

BEFORE THE
Federal Communications Commission'-' 1998
WASHINGTON, D.C.

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

COMMENTS OF
THE CELLULAR TELECOMMUNICATIONS INDUSTRY ASSOCIATION

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The Cellular Telecommunications Industry Association ("CTIA")¹ hereby submits its Comments in the above-captioned proceeding.²

I. INTRODUCTION AND SUMMARY

Section 255,³ which is designed to permit access by persons with disabilities to telecommunications services and equipment, reflects the core principle of telecommunications common

¹ CTIA is the international organization of the wireless communications industry for both wireless carriers and manufacturers. Membership in the association covers all Commercial Mobile Radio Service ("CMRS") providers and manufacturers, including 48 of the 50 largest cellular and broadband personal communications service ("PCS") providers. CTIA represents more broadband PCS carriers and more cellular carriers than any other trade association.

² Implementation of Section 255 of the Telecommunications Act of 1996: Access to Telecommunications Services, Telecommunications Equipment, and Customer Premises Equipment by Persons with Disabilities, WT Docket No. 96-198, Notice of Proposed Rulemaking, FCC 98-55, (rel. Apr. 20, 1998) ("Notice").

³ 47 U.S.C. § 255.

carriage. It essentially expounds upon the duty to serve all customers on a reasonable and nondiscriminatory basis.⁴ The record demonstrates that CMRS carriers and manufacturers remain committed to serve everyone, including the 54 million consumers with disabilities.

This proceeding presents a unique juxtaposition of economic and regulatory safety issues, issues that are normally distinct, competing notions. By employing a "readily achievable" access standard,⁵ Congress limited the access obligations of Section 255 to matters that can be secured cost effectively. Balancing these social and economic considerations consistent with Congressional intent presents a special challenge for the Commission as it proposes rules governing Section 255 which effectively permit access without undue expense.

In light of Congress' admonitions, the Commission must ensure at the outset that its Section 255 regulations: (1) grant CMRS carriers and manufacturers significant latitude in complying with their Section 255 duties; (2) sufficiently account for the dynamic, competitive nature of CMRS services; and (3) impose no undue costs upon all affected parties, including carriers, manufacturers and consumers. These principles should be applied

⁴ See 47 U.S.C. §§ 201, 202. Section 255 advances important social goals. It is not as sweeping as the Americans With Disabilities Act ("ADA") primarily because there is no obligation to retrofit existing telecommunications equipment and services.

⁵ This obligation is fluid; i.e., Section 255 contemplates the use of flexible, alternative approaches to securing accessibility and the employment of ongoing cost-benefit assessments in the development of compliance standards.

when the Commission defines relevant carrier and manufacturer obligations under Sections 255 and 251(a)(2)⁶ as well as when the Commission adopts enforcement and complaint mechanisms.

II. THE COMMISSION SHOULD DEFINE CARRIER AND MANUFACTURER OBLIGATIONS UNDER SECTIONS 255 AND 251(a)(2) IN WAYS WHICH DO NOT IMPAIR FLEXIBILITY OR IMPOSE UNDUE COSTS.

Section 255 represents a flexible approach to the important issue of access to telecommunications by persons with disabilities. Congress, in imposing upon telecommunications carriers and manufacturers an access obligation that is "readily achievable,"⁷ refrained from micro-managing. This reflects a reasonable, cautious, and result-oriented approach, as opposed to specifying rigid, overly prescriptive rules. Given the dynamic nature of telecommunications, the Commission, in establishing regulations governing access to telecommunications services and equipment, is well advised in following Congress' lead.⁸ Indeed,

⁶ 47 U.S.C. § 251(a)(2).

⁷ "Readily achievable" was a new term of art developed specifically for the ADA. It had neither been defined nor applied in previous Federal statutes. As applied to the ADA, the phrase was designed to "capture the concept of 'simple, relatively cheap barrier removal' such as the ramping of a single step." Karen E. Field, The Americans With Disabilities Act "Readily Achievable" Requirement For Barrier Removal: A Proposal For The Allocation Of Responsibility Between Landlord And Tenant, 15 Cardozo L. Rev. 569, 578-579, n. 46 (1993).

