

A. Disability.

The NPRM adopts the ADA definition of disability, and also proposes to incorporate a list of common disabilities identified by the Access Board as a useful guide to service providers and equipment manufacturers.³⁹

As suggested above, this is the proper approach. The Commission does not have the authority to limit the definition of disability. At the same time, AFB agrees that it is sensible to provide guideposts that may assist manufacturers and service providers in defining the disabilities issues that they must address. The Access Board guidelines are useful and useable in this regard.

B. Accessible To and Useable By.

The Commission proposed to adopt the Access Board's definition of accessibility and usability. That definition is designed to ensure that there are no impediments to the "functional" use of equipment or services.⁴⁰

In general, AFB supports the Commission's approach, which defines "accessibility" in a practical, not an academic manner. The Commission, recognizes, for example (at ¶72) that in order for equipment to be useable for disabled individuals, those individuals must have access to documentation regarding the product equivalent to the information available to consumers generally.⁴¹ This approach is required under Section 255 of the statute, which focuses on the

³⁹ NPRM, ¶ 68.

⁴⁰ NPRM ¶ 73.

⁴¹ NPRM ¶ 75.

accessibility and usability of equipment and services from the perspective of the user.⁴²

Manufacturers and service providers, by their actions in the marketplace, have indicated what information must be available in order for equipment and services to be "accessible and useable" by consumers generally. For example, while cellular phones are delivered with a manual, it is also common for cellular phones to include an "in-unit" menu that provides some guidance for activating unit functions; and it is also common to have a number for accessing technical support. Equipment or software upgrades may be available, possibly through the Internet. The decisions to offer assistance in various forms and upgrades over time reflect both the complexities of the equipment and judgments about the way in which the equipment is likely to be used and the speed of its technological evolution. These decisions provide a guide for measuring the minimum types of information resources that must be available to persons with disabilities.

The guidelines that are described at ¶¶73-74 therefore should be supplemented to make it clear that disabled individuals should be provided options for receiving technical assistance similar to the options available to general consumers, where readily achievable. Further, this support should be available for the product life and for product upgrades. Finally, the accessibility of the support should be evaluated consistent with the guidelines identified by the Access Board and listed at Section 1193.33 of the guidelines.

At ¶80, the Commission asks how it should distinguish between accessibility obstacles caused by network equipment, and those attributable to service providers. As a general matter,

⁴² Thus, for example, Section 255(b) requires that manufacturers ensure that "equipment is designed, developed, and fabricated to be accessible to and usable by individuals..."

the problem may be more difficult in theory than in fact, if the Commission simply recognizes that all parties -- the equipment manufacturer, the service provider, and the network owner -- will have independent obligations to ensure accessibility. Those independent obligations should lead to cooperative solutions, so long as the Commission makes it clear that it will presume that cooperation and sharing of information to address access problems is "readily achievable."

C. Commonly Used.

The NPRM proposes to determine whether peripheral equipment is "commonly used" by examining, *inter alia*, the cost of the equipment.⁴³ AFB believes that this misunderstands the nature of the "commonly used" test. The Access Board Guidelines at Subpart D, Section 1193.51 provide a more sensible approach. As those guidelines suggest, it should not matter whether a particular piece of equipment is expensive or not expensive, or has achieved wide dissemination within the disabilities community, if the equipment has inputs and outputs that are themselves standardized. A focus on the price of a piece of equipment, or even whether it is widely used necessarily will exclude from coverage some specialized access technology such as braille displays, or new and innovative equipment.

D. Readily Achievable.

The NPRM's discussion of the "readily achievable" standard departs most significantly from the plain language of the statute.⁴⁴ The result is a circular and overly complex, three-prong

⁴³NPRM, ¶ 90.

