

Before the  
**FEDERAL COMMUNICATIONS COMMISSION**  
Washington, D.C.

In the Matter of )  
)  
Implementation of Section 255 of the )  
Telecommunications Act of 1996 )  
)  
Access to Telecommunications Services, )  
Telecommunications Equipment, and )  
Customer Premises Equipment )  
by Persons with Disabilities )

DOCKET FILE COPY ORIGINAL

WT Docket No. 96-198

JUN 30 1998

NOTICE OF PROPOSED RULEMAKING

THIS DATE  
**CANCELLED**  
JUN 30 1998  
F.C.C.  
OFFICE OF THE SECRETARY

COMMENTS SUBMITTED BY

**TELECOMMUNICATIONS FOR THE DEAF, INC.**

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## I. INTRODUCTION

Telecommunications for the Deaf, Inc. (TDI) hereby submits comments to the Federal Communications Commission in response to WT Docket No. 96-198. TDI views this proceeding on the implementation of Section 255 of the Telecommunications Act of 1996 as one of the most profound and most important legislative initiatives to impact the quality of life for our membership since the enactment of the Americans with Disabilities Act (ADA).

As a consumer organization representing the interests of those who are deaf, hard of hearing, and late-deafened, TDI's mission is to promote full visual access to entertainment, information, and telecommunications through consumer education and involvement, technical assistance and consulting, application of existing and emerging technologies, networking and collaboration, uniformity of standards, and national policy development and advocacy.

The historic Telecommunications Act of 1996 is intended to pave the way 'for a new era of greater competition and consumer choice in telecommunications for the American people.' More specific to this proceeding, it was understood that **Section 255 of the Act was included by Congress to ensure that *all* Americans can gain the benefits of advances in telecommunications services and equipment, *including* those with disabilities.**

How those with hearing loss came to such an 'inaccessible point' was established with a precedent that is a bit ironic. In the 1870's, Alexander Graham Bell's effort to create a hearing device that would aid his deaf wife and deaf mother resulted in a device that created employment, business, social, and emergency access barriers for those with hearing loss for well over a century. Over time, if the telecommunications marketplace, through natural attribution, had naturally incorporated the telecommunication needs of those with disabilities without the enactment of legislation, we would not be here participating in this proceeding. Because universal design did not happen inclusively amongst all manufacturers, we are now here deliberating on how to regulate the telecommunications industry in order to ascertain access to telecommunication services, telecommunications equipment, and customer premises equipment by individuals with disabilities. The simple fact remains...market forces alone have *not* been enough! As we move forward into the 21<sup>st</sup> century, Section 255 regulations must be drafted in a way that ensures consumers with disabilities access to telecommunications equipment, customer premises equipment (CPE), and telecommunications services as inclusively as is readily achievable.

FCC chairman William Kennard strongly expressed his commitment to ensure the telecommunication revolution benefit *all* Americans on March 8 at the 1998 Josephine L. Taylor Leadership Institute conference. He stated,

"We cannot ignore the needs of those with disabilities. We cannot create a society that leaves out the 26 million Americans with hearing disabilities or the 9 million with sight

disabilities or the 2.5 million Americans with speech disabilities...it's just too much a part of America.. . too important a segment of the American society.. .we must strive to ensure that advances in technology benefit everyone.”

Chairman Kennard also stated,

“Section 255 represents the most significant opportunity for people with disabilities since the passage of the Americans with Disabilities Act in 1990. And **at the FCC we intend to fully implement it.**”

Commissioner Tristani acknowledged in her statement on issuance of the Section 255 NPRM, “telecommunications services and equipment translates into opportunity and participation.” Commissioner Powell added, “. . .this is an area where free market forces alone are unlikely to address the specific needs of individuals, who solely because of life’s unpredictability and randomness find themselves restricted by physical adversity.” Commissioner Furchtgott-Roth also acknowledges Section 255 proposed rules present “rational regulation[s]” that “introduces efficiencies unlikely to develop in the market.” All the Commissioners have acknowledged the importance of participation and opportunity so to ascertain those with disabilities will not be ‘strewn aside’ as the telecommunications revolution continues to emerge.

TDI, along with many other organizations commenting in this proceeding, strongly urge the FCC to carry out implementation of clear, concise regulations that implement Section 255 of the Act as intended by Congress. The NPRM presents a number of areas we wish to endorse, but it also presents sections that are vague and need further clarification. In fact, both industry and consumers will agree, there are aspects of these proposed regulations that are so unclear one cannot in any certainly know what one’s rights or obligations are! Flexibility can be provided to the industry without being so ‘non-prescriptive’ that industry feels, regardless of their efforts, they may be perceived as or accused of not complying. If the FCC’s regulations remain vague in any regard, they will lack the full potential for reaching the end result intended by Congress as stated by Chairman Kennard and his fellow colleagues above. One could easily speculate that this legislation could ‘collect dust’ and not serve its intended need. This would be a ‘lose-lose’ situation for everyone involved. This is obviously not acceptable and every effort to avoid this from occurring must be made. While we applaud the FCC for issuing proposed rules to implement Section 255 of the Telecommunications Act of 1996, we urge the FCC to adopt the suggestions contained in these comments so that our needs are fully considered in the design, development and fabrication of telecommunications products and services.