⁸ See Cass R. Sunstein, Congress, Constitutional Moments, and the Cost Benefit State, Stan. L. Rev, 247, 268 (1996) (contending that Congress can "reduce costs by focusing legislative attention on ends rather than on means of achieving those ends. For this reason, 'performance standards' are generally better than 'design standards.' . . . [A]dministrators should, to the extent feasible, rely on market forces in selecting those means. . . . [G]overnment should not command a particular method of compliance.")

it is critical to achieving the goals of Section 255 that the Commission avoid becoming mired in minutiae.

A less rigid approach to implementing Section 255 will minimize the regulatory burdens on all concerned parties and will make it more likely that access will better follow the rapidly changing pace of the telecommunications industry. Congress' determination that telecommunications equipment and services be accessible to persons with disabilities where readily achievable, does not necessarily require that the Commission establish accessibility standards. There are various ways in which the Commission can promote the objectives set out in Section 255.⁹ In the end, the Commission should be guided by the fact that while improving accessibility for persons with disabilities:

creates a potential role for government action . . . this action must be well conceived. A clearly misguided and unduly burdensome regulation certainly would not be in society's best interest even if it were intended to address a legitimate social problem. As in other policy contexts, the task is to structure regulatory efforts to promote society's welfare as effectively as possible.¹⁰

⁹ In his study of the legislative and administrative process, Professor Sunstein concludes that more can be achieved if "[g]overnment [were to] favor flexible, market-based incentives rather than rigid commands." *Id.* at 260. He reasons that a system which requires companies to disclose information, in this case information concerning their accessible products and services, could spur voluntary action on the part of carriers and manufacturers to satisfy public demand. *Id.* at 261, 301. CTIA believes, assuming the collection requirements impose only minimal burdens, that this may represent a more market-oriented approach to Section 255 regulation. The Architectural and Transportation Barriers Compliance Board ("Access Board") has already announced its intention to compile a similar market monitoring report. See Telecommunications Act Accessibility Guidelines, 63 Fed. Reg. 5608, 5610 (1998) ("Access Board Order").

¹⁰ W. Kip Viscusi, Regulating the Regulators, 63 U. Chi. L. Rev. 1423 ('1996).

A. The Concept Of Readily Achievable Must Include An Analysis Of A Complex Set Of Factors Including Feasibility, Cost And Practicality.

The hallmark of the U.S. Department of Justice's ("DOJ") interpretation of the "readily achievable" standard is flexibility. For this reason, the readily achievable standard lacks specific numerical guidance. Specifically, DOJ:

declined to establish in the final rule any kind of numerical formula for determining whether an action is readily achievable. It would be difficult to devise a specific ceiling on compliance costs that would take into account the vast diversity of enterprises covered by the ADA's public accommodations requirements and the economic situation that any particular entity would find itself in at any moment. The final rule, therefore, implements the flexible case-by-case approach chosen by Congress.¹¹

Whether or not any particular "measure[]" is readily achievable is to be determined on a case-by-case basis in light of the particular circumstances presented and the factors listed in the definition of readily achievable."¹² The Commission's interpretation of the "readily achievable" standard should retain these characteristics.

CTIA agrees that an assessment whether access is "readily achievable" involves determinations regarding (1) feasibility, (2) expense and (3) practicality.¹³ In essence, by employing "a 'readily achievable' standard, Congress ensured that a business' obligation to remove barriers would reflect its ability to do

¹¹ 28 C.F.R. § 36.104, app. B, at 617.

¹² 28 C.F.R. § 36.304, app. B, at 637.

¹³ Notice at ¶ 100.

so."¹⁴ These concepts are sufficiently flexible to ensure reasonable outcomes that do not stray beyond a carrier's or manufacturer's abilities.

