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NATIONAL COUNCIL ON DISABILITY

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

An independent federal agency working with the President and Congress to increase the inclusion, independence, and empowerment Of all Americans with disabilities.

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

Reply Comments submitted to the Federal Communications Commission by the
National Council on Disability
Marca Bristo, Chairperson
August 14, 1998

On behalf of the National Council on Disability (NCD), I am pleased to submit these reply comments in response to the accessibility regulations proposed by the Federal Communications Commission (FCC) under the Telecommunications Act of 1996. NCD is an independent federal agency with a fifteen member board appointed by the President and confirmed by the U.S. Senate. Our mandate is to advise Congress and the Administration on public policy affecting America's 54 million people with disabilities.

NCD developed these comments with guidance from a federal advisory council called Tech Watch: a cross-disability task force of NCD which regularly convenes a dozen leaders on technology and disability policy from around the country. NCD's Tech Watch monitors technological developments for accessibility, facilitates communications between industry representatives and consumer leaders with disabilities, and makes recommendations to our board on ways of promoting access to the information superhighway.

1. SCOPE OF COVERED SERVICES

Many commenters expressed opinions about the Commission's proposals to cover only "basic" and "adjunct-to-basic" telecommunications services under the proposed rule. In light of these comments, NCD wishes to reiterate and expand upon views expressed in our original comments.

NCD does not dispute the existence of legal distinctions between basic and enhanced (or "information") services. NCD also accepts that while this distinction is largely the product of the Commission's own regulatory activities dating back to 1980, the failure of Congress to abolish or substantially modify these distinctions does reflect a measure of acquiescence that can be regarded as legislative endorsement of the Commission's overall approach.

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These historical realities do not resolve the issues before the Commission in this proceeding however. All that can reasonably be inferred from Congressional action and inaction is that Congress approves the division of services among the categories established by the Commission. Since the Commission has also asserted its authority to reclassify and reassign various telecommunications services, and thereby to move them from one category to another, the lack of any Congressional response to such decisions on the Commission's part must likewise be taken as evidence of Congressional acquiescence to the Commission's authority to change what it has created.

This being so, the fundamental question which the Commission must answer in this proceeding must be posed a little differently than before. The question is not: is the Commission limited in its ability to include information services among those telecommunications services covered by the rules implementing Section 255? Instead, we believe the question should be formulated as: What services are basic or adjunct-to-basic for purposes of Sec. 255, and what criteria should the Commission use in allocating telecommunications services among regulated and unregulated categories?

Using the Commission's own criteria as set forth in prior rulemakings and as articulated in its NPRM in this proceeding, the only conceivable answer is that services such as email, voicemail, audiotext and fax, must be treated as adjunct-to-basic services. This is so for two factually indisputable reasons. First, for many people with disabilities, these modalities represent either the only means or the best means for completing calls in various circumstances. To say that they are not required by law to be accessible is therefore to say that the Commission's definition of basic services (namely the ability to send, route and receive transmissions) does not apply to many people with disabilities who need these telecommunications modalities to perform these functions.

A related point is that the notion of completing calls becomes meaningless if limited to the mere establishment of a connection, as would be the case if voicemail for example were deemed outside the coverage of the law. Imagine a long-distance carrier that advertised its services by guaranteeing completion of a call but then indicating that because of poor line quality, the person making and the person receiving the call would probably not be able to effectively communicate with one another. Imagine a long-distance carrier that announced in advance that its lines were so poor as to reduce or totally prevent the sending of intelligible faxes or email. Would we take such a carrier seriously? Would the law offer no redress? Or would the marketplace alone be relied upon for customers to switch to other carriers?

Yet this is exactly the situation the Commission's initially-proposed distinctions will create for many telecommunications users with disabilities. They will be able to complete their calls but only in the most nominal, frustrating and often meaningless sense. This need not be the case. The Commission has authority to implement its recognition that for many people with disabilities, meaningful access to the telecommunications system will require that these services (which are basic to them) be accessible.

We wish we could say that the comments from industry on this point went beyond a rhetorical commitment to the accessibility of the telecommunications system. We wish we could say that beyond asserting the distinction between regulated and unregulated services, industry commenters had gone on to give details of the voluntary measures they plan to take to make all their services accessible. We hope that such details may yet emerge in the reply comments.

