

achievable." Section 3 of the Act defines "telecommunications" as "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received."¹⁷¹ It defines "telecommunications service" as "the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used."¹⁷²

77. We adopt our tentative conclusion in the *NPRM* that the phrases "telecommunications" and "telecommunications services" have the general meanings set forth in the Act.¹⁷³ Many commenters supported this conclusion.¹⁷⁴ Telecommunications services, however, does include services previously classified as adjunct-to-basic. Adjunct-to-basic services are services which literally meet the definition of enhanced services, now called information services, established under the Commission's rules,¹⁷⁵ but which the Commission has determined facilitate the completion of calls through utilization of basic telephone service facilities and are included in the term "telecommunications services."¹⁷⁶ Adjunct-to-basic services include such services as call waiting, speed dialing, call forwarding, computer-provided directory assistance, call monitoring, caller identification, call tracing, and repeat dialing.¹⁷⁷

78. We decline to expand the meaning of "telecommunications services" to include information services for purposes of section 255, as urged by some commenters.¹⁷⁸ In the *NPRM*, we recognized that under our interpretation of these terms, some important and widely used services, such as voicemail and electronic mail, would fall outside the scope of section

¹⁷¹ 47 U.S.C. § 153(43).

¹⁷² 47 U.S.C. § 53(46).

¹⁷³ *NPRM*, 13 FCC Rcd at 20409-10, ¶ 36.

¹⁷⁴ See, e.g. Bell Atlantic comments at 4; GTE comments at 4; ITI comments at 8; SBC comments at 3; Microsoft reply comments at 4.

¹⁷⁵ See *Non-Accounting Safeguards Order*, 11 FCC Rcd at 21958.

¹⁷⁶ See *North American Telecommunications Association Petition for Declaratory Ruling under Section 64.702 of the Commission's Rules Regarding the Integration of Centrex, Enhanced Services, and Customer Premises Equipment*, ENF No. 84-2, Memorandum Opinion and Order, 101 FCC 2d 349 (1985) (*NATA Centrex Order*), recon., 3 FCC Rcd 4385 (1988).

¹⁷⁷ *NATA Centrex Order*, 101 FCC 2d at 359-61.

¹⁷⁸ See, e.g., Blackseth comments at 1; IDHS comments at 2; Kailes comments at 3; PCPED comments at 11; USA comments at 8. Some commenters urged the inclusion of certain enumerated information services in the definition of "telecommunications services." See, e.g., Dietrich comments at 1; Ireland comments at 2; Lapointe comments at 2-3; TDI comments at 8; WI-TAN comments at 4.

255 because they are considered information services.¹⁷⁹ We conclude, however, that we may not reinterpret the definition of telecommunications services, either for purposes of section 255 only or for all Title II regulation. First, we emphasize that the term "information services" is defined separately in the Act.¹⁸⁰ As we noted in the *NPRM*, there was no indication in the legislative history of the 1996 Act that Congress intended these terms to have any different, specialized meaning for purposes of accessibility.¹⁸¹

79. Furthermore, in a Report to Congress that was released subsequent to the *NPRM*,¹⁸² we reiterated the distinction between information services and telecommunications services. Specifically, we found that "Congress intended [that] the categories of 'telecommunications service' and 'information service' to be mutually exclusive, like the definitions of 'basic service' and 'enhanced service' developed in our *Computer II* proceeding, and the definitions of 'telecommunications' and 'information service' developed in the Modification of Final Judgment that divested the Bell Operating Companies from AT&T."¹⁸³ While we decline here to redefine the meaning of telecommunications services, either for purposes of section 255 or more broadly, we do think it is appropriate, as we discuss below, to use our ancillary jurisdiction to extend to certain non-telecommunications services accessibility obligations that mirror those under section 255 in order to effectuate Congress' intent that we make telecommunications services accessible.

a. Provider of Telecommunications Services

¹⁷⁹ *NPRM*, 13 FCC Rcd at 20413, ¶ 42.

¹⁸⁰ The Act defines an "information service" as "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing, but does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service." Section 3(20), 47 U.S.C. 153(20). We note that information services consist of all services that the Commission previously considered to be enhanced services under the regulatory structure it had established in the 1980 *Computer II* proceeding. Amendment of Section 64.702 of the Commission's Rules and Regulations (*Computer II*), Docket No. 20828, Final Decision, 77 FCC 2d 384, 435 (1980), *recon.*, 84 FCC 2d 50 (1980), *further recon.*, 88 FCC 2d 512 (1981), *aff'd sub nom.* Computer and Communications Industry Ass'n v. FCC, 693 F.2d 198 (D.C. Cir. 1982), *cert. denied*, 461 U.S. 938 (1983). Enhanced services are defined in section 64.702(a) of the Commission's rules as "services, offered over common carrier transmission facilities used in interstate communications, which employ computer processing applications that act on the format, content, code, protocol or similar aspects of the subscriber's transmitted information; provide the subscriber additional, different, or restructured information; or involve subscriber interaction with stored information," and include, among other things, such services as voice mail, electronic mail, facsimile store-and-forward, interactive voice response, protocol processing, gateway, and audiotext information services.

¹⁸¹ *NPRM*, 13 FCC Rcd at 20409, ¶ 35

¹⁸² In re Federal-State Joint Board on Universal Service, CC Docket No. 96-45, Report to Congress, 13 FCC Rcd 11501 (1998) (*Report to Congress*).

¹⁸³ *Report to Congress*, 13 FCC Rcd at 11507, ¶ 13.

80. We adopt our tentative conclusion in the *NPRM* and conclude that all entities offering telecommunications services (*i.e.*, whether by sale or resale), including aggregators, should be subject to section 255. An entity that provides both telecommunications and non-telecommunications services, however, is subject to section 255 only to the extent that it provides a telecommunications service.¹⁸⁴ Commenters from both the disability community and the industry broadly supported both of these *NPRM* proposals.¹⁸⁵ We find that, with respect to section 255, Congress intended to use the term "provider" broadly, to include all entities that make telecommunications services available. Our interpretation of "provider of telecommunications service" is grounded in the Act's own definitions. For example, section 3(44) states that a "telecommunications carrier" means any "provider of telecommunications services" with the exception of aggregators, thus indicating that a "provider of telecommunications services" would otherwise include aggregators.¹⁸⁶ Furthermore, our limitation on the scope of section 255 to cover an entity only to the extent that it provides telecommunications service comports with an analogous limitation in section 3(44), which expressly provides that a telecommunications carrier "shall be treated as a common carrier under this Act only to the extent that it is engaged in providing telecommunications services."¹⁸⁷

b. Telecommunications Equipment and Customer Premises Equipment

81. The Act defines "telecommunications equipment" as "equipment, other than customer premises equipment, used by a carrier to provide telecommunications services, and includes software integral to such equipment (including upgrades)."¹⁸⁸ It defines "customer premises equipment" (CPE) as "equipment employed on the premises of a person (other than a carrier) to originate, route, or terminate telecommunications."¹⁸⁹

82. In accordance with the proposal made in the *NPRM*,¹⁹⁰ the express statutory language, and the views of commenters, we find that telecommunications equipment includes software integral to telecommunications equipment.¹⁹¹ Operation of today's technologically

¹⁸⁴ *NPRM*, 13 FCC Rcd at 20414-15, ¶ 44-45.

¹⁸⁵ See *e.g.*, NAD comments at 17; UCPA comments at 5-6; Ameritech comments at 7-8; SBC comments at 5.

¹⁸⁶ 47 U.S.C. § 153(44).

¹⁸⁷ *Id.*

¹⁸⁸ 47 U.S.C. § 153(45).

¹⁸⁹ 47 U.S.C. § 153(14).

¹⁹⁰ *NPRM*, 13 FCC Rcd at 20419, ¶ 55.

¹⁹¹ See, *e.g.*, AFB comments at 15; AIM comments at 1; Mulvaney comments at 6; NAD comments at 18.

sophisticated telecommunications networks would be impossible without software, and we believe that Congress' decision to expressly clarify that software and upgrades to software are to be considered "equipment" acknowledges the important role played by software products. Further, by referencing "upgrades" to software as equipment, the definition expressly contemplates that stand-alone software should be considered equipment. For these reasons, we conclude that all software integral to telecommunications equipment is covered by the definition, whether such software is sold with a piece of telecommunications equipment hardware or is sold separately.

83. The statutory definition of CPE under section 3(14) of the Act encompasses all "equipment employed on the premises of a person (other than a carrier) to originate, route, or terminate telecommunications." ¹⁹² Although section 3(14) does not specifically reference software integral to CPE, we find, nonetheless, that CPE includes software integral to the operation of the telecommunications functions of the equipment, whether sold separately or not. We note that this conclusion is contrary to our tentative conclusion in the *NPRM* that software sold separately from CPE would not fall within the definition of CPE. ¹⁹³ After review of the record, however, we are persuaded that stand-alone software that originates, terminates and routes telecommunications should be deemed "equipment" under the CPE definition.

84. Some commenters argue that the absence of a reference to software in section 3(14), when contrasted with its inclusion in section 3(45) defining "telecommunications equipment," means that Congress intended to make a distinction in its treatment and classification of software depending upon whether it was integral to the operation of CPE or of telecommunications equipment. ¹⁹⁴ Other commenters argue that in interpreting this provision, we should focus instead, as the Access Board did, on the functions performed by the equipment in question, rather than whether it is hardware or software. ¹⁹⁵ These parties argue that if a product originates, routes, or terminates telecommunications, then it should be considered to be CPE. Many commenters supported this functional definition of CPE and chose to de-emphasize whether the software was sold together with hardware or separately. ¹⁹⁶

¹⁹² 47 U.S.C. § 153(14).

¹⁹³ *NPRM*, 13 FCC Rcd at 20419, ¶ 56.

¹⁹⁴ ITI comments at 12; Microsoft reply comments at 7.

¹⁹⁵ AccLiv comments at 3; ACB comments at 3-4; ILDEAF comments at 3; LDA comments at 2; CILNM comments at 2-3; CPB/WGBH comments at 5; IDHS comments at 3; Lake County comments at 2; Lighthouse comments at 3; NAD comments at 11; NCD comments at 15-16; PCEPD comments at 9-10; SHHH comments at 8; SIL comments at 3; TDI comments at 11; TRACE comments at 11; UCPA comments at 6-7; USA comments at 6; WI-TAN comments at 3; WID comments at 3-4.

¹⁹⁶ See NCD comments at 13-14 (arguing that if the functionality of telecommunications equipment or CPE is the issue in determining a device's accessibility, then distinctions among hardware, firmware and software are pointless, and that it hardly matters to the CPE user whether software was sold with the CPE, or was purchased later

Trace notes that increasingly we will see telecommunications products becoming software in nature. That is, individuals will have devices that will be used for computing, for information, and for telecommunications services; often the devices will become telecommunications devices when a piece of software is plugged into them. Trace argues that in the future, we may not be buying telephones, but we simply may be buying telephone functions or software modules that we will use on our multi-purpose devices. Unless software is considered to be equipment and treated as CPE, Trace argues that these types of telephones would not be covered under Section 255.¹⁹⁷ Trace argues that it is not clear why these software based telecommunications products should not be covered when their hardware counterparts are, and projects that this would leave us with an unlevel playing field that would only get worse over time.¹⁹⁸

85. While we agree that the definition in section 3(14) does focus primarily on the functions performed by the product, we believe we still must resolve the more narrow question of whether software integral to the operation of the telecommunications functions of CPE, but sold separately from the CPE hardware, should be considered to be "equipment" within the meaning of this provision. The statutory definition therefore requires our interpretation. While this provision of the Act is susceptible to varying meanings, we conclude that the better interpretation of this definition is that this type of software is "equipment" and thus would be CPE if it is integral to the origination, routing, or termination telecommunications. The structure of the Act's definitions support this interpretation. Rather than viewing the language in paragraph (45) of section 3 as a limitation on the definition of CPE, as some commenters have urged,¹⁹⁹ we find instead that such language illuminates what Congress considers as falling within the scope of "equipment." As noted above, Congress clarifies in section 3(45) that the term "equipment" includes that software which is integral to a product, including upgrades. Congress recognized that software, which plays a vital role in telecommunications products, is often marketed and sold separately, affording purchasers or users the opportunity to upgrade or customize their equipment. Because Congress determined that software is "equipment" in paragraph (45), we find that the better interpretation of CPE is to similarly construe "equipment" as including software integral to the product, whether sold separately or not. Such an interpretation harmonizes the term "equipment" as it is used in the

from a different source at the election of the user for use with the CPE); SHHH comments at 8 (arguing that software is a component of the CPE that is required in order to use the device for a telecommunications function, and it is not logical to exclude software that is not initially bundled with the CPE because it can and will be used with the CPE later); IDHS at 3 (arguing that all software should be covered and made accessible if it is used as a telecommunications device); USA comments at 5 (arguing that from a consumer's point of view, there is no difference in whether a telecommunications function is accomplished through hardware, software, or a combination thereof). *See also* AFB comments at 15; CPB/WGBH comments at 5; NAD comments at 18; TDI comments at 11; Trace comments at 5; WI-TAN comments at 3; WID comments at 3-4; TDI comments reply at 6.

¹⁹⁷ See Trace reply comments at 12.

¹⁹⁸ See Trace reply comments at 12.

¹⁹⁹ See ITI comments at 12; BSA comments at 9.

definitions of both "CPE" and "telecommunications equipment," and gives recognition to the fact that software products are often sold separately from the hardware.

86. This interpretation is consistent with the Access Board's Guidelines.²⁰⁰ It also furthers the purposes of section 255 by ensuring that software that is integral to the operation of CPE is not beyond the scope of section 255. If such software were not covered as CPE, then CPE manufactured in compliance with section 255 could readily be converted into a product that was inaccessible to those with disabilities, resulting in a significant gap in the Act's coverage.

87. In connection with multipurpose equipment, we adopt our tentative conclusion that customer premises equipment is covered by section 255 only to the extent that it provides a telecommunications function. Specifically, equipment that generates or receives an electrical, optical or radio signal used to originate, route or terminate telecommunications is covered, even if the equipment is capable of providing non-telecommunications functions. In so concluding, we reject the recommendations of commenters which argued we should apply section 255 to all functions of equipment whenever the equipment is capable of any telecommunications function.²⁰¹ We believe that our narrowed interpretation ensures consistency between the obligations of manufacturers to ensure that telecommunications equipment and CPE is designed, developed and fabricated to be accessible, and the obligations of service providers to ensure that the service is accessible. This consistency is important as both equipment and services must be accessible for effective access to be available to consumers. Although section 255(b) does not specifically address this question, we conclude that this is the most reasonable interpretation of the statute. Moreover, the Access Board supports such an interpretation.²⁰²

88. Furthermore, as supported by the record, we conclude that manufacturers will be liable under section 255 for all telecommunications equipment and CPE to the extent that such equipment provides a telecommunications function.²⁰³ In those instances, where a piece of equipment undergoes substantial modifications after its sale, however, we agree with those commenters who argue that it would be unfair to hold the manufacturer liable under section 255.²⁰⁴ In those instances, which we expect to be infrequent, manufacturers shall bear the burden of proving, by a preponderance of the evidence, that a piece of equipment has

²⁰⁰ *Access Board Order*, 63 Fed. Reg. at 5612.