## II. FCC AUTHORITY

### A. Scope of Rulemaking Authority

It is our understanding that Congress gave responsibilities both to the Commission and to the Architectural and Transportation Barriers Compliance Board (“Access Board” or “Board”) to carry out the mandate of Section 255. The FCC’s Notice of Inquiry noted that the Commission possesses exclusive authority with respect to complaints under Section 255(f). It also noted that Section 255(f) authorizes the Commission to work in conjunction with the Access Board to develop guidelines for accessibility of telecommunications equipment and customer premises equipment (CPE).

### B. Enforcement Authority

As the FCC has documented in the Notice of Proposed Rulemaking (NPRM), Section 255(f) provides that the Commission shall have exclusive jurisdiction with respect to any complaint under Section 255, and expressed the Commission’s view that Section 255 has established a new statutory right for aggrieved parties to file complaints — a right that is independent of, and in addition to, the right to file complaints against common carriers under Sections 207 and 208. Section 207 allows individuals to seek damages either by private actions against carriers in Federal courts, or by recourse to the Commission’s complaint process. Section 208 governs complaints against common carriers filed with the Commission.(FCC NPRM )

The FCC has well established that the Commission possesses authority to adopt rules to implement the requirements of the Communications Act. The FCC has cited several statutory provisions that authorize the Commission to adopt rules it deems necessary or appropriate in order to carry out its responsibilities, so long as those rules are not otherwise inconsistent with the Act or other law. Specifically, Section 4(i) of the Communications Act explicitly permits the Commission to “perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with [the] Act, as may be necessary in the execution of its functions.”<sup>1</sup> Section 201 (b) provides that “the Commission may prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this Act.”<sup>2</sup> Section 303(r) provides that the Commission may “make such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this Act”<sup>3</sup>

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<sup>1</sup> 47 U.S.C. § 154(i).

<sup>2</sup> 47 U.S.C. § 201(b).

<sup>3</sup> 47 U.S.C. § 303(r).

### **C. Access Board Equipment Guidelines**

TDI readily recognizes the FCC's statutory authority, however, TDI urges the FCC to clarify its intent to incorporate the Access Board's guidelines in their entirety, along with additional standards that cover telecommunications services, the enforcement/complaint procedure aspects of Section 255 as well as further clarification of the term "readily achievable" for application to the telecommunications industry. TDI feels the FCC needs to re-affirm the fact that the intent of Congress was for the FCC and the Access Board to work in conjunction with each other. Regardless as to the approach the FCC takes in implementation and enforcement of Section 255, the Commission needs to acknowledge that Congress clearly intended that the FCC's actions be consistent with the Board's guidelines. It is clearly sound public policy to issue telecommunications equipment and customer premises equipment rules that are consistent with the Board's guidelines. Public confusion over application of the Board's guidelines and any differences proposed will be eliminated. The Act specifically gives the Access Board responsibility to periodically review the guidelines and revise them as needed. Obviously, there will be an element of confusion if the Access Board's guidelines and the FCC's standards are not clearly in line with each other. As the FCC and the Access Board have both acknowledged, "Congress clearly intended that the FCC's actions be consistent with the Board's guidelines." (FCC NPRM/Access Board order)

TDI expects the Access Board's guidelines to be incorporated in their entirety as a *minimum* starting point for the implementation of both telecommunication products and services and should focus its role more on the telecommunications services aspect and the enforcement of Section 255 of which the Commission has sole jurisdiction. We agree with the FCC that "it would be appropriate [to] adapt the Board's guidelines to develop a coordinated approach to accessibility for both services and equipment." (FCC NPRM) The FCC can take flexibility in further analyzing and interpreting the guidelines in their enforcing rules.

## **III. SCOPE OF SECTION 255's COVERAGE**

### **A. Product vs. Product Line**

One cannot establish the framework of these regulations with the intent of representing what consumers can expect from Section 255, and what responsibilities manufacturers and service providers have under Section 255, without clearly stating the parameters of application on each individual new product vs. the product line or groups of similar products. Although there are a variety of views on how this should be applied, it is obvious that without some specific guidance, very little meaningful accessibility solutions will likely evolve. TDI is concerned that 'superficial access' that has limited value will prevail and those that have historically faced a lack of access to mainstream telecommunication products will continue to see products introduced that present barriers to use.

Thus, TDI agrees with the FCC's and Access Board's analysis that Section 255 requires manufacturers and service providers to consider providing accessibility features in each product they develop and offer. In designing, developing and fabricating a product or service, manufacturers and providers of services need to consider incorporating the usability and accessibility factors, and/or compatibility factors, if it is readily achievable to do so. TDI acknowledges that at times it may not be feasible to incorporate all potential access features into one product. In this case, it may be reasonable to consider products '**functionally similar**' if they provide **similar features and functions** and are **close in price**. Because 'readily achievable' is a relatively low standard, it is possible that more access overall will be achieved with this approach. We are comfortable with this if the final result of implementing this approach **increases the overall accessibility of the provider's offerings**. A manufacturer should not be able to bypass incorporating accessible features if it is readily achievable solely because they already have one product that is accessible. They must still consider in their determination if it is also readily achievable and marketable to incorporate accessible features in each and every new product. And if it is not feasible to make the product accessible, they still must explore the compatibility factors. We anticipate this approach will provide incentive for product developers to consider the widest possible range of accessibility options to maximize overall accessibility, without creating a means of evading Section 255 obligations. However, we want to make clear this should not be interpreted to mean it is permissible for a manufacturer to refer consumers to another manufacturer's product(s) or service(s).

