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March 9, 1999

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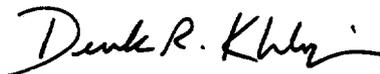
Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
445 Twelfth Street, S.W.
12th Street Lobby, TW-A325
Washington, D.C. 20554

**Re: 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 Docket No. 96-198**

Dear Ms. Salas:

Pursuant to 47 C.F.R. § 1.1206, the Telecommunications Industry Association (TIA) submits an original and one copy of the enclosed written *ex parte* letter for inclusion in the record of the above-captioned proceeding. If you have any questions regarding this submission, please contact the undersigned.

Sincerely,



Derek R. Khlopin
Regulatory Counsel

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List ABCDE

Government and International Affairs Office
1300 Pennsylvania Avenue • Suite 350
Washington, DC 20004
202/383-1480 • FAX 202/383-1495
www.tiaonline.org

Representing the telecommunications industry in
association with the Electronic Industries Alliance



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Re: 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
Docket No. 96-198

To the Commission:

As part of its ongoing effort to assist the Commission with its implementation of Section 255 of the Telecommunications Act of 1996, The Telecommunications Industry Association (TIA), pursuant to 47 C.F.R. § 1.1206, is writing to supplement the record of the above-captioned proceeding. Throughout this proceeding, TIA has been an active participant, consistently urging the Commission to adopt rules affording manufacturers the necessary flexibility to continue to innovate in the design of their products and to realize the fundamental goal of Section 255 -- increased accessibility to telecommunications products and services for consumers with disabilities.

The impetus for this TIA filing is the recent submission of several distinct proposals. On January 8, 1999, TIA filed a letter explaining its recommendations for implementation of Section 255 which was accompanied by a very detailed explanation of a product line approach to its implementation.¹ On January 20, 1999, several organizations that represent the interests of disabled consumers filed with the Commission a document entitled, *Implementation of Section 255 of the Telecommunications Act of 1996: A Two-Tier Approach for Product Accessibility*.² On February 5, 1999, the same organizations filed a document that proposed a definition of "telecommunications services" for purposes of regulation under Section 255.³

After carefully reviewing the specifics of these proposals, TIA is compelled to respond in order to ensure that the record reflects as accurate as possible the complete positions advocated by TIA and its members, the companies that build and supply the myriad of telecommunications equipment and CPE. In essence, while the recent filings represent sincere

¹ TIA *Ex Parte*, WT Docket No. 96-198 (filed January 8, 1999) ("TIA January 8 Proposal").

² National Association of the Deaf, *et al.*, *Ex Parte*, WT Docket No. 96-198 (January 20, 1999) ("January 20 Consumer Proposal").

³ National Association of the Deaf, *et al.*, *Ex Parte*, WT Docket No. 96-198 (February 5, 1999) ("February 5 Consumer Proposal").

efforts on all sides to accommodate the interests and positions of other interested parties, fundamental differences still remain.

January 20 Consumer Proposal

TIA consistently has urged the Commission to adopt rules that allow manufacturers to use a "product line" approach rather than a "product-by-product" approach to Section 255 compliance because it will best serve the needs of consumers and fulfills the letter and spirit of the statute.⁴ In order to make it as clear as possible what such an approach entails, TIA submitted the detailed explanatory document mentioned above. *Section 255 of the Telecommunications Act of 1996: A Product Line Compliance Implementation* describes the product line approach as it relates to the manufacturing process and demonstrates how the product line approach will allow manufacturers to innovate and ultimately will result in greater access to telecommunications products and services than a "product by product" or "universal design" approach.

The advantages of a product line approach are that it (1) is likely to result in a greater breadth and depth of access features for disabled consumers, (2) provides a safe harbor against complaints where an accessible product is available within a product line, and (3) reduces non-value added documentation costs.