²⁰¹ AFB comments at 13; AIM comments at 1; AFB reply comments at 11-12.

²⁰² *Access Board Order*, 63 Fed. Reg. at 5612.

²⁰³ NAD comments at 18; SHHH comments at 8 (arguing that we would be encouraging evasion of section 255 obligations if we were to determine a manufacturer's compliance based upon its subjective intent about how the product should be used).

²⁰⁴ CEMA comments at 8; TIA comments at 57-59; CEMA reply comments at 9; Lucent reply comments at 3-4; Motorola reply comments at 20; TIA reply comments at 49.

undergone substantial modifications after its sale.

2. Manufacturer

89. The Act does not define "manufacturer of telecommunications or customer premises equipment."²⁰⁵ The Access Board guidelines define a "manufacturer" as an entity "that sells to the public or to vendors that sell to the public; a final assembler."²⁰⁶ This approach, according to the Access Board, would generally cover "the final assembler of separate subcomponents; that is, the entity whose brand name appears on the product."²⁰⁷ In the *NPRM*, the Commission proposed to adopt a definition of "manufacturer" based upon the Access Board guidelines.

90. In light of our enforcement obligations and based on the record, we now believe that we need a more precise definition of manufacturer than that adopted by the Access Board. In our rules, therefore, we define manufacturer as an entity that makes or produces a product. This definition puts responsibility on those who have direct control over the products produced, and provides a ready point of contact for consumers and the Commission in getting answers to accessibility questions and resolving complaints. We decline to adopt the Access Board's definition because we find that it is so broad that it could include retailers, who simply sell products and may not control any aspect of their actual manufacture. We conclude that our adopted definition more clearly distinguishes between sellers of a product and manufacturers, who control the design, development and fabrication of a product. In appropriate circumstances, however, where an entity is otherwise extensively involved in the manufacturing process -- for example, by providing product specifications -- we may, as the individual circumstances warrant, deem such an entity to be a co-manufacturer of the product involved. This could result in some branders being considered manufacturers, contrary to the position of several commenters.²⁰⁸

91. We believe this is an appropriate interpretation of the statute and is consistent with the Access Board's intent.²⁰⁹ We do not intend this definition to include those who simply sell or distribute a product manufactured by another entity.²¹⁰ Nor do we extend the concept of manufacturer to anyone who might modify the equipment before sale to the public.²¹¹ We do

²⁰⁵ *NPRM*, 13 FCC Rcd at 20420, ¶ 57.

²⁰⁶ 36 C.F.R. § 1193.3.

²⁰⁷ *Access Board Order*, 63 Fed. Reg. at 5613.

²⁰⁸ BellSouth comments at 6; Sprint comments at 5-6; Tandy reply comments at 5-7.

²⁰⁹ *Access Board Order*, 63 Fed. Reg. at 5613.

²¹⁰ Bell Atlantic comments at 5.

²¹¹ See ITI comments at 13-14.

not believe as a general matter that retailers, wholesalers, and other post-manufacturing distribution entities can be considered manufacturers who have accessibility obligations under the Act.

92. As supported by the record, we adopt our tentative conclusion to construe section 255 to apply to all manufacturers offering equipment for use in the United States, regardless of their location or national affiliation.²¹² In the NOI record, there was broad agreement that all equipment marketed in the United States, regardless of national origin, should have uniform accessibility requirements.²¹³ Further, the Access Board guidelines do not distinguish between foreign and domestic manufacturers.²¹⁴ Exempting foreign manufacturers would disadvantage American manufacturers, and would deny the American public the full protection section 255 offers.

3. Voicemail and Interactive Menus

93. The record has convinced us that in order for us to carry out meaningfully the accessibility requirements of section 255, requirements comparable to those under section 255 should apply to two information services that are critical to making telecommunications accessible and usable by people with disabilities. We assert ancillary jurisdiction to extend these accessibility requirements to the providers of voicemail and interactive menu service and to the manufacturers of the equipment that perform those functions. By enacting section 255, Congress has charged the Commission with ensuring that telecommunications services and equipment are accessible to, and usable by, persons with disabilities. We cannot fully achieve that objective without this limited use of our ancillary jurisdiction.

94. The Commission's assertion of ancillary jurisdiction over information services was upheld by the Court of Appeals for the District of Columbia over fifteen years ago in litigation challenging our rules in *Computer II*, where the Commission deregulated the provision of both information services (then called "enhanced services")²¹⁵ and CPE.²¹⁶

²¹² NAD comments at 19 (stating that such action is consistent with prior Commission rulings requiring accessible features on imported telephones (*i.e.*, hearing aid compatibility), and imported televisions (*i.e.* decoder circuitry for closed captioning)); SHHH comments at 9 (noting that, given the large percentage of telecommunications equipment that is produced outside the U.S., section 255 would be severely limited if it were not applied universally to foreign as well as domestic markets). We decline, however, to adopt ITI's suggestion that we extend the reach of section 255 to importers. *See* ITI comments at 12-13. As already stated, post-manufacturing entities such as importers, are not covered by section 255.

²¹³ *NPRM*, 13 FCC Rcd at 20420, ¶ 58.

²¹⁴ *See* 36 C.F.R. § 1193.3.

²¹⁵ Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended, CC Docket No. 96-149, First Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd 21905, 21955, ¶ 102 (1996) ("all of the services that the Commission has previously considered to be 'enhanced services' are 'information services'"), Order on Reconsideration, 12 FCC Rcd 2297 (1997), *further recon.*

Although the Commission found there that the provision of information services and CPE were not common carrier activities within the scope of Title II regulation, the Commission simultaneously asserted ancillary jurisdiction over information services, including voicemail and interactive menus, by imposing upon AT&T (and its local exchange affiliates) structural separation safeguards that required them to offer these services only through a separate subsidiary. The Commission also asserted ancillary jurisdiction over CPE, deregulating CPE at the federal level and preempting state CPE tariffing. The Court of Appeals upheld the Commission's ancillary jurisdiction, finding that the Commission's authority to assert ancillary jurisdiction over matters not within the reach of Title II regulation was "well settled."²¹⁷ It concluded that the "Commission acted reasonably in defining its jurisdiction over enhanced services and CPE," and that its jurisdiction satisfied the *Southwestern Cable* standard.²¹⁸ The court adopted a deferential standard of review, holding that "[b]ecause the Commission's judgment on 'how the public interest is best served is entitled to substantial judicial deference,' the Commission's choice of regulatory tools in *Computer II* must be upheld unless arbitrary or capricious."²¹⁹ This precedent guides us in our action today.

95. Ancillary jurisdiction may be employed, in the Commission's discretion, where the Commission has subject matter jurisdiction over the communications at issue and the assertion of jurisdiction is reasonably required to perform an express statutory obligation.²²⁰ Both predicates for jurisdiction are satisfied here. The Court of Appeals' conclusion in *Computer II* that the Commission has subject matter jurisdiction over information services is particularly appropriate for voicemail and interactive menus, two services over which the Commission has

pending, Second Report and Order, 12 FCC Rcd 15756 (1997), *aff'd sub nom. Bell Atlantic Telephone Companies, et al v. FCC, et al.*, 131 F.3d 1044 (D.C. Cir. 1997).

²¹⁶ *Computer and Communications Industry Association v. FCC*, 693 F.2d 198, 213 (D.C. Cir. 1982), *cert. denied*, *Louisiana Public Service Commission v. FCC*, 461 U.S. 938 (1983). Pending before the court were several FCC orders, known broadly as *Computer II*, in which the Commission asserted ancillary jurisdiction over information service. The court designated the following orders as comprising the *Computer II* decision: "Final Decision, In re Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry), 77 F.C.C. 2d 384 (1980) (*Computer II Final Decision*); Memorandum Opinion and Order, Amendment of Section 64.702 of the Commission's Rules and Regulations (*Second Computer Inquiry*), 84 F.C.C. 2d 50 (1980) (*Computer II Reconsideration Decision*); Memorandum Opinion and Order on Further Reconsideration, Amendment of Section 64.702 of the Commission's Rules and Regulations (*Second Computer Inquiry*), 88 FCC 2d 512 (1981) (*Computer II Further Reconsideration Decision*)." *Id.* at n.1

²¹⁷ *Computer and Communications Industry Association*, 693 F.2d at 213.

²¹⁸ *Id.* at 213, referring to *United States v. Southwestern Cable Co.*, 392 U.S. 157, 88 S.Ct. 1994, 2005 (1968) (Commission has jurisdiction over that which is "reasonably ancillary to the effective performance of the Commission's various responsibilities").

²¹⁹ *Id.*

²²⁰ See generally *United States v. Southwestern Cable Co.*, 392 U.S. 157, 88 S.Ct. 1994 (1968); see also *Second Computer Inquiry*, 77 FCC 2d. at 432, ¶ 126.

asserted ancillary jurisdiction for more than a decade through its comparably efficient interconnection (CEI) plan requirements.²²¹ Given our continuous assertion of jurisdiction over these two information services, we reject any suggestion by commenters that we have not previously concluded that we have subject matter jurisdiction over these services.²²²

96. Our subject matter jurisdiction flows from at least three distinct provisions of Title I of the Act. Section 1 of the Communications Act established the Commission "[f]or the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States ... adequate facilities at reasonable charges"²²³ Similarly, Section 2 gives us jurisdiction over "all interstate and foreign communication by wire or radio" and "all persons engaged within the United States in such communication..."²²⁴ Section 3 defines "communication by wire" and "communication by radio" as including "the transmission ...of writing, signs, signals, pictures and sounds of all kinds ... including all instrumentalities, facilities, apparatus, and services (among other things, the receipt, forwarding, and delivery of communications) incidental to such transmission." (emphasis added).²²⁵ We believe that these three provisions serve as the foundation for subject matter jurisdiction today, just as they did when *Computer II* was decided.

97. Both voicemail and interactive menu services, and the related equipment that perform

²²¹ In *Computer III*, the Commission adopted a new regulatory regime that substituted "nonstructural" safeguards for *Computer II*'s requirements that information services be offered only through a separate subsidiary. The Commission determined that information services could be offered by carriers on an integrated basis, provided that those previously subject to separation requirements file a plan for "comparably efficient interconnection" (CEI). See Amendment of Section 64.702 of the Commission's Rules and Regulations (*Computer III*), CC Docket No. 85-229, Phase I, 104 FCC 2d 958, 118-21 (1986) (*Phase I Order*), recon., 2 FCC Rcd 3035 (1987) (*Phase I Recon. Order*), further recon., 3 FCC Rcd 1135 (1988) (*Phase I Further Recon. Order*), *Phase I Order* and *Phase I Recon. Order* vacated, *California v. FCC*, 905 F.2d 1217 (9th Cir. 1990); Phase II, 2 FCC Rcd 3072 (1987) (*Phase II Order*), recon., 3 FCC Rcd 1150 (1988) (*Phase II Recon. Order*), *Phase II Order*, vacated, *California v. FCC*, 905 F.2d 1217 (9th Cir. 1990); *Computer III* Remand Proceedings, 5 FCC Rcd 7719 (1990) (*ONA Remand Order*), recon., 7 FCC Rcd 909 (1992), *pets. for review denied*, *California v. FCC*, 4 F.3d 1505 (9th Cir. 1993); *Computer III* Remand Proceedings: Bell Operating Company Safeguards and Tier 1 Local Exchange Company Safeguards, 6 FCC Rcd 7571 (1991) (*BOC Safeguards Order*); *BOC Safeguards Order vacated in part and remanded*, *California v. FCC*, 39 F.3d 919 (9th Cir. 1994) (*California III*). Since that requirement took effect, carriers have filed numerous CEI plans covering both voice mail and interactive menus, among other services. See, e.g., Bell Operating Companies Joint Petition for Waiver of *Computer II* Rules, 10 FCC Rcd 13758, 13770-13774, App. A (Com.Car.Bur. 1995) (*BOC CEI Plan Approval Order*).

²²² See Attachment to Letter from Brian F. Fontes, CTIA, to Chairman William E. Kennard, dated July 7, 1999 (*ex parte* submission in WT Docket No. 96-198).

²²³ 47 U.S.C. § 151.

²²⁴ 47 U.S.C. § 152.

²²⁵ 47 U.S.C. §§ 153(33), 153(51).

these functions, are at the very least "incidental" to the "receipt, forwarding and delivery of communications." Indeed, the evidence here persuades us that these two information services are not only incidental to communications, but essential to the ability of persons to effectively use telecommunications.²²⁶ In reaching this conclusion, we are not breaking new ground, but are simply continuing our longstanding practice of asserting jurisdiction over voicemail and interactive menus.²²⁷

98. We note, however, that in the *Computer II Reconsideration Decision* we expressly reserved judgment on whether or not non-carrier-provided CPE would be subject to our Title I jurisdiction.²²⁸ Similarly, we did not reach the question of whether the Commission had jurisdiction over information services provided by non-carriers. We resolve these questions here in the affirmative. These services and their related equipment are not less "incidental" to the "receipt, forwarding, and delivery of communications" because the services may be provided by non-carriers in some instances. Indeed, sections 1 through 3 of Title I of the Act are broadly worded and not limited in scope to communications by carriers. Consistent with the statutory language, therefore, we find that our Title I subject matter jurisdiction over voicemail and interactive menu services, and related equipment, extends to that which is provided by carriers and non-carriers alike.

99. The second step in our analysis requires us to evaluate whether, in this specific context, there is a statutory nexus supporting assertion of ancillary jurisdiction over voicemail and interactive menu service and manufacturers of equipment that performs those functions. Framed somewhat differently, the test, as articulated by the Court of Appeals for the District of Columbia, is whether jurisdiction is "reasonably ancillary."²²⁹ We find that the requisite statutory nexus exists, and employ ancillary jurisdiction to require that voicemail and interactive menu service and equipment must comply with requirements comparable to those under section 255. We find, as described below, that these two discrete information services are both so integral to the use of telecommunications services today that, if inaccessible and unusable, the underlying telecommunications services that sections 255 and 251(a)(2) have

²²⁶ See, e.g., AccLiv. comments at 2-3; NAD comments at 16-17; NCOD comments at 1-2; Kear comments at 2; Mulvany comments at 3; Nelson comments at 3; Vickery comments at 2-3; MiATC comments at 2; Illinois Deaf and Hard of Hearing Commission comments at 3-4; DDTP comments at 4-5; CPB/WGBH National Center for Accessible Media comments at 6, LaPointe comments at 2-3, Janes comments at 3; ACB comments at 4; WID comments at 4-5; Lake County Center for Independent Living comments at 3-4; Dietrich comments at 1; Ireland comments at 2; The Lighthouse comments at 2; UCPA comments at 3-4; AFB comments at 6-8; Oklahoma Department of Rehabilitation Services comments at 2-3.

