint processes. This will entail greater burdens on all affected parties, including the Commission and will substantially delay the time it takes to resolve legitimate complaints.

Second, and more importantly, the Commission's proposal to rely on outside sources in a fast track process is not appropriate. At this point in time, there is no acknowledged group of telecommunications disability experts who have actual knowledge about whether it is "readily achievable" for a manufacturer to incorporate accessibility features into telecommunications equipment and CPE. Expertise in accessibility is but one dimension in the process of developing and incorporating accessibility features into telecommunications equipment and CPE. Expertise in manufacturing systems and design of product for the market is

¹¹⁴ *NPRM* ¶ 141.

also essential. While systems may vary from company to company, all manufacturing systems ultimately utilize a “design team” to define a product with the specificity necessary for production. The “design team” consists of numerous personnel, including human factors engineers, RF or systems engineers, marketing, and manufacturing engineers, each of whom has expertise that must be melded together to agree on final product definition. The product definition establishes all of the technical specifications (e.g., frequency, bandwidth, technology platform, power source) and market specifications (e.g., size, features, weight). While “accessibility experts” may exist in the area of human factors and technological approaches for addressing various functional limitations, those experts would likely be uninformed in other areas that go into product design, and their conclusions about a particular solution for a particular product made by a particular manufacturer may be totally inconsistent or mutually exclusive with other factors that go into the product design process. For example, while an “accessibility expert” may know about the use of voice chips, variable size fonts or color contrasts to assist persons with specified disabilities, the “accessibility expert” is not likely to understand the impact such factors may have on other critical components of the product definition such as the increased power consumption, memory size or chip size. Thus, Commission reliance on such “experts” is of questionable validity at best and at worst could lead to wholly erroneous and subjective conclusions on whether it was “readily achievable” for a manufacturer to make a product accessible for a given disability.

Moreover, unless, a manufacturer is given the opportunity to submit comment “on the record” regarding information provided to the Commission by outside sources who are not

parties to the proceeding, it would be denied procedural due process in an administrative proceeding. If, on the other hand, a manufacturer is allowed to provide comment on such discussions and/or documents, the "fast track" process would be delayed further. Thus, the better course of action would be for the Commission to use TIA's DRP process which requires the parties to engage in direct, substantive dialogue before the matter even comes to the attention of the Commission. Only after good faith efforts at resolving their differences fail, should the Commission institute one of its more traditional dispute resolution processes.

7. Ability to Switch Out of the Fast Track Process.

In the *NPRM* the Commission asks for 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."¹¹⁵ The fact that the FCC calls for comment on this issue is an acknowledgment that the fast track process has potential flaws for the reasons described above. Thus, TIA does not believe the Commission is asking the correct question here. Rather than attempting to provide a mechanism by which parties can switch out of fast track if it is not producing the desired result (which will certainly result in wasted resources of all affected parties), the Commission should evaluate whether the fast track process concept is likely to accomplish the desired result in the first place. TIA asserts the Commission's fast track proposal will not accomplish the desired result.

¹¹⁵ *NPRM* ¶ 137.

B. TIA's Proposed Dispute Resolution Process.

Instead of implementing the FCC's proposed fast track process, the public would be better served if the FCC were to adopt TIA's DRP, as slightly modified in these comments from December 1997 proposal distributed to the staff of the Wireless Telecommunications Bureau, the Commission's Disabilities Task Force and other interested parties.¹¹⁶ The DRP is specifically designed to accomplish the dual objectives expressed by the Commission that a compliance program for Section 255 complaints should (1) be responsive to consumers and (2) be an efficient allocation of resources.¹¹⁷

TIA's DRP¹¹⁸ has the following basic characteristics:

Manufacturers are required to establish at least one point of contact to be the person responsible for receiving complaints and otherwise fielding inquiries regarding accessibility issues;

Manufacturers are required to provide the FCC, and upon request to individuals with disabilities and their representatives, with a point or points of contact;

The FCC is required to advise aggrieved parties that they must first engage in the TIA DRP process as a prerequisite to filing an informal or formal complaint under Section 255;

Manufacturers are required to establish contact with the aggrieved party within 5 business days after the point of contact has been contacted by the

¹¹⁶ See Appendix B.

¹¹⁷ *NPRM* ¶ 124.