⁴⁴NPRM, ¶¶ 94-97.

standard that defines "readily achievable" as a function of "feasibility," "expense" and "practicality."⁴⁵

1. Feasibility.

The NPRM states that in determining whether accessibility is "readily achievable," it is essential to consider whether a solution is technically feasible, citing as an example the alleged technical infeasibility of fitting large keyboard buttons onto a small wireless phone.⁴⁶ While technological feasibility is obviously something to consider in determining whether a *particular solution* will resolve an accessibility issue, the feasibility standard, as proposed, may tend to confuse rather than enlighten. As the keyboard example suggests (and contrary to the discussion at ¶102), a simple "feasibility" standard may lead a manufacturer or service provider to believe its obligations under the statute are satisfied if it can be shown that a particular accessibility option is technologically infeasible given the design, development and implementation decisions the manufacturer or service provider has chosen to make. As discussed earlier,⁴⁷ a manufacturer might actually choose to eliminate a feature that is accessible in order to enhance a feature that is not. For example, a manufacturer may be able implement a design that allows 200 speed dial numbers to be activated from a video screen but no speed dial numbers via keyboard command; or to implement a design that allows 100 speed dial numbers to be activated via keyboard or video screen, at the user's choice. Accessibility for people who are blind or visually impaired is feasible if the latter approach is taken, but not in the former case. If the manufacturer can simply

⁴⁵NPRM, ¶ 100.

⁴⁶NPRM, ¶ 101.

⁴⁷ See discussion at p. 16.

decide to incorporate features in a manner that *makes it infeasible* to provide accessibility, the statute will have little meaning. A simple feasibility standard therefore begs the question: the critical question is whether the manufacturer or provider considered alternatives, including an assessment of their impact on accessibility, and erred in favor of accessibility. This is the test required by the statute. As the NPRM (at n. 199) suggests, the closest corresponding ADA test considers the "nature and cost" of the action needed to provide accessibility. Returning to the original example of large keys on a small unit, this test focuses on the nature of the problem (keys not useable by persons with limited vision) and nature of the resolution required (provision of an input approach that is useable). Feasibility would only become an issue if there were no way to provide an input device. The Commission's rules should therefore be clear that there is a responsibility to define the problem, and to consider alternatives, consistent with the ADA approach. This is preferable to the adoption of the vague "feasibility" standard set out in the NPRM.⁴⁸

2. *Expense.*

The Commission proposes to determine the expense associated with accessibility by considering the cost of implementing accessibility, offset by the potential income stream associated with sales of the service or equipment.⁴⁹ In addition, the Commission proposes to take into account the "opportunity cost" associated with implementing accessibility solutions.⁵⁰ While expense is obviously something that is appropriately considered in the context of the

⁴⁸NPRM, ¶¶ 101-102.

⁴⁹NPRM, ¶ 103.

⁵⁰NPRM, ¶ 104.

ADA, the expense test proposed by the Commission is unworkable. The "opportunity cost" analysis, for example, assumes that opportunity costs can be sensibly quantified -- and that had a particular company devoted resources to some other enterprise, that enterprise would have proven profitable. Thus, the Commission (at ¶104) suggests that it will consider the fabrication resources required to build a product, although it is not clear why it should be presumed that the facilities would have been useable for some other purpose, or that the use would have been profitable. The cost of determining the opportunity cost will be enormous. Moreover, it cannot possibly lead to the result contemplated by the statute. By definition, if manufacturers believed that the best use of their dollars was to produce accessible equipment, the equipment would be produced; the fact that Congressional intervention was required suggests the possibility that the opportunity cost analysis is being made in the market place and is being resolved in a manner that Congress decided was inconsistent with important public policies.

Even the process of determining the "net" expense associated with providing accessibility, while more defensible, is likely to be a speculative enterprise at best. The process is made even more confusing by the fact that the NPRM proposes to consider the same issue in several different ways. Thus, not only does the Commission propose to consider the "net" expense (which appears to be the cost of the feature minus additional income), the NPRM also proposes to consider "cost recovery," which appears to require the Commission to identify the incremental cost of a feature, and whether that incremental cost will be recovered.⁵¹ Further, the NPRM's analysis ignores the fact that in this technologically evolving field, it is not at all clear

⁵¹ NPRM, ¶¶ 115-116.

how "expense" should be accounted for. A feature that industry wished to add might be very expensive, but might nonetheless be added to a particular product even where adding the feature might not otherwise seem to be justified because adding the feature might pave the way to new markets, or because the cost of the feature might well be spread across several product lines. In order to consider the expense of including voice activation features in a particular cellular phone, for example, one would need to ask whether that expense is properly allocated to the particular product or should be spread across several other products.