²²⁷ See, e.g., Petition for Emergency Relief and Declaratory Ruling Filed by the BellSouth Corp., 7 FCC Rcd. 1619 (1992) (ruling that the Georgia Public Service Commission was preempted from interfering with BellSouth's provision and marketing of voicemail service under the terms and conditions set forth in its FCC-approved CEI plan).

²²⁸ See Amendment of Section 64.702 of the Commission's Rules and Regulations (*Second Computer Inquiry*), Memorandum Opinion and Order, 84 FCC 2d 50 at ¶ 144, (1980).

²²⁹ *Computer and Communications Industry Association*, 693 F.2d at 213.

sought to make available will not be accessible to persons with disabilities in a meaningful way. In short, inaccessible voicemail and interactive menus could defeat the effective implementation of sections 255 and 251(a)(2).

100. Many commenters raised compelling examples of the importance of access to voicemail and interactive menus. Both professional organizations and individual consumers reported how people with disabilities are hampered daily by lack of access to services others take for granted -- leaving a message for a colleague, reaching the desired person at a business, or simply receiving a phone call.²³⁰ The Council of Organizational Representatives on National Issues Concerning People who are Deaf or Hard of Hearing (COR) concluded that "without access to certain enhanced services, such as automated voice response systems and voice mail services, individuals who are deaf or hard of hearing will continue to be barred from enjoying even basic access to the telecommunications network."²³¹ Others explained that because of the prevalence of voicemail and interactive menus, unless these services are made accessible, the isolation of people with disabilities will be exacerbated,²³² decreasing employment opportunities and reducing the participation of persons with disabilities in today's society.²³³ UCPA summarized the concern with the observation that "voice mail, interactive telephone prompt systems, and Internet telephony are becoming available as mainstream services and are becoming critical to successful participation and competition in our society."²³⁴

101. The access barriers created by inaccessible and/or unusable voicemail and interactive menus has made it extremely difficult for people with hearing, vision, or physical disabilities

²³⁰ See, e.g., Blackseth comments at 1; Dietrich comments at 1; Garretson comments at 3; Hoshauer comments at 1; Ireland comments at 2; Janes comments at 3; Kear comments at 2; LaPointe comments at 2-3; MiATC comments at 1; Nelson comments at 2; PCEPD comments at 2-4; CDC comments at 1-2; OKDRS comments at 1; NCOD comments at 1-2; SHHH comments at 6; TDI comments at 8; LICIL comments at 3; AIM comments at 1; SHHH reply comments at 16-17; TDI reply comments at 5; Kailes comments at 3; CCDI comments at 2-3; Mulvaney comments at 3; Vickery comments at 3; AIM comments at 1; AFB comments at 9; Born comments at 2; Witkin comments at 1; DeVilbiss comments at 2; AccLiv comments at 3; MoGCD comments at 3; ACB comments at 3; CPB/WBGH comments at 6; ILDEAF comments at 3-4; IDHS comments at 3; LDA comments at 2; CILNM comments at 3-4; Lake County comments at 1; SIL comments at 3-4; NAD comments at 15-16; NCD comments at 10; WI-TAN comments at 4; WID comments at 4; UCPA comments at 11.

²³¹ COR reply comments at i.

²³² APT reply comments at 4.

²³³ BUTLER comments at 2; CFILC comments at 2; CDR comments at 2; CCDI comments at 1 (noting statute affects 54 million Americans with disabilities); Eleoff comments at 1; Huber comments at 1; Mitchell comments at 1; NC -ATP comments at 1; Radke comments at 1 (fully employed person with quadriplegia who has relied on advanced telecommunications for opportunities to learn, work and participate in the community); Mutuum comments at 2 ("You might as well call all nourishment except bread and water 'enhancement'."); CNMI comments at 1-2; Andrews comments at 2.

²³⁴ UCPA comments at 11.

either to reach the party to whom they have placed the call or to obtain the information they seek in their phone call.²³⁵ One commenter explains:

People with disabilities have been terribly affected by such lack of access; many menus offer no option to connect with a human operator and they remain cut off from communication. They thus remain in the dark about how to fix their products and how to access other important information from private enterprises.²³⁶

102. Often all that is available at the other end of the line is an automated voicemail or menu system which is not accessible to or usable by people with disabilities. For example, the voicemail or menu may not allow adequate time for a caller using the Telecommunications Relay Service to have the information from the automated device relayed to the caller's TTY and a response from the caller relayed back to the device through the Communications Assistant; or the sounds may be so quick that a person who is hard of hearing cannot process them quickly enough.²³⁷ The speed of the menu choices can also create an access barrier for someone with a learning disability who cannot process the information fast enough. The time allowed for a person to input the necessary numbers to retrieve voicemail messages, select an option from a list of choices or control the other functions may be too short for people with motor disabilities, or people who are blind.²³⁸ In these instances, although the phone call may be completed in the technical sense of terminating the call, the call is not accessible to the person. Despite the creation of a transmission path, if there is no means for a person to communicate with the mechanism at the other end, the telephone call is ineffective.²³⁹

²³⁵ Dietrich comments at 1; Ireland comments at 2; Janes comments at 3; Kear comments at 2; LaPointe comments at 2-3; MiATC comments at 1; OK-DRS comments at 1; NCOD comments at 1-2; SHHH comments at 6; TDI comments at 8; LICIL comments at 3; AIM comments at 1; SHHH reply comments at 16-17; TDI reply comments at 5; Lapointe reply comments at 1; Kailes comments at 3; Mulvaney comments at 3; Vickery comments at 3; AIM comments at 1; AFB comments at 9; Born comments at 2; Witkin comments at 1; DeVilbiss comments at 2; AccLiv comments at 3; ACB comments at 4; CPB/WBGH comments at 6; ILDEAF comments at 3-4; LDA comments at 2; CILNM comments at 3-4; Lake County comments at 1; SIL comments at 3-4; NAD comments at 15-16; NCD comments at 10; WI-TAN comments at 4; WID comments at 4.

²³⁶ Mulvaney comments at 3

²³⁷ See, e.g., Ireland comments at 2 ("Voice mail and automated voice response systems, so common today, are impossible for many hard of hearing people to understand. Ears affected by hearing loss, even when properly fitted with hearing aids, cannot process sound as quickly as normal ears; by the time the first word or two are deciphered, the speaker is already on to the next sentence.")

²³⁸ CILMN comments at 3-4.

²³⁹ A number of carriers have made a similar point in comments submitted in other proceedings where they have argued that various messaging services are "integral" to the telecommunications services provided by the carrier, and that services such as voicemail therefore should be treated differently than other information services. (Petition of Bell Atlantic at 7-8, Petition of NTCA at 6-7, Petition of Primeco at 6-7, Petition of SBC at 7, Petition of TDS at

103. This record persuades us that failure to ensure accessibility of voicemail and interactive menu services, and the related equipment that performs these functions, would seriously undermine the accessibility and usability of telecommunications services required by sections 255 and 251(a)(2). In *Southwestern Cable*, the Supreme Court found that Commission had authority to regulate CATV using its ancillary jurisdiction to avoid disruptive effect on network broadcasting.²⁴⁰ Here, too, we seek to avoid the disruptive effects caused by inaccessible voicemail and interactive menus so as to ensure that the implementation of section 255 is not thwarted. Further, the statutory nexus for asserting jurisdiction is even stronger here than in *Computer II*, which broadly sanctioned ancillary jurisdiction over information services. In *Computer II* the Commission asserted ancillary jurisdiction to ensure just and reasonable rates for regulated services *that consumers were already receiving*. Our concern here is even more fundamental: ensuring and facilitating accessibility and usability of telecommunications services and equipment by those persons not receiving full access and use of these services.

104. Under these circumstances, we disagree with those who contend that the Act's use of defined terms precludes us from extending accessibility requirements to anything other than telecommunications services.²⁴¹ The *expressio unius maxim* "has little force in the administrative setting".²⁴² Indeed, the Court of Appeals for the D.C. Circuit has expressly rejected this argument in upholding the Commission's interpretation of recent amendments to the Communications Act. In *Mobile Communications*, the Commission required MTEL, the holder of a pioneer's preference, to pay for its license for a narrowband personal communications service (PCS) despite the fact that in amending the payment provisions of the Act in 1996, Congress did not require payments for such licenses but did require payment for other types of licenses. In the provision at issue, Congress required the three broadband PCS pioneers and all future pioneers to pay for their licenses according to a statutorily defined formula. However, by its terms, the payment requirement did not extend to MTEL, whose license was confirmed in July 1993, because the statute specified that the payment requirements did "not apply to applications that have been accepted for filing on or before September 1, 1994."²⁴³

105. The court did not agree that where the statutory scheme "limits a thing to be done in

6, filed in Telecommunication Carriers' Use of Customer Proprietary Network Information and Other Customer Information, CCB Docket 96-115 (*CPNI Proceeding*)).

²⁴⁰ *Southwestern Cable*, 392 US at 175-77.

²⁴¹ BSA reply comments at 3-4; CEMA comments at 9; CTIA reply comments at 10; GTE comments at 3; ITI comments at 9; Microsoft reply comments at 7-8; PCIA reply comments at 4-5; SBC reply comments at 2,4; SBC comments at 3; Sprint reply comments at 3-4; TIA reply comments at 43; USA comments at 4.

²⁴² *Mobile Communications Corp. of America v. FCC*, 77 F.3d 1399, 1404-05 (D.C. Cir. 1996 (citations omitted)), *cert. denied Mobile Telecommunication Technologies Corp. v. FCC*, 519 U.S. 823 (1996).

²⁴³ 47 U.S.C. § 309(j)(13)(D)(iv).

a particular mode, it includes the negative of any other mode'." ²⁴⁴ Its rationale is particularly instructive here. Not only did it dismiss expressio unius as a maxim of construction in the administrative setting, but it also noted that a "congressional prohibition of particular conduct may actually support the view that the administrative entity can exercise its authority to eliminate a similar danger'." ²⁴⁵ Analyzing the Commission's jurisdiction to require license payments not specified in the statute, the Court rejected a reading of congressional intent that would have forbidden the Commission from setting reasonable charges for a license "even where doing so would enable the Commission to reap many of the benefits of Congress's own new policy -- including obtaining reimbursement for the transfer of a valuable entitlement. We think such a reading untenable." ²⁴⁶

106. The suggestion that we lack ancillary jurisdiction here suffers from the same infirmity. ²⁴⁷ We simply cannot credit the argument that Congress intended that we be barred from effectively implementing sections 255 and 251(a)(2). To the contrary, we believe that Congress enacted these new provisions to ensure that telecommunications services are made accessible to persons with disabilities, and expected that we implement these provisions in the most efficacious manner possible. We will not ignore a record that demonstrates that our failure to apply accessibility requirements to voicemail and interactive menus will substantially undermine implementation of these significant provisions. Where, as here, we have subject matter jurisdiction over the services and equipment involved, and the record demonstrates that implementation of the statute will be thwarted absent use of our ancillary jurisdiction, our assertion of jurisdiction is warranted. Our authority should be evaluated against the backdrop of an expressed congressional policy favoring accessibility for persons with disabilities. This backdrop serves to buttress the actions taken today, not limit it.

107. On this same basis, however, we decline to extend accessibility obligations to any other information services. While some commenters have argued that there is an overwhelming need for all information services to be accessible to people with disabilities, we

²⁴⁴ *Mobile Communications Corp. of America*, 77 F.3d at 1404 (citation omitted).

²⁴⁵ *Id.* at 1405 (citation omitted).

²⁴⁶ *Id.*

²⁴⁷ In *United Video, Inc. v. FCC*, 890 F.2d 1173, 1183 (D.C. Cir. 1989), the court also sustained our ancillary jurisdiction in the face of an argument akin to expressio unius. At issue was the FCC's syndicated exclusivity rule, which was predicated upon our section 303(r) powers and ancillary jurisdiction. Petitioners had suggested that any such authority was constrained by the enactment of the 1984 Cable Act. Because the Cable Act did not affirmatively authorize the syndex rules, petitioners argued that they were impermissible. The court disagreed: "[the syndex rules] clearly fall within the Act's general authority, the regulation of interstate and foreign communication by wire or radio... [and] were reasonably adopted in furtherance of a valid communications policy goal. Hence, they fall under the Commission's section 303(r) powers unless they are 'inconsistent with law'." *Id.* Thus, even where Congress has enacted legislation addressing a subject, that does not bar the Commission from using its ancillary jurisdiction where reasonably required to further a valid statutory goal - - in this case, the effective implementation of sections 255 and 251(a)(2).

assess the record differently, and use our discretion to reach only those services we find essential to making telecommunications services accessible. Unlike voicemail and interactive menus, other information services discussed by commenters do not have the potential to render telecommunications services themselves inaccessible. Therefore, we decline to exercise our ancillary jurisdiction over those additional services. Many of these other services are alternatives to telecommunications services, but not essential to their effective use. For example, e-mail, electronic information services, and web pages are alternative ways to receive information which can also be received over the phone using telecommunications services. In contrast, inaccessible and unusable voicemail and interactive menus operate in a manner that can render the telecommunications service itself inaccessible and unusable.

108. Our assertion of ancillary jurisdiction is thus discrete and limited. Consequently, we dismiss the contention that including even a single information service under our accessibility and usability rules could lead to the full-scale regulation of entities providing information services, such as Internet Service Providers.²⁴⁸ Nor can we credit the argument that extension of these provisions through ancillary jurisdiction will chill innovation, resulting in less accessibility not more.²⁴⁹ We do emphasize, however, that our decision to apply these accessibility obligations to two discrete information services does not alter the regulatory classification afforded these services. Nor is it our intent by this action to apply any additional provisions of the Act to providers and manufacturers of voicemail and interactive menu services and equipment. Thus, as a general matter, we are not altering our past or current treatment of information services.

E. ENFORCEMENT OF SECTION 255

1. Overview

109. Prompt and efficient enforcement of section 255 and the rules adopted in this Order is a crucial component of successful implementation of the accessibility requirements described in this Order. We noted in the NPRM that our complaint mechanisms would be the principal vehicle for ensuring compliance with section 255 and that consumers, manufacturers and service providers alike will benefit from swift resolution of complaints. Moreover, unlike section 207 of the Act, which authorizes the filing of complaints against common carriers either before the Commission or in federal district court, section 255(f) confers exclusive jurisdiction over complaints on the Commission and bars private rights of action. As the only recourse for consumers concerned about the accessibility, usability or compatibility of a product or service, our complaint processes must be accessible and fair.

110. We also recognized in the NPRM that a complaint process that imposes substantial burdens on parties could discourage otherwise legitimate complaints, require manufacturers and service providers to expend substantial resources responding to complaints rather than

²⁴⁸ BSA reply comments at 4-5.

