file a Section 2.55 complaint. Conceivably, a competing company can file a complaint against another company in an effort to harm the other company's reputation and revenues. The complaint process might also be used to obtain proprietary and financial information from an equipment manufacturer. Individuals may also use the process to obtain and divulge proprietary information to the detriment of the company involved. Without the imposition of a standing requirement, there is a significant potential for abuse of the complaint process, and very little the Commission can do to penalize parties should they engage in such abuse. CEMA therefore urges the Commission to establish a standing requirement for complaints under Section 255, in order to preserve the integrity of the complaint process,

Additionally, CEMA encourages the Commission to impose sanctions on parties who file frivolous Section 255 complaints before the Commission or its staff.[37] A pleading may be deemed frivolous under Section 1.52 of the Commission's Rules, 47 C.F.R. § 1.52, if there is no "good ground to support it' or if it is "interposed for delay."'* Without a standing requirement, there are no safeguards against the filing of frivolous complaints under Section 255.

### B. The Commission Should Establish A Time Limit For The Filing Of A Complaint Under Section 255.

In the *NPRM*, the Commission proposes not to establish any time limit for the filing of a complaint under Section 255.[39] CEMA disagrees with this proposal. The fact that

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37 *See Commission Taking Tough Measures Against Frivolous Pleadings,* Public Notice, 11 FCC Rcd 3030 (1996) ("The Commission intends to fully utilize its authority to discourage and deter the filing of such pleadings and to impose appropriate sanctions where such pleadings are filed.").

38 *Id.*

39 *NPRM* at ¶ 149.

Congress did not specify a statute of limitations period does not automatically suggest that Congress intended that no limitations period for the filing of a Section 255 complaint applies. In cases before federal courts, for example, if "Congress has created a cause of action and has not specified the period of time within which it may be asserted, the [courts have] frequently inferred that Congress intended that a local time limitation should apply."[40] Alternatively. courts have also relied on analogous federal law for selecting an appropriate limitations period.[41] The ADA, for example, does not contain a specific statute of limitations, yet courts frequently rely on the most applicable state limitations period in resolving disputes under this Act. Similarly, the Commission should look to comparable statutes in selecting an appropriate limitations period for filing Section 255 complaints."* One possibility would be to impose the same limitations period under Section 415(a) of the Communications Act applicable to common carriers.[43] This two-year period could accrue at the time the equipment is made available to the general public.

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40 *Occidental Life Insurance Company v. EEOC, 432* U.S. 355,367 (1977).

41 *See, e.g. Stevens v. Department* of *the Treasury,* 500 U.S. 1, 2 (1991) (If a "statute does not expressly impose any additional limitations period for a complaint, it must be assumed that Congress intended to impose an appropriate period borrowed either from a state statute or from an analogous federal one.").

42 The Commission has recognized the importance of a standing requirement: "to protect a potential defendant against stale and vexatious claims by ending the possibility of litigation after a reasonable period of time has elapsed." *Municipality of Anchorage d/b/u Anchorage Telephone Utility,* 4 FCC Rcd 2472, 2473 (CCB 1989) (citing *Armstrong Utilities, Inc. v. General Telephone Co. of Pa., 25* FCC 2d 385 (1970).

43 Section 415(a) states: "All actions at law by carriers for recovery of their lawful charge, or any part thereof, shall be begun, within two years from the time the cause of action accrues, and not after." 47 U.S.C. § 415.

### C. The Commission Should Require, Not Just Encourage, Complainants To Contact The Manufacturer Before Lodging A Complaint With The FCC.

In the *NPRM,* the Commission indicates that it "would encourage potential complainants to contact the manufacturer or service provider to attempt to resolve the problem before lodging a complaint."[44] CEMA proposes that the Commission require, not simply encourage, complainants to contact the manufacturer first before lodging a complaint. The adoption of this requirement would provide manufacturers an opportunity to fully educate the consumer on accessible alternatives or otherwise remedy the problem, free from unnecessary government intervention. This would also allow the manufacturer to preserve its good relationship with its customers. Only if the dispute remains unresolved should a complaint be filed and the Commission become involved. Complaints should thus be required to recite in their complaints the attempts made with the manufacturer to resolve the dispute without Commission involvement, and attach copies of relevant correspondences. Failure to fully demonstrate such efforts should result in dismissal of the complaint.