The Section 255 standard necessarily comprehends a cost-benefit assessment.¹⁵ Given the nature of this standard, the Commission should employ the least restrictive means available in addressing access issues.¹⁶ Moreover, the Commission should be cognizant that access determinations will vary based upon the circumstances present, including whether the underlying technology is wireline or wireless. Therefore, one size fits all regulation is inherently inappropriate.

1. Both Technical And Legal Infeasibility Can Inhibit Access.

A key determinant in a "readily achievable" analysis is whether access is technically feasible. Simply stated, the laws of physics may limit accessibility.¹⁷ To illustrate, it is

¹⁴ Pinnock v. Int'l House of Pancakes Franchisee, 844 F. Supp. 574, 588 (S.D. Ca. 1993) (interpreting "readily achievable" standard under Title III of the ADA).

¹⁵ This is due in large to Congress' adoption of a standard which dictates that economic regulations should not be overlooked or thrust into a subordinate position.

¹⁶ Cf. Cincinnati Bell Telephone Co. v. FCC, 69 F.3d 752, 761 (6th Cir. 1995).

¹⁷ Congress has recognized as much in its hearing aid compatibility legislation. Specifically, it found that "background ambient noises and magnetic fields associated with mobile communications often interfere with the inductive transmission between the hearing aid and the telephone handset, thus making compatibility impossible." H.R. Rep. No. 674, 100th Cong., 2d Sess. 9, 13 (1988); see generally CTIA Comments in RM-8658, at 6-7 (filed Jul. 17, 1995). Regarding the hearing aid interference issue, both the hearing aid (receiver) and the digital mobile phone

impossible now to design a mobile phone which permits accessibility by all persons with disabilities because of the prohibitive size and expense of such an instrument. The smaller size of mobile handsets as well as limited battery life may also affect technical feasibility, and should also be accounted for in a "readily achievable" analysis. Moreover, legal impediments such as bundling restrictions for wireline services may create infeasibility.¹⁸

2. Expenses Such **As** Direct Costs, Opportunity Costs And Compliance Costs Must Be Factored In A Readily Achievable Analysis.

Given that the statutory meaning of the "readily achievable" standard is "easily accomplishable and able to be carried out without much difficulty or expense,"¹⁹ cost issues are an integral part of the analysis. Appropriate expenses include the relevant costs to provide access such as research and development, production, marketing, and customer support, and opportunity costs incurred in forgoing other activities.²⁰

Other legitimate costs that should be included, but which are not mentioned in the Notice, are compliance costs associated

(transmitter) create interference. Even when the hearing aid is shielded, interference cannot be totally eradicated. See Access Board Order at 5622 ("[i]nterference levels are a complex issue. . . [i]nterference is a function of both the hearing aid and [the wireless] telephone") .

¹⁸ Of course, feasibility cannot be equated with accessibility. Other factors such as expense or practicality may inhibit an otherwise technically feasible access solution.

¹⁹ 42 U.S.C. § 12181(9) .

²⁰ Notice at ¶ 103.

with meeting Commission regulations.²¹ The Commission's rules do not exist in a vacuum. There are quantifiable costs associated with following Commission procedures. Necessarily, the more intricate or burdensome these regulations, the higher the associated costs of compliance.²² Any procedures the Commission adopts in implementing Section 255 must be cost effective and not unduly burdensome, or they run the risk of defeating the "readily achievable" standard.

3. Practical Considerations Such **As** Market Issues And Cost Recovery Can Limit Access.

As part of the "readily achievable" analysis, the Commission must determine whether it is reasonable and logical for a

²¹ Both the Commission and the Access Board recognize that the decisionmaking process associated with making a "readily achievable" analysis generates costs which must be included. Notice at n. 301 ("this decisionmaking process [determining which features to include or to omit in a product] carries its own costs, which can thus further limit what accessibility features are readily achievable"); Access Board Order at 5618 (costs of making a readily achievable determination "are explicitly included in deciding whether an action is readily achievable"). Logically, if the Commission's process imposes additional compliance obligations, the associated costs are also relevant. To illustrate, if the Commission's rule obligates carriers and manufacturers to document their consideration of access issues regarding every telecommunications service and product offered, such compliance costs must be included in a "readily achievable" analysis.

