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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

February 5, 1999

Ms. Magalie Roman Salas  
Secretary  
Federal Communications Commission  
445 Twelfth Street, S.W.  
12th Street Lobby, TW-A325  
Washington D.C. 20554

Re: Ex Parte Filing: Implementation of Section 255  
of the Telecommunications Act of 1996: Access to  
Telecommunications Services, Telecommunications  
Equipment, and Customer Premises Equipment by  
Persons with Disabilities, WT Dkt. No. 96-198

To the Commission:

On January 20, 1999, the undersigned organizations submitted a document to the Commission setting forth a regulatory framework for the design and manufacture of accessible products under Section 255 of the Telecommunications Act. In this document, the undersigned organizations submit legal analyses supporting an interpretation of "telecommunications services" which will effectuate the purposes of and intent of Section 255.

As held true for our prior document, this document is the product of much discussion and consensus building among the disability community, and carries the support of the undersigned organizations. The material contained herein is a compilation and synthesis of several of the proposals already submitted by these organizations in comments or ex parte presentations to the FCC.

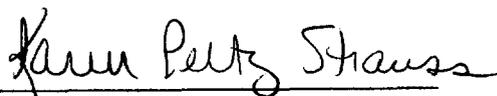
We continue to remain open to further discussions with members of the FCC and representatives of the telecommunications industry regarding the points made in this and our earlier proposal. We look forward to prompt agency action with respect to the implementation of

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Section 255.

Sincerely,



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On behalf of:

Alexander Graham Bell Association

League for the Hard of Hearing

American Council of the Blind

National Association of the Deaf

American Foundation for the Blind

Self Help for Hard of Hearing People, Inc.

American Society for Deaf Children

Telecommunications for the Deaf, Inc.

American Speech-Language-Hearing Association

United Cerebral Palsy Associations

Gallaudet University

World Institute on Disability

**Implementation of Section 255 of the Telecommunications Act of 1996:  
A Practical Approach to Defining Telecommunications Services**

**I. Introduction**

In its efforts to implement Section 255 of the Telecommunications Act of 1996, the Federal Communications Commission (FCC) faces few issues as vexing as the scope of "telecommunications services" covered under Subsection (c) of Section 255. Yet, it is indisputable that the role that Section 255 will have in expanding telecommunications access for Americans with disabilities will hinge largely on the scope of the services covered by this section. A broad interpretation of these services will serve well the intent of Congress to expand telecommunications access for people with disabilities. A narrow definition which excludes all "information" or "enhanced services" from the accessibility requirements will have the opposite effect. A narrow interpretation will leave the discretion to provide such access with each service provider. More than likely, this, in turn, will leave millions of Americans with disabilities without access to, and without legal protection from discrimination in the provision of these services. As we demonstrate below, a narrow interpretation of Section 255 would result in the denial of access by individuals with disabilities to a number of key telecommunications services, a result that Congress could not possibly have contemplated.

The Commission raises concerns about its authority to include such familiar and widely used telecommunications services as e-mail and voice-mail, or such rapidly growing telecommunications services as Internet voice-telephony, within the coverage of Section 255. In this document, the undersigned organizations summarize and highlight legal analyses previously submitted in comments to the FCC, which clearly support a broad interpretation of the

Commission's discretion to regulate in a manner that is consistent with the intent and purposes of Section 255. Specifically, in this submission, we demonstrate that a narrow interpretation of covered services would not only be inconsistent with existing legal doctrine, but also would conflict with sound public policy and prove to be highly impractical. Our analysis is founded on three premises:

- Congress never intended - and indeed could not have intended - to define "covered" telecommunications services so as to exclude all enhanced or information services from Section 255's coverage;
- The Commission has authority to allocate ambiguous or close-to-the-line services among the categories of "basic," "adjunct-to-basic" and "information" services in a manner that effectuates the purposes of Section 255;
- A narrow interpretation of covered services under Section 255 will impede, rather than promote the competition so desired in the Telecommunications Act of 1996.