²⁴⁹ ITI reply comments at 11-12; Microsoft reply comments at 4-5; Sprint reply comments at 4.

enhancing accessibility of their offerings, and restrict the commission's ability to cope with complaints in a timely manner. As discussed below, the rules we adopt in this Order, which are modeled after our section 208 complaint rules, permit the commission to ensure that consumers' complaints are resolved expeditiously. In addition, we describe below the scope of the Commission's authority when initiating an action on its on motion against service providers or manufacturers.

2. Enforcing the Rules

a. Damages; Other Remedies and Sanctions

111. *Damages.* In the *NPRM*, we tentatively concluded that damage awards against common carriers/service providers pursuant to section 207 of the Act are available to complainants as a remedy for violations of section 255 and our implementing rules. We sought comment on this tentative conclusion and on whether there is any statutory basis for awarding damages against entities other than common carrier. A majority of the industry commenters argued that the plain language of section 207 precludes the Commission from awarding damages against entities other than common carriers because the section is expressly limited to common carriers.²⁵⁰ These commenters contended that had Congress intended to provide the Commission with authority to award damages against entities other than common carriers, it would have clearly stated so when it enacted section 255.²⁵¹ Still other industry commenters argued section 255 bars not only damages complaints against non-common carriers but also against carriers.²⁵² According to these commenters, the explicit bar on private rights of action in section 255 applies equally to the Commission and the courts. They argued that the Commission's conclusion in the *NPRM* that the statute permits administrative complaints for damages but bars actions in court for damages misconstrues the meanings of the two distinct sentences in section 255(f) regarding the Commission's exclusive jurisdiction over complaints and the prohibition of private rights of action respectively.²⁵³ They maintained that the question of what is a private right of action depends solely upon who brings the action, not the forum.²⁵⁴

112. Commenters representing the disability community,²⁵⁵ however, contended that the Commission has the same range of remedies for violations of section 255 that are available to

²⁵⁰ See, e.g., BSA comments at 14-15; CEMA comments at 24-26; TIA comments at 97-98.

²⁵¹ See, e.g., BSA comments at 15; CEMA comments at 24-26; TIA comments at 97-98.

²⁵² See, e.g., Ameritech comments at 10-11.

²⁵³ See, e.g., Ameritech comments at 10-11.

²⁵⁴ See, e.g., Ameritech comments at 10-11.

²⁵⁵ See, e.g., NAD comments at 39-40; NCD comments at 35; AIM comments at 3; Oklahoma DRS comments at 2.

it for violations of other provisions of the Act, including damages awards under section 207 of the Act.²⁵⁶ Several industry commenters, on the other hand, contended that the Conference Report refers solely to remedies against service providers who are common carriers, not to manufacturers.²⁵⁷

113. We adopt our tentative conclusion in the *NPRM* that damages are available for violations of section 255 or our implementing rules against common carriers. In so holding, we reject the claim that 255(f)'s preclusion of private rights of action deprives the Commission of any authority to entertain requests for damages by or on behalf of individual complainants. As we noted in the *NPRM*, the preclusion of private actions compels complainants to seek redress exclusively from the Commission but in no way limits the remedies available to such complainants at the Commission.²⁵⁸ The right created in section 255(f) to complain to the Commission about the accessibility practices of common carriers does not supersede the rights available against common carriers under sections 206-208 of the Act, nor does it alter the scope of the remedies the Commission may apply. Indeed, by specifically referencing sections 207 among the list of remedies available for violations of section 255, we believe that Congress intended to make clear that common carriers could be subject to damages awards for violations of section 255 to the same extent as they could for other Title II violations. We find no support in the Act or its legislative history for the restrictive reading on our damages authority urged by the industry.

114. Nor are we persuaded by the claims of commenters representing the disability community that the right to complain to the Commission under section 255 includes the right to pursue damages against manufacturers for violations of the section. Sections 206 through 209 of the Act, on their face, apply solely to common carriers, a term specifically defined in section 3(10) of the Act.²⁵⁹ No plausible reading of the Act would extend the damages remedy prescribed under these sections to manufacturers or other non-common carriers. The commenters' reliance on statements regarding section 207 in the Conference Report accompanying the 1996 Act is unavailing.²⁶⁰ Judicial precedent clearly establishes that the

²⁵⁶ 47 U.S.C. § 207.

²⁵⁷ See, e.g. BSA comments at 15; CEMA comments at 24-26; SBC comments at 27.

²⁵⁸ *NPRM*, 13 FCC Rcd at 20408, ¶ 32-33.

²⁵⁹ See 47 U.S.C. § 153(10) (term "common carrier" or "carrier" means any person engaged as a common carrier for hire, in interstate or foreign communications by wire or radio or in interstate or foreign communication by wire or radio).

²⁶⁰ Commenters argued that the Conference Report accompanying Section 255 specifically references the availability of damages awards pursuant to Section 207 to remedy violations of Section 255 and makes no distinction between manufacturers and service providers, demonstrating that Congress clearly intended for manufacturers and service providers to be treated uniformly for all purposes under Section 255. See, e.g., NAD comments at 39-40.

starting point for interpreting a statute is the plain language of a statute itself.²⁶¹ Where the language of statute is unambiguous, we must "give effect to the unambiguously expressed intent of Congress."²⁶² The reference in the Conference Report to a section 207 damages remedy for section 255 violations is not inconsistent with our interpretation.²⁶³ The language in the report cited by the commenters does not mention manufacturers, nor does the report elsewhere state unequivocally that damages may be sought against manufacturers or other non-common carriers pursuant to 207 of the Act. We agree with Uniden, TIA and other industry commenters that a more reasonable reading of the reference in the Conference Report to section 207 as a possible remedy for violations of section 255 is that Congress was referring to remedies against providers who are common carriers within the meaning of the Act.²⁶⁴

115. *Other Sanctions and Remedies.* We affirm our conclusion in the *NPRM* that we should employ the full range of sanctions and remedies available to us under the Act in enforcing section 255. Most commenters addressing this issue maintained that the Commission should assess the same penalties against manufacturers and service providers, with the most onerous penalties such as forfeitures, license revocations, and cease and desist orders reserved for intentional and repeated violations.²⁶⁵ We conclude that we need not delineate in this Order the various sanctions and remedies available to us under the Act to address violations of section 255 and our rules. We recognize that sanctionable behavior may involve a wide range of conduct by manufacturers and service providers and we will use our considerable discretion to tailor sanctions or remedies to the individual circumstances of a particular violation. We note that the commenters opposing retrofitting as a possible remedy for non-compliance do not challenge our authority to require such action, but instead question its appropriateness given the fast-pace of technological advances and the fact that the costs of retrofitting will likely exceed any reasonable monetary penalty that could be imposed under law.²⁶⁶ While we will view retrofitting as an extreme remedy to be used in egregious cases of willful misconduct, we nevertheless believe that the prospect of such action will serve as a major deterrent to willful and repeated violations of the Act and our rules.

116. A number of commenters have requested that we establish enforcement guidelines and procedures that would ensure regulatory parity in the treatment of manufacturers and

²⁶¹ *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843, 104 S.Ct. 2778, 2781 (1984).

²⁶² *Id.*

²⁶³ *See Bell Atlantic Tel. Cos. v. FCC*, 131 F.3d 1044 (D.C. Cir. 1997).

²⁶⁴ *See, e.g.*, Uniden comments at 8-9, TIA reply comments at 64-67.

²⁶⁵ *See, e.g.*, Business Software Alliance comments at 15; CEMA comments at 24-26; TIA comments at 97-98; SBC comments at 27.

²⁶⁶ *See, e.g.*, SBC comments at 27.

service providers under section 255.²⁶⁷ We again note that our enforcement authority with respect to manufacturers and service providers is constrained by explicit requirements under the Act. For example, section 503(b)(5) of the Act pertaining to forfeiture penalties²⁶⁸ provides that

No forfeiture liability shall be determined under this subsection against any person, if such person does not hold a license, certificate or other authorization issued by the Commission, and if such person is not an applicant for a license, permit, certificate, or other authorization issued by the Commission, unless, prior to the notice required by paragraph (3) of this subsection or the notice of liability required by paragraph (4) of this subsection, such person (A) is sent a citation of the violation charged; (B) is given a reasonable opportunity for a personal interview with an official of the Commission, ...; and (C) subsequently engages in conduct of the type described in such citation.

47 U.S.C. § 503(b)(5).²⁶⁹

Thus, a manufacturer covered by section 255 who does not hold any authorization from the Commission and is not otherwise engaged in activity for which such authorization is required is in a markedly different position than a common carrier against whom the Commission may assess a forfeiture for section 255 violations without first issuing a citation and providing an opportunity for corrective action.²⁷⁰ Given these explicit statutory requirements, with no

²⁶⁷ See, e.g., USTA reply comments at 19; PCIA reply comments at 8-9.

²⁶⁸ 47 U.S.C. § 503 (containing the general forfeiture provisions under the Act). The Act also contains specific forfeiture provisions relating to certain activities or omissions by common carriers. See, e.g., 47 U.S.C. §§ 202(c), 203(e), 205(b). Under the general forfeiture provisions contained in section 503(b)(1)(B), any person who willfully or repeatedly fails to comply with any of the provisions of the Communications Act or any rule, regulation, or order issued by the Commission under the Act, may be liable to the United States for a forfeiture penalty. Section 503(b)(2)(B) authorizes the Commission to assess forfeitures against common carriers of up to one hundred thousand dollars for each violation, or each day of a continuing violation, up to a statutory maximum of one million dollars for a single act or failure to act. In exercising such authority, the Commission is required to take into account "the nature, circumstances, extent, and gravity of the violation and, with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and such other matters as justice may require" 47 U.S.C. §§ 503(b)(1)(B), (b)(2)(B).

²⁶⁹ See 47 U.S.C. § 503(b)(5). The section further provides, however, that the restriction "shall not" apply if, among other things, the person involved is engaging in activities for which a license, permit, certificate, or other authorization is required. *Id.*

²⁷⁰ In addition, section 503(b)(2)(B) authorizes the Commission to assess forfeiture penalties against common carriers up to \$100,000 for each violation or each day of a continuing violation, up to a maximum of \$1,000,000 for any single act or failure to act as described in section 503(b)(1). 47 U.S.C. § 503(b)(2)(B). Conversely, an equipment manufacturer or other non-common carrier subject to section 255 which does not hold any authorization issued by the commission, may only be assessed forfeiture penalties (pursuant to the procedures set forth in section 503(b)(5)) of up to \$10,000 for each violation or each day of a continuing violation up to a maximum of \$100,000 for any single act or failure to act as described in section 503(b)(1). 47 U.S.C. § 503(b)(2)(C).

indication that Congress intended to alter the scope of the sanctions and remedies available to the Commission to enforce section 255, we find no compelling reason to attempt to fashion parity in the regulatory treatment of manufacturers and service providers under section 255.²⁷¹ Indeed, in light of the constraints resulting from generally applicable penalties and enforcement provisions of the Act, we doubt such parity could be fashioned in any event. We are persuaded that the substantive rules and policies we adopt today provide the appropriate incentives for both manufacturers and service providers to take seriously their obligations under section 255 and our rules.

3. Procedures to be Followed When Complaints Are Filed Pursuant to Section 255

117. In the *NPRM*, we identified two principal objectives underlying our fast-track dispute resolution proposal: responsiveness to consumers and the efficient allocation of resources by affected manufacturers and service providers.²⁷² We proposed a number of specific procedures surrounding the mandatory fast track process, including, *inter alia*, requirements pertaining to a consumer's initial contact with the Commission and the manufacturer or service provider concerned, the allowable time period for resolving a fast track complaint, the defendant manufacturers or service provider's reporting requirements, the manner in which Commission staff would evaluate the defendant's fast-track response, and post-fast-track proceedings at the Commission.²⁷³

118. We do not address parties' comments regarding these proposals in the context of fast-track because of our conclusion that our enforcement goals can be accomplished using traditional complaint mechanism modeled after our existing common carrier complaint procedures. The parties' comments, however, are addressed where appropriate in our discussion of our traditional informal and formal complaint rules.

a. Initial Contact With the Commission

119. We adopt our tentative conclusion in the *NPRM* that we should, as recommended by the *TAAC Report*, "encourage consumers to express informally their concerns or grievances about a product to the manufacturer or supplier who brought the product to market before complaining to the Commission."²⁷⁴ We believe that this policy should apply with equal force to grievances or concerns relating to service providers. We fully expect that many accessibility-related disputes will be satisfactorily resolved through such communications without the need to file complaints. We decline, however, to adopt a rule that would require consumers to contact the manufacturer or service provider about an accessibility barrier before

²⁷¹ See, e.g., SBC comments at 27.

²⁷² *NPRM*, 13 FCC Rcd at 20448-49, ¶ 124.

²⁷³ *NPRM*, 13 FCC Rcd at 20448-53.

²⁷⁴ *TAAC Report*, §§ 6.7.4.1 and 6.7.4.2, at 32.

a complaint could be filed with the Commission.²⁷⁵ Under our section 208 rules, consumers are encouraged but not required to contact the carrier in advance of filing an informal complaint. Because the informal complaint process itself is geared toward cooperative efforts, it is not useful to require a complainant to contact the carrier before using the Commission's informal complaint processes.²⁷⁶

120. On the other hand, our rules governing formal section 208 complaints require both the complainant and defendant to certify, as part of the complaint and answer respectively, that they discussed, or attempted in good faith to discuss, the possibility of settlement with the opposing party prior to filing of the complaint.²⁷⁷ We conclude that this model is also appropriate for section 255 formal complaints. A consumer-friendly complaint process will ensure that consumers have an absolute right to have their accessibility concerns promptly addressed by the manufacturer or service provider concerned with reasonable expectation that the manufacturer or service provider will respond within the time and in the manner specified by the Commission. At the same time, consumers contemplating formal adjudication of a dispute with a manufacturer or service provider will have the appropriate incentives to explore settlement options before initiating costly and time consuming formal adjudicatory proceedings.

b. Form and Content of Informal Complaints; Standing to File

121. *Form.* We adopt our proposal to allow informal complaints all to be transmitted to the Commission by any reasonable means such as by letter, facsimile transmission, voice telephone (voice and TTY), Internet e-mail, audio-cassette recording, and braille. Most commenters supported this proposal as the most practical and beneficial way to ensure that complainants with disabilities have full access to our complaint mechanisms.²⁷⁸ Our rules therefore specify the various means through which complaints may be filed with the Commission.

122. *Content.* Our objective is to make it easy for consumers with disabilities to file

²⁷⁵ See, e.g., AT&T reply comments at 7-8; BSA reply comments at 7; PCIA reply comments at 9-10; TIA reply comments at 63. The NAD and COR, on the other hand, are opposed to any rule that would require consumers to first notify manufacturers and service providers before filing a complaint with the Commission; NAD reply comments at 6; COR comments at 4-5.