²² Moreover, carriers are assessed regulatory fees based on the costs the Commission incurs in regulating them. Logically, the more complex a regulatory scheme, the higher the regulatory costs. If the Commission were to raise the regulatory fees as a result of the increased costs it incurs in implementing Section 255, then this increase should be factored in the "readily achievable" assessment.

telecommunications carrier or manufacturer to provide access. Both market issues and cost recovery should be considered.

The Commission cannot require a telecommunications carrier or manufacturer to provide access to every product or every service if the resulting product or service is not marketable. For example, the Commission cannot require that all mobile phones have one inch square (or larger) keys on their key pads.

Moreover, the wireless industry is competitive, and the Commission's rules should explicitly account for this, especially in its consideration of cost recovery. Generally, if a carrier or manufacturer cannot recover the costs associated with providing accessibility, this renders access not readily achievable. This issue is potentially more serious for the competitive CMRS industry because competition will affect a provider's or manufacturer's ability to pass through costs.

4. Section 255 Obligations Should Be Enforced Prospectively.

Consistent with Congressional intent,²³ and the Access Board's view regarding telecommunications equipment,²⁴ all

²³ Notwithstanding the Commission's observation that Section 255 of the Telecommunications Act of 1996 was effective in February, 1996, Notice at ¶¶ 8 and 175, Congress contemplated regulatory implementation and enforcement of Section 255. This renders Section 255 not self-executing. See 47 U.S.C. § 255(e),(f) (requiring the Access Board to develop implementing guidelines for equipment and the Commission to enforce complaints); 47 U.S.C. § 251(a) (2) (telecommunications carrier duty must comply with guidelines and standards established by Section 255). See also S. Conf. Rep. No. 104-230, 104th Cong., 2d Sess., at 53 (1996) ("Senate Report") (Committee intends that both telecommunications manufacturer and carrier obligations should "apply prospectively" and arise "after the date for promulgation of regulations by the Commission");

obligations under Section 255 should be considered prospective in nature. In other words, the duties contemplated should not arise until the Commission has articulated guidelines implementing Section 255. Given (1) that the Commission has chosen to provide guidance and is planning to adopt specific enforcement mechanisms, and (2) the complex nature of the readily achievable standard, this is a reasonable outcome.

Prospective enforcement means that there should be no obligations to retrofit existing equipment. This also means that the majority of accessibility issues must be dealt with in the beginning of the design phase. Moreover, the Commission's rules should include a transition period to permit carriers and manufacturers to come into compliance with the Commission's regulations.

B. Section 251(a) **(2)** Imposes Upon Carriers Network Obligations Which Are Prospective In Nature.

Section 251(a) (2) provides that once the Commission has defined certain duties, those obligations adhere to the network.

Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996, CC Docket No. 96-128, Notice of Proposed Rulemaking, 11 FCC Rcd. 6716, at n. 128 (1996) (The implementation of Section 255 will be addressed in a separate [Section 2551 proceeding. ") (emphasis added).

²⁴ See Access Board Order at 5612 ("the Senate report clearly says that the Board's guidelines should be 'prospective in nature,' intended to apply to future products. In addition, the statute applies to equipment designed, developed and fabricated which the Board interprets to mean that the Act applies to equipment for which all three events occurred after enactment of the Act. There is no requirement to retrofit existing equipment."); see also Notice at ¶ 119.

This means that as networks evolve and new services are offered they should meet the Section 255 obligations.