While the cover letter to the January 20 Consumer Proposal indicates that the proposal "takes into consideration various industry submissions, both in comments and in ex parte filings," the consumer proposal unfortunately does not fulfill that hopeful promise, at least with respect to the industry-proposed product line approach. The consumer proposal describes the suggested approach as one that "endorses the use of a modified product line approach as a *valuable component* of the structure for implementing Section 255. We submit this proposal, however, with the understanding that the mandate of the law still requires *every* product to be accessible, where readily achievable."⁵

The rules adopted by the Commission in this proceeding must be clear and consistent with the statute itself. TIA believes that the January 20 Consumer Proposal is neither, but rather is ambiguous and inconsistent, and, in fact, would expand the requirements created by Section 255. TIA continues to dispute the notion that the law necessarily requires every product to be accessible to every person with different functional limitations and accessibility needs. The Commission has the authority to interpret Section 255 to require accessibility across product lines rather than for each product, where readily achievable.⁶

To the best of TIA's understanding, the proposal appears to destroy entirely the true utility and effectiveness of the product line approach. Rather than providing manufacturers with the increased flexibility it purports to accomplish, it removes any incentive for the use of a product line approach, and requires manufacturers, in essence, to comply with both the consumer supported product-by-product approach and then the product line approach when the former is

⁴ TIA Comments at 10, Reply Comments at 7.

⁵ January 20 Consumer Proposal at 1 (emphasis added).

⁶ See TIA Comments at 17.

not readily achievable. TIA consistently has stressed that the product line proposal should be implemented *in lieu* of a product-by-product approach, not in addition to it.⁷

The two-tiered proposal negates each of the advantages of a product line approach. With a product-by-product approach as the first tier of compliance:

- Manufacturers would comply on a product-by-product basis whenever readily achievable, providing some few access features for as many disabilities as possible. No incentive exists for a manufacturer to pursue the second tier when every product must be evaluated on a product-by-product basis.
- Manufacturers that invoke the product line second tier approach would not be able to offer alternative products that are accessible to persons with particular functional limitation(s) and are comparable in features, functions and price. Manufacturers still would be subject to complaints on every product (the issue of whether the product line approach was appropriately invoked could be litigated in every complaint).
- With product-by-product as the first tier of compliance, manufacturers would still need to document each decision on whether to include each access feature on each product.

TIA notes that some confusion exists as to whether, under the January 20 Consumer Proposal, the product line analysis is automatically triggered (*e.g.* under situations where incorporation of a particular access feature into a particular product is not readily achievable) or is strictly utilized at the discretion of the manufacturer. In any event, it is quite clear that it imposes a substantial burden on the industry since it requires a full product-by-product analysis and then either allows or mandates a product line approach where it is not readily achievable to incorporate all access features into every product. The proposal at times indicates that industry apparently would be afforded some form of “discretion” to apply the second tier during its product design and development process, but a manufacturer would not know until the end of the process whether it was successful.

This proposal obviously differs substantially from the one proposed by manufacturers. In fact, as mentioned previously, it expands the law by mandating an extra tier that precedes a product line approach, requiring manufacturers to consider accessibility functions for each product, and permitting them to exclude accessibility features only where it is not readily achievable. Most significantly, this two-tiered proposal will result in even greater burdens being imposed on manufacturers, and ultimately, more resources spent on Commission processes and less on the cooperative efforts between industry and consumers that is needed to continue enhancing the accessibility of telecommunications products and services.

TIA therefore again urges the Commission to adopt the product line approach developed by manufacturers. If a company demonstrates that it makes a product that meets the needs of a specific consumer and the company has taken a balanced approach to incorporating meaningful access features across its product line, there is no need to look any further. The valuable resources of the Commission and the manufacturers must be put to their best use -- that is, the Commission's to facilitating the quick and satisfactory resolution of consumer concerns,

⁷ See, *e.g.*, TIA Reply Comments at 9.

and the manufacturers' to meeting consumers' needs, both in responding to their inquiries and in designing new and improved accessible products.

The January 20 Consumer Proposal states that "over time, it will become easier and less expensive to incorporate a greater number of access features into a greater number of individual products."⁸ TIA and its members do not disagree with the general notion that society will see greater improvement in the access features that can be incorporated into equipment and the cost of doing so will be less than it is today. However, "easy" and "less expensive" are not synonymous. Improvements in access features will be less difficult to accomplish over time based on a greater learning curve, but by no means will improvements be "easy." Similarly, the concept of "less expensive" does not equate with economic feasibility.