¹¹⁸ In these comments, the proposal has been modified and expanded slightly since its initial preparation based on consideration of the issues and evaluation of the *NPRM*.

aggrieved party and to enter into good faith discussions with the aggrieved party thereafter to try and resolve the issue;

Manufacturers are required to provide a complete, detailed response to the aggrieved party, with a copy to the FCC, as promptly as possible but in no event later than 60 days after receipt of the aggrieved party's initial contact with the manufacturer, providing the solution to the complaint or stating the specific reasons why the complaint could not be satisfied;

The FCC is required to consider complaints brought pursuant to Section 255 only if the complainant has first contacted the manufacturer and the 60 day time for a response has expired (or such shorter period of time if the manufacturer has submitted a response in less than 60 days).

TIA's DRP is responsive to consumers' needs. It provides sufficient time to allow a manufacturer and aggrieved party to engage in the type of dialogue necessary for the manufacturer to fully understand and evaluate a particular complaint and for the consumer to understand the manufacturer's issues. To the extent a perceived complaint involves a service provider, the 60 day (or less) resolution period also enables the parties to contact the service provider to receive its input.

TIA agrees that "accessibility delayed is accessibility denied."¹¹⁹ However, as described above, it does not believe that arbitrarily short response deadlines create an environment or process which expedites the ultimate provision of accessibility. In fact, TIA believes the fast track process will create the opposite result. The dialogue which must take place between an aggrieved party and a manufacturer (and perhaps with service providers as well) will be especially important in the early days of Section 255 implementation. At the

¹¹⁹ *NPRM* ¶ 124.

present time there is a very small book of knowledge on telecommunications accessibility issues. Though the learning curve will increase rapidly as telecommunications accessibility issues are discussed and evaluated for a wide variety of disabilities, there will be a period of time during which persons with disabilities and manufacturers will learn each other's respective needs and the practical limitations of making accessible products in today's competitive marketplace.

In addition to the foregoing, nowhere in the *NPRM* does the Commission commit to resolve fast track complaints within 30 days, 60 days or any other period. Unless there is a commitment on the part of the Commission to resolve fast track complaints within a short period of time, there is no guarantee that unreasonably short time periods for manufacturers to respond to fast track complaints will lead to less delay in providing accessibility solutions than if the parties are given a reasonable period of time to resolve the issues themselves.

The TIA DRP also serves to conserve resources of the Commission and industry. By allowing a period of time during which manufacturers can discuss accessibility complaints with persons with disabilities free of Commission involvement, the Commission can devote its staff resources to resolving legitimate complaints filed under its formal or informal complaint processes. From the manufacturer's standpoint, more design resources can be devoted to ensuring accessible products are produced for a wide variety of disabilities than are devoted to participating in expensive and time consuming complaint proceedings.

C. Use of Traditional Dispute Resolution Processes.

1. Statute of Limitations for Bringing Complaints.

The *NPRM* does not propose to impose a statute of limitations on the filing complaints under Section 255 (whether a complainant uses the fast track, informal or formal complaint process) but asks for comment on whether the 2 year statute of limitations in Section 415 should be applied to manufacturers.¹²⁰ TIA does not agree with the Commission's tentative conclusion that no statute of limitations should be imposed for Section 255 complaints. The longer the period of time after the design and development process is commenced for a given product that a complaint under Section 255 can be brought, the greater the burden will be for a manufacturer to respond to the complaint. This is due to the fact that records for a given product may be archived or personnel involved in the process of determining what accessibility features in a product were “readily achievable” are no longer employed by the manufacturer. Most importantly, the telecommunications equipment market continues to evolve at an accelerating pace. There are hundreds, if not thousands, of new products being introduced on a monthly basis. CPE typically has a typical product life of approximately 12 months and, on average, is only produced for that period of time.

In addition, as time goes on, it will be “readily achievable” to build more accessibility features into telecommunications equipment and CPE. Moreover, the alleged

¹²⁰ *NPRM* ¶ 149. Section 415 of the Communications Act requires parties to file complaints against telecommunications carriers for charges levied within the previous two years. Section 415 is not applicable to manufacturers of telecommunications equipment and CPE.

inaccessibility of a product which is no longer in production may be rendered moot if other more recently developed and introduced products presently being manufactured will have the accessibility features desired. Nonetheless, unless the Commission imposes a statute of limitations on the ability to file a complaint under Section 255, manufacturers will have to devote substantial resources to responding to some complaints which prove to be unnecessary.¹²¹ TIA asserts that the Commission should adopt a statute of limitations for bringing a complaint under Section 255 (whether fast track, informal or formal) under which complaints tendered pursuant to Section 255 will be barred if they are filed more than 6 months subsequent to the complainant's initial purchase of a device subject to Section 255. TIA's proposal provides balance between the right of a person with a disability to file a Section 255 complaint within a reasonable amount of time after purchase¹²² and a manufacturer's right to avoid having to respond to obviously stale complaints which are wasteful of resources.