## **B. Promotional Offers**

In considering this subject, one must also answer the question regarding how Section 255 might be applied to promotional offers if rigid product-by-product application is not enforced. Many of our members have told us they have encountered promotional offers that offer a product for little or no cost, only to find that telecommunication product or service was not accessible. This lack of accessibility was the sole reason the consumers were unable to take advantage of the promotional offer without additional costs. Let us give you two examples--

Scenario 1) Joe Consumer enters a cellular store after seeing an ad in the newspaper offering a free analog cellular phone with a service contract. Joe is most eager to take advantage of this offer. Upon entering the store Joe learns that: 1) the promotional phone does not have a connection point to connect his TTY nor the appropriate fit for an acoustic connection; and 2) the promotional phone does not have a vibrator to offer a functionally equivalent means of knowing the phone is ringing. Joe learns that a different cellular phone product in the store has the needed access features, however, this phone is not available under the promotional offer. The cost of getting a cellular phone is no longer at no cost, it is now at \$179.95 due *solely* to the need for a phone with accessible features. In addition, Joe also learns he needs to incur the cost of connection cabling (in this case: an RJ11 data converter at an amount of \$159-189). Joe Consumer commutes an hour to work each day through rural areas and all sorts of weather, where pay phones are not readily available, thus he decides he has no option but to fork out the

additional funds to cover the accessible product. This ‘bait and switch’ occurrence transpired solely due to Joe Consumer’s disability.

Scenario 2) Jane Consumer receives her monthly telephone bill with an insert informing her that her telephone provider is offering a free Caller ID box to new customers of this service. Jane eagerly follows up on this promotional offer only to learn that the Caller ID box being offered is not accessible to her because she is visually impaired and the box in question does not offer talking output capabilities. The telephone provider does have available a talking Caller ID box for a nominal extra cost, however, they state they are unable to substitute the Caller ID box that would allow Jane the access she needs. Not only is she not allowed to pay the nominal difference, she is told to secure that accessible box she will need to pay the full cost of the accessible product rather than the difference of the two.

TDI strongly encourages the FCC to incorporate a policy practice provision into Section 255 that encompasses handling of promotional offers in a way that does not discriminate against those with disabilities outright. One could go on with examples of such offers for non-accessible products and services that do not provide an equivalent or similar function offer at a comparable price. In many cases a modification of ones’ policies and/or practices as required by Title III of the ADA would provide the necessary corrective action. Ultimately, promotional offers that utilize accessible products are the ideal solution!

Title III of the ADA (Section 36.302) requires that “a public accommodation shall make reasonable modifications in policies, practices, or procedures, when the modifications are necessary to afford goods, services, facilities, privileges, advantages, or accommodations to individuals with disabilities, unless the public accommodation can demonstrate that making modifications would fundamentally alter the nature of the goods, services, facilities, privileges, advantages, or accommodations.” We would like to see the FCC address how a form of this regulation might be applied in Section 255 to telecommunications products and services.

### **C. Telecommunications vs. Enhanced Services**

TDI is concerned with the fact the application of the term “telecommunications” may have the effect of excluding from the coverage of Section 255 a number of services that are necessary and important to consumers. Many services that have been classified as “enhanced services” have become commonplace in today’s telecommunication operations. In the employment world, deaf and hard of hearing TTY users constantly face the obstacle of inaccessible voice mail and automated voice response systems. It is unthinkable that Congress would intend to leave out from inclusion of coverage such basic fundamental occurrences in our existing telecommunications structure. TTY users face inaccessible audiotext systems in everyday communications for business, personal and civic purposes. These audiotext systems require quick responses to choose options. We have heard endless examples of daily encounters with

inaccessible audiotext systems from TTY users. Here are examples of incidents from consumers who have attempted to call such systems via their state telecommunications relay service:

Scenario 1) Jane Consumer was visiting another state to care for her niece and nephew while their parents were on vacation. Jane, unfamiliar with the area, received a ticket for a wrong turn on the day before she was to leave. The ticket offered the opportunity for a reduced fine, if Jane showed up in court or at least called to state circumstances for not being able to do so. Jane called the number of the court on the ticket through relay. The audiotext recording was so fast and so complex the CA made several call backs in attempt to reach the correct department needed. Although we do not hear of this often, the consumer said that finally the CA became so frustrated with the number of repeated calls, and the speed of the tape, she recommended that Jane go to the court in person (which wasn't possible)! Jane even tried calling back into the relay center to a second CA and still she was not totally successful. She then called her home state relay and asked them to call the state she was in and they too were challenged by the audiotext recording. Forty minutes later Jane still never accomplished what she needed even after long waits for a live operator to come on-line whom never did so. After the fact, Jane Consumer went home and wrote a letter (more time on her part!) and tried to explain the factors as to why she did not take advantage of the court option nor inform them in a timely manner by phone. This all obviously would be a non-existing scenario if the audiotext system was directly TTY accessible. (Congress could not possibly have intended to eliminate such an important and widely used service from the scope of Section 255!)