Moreover, the duty created by Section 251(a) (2) should be enforced prospectively, specifically as of the date the Commission-articulated guidelines under Section 255 become official. As with Section 255, Section 251(a)(2) is not self-executing. It is clear from the language that the duty "not to install network features, functions, or capabilities that do not comply with the guidelines and standards established pursuant to section 255 or 256"²⁵ should be enforced on a going-forward basis. That is, the obligation arises once the Commission has adopted implementing guidelines. When Congress intends for such network obligations to be applied retroactively, such as with CALEA, it has allocated moneys to carriers to compensate them for costs associated with modifying their existing networks.²⁶ In this case, there is no similar expression of intent.

C. Enhanced Services Are Not Within the Purview Of Section 255.

The Commission should, consistent with precedent²⁷ and the Access Board's conclusion,²⁸ refrain from interpreting Section 255 to include enhanced and information services. As a matter of law, the language of Section 255 is clearly limited to

²⁵ 47 U.S.C. § 251(a) (2).

²⁶ 47 U.S.C. § 1008(a).

²⁷ See Notice at ¶ 36.

²⁸ Access Board Order at 5612 (information services are not covered by these guidelines).

telecommunications services, and does not include enhanced and information services. Notwithstanding the Commission's predilections, the plain language of the statute controls in this case,²⁹ and operates as a bar to the inclusion of information services.

Absent Congressional mandate, and as a matter of policy, a less expansive determination at the outset best meets Section 255 objectives to afford carriers flexibility and to account for costs and other legitimate factors. An overly expansive determination of the services covered by Section 255 imposes unneeded costs which can impair readily achievable solutions.

D. To Preserve A Manufacturer's Flexibility To Develop Innovative Technologies, Section 255 Obligations Should Not Attach To Every Product.

As noted above, issues of feasibility, expense and practicality are necessary to determine whether accessibility is attainable.³⁰ The Telecommunications Access Advisory Committee ("TAAC") recognizes that "it may not be readily achievable to make every type of product accessible for every type of disability using present technology."³¹ Moreover, the Access Board has specifically acknowledged:

that it may not be readily achievable to make every product accessible or compatible. Depending on the design, technology, or several other factors, it may be determined that providing accessibility to all products in a product line is not readily achievable.

²⁹ See Chevron v. Natural Resources Defense Council, 467 U.S. 837 (1984) ("Chevron").

³⁰ Notice at ¶ 170.

³¹ Id. at ¶ 15.

The guidelines do not require accessibility or compatibility when that determination has been made, and it is up to the manufacturer to make it.³²

CTIA agrees with these assessments. Manufacturers need flexibility in making these determinations, There can be no expectation that every product will be accessible.

As the Commission is well aware, regarding mobile technology, such a requirement creates prohibitively expensive and/or excessively cumbersome equipment. Moreover, access obligations which attach to every product in a product line will stifle innovation and impair manufacturers' flexibility to provide innovative technology. The imposition of these costs cannot be justified and should be avoided.

III. ANY COMPLAINT RESOLUTION PROCESS THE COMMISSION ADOPTS MUST BE EFFECTIVE, EFFICIENT **AND** ACCOUNT PROPERLY FOR THE COMPETITIVE NATURE OF THE CMRS MARKET.

CTIA previously has advocated the adoption of flexible, voluntary guidelines as best meeting the objectives underlying Section 255. Given the CMRS industry's commitment to serve consumers with disabilities, and the costs associated with government regulation, direct intervention should be limited to cases of actual failure to serve all consumers.

The Commission, though, has determined that rules are necessary,³³ and has proposed a relatively complex new complaint process. Assuming the Commission adopts binding rules governing Section 255, the associated complaint process must be effective,

³² Access Board Order at 5611.

³³ Notice at ¶ ¶ 24-25.

efficient and orderly. The Commission should enforce Section 255 by taking a well-defined and understandable approach. It should permit aggrieved persons, carriers and manufacturers to address real issues in an efficient, inexpensive manner.

Too casual a complaint process -- one which is completely open ended, creates unrealistic time frames for resolving complaints, and imposes no statute of limitations or reasonable standing requirements -- not only fails to give proper credence to the important access issues raised in Section 255 but also imposes unnecessary costs and burdens ultimately borne by all consumers. Included among these costs is the possible reputational damage telecommunications carriers and manufacturers may suffer as a result of frivolous complaints.