II. Congress Never Intended - and Indeed Could not Have Intended - to Define "Covered" Telecommunications Services so as To Exclude All Enhanced or Information Services from Section 255's Coverage.

Section 255 is a civil rights statute. It may at first seem strange for the FCC to be vested with the responsibility for implementing a civil rights statute, but in fact such responsibility is not novel.<sup>1</sup> While incorporation of a civil rights provisions in a lengthy, multi-purpose statute such as the Communications Act may seem unusual, there is surely no doubt as to Congress's intentions in this regard. Patterned after the ADA, Section 255 was intended to be a civil rights provision that would fill a gap left open by the ADA: the need to end discrimination against individuals with disabilities with respect to telecommunications products and services. It is an axiom of statutory construction that civil rights laws are to be construed liberally. Such laws are to be interpreted as

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<sup>1</sup> See e.g., Title IV of the Americans with Disabilities Act (ADA), 47 U.S.C. §225 (1990).

broadly as possible in favor of the rights sought to be created or protected.<sup>2</sup> As shown below, the very purpose of Section 255 necessarily dictates a broad interpretation of its scope.

The Telecommunications Act of 1996 was designed to liberate and empower the competitive and innovative forces of our nation's telecommunications industry. With the passage of this Act, Congress anticipated a steady stream of new and exciting telecommunications services that would unquestionably alter the manner in which our nation's citizens conduct telecommunications on a daily basis. Many new services have indeed come into the telecommunications market, and innovation has become the watchword.

Given the pervasive influence that Congress expected these advanced new services to have on our daily existence, it is hardly conceivable that Congress could have intended to exclude such services from the scope of Section 255. In fact, however, most if not all, of these innovative new services will fall outside the coverage of the Section 255 if the Commission limits its scope to only those "basic" and "adjunct to basic" services that are set forth in its NPRM. It is simply not plausible to conclude that Congress would have gone to all the trouble of passing Section 255, if it did not intend for Americans with disabilities to share in our nation's dramatically unfolding telecommunications future.

Prior to the enactment of Section 255, Congress had taken a number of steps designed to eradicate barriers to basic telecommunications services. Congressional mandates to ensure the ongoing availability of specialized customer premises equipment,<sup>3</sup> nationwide relay services,<sup>4</sup> and

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<sup>2</sup> Gates v. Collier (liberally construing Civil Rights Attorneys' Fee Awards Act); United States v. DeRosier (liberally interpreting Civil Rights Act of 1964).

<sup>3</sup> Telecommunications Act of 1992, 47 U.S.C. §610 (1988), as amended.

<sup>4</sup> Supra n. 1.

hearing aid compatibility with wireline telephones,<sup>5</sup> were all legislative attempts to provide basic disability access to our nation's telecommunications networks. Congress's interest in offering protections for and assurances of access to these traditional voice telephone services is inconsistent with an interpretation of Section 255 that would not permit people with disabilities to enjoy and benefit from new, advanced services that are now entering the marketplace. Many, if not most, of these new telecommunications services that are rapidly becoming commonplace, or are expected to come into commercial use within the next few years, are being classified as "information" or "enhanced" services. Congress's prior interest in ensuring comprehensive access to our nation's telecommunications, as evidenced by the above legislative actions, can only be fulfilled with a broad interpretation of Section 255 that covers these services as well. Indeed, in its report on Section 255, Congress made plain its intent to ensure full access by individuals with disabilities to these new telecommunications technologies:

The Committee recognizes the *importance of access to communications for all Americans*. The Committee hopes that this requirement will foster the design, development, and inclusion of new features in communications technologies that permit *more ready accessibility of communications technology by individuals with disabilities*. The Committee also regards this new section as *preparation for the future* given that a growing number of Americans have disabilities.<sup>6</sup>

This language, when considered with the obvious purpose of Section 255, leads to the inescapable conclusion that Congress intended to guarantee access by individuals with disabilities to the new, exciting, and advanced telecommunications services that the rest of our society will enjoy as we move into the next century.