Scenario 2) Joe Consumer received a new credit card from his credit card company in the mail. Because he just opened a new account with a credit card company offering a better rate, he just wanted to make a simple, toll-free, five minute call to cancel the new credit card received. Joe had never called this toll free number listed before so had no clue as to what would prevail. He gave the CA his credit card number assuming it would be needed prior to calling. The relay service CA encountered the most amazing, labyrinth audiotext system which asked the most unexpected questions (i.e., not likely you would think to tell the CA all the possible information they might need to proceed past the prompts). Each time the CA reached a new layer of the audiotext system, the system would "time out" before the CA had adequate time to ask Joe the necessary information to continue. Thus, the CA would need to call back after gaining input from Joe of the input needed to move forward. Each time the CA got to the new portion of the audiotext message there was another layer that the CA had not yet heard previously because that layer of the system was not available nor heard until you input a certain selection! At different layers, the system wanted Joe's credit card number, social security number, telephone number, activation pin number, and finally his mother's maiden name! At one point Joe had the CA wait for what he thought would be a live operator, with no luck after lengthy waits of 10 to 15 minutes at a time. Joe finally got through the system faster by learning all the variables needed, giving the CA those variables, and calling back again. Joe readily recognized after 40 minutes into this sunny Saturday afternoon this was no longer a "simple" five or even ten-minute call. On Monday, out of curiosity, he had a hearing friend call the same toll-free number with the intent of

performing the exact same call without forewarning of what would prevail. Need we tell you the call was completed moments after it began.

Joe Consumer has confronted wasted time and in the case of the business day money, while facing audiotext systems that cannot be properly accessed in a functionally equivalent, efficient manner via a relay system. Plus, those that offer TTY direct services almost always leave their TTYs in auto-answer. Consumers do not get call backs, thus they call through relay as a last resort. Some credit card companies have told consumers that they must talk to them directly, because company policy does not allow them to talk via relay. They are instructed to call a TTY number that is set in auto-answer or only answered certain hours of the day, while voice calls are handled 24 hours a day. The reality is the system must and can be made accessible in an efficient, functionally equivalent manner.

TDI could provide numerous additional examples of consumers calling banks, hospitals, movie theaters, and so forth usually with a simple, expectedly brief task at hand. There is no reason the provider of such telecommunications services cannot offer such services in an accessible manner.

We strongly urge the FCC to take advantage of any and all 'vehicles' it has for allowing inclusion of services such as audiotext systems and voice mail to be classified within the category of 'adjunct to basic' services under Section 255. At minimum, we feel voice mail and audiotext systems must be included for coverage under Section 255, because other forms of accessing such systems are many years away from becoming functionally equivalent. The FCC must clearly recognize that the way the NPRM is drafted now takes too narrow an approach to the discretion the FCC legally has.

Our impression from the FCC's NPRM is in 1995-1 996 the Commission updated the regulatory structure it had established in the 1980 Computer II proceeding to include services such as voice mail, electronic mail, facsimile store-and-forward, interactive voice response, protocol processing, gateway, and audiotext information services as enhanced services.<sup>4</sup>

In the NPRM, FCC acknowledges, "On the other hand, the Commission has found that services it had previously classified as "adjunct-to-basic" should be classified as telecommunications services.' These are services that fall within the literal definition of an "enhanced service" set forth in the Commission's rules, but are basic in purpose and facilitate the

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<sup>4</sup> See Bell Operating Companies Joint Petition for Waiver of Computer II Rules, Order, 10 FCC Rcd 13758, 13770-74, App. A (Conn. Car. Bur. 1995).

<sup>5</sup> See *Non-Accounting Safeguards Order*, 11 FCC Rcd at 2 1958.

completion of calls through utilization of basic telephone service facilities.”<sup>6</sup> TDI views the fact the FCC was able to change the status of other previously classified services as indication it can do the same now. TDI strongly urges the FCC to take similar action to ascertain that the ability of TTY users to make simple calls using today’s commonplace systems is possible. This certainly would bring “maximum benefit to the public through its incorporation in the network,” as stated in the Commission’s NPRM. Clearly, several of the services that are otherwise considered to be ‘enhanced’ fall within this definition. The test of coverage should be whether access to a service is needed to achieve effective communication by people with disabilities.

#### **D. Coverage of Telecommunications Equipment & Customer Premises Equipment**

The Access Board’s guidelines state “only the functions directly related to a product’s operation as telecommunications equipment or [CPE] are covered by the guidelines.”<sup>7</sup> The Access Board’s guidelines do not differentiate between hardware, firmware or software implementations of a product’s functions or features, nor do they differentiate between functions and features built into the product and those that may be provided from a remote server over the network. The functions are viewed as covered by these guidelines whether the functions are provided by software, hardware, or firmware. The FCC notes the definition of telecommunications equipment includes “software integral to such equipment (including upgrades).” (FCC NPRM) Thus, TDI supports the Board’s and FCC’s view that the focus of Section 255 should be on functionality, and views software as simply one method of controlling telecommunications functions. TDI encourages the FCC to confirm that when the software has a telecommunication purpose, it should be covered, since the software serves to provide electronic operating instructions.

### **IV. Nature of Statutory Requirements**

#### **A. Definition of “Disability”**

TDI supports the FCC’s proposal to follow without modification or enhancement the ADA definition of “disability,” as set out below.

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<sup>6</sup> 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) (*NATACentrex Order*), *recon.*, 3 FCC Rcd 4385 (1988).

<sup>7</sup> *Access Board Order*, 63 Fed. Reg. at 5612.

Section 255(a)(1) of the Act provides that “the term ‘disability’ has the meaning given to it by section 3(2)(A) of the [ADA].” The ADA defines “disability” as:

- A physical or mental impairment that substantially limits one or more of the major life activities of an individual;
- A record of such an impairment; or
- Being regarded as having such an impairment.

