to the requirements of Section 255, *i.e.*, because it is "capable" of functioning with the PSTN.[43] This is surely not what Congress envisioned or what the Commission suggested in its NPRM.

As TIA observed, if the manufacturer of such a telephone (or any other device not intended for use with a telecommunications service) were required to produce the telephone in compliance with Section 255, competitors who could produce the same product more cheaply without having to comply with Section 255 would force the manufacturer out of that market. Conversely, the U.S. manufacturer attempting to confront foreign competition by not building its line of private network equipment in compliance with Section 255 would risk violation of U.S. law.

The most logical and practical approach to assuring compliance with Section 255 for multi-use telecommunications equipment is to look to the purpose underlying manufacture of the equipment. If it is apparent from the manufacturer's marketing materials or it is evident from the nature of the device itself that the equipment is reasonably expected to connect to a telecommunications service <u>at any time</u>, it should be fully subject to Section 255. For its part, Trace Research & Development Center, University of Wisconsin-Madison, favors applying Section 255 to equipment that "<u>is manufactured for or marketed as</u> equipment that would be used in a telecommunications system."[44] Motorola agrees with Trace that the intention to manufacture or market equipment for use with telecommunication service is at the heart of the Section 255 inclusion criterion. Motorola does not agree with those who would apply Section 255 to devices that theoretically "can" be used with telecommunications service but were not

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[43] NAD Comments at 17; American Foundation for the Blind ("AFB") Comments at 5.

[44] Trace Comments at 5 (emphasis added).

intended for that purpose. Such an approach is unnecessarily and unfairly inclusive and is not contemplated by Section 255.

VI. MOTOROLA SUPPORTS SUBSTANTIVE REVIEW AND REVISION OF THE ACCESS BOARD'S GUIDELINES BY THE FCC.

Motorola endorses the FCC's proposal in the NPRM to use the guidelines adopted by the Access Board "as a starting point" for Section 255 implementation and its recognition that the guidelines must be revised "to develop a coordinated approach to accessibility for both services and equipment."[45] The FCC has the required expertise to establish a regulatory framework for telecommunications manufacturers and service providers to achieve the goals of Section 255 – increased accessibility to telecommunications systems. The Access Board and TAAC clearly played a critical role in defining many of the issues involved in achieving the goal of Section 255; however, the Access Board is not well-suited by its function or expertise to design the framework which blends equipment requirements with general and specific requirements for telecommunications networks and services.

The FCC is well suited to establish the regulatory framework for another reason: the real solutions for people with disabilities will be forward-looking innovations. The horizons for telecommunications technology and services are addressed by the FCC in policy studies, spectrum allocations and forward-looking, incentive-based regulatory schemes. The Access Board does not and has no mandate to address these issues.

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[45] NPRM ¶ 30. Contrary to the Access Board's assertion, Section 255 by vesting exclusive enforcement authority with the FCC and by requiring the FCC to develop guidelines "in conjunction with" the Access Board, envisioned a more substantive review and oversight role for the FCC.

It is understandable that several commentors objected to any modification of the Access Board's guidelines and argued that the FCC either should, or is required to, adopt the guidelines wholesale.[46] In part these views reflect a comfort with what is known. Many of these commentors not only know the guidelines, but also know the Access Board and have associates who are, in fact, board members of the Access Board. While understandable, it would not be a sound decision in law or public policy for the FCC to succumb to the pressure in the record and abdicate its clear obligation to review independently the guidelines adopted by the Access Board.

Many of these commentors based their arguments in favor of adoption of the Access Board guidelines in their entirety on the process of the Telecommunications Access Advisory Committee ("TAAC") that resulted in the TAAC Final Report, which formed the basis of the Access Board guidelines.[47] Similarly, the Access Board submitted comments arguing that the FCC lacks authority to alter the guidelines in any way.[48]

Motorola participated in the TAAC process and believes that it served several useful purposes, particularly, opening the lines of communication between organizations representing persons with disabilities and manufacturers and promoting the frank exchange of information about access needs and the realities of the manufacturing process. Some aspects of the TAAC process, however, demonstrate the very real need for substantive review and revision

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[46] See, e.g., ACB Comments at 3; NAD Comments at 4; SHHH Comments at 4-5; National Council on Disability ("NCD") Comments at 2-3; TDI Comments at 6; WID Comments at 2.

[47] See, e.g., ACB Comments at 3; NAD Comments at 4; NCD Comments at 2; WID Comments at 2.

[48] See Access Board Comments at 2-3.

by the FCC of the Access Board's guidelines, which deviate in several significant respects from the conclusions reached in the TAAC Final Report.

Most importantly, the Access Board's guidelines should not be immunized from substantive FCC review on the basis that they are the product of consensus achieved by the TAAC and memorialized in the TAAC Final Report.

First, in several instances where the TAAC did reach a consensus, the Access Board deviated from that consensus and reached its own significantly different conclusions. With respect to the definition of "accessible,"[49] the Access Board ignored the TAAC consensus and instead adopted far more onerous compliance requirements upon manufacturers that have generated much opposition in response to this NPRM. Whereas the TAAC recognized that conflicting access needs and the limitations of the "readily achievable" standard would require manufacturers to exercise discretion in choosing among access features,[50] the Access Board eliminated any reference to manufacturer discretion from its final guidelines, and added the additional requirement that each item on the access checklist must be "assessed independently."[51]

With these omissions and additions, the Access Board completely altered the definition of this key statutory term from that which was agreed upon by the TAAC. The change

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[49] 36 C.F.R. §§ 1193.41, 1193.43.