²⁷⁶ See 47 C.F.R. §§ 1.716 - 1.718. In administering the informal complaint rules, Commission staff works cooperatively with consumers and carriers to ensure meaningful solutions to problems raised by consumers and to address any underlying compliance concerns. In many instances, informal complaints are satisfactorily resolved by carriers with little direct involvement by Commission staff. We note further that Commission staff routinely meets with carrier representatives and consumer groups to discuss the informal complaint process and identify improvements that will better serve the needs of consumers and the industry.

²⁷⁷ See 47 C.F.R. § 1.720; 47 U.S.C. § 208.

²⁷⁸ See, e.g., NAD comments at 25-30; BellSouth comments at 16-17.

accessibility complaints and for manufacturers and service providers to move promptly to satisfy any meritorious complaints. A rule outlining the minimum information that must be provided by consumers to trigger the informal complaint mechanism should strike a balance between the rights and duties of consumers and affected manufacturers and service providers. Almost all commenters support such a rule.²⁷⁹ We believe it necessary and appropriate for potential complainants to have a clear basis for believing that a violation has taken place and not simply allege that particular equipment or service is not accessible. We recognize, however, that it would not be realistic or feasible for complainants to document, in the first instance, all the factors necessary to establish that the access needed is readily achievable within the meaning of our rules.

123. Therefore, we adopt a rule providing that any section 255 complaint filed with the Commission include: (1) the name and address of the complainant; (2) the name and address of the manufacturer or service provider against whom the complaint is made; (3) details about the equipment or service about which the complaint is made; (4) the date or dates on which the complainant or person on whose behalf the complaint is being filed either purchased, acquired, used or attempted to purchase or use the equipment or service about which the complaint is being made; (5) a statement of facts supporting the complainant's allegation that the equipment or service is not accessible to a person or persons with a disability; (6) the specific relief or satisfaction sought by the complainant; and (7) the complainant's preferred method of response to the complaint (e.g., letter, facsimile transmission, telephone (voice or TTY), Internet e-mail, audio-cassette, braille, or another method that will provide effective communication with the complainant. Although these content requirements will entail diligence on the part of consumers in preparing and submitting complaints, we believe that any burden on consumers is far outweighed by the benefits of prompt and decisive action by Commission staff and defendant manufacturers and service providers resulting from such complaints. Commission staff will be available to assist consumers in filing complaints and may relax or modify our content requirements where needed to accommodate a consumer whose disability may prevent him from providing the information required under our rules.²⁸⁰

124. *Standing to File.* We conclude that our minimum form and content requirements will alleviate concerns raised by a number of commenters regarding the need for a standing requirement for filing section 255 complaints. These commenters urged that we reverse our tentative conclusion in the *NPRM* and adopt a strict standing requirement under which only customers of a manufacturer or service provider would have standing to file a section 255

²⁷⁹ ATSI comments at 8; BellSouth comments at 9; CBT comments at 7; CompTel comments at 5; GST comments at 5; KMC comments at 5.

²⁸⁰ As required by the Rehabilitation Act of 1973, as amended, the Commission has a responsibility to prohibit discrimination on the basis of disability in its programs and activities. See 47 C.F.R. §§ 1.1801 - 1.1870.

complaint with the Commission.²⁸¹ A standing requirement is needed, these commenters contend, to ensure that manufacturers and service providers are not inundated with disputes among competitors and otherwise frivolous or vindictive complaints that will waste the resources of the Commission and the defendant companies.²⁸²

125. Commenters have made no persuasive argument why we should adopt a different standard for standing for these rules than for other complaints. As we noted in the *NPRM*, section 255 itself does not impose a standing requirement. Nor is there a standing requirement under section 208 of the Act and our common carrier complaint rules, which generally authorize the filing of a complaint by "any person"²⁸³ claiming that a carrier has violated a provision of the Act or the Commission's rules.²⁸⁴ The concerns raised by the commenters about possible frivolous complaints are too speculative to warrant a standing requirement where none otherwise exists under our common carrier complaint rules. There is no evidence that frivolous complaints have been a problem under our common carrier rules; nor is there any basis in the record to reasonably conclude that such will be the case for section 255 complaints. In any event, we believe that the minimum content requirements for section 255 complaints will effectively deter the filing of frivolous complaints. We are persuaded that these requirements will ensure that the focus of any complaint filed pursuant to these rules remains, as it should, on promoting accessibility.

c. Service; Designation of Agents

126. *Service.* We adopt a rule requiring the staff to promptly forward complaints that satisfy our content rules to the manufacturer or service provider involved, along with specific instruction to the defendant company to investigate and attempt to satisfy the complaint within a specified period, generally thirty days. The rule further provides that Commission staff may, in its discretion, request from the defendant company whatever additional information it deems useful to its consideration of the complaint. These requirements are similar to the service requirements contained in our rules governing section 208 informal complaints.

127. *Designation of Contacts/Agents.* We proposed in the *NPRM* to require manufacturers and service providers to establish points of contact for section 255 complaints and inquiries.

²⁸¹ See e.g., AirTouch comments at 7; Bell Atlantic comments at 9; Brightpoint comments at 5-6; BSA comments at 12; CEMA comments at 17-19 and reply comments at 11-12; CTIA comments at 15-17; Motorola comments at 50-52; PCIA comments at 15-16; Phillips comments at 12-14; SBC comments at 20-22; USTA comments at 14-15; Lucent reply comments at 1; TIA comments at 77; Nextel comments at 8-9; Nokia reply comments at 4-7; Redcom reply comments at 4-5; MTA reply comments at 11.

²⁸² *Id.*

²⁸³ See 47 U.S.C. § 153(33) (the term person includes "an individual, partnership, association, joint-stock company, trust, or corporation").

²⁸⁴ 47 U.S.C. § 208. This section, applicable to complaints against common carriers, specifically states that "no complaint shall at any time be dismissed because of the absence of direct damage to the complainant."

We tentatively concluded that such a requirement would facilitate the ability of consumers to contact manufacturers and service providers directly about accessibility issues or concerns and to ensure prompt and effective service of complaints on defendant manufacturers and service providers by Commission staff.²⁸⁵ There was universal support among the commenters for this proposal. We therefore adopt a rule requiring affected manufacturers and service providers to designate an agent or contact whose principal function will be to ensure the manufacturer's or service provider's prompt receipt and handling of accessibility concerns raised by consumers or Commission staff. The contact information must, at a minimum, include the name of the person or office, telephone number (voice and TTY), fax number and both mailing and e-mail addresses.²⁸⁶ The representative or agent should have the means available to convert materials distributed and received into accessible formats.

128. We recognize that we need to ensure that consumers can readily obtain information identifying the points of contact for manufacturers and service providers covered by these rules. Accordingly, the Commission will provide access to a listing of the contact representatives or agents designated by manufacturers and service providers. In order to establish this listing, we will require covered manufacturers and service providers to file the required contact information with the Secretary of the Commission within thirty days after the effective date of the rules adopted herein.²⁸⁷ Commission staff will prepare a Public Notice advising consumers and other interested parties how to obtain access to the contact information once it has been compiled. We anticipate that the information will promptly be made available through the Commission's website. We also strongly encourage manufacturers and service providers to employ their own measures to inform consumers about how to contact the appropriate offices within their companies regarding accessibility barriers or concerns.

129. As a related matter, we note that certain commenters urged that we adopt a requirement that defendant manufacturers and service providers make reasonable, good faith efforts to contact the complainant within five business days of receipt of a complaint to acknowledge such receipt and discuss how the company intends to proceed with its handling of the complaint.²⁸⁸ We agree with these commenters that this measure is consistent with our point of contact requirement and will not unduly burden affected companies, and adopt this

²⁸⁵ *NPRM*, 13 FCC Rcd at 20426, ¶ 71.

²⁸⁶ We note that common carriers are required under section 413 of the Act, 47 U.S.C. § 413, to designate agents within the District of Columbia, upon whom service of all notices and processes and all orders, decisions, and requirements of the Commission may be made and to file such designation with the secretary of the Commission. We emphasize that the contact designation required in this Order is in addition to the obligation under section 413.

²⁸⁷ See Appendix B, rules 6.18, 7.18. We encourage industry trade associations, such as CEMA, CompTel, TIA, CTIA, TRA, and USTA, to file this information on behalf of their members if they so desire. The Commission would consider such group submissions to be in full compliance with this requirement and would appreciate receiving such submissions both in hard copy and on a computer disk.

²⁸⁸ See, e.g., TIA comments at 68.

requirement. We anticipate that this exchange of information by complainants and defendant companies will lead to prompt and effective accessibility solutions in many instances.

130. We decline, however, to adopt related proposals by certain commenters that would require manufacturers and service providers to establish specific internal systems and recordkeeping practices for purposes of responding to section 255 complaints and inquiries.²⁸⁹ Nor do we adopt proposals by other commenters that would require manufacturers to maintain public files recording their compliance with section 255 and our rules. We agree with USA that companies will have different and often unique methods and systems for handling complaints and inquiries.²⁹⁰ We see no need to burden manufacturers and service providers with detailed processing and reporting requirements which could hinder rather than hasten the resolution of accessibility disputes. We fully expect, however, that good business and customer service practices will require that companies establish and maintain effective internal procedures and maintain adequate records in order to ensure compliance with our rules, as well as to respond promptly to their actual or prospective customers. We emphasize, however, that we may revisit this decision if our experience processing section 255 complaints indicate that such requirements are needed to effectively enforce section 255.²⁹¹

d. Responses to Informal Complaints

131. *Content.* We do not adopt a rule urged by certain commenters prescribing the information that manufacturers and service providers would be required to provide in their responses to informal section 255 complaints.²⁹² As we stated above, our section 255 informal complaint process emphasizes informal and cooperative efforts between consumers and defendant manufacturers and service providers to resolve accessibility concerns without extensive involvement by the Commission. Our goal here is to avoid imposing cumbersome filing and reporting requirements that would deprive consumers and companies of non-adversarial opportunities to resolve disputes. Just as it is important to ensure that consumers have a simple, easy to understand process for raising their accessibility concerns with the Commission, it is equally important that manufacturers and service providers are able to respond quickly and effectively to those concerns. We do not believe it feasible to speculate about specific types of information that may be required by the staff. The level and nature of the information required to respond to accessibility complaints may vary widely depending upon the specific allegations raised, and it appears impractical to fashion a rule to anticipate these varying circumstances.

132. Moreover, our rules require defendant manufacturers and service providers to prepare

²⁸⁹ See, e.g., AFB comments at 33, reply comments at 13-14.

²⁹⁰ See USTA comments at 13.

²⁹¹ See ¶¶ 24-36, *supra*.

²⁹² See, e.g., AFB comments at 33.

their responses in the format requested by the complainant, except where the defendant service provider or equipment manufacturer is incapable of doing so. In cases in which the defendant is incapable of preparing a response using the format requested by the complainant, Commission staff will take actions necessary to ensure that the response is accessible to the complainant.

133. *Time to Respond.* The commenters are generally supportive of a thirty day period in which to respond to informal complaints, although certain commenters argue that the response should be shortened to 15 days²⁹³ while others favor a longer period of 60-90 days.²⁹⁴ We believe that a thirty day response period, which mirrors the response time afforded under our common carrier complaint rules, strikes a reasonable balance between our goals of promoting the prompt resolution of accessibility disputes and ensuring that manufacturers and service providers have sufficient time in which to evaluate the complaint and provide meaningful solutions or explanations to consumers. We recognize that the issues raised in some section 255 complaints will be resolved promptly by the defendant company while others will be complex and not susceptible to expeditious resolution. Commission staff will manage the informal complaint process to reflect these case specific differences. For example, the staff will have authority to require a response to a complaint in less than thirty days if warranted under the circumstances. In a similar vein, the staff may grant a defendant additional time in which to attempt to informally resolve a complainant's accessibility problem, particularly in cases that raise extraordinarily complex issues or facts.

e. Review and Disposition of Informal Complaints by the Commission

134. Although we anticipate that the vast majority of complaints can be resolved by the informal complaint process, we recognize that not all informal complaints will be susceptible to resolution. A number of commenters expressed concern that our *NPRM* failed to describe our complaint mechanisms in sufficient detail to enable consumers and potential defendants to understand the mechanics and possible outcomes of the proceedings.²⁹⁵ To address these concerns, we describe in this section the staff review process and possible dispositions of informal section 255 complaints. Generally, the dispositions described are similar to those provided for under our common carrier complaint rules.

135. We emphasize that, with regard to informal complaints that are resolved by the manufacturer or service provider to the satisfaction of the individual complainant, our commitment to promoting such resolution efforts should not be construed by companies as a license to implement "quick-fix" or "patch-work" accessibility solutions for individual customers that fail to address underlying compliance issues or concerns. Commission staff will be charged with carefully monitoring the section 255 complaint process. If the nature

²⁹³ See, e.g., AFB comments at 7; NAD comments at 16-17.

²⁹⁴ See e.g., TIA reply comments at 58.

²⁹⁵ See, e.g., NAD comments at 4-5; TDI comments at 6; Advocacy Center comments at 4.

and/or number of complaints against a particular manufacturer or service provider indicates non-compliance with the Act or our rules, we fully expect the staff to initiate, or recommend to the Commission if appropriate, prompt and decisive enforcement actions.

136. *Complaints Satisfactorily Resolved by the Manufacturer or Provider.* As a general matter, if it appears from a response to an informal complaint that the accessibility problem has been resolved, the staff shall close-out the complaint. In cases, where there has been no resolution, the staff shall inform parties of the review and disposition of an informal complaint as described below.

137. *Unresolved Complaints.* There are three basic outcomes that may result from the staff's review of unresolved informal section 255 complaints. First, in the event that the staff determines, based on its review of the complaint, defendant's response, and any supporting documentation, that no further action by the Commission is warranted with regard to the matters alleged in the complaint, our rules require the staff to inform the parties of its decision to close-out the complaint and further advise them of the complainant's right to file a formal complaint pursuant to sections 1.720 -1.736 of the our rules if the complainant desires to pursue formal adjudication of its claims.

138. Second, if the staff determines that there is an unresolved question of compliance by the defendant manufacturer or service, the staff will be authorized to conduct a further investigation or initiate such further proceedings as are necessary to resolve compliance questions and determine what, if any sanctions against the defendant are appropriate. In this regard, we note that Act gives the Commission, and its staff pursuant to delegated authority, broad authority to inquire into or investigate practices by parties subject to the Act's requirements.²⁹⁶

139. Third, in cases in which Commission staff determines that the defendant is not in compliance with section 255 , the rules specify that the staff may order or prescribe (or recommend to the Commission) such sanctions or remedies as deemed appropriate under the facts and circumstances.

f. Formal Complaints

140. *Applicability of Sections 1.720-1.736 of the Rules.* As indicated above, we conclude that our rules governing complaints filed against manufacturers and service providers under section 255 of the Act should provide aggrieved parties an unqualified option of pursuing an accessibility claim against a manufacturer or service provider informally or through our more formal adjudicative procedures. We agree with a number of the commenters that certain accessibility disputes, by their nature or complexity, may not be able to be resolved by the disputing parties. Therefore, we adopt a rule providing that any person seeking formal adjudication of a problem or dispute with a manufacturer or service provider may do so pursuant to the procedures specified under sections 1.720-1.736 of our rules. We note that in

²⁹⁶ See e.g., sections 4(i) and 403 of the Act, 47 U.S.C. §§ 154(i), 403.