There is no particularly good way to determine opportunity cost or net expense or cost recovery based on "expeditious procedures," without creating simple rebuttable presumptions.⁵² There may be a basis for presuming that the cost of providing access is in fact low, because the same options that make a product accessible to what has traditionally been defined as the disabled community will often make the product more useable or useful to the general consuming public. Equipment that is voice-activated, and equipment that can convert text-to-speech may be critical to persons who are blind. Chairman Kennard has emphasized this point in recent speeches.⁵³ It has also become clear that such features are enormously beneficial to others

⁵² The Commission's efforts to develop a simplified cable rate regulatory structure that, *inter alia*, would nonetheless permit it to determine the "net" cost of programming have required the Commission to revise its rules at least 14 times in a span of only six years; the Commission has recently suggested that its rules may not be adequate to allow it to identify these "net" costs, and that further investigation may be necessary to determine whether programming charges levied by cable companies are reasonable. The Commission's description of the "expense" test it proposes to apply here likewise seems to invite regulatory confusion.

⁵³ Remarks by William E. Kennard, Chairman, Federal Communications Commission to WIRELESS 98, Atlanta, Ga. (February 23, 1998). "The best way [to achieve accessibility] is to consider access issues at the front end -- during the development and design process. It is an area where the truly innovative can help the disabled -- and create a lucrative market. After all, look at other products first designed as "disability solutions": vibrating pagers, ball mouses, speaker phones. They are on the mass market now.

who may wish to "hear" their e-mail messages, or activate calling card features by voice, rather than from a keypad. Therefore, absent some showing that an accessibility feature is not useable by the general public, or that an accessibility feature cannot be marketed more generally (because of legal constraints, for example), the Commission should presume that any expense will be offset by net benefits. If there is such a showing that an accessibility feature is not useable by the general public, then the question is a much simpler one: what is the incremental cost of the accessibility feature? That cost must then be balanced against the resources available to the provider to determine whether accessibility is "readily achievable" given the costs associated with it.

3. *Practicality.*

The "practicality" standard devised by the Commission seems designed to consider the organizational resource issues implicit in the ADA definitions at 301(9)(B)-(D). The FCC proposes to consider the resources available to the provider to meet expenses associated with accessibility; to consider the potential market for the product or service; to consider incremental cost; and to consider product life cycle issues.⁵⁴ One of the issues that the Commission proposes to consider as part of the "practicality standard" -- the incremental cost issue -- duplicates the investigation conducted in determining the expense of accessibility and is unnecessary. The remaining tests are discussed below.

Speaker phones, Motorola's new talking pager, and PacBell's priority ringing service can be used by everybody. At the Winter Olympics, Japan's NTT is testing another product with great potential for more than the disabled. It's a mobile phone that can be worn like a watch, weighs less than two ounces and uses voice-recognition, not a keyboard."

⁵⁴NPRM, ¶ 106.

i. Resources.

The FCC (at ¶¶ 109) proposes to examine the resources of the corporation or equivalent organization that is legally responsible for the equipment or service, subject to presumptions which are designed, on the one hand, to prevent companies from establishing sub-units that do not have access to the resources other units may have; and on the other to look only at the resources of a sub-unit that does not have access to the resources of the parent.

AFB generally supports this approach, with three important modifications.

First, in determining whether a corporation or other unit should be deemed to have access to the resources of the parent, the Commission must examine not only whether the corporation has access to the resources of the parent generally, but also whether other corporations or units of the parent have access to parental resources. That is, one cannot create isolated sub-units in order to evade Section 255 responsibilities.

Second, in determining whether a sub-unit does not have access to the resources of the parent, the Commission should make it clear that the impediment to resource access must be legal and not simply budgetary. In response to the NOI, several industry groups pointed out that products might be created by sub-units that are given very limited budgetary resources, as a matter of corporate policy. However, Section 255 places the legal responsibility on the service provider or the telecommunications equipment manufacturer, not upon the sub-unit. The parent cannot avoid its responsibility by creating underfunded production sub-units. This is particularly important in the context of Section 255, where an accessibility option (e.g., voice activated features) developed in connection with one product may have application to other products

outside the sub-unit. Focusing on the legally responsible entity will allow the Commission to determine whether development of an accessibility feature is "readily achievable."