We further agree with the FCC’s proposal to use the Access Board’s list of categories of common disabilities as stated below:

-- to “principally address the access needs of individuals with disabilities affecting hearing, vision, movement, manipulation, speech, and interpretation of information.”  
(Access Board Order)

#### **B. “Accessible to and Usable by”**

Section 255 clearly requires that equipment and telecommunications services be “accessible to and usable by individuals with disabilities, if readily achievable.” The Access Board guidelines define “usable” as meaning that “individuals with disabilities have access to the full functionality and documentation for the product, including instructions, product information (including accessible feature information), documentation, and technical support functionally equivalent to that provided to individuals without disabilities,” and the guidelines define “accessible” as compliance with Sections 1193.3 1 through 1193.43 of the rules.<sup>8</sup>

TDI supports the Commission’s proposal to adopt the Access Board’s definition of usability as part of the definition of “accessible to and usable by.” However, TDI opposes combining the two concepts: accessibility and usability. Each has an independent objective that should be treated as such. We respectfully disagree with the FCC in its thinking that there is no reason to distinguish the two terms for purposes of Section 255. We urge the FCC to maintain the distinction between the two terms as presented in the Board’s guidelines.

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<sup>8</sup> Section 1193.33 describes information, documentation, and training measures; Section 1193.37 specifies pass-through of information required for access; Section 1193.39 bars net reductions in accessibility; Section 1193.41 describes accessible input, control, and mechanical functions; and Section 1193.43 describes accessible output, display, and control functions. 36 C.F.R. §§ 1193.33, 1193.37, 1193.39, 1193.41, 1193.43.

TDI believes one of the strongest aspects of the FCC's NPRM is its support of incorporating the Access Board's definition of equipment accessibility as listed below. TDI strongly encourages the FCC to incorporate this section in its entirety in the final rules. Telephone equipment and CPE should incorporate the following accessibility functions where appropriate, *if readily achievable*--

**Input, control, and mechanical functions:**

- Operable without vision
- Operable with low vision and limited or no hearing
- Operable with little or no color perception
- Operable without hearing
- Operable with limited manual dexterity
- Operable with limited reach or strength
- Operable without time-dependent controls
- Operable without speech
- Operable with limited cognitive skills

**Output, display, and control functions:**

- Availability of visual information
- Availability of visual information for low vision users
- Access to moving text
- Availability of auditory information
- Availability of auditory information for people who are hard of hearing
- Prevention of visually-induced seizures
- Availability of auditory cutoff
- Non-interference with hearing technologies
- Hearing aid coupling

**1. Telecommunication Service Issues**

In reference to telecommunication services, the FCC sought examples where service itself has characteristics that render accessibility difficult. TDI wishes to note that when a TTY caller dials a number that has been disconnected, changed, or is no longer in service, they receive an inaccessible voice recording. Technology already exists to allow for a TTY intercept message and is being offered in limited, isolated parts of the country. TDI encourages the FCC to clarify whether TTY intercept messages are required in instances as stated above under Section 255. TDI also strongly encourages the FCC to clarify whether telecommunication service providers are required to offer direct TTY access for essential support services such as customer service and help desk lines. We find it quite ironic that so many telecommunication providers have chosen to rely on the telecommunications relay system rather than provide direct TTY access

given their business type. We also strongly encourage the requirement of captioning on tutorial videotapes. We commend the FCC for seeking comment on criteria that would constitute service accessibility. We urge you to clearly indicate that when direct TTY service *is* offered, it needs to be operated the same hours and in the same manner as non-TTY based calls.

## **2. Pay Phone Access**

We commend the FCC for raising the aspect of pay phone access. We agree that the FCC should not concern itself with the height or installation factors of the pay phone, but should involve itself in the operability aspects. We would expect the **payphone** manufacturers to include operable functions on new phones to allow independent use of various functions. For example, in Europe pay phones have visual displays that indicate the amount of money that is needed for a call. TTY users in America that wish to place a long distance call from a pay phone now need to either have a calling card, debit card, credit card or call collect. If the pay phone does not have a card slot, to complete the call the consumer has to make a call-within-a-call to a TTY operator to complete the transaction. None of these options are as affordable as if one were to pay directly into the phone with coins. We have heard the arguments that in a few years all pay phones will be card operated, but we heard that same argument 10 years ago. If the pay phones included displays like models that already exist but are not widespread in use in America, this would allow access to the phone without third party intervention and alleviate the more expensive means of calling for the consumer. This no doubt would be an example of universal design that would be appreciated and beneficial to everyone.

## **3. Peripheral Devices or CPE : Specialized Customer Premises Equipment**

TDI understands the Commission is considering whether there needs to be a distinction between peripheral devices and specialized customer premise equipment in dealing with the Section 255(d) which requires that telecommunications offerings be compatible with “existing peripheral devices or specialized [CPE] commonly used by individuals with disabilities to achieve access, if readily achievable.”

“The Access Board defines “peripheral devices” as “[d]evices employed in connection with telecommunications equipment or customer premises equipment to translate, enhance, or otherwise transform telecommunications into a form accessible to individuals with disabilities.” and it defines specialized CPE as “[e]quipment, employed on the premises of a person (other than a carrier) to originate, route, or terminate telecommunications, which is commonly used by individuals with disabilities to achieve access.”

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<sup>9</sup> 47 U.S.C. § 255(d).

<sup>10</sup> *Id.*

The Access Board further explains its definitions as follows:]’

“The term peripheral devices commonly refers to audio amplifiers, ring signal lights, some TTYs, refreshable Braille translators, text-to-speech synthesizers and similar devices. These devices must be connected to a telephone or other customer premises equipment to enable an individual with a disability to originate, route, or terminate telecommunications. Peripheral devices cannot perform these functions on their own.”