2. STANDING

A number of commenters take exception to the Commission's proposal not to impose a standing requirement. One commenter even goes so far as to suggest that complainants be required to give details of their disabilities as a condition for lodging a complaint.

Two points about the opposition to the Commission's proposal are especially striking. First, many commenters appear to believe that they face inundation with frivolous complaints unless protected by the kind of screening mechanism a standing requirement would represent. But who would be filing these complaints, and what evidence do these commenters have to support their fears? Complaints by people with disabilities, whether frivolous or not, would not be screened out, and almost certainly, complaints by organizations representing people with disabilities would not be screened out. Perhaps complaints by business competitors would be screened out, but even there it would be quite simple for a competing company to hire a bona fide individual with a disability to bring the complaint.

We therefore believe that recommendations for a standing requirement need to be more specific as to what types of complaints, from what sources and in what a volume would be barred. If there are no real data available concerning the benefits of a standing requirement in reducing the number and type of non-meritorious complaints, then imposition of such a requirement would only serve to needlessly complicate the complaint process. It seems as if many of the same commenters who are complaining about the potential burdensomeness of the complaint process also want to add an additional layer of inquiry to it. Presumably all complainants would have to affirmatively show that they had standing or could be asked to prove that they had standing before their complaints could be considered. How much longer and more complicated will this make the complaint process?

The second assumption underlying many of the comments favoring a standing requirement is even more troubling. Most commenters who take this position want standing to be limited to individuals with disabilities, their families, legal guardians, etc. or in some cases their employers. Indeed, one commenter goes so far as to suggest that where the equipment in question is used in an employment context, only the employer and not even the employee with the disability, should have standing. While the proposals for standing differ, few of any of them as represented in the comments recognize the existence of a societal interest in accessibility. Few recognize the legitimate interests of people without disabilities in being able to communicate effectively with their neighbors, coworkers and friends.

3. READILY ACHIEVABLE FACTORS

Not surprisingly, many commenters expressed varying opinions on how the “readily achievable” standard should be applied under Sec. 255 and on what factors should be taken into account in making the readily-achievable determination.

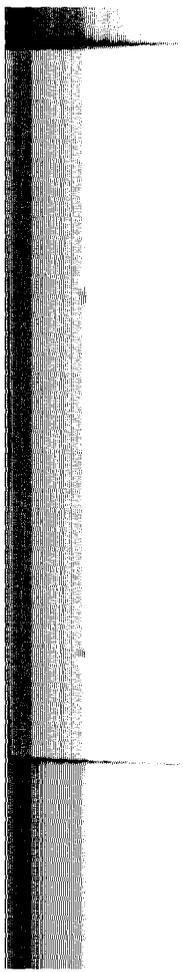
Most commenters appear to agree that the ADA factors should govern, but some then go on to endorse the Commission’s proposed addition of factors that we believe are not countenanced under the ADA and could never therefore have been within Congress’s intentions when it applied the concept of readily-achievable to telecommunications. Most notably in this regard are factors such as “cost recovery” and “opportunity costs”.

There is no precedent under the ADA for making a covered entity’s ability to recover its costs a factor to be considered in determining its legal obligations. In the instant proceeding some commenters appear to believe that a guarantee of cost recovery is a prerequisite for any obligation under Sec. 255. To the degree that such a view implies that industry is not expected to bear any cost in connection with Sec. 255 compliance, this position is baseless and destructive. The Commission must make abundantly clear that within reason, and to the extent “readily achievable” industry is indeed expected to bear some costs in meeting the obligations of the law. Readily achievable does not mean without “any” cost or difficulty. It means without “much” cost or difficulty.

Admittedly the majority of commenters who favor the inclusion of cost recovery as a readily-achievable factor do not go so far as to suggest that the absence of a guarantee on this point would free them from any responsibility. Mostly these commenters seem to argue simply that cost recovery should be taken into account without being too specific as to what cost recovery period is too long or how much weight cost recovery should be given vis a vis other factors.

We would be considerably less worried if some of those commenters who favor cost recovery had been more explicit about exactly how it is to apply and where it is to rank in order of importance. That they failed to do so is open to a number of interpretations, but one unmistakable inference to be drawn from that failure is that companies never know whether or in how long they will recover the costs of new products or services. Likewise, though they may set limits on their budgets for such activities, manufacturers and service providers never have any guarantees that a new product development effort will result in a viable and successful entrant in the marketplace.