Moreover, too ambitious a process helps no one and only serves to create unfulfilled expectations. An unrealistic access complaint process involves institutional risks to the Commission that are entirely unnecessary.

A. Section 255 Confers No Private Rights Of Action.

As the Commission correctly notes, the "plain language of the statute confers exclusive jurisdiction on the Commission and bars private rights of action."³⁴ The plain language of the statute controls. Reliance upon legislative history, namely the Conference Report statement that "the provisions of sections 207 and 208 . . . are available to enforce compliance with the

³⁴ Id. at ¶ 34 (citing favorably CTIA Reply Comments in WT Docket 96-198, at 6, n.n. 9-10 (filed Nov. 27, 1996)).

provisions of section 255,"³⁵ cannot be used to defeat Congress' clear intention under Section 255.³⁶ That is, recourse to a Federal District Court is expressly prohibited.

On a related note, there should be limitations on the award of consequential damages.³⁷ The policy considerations underlying these limitations in common law apply with equal force here.³⁸

B. The Commission Should Impose Reasonable Standing Requirements For Those **Alleging** A Violation Of Section 255.

Contrary to its proposals,³⁹ the Commission's complaint process should have some rational limitations on standing to file a complaint alleging a violation of Section 255.⁴⁰ Standing

³⁵ H.R. Conf. Rep. No. 458, 104th Cong., 2d Sess., at 135 (1996).

³⁶ See, e.g., Melcher v. FCC, 134 F.3d 1143, 1153 (D.C. Cir. 1998) (FCC's eligibility restrictions on rural LEC participation in Local Multipoint Distribution Service consistent with plain language of auction statute) (citing Chevron, 467 U.S. at 842-843 (Under the first prong of the Chevron test, if "the intent of Congress is clear . . . the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress'")).

³⁷ Notice at ¶ 172 (seeking comment regarding when damages should be awarded, and how they should be calculated).

³⁸ See CTIA Reply to Oppositions on Petitions for Reconsideration and Clarification filed in CC Docket No. 94-102, RM 8143, at 4-9 (Apr. 1, 1998) (discussing common law practice of limiting carrier liability, including the award of consequential damages, given the nature of services provided by a carrier and its duty to serve all customers) .

³⁹ Notice at ¶ 148 (Section 255 is silent with respect to standing).

⁴⁰ At most, Section 255 expands the complaint process to telecommunications manufacturers. It should not be interpreted more broadly to permit anyone to file a Section 255 complaint.

should be limited to actual or potential subscribers/customers (of either telecommunications service and/or equipment) who can allege injury as a result of a violation of Section 255.

By way of analogy, both Sections 207 and 208 establish reasonable limitations on who may file claims. Section 207 requires as a prerequisite to seeking relief an allegation of damages. Similarly, Section 208 requires an allegation that a carrier has either acted or failed to act in contravention of the Act. In either case, Section 255 defines the relevant obligation; if the action complained of is outside of Section 255's requirements, the complaint is not viable. Logically, this requires minimal standing requirements.

Moreover, the Commission should require that complainants contact the relevant telecommunications carrier and/or manufacturer to seek a timely resolution of their access issue(s) prior to filing a complaint with the Commission.⁴¹ Given that Section 255 imposes duties of access directly upon telecommunications carriers and manufacturers, the respondents should have the initial option of resolving any complaints prior to complainants seeking recourse from the Commission.

As a matter of fundamental fairness, the Commission's complaint process should give some consideration to possible reputational damage telecommunications carriers and manufacturers may suffer. Goodwill is valuable and is largely accrued through service to the consuming public. The Commission's Section 255

⁴¹ Such action is consistent with the TAAC Report's specific recommendations (See Notice at ¶¶ 15, 128).

complaint process should not lead to reputational damage in a casual way, nor should it encourage "greenmail."