November 1997, the Commission adopted comprehensive changes to these rules which are intended to improve the speed and effectiveness of the formal complaint process.²⁹⁷ Under the revised rules, both complainants and defendant carriers are required to (1) certify in their respective complaints and answers that they attempted in good faith to settle the dispute before the complaint was filed with the Commission; (2) and submit detailed, factual and legal support, accompanied by affidavits and documentation for their respective positions in the initial complaint and answer.²⁹⁸ In addition, the rules place strict limits on the availability of discovery and subsequent pleading opportunities to present and defend against claims of misconduct.²⁹⁹ The rules contain a number of additional procedural and pleading requirements designed to expedite rather than delay the resolution of formal complaints.³⁰⁰

141. We do not adopt our proposal in the *NPRM* to require parties to obtain Commission approval in order to file a formal complaint; nor do we adopt the suggestion by certain commenters that we require parties to invoke our informal complaint processes as a prerequisite to filing a formal complaint.³⁰¹ No such requirements exist under our common carrier complaint rules and we find no basis in the record to conclude that such requirements are needed for section 255 complaints. Moreover, given the relative ease of the informal complaint process, parties typically do not file formal complaints that would more appropriately be filed as informal complaints in the first instance.³⁰²

142. We note that our *Formal Complaints Order* specifically authorizes the staff to waive or grant exceptions to formal procedural and pleading requirements in particular cases based on showings of financial hardship and other public interest factors.³⁰³ We expect the staff to give due consideration to the circumstances of individual persons with disabilities, and the disability community at large, in administering our formal complaint mechanisms. We

²⁹⁷ Amendment of Rules to be Followed When Formal Complaints are filed Against Common Carriers, First Report and Order, CC Docket No. 96-238, 12 FCC Rcd 22497 (1997) (*Formal Complaints Order*), *pets. for recon. pending*.

²⁹⁸ *Formal Complaints Order*, 12 FCC Rcd at 22514-22517, ¶¶ 39-42.

²⁹⁹ *Formal Complaints Order*, 12 FCC Rcd at 22541-22554, ¶¶ 102-132.

³⁰⁰ *Formal Complaints Order*, 12 FCC Rcd at 22587-22608, ¶¶ 214-274.

³⁰¹ See, e.g., CEMA comments at 21.

³⁰² Historically, for reasons primarily of cost, expedition, and simplicity, consumers have found the filing of informal complaints rather than formal complaints to be generally preferable. For example, during 1997, Commission staff processed over 44,000 written complaints and inquiries concerning various common carrier practices; the vast majority of these were filed by individual consumers. During this same period, the Commission received fewer than 100 formal complaints against common carriers, only 2 of which were filed by or on behalf of individual consumers.

³⁰³ See *Formal Complaints Order*, 12 FCC Rcd at 25538-25539, ¶¶ 93-95.

emphasize, however, that the staff may not exercise this waiver authority in a manner which relieves a section 255 formal complainant from its obligations to allege sufficient facts, supported by affidavits or other documentation, which, if true, would constitute a violation of section 255 or the FCC's implementing rules.

g. Accelerated Dispute Resolution

143. We anticipate that some formal complaints may be filed which raise broad, industry-wide concerns of immediate and paramount importance to the disability community. We recognize that even minor delays or barriers to access that is readily achievable could pose serious and damaging consequences for consumers with disabilities. We also believe that in many situations, manufacturers and service providers will have an interest in obtaining the prompt resolution of formal complaints filed against them in order to quickly establish the validity of their accessibility practices.

144. In July 1998, we amended our formal complaint rules to establish specialized procedures for resolving on an expedited basis certain categories of disputes arising between parties competing in the telecommunications market.³⁰⁴ These procedures, *inter alia*, require disputing parties to engage in Commission supervised settlement negotiations prior to the filing of the complaint and, once the complaint is filed, proceed under abbreviated discovery and pleading schedules. The accelerated process is designed to produce a decision by the staff on the merits of the parties' dispute within 60 days from the time the matter is accepted for inclusion in the accelerated docket.³⁰⁵ We concluded that the specialized procedures will serve the critical function of simulating the growth of competition for telecommunications services by ensuring the prompt resolution of disputes that may arise between market participants.³⁰⁶ We conclude that such specialized procedures for section 255 disputes could play a similar role in promoting the accessibility goals underlying section 255 and, therefore, we provide in this *Order* that such procedures may be used by the staff for purposes of section 255 formal complaints. Such accelerated procedures will minimize the opportunity for manufacturers and service providers to continue to delay otherwise readily achievable accessibility solutions because the lawfulness of such practices will be subject to expedited review.³⁰⁷

145. *Eligibility Requirements.* Not all accessibility disputes raised in the context of formal complaints will be appropriate for handling under these accelerated procedures.

³⁰⁴ *Amendment of Rules Governing Procedure to be Followed When Formal Complaints are filed Against Common Carriers*, Second Report and Order, CC Docket No. 96-238, 13 FCC Rcd 17018 (1998) (*Accelerated Dockets Order*).

³⁰⁵ *Accelerated Dockets Order*, 13 FCC Rcd at 17024, ¶ 10.

³⁰⁶ *Accelerated Dockets Order*, 13 FCC Rcd at 17024-17025, ¶¶ 10-11.

³⁰⁷ *Cf. Accelerated Dockets Order*, 13 FCC Rcd at 17024, ¶ 10.

Therefore, we adopt the following requirements that a complainant must satisfy in requesting accelerated resolution of its complaint:

- First, a complainant desiring accelerated dispute resolution must allege in good faith that a person with a disability is not able to access/use particular equipment or services is due to a product's lack of accessibility, and that such lack of access is having or will have an immediate adverse impact on consumers' ability to use the services and equipment covered by our rules.
- Second, the complainant must demonstrate that he or she has contacted or attempted in good faith to contact the manufacturer or service provider against whom the allegations are made and gave or attempted to give the manufacturer or service provider a reasonable period of time (not less than 30 days) to address the problem;
- Third, the complainant must have given prior advance notice to the manufacturer or service provider of its intention to file a formal complaint; and
- Fourth, the complainant must agree to participate in any settlement negotiations scheduled and supervised by Commission staff with respect to the matters alleged in the complaint.

146. *Accelerated Dispute Resolution Procedures.* Any person with a disability or entity acting on behalf of any such person who satisfies the above-listed conditions may submit its formal complaint, along with a request for accelerated dispute resolution, to the Common Carrier Bureau's Enforcement Division.³⁰⁸ Where practicable, such complaint and request may be submitted to the Commission by any reasonable means. The filing must include at a minimum: (1) the information described in sections 1.721-1.724 of our rules and (2) a representation by the complainant that the conditions specified in subsection 1.730 have been met. Complaints accepted for accelerated dispute resolution will be promptly forwarded by the Commission to the named manufacturer or service provider, which shall be called on to answer the complaint in 15 days or such shorter time as the staff may prescribe. Commission staff may, in its discretion, require the complainant and defendant to appear before it, via telephone conference or in person, to bring and give evidence bearing on accessibility, usability or compatibility. In appropriate cases, the staff may schedule and supervise

³⁰⁸ In our *Accelerated Dockets Order*, we stated that while section 208 complaints are handled by both the Common Carrier Bureau and the Wireless Telecommunications Bureau, we would initially exercise our discretion to apply the accelerated docket rules to formal complaints handled by the Common Carrier Bureau. *Accelerated Dockets Order*, 13 FCC Rcd at 17022, ¶ 6, n.9. We added, however, that after gaining experience with the application of the rules by the Common Carrier Bureau, we may, in our discretion, make the accelerated docket procedures available for the adjudication of complaints against commercial mobile radio service (CMRS) providers and other wireless carriers. *Id.* We see no reason in this instance to delay use of our accelerated docket procedures for section 255 complaints against CMRS providers and equipment manufacturers. Therefore, Commission staff will entertain requests for accelerated resolution of disputes concerning commercial mobile radio service providers and manufacturers and other wireless carriers and manufacturers will be handled by the Wireless Telecommunications Bureau.

settlement negotiations between the parties.

147. *Factors to be Considered by the Staff.* To further guide parties contemplating formal complaint actions to enforce the requirements of section 255 and our rule, we believe it useful to delineate certain factors which the staff may consider in evaluating requests for accelerated dispute resolution under our specialized procedures. These non-exclusive factors include:

- (1) Whether the complainant alleges facts indicating a continuing violation of section 255 or the rules;
- (2) Whether it appears that the complainant has exhausted reasonable opportunities for settlement with the defendant;
- (3) Whether expedited resolution of the particular dispute appears likely to advance the objectives of section 255;
- (4) Whether the issues raised by the complainant appear suited for accelerated resolution (this factor may entail, among other things, an examination of the number of distinct issues and the complexity of the information required to resolve them);
- (5) Whether the accelerated schedule may be unfair to one party because of disparity in resources.

148. *Decisions Issued in Accelerated Proceedings.* We noted above that our accelerated dispute resolution procedures contemplate decisions by the staff on the merits of a complaint within 60 days from the time the complaint is accepted onto the accelerated docket. We similarly adopt a 60-day timetable for issuing a decision in section 255 complaint proceedings under our accelerated procedures. At the same time, we recognize that some disputes that are likely to arise over the proper interpretation and application of our rules will be cases of first impression, the resolution of which may not be possible within the 60 day period. Therefore, staff administering the accelerated docket will have the discretion to extend the 60-day period. We emphasize, however, that extensions granted by the staff will be calculated to produce full and fair decisions in the shortest possible time frame.

h. Defenses to Complaints

149. We noted in the *NPRM* that the most common defenses likely to be mounted by manufacturers and service providers in response to either a complaint or an inquiry by the Commission are claims that: (1) the product or service lies beyond the scope of section 255; (2) the product or service is in fact accessible; or (3) accessibility is not readily achievable.³⁰⁹ We noted that while the first two defenses are relatively straightforward, the readily

³⁰⁹ *NPRM*, 13 FCC Rcd at 20465, ¶ 162.

achievable defense is complex.³¹⁰ We therefore proposed to use the Access Board Guidelines applicable to manufacturers as examples of the kinds of compliance measures we would consider in this regard.³¹¹ These include four categories of activities by companies demonstrating: (1) self-assessment of whether accessibility is readily achievable with respect to the product or product line at issue; (2) external outreach efforts to ascertain accessibility needs and solutions; (3) internal management processes to ensure early and continuing consideration of accessibility concerns as product offerings evolve; and (4) the availability of user information and support.³¹²

150. Most of the commenters generally agree that good faith efforts to comply with section 255 should be considered in evaluating complaints and compliance generally. Many support the establishment of specific criteria for measuring good compliance efforts, but contend that the criteria should be explicit and fully explained by the Commission.³¹³ Others maintain that companies who engage in the activities listed by the Commission should be given a rebuttable presumption that they have complied with section 255.³¹⁴ Still others maintain that the Commission should adopt a case-by-case approach to measuring compliance and not exclude the consideration of additional factors.³¹⁵ In addition, one commenter argues that the Commission should clarify that a manufacturer or service provider's failure to provide accessible documentation and customer service support accessible to persons with disabilities should not only be a factor to be considered in measuring good faith compliance efforts, but itself a violation of section 255.³¹⁶ Another commenter endorses the Commission's consideration of practices by manufacturers and service providers designed to assist consumers with disabilities in obtaining information about accessible products and services.³¹⁷

151. While we believe some weight should be given to evidence that a respondent made good faith efforts to comply with section 255,³¹⁸ we decline to adopt a rule establishing a presumption of compliance in favor of manufacturers and service providers in section 255 complaint actions. Instead, we will review section 255 complaints on a case-by-case basis,

³¹⁰ *Id.*

³¹¹ *Id.*

³¹² *Id.*

³¹³ *See, e.g.,* PCIA comments at 17.

³¹⁴ *See, e.g.,* TIA comments at 95-96.

³¹⁵ *See, e.g.,* AT&T comments at 15-16.

³¹⁶ NCD comments at 34.

³¹⁷ TDI comments at 23.

³¹⁸ *NPRM*, 13 FCC Rcd at 20465, ¶ 162.

giving due consideration to whether the defendant took actions consistent with the rules and guidance we set forth today, as well as any other compliance measures that the respondent has undertaken, such as those set forth in the Access Board's Advisory Appendix. We do not believe it practical to attempt to delineate specific acts or omissions that would demonstrate compliance with section 255. We emphasize that it will be incumbent upon manufacturers and service providers faced with complaints or compliance inquiries from the Commission to provide information and arguments to support any claim that an accessibility feature is not readily achievable within the meaning of section 255 of the Act.

4. Limitations on Filing Complaints

152. *Time Limit for Filing Complaints.* The commenters are split over our tentative conclusion in the *NPRM* that we should not impose any specific timetable on the filing of complaints under section 255. Industry commenters argued in unison that a time limit on such filings is need to prevent manufacturers and providers from being exposed indefinitely for accessibility assessments made years earlier.³¹⁹ Because of what they describe as the fast-changing nature of the telecommunications industry, some urged the Commission to apply a 6-month to 12-month time limit, starting from the time the complainant acquired or used or attempted to acquire or use a product or service.³²⁰ Others supported a two-year limitations period comparable to the 2-year limit on the filing of damages claims against common carriers under section 415(b) of the Act.³²¹ According to these commenters, without the finality of a limitations period, uncertainty would stifle companies' ability to move forward with other accessibility programs and innovations.³²² Commenters representing the disability community were likewise unanimous in their support of our proposal not to impose any specific time limit. These commenters contended that inaccessibility may not become apparent until equipment or service is used, and even then, it may take a while to realize the inaccessibility or incompatibility of the product.³²³

153. We decline to adopt either the 6-month or 1-year limitations period on the filing of section 255 complaints urged by some commenters. We do not agree that a limitations period more restrictive than the 2-years prescribed in section 415 of the Act pertaining to damages claims against common carriers is necessary or desirable to guard against stale or unmeritorious claims. The Commission has not imposed any shorter time limits under its

³¹⁹ See, e.g., Bellsouth comments at 11-12.

³²⁰ See, e.g., Business Software Alliance comments at 11-12.

³²¹ 47 U.S.C. § 415(b). This section provides, in pertinent part that "[a]ll complaints against carriers for the recovery of damages not based on overcharges shall be filed with the Commission within two years from the time the cause of action accrues, and not after...."

³²² See, e.g., BellSouth comments at 11-12; Ameritech comments at 9-10; TIA comments at 86-87.