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<sup>5</sup> *Supra* n. 3; Hearing Aid Compatibility Act of 1988, 47 U.S.C. §610 (1988).

<sup>6</sup> S. Rep. No. 104-23, 104th Cong, 1st Sess. 52 (1995) (emphasis added).

**III. The Commission has Authority to Allocate Ambiguous or Close-to-the-Line Services Among the Categories of "Basic," "Adjunct-to-Basic" and "Information" Services in a Manner that Effectuates the Purposes of Section 255.**

The intent of Congress to ensure access to our nation's advanced telecommunications services provides more than ample authority for the Commission to exercise its discretion to define Section 255 services in a manner which fulfills this legislative intent. As is shown below, the Commission has, on prior occasions, exercised its authority to reclassify services among the "basic," "adjunct to basic," and "information" services categories, to ensure the effective utilization of these services. We call upon the Commission to again use its authority to determine which services are, by virtue of their ubiquity and function, truly "basic" to accessing the telecommunications environment of today. Where such services are found to be indispensable to meaningful telecommunications access for Americans with disabilities, they should be classified in a fashion that ensures their coverage under Section 255.

Under the FCC's own definition of adjunct-to-basic services, many of the services otherwise considered to be enhanced or information services for the general population necessarily fall within the scope of Section 255's coverage for individuals with disabilities. The FCC defines adjunct-to-basic services as services which facilitate the "establishment of a transmission path over which a telephone call may be completed, without altering the fundamental character of the telephone service,"<sup>7</sup> and which bring "maximum benefit to the public through

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<sup>7</sup> *In the Matter of Implementation of Section 255 of the Telecommunications Act of 1996, Access to Telecommunications Services, Telecommunications Equipment, and Customer Premises Equipment by Persons with Disabilities, Notice of Proposed Rulemaking*, WT Dkt No. 96-198, FCC 98-55 (April 20, 1998) (NPRM) at ¶39.

[their] incorporation in the network.<sup>8</sup> Similarly, the Commission states that it has “consistently categorized a service option or feature as adjunct-to basic . . . if that option or feature is clearly basic in purpose and use.”<sup>9</sup> Under this analysis, one can safely conclude that options or features essential to the initiation, transmission, or completion of telecommunications by individuals with disabilities should fall within the adjunct-to-basic category. Toward that end, those services required for person A to originate, route, and complete a telephone transmission to person B, using the basic telephone system should be covered by Section 255.

An example will illustrate that certain services considered to be enhanced for the general population will, in fact, fall into the basic or adjunct-to-basic categories for individuals with disabilities under the above definitions. Deaf and hard of hearing people are presently unable to complete telephone calls that use interactive voice responses and audiotext information services, two types of services which the FCC says may not be covered by Section 255. These services are not TTY accessible and relay systems are ill equipped to handle their speed. Yet, it cannot be disputed that access to these services, under the FCC's own definition, would bring “maximum benefit” to deaf and hard of hearing persons wishing to access the network. Perhaps more importantly, access is needed to bring any benefit to these individuals; under the FCC's own classifications, this feature is “clearly basic in purpose and use” for people who are deaf and hard of hearing. It can be concluded, then, that such services should be covered by Section 255.

Voice mail offers a second example. If voice mail is not accessible, an individual with a disability may be able to technically establish a phone connection, but cannot leave a message if the intended party is not available. In this instance, the individual has little prospect of achieving

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<sup>8</sup> *Id.* at ¶40.

any real communication or of accomplishing the purpose of his or her call without access, i.e., the basic purpose of the call is defeated.

A final example, that of Internet telephony, will further bolster this point. If person A chooses to communicate with person B the exact same information that he or she would communicate by voice telephone, over the exact same route, from the same origination point to the same destination, without altering the form or content of the data, but does so via the Internet because that is accessible to both persons, a common sense reading of Section 255 dictates that such method of communication should be made accessible. Indeed, the FCC itself, in its universal service report, questioned whether Internet telephony service providers using the network for phone-to-phone service, are actually offering telecommunications services, in that they are creating transmission paths between various points on the public switched telephone network.