TDI tentatively agrees with the FCC that although the Access Board has created a distinction between peripheral devices and specialized customer premises equipment for the purpose of considering some SCPE as a subset of a CPE (thus with separate obligations under the Act), we agree it is not necessary to distinguish between peripheral devices and specialized CPE for purposes of applying Section 255 (d) for compatibility purposes.

#### **4. “Commonly Used”**

The term “commonly used” by those with disabilities comes directly from the statute. We understand the FCC’s intent is to clarify for industry what products would be classified as ‘commonly used by those with disabilities’ thus devices that a product needs to be compatible with if it is not readily achievable to make it accessible. It is true that devices offered in statewide equipment distribution programs for persons with disabilities do include many, but not all of the devices that are commonly used by individuals with disabilities for accessing telecommunications. However, this alone would not be a complete listing. Further, it would be erroneous to determine whether the CPE or peripheral device may be deemed to be commonly used by persons with disabilities based on whether it is ‘affordable and widely available’ as many specialized products are overly costly and available via limited distribution. Perhaps development of a technical assistance document identifying various potential devices would be a proper effort, after consulting all the various affected consumer groups for input on products their constituents use. The idea however is to move away from specialized devices and more towards mainstream products that are used by everyone.

#### **5. Compatibility**

The Access Board lists five criteria for determining compatibility, subject to applicability:”

- External access to all information and control mechanisms;

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<sup>11</sup> *Access Board Order*, 63 Fed. Reg. at 5613, 5616.

<sup>12</sup> 36 C.F.R. § 1193.51.

- Connection point for external audio processing devices;
- Compatibility of controls with prosthetics;
- TTY connectability; and
- TTY signal compatibility.

TDI supports adoption of the above five criteria as a starting point for determining compatibility. We recognize that as technology evolves and changes review of the guidelines and enforcing rules will be needed. An example might be, as video telephony moves into mainstream use, video equipment compatibility will become important to those reaching out to use this mode of communications. Congress has wisely incorporated statutory language instructing the Access Board to periodically review its guidelines.

### **C. “Readily Achievable”**

#### **1. General**

Of all the sections of the FCC’s NPRM, the readily achievable section is indeed the most crucial section as it has the potential of ‘making or breaking’ Section 255. The FCC has the challenge of clearly indicating for consumers and industry alike the foundation on which Section 255 will operate. TDI strongly urges the FCC to re-examine its approach in defining “readily achievable” for application to Section 255 of the Telecommunications Act. As the FCC has noted, Section 255(a)(2) provides that “the term ‘readily achievable’ has the meaning given to it by section 301(9) of [the ADA].”<sup>13</sup> Congress chose to adopt the readily achievable language of the ADA knowing that the Department of Justice had already interpreted this language. TDI strongly believes the FCC should only depart from that analysis where it is necessary to do so for the sole purpose of applying that analysis to telecommunications products and services.

ADA defines readily achievable as:<sup>14</sup>

“easily accomplishable and able to be carried out without much difficulty or expense.”

It is TDI’s belief that the following factors, as they exist in the ADA, are also appropriate factors to be considered under Section 255. In determining whether an action

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<sup>13</sup> Section 255(a)(2) of the Communications Act, 47 U.S.C. § 255(a)(2).

<sup>14</sup> 42 U.S.C. §12181(9).

is readily achievable, factors considered should include:

- A. the nature and cost of the action needed;
- B. the overall financial resources of the facility or facilities involved in the action; the number of persons employed at such facility; the effect on expenses and resources, or the impact otherwise of such action upon the operation of the facility;
- C. the overall financial resources of the covered entity; the overall size of the business of a covered entity with respect to the number of its employees; the number, type, and location of its facilities; and
- D. the type of operation or operations of the covered entity, including the composition, structure, and functions of the workforce of such entity; the geographic separateness, administrative or fiscal relationship of the facility or facilities in question to the covered entity.

TDI agrees with the Access Board's and FCC's conclusion that "readily achievable," as defined by the ADA and incorporated in Section 255, simply means "easily accomplishable and able to be carried out without much difficulty or expense." We remind the FCC that "readily achievable" in relation to "undue burden" is a relatively low standard. We believe the cost concerns are already built into this definition. We believe that this broad definition is applicable to telecommunications equipment and services.

We do acknowledge that given the differences between architectural barriers and telecommunications barriers, the "ADA factors should guide, though not constrain...development of factors that more meaningfully reflect pertinent issues and considerations relevant to telecommunications equipment and services" if and only if they are truly necessary to further define application to the telecommunications industry. (FCC NPRM)

## **2. Telecommunications Factors**

### **a. Technical Feasibility**

TDI agrees that implementation of an accessible feature has to be 'technically feasible' for it to occur. However, we agree with the Access Board's analysis that "technological feasibility is

inherent in the determination of what is readily achievable..”<sup>15</sup> Although feasibility appears to us as an obvious element of “readily achievable,” we can agree that identifying it as a separate analytical component will not hurt, as long as the manufacturer is required to show proof of technical infeasibility if asked. In some cases, one could appropriately determine that due to lack of familiarity or expertise of the organization’s engineers with certain accessibility techniques implementation of a feature or approach is not readily achievable. Of course, good-faith assessments need to be made for the technical feasibility factor to be applied appropriately.