Given the nature of the interests involved, and the costs associated with adjudicating alleged violations, complainants should be obligated initially to prove (1) that access has been denied; (2) that there are no compatible alternatives readily available; and (3) that they sought and failed to achieve a resolution with the relevant carrier or manufacturer.⁴²

Moreover, at the outset, complainants should be required explicitly, if necessary, to waive any right to prevent carriers from disclosing to the Commission customer proprietary network information ("CPNI") relating to their access complaint.

Otherwise a carrier may be unable to disclose pertinent information necessary to achieve a resolution.⁴³

C. The Commission Should Impose A Reasonable Statute of Limitation On Complaints Filed, As Well As Other Principles of Finality.

Under Section 415(b),⁴⁴ there is a general understanding that complaints brought against carriers after two years are stale.⁴⁵ Section 415(b) applies in this case to require

⁴² These pleading requirements are particularly crucial in any expedited complaint process.

⁴³ This waiver, of course, can be tailored so that disclosure is limited solely to the Commission and not to the general public.

⁴⁴ 47 U.S.C. § 415(b).

⁴⁵ Section 415(b) requires, in relevant 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. . .".

complainants to observe a two year statute of limitation for Section 255 claims of damages. As a matter of fundamental fairness, this two year limit should be extended to all Section 255 actions against carriers and manufacturers, including Commission license revocations and cease and desist orders under Section 312.⁴⁶

Finality is also crucial to the Section 255 complaint process. An open-ended complaint process, in which complainants can move freely between the informal and formal complaint process imposes undue costs upon carriers, complainants and the Commission. Without finality, it will be hard to define specific obligations under Section 255 to ensure continued compliance.

There are substantial costs to open ended litigation. The Commission should therefore impose limitations on complaints consistent with the principles of *res judicata* to foreclose endless appeals. Section 1.718 of the Commission's rules⁴⁷ provides a useful model: Any complainant who is unsatisfied with the results in the informal complaint process has six months to file a formal complaint on the same access issue, or the matter is deemed closed. Finally, consistent with principles of administrative convenience, the Commission should not conduct a review of complaints involving the same issues if it has already determined that access is not readily achievable.

⁴⁶ The Commission's Section 4(i), 47 U.S.C. § 154(i) authority provides it with ample ability to apply a two year statute of limitation to all Section 255 actions. See U.S. v. Southwestern Cable Co., 392 U.S. 157 (1968).

⁴⁷ 47 C.F.R. § 1.718.

D. The Five Day Fast Track Process Is Impractical.

The Commission should permit 30 days, as opposed to five, for carriers and manufacturers to respond to complaints. Notwithstanding the Commission's assurances that responses within the five day timeframe can be informal, given the interests involved, five days is insufficient.

The Commission's goal in proposing a five day "fast-track" problem solving phase is to adopt a system which ensures responsiveness to consumers and the efficient allocation of resources.⁴⁸ While the objectives underlying the fast track proposal are worthy of pursuit, the means the Commission has chosen are ill suited.

Given the current availability of an informal complaint process, additional fast track measures are unwarranted. This is true especially in the absence of documented proof that the informal complaint process is unworkable for Section 255 access issues. In fact, the Notice's discussion of the informal complaint process presents a favorable view of this process. The Notice contemplates reliance upon the informal complaint process (if resolution is not achieved during the fast track period) largely due to its efficient and flexible nature.⁴⁹ The Commission provides no adequate explanation for why this

⁴⁸ Notice at ¶ 124.

⁴⁹ Id. at ¶ 147 ("For those Section 255 complaints that are not resolved under fast-track procedures, we propose to resolve most under informal, investigative procedures, which we consider to be more efficient and flexible than formal procedures.")

efficient, flexible, pre-existing process is completely inadequate to resolve Section 255 complaints.

Moreover, the Notice finds that once a complaint has moved from the fast track process into the informal complaint process, "[g]iven the likely complexity of many Section 255 complaints, we propose generally to allow 30 days for a respondent to answer a complaint, rather than the ten days provided for in our general pleading rules."⁵⁰ The Commission provides no rational explanation for why these issues become somehow more complex in the informal complaint process than they were initially under the five day fast track process.