³²³ See, e.g., National Assistive Technology Project comments at 2; CCD comments at 1; Center for Disability Rights comments at 2.

common carrier complaint rules, and none of the commenters makes persuasive arguments why we should adopt a different approach for the filing of section 255 complaints. Nor does our experience processing informal section 208 complaints indicate to us that more stringent limits are needed to guard against stale or unmeritorious complaints. To the contrary, our records indicate that consumers seldom file complaints against carriers that involve disputes over carrier practices occurring more than a year prior to the filing of a complaint. In fact, it appears that consumers are becoming increasingly prompt in filing complaints with the Commission.³²⁴ We find nothing in the record to suggest that this will not be the case with complaints arising under section 255.

154. We emphasize, however, that our section 255 complaint rules are designed to focus on ensuring practical accessibility solutions for individual consumers while promoting overall compliance with section 255 and our implementing rules. To ensure that this Commission's resources remain properly focused, we adopt a general policy that complaints against manufacturers and service providers determined by the staff to raise issues that are dated or stale due to the passage of time or moot because of industry or product changes (and which do not raise timely damages claims within the meaning of section 415(b)) may, absent indications of an ongoing compliance problem, be subject to summary disposition by the staff.

155. *Alternative Dispute Resolution Procedures.* A number of commenters also proposed that we require parties to engage in formal alternative dispute resolution practices as a prerequisite to filing complaints pursuant to section 255. Others proposed that we adopt a rule requiring the Commission to arbitrate or mediate disputes at the request of the disputing parties as an alternative to complaint actions. We decline to adopt these proposals because their potential problems outweigh potential benefits. We conclude that these proposals could either stifle the parties' ability to develop creative solutions or delay unnecessarily the filing of complaints, or both. For example, we agree with NAD and Council for Organizational Representatives that requiring formal ADR efforts prior to the filing of a complaint could permit defendant manufacturers or service providers to delay the filing of formal complaints to the detriment of customers. We find also that the proposal to require Commission staff to formally mediate or arbitrate accessibility disputes in all cases would unnecessarily tax the Commission's resources when there are many qualified ADR experts outside the Commission. We note that Commission staff will work with industry members and consumers to resolve accessibility disputes and compliance issues informally, both before and after complaints have been filed. We see little benefit, however, in requiring the staff to conduct such mediation or arbitration efforts in all cases.

5. Applicability of Statutory Complaint Resolution Deadlines

156. We do not agree with the claim by certain commenters that the five-month complaint resolution deadline imposed on the Commission under section 208(b) of the Act is also applicable to all complaints alleging violations of section 255. In the *Formal Complaints Order*, we specifically addressed the issue of the scope and applicability of the section 208(b)

³²⁴ See *The TELEPHONE COMPLAINT SCORE CARD (Common Carrier Bureau 1998)*.

deadline. We held that section 208(b) applies only to formal complaints which involve: (1) “investigation[s] into the lawfulness of a charge, classification, regulation or practice” contained in tariffs filed with the Commission and (2) any complaint about the lawfulness of matters that would have been included in tariffs but for the Commission’s forbearance from tariff regulation.³²⁵

157. Thus, we conclude that section 208(b) would apply to a properly filed section 255 formal complaint only to the extent that the complaint raised issues concerning a matter contained in a service provider’s tariff or that would have been included in the service provider’s tariff but for our forbearance policies. We emphasize, however, that notwithstanding the absence of a statutory resolution deadline in section 255, our goal will be to resolve all section 255 complaints in the shortest possible time frame in order to give full effect to accessibility requirements of the Act and our rules.

6. Confidential Treatment of Filings

158. We noted in the *NPRM* that our enforcement of these rules may often involve evaluation of information which may be considered proprietary business data.³²⁶ We noted further that sections 0.457(d), 0.457(g), and 0.459 of our rules³²⁷ already provide confidentiality for proprietary information in certain instances and requested comment regarding the need, if any, for additional protective measures.³²⁸ Many of the industry commenters strongly support the adoption of additional requirements to protect proprietary business information. Certain of the commenters argue that the Commission should establish a rebuttable presumption that information submitted in response to a complaint is confidential.³²⁹ Others contend that complainants should be required to sign non-disclosure agreements. Still others argue that where a readily achievable defense is invoked, the Commission should deem any information submitted by the defendant manufacturer or service provider as confidential and impose strict penalties for improper disclosures.³³⁰

159. We agree with the commenters’ assessment that our rules should facilitate the submission of relevant information by consumers with disabilities as well as manufacturers and service providers without fear of public dissemination of information that is confidential

³²⁵ *Formal Complaints Order* at ¶ 36-37.

³²⁶ *NPRM*, 13 FCC Rcd at 20465, ¶ 162.

³²⁷ 47 C.F.R. §§ 0.457, 0.459.

³²⁸ *NPRM*, 13 FCC Rcd at 20465, ¶ 162.

³²⁹ *See, e.g.*, Lucent comments at 23.

³³⁰ *See, e.g.*, TIA comments at 89-91; Motorola comments at 54.

or proprietary.³³¹ We also agree that consumers and defendant manufacturers and service providers must be assured of protection for their confidential or proprietary information in order to avoid the time consuming process of resolving disputes over the treatment of documents. We conclude, however, that our rules governing confidential materials adequately address the concerns raised by the commenters and, therefore, do not adopt the additional requirements proposed. As an initial matter, we note that we do not anticipate that confidentiality issues will arise frequently in informal section 255 complaint proceedings.³³² Informal complaint actions, which are exempt proceedings under our ex parte rules, are by nature not designed or intended to facilitate the exchange of confidential information between disputing parties. Defendant manufacturers and service providers are not typically required to submit information designated as confidential or proprietary directly to a complainant; nor is the staff required to transmit confidential information provided by a complainant to a defendant company. To the extent that such information is deemed necessary to the staff's evaluation of an informal complaint, the submitting party may invoke the protection afforded under sections 0.457-0.459 of our rules by clearly designating the information as confidential or proprietary at the time it is submitted to the Commission.

160. We recently reexamined our confidentiality rules and adopted certain amendments and clarifications to more specifically describe the information needed to evaluate requests for confidential treatment.³³³ The revised rules clarify that the Commission will carefully consider the competitive implications of disclosure on a case-by-case basis. There is no evidence in the record before us that the type of business information that may be submitted by companies to support a readily achievable defense is so unique as to require additional protective measures.

161. Moreover, we note that in the context of formal complaint actions, in which relevant information or material designated as confidential must be produced to the opposing party, section 1.731 of our rules places very specific requirements and limitations on the use of information or materials. Section 1.731 makes it clear that confidential or proprietary information may not be used for any purpose other than prosecuting or defending the complaint at issue, or disclosed to any employees other than those directly involved in such prosecution or defense. The rule further provides that parties receiving confidential material must sign a sworn statement affirmatively stating that they have reviewed the Commission's confidentiality provisions pertaining to formal complaints actions and understand and accept the limitations period. We believe that these requirements offer adequate protection in the vast majority of cases. In those cases in which a party legitimately believes that the

³³¹ See, e.g., USTA Reply Comments at 17-18; Motorola Comments at 53-55; Uniden Reply Comments at 8; Redcom Reply Comments at 5; SHHH Reply Comments at 18-19.

³³² We note that confidentiality issues do not typically arise in connection with informal complaints filed against common carriers under our section 208 complaint rules.

³³³ See *Examination of Current Policy Concerning Treatment of Confidential Information Submitted to the Commission*, CC Docket No. 96-55, Report and Order, 13 FCC Rcd 24816 (1998).

protection afforded under these rules is inadequate, the rules afford the opportunity to seek more stringent limitations of the submission or exchange of particularly sensitive materials.

7. *Ex Parte* Treatment of Informal and Formal Complaints

162. We will amend our rules pertaining to *ex parte* communications to provide that informal complaints filed pursuant to section 255 of the Act shall be deemed "exempt" proceedings, as is the case with informal complaints filed pursuant to section 208 of the Act.³³⁴ This exempt designation will allow the Commission and its staff to meet or otherwise communicate with either party, as well as non-parties, on an *ex parte* basis to discuss matters pertaining to the complaint and related compliance issues. This exempt classification has proven to be extremely beneficial to consumers, defendant companies and the Commission in terms of facilitating the identification and exchange of information and ideas needed to resolve section 208 informal complaints and related compliance issues.³³⁵

163. Formal complaints filed against common carriers pursuant to sections 1.720-1.736 of our rules are classified as "restricted" proceedings under our *ex parte* rules.³³⁶ This "restricted" designation, as with other proceedings not designated as exempt or permit-but-disclose, expressly prohibits *ex parte* presentations in these adjudicatory proceedings from any source.³³⁷ Formal section 255 complaints filed against manufacturers or service providers shall be similarly treated as restricted proceedings.

8. Actions by the Commission on its own Motion

164. Our discussion in this section of the *Order* has focused on rules and policies to be applied when complaints are filed against manufacturers and service providers under section 255 of the Act as a means of promoting compliance with the Act's accessibility requirements and those under our rules. As we noted earlier, swift and effective enforcement is crucial to our section 255 implementation plan. We fully expect that most accessibility-related informal complaints filed pursuant to section 255 will be resolved promptly by manufacturers and service providers, without the need for significant Commission involvement. We emphasize, however, that to the extent that compliance issues or problems requiring regulatory intervention are perceived by the staff during the processing of an accessibility-related

³³⁴ See section 1.1204 of the rules, 47 C.F.R. § 1.1204.

³³⁵ We note that our *ex parte* rules specifically authorize the Commission or its staff to apply different *ex parte* procedures in particular cases if deemed in the public interest. For example, the staff could designate an informal complaint as either "restricted" (which would mean that *ex parte* communications would be strictly prohibited) or non-restricted (*ex parte* communications are permitted but must be fully disclosed to the Commission and other parties to the proceeding) if deemed in the public interest. See 47 C.F.R. §§ 1.1200-1.1208.

³³⁶ See 47 U.S.C. § 1.1208.

³³⁷ *Id.* As we noted above, our *ex parte* rules specifically authorize the Commission or its staff to apply different *ex parte* procedures in particular cases if deemed in the public interest.

informal complaint or are otherwise brought to the Commission's attention, the staff will be poised to pursue the matter on its own motion and, when warranted, take or recommend appropriate remedial actions or sanctions from those available to us under the Act and our rules.³³⁸

165. We reject the suggestion by certain commenters that we establish specific guidelines for initiating investigations and other section 255 enforcement actions on our own motion.³³⁹ We see no need to attempt to describe in this *Order* the various factors and circumstances that might warrant exercise of our broad enforcement authority. The procedures to be followed by the staff in taking action on its own motion, unless prescribed under the Act or our rules, shall be those which will best serve the purposes of such enforcement proceedings.³⁴⁰

9. Program Accessibility

166. As we noted earlier, the Commission has a responsibility to prohibit discrimination on the basis of disability in its programs and activities, as required by the Rehabilitation Act of 1973, as amended.³⁴¹ The Commission's rules implementing these responsibilities are set forth at 47 C.F.R. §§ 1.1801 - 1.1870. These requirements apply to the Commission's enforcement provisions and activities.³⁴² If a member of the public believes that the Commission is not providing equal access to its programs and activities, the procedures for filing a program accessibility complaint are set forth in 47 C.F.R. § 1.1870. Complaints regarding access to Commission programs and activities should be sent to the Commission's Office of the Managing Director. Commission staff will provide technical assistance to any member of the public wishing to file a complaint pursuant to sections 1.1801 - 1.1870 of the rules; regarding access to Commission programs and activities; and any such complaint will not predispose the Commission negatively against any section 255 complaints.

F. ADDITIONAL IMPLEMENTATION AND ENFORCEMENT MEASURES

167. In the *NPRM*, the Commission sought comment regarding whether existing Commission processes (and associated forms) would be efficient vehicles for any requirements the Commission might develop in this proceeding, such as information collection, or providing notice to firms dealing with the Commission that they may be subject to section 255. The Commission listed the following examples: (1) the Commission's equipment

³³⁸ See our discussion of sanctions and remedies *supra*, at ¶¶ 108-111.

³³⁹ See, e.g., CEMA comments at 24-26; TIA comments at 98-99.

³⁴⁰ See generally, 47 U.S.C. § 154(j).

³⁴¹ 29 U.S.C. §§ 791 *et seq.*

³⁴² This includes requirements for access to electronic and information technologies developed, maintained, procured, or used by all Federal agencies, as required by the Workforce Investment Act of 1998, Pub. L. No. 105-220, 112 Stat. 936 (1998); §§ 408(b), 508, 112 Stat. at 1203-06.

authorization processes under Part 2, Subpart J of the Commission's Rules; (2) equipment import documentation requirements under Part 2, Subpart K of the Rules; (3) licensing proceedings under section 307 of the Act for various radio services used by entities subject to section 255 obligations; and (4) various common carrier filing processes.

168. The Commission also expressed the view that there could be other measures the Commission might take, or might encourage others to take, to foster increased accessibility of telecommunications products. The Commission listed the following examples:

- (1) Establishment of a clearinghouse for current information regarding telecommunications disabilities issues, including product accessibility information, and accessibility solutions.
- (2) Publication of information regarding the performance of manufacturers and service providers in providing accessible products, perhaps based on statistics generated through the fast-track and dispute resolution processes.
- (3) Expansion of the information provided on the Internet at the Commission's Disabilities Issues Task Force Web site (<http://www.fcc.gov/df>).
- (4) Efforts by consumer and industry groups to establish on-going informational and educational programs, product and service certification, standards-setting, and other measures aimed at bridging the gap between accessibility needs and telecommunications solutions.
- (5) Development of peer review processes.

169. Commenters who addressed the first group of issues generally endorsed the use of existing Commission procedures and forms as an efficient and effective method of enforcement.³⁴³ Commenters on the second group of issues involving educational efforts were split between members of the disability community who advocated an expansion of existing Commission dissemination of technical assistance accessibility information³⁴⁴ and manufacturers' groups who advocated that a "good faith effort" to comply with section 255 and keep record of this compliance would be sufficient to fulfill their obligations under the Act.³⁴⁵

170. As to the first group of issues, we find that modifying the current equipment

³⁴³ See, e.g., AirTouch comments at 8.

³⁴⁴ See, e.g., Access Living of Metropolitan Chicago comments at 2; Illinois Deaf and Hard of Hearing Commission comments at 2-3; NAD comments at 34-39.

³⁴⁵ See, e.g., SBC comments at 26; TIA comments at 95-96; Information Technology Industry Council comments at 42.

certification or other existing Commission processes for purposes of compliance with section 255 is not appropriate. As outlined in the discussion on enforcement and the application of the readily achievable standard, no specific documentation is being required at this time.