Third, the Commission should add a final test. As noted above, the Commission has proposed to identify the "equipment manufacturer" as the final assembler. The "resource" analysis echoes that approach, and raises some of the same concerns that AFB discussed earlier. With respect to parents and subsidiaries that create a marketing chain responsible through different legal entities for the collective "design, development and fabrication" of a product, at the very least the resource analysis should look to the resources available through the entire chain. For example, a parent company might purchase and then market products from a subsidiary under its own name, and bear responsibility for technical support of the product. Under this example, the parent, as well as the subsidiary has responsibility for compliance under Section 255. Therefore, resources of the parent (if greater) should be considered in determining whether access is readily achievable, even if the parent would not ordinarily make the resources available to the subsidiary.

ii. Market Considerations.

The Commission proposes to take market considerations into account in determining whether it is practical to make a product accessible. The Commission (at ¶¶ 111-114) seeks comment on whether and how these considerations should be taken into account.

As the Commission recognizes, a standard that relies on "market considerations" is likely to lead to specious claims that accessibility will adversely affect the marketability of a product.⁵⁵

⁵⁵ NPRM, ¶ 113.

While the FCC states that it does not intend to entertain such claims, it is doubtful that the claims could be avoided.⁵⁶ Particularly troubling is the Commission suggestion that one might consider whether the accessible product would compete with non-accessible products in terms of price and features. The goal of Section 255 is to provide accessibility for all equipment and services. Allowing accessibility to be denied by comparison to non-accessible equipment and services results in a circular analysis that undercuts the mandate of Section 255. It does not appear to be necessary to address "market considerations" independently as part of the "readily achievable" test.

Finally, in its discussion of "market considerations," the FCC declines to adopt the "no net decrease" rule proposed by the Access Board, apparently because the Commission believes that manufacturers should be allowed to make "legitimate feature tradeoffs" or because the rule may somehow discourage innovation.⁵⁷ AFB does not believe that the Commission's innovation concerns are well-grounded and its "trade-off" test cannot be squared with the statute. It does not appear to the AFB that the Commission has the option of allowing innovation that limits *existing* accessibility. Section 255 mandates accessibility where it is readily achievable, and as the FCC recognizes, "the fact that a product has particular accessibility features is evidence that inclusion of those features in later products from the same producer is readily achievable." The Congressional mandate appears to AFB to decide that innovations that limit accessibility are not permitted. Graphical user interfaces (to take one "innovation") present problems for the blind if

⁵⁶ NPRM, ¶ 113.

⁵⁷ NPRM, ¶ 114.

implemented in one particular way (without appropriate backward compatibility and without the capability of interacting with the icon without seeing it) but could also be implemented in a way that does not create these problems. That should be the required result. The Commission has recognized that speed dialing is a telecommunications service. Many older cellular phone models permitted numeric keyboard activation of speed dialing, ringer tone/volume, and other features which were accessible to people who are blind or visually impaired. By contrast, most newer models reduce or eliminate numeric keypad control of functions and features, requiring the user instead to scroll through a menu of options shown on a visual display which, of course, is inaccessible to a person who is blind. In one sense, this is a product innovation: the convenience of an expanded menu-driven interface for those who can see the menu; but it is a tremendous step backward for users who are blind, or anyone else who must use the phone in poor lighting conditions. This sort of access-limiting approach makes precisely the tradeoffs that the law was intended to prevent. The Access Board's "no net decrease" guideline should be adopted."

iii. Timing issues.

The Commission generally draws a distinction between new products and old products, assuming that features are more difficult to add at the end of the development cycle or post-development. Hence, the FCC states that once a product is introduced without the accessibility features (because accessibility was not possible at the time) it need not be retrofitted to incorporate subsequent accessibility features.⁵⁸

⁵⁸ NPRM, ¶ 120.