[50] "There will be cases where manufacturers may not be able to achieve the creation of a single product that addresses all or some combinations of disabilities without sacrificing product usability . . . there will be cases where a company will have to use discretion in choosing among accessibility features." TAAC Final Report § 5.3.

[51] See 36 C.F.R. §§ 1193.41, 1193.43.

is dramatic: the Access Board increases the burden of compliance for manufacturers and decreases the potential for the greatest number of products with meaningful access features to be brought to market. Clearly, the Access Board's guidelines do not reflect the consensus that was reached after long and difficult negotiations,[52] with trade-offs and compromises made by all parties. Instead, the Access Board's guidelines are the product of the Access Board's own independent decisions to pick and choose among the elements of the TAAC Final Report, in effect, resulting in guidelines that do not reflect the TAAC.

A second reason this Access Board's Guidelines should not be immunized from review is that, with respect to several key issues, the Access Board reached its own independent conclusions because the TAAC could not reach a consensus. Most notably, the TAAC could not reach a consensus concerning whether Section 255 compliance should be assessed on the basis of every single CPE product or across product-lines.[53] The Access Board reached its own independent conclusion that Section 255 applies to every product,[54] thereby rejecting the alternative view endorsed by industry in the TAAC Final Report.

While the Access Board's guidelines can, as the FCC acknowledges, provide a "useful starting point"[55] for Section 255 implementation, they should not be adopted without

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[52] Negotiations on the issue of manufacturer discretion alone lasted several hours. Moreover, the manufacturers' "agreement" to several other items contained in the Final Report (such as voluntary employee training, § 4.9) was conditioned on express recognition of manufacturers' discretion.

[53] See TAAC Final Report § 6.7.4.4.

[54] 63 Fed. Reg. 5610-11 (Feb. 3, 1998).

[55] NPRM ¶ 30.

independent review by the FCC. As the FCC acknowledges, it has an important role to play in ensuring a coordinated approach to Section 255 implementation for both manufacturers and service providers. In addition, the FCC has technical and practical experience that should be brought to bear in a thorough substantive review, and, where appropriate, substantive revision of the Access Board's guidelines.

VII. CONCLUSION

Motorola has demonstrated through its actions its commitment to making its products easier to use for all customers, including persons with disabilities. Motorola believes that this commitment is shared by other members of the telecommunications manufacturing industry, particularly TIA's member companies. Telecommunications manufacturers want to invest wisely and substantively in accessible products. An incentive-based regulatory regime, which recognizes the value of product differentiation in providing products with features to promote access will, in the long run, increase the accessibility of telecommunications equipment and CPE for persons with disabilities. To this end, the FCC should endorse a product-line approach to compliance, which will: (a) permit manufacturers flexibility to provide more meaningful levels of access to particular functional limitations in a given product; (b) increase manufacturer accountability for meeting the range of access needs generated by different functional limitations; and (c) reduce the importance of market considerations in determining what is "readily achievable." Similarly, the FCC should abandon the formalistic definition of "accessible" because it is inconsistent with both the preferred product-line implementation strategy, and the "readily achievable" standard, which requires consideration of cumulative costs and impacts that result from inclusion of features to promote access.

With respect to the definition of "readily achievable," the FCC should implement the consensus in favor of considering technical feasibility as a factor, and, in addition, recognize that cumulative cost must be considered and that fundamental alteration of products is not required to comply with Section 255. The FCC should determine that multi-use equipment is subject to Section 255 only to the extent that the manufacturer intends it to be used for telecommunications services.

Respectfully Submitted,

MOTOROLA, INC.

Mary E. Brooner

Mary E. Brooner
Alfred R. Lucas
MOTOROLA, INC.
Suite 400
1350 I Street, N.W.
Washington, D.C. 20005
(202) 371-6900

Thomas C. Collier
Steven K. Davidson
Jennifer M. Quinn
Karen E. Lloyd
STEPTOE & JOHNSON LLP
1330 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 429-3000
Its Attorneys

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CERTIFICATE OF SERVICE

I, Karen E. Lloyd, do hereby certify that on this 14th day of August 1998, a copy of the foregoing Reply Comments of Motorola, Inc. has been served, via hand delivery, upon the following:

Meryl Icove
Disabilities Task Force
Federal Communications Commission
2033 M Street, N.W.
Room 910
Washington, D.C. 20036

Dan Phytheon
Wireless Bureau Chief
Federal Communications Commission
2025 M Street, N.W.
Room 5002
Washington, D.C. 20036

Elizabeth Lyle
Senior Legal Advisor
Wireless Telecommunications Bureau
Federal Communications Commission
2025 M Street, N.W.
Room 5002
Washington, DC 20036

John Cimko
Chief, Policy Division
Wireless Telecommunications Bureau
Federal Communications Commission
2025 M Street, N.W.
Room 5202
Washington, DC 20036

John Spencer
Attorney Advisor
Wireless Telecommunications Bureau
Federal Communications Commission
2025 M Street, N.W.
Room 7130
Washington, D.C. 20036

Susan Kimmel
Attorney Advisor
Wireless Telecommunications Bureau
Federal Communications Commission
2025 M Street, N.W.
Room 7112
Washington, D.C. 20036

International Transcription Service
1231 20th Street, N.W.
Washington, D.C. 20036

Karen Lloyd