171. As to the second group of issues, however, we believe that the dissemination of technical assistance, including information on product capabilities and availability, as well as information about manufacturer and service provider compliance with section 255, is vitally important. It will both help ensure that people have access to needed products and serve as an enforcement tool. After we determine the best way to present the relevant data, we intend to publish information regarding entities' compliance with these rules. We also intend to provide technical assistance and conduct outreach efforts to inform customers and companies of their rights and responsibilities under these rules.

172. We note that some companies and associations have already begun efforts to provide information regarding section 255, such as developing a clearinghouse function on accessibility and training employees on the obligations under section 255. We will not, however, require specific efforts at this time, as we believe companies should have flexibility in addressing this issue. Should we determine in the future that the lack of technical assistance or information about products or these rules is preventing people with disabilities from receiving the full benefits of the statute, we will consider measures to address these issues, including amending our rules.

G. NOTICE OF INQUIRY

1. Overview

173. While we believe this Order takes a dramatic step toward bringing people with disabilities into the information age, we recognize that there is much to be done. There is a vast array of communications-related services available today that are not covered by these rules.³⁴⁶ In addition, there are new technologies, which may be outside the scope of these rules, being developed that may further revolutionize the way we communicate. These developments will undoubtedly affect access to communications for people with disabilities. We must ensure that the disability community is not denied access to innovative new technologies, for example Internet and computer-based services, that may become complements to, or even replacements for, today's telecommunications services and equipment.

174. We are cognizant, in general, of the speed with which innovative next generation

³⁴⁶ We note that the Commission proposed that Video Relay Interpreting (VRI) be considered "TRS" within the meaning of Title IV of the ADA. See *Telecommunications Relay Services and Speech-to-Speech Services for Individuals With Hearing and Speech Disabilities*, Notice of Proposed Rulemaking, CC Docket No. 98-67 (rel. May 20, 1998). TRS, mandated by Title IV of the ADA (47 U.S.C. § 225, requires the Commission to ensure that people with hearing or speech disabilities have 'functionally equivalent' access to the telephone network. 47 U.S.C. 225 (a) - (c).

technologies are changing the way communications services are offered to the public, and the challenges posed to the disability community by these new technologies if they are not accessible. We lack, however, knowledge of the specific characteristics of those changes, and the implications for accessibility for people with disabilities. Given the rapid evolution of communications and the pace of technological innovation, we need to ensure that as new services and networks are developed they are designed to provide access to persons with disabilities.

175. Accordingly, we are issuing this Notice of Inquiry (NOI) to aid our understanding of the access issues presented by communications services and equipment not covered by the rules we adopt in this Order. Our goal is to take full advantage of the promise of new technology, not only to ensure that advancements do not leave people with disabilities behind, but also to harness the power of innovation to break down the accessibility barriers we face today and prevent their emergence tomorrow. While we are interested in all aspects of communications technology that may present accessibility issues, we specifically request information on two types, Internet telephony and computer-based equipment that replicates telecommunications functionality. First, we ask commenters to address the extent to which Internet telephony has begun, to replace the traditional telecommunications services, including usage patterns by person with disabilities, which Congress clearly intended to be subject to section 255. Second, we ask commenters to advise us on the impact of computer based applications that provide telecommunications functionalities farther into a customer's premise than the point of connection with the public network, such as voicemail capability that resides in a computer connected to a PBX, rather than in a PBX. We ask commenters not to limit their responses to these two areas, however, but rather to raise any issues of innovations in telecommunications that may present accessibility challenges for the disability community.

176. We are also expressly interested in commenters' views on the extent to which government regulation will be necessary to ensure accessibility of communications technology in the future. We note, for example, the commitment of the Voice on the Net (VON) Coalition to voluntarily ensure that Internet telephony services provided by its members are "accessible as readily achievable", and to take into account disability access needs when developing new products and services.³⁴⁷ Because of our strong interest in ensuring that the disability community is not denied access to any communications technologies, we ask commenters to tell us what we can do the guarantee that access.

2. Discussion

a. Internet Telephony

177. Internet Protocol telephony ("Internet" or "IP" telephony) services enable real-time voice transmission using the Internet Protocol (IP), a packet-switched communications protocol. The services can be provided in two basic ways: computer-to-computer IP telephony conducted through special software and hardware at an end user's premises; or

³⁴⁷ Letter from Bruce D. Jacobs, Counsel to the VON Coalition, to Magalie R. Salas, dated July 7, 1999.

phone-to-phone IP telephony conducted through "gateways" that enable applications originating and/or terminating on the public switched network. Phone-to-phone IP telephony is provided through computer gateways that allow end users to make and receive calls using their traditional telephones. Gateways translate the circuit-switched voice signal into IP packets, and vice versa, and perform associated signalling, control, and address translation functions. The voice communications can then be transmitted along with other data on the "public" Internet, or can be routed through intranets or other private data networks for improved performance.

178. Many commenters urged that we apply the requirements of Section 255 to Internet telephony ("IP telephony") in general or phone-to-phone IP telephony, specifically.³⁴⁸ They pointed out that, given the evolutions in communications and the rapid pace of technological innovation, we need to ensure that as new services and networks are developed they are designed to provide access to persons with disabilities. They noted that it is during the development stage that accessibility can be most effectively included. We are concerned that consumers who are simply attempting to place or receive a call using standard CPE not have their accessibility disappear or diminished because the call is being transmitted using a new, developing technology. In addition, commenters stated that if persons with disabilities cannot participate in communications over these newly developing networks, they risk becoming further marginalized from society.³⁴⁹

179. We ask commenters to provide any further information as to the extent to which phone-to-phone IP telephony services might impact the disability community, and the steps, we should take to address any adverse impacts in order to fulfill the goals of section 255, or otherwise promote the accessibility of this technology. Commenting parties should offer specific suggestions as to the appropriate role for the Commission in guaranteeing access and the statutory basis for that role. For example, commenters should address ways in which phone to phone IP telephony may be interpreted as falling within the purview of section 255. Commenters should provide specific definitions of the services or equipment to which the statute might apply, and the appropriate means of limiting its application to only those services and equipment. Commenters should address the ways, if any, in which industry bodies can ensure access without regulatory action. Commenters should also describe the specific access issues or experiences that might arise with IP telephony. For example, will TTY tones be adequately transmitted in a packet-switched environment? Will persons with speech disabilities whose speech patterns and voice outputs from alternative and augmentative

³⁴⁸ NAD *Ex Parte* Statement, filed Feb. 5 1999, on behalf of Alexander Graham Bell Association, ACB, AFB, American Society for Deaf Children, American Speech-Language-Hearing Assoc., Gallaudet University, League for the Hard of Hearing, NAD, SHHH, TDI, UCPA, WID at 7; AccLiv Comments at 3; ACB at 4; CPB/WBGH Comments at 6; ILDEAF Comments at 3-4; LDA Comments at 2; CILNM Comments at 3-4; Lake County at 1; SIL at 3-4; NAD at 15; DDTP at 4-5.

³⁴⁹ UCPA Comments at 3; AccLiv Comments at 3; ACB Comments at 4; CPB/WBGH Comments at 6; ILDEAF Comments at 3-4; LDA Comments at 2; CILNM Comments at 3-4; Lake County Comments at 1; SIL Comments at 3-4; NAD Comments at 15-16; WI-TAN Comments at 4; WID Comments at 4.

communications devices may fall outside of traditional voice patterns, face additional communications barriers with packetized voice services?

180. We further ask commenters to address what efforts manufacturers of equipment that performs phone-to-phone IP telephony functions and providers of phone-to-phone IP telephony services are currently making to ensure that such equipment and services are accessible. What improvements in accessibility may be possible through the use of phone-to-phone IP telephony? Are there natural opportunities for incorporating accessibility into IP telephony? Can greater accessibility be achieved if requirements are adopted early in the development of IP Telephony? Is it possible that greater levels of accessibility will be readily achievable with IP telephony than conventional telephony? How will compatibility with assistive technology affect the use of IP telephony?

181. Commenters should also address the extent to which IP telephony is now, or soon will be, an effective substitute for conventional circuit-switched telephony. As Internet usage grows, phone-to-phone voice IP telephony may be used with increasing frequency as an alternative to more traditional telephone service. How extensive is Internet telephony usage today? What is the projected usage of Internet telephony in the near future? What is the projected use of various kinds of IP telephony by persons with disabilities?

182. Commenters are asked to describe differences in characteristics between computer-based and phone-based IP telephony, and whether such differences merit different treatment by the Commission. Given the rapid pace of technological change in the telecommunications marketplace, we also ask commenters to apprise us of any new technologies that may impact the availability of accessible services and equipment.

b. Computer Based Equipment

183. We also seek comment on another aspect of the network of the future -- the movement of telecommunications and information service functions from the network, or the terminal equipment which connects directly to the network, into computer equipment which does not connect to the network directly. This computer hardware and software is not typically regarded as CPE, but may, in fact, deliver the same functions we seek to make accessible. For instance, voicemail, interactive menus, or phone-to-phone IP telephony in current network topologies can reside in equipment located on the service provider's premises, but such functionalities are also available in several forms to end users on their own premises. For example, voicemail can be purchased from a carrier, can be provided via software and a private branch exchange (PBX), or can be provided through a computer that connects with the PBX, but is not generally regarded as part of the PBX. It is this latter application as to which we seek comment.

184. These software applications shift the potential for accessibility solutions from the core of the network to the end user's premises. We therefore ask commenters to address whether equipment that provides these capabilities, but which does not connect directly into the public network (or otherwise directly receive the transmission of the telecommunications),

should be considered to be CPE subject to the requirements of section 255. We note, for example, that this Order does not currently reach a software telephone or the personal computer on which it resides, even though it performs the same functions as the traditional telephone.

185. We ask commenters to address the need to include this computer-based equipment as CPE or otherwise apply the provisions of these rules to that equipment in order to ensure access. We also ask commenters to address whether failure to bring such equipment within the scope of section 255 would create a serious gap in coverage that would interfere with our ability to effectively implement its provisions. Commenters should offer suggestions as to the appropriate role for the Commission in ensuring access for this kind of equipment and the statutory basis for that role. We also ask about the potential for this kind of equipment for improving accessibility and its compatibility with assistive technology. Is it possible that greater levels of accessibility will be readily achievable if this kind of equipment has accessibility requirements?

H. PROCEDURAL MATTERS

1. Comment Filing Procedures

186. Pursuant to sections 1.415 and 1.419 of the Commission's rules, interested parties may file comments as follows: comments are due on November 14, 1999 and reply comments are due on December 14, 1999. Comments may be filed using the Commission's Electronic Comment Filing System (ECFS) or by filing paper copies.

187. Comments filed through the ECFS can be sent as an electronic file via the Internet to <http://www.fcc.gov/e-file/ecfs.html>. Generally, only one copy of an electronic submission must be filed. If multiple docket or rulemaking numbers appear in the caption of this proceeding, however, commenters must transmit one electronic copy of the comments to each docket or rulemaking number referenced in the caption. In completing the transmittal screen, commenters should include their full name, Postal Service mailing address, and the applicable docket or rulemaking number. Parties may also submit an electronic copy by Internet e-mail. To get filing instructions for e-mail comments, commenters should send an e-mail to ecfs@fcc.gov, and should include the following words in the body of the message: "get form <your email address>." A sample form and directions will be sent in reply.

188. Parties who choose to file by paper must file an original and four copies of each filing. If more than one docket or rulemaking number appears in the caption of this proceeding, commenters must submit two additional copies for each additional docket or rulemaking number. All paper filings must be sent to the Commission's Secretary, Magalie Roman Salas, Office of the Secretary, Federal Communications Commission, 445 Twelfth Street S.W., Room TW-A325, Washington, DC 20554.

189. Parties who choose to file by paper should also submit their comments on diskette to Al McCloud, Network Services Division, Common Carrier Bureau, Federal

Communications Commission, 445 Twelfth Street SW, Room 6-A423, Washington, DC 20554. Such a submission should be on a 3.5 inch diskette formatted in an IBM-compatible format using WordPerfect 5.1 for Windows or a compatible software. The diskette should be accompanied by a cover letter and should be submitted in read-only mode. The diskette should be clearly labeled with the commenter's name, proceeding, including the lead docket number in the proceeding (CC Docket No. 96-198), type of pleading (comment or reply comment), date of submission, and the name of the electronic file on the diskette. The label should also include the following phrase (Disk Copy - Not an Original.) Each diskette should contain only one party's pleadings, preferably in a single electronic file. In addition, commenters should sent diskette copies to the Commission's copy contractor, International Transcription Service, Inc., 1231 20th St. NW, Washington DC 20037.

2. Regulatory Flexibility Act

190. As required by section 203 of the Regulatory Flexibility Act,³⁵⁰ the Commission has prepared a Final Regulatory Flexibility Analysis (FRFA) of the expected impact on small entities of the policies and rules adopted herein. The FRFA analysis is set forth in Appendix D.

3. Paperwork Reduction Act Analysis

191. The decision herein has been analyzed with respect to the Paperwork Reduction Act of 1995, Pub. L. 104-13, and the Office of Management and Budget ("OMB") has approved some of its information collection requirements in OMB No. 3060-0833, dated August 4, 1998. Some of the proposals in the *NPRM*, however, have been modified or added. Therefore, some of the information collection requirements in this Report and Order are contingent upon approval by OMB.

I. ORDERING CLAUSES

192. Accordingly, IT IS ORDERED that pursuant to the authority contained in Sections 1, 2, 4, 201(b), 208, 251(a)(2), 255, and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 152, 154, 201(b), 208, 251(a)(2), 255, 303(r), this Order IS ADOPTED and COMMENTS ARE REQUESTED as described above.

193. IT IS FURTHER ORDERED that 47 C.F.R. Parts 0 and 1, ARE AMENDED as set forth in Appendix A, effective seventy (70) days after publication of the text thereof in the Federal Register.

194. IT IS FURTHER ORDERED that 47 C.F.R. Parts 6 and 7 ARE ADOPTED as set forth in Appendix B, effective seventy (70) days after publication of the text thereof in the Federal Register.

³⁵⁰ 5 U.S.C. § 603.

195. IT IS FURTHER ORDERED that the Commission's Office of Public affairs SHALL SEND a copy of this *Report and Order*, including the FRFA, to the Chief Counsel for Advocacy of the Small Business Administration in accordance with paragraph 603(a) of the Regulatory Flexibility Act, Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C. § 601, *et seq.* (1981).

196. The *Report and Order* IS ADOPTED, and the requirements contained herein will become effective 70 days after publication of a summary in the Federal Register. The collection of information contained within is contingent upon approval by OMB. Notice of that approval will be published in the Federal Register.

197. Alternative formats (computer diskette, large print, audio cassette and Braille) are available to persons with disabilities by contacting Martha Contee at (202) 418-0260, TTY (202) 418-2555, or at mcontee@fcc.gov. The *Report and Order* and the rules can also be downloaded in Wordperfect 5.1 and in ASCII formats at: <http://www.fcc.gov/df>.

FEDERAL COMMUNICATIONS COMMISSION



Magalie Roman Salas
Secretary