The Commission's analysis is correct to the extent that it assumes that retrofitting may not be possible for certain existing products. But, the sort of blanket presumption the NPRM proposes to adopt is not justified and runs counter to the access board guidelines. Product upgrades, through software or hardware additions may be made available by a manufacturer during the course of the life of a product. For example, a corporate phone system may remain in place for years, but may be upgraded via hardware or software additions that add or modify features over time.⁵⁹ These sorts of upgrades should incorporate accessibility features, to the extent readily achievable. Even additions to documentation may sometimes make a product accessible, by explaining how advanced features can be manipulated. Likewise, to the extent that it is "readily achievable" to add accessibility features post-development, the features ought to be added. An exception could be drawn where the manufacturer could show that the cost of the add-on to the product would be roughly equivalent to the price of purchasing a new unit, and further shows that it is or will be making a new unit available within a short period of time. As a general matter, the replacement unit should have been fully tested and be in the final phase of production before a manufacturer may take advantage of this defense.⁶⁰

⁵⁹ Indeed, the FCC needs to recognize that some equipment or systems are actually expected to remain in place for relatively longer period of time, and may be marketed based on an ability to be upgraded over time. Certainly where products are touted as upgradeable, and a company devotes sales efforts to upgrades, the process of designing, fabricating and implementing the upgrades should include efforts to add accessibility.

⁶⁰ An additional issue arises where a manufacturer or service provider simply fails to abide by the mandates of Section 255. In such a case, it is appropriate to order retrofitting even if the retrofit would not ordinarily be required "readily achievable." Otherwise, a company could avoid Section 255 altogether simply by evading the law until it was no longer possible to comply cheaply.

IV. IMPLEMENTATION ISSUES.

The major problem with the complaint process devised by the Commission is that it does not ensure that there will be any way to easily determine whether or not a company is in fact taking the steps required to comply with Section 255. As is clear from the Initial Regulatory Flexibility Analysis, the only "recordkeeping requirement that the Commission proposes is for each covered entity to provide a point of contact for referral of consumer problems." This means that companies will not have internal, written guidelines for implementing Section 255, nor will they be required to maintain records of e.g., the manner in which the FCC guidelines were taken into account in the product design, development and fabrication processes.

However, the efficacy of the proposed rules depends upon industry considering accessibility issues throughout product development. As the Commission has suggested, the rules are very process oriented.⁶¹ But, unless the process is defined, and its implementation reviewed, there is no reason to suppose that the process is likely to operate well or serve the statutory goals.

Likewise, without documentation, the "readily achievable" test that the Commission proposes is likely to be impossible to apply without extended hearings. The informal process, to be most effective, requires that complainants be able to determine to their satisfaction whether accessibility was or was not readily achievable. A process that does not have this effect will result in the submission of more formal complaints.

⁶¹NPRM, ¶ 124.

AFB therefore suggests a simple four-pronged approach that will render the FCC's implementation procedures more efficient.

First, every telecommunications service provider, every equipment manufacturer and every carrier subject to 251(a)(2) should be required to develop an accessibility plan defining precisely how it intends to implement the accessibility obligations through the product and service development process. To the extent that a product is tested, the testing should include some plan for product testing for accessibility. The plan should be periodically reviewed to determine whether it is resulting in accessibility, and if it is not, then the process itself should be revisited.

Second, every covered entity should maintain records showing how the plan was implemented at each phase of the production process. In the design phase for equipment, for example, records should show what accessibility options were considered, and why they were rejected.

Third, the manufacturer or service provider should certify that it has taken accessibility issues into account, and should further state(using the FCC guidelines) whether it believes that its product is or is not accessible to and usable by persons with specific functional limitations.⁶²

Fourth, the information described in the first and second point above should be provided to a complainant on request.

⁶² The Commission asked whether it should adopt rules similar to its equipment certification rules for purposes of Section 255. AFB believes that this would be helpful. First, it will help people in the disabled community to make decisions about what products to buy. Second, it may help focus complaints. More detailed investigation may be necessary where a product is plainly not accessible. The informal process may be best suited for resolving complaints about products that are certified accessible but which for some reason -- inadequate documentation, correctable code errors, etc. -- are not accessible in fact.

Complainants will then be able to focus upon whether reasonable efforts have been made to address Section 255. In turn, at the end of the complaint process, it will become simpler for the FCC to determine the appropriate remedy for a particular violation. The FCC will be in a position to distinguish between companies that have made good faith efforts to comply with Section 255, and those which have not.