## **b. Expense**

TDI believes that the cost of implementation is already considered within the readily achievable definition. However, the parameters as to what can be considered within the cost analysis have not been defined. We believe everyone involved still wonders: how much cost will be too much cost? Is it allowable to include such cost factors as research and development, production, customer support and marketing costs? (We believe so.) Should operating costs and accessibility costs be considered together? (We believe this is probably unavoidable.) **If opportunity costs are considered, shouldn’t the opportunity costs of inaccessibility also be taken into consideration?** Lack of opportunity and lack of active participation due to inaccessible telecommunications results in unemployment and underemployment of individuals with disabilities which has had an undeniable impact on our society’s economy. In Commissioner Tristani’s statement on the Section 255 NPRM, she acknowledged the unemployment rate amongst individuals with disabilities is roughly 73%. Lack of accessibility clearly has a cost on our society and results in lack of opportunity for those with disabilities to be active telecommunications consumers utilizing all the latest telephony technology. Generally, TDI agrees that FCC direction should be given on these questions, where possible, to give further clarity to both industry and consumers.

## **c. Practicality**

The practicality section of the FCC’s NPRM addresses four potential key factors: resources, market considerations, cost recovery, and timing. We will address each factor within that context.

### **1. Resources**

TDI agrees with the Commission’s tentative position that the financial resources of the organization that has legal responsibility for, and control over, a telecommunications product (service or equipment) should be presumed to be available to make that product accessible in compliance with Section 255. ..thus the entity (i.e., corporation or equivalent organization)

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<sup>15</sup> *Access Board Order*, 63 Fed. Reg. at 5615.

legally responsible for the equipment or service that is subject to the requirements of Section 255 should hold responsibility. We agree that there is the potential of evasive practices otherwise.

TDI supports the Commission's proposal that they review what resources are reasonably available on a case-by-case basis in the context of complaint proceedings or other enforcement proceedings, due to the variety of organizational forms and other circumstances that exist in the telecommunications manufacturing environment. We do however believe that as a general rule the ADA provides guidance in this area and that new exceptions to the general practice of ADA resource exploration are not warranted in the readily achievable definition.

## **2. Market Considerations**

TDI does not believe that a separate distinction for a market consideration factor within the readily achievable definition is warranted, because there is nothing unique to telecommunications over other products and services that must be accessible (if readily achievable) to justify its inclusion. We recognize in order to incorporate universal design with a wide variety of products and devices this may mean few detailed specifications may be applicable across all devices. This is why we have acknowledged some flexibility is meritorious under the product-by-product application of accessibility. The argument that states the need to include market considerations in a readily achievable definition is completely unfounded. Certainly all markets need to consider whether a product is sellable. This is not unique to telecommunications or accessibility. But the fact remains, the very reason Section 255 is needed is because market considerations alone have not brought about inclusion of accessible features for those with disabilities to any great extent.

The FCC points out their intent is not to "sanction unfounded arguments that the addition of such features would make products less desirable to mass markets. Indeed, it may frequently be the case that accessibility features will make a product more desirable to mass markets." There are numerous products that have benefited everyone that initially were merely intended to offer an accessibility function. In addition some of these products were not designed to necessarily assist those with disabilities but they did nonetheless. Products such as telephone amplifiers, built-in TV captioning capabilities, hands-free dialing, speakerphones, vibrating pagers, vibrating cellular phones, caller ID with talking output and visual information used by TTY users to screen voice and TTY calls, phones with neon lights that indicate a phone ring, voice recognition dialing, memory dialing and re-dialing, and cordless phones are all products that are universal in their offering of capabilities to the mainstream, and some accessibility features for those with disabilities. The market has shown incorporation of features solely based on the market as a whole generated these features. It was not by any means the result of Section 255 or 'special' readily achievable factors. This is not to say access is complete. Development of such products that allow for cordless text phone use, digital cellular/TTY phone use, accessible audiotext systems, accessible voice mail, pay phone functions and cellular access for VCO and HAC compatibility, and so forth are all still needed and the reason Section 255 exists.

### 3. Cost Recovery

TDI strongly opposes inclusion of a cost recovery factor as currently described in the readily achievable definition. Congress has already provided a cost limitation for telecommunications manufacturers or service providers within the readily achievable definition of “...able to be carried out without much difficulty or expense.” Manufacturers of telecommunications equipment or customer premises equipment (CPE) are obligated to ensure that the equipment is designed, developed and fabricated to be accessible to and usable by individuals with disabilities, only if readily achievable, and providers of telecommunications services shall ensure that the service is accessible to and usable by individuals with disabilities, only if readily achievable. The Commission notes in their cost recovery discussion, “...this is not to say that the equipment manufacturer or service provider must be able to fully recover the incremental cost of the accessibility feature in order for accessibility to be readily achievable. Indeed, the assumption of some cost burden is an explicit element of the definition of readily achievable.” (FCC NPRM) It is ironic to note that although industry states they need the cost recovery mechanism within Section 255’s “readily achievable” definition, all of the accessible products as described above were done without any special provisions by an enforcing agency.

Since “readily achievable” is a relatively low standard, and cost recovery in any manufactured product is expected business practice for survival, the industry would be hard pressed to prove this is unique to implementing accessibility by the telecommunications industry over any other entity that has had to implement access. Including the cost recovery factor as a part of Section 255 has the potential impact of destroying all progress we have made in the disability movement to date.