Interactive voice response systems, Internet telephony, and other Internet based electronic mail services, as well as other contemporary services such as voice mail, facsimile store and forward, gateway, and electronic databases are likely to come into increasing use. These services are already beginning to facilitate and lower the costs of conventional long distance services. Many of these services are simply necessary for the subscriber to place and complete a call, much in the same way that the FCC has already determined that directory assistance services and Operator Services for the Deaf, are necessary to make a call. Insofar as these latter services are in fact considered to be “adjunct to basic,” so too should these former services fall into this category for purposes of achieving communication by people with disabilities, under Section 255.

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<sup>9</sup> Id.

The Commission has recognized that its classification of various telecommunications services is under constant examination and review. Indeed, in its NPRM on Section 255, the FCC noted that in the past it has reclassified a number of adjunct-to-basic services as telecommunications services, even though prior to that time these services “technically” fell within the definition of information services. Included among these services, which the Commission has found to be “basic in purpose” and which “facilitate the completion of calls through utilization of basic telephone service facilities” are speed dialing, computer-provided directory assistance, call return, repeat dialing, call tracking, call forwarding, call monitoring, caller ID, call tracing, call blocking, and certain Centrex features.<sup>10</sup> For example, the Commission designated directory assistance to be an adjunct to basic service because as a practical, though not a technical matter, it is impossible to complete a call unless one knows the telephone number being called.

Congress, too, has previously seen a need to alter the application of FCC rulings to ensure access by individuals with disabilities. For example, in the Telecommunications for the Disabled Act of 1982,<sup>11</sup> Congress modified the FCC's decision to detariff customer premises equipment (CPE) nationwide, so that individuals with disabilities could continue to afford specialized customer premises equipment (SCPE), such as TTYs and telebrailles. The 1982 Act was a response to the FCC's ruling in its Second Computer Inquiry (Computer II), one of the proceedings upon which the FCC is again relying in drawing its distinction between telecommunications and enhanced services. In Computer II, the Commission had ordered telephone companies to separate the sale and rental of their equipment from their regulated services. By detariffing CPE and requiring users to pay the full cost of that equipment, the FCC

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<sup>10</sup> Id. at ¶39, n 84-86.

had hoped to create competition among the sellers of CPE. However, because many telephone companies had been offsetting the high costs of providing SCPE with revenues from other services, the Computer II ruling would have meant that individuals with disabilities would now be faced with having to pay the full costs of buying SCPE. The 1982 Act reversed the Computer II ruling for SCPE, expressly allowing the states to require carriers to continue providing subsidies for this equipment. The goal was to ensure that individuals with hearing speech, vision, and mobility disabilities would have continued telecommunications access.

Similarly, the arguments for narrowly defining telecommunications services, to the exclusion of enhanced or information services, cannot withstand scrutiny when applied in the context of telecommunications access for people with disabilities. As traditional telecommunications services continue to steadily shrink in number and importance in the telecommunications milieu, new, advanced services are rapidly supplementing and replacing them. Unfortunately, as traditional voice telephony becomes less viable, more costly, or even unavailable for a growing proportion of telecommunications activities, the number of people with disabilities facing telecommunications disenfranchisement will continue to grow under a restricted interpretation of "telecommunications services." For those individuals with disabilities who cannot use standard voice telephony to accomplish their telecommunications needs, or for those individuals who were previously able to use certain telephony services, but are now finding these services to be so altered that they are no longer accessible, this shift in our nation's telecommunications milieu is especially troubling. Moreover, if the trend toward software- and network-based functionality continues, provisions of Section 255 which guarantee the

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<sup>11</sup> Supra n.3

"accessibility" and the "compatibility" of CPE may also be in serious danger of being rendered meaningless with a restrictive definition of Section 255's coverage. Classifications of telecommunication services that reduce access for such individuals is markedly at odds with the intent of Congress to expand, not restrict telecommunications access.