A. The Informal Process.

The AFB generally supports the informal procedures outlined by the Commission. It believes that the approach can be flexible, so long as the procedures are clearly understood, publicized, and easily accessible.

At ¶132, for example, the Commission asks whether it should permit delegation of contact point responsibility to clearinghouses or to other entities that are not "in-house." The main goal should be to ensure that the complaint process is seamless to the complainant. So long as one entity is responsible for receiving complaints (as opposed to one entity for engineering issues, one for design, etc.) the process should work whether or not the contact responsibility is delegated. The Commission should permit latitude in contact point designation, so long as the legal responsibility for ensuring that complaint response deadlines are satisfied lies with the entity that is subject to Section 255.

At ¶134, the Commission asks whether contact information should be publicly available. The answer is "yes." If the information is publicly available, secondary information sources will develop that will help potential complainants use the informal process more effectively. Access through the Commission's own web resources would be helpful in this regard. It may also be helpful to establish an e-mail address for filing complaints.

It may also prove helpful to establish a database of complaints filed. This would simplify processing procedures, and also (a) help equipment and service users to identify what sort of issues are being addressed through the complaint process and (b) help the Commission identify particular problems or particular companies that may be of most significant concern. Further, the database should include information about complaints that were dismissed on the ground that the service involved was an information service. By collecting data on accessibility of information services, the Commission will be in a better position to gauge the rationality and impact of the telecommunications/information services distinctions that it draws.

At ¶135-139, the Commission sets out very strict deadlines for responding to complaints - too strict for a process that is supposed to be informal and cooperative. While some complaints (such as complaints about documentation for a product) might well be resolved quickly, in other cases (where it appears that a company is not implementing Section 255 in the design process) it is likely to take more time for the company to produce and the complainant to examine information that will help resolve the complaint. It may be that many complaints, for example, will come from organizations that represent a group of individuals that cannot obtain access, and that the appropriate "informal" resolution will result in changes to the process by which Section 255 is implemented within a company. This is likely to take some time.

AFB therefore proposes to adjust the timetables as follows.

The time for forwarding a complaint should be one day, as proposed, though a failure to meet this deadline should not become grounds to excuse subsequent deadlines.

The complaint should be acknowledged, and the procedure the company will follow to address the complaint should be described to the complainant within five business days, in a format accessible to the complainant.

The time for response should be 20 business days from the complaint.

The Commission should issue its decision on the fast-track complaint within 40 days of the submission of the report by the entity covered by Section 255.

The time for response provides a more realistic schedule for discussions between a complainant and a company, and makes it less likely that the Commission will be asked to approve multiple extensions of time. However, just as critical is a deadline for Commission action, particularly for the initial report. Such a deadline is required as a matter of due process.

The Commission also asks under what circumstances the informal process may be terminated.⁶³ Obviously, a complainant should be able terminate the process at any time by withdrawing its complaint. And, so long as there is a deadline for initial Commission action -- and that action may be followed by an appeal of the informal decision, or by initiation of a formal complaint -- once the informal process begins it may continue to the issuance of the initial Commission report. Whether or not the Commission establishes strict deadlines for the issuance of a report, it will be critical to permit a complainant to file a formal complaint at any time. Indeed, the formal and informal processes could proceed simultaneously.⁶⁴

⁶³ NPRM, ¶ 137.

⁶⁴ In the cable renewal process, for example, the informal resolution procedures and the formal procedures may and often do move forward simultaneously. This can avoid unnecessary delay or duplication of effort.

Finally, the Commission should recognize that the informal process will only proceed smoothly and soundly if the staff members of the Commission understand disability issues. This requires training on an ongoing basis, and it will behoove the Commission to take steps to ensure that this training can occur.

B. The Formal Process.

AFB's main concern with the Commission's discussion of the formal procedures is the absence of a clear statement indicating that a complainant always has the option of initiating formal procedures. At ¶147, for example, the Commission suggests that the formal proceedings will only be initiated at its discretion. Because the informal procedures in fact provide very limited protection for the complainant as crafted, and no apparent opportunity for participating beyond the initial issuance of a Commission report, and because the Commission has declared that it is the sole forum for hearing complaints, this limitation denies complainant's due process. This is a civil rights statute. The Commission should not be able to refuse to commence formal proceedings (although it can obviously resolve some complaints on a summary judgment basis).