We wonder if Section 401(a) of the ADA which deals with the Telecommunications Relay Service (TRS) may be in part the genesis of the Commission’s discussion of cost recovery in the Section 255 NPRM. Section 401(a) amends Section 255(d)(3)(B) of the Communications Act of 1934. This section states in the FCC regulations regarding TRS that a fund “shall generally provide that costs caused by interstate telecommunications relay services shall be recovered from all subscribers for every interstate service and costs caused by intrastate telecommunications relay services shall be recovered from the intrastate jurisdiction.” This is the only mention in disability civil rights laws of cost recovery, and has a mechanism in place for recovering such costs, TDI believes a set-up of this type of cost recovery would be the only acceptable method of allowing cost recovery. Such a provision could be established via a ‘universal fund mechanism’, but would likely add new and unnecessary complexity to the issue and open a ‘can of worms’ for every entity that is required to provide access in America today. In truth, we want to acknowledge this is obviously not workable as the market needs to remain competitive and free of bureaucratic factors that do not help bring about access.

We believe that any costs incurred from providing accessible features should be borne by all consumers who purchase that product or service. This is really not unique, thus unless the FCC intends to set-up something similar to the Universal Service Fund (which we highly doubt), a cost recovery factor in the readily achievable determination is in no way exclusive to accessible telecommunications. One could argue the telecommunications market is very competitive. Since all manufacturers in question are obligated to make such provisions, the impact should be spread evenly amongst everyone.

#### 4. Timing

TDI recognizes it may be determined technically feasible to include access during the design stage of a particular product or service. However, during the final design stage of the product, a readily achievable technical solution may arise that could be implemented. Although this may not be practical to incorporate at this point, a company should continue to seek access solutions that can be implemented in the next model version if not the one going to the assembly line.

### **V. COMPLAINT PROCESSES**

#### **A. Fast Track Problem Solving Phase & Complaint Mechanisms**

TDI commends the FCC for attempting to “streamline the process for addressing accessibility issues as much as possible, freeing consumers and industry alike to apply their resources to solving access problems, rather than subjecting them to burdensome procedural requirements.” However, we recommend revising the initial response proposal under the fast track to 10 working days, with an outside limit of no more than 30 calendar days where extensions of time are sought. **After** that time, consumers should automatically be allowed to use the informal or formal complaint processes.

TDI wishes to commend the FCC for its flexibility in offering individuals with disabilities accessible means, including letter, Braille, facsimile, electronic mail, internet, TTY, audio cassette, or telephone calls as means of filing a complaint. TDI approves of the FCC’s plan to make available a complaint form, but not require its use for the initiation of a Section 255 complaint. We also believe it is of value to both the consumer and the industry to have a clear contact point within a company’s organization. This way the consumer connects with the individual with the most knowledge in the area of concern, and the industry assures the consumer connects with this contact point alleviating additional frustration or misunderstandings.

## **B. Use of Traditional Dispute Resolution Processes**

### **1. Informal & Formal Dispute Resolution Process**

TDI endorses the following FCC proposals:

**--not to impose a standing requirement** for complaints under Section 255, whether by virtue of being a person with a disability, being a customer of the entity that is the subject of the complaint.

**--not to establish any time limit for the filing of a complaint** under Section 255.

**--adoption of a E-calendar-day reply period, subject to Commission adjustment in specific cases**, but acknowledge proper staffing at the FCC needs to be set up to be able to handle Section 255 complaints.

**--not to require a filing fee for informal** resolution of complaints, or for formal resolution of complaints directed at equipment manufacturers and service providers that are not common carriers. Although the FCC is required to impose a filing fee for formal complaints directed against common carriers, waivers have already been granted for complaints filed under Title IV of the ADA for Telecommunication Relay Service concerns. It is clear that for Section 255 waiving the fee would be in the public interest.

### **2. Alternative Dispute Resolution Process**

TDI supports use of any and all effective means of resolving complaints that arise. Thus, we support making available alternative dispute resolution (ADR) procedures such as arbitration, conciliation, facilitation, mediation, settlement negotiation, and other consensus methods of dispute resolution for resolving Section 255 complaints not resolved under the fast-track process. We recognize that ADR procedures are not necessarily appropriate in every case, including specifically:

- Precedent setting cases,
- Cases bearing on significant new policy questions,
- Cases where maintaining established policies is of special importance,
- Cases significantly affecting persons or organizations who are not parties to the proceeding,
- Cases where a formal record is essential.

#### **4. Defenses to Complaints**

TDI believes manufacturers should be free to use their resources in a way that minimizes the paper work and tasks that don't necessarily bring about access. This will allow them to spend their time and resources wisely on innovation. TDI does endorse the following practices by manufacturers and telecommunication providers to assist them in avoiding complaints:

- External outreach efforts to ascertain accessibility needs and possible solutions, such as:
  - including individuals with disabilities in product design, testing, and product trials
  - working cooperatively with appropriate disability-related organizations
  
- Internal management processes to ensure early and continuing consideration of accessibility concerns as product offerings evolve, such as:
  - employee training on access by persons with disabilities
  - use of checklists or other objective criteria for identifying options for product accessibility
  - documentation of accessibility consideration and exploratory efforts
  
- User information and support, such as:
  - descriptions of product accessibility and compatibility features
  - end-user product documentation (in accessible modes and formats)
  - providing usable customer support and technical support, and providing information on how to obtain such support
  - disability-oriented training for customer support personnel

## VI. CONCLUSION

In closing, TDI appreciates the opportunity to comment in this important proceeding and urges the FCC to implement comments shared in their final rules for Section 255. The FCC had statutory responsibility to implement rules within 24 months. Since this time frame has already passed since the enactment of the Telecommunications Act of 1996, we urge you to act promptly in issuing final rules once the final reply period has ended in August.

Respectfully submitted,



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June 30, 1998