Companies never have any guarantees on these points. Imagine if under Title I of the ADA a company took the position that it would be required to provide reasonable accommodations for a worker with a disability only if it could be assured in advance that the cost of the accommodation would yield offsetting profits over a specified period of time. Would the Commission or anyone else take such a claim seriously? Yet the Commission is dangerously close to the brink of giving its stamp of approval to analogous claims here.



The traditional and established parameters for readily-achievable determinations more than adequately protect companies against excessive costs. There is no conceivable reason why they should be immunized against all costs, especially under circumstances where history suggests that much of the industry has a low estimate of the market and demand for accessible technology.

Another dimension of the readily-achievable question is presented by the suggestion on the part of a number of commenters that the financial resources of parent companies should not be taken into account in determining what is readily achievable. Some commenters suggest alternatives such as that only those resources under the direct control of the particular operating unit should be considered.

On the whole, those commenters who oppose the consideration of parent company financial resources do not give convincing reasons why this distinction should be made. They also fail by and large to give any indication of how they would deal with the situation where a parent company which has control over the allocation of resources among subsidiaries or operating units chooses to authorize adequate funding to allow the subsidiary or operating unit to meet its accessibility obligations under the law.

We believe that the general law provides ample guidance on how to determine the financial resources base against which readily-achievable is to be judged. Just as in the case of any other statutory obligation, the legal resources available to an entity should provide the baseline for measuring the costs of compliance. If the resources of a parent or holding company are available for other lawful purposes, or if they would be available to meet the costs of liability in connection with some violation of law, then those resources should be deemed available for meeting the mandate of accessibility. If the parent company has effective control over budgets for product development, then it could hardly be argued that the adequacy or inadequacy of funds for accessibility is not a proper concern of the parent. If the parent company controls the speed of development, decides what products will be developed, or otherwise makes the key decisions regarding product types and cycles, it hardly makes sense to deal with accessibility outside the context of this highly intertwined set of relationships.

Would those who contend that parent financial resources should not be taken into account in determining what is readily-achievable also contend that the parent company should have no power to pump resources into the marketing of a new product where the parent believed it to be cost effective to do so? We think not. If someone can provide a case where a parent company has no legal right to augment the advertising budget for a subsidiary's or an affiliate's product, or has no influence over whether its subsidiaries market in complementary or in competitive ways, then we might accept that such a parent has no responsibility for accessibility either. But we think that such "fire walls" are rare in modern industry, and we see no reason why accessibility should be an exception to the general rule.

With respect to “opportunity costs”, we must note the failure of those commenters who support their use as a readily-achievable factor to provide any workable definition of the concept. In place of any definition for the Commission to adopt, these commenters offer only vague generalizations regarding how expenditures on accessibility would, might or could divert resources from other productive activities. Accordingly, NCD continues to believe not only that the ADA provides no basis for the use of an opportunity-cost factor, but also that even if the Commission were disposed to utilize such a concept, no one has the slightest idea what it means or how opportunity costs could be assessed or approved.

4. INDIVIDUAL PRODUCTS VERSUS PRODUCT LINES

A number of industry commenters argue that the Commission should not require every covered equipment item to be accessible to the extent readily-achievable. Instead these commenters favor a “product line” approach whereby manufacturers could make particular models of the various devices accessible but would not need to analyze or attempt to achieve accessibility with respect to other models of the product. Details of this proposed approach vary among the manufacturers who support it. Particularly notable and highly developed is Materially’s approach, encapsulated in the phrase, “a product for every person . . . not every product for every person.”

Materially’s analysis proceeds along the following lines:

- There is an 18-point accessibility checklist which manufacturers of covered CPE must use in making their products accessible.
- For a number of enumerated reasons, no one product can be expected to meet all accessibility requirements for all disabilities.
- Products that attempt to do this are therefore likely never to be fully accessible or will at best, achieve only superficial accessibility.
- Specific products designed or modified for use by people with particular disabilities can be made more accessible to users.

In a further analysis that seems representative of the views of many commenters from the manufacturing sector, Materially goes on to suggest that the complexities of the manufacturing process make it difficult to think about accessibility features in a vacuum. Without indicating who may be thinking of such features in this way, the comments suggest that accessibility modifications will almost invariably result in fundamental alterations in products because of the implications of such modifications for other product functions and features. It follows from this line of reasoning in the view of the **commenter**, that since not every product need be subject to accessibility requirements, there is little point in subjecting every product design or product planning process to an accessibility analysis. Why bother to assess the possibilities for accessibility in connection with products that don’t need to be made accessible?