In practice, the access issues underlying Section 255 may not be capable of quick resolution. To illustrate, notwithstanding a carrier's attempt to provide access training to its agents -- which frequently are large, discount retail stores with many staffers (often part-time), high turnover, and incentives (i.e., commissions in lieu of wages) to close a sale quickly -- a mobile customer with access needs may not be properly accommodated by a retail store. If the Commission were to remedy this by imposing strict requirements on the carrier/agency relationship, it would discourage retail distribution outlets, services which generally provide public benefits.⁵¹

⁵⁰ See Notice at ¶ 150; see also id. at ¶ 162 (A carrier's or manufacturer's defense that accessibility is not readily achievable is "likely to present formidable difficulties to all concerned").

⁵¹ See infra discussion on indirect retail sales.

Any process the Commission adopts to enforce Section 255 should be informed by experience. As noted above, the "readily achievable" standard is not easily applied. Adjudications by the DOJ under the ADA demonstrate that determinations are largely case-by-case, do not adhere to any strict procedural time frames, and can take years to resolve.⁵² Each claim of discrimination involves complex factual issues including whether the proposed barrier removal is readily achievable. As a recent consent order between the DOJ and a commercial facility illustrates, resolution of these claims is often a lengthy process. A complaint of discrimination which occurred on May 14, 1994 was investigated by the DOJ on December 6, 1994 and resolved by a consent order dated April 15, 1998. Even though this case was resolved by an out of court agreement, it lasted several years.⁵³ The duration of the DOJ's ADA enforcement efforts demonstrate the inadequacy of the Commission's proposed five-day response time and the need for flexible enforcement procedures in resolving disability access issues.

⁵² DOJ regulations do not set out an administrative process for enforcement of the ADA. Rather, the regulations describe the procedures for private suits by individuals and provide for investigation of alleged violations of the ADA by the Attorney General. See 28 C.F.R. §§ 36.501-36.508. The Attorney General may also intervene in a private suit or commence a civil action against a commercial facility in a U.S. District Court if issues of general public importance exist.

⁵³ See United States v. Dover Downs Entertainment, Inc., Consent Order, DJ 202-15-7 (April 15, 1998) (requiring defendant to remove certain architectural barriers from racetrack where readily achievable and remedy violations of ADA Standards for Accessible Design).

This "readily achievable" standard, as applied in Section 255, is necessarily complex as it requires the weighing of numerous factors, as well as a determination of whose duty is implicated under Section 255. Section 255 obligations may overlap between and among telecommunications carriers and manufacturers, and create complications in determining to whom the Section 255 duty attaches. For example, a potential subscriber with a disability may go to a major electronics retailer to purchase mobile services.⁵⁴ In the Washington D.C. area, some retailers may offer service plans from several carriers (between two to four) and wireless phones from up to eight separate manufacturers.⁵⁵ If the potential subscriber files a complaint that the phones and/or services were inaccessible, the issue arises whose Section 255 duty is implicated. Merely forwarding the complaint to all carriers and manufacturers does not encourage rapid or beneficial responses. Another potential problem is pre-paid phones -- it is unclear to whom the Section 255 obligation attaches.⁵⁶ This renders the

⁵⁴ These practices are in direct contrast to those of major local exchange carriers and interexchange carriers where the consumer generally purchases services directly from the carrier.

⁵⁵ See CTIA Attachment, "Indirect Wireless Retail Store Survey -- Washington D.C. Area." In fact, over 50% of CMRS phones are sold indirectly through retail operations.

⁵⁶ For example, pre-paid phone services can be network-based or handset-based, thus implicating potential carrier and/or manufacturer obligations. Because the "carrier" providing service may not have a system identification, pre-paid calls generally are treated as roaming calls. Thus, it is possible for different carriers to provide service to a pre-paid caller, depending in large part upon where the call is made.