Upon receipt of a complaint, the Commission, under its proposal, would promptly forward the complaint to the manufacturer whose offerings were the subject of the complaint, and set a deadline for a report of action taken to resolve the complaint.[45] CEMA recommends that the Commission, before forwarding the complaint to the manufacturer. first conduct a threshold determination that the complaint is valid under Section 255 before forwarding the complaint to the manufacturer. The complaint should be rejected if. for example, the complainant has not made efforts to contact the manufacturer first prior to lodging

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44 *NPRM* at ¶ 126.

45 *Id.*

its complaint, the product in question lies beyond the scope of Section 255, or the complaint is frivolous. CEMA believes that the foregoing modifications to the Commission's tentative proposals for Section 255 implementation will serve the interests of the manufacturer and the consumer in minimizing government intervention, as well as the Commission's interest in minimizing administrative burdens.

### D. The Commission Should Provide Manufacturers At Least Thirty, Not Five, Business Days To Try to Solve the Complainant's Access Problem And Informally Report The Result Of Their Efforts To The Commission.

In the *NPRM*, the Commission proposes to provide only a five-business-day period for a provider or a manufacturer to assess a consumer's complaint and begin to resolve it. Certainly, as the Commission itself recognizes, this amount of time may "not be long enough to complete the resolution."[46] As a matter of course, however, five days is not sufficient time for a manufacturer to study the complaint, gather relevant information, and identify possible accessibility solutions. In some instances, a manufacturer might have to hire or consult expert staff to develop solutions. The Commission, therefore, should provide equipment manufacturers at least thirty business days to try to address the consumer's complaint and informally report the result of their efforts to the Commission. The statute does not impose a specific resolution deadline for such complaints. The Commission should not establish an arbitrary and unreasonable deadline of five business days for the manufacturer to try to resolve the complaint.

Affording manufacturers an appropriate amount of time to resolve consumer complaints under the "fast-track" phase would reduce the number of requests for extension of time that the Commission is likely to receive. Awaiting Commission decisions in response to such requests, including oppositions that might be made in response to such requests, will only

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[46] *Id.* at ¶ 137.

serve to further delay the process. CEMA believes that a period of 30 days would strike a reasonable balance of the foregoing concerns,

### E. Access To Proprietary Information Must Be Severely Restricted In Any Complaint Proceeding.

The Commission's current rules for formal complaints against common carriers call for certain restrictions on access to proprietary information that may be generated in the discovery process.[47] The *NPRM* proposes to utilize these rules on a unchanged basis for formal complaints arising from alleged violations of Section 255.[48] CEMA believes that these protections are useful but insufficient in the circumstances that will arise in complaints against manufacturers under Section 255.

Cost and design information are the two types of information that are likely to be the targets of discovery requests and are most subject to abuse and improper disclosure. Unlike common carriers, manufacturers do not file tariffs, are not subject to any form of rate regulation, and are not even subject to the Communications Act's requirements of just and reasonable pricing and no unjust discrimination. The Commission thus does not exercise plenary authority over manufacturers' pricing, costs, and product design information as it arguably does with respect to common carriers, and such information should not be readily disclosed through the Commission's processes. Instead, this information should only be conditionally available to parties to a Section 255 complaint if it is demonstrated that a particular need of a particular disabled person or persons is not capable of being met by products available in the marketplace, and then only if such information is essential for the Commission's decision whether

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47 *47* U.S.C. *$1.731.*

48 *NPRM* at B15-B16.

accessibility in a particular product or line of products is "readily achievable." Without such protections, the Commission risks significant distortion of the competitive marketplace and substantial harm to innocent manufacturers through improper disclosure of this information. Frankly speaking, the risk of sanctions may mean little to an advocate for people with disabilities convinced of the correctness of his or her cause and relatively unmindful of the economic damage that improper disclosure could wreak, nor is it likely that the Commission would seek severe penalties against such a party.

Without appropriate standing requirements such as those advocated by CEMA above, the risks of improper disclosure are multiplied. Unscrupulous competitors and "green mail"-type extortionists would be sorely tempted to utilize such information to improve their own product designs and marketing efforts, and detection of such improper disclosure would be extremely difficult. If the Commission should forego a stringent standing requirement — which it should not -then it should at least create additional protections against improper disclosure of proprietary information though requirements that surety bonds be posted by commercial parties to a Section 255 proceeding seeking such information. Such bonds would be of sufficient term (for example, three years) so that any improper disclosure would become apparent, even after the complaint proceeding terminated. This requirement would deter abuse of the Commission's processes while providing for private action remedies if such abuses occur.