The procedures that the Commission has outlined⁶⁵ will generally work reasonably well in a Section 255 context, so long as the Commission properly allocates the burden of proof. That burden should be squarely placed on the company that is covered by Section 255. In addition, there will be instances where a complaint may actually involve multiple companies (e.g., in considering what resources are available to a Section 255 covered entity). The identity of the companies may not be known to the complainant. It should be clear that once a company

⁶⁵ NPRM, ¶¶ 144-156.

receives a formal complaint, it is that company's responsibility to join others who may bear responsibility for providing accessibility. For example, if an equipment manufacturer believes inaccessibility is actually attributable to the service provider, the provider should be joined. The rules should therefore provide for a simple process for joinder, and should ensure that discovery is available from all relevant companies in a product or service chain.

Generally, persons filing Section 255 complaints should not be subject to filing fee requirements. In many cases, filing fees would impose an unreasonable bar to resolution of Section 255 complaints by individuals and the groups that represent them. National statistics indicate that disabled individuals have materially below-average incomes. Filing fees would only exacerbate the difficulties of solving access problems. And, given the Commission's exclusive jurisdiction over such complaints, filing fees could well result in a denial of due process.

In addition, the Commission should make the following modifications to its rules of procedures for Section 255 complaints:

1. Section 1.721(a)(5) generally prohibits allegations from being made on the basis of information and belief and requires a full description of the source of the harm. In this case, however, while a complainant can reasonably be expected to make the fundamental allegation that a piece of equipment is not accessible, a complainant generally will not be able to identify the cause of the inaccessibility, or otherwise detail whether, e.g., inaccessibility is due to flaws in the design process, the development process or the fabrication process.⁶⁶ The Commission must

⁶⁶ The Commission's own inquiry as to how to distinguish between inaccessibility problems caused by the equipment and inaccessibility problems caused by the service illustrate the point.

either allow pleadings on information and belief, or more simply make it clear that a Section 255 complaint is stated by an allegation that the equipment or service is subject to Section 255 and is inaccessible. Section 1.721(10) will also require changes to this end.

Section 1.721(a)(8) appears to require that complainants attempt to resolve complaints informally before filing a formal complaint. Given the availability of the fast-track procedures, this requirement should not apply in Section 255 proceedings.

A company that answers a complaint should be required to make as an affirmative defense any claim that the accessibility problem is the responsibility of another company, and the rules should provide for joinder of any company so identified.

The Reply process contemplated in Section 1.726 establishes a strict standard for responses to affirmative defenses. Since complainants are not likely to be in a position within three days of the answer to respond to affirmative defenses, (given the complexity of the "readily achievable" standard). Indeed, no response should be required to affirmative defenses. Rather, the validity of the affirmative defenses should be resolved through the complaint proceeding itself.

As suggested above, records must be maintained and produced if the complaint process is to work. Section 1.730(h) should make it clear that complainants have an absolute right to such documentary materials in the Section 255 process.

Finally, Section 1.733 rules need to be modified so that they do not place an unreasonable burden on disabled individuals, and so that the critical transcripts and recordings are themselves accessible.

V. CONCLUSION.

AFB's Comments have focused on areas where it believes that the regulations proposed by the NPRM require improvement. Generally, however, the Commission is to be applauded for recognizing that the key to implementing Section 255 is to develop a practical approach that results in functional accessibility. If the Commission adopts the NPRM with the sorts of modifications suggested above, that goal will be achievable.

Nothing that has been proposed by AFB should prove burdensome to industry. The additional planning and record-keeping requirements are in fact relatively minimal, because those requirements can be incorporated into existing product design procedures. For example, companies will already keep records with respect to test performed on products to comply with FCC technical standards; it adds very little to require that the testing records include accessibility testing. Design procedures will already include records; it adds very little to include records regarding accessibility.

On the other hand, the rewards associated with ensuring that equipment is accessible are large, and cascade across society. And, as Congress recognized, in a society that is aging

rapidly, and where the disabled population is increasing rapidly, taking steps now to ensure accessibility is actually vital to the long-term health of the telecommunications infrastructure in this country.

Respectfully submitted,



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