Much of the foregoing industry argument is based on supposition and surmise. NCD believes that if these arguments are supportable, industry should by now be able to provide

some significant data to support them. We regard the lack of such data as extremely revealing.

The first problem is that in their comments, manufacturers do not provide any historic data regarding the degree to which various major product offerings would need to be modified in order to come into compliance with the so-called 18-item accessibility checklist. It may be that for some product lines many of the criteria are already met, But instead of case studies showing how projected costs were analyzed and what they were found to be, all we get are undocumented wailing about how expensive it's going to be. The two and a half years that have elapsed since enactment of Sec. 255 ought to be sufficient, given accelerating product cycles, for the acquisition of some experience data on this and other related points. Had such experience data and case studies been presented by industry commenters, we would be in a better position to evaluate claims such as that making products broadly accessible is far more expensive than making one product in each product line accessible to people with each major disability.

We recognize--and have always recognized--that situations will exist in which a given product cannot be made accessible to everyone or in which a specific accessibility need cannot be met at all. In such situations, a measure of product differentiation will be required, just as the buyer with a disability cannot have all features and functions. But this is a far cry from saying that a product line analysis should be the starting point of inquiry and should be the norm.

We might be less troubled by proposed recourse to the product line approach if we knew what it meant. Regrettably, industry does not tell us what a product line is, and the definition of the term is by no means self evident. Moreover, at least one **commenter** suggests that product line should include not only its own range of product offerings, but also those of other manufacturers.

Materially provides a glimpse into how product-line would work by its discussion of the Voice Answering Machine, its portable pager equipped with voice output for use by blind and visually-impaired persons. Inevitably though, even when presented with a product of such high quality, product-line will result in the ghettoization of the consumer with disabilities. A product like the Voice Answering Machine has a given set of features, and functions; it has a position among the range of pagers that the manufacturer produces, and it is marketed for particular users and purposes which largely serve to distinguish it from other pagers in the manufacturer's line. As excellent a product as it is, the blind user may prefer other features and other functions, may wish a more expensive and richly endowed or less expensive and more bare-bones feature set. The blind customer may want alphanumeric output. Is the blind customer to be limited to one model of a product that is provided to the general public in many variations?

At the very least then, we would need a definition of product line. That definition would have to include: features, functions, price, quality, availability, customer support, and any

other key variables used by manufacturers or by consumers to distinguish product models in the marketplace. If industry means to say that at least one device with every feature set, one model with each major set of functions, and one product in every price range would be made accessible to people with each disability, that is one thing. If on the other hand industry means to say (as we fear they may) that one pager will be made accessible to blind people, one pager to deaf people and so on, that is quite another matter. So if industry wishes to pursue product line as the norm, let it come forward with their definition of what product line means.

5. FUNDAMENTAL ALTERATION

Although we believe the Commission's tentative proposals in this area to be adequate, a number of industry commenters have expressed the desire for the Commission to strengthen the language that indicates fundamental alteration of products will not be required in achieving accessibility. However, through these requests, it has become apparent that some confusion exists about what a "fundamental alteration" is. Some industry commenters seem to take the view that adding functions or features is a fundamental alteration. We do not believe that this is necessarily so. Ordinarily, functional equivalents should be the basis for analysis. For example, addition of speech output to a pager through modification of a chip is not in itself a fundamental alteration to the product, any more than improving the backlighting of a screen would be.

This issue may prove particularly important in light of shortening product cycles. If the Commission does decide to amplify the rules concerning the meaning and applicability of fundamental alteration, it may therefore also be useful to clarify the distinctions between fundamental alteration and redesign.

6. ACCESSIBILITY ANALYSIS

Many industry commenters seem to believe that assessing the accessibility of each proposed product will be an insuperable burden. We cannot imagine how this can be so, and we believe if it were so, case studies would have been presented to show it.

For one thing, companies who comply with the law will surely develop methods and procedures for making this assessment. Presumably these will become routine parts of the engineering, fiscal and management assessments that are surely made in connection with all products. Are we to believe that a careful assessment is not currently made of the market potential and proper positioning of each product? Are we to believe that assessments are not routinely made of the safety of each product?