### F. Section 255 Does Not Authorize The Commission To Impose Damages Or To Order The Retrofit of Accessibility Features For Alleged Violations Of Section 255.

In the *NPRM*, the Commission notes that Sections 207 and 208 of the Communications Act, as amended, provide for the award of damages for violations by common

carriers.[49] The Commission seeks comment on the relationship between Sections 207 and 208 and Section 255, and on the circumstances that would warrant the imposition of damages where Section 255 is found to have been violated." It is CEMA's position that the Commission has no authority to impose damages against equipment manufacturers or other non-common carriers for violations of Section 255.[51] It is clear from the text and legislative history of Section 255 that complainants are not entitled to monetary relief against equipment manufacturers and other non-common carriers for alleged violations of Section 255. Similarly, there is no indication from the text or legislative history of Sections 207 and 208 that Congress contemplated application of those sections to entities other than common carriers. Sections 207 and 208 apply only to complaints filed against common carriers; these sections are not applicable to equipment manufacturers or other non-common carriers.[52]

The only appropriate penalties for non-compliance with Section 255 are issuance of declaratory rulings and cease-and-desist orders against equipment manufacturers. The Commission's enforcement powers against non-common carriers are governed by Section 4(i) of the Communications Act — not Sections 207, 208, and 209 — which contain no provision

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49 *Id.* at ¶ 172.

50 *Id.*

51 Awarding damages to complainants would be especially improper if the Commission fails to require complainants to establish standing in a Section 255 complaint.

52 The Commission has already recognized that complaints filed under Sections 207 and 208 are distinct from complaints filed under Section 255. *See In the Matter of Implementation of the Telecommunications Act of 1996: amendment of Rules Governing Procedures to Be Followed When formal Complaints Are Filed Against Common Carriers,* Report and Order, CC Docket No. 96-238, 12 FCC Rcd 22497, 22501 (1997) ("The rules we adopt today apply to all formal complaints, except complaints alleging violations of Section 255.").

for the assessment of damages.[53] The Commission's declaratory rulings and cease-and-desist orders issued pursuant to Section 4(i) may be enforced by the courts through Section 401 of the Communications Act.[54] CEMA contends that the Commission's existing declaratory ruling power under Section 4(i) is sufficient to enforce Section 255 against non-common carriers, and that its formal complaint process under Sections 207 and 208 is sufficient to enforce Section 255 against common carriers.

Section 255 also does not authorize the Commission to order the retrofit of accessibility features. The Commission would have no legal basis for ordering the retrofit of accessibility features into products that were developed without such features, in cases in which the Commission determines that including them was readily achievable at the time of design.

There is no language in the statute or the legislative history that authorizes the Commission to order the retrofit of accessibility features. Further, Congress intended Section 255 to be applied prospectively to new equipment manufactured.[55] Even if the Commission had a legal basis for imposing the retrofit of accessibility features, it would not be practicable, given the rapid changes in technology, and it would be too costly. As former FCC Chairman Reed E. Hundt astutely noted, "[re]trofitting equipment with accessibility options is often

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53 Section 4(i) of the Communications Act states: "The Commission may perform any and all acts, make such rules and regulations, and issue such order, not inconsistent with this Act, as may be necessary in the execution of its functions," 47 U.S.C. § 154(i)

54 47 U.S.C § 402.

55 See S. Rep. No. 104-23, at 20.

costly and unwieldy."[56] For the reasons stated herein, CEMA strongly urges the Commission not to consider damages or the retrofit of equipment as possible penalties for violations of Section 25 5.

## VI. CONCLUSION

CEMA supports the public policy goals behind Section 255, but urges the Commission to implement this section in an economically realistic manner. Implementation that is not mindful of economic realities of manufacturing products in highly competitive markets will not serve the interests of the disabled or the public at large if the net result of the implementation of Section 255 is a decrease in new products and significantly higher costs. The Commission should focus its efforts on inducing cooperation between industry and organizations representing persons with disabilities for implementation of this section, not on formulating ambiguous and obscure mandates and legalistic enforcement procedures that will promote needless controversies, the approach manifested in the *NPRM*. For the reasons set

[56] Reed E. Hundt, "The Hard Road Ahead – An Agenda for the FCC in 1997," FCC News (Dec. 26, 1996).

forth in this Comment, CEMA urges the Commission to adopt the foregoing proposals and recommendations.

Respectfully submitted,

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