In reclassifying directory services and other adjunct to basic services, the Commission acted both within its authority and within the dictates of common sense. In the Section 255 context, the Commission should be guided not only by the dictates of common sense, but also by a clear Congressional directive. The test for purposes of Section 255 coverage, should be whether access to a service is needed to achieve telecommunications access by people with disabilities, i.e., whether access to a service is needed to achieve the objectives of Section 255. Thus, the Commission should treat as covered "telecommunications" services all those services needed by individuals with disabilities to originate, transmit, and receive information, irrespective of the use of voice, data, sound, video, or combinations of these media. In this regard, we urge the Commission to define call "completion" in a realistic and practical fashion, recognizing that the term refers not merely to the technical establishment of a connection but also to the ability to effectuate a measure of communication and information exchange.

**IV. A Narrow Interpretation of Covered Services under Section 255 Will Impede, Rather than Promote the Competition so Desired in the Telecommunications Act of 1996.**

The principle that enhanced or information services should be free to develop in the competitive marketplace, unencumbered by regulation, is a well-established one in Commission jurisprudence. But the principal reasons behind a narrow definition of telecommunications services - to encourage competition - do not have any bearing on disability access. Indeed, a

broad interpretation of Section 255 would not impede the primacy of the marketplace; it would enhance it.

In its universal service report, the FCC concluded that to subject information services to the "broad range of Title II constraints, could seriously curtail the regulatory freedom that the Commission concluded in Computer II was important to the healthy and competitive development of the enhanced services industry." As held true with respect to the FCC's decision to detariff CPE in its Computer II ruling, the FCC's reliance upon Computer II for distinguishing between telecommunications and information services cannot withstand an analysis that fosters increased access by individuals with disabilities. In contrast to most sections of the 1996 Act, Section 255 was not intended to reduce regulatory burdens. Rather, Section 255, in the interest of expanding telecommunications access, is a civil rights provision, which creates new regulatory obligations for service providers, albeit restricted by the "readily achievable" standard.<sup>12</sup> The deregulatory goals of the 1996 Act, to which the Commission repeatedly alludes in its universal service report, have no relevance to the goals of Section 255.

A broad application of Section 255 can in fact stimulate much of the competition and innovation so desired in the 1996 Act. Without any legal requirements, companies that endeavor to incorporate some heightened degree of accessibility in their services will face a competitive disadvantage. However small the amount, they will be incurring costs that their competitors do not, and depending on the recovery period, these costs may or may not have a marginal impact on their pricing and other aspects of their competitiveness. Under such circumstances, it would not

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<sup>12</sup> The "readily achievable" standard offers considerable protection for service providers, even where telecommunication services are classified as "basic" or "adjunct-to-basic."

be surprising if few companies make concerted or sustained efforts to provide access to their services. In contrast, by imposing the same requirements on all who engage in advanced telecommunications services, Section 255 will create a truly level playing field, and will reward in the marketplace those who achieve access more fully, more quickly and more efficiently.

#### V. Conclusion

In its report on universal service, the FCC explained that an entity which offers a simple, transparent transmission path, but which does not provide enhanced functionality, offers a “telecommunications” service. Access to many of the services otherwise considered to be enhanced for the general population, will in fact create only a simple transmission path for people with disabilities. Without Section 255 access, there will be no path at all. If these services are excluded from Section 255's coverage, individuals with disabilities will be able to initiate calls, but will not be able to complete those calls, thus defeating the purpose and intent of Section 255 to provide comprehensive telecommunications access for all Americans. It is incumbent upon the Commission to ensure that this does not occur. Rather, the Commission should fulfill its obligation to define Section 255 so as to achieve the objectives of Congress to enhance, not hinder, telecommunications access for all Americans with disabilities as we enter the 21<sup>st</sup> century.