TIA also has concerns about the statement that a manufacturer "shall not be prohibited from discontinuing a product which has access features so long as such access (or functionally equivalent access) is already incorporated in another product with comparable availability, features, functions, and price within that product line."⁹ This requirement would seriously impinge on a manufacturer's legitimate business discretion and goes beyond the text adopted by the Architectural and Transportation Barriers Compliance Board (Access Board) in its Final Order. The Access Board in fact allowed the discontinuation of a product as an exception to its rule prohibiting the reduction of accessibility, usability and compatibility.¹⁰ In essence, the Access Board understood that manufacturers should not be required to continue producing products that are "obsolete or unmarketable."¹¹

The proposal adds an "access plan" as a mandatory requirement for Section 255 compliance. Nothing in the text of this statute, however, supports such a requirement. The Commission's NPRM appropriately limited the role of such a plan to consideration of it as a "good faith effort" to be asserted by a manufacturer in response to a complaint.

The January 20 Consumer Proposal includes instances where excessive and burdensome documentation appears to be suggested. For example, under the definition of "readily achievable," the concept of demonstrating that accessibility, usability, and compatibility were considered at "the earliest stages of design and throughout the development process" is too vague.¹² There is a point in the design and development process of any product where the decision is made as to what features will be incorporated into the product. After this point, it is an extremely inefficient use of resources if a manufacturer is required to continue to document

⁸ January 20 Consumer Proposal at 2.

⁹ *Id.* at 5.

¹⁰ The Rule adopted by the Access Board -- Prohibited reduction of accessibility, usability, and compatibility -- states that "(a) no change shall be undertaken which decreases or has the effect of decreasing the net accessibility, usability, or compatibility of telecommunications equipment or customer premises equipment. (b) Exception: Discontinuation of a product shall not be prohibited." 36 C.F.R. § 1193.39 (1998).

¹¹ Telecommunications Act Accessibility Guidelines, Architectural and Transportation Barriers Compliance Board (Federal Register Feb. 3, 1998) (*see* Section-by-Section Analysis, Section 1193.39). The Access Board also noted that this exception should not affect the availability of accessible products since "any new product introduced to replace another would be subject to the statutory requirement to provide accessibility or compatibility if readily achievable." *Id.*

¹² January 20 Consumer Proposal at 6.

proof that accessibility features continued to be considered. As product cycles shorten and the demands on manufacturers to quickly bring new products to market increase, requiring manufacturers essentially to provide micro-level documentation for every product will result in an inefficient and ineffective process to the severe detriment of the industry and consumers.

As it finalizes the rules in this proceeding, the Commission must consider together all compliance and complaint process components in light of their interdependence. Therefore, while the January 20 Consumer Proposal focuses on other issues, the Commission should not forget the important points made by TIA, and others, regarding the Commission's proposed fast track or related processes, a reasonable statute of limitations, and the confidentiality of information submitted to the Commission.¹³

TIA disagrees with the January 20 Consumer Proposal's suggested standing requirement.¹⁴ TIA continues to believe that the Commission should entertain complaints by a person or persons with a disability or someone filing a complaint on behalf of a specific identifiable individual with a disability (such as an organization that represents people with disabilities, or a parent, spouse, or legal guardian).¹⁵ This approach will reduce the possibility of abuse of the complaint process and enable manufacturers to devote more of their resources to the development of accessible products. At the same time, it also will preserve the ability of individuals who experience difficulty using mass market CPE to file complaints.

Disabled consumer advocates seek the wide availability of accessible products in the marketplace. The proposal suggests that manufacturers are responsible for the availability of products – which simply is not true. Manufacturers have little control over the range of accessible products that a service provider has on its shelves and sells to consumers. The availability issue thus should be addressed by the provisions that the Commission will adopt regarding service providers, not through the imposition of overly burdensome requirements on the manufacture of every product – requirements that are inconsistent with the “readily achievable” limitation of Section 255.