Even supposing that product line were adopted as a standard, how would manufacturers determine which version or model of a product line was to be made accessible? Presumably they would have to do some analysis of each of their existing or prospective offerings to decide that, so a measure of product-by-product analysis would be going on anyway. What

evidence do they give us that this would be materially less costly or more efficient than the kind of product-by-product analysis contemplated by the Commission in its tentative proposals? Once again, if industry could come forward with some case studies comparing the two kinds of assessment efforts, we would be eager to evaluate them, but no such data are forthcoming or are likely to be.

7. COMPATIBILITY

Even supposing that a product line model were to be adopted, the question of what items need to comply with the compatibility requirements of sec. 255(d) would still remain. Some commenters appear to believe that if they offered one or more products that were accessible, they should not be required to implement compatibility with respect to the remainder of their offerings.

This position is not sound. There is nothing in the statute to suggest that because some products are accessible, others do not need to be compatible to the extent readily-achievable. Indeed, if a product line analysis were to be adopted, the need for compatibility of other products would be greater than ever before since compatible CPE would then become the major strategy for affording customers with disabilities a full range of options with respect to features, functions, price, quality, availability, customer service and other variables.

In an interesting twist on the compatibility argument, at least one **commenter** argues that the requirement for compatibility with TDD's should be eliminated because that requirement would hinder the development of new technologies that bypass the need for TTY entirely. This contention is frankly little short of absurd. The Commission has made it abundantly clear in the NPRM that nothing in the law or its implementing regulations is intended to prevent innovation. If technology were introduced into the market that eliminated the need for TTY use by persons who are deaf, then the devices incorporating that new technology would be accessible. The requirement for TTY compatibility would not arise with respect to those devices but would continue in effect with respect to devices that did not incorporate the new technology.

8. THE MARKETPLACE

An underlying and recurrent theme running through most industry comments is that the marketplace alone can be relied upon to meet the accessibility needs of customers with disabilities. Unfortunately after two and a half years of life under Sec. 255, the evidence does not support this contention. While we must rely primarily on anecdotal information, all indications are that people with disabilities feel that the telecommunications system as a whole is in many ways less accessible and less friendly to them today than it was five or ten years ago. Persons who are blind search in vain for cellular telephones whose menus, email, battery status indicators or other key status information are accessible by nonvisual means, People who are deaf seek cell phones that are hearing aid compatible, and seek devices that do not create interference. People with motor impairments report growing frustration in

their efforts to use telephone systems that require quick responses to choices. Individuals with cognitive disabilities recount growing difficulties associated with the complex voice menus that telephone information systems increasingly use.

It is one thing for industry to claim soothingly that the marketplace will solve the problem. It is quite another to look at the record. Unless we are to believe that industry held off major accessibility efforts until the Commission's regulations were in place, the record of the marketplace is anything but encouraging.

In this connection, it is to be noted that many of the same commenters who tell the FCC and the disability community not to worry, also indicate their doubts regarding the market potential of accessibility. These are after all the same people who want to be exempted from any obligation unless they can be assured of cost recovery. If they believed accessibility were a viable market strategy, they would hardly need such protections. If they believed accessibility represented a net gain for their businesses, they would not seek various means for being exempted from "any" costs. So which way is it? If they do believe accessibility is good business, why would they be so fearful and so in need of protection? And if they don't believe accessibility is good business and haven't pursued it in any systematic way up until now, what reason is there to believe that if left to their own devices, they will achieve it in the near future through wholly voluntary action?

9. THE WORLD MOVES ON

One week ago, on August 7, the President signed HR 1385 (The Workforce Investment Act of 1998). Among other things, this landmark statute will greatly strengthen the provisions of federal law regarding the government's obligation in purchasing communications and other electronic technology to make certain that accessible devices are bought. One way or another, the telecommunications industry in particular, and the electronics industry as a whole are going to have to take accessibility seriously. It's time the industry stopped fighting Sec. 255. The requirements of Sec. 255 are reasonable, and the Commission in its tentative proposals has given industry every reasonable benefit of the doubt in the effort to balance the many conflicting interests brought into play by the law. Instead of talking about what it will achieve, but refusing to be held legally accountable for what it actually does, industry should simply get on with the business of reasonable compliance. The Commission can go a long way in bringing that about. We commend its efforts to date and we have faith in its future willingness to establish and maintain reasonable standards and equitable balances that will help to ensure continued progress toward a telecommunications environment that is open to all.