2. Response Time for Informal and Formal Complaints.

The NPRM proposes to require respondents to provide answers within 30 days of the date of the complaint and complainants to respond thereto within 15 days¹²³ rather than 10

¹²¹ This is another example where the use of TIA's proposed process for requiring mandatory dialogue between a potential complainant and a manufacturer before a complaint is filed with the Commission can be put to good use.

¹²² Presumably, shortly after purchase, a person with a disability will know whether the product in question is accessible.

¹²³ *NPRM* ¶¶ 150-152.

days and 5 days as provided for in the Commission's general pleading rules. The basis for the longer time periods is due to the Commission's acknowledgment that Section 255 informal and formal complaints are likely to be more complex than complaints typically filed with the Commission. TIA agrees that Section 255 complaints will be complex and that a longer period of time is necessary to answer a complaint and to respond to an answer.¹²⁴ However, TIA submits that 30 days and 15 days are not sufficient periods within which to file answers and replies for a number of reasons. First, as noted in the discussion on fast track complaints, it may be necessary to translate the answer and response to formats that the respondent and the complainant can both understand. Second, it may take a substantial amount of time to evaluate the complaint and to identify those parties within an organization who were primarily responsible for making a determination on the addition of accessibility features in a given product. Third, because there is no present body of law or precedent with regard to Section 255, neither complainants nor respondents know what showings will satisfactorily support their respective cases. As a result, parties are likely to spend more time evaluating the proper factual information that must be submitted to demonstrate a violation of Section 255 or to defend against the same. For the foregoing reasons, TIA submits that answers to complaints should be filed within 60 days of receipt thereof, and responses to the answers should be filed within 30 days thereof.

¹²⁴ TIA also believes this statement about the complexity of Section 255 complaints demonstrates that a 5 day fast track response period is unreasonable on its face.

To the extent the Commission implements TIA's DRP proposal which requires parties to engage in a mandatory 60 day (or less) resolution period before informal or formal complaints can be filed, the 30 day answer and 15 day response periods proposed are reasonable. This is due to the fact that the dialogue between the parties in the mandatory pre-filing discussion stage will have served to enable manufacturers to engage in research regarding the factual matters alleged and to narrow the focus of the complaint which will have provided both sides with a substantial amount of information about the other's position thus reducing the time necessary to respond.

3. Confidentiality.

The confidentiality of information submitted in the context of the Section 255 complaint process (whether in the fast track, informal or formal complaint process) is a critical concern to manufacturers. Information on why it was not "readily achievable" to make a product accessible or to incorporate a particular accessibility feature goes to the very core of a manufacturer's product design and development process. It can also include highly proprietary and sensitive cost and financial information regarding a product or product pricing strategies. For example, especially when raising the "readily achievable" defense, information which would have to be submitted to prove a case might include product costs, current drains required for certain features, ROM space required for certain features, licensing fees paid to others, technical details of operation and similar matters of a highly proprietary and confidential nature, which, if

put in the public domain would have devastating impact on a manufacturer's competitive position in the marketplace.

TIA is concerned that existing rules which are designed to protect disclosure of confidential information are not sufficient to protect manufacturers' legitimate interests. TIA is further concerned that unless the Commission takes strong steps to prevent the disclosure of confidential information, the Section 255 complaint process might be used by unscrupulous entities (including other manufacturers) as fishing expeditions to try and surreptitiously obtain information to their competitive advantage.

For the foregoing reasons, TIA proposes that the Commission should adopt a presumption that trade secrets and commercial or financial information submitted to the Commission by a manufacturer in connection with a "readily achievable" defense to a Section 255 complaint will be treated as confidential as a matter of course¹²⁵ and that it will treat such material as falling within exemption 4 of the Freedom of Information Act.¹²⁶ Further, TIA proposes that the FCC impose the following additional procedural rules to protect a manufacturer's confidential information: (1) no confidential materials will be required to be disclosed unless the complainant executes a confidentiality agreement; (2) complainants shall not

¹²⁵ In a similar product defense, disclosure of such confidential information would not be required.

¹²⁶ Exemption 4 of FOIA, 5 USC § 552(b)(4), provides that an agency need not disclose information that is "trade secrets and commercial or financial information obtained from a person and privileged or confidential." *Bartholdi Cable Company, Inc. v Federal Communications Commission and United States of America*, 114 F.3d 274 (D.C. Cir. 1997).