Finally, TIA appreciates the acknowledgement that manufacturers are likely to undertake their Section 255 obligations in good faith.¹⁶ However, it is unclear to what use a demonstration of these efforts may be put.

February 5 Consumer Proposal

In the February 5 Consumer Proposal, representatives of the disability community once again urge the Commission to take a “broad interpretation” of the meaning of “telecommunications services” covered under subsection (c) of Section 255. Under this recommendation, “information” or “enhanced” services would be subject to Section 255 compliance. TIA continues to support the Commission's tentative conclusion that such services

¹³ See e.g., TIA January 8 Proposal at 2-5.

¹⁴ January 20 Consumer Proposal at 6-7.

¹⁵ See, e.g., TIA January 8 Proposal at 4.

¹⁶ January 20 Consumer Proposal at 7.

are not included within the meaning of “telecommunications service.”¹⁷ Any finding to the contrary would upset clear Commission precedent, ignore the scope of statutory definitions, and expand Title II regulation to areas that the Commission rightfully has decided not to disturb.

The proposal asserts that this expanded view of the meaning of “telecommunications services” will serve well the intent of Congress to expand telecommunications access for people with disabilities.¹⁸ TIA agrees that the intent of Congress was to expand access to *telecommunications* and the plain language of the statute states that *telecommunications* services are subject to Section 255. On the other hand, and as TIA has noted previously, if Congress wanted information services to be covered, it would have said so explicitly.¹⁹ After all, telecommunications services and information services are separately defined in the Communications Act and this distinction has been upheld repeatedly by the Commission.²⁰

The proposal asks the Commission to treat as covered “telecommunications” services “all of 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.”²¹ Such Commission action, however, would eviscerate entirely the statutory distinctions between services.

The proposal’s analysis that on the one hand, the deregulatory goals of the 1996 Telecommunications Act do not apply to Section 255, and on the other, that a broad interpretation of Section 255 will stimulate competition and innovation are in conflict.²² History has proven that the imposition of expansive regulation on an industry reduces incentives for innovation. The 1996 Telecommunications Act was intended to correct the reality. The disheartening notion of regulating all companies equally so that everyone incurs added burdens will not result in companies achieving access more fully or quickly. On the contrary, this approach will impose substantial inefficiencies on the industry, burdening it with unnecessary costs while at the same time continuing to expect quick responses in products and services to meet consumers’ needs.

Conclusion

TIA and its member companies are very committed both to assisting the Commission in establishing a workable, efficient and effective implementation of Section 255, and to continuing to design innovative and accessible products and services. TIA applauds the sincere and thoughtful efforts put forth in the January 20, 1999 and February 5, 1999 documents submitted by representatives of disabled consumers. As described above, however, the January 20

¹⁷ NPRM ¶ 42; *see* TIA Comments at 54, Reply Comments at 42.

¹⁸ February 5 Consumer Proposal at 1.

¹⁹ TIA Comments at 53.

²⁰ *See, e.g.,* Federal-State Joint Board on Universal Service, *Report to Congress*, FCC 98-67 at ¶ 39 (Apr. 10, 1998) (“After careful consideration of the statutory language and its legislative history, we affirm our prior findings that the categories of ‘telecommunications services’ and ‘information service’ in the 1996 Act are mutually exclusive”).

²¹ February 5 Consumer Proposal at 10.

²² *Id.* at 11-12.

Consumer Proposal is ambiguous and inconsistent, and increases the burdens on industry in a manner that is likely to result in the introduction of less, not more, accessible products. The Commission also should resist the February 5 Consumer Proposal's call for the expansion of the reach of Section 255 to encompass information or enhanced services.

TIA remains dedicated to continue working with all interested parties, and the Commission, in order to reach a solution that meets the goals of this important statute.

Respectfully Submitted,

TELECOMMUNICATIONS INDUSTRY ASSOCIATION



Grant E. Seiffert
Vice President, Government Relations

Derek R. Khlopin
Regulatory Counsel

1300 Pennsylvania Avenue, N.W.
Suite 350
Washington, D.C. 20004
(202) 383-1480