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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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
CONSUMER ELECTRONICS MANUFACTURERS ASSOCIATION

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SUMMARY OF POSITION

The Consumer Electronics Manufacturers Association ("CEMA") and its customers support the purposes of Section 255, but must take the opportunity afforded by the Commission's Notice of Proposed Rulemaking ("*NPRM*") to suggest that the Commission's implementation of this section must be done in an achievable, customer friendly. and economically realistic manner. CEMA companies strive to create markets for all customers, including those with disabilities. CEMA and its members participated in the Telecommunications Access Advisory Committee that was formed to advise about the implementation of this section. Thanks to the efforts of CEMA, its members, their customers, and other like-minded organizations, the needs of people with disabilities are now met through a growing marketplace. Where demonstrated deficiencies exist, however, the Commission can rest assured that CEMA and its members will be responsive.

Given its members' experience with customers, CEMA believes that the FCC's proposed implementation is not mindful of the economic realities of manufacturing products in highly competitive markets will not serve the interests of people with disabilities or the public at large. Such will be the case if the net result of implementation of Section 255 is a decrease in new products and significantly higher costs paid by persons with disabilities and mass-market consumers. CEMA urges the Commission to focus this initiative on cooperative efforts that benefit all markets and customers and not to impose government regulation that results in obscure mandates or legalistic enforcement procedures that, in the end, create rather than minimize controversies.

Thus, although CEMA supports the need to address the emerging market for specialized capabilities, CEMA disagrees with some of the fundamental aspects of the FCC's

approach. Unfortunately, the *NPRM* demonstrates a propensity to intrude into every level of economic decisionmaking by manufacturers and distributors, Such government intrusiveness, even for the loftiest of purposes, shows a total absence of understanding of the dynamics of a vibrant marketplace that has served all consumers so well. CEMA urges the Commission to focus on outcomes *(i.e.*, determinations if the needs of the disabled are met in the marketplace, and if not, then determinations of what products need to be provided to meet those needs). rather than attempting the economic micromanagement of thousands of manufacturers and distributors.

CEMA's position on several of the Commission's tentative proposals are summarized below:

RE: <u>The Commission's Statutory Authority</u>

(1). The Commission does not have adequate authority to promulgate mandatory rules implementing Section 255. The plain text of Section 255 does not direct the Commission to prescribe rules on accessibility for the disabled. See II.B, *infra*.

(2). The Access Board's guidelines should not be considered determinative in the Commission's implementation of Section 255. If the Commission, however. intends to issue rules implementing Section 255, it should not consider the Board's guidelines determinative on any issue. *See* II.B, *infra.*

RE: <u>Statutory Definitions</u>

(1). The Commission should not broaden the definition of "readily achievable" in its implementation of Section 255. Any expansion of the definition beyond the Americans with Disabilities Act definition risks conflict between the Commission's interpretation of its own authority under the Communications Act. and the express directions Congress provided. See III.A, *infra.*

(2). CEMA generally agrees with the Commission's tentative conclusion that Section 255 applies to "equipment used in the provision of telecommunications service." However, the Commission must not broaden this coverage to include equipment that is used only tangentially in combination with telecommunications services. In the case of multi-use equipment, the Commission should apply Section 255 only to the extent that the equipment is designed for telecommunications functions, and is used primarily for the provision of telecommunications services.

Equipment that does not connect to the public switched network should not be covered. See III.B, *infra.*

(3). The Commission must accord expense and practicability factors substantial weight in assessing whether an accessibility feature is "readily achievable." By incorporating the ADA's definition of "readily achievable" in the statute, Congress sought to ensure that a manufacturer's obligation to modify the equipment it produces would reflect its financial ability to do so. Further, CEMA agrees with the Commission that opportunity costs must also be factored in the analysis. Finally, manufacturers must not be required to absorb the cost of accessibility features, because doing so would create a major disincentive for product development. See IV.A, *infra*

(4). The financial resources of a parent company should not be considered in determining what equipment modifications are "readily achievable." Instead, the Commission should consider the financial resources directly controlled by the unit responsible for the design and production of equipment. See IV.B, *infra.*

(5). Manufacturers should not be required to provide accessibility features in each product they develop. Imposing such a requirement would be unreasonable because of the costs that the manufacturer would have to bear. The Commission should make it possible for a manufacturer to satisfy accessibility requirements through other products already available in the market. See IV.C, *infra.*

(6). CEMA believes that the life cycle of a product should have no bearing on whether an accommodating feature is "readily achievable." For a manufacturer, the product life cycle is often largely irrelevant to the cost of producing the product. With respect to the impact of design and production cycles, CEMA agrees with the Access Board that guidelines under Section 255 should be applied prospectively. See IV.D, *infra.*

RE: **Implementation and Enforcement of Section 255**

(1). The Commission should require complainants to demonstrate standing to file a complaint under Section 255. The Commission has not provided a sufficient legal basis for choosing not to establish a standing requirement. A standing requirement is essential to deterring abuse of the complaint process and to preventing delay of complaints filed by individuals who actually need relief -- the disabled. See V.A, *infra.*

(2). The Commission should establish a time limit for filing a complaint under Section 255. In instances where Congress was silent about a limitations period, courts have applied an analogous local time limitations or analogous federal law that specifies a limitations period. As an example, the Commission could rely on the two year statute of limitations period found under Section 415(a). See V.B, *infra.*

(3). The Commission should require, not just "encourage," complainants to contact the manufacturer before lodging a complaint. Only if there is credible evidence that the manufacturer has not been responsive to the consumer's concerns should the Commission commence processing the complaint. Furthermore, before forwarding the complaint to the manufacturer, the Commission should first conduct a threshold determination that the complaint is valid under Section 255. See V.C, *infra.*

(4). The Commission should provide equipment manufacturers at least 30, not five, business days to try to resolve a consumer's complaint under Section 255. Five days would not be sufficient to resolve the problem and gather relevant information to report to the Commission. Further, affording manufacturers an appropriate amount of time, such as 30 days, would minimize the number of requests for time extension. See V.D., *infra.*

(5) The Commission should severely limit complainants' access to proprietary information that might otherwise be available through the formal complaint discovery process. Without appropriate protections, sensitive design and cost information could easily be transferred to competitors, which would distort the marketplace and harm innocent manufacturers. See V.E., *infra.*

(6). Section 255 does not authorize the Commission to award monetary damages to complainants. The text and legislative history of Section 255 provide no such relief to complainants. Furthermore, Section 255 does not authorize the Commission to order the retrofit of accessibility features. CEMA agrees with the Access Board's decision to apply its guidelines only prospectively, "[with] no requirement to retrofit existing equipment." See V.E., *infra.*

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Implementation of Section 2.55 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
CONSUMER ELECTRONICS MANUFACTURERS ASSOCIATION

The Consumer Electronics Manufacturers Association ("CEMA") hereby submits the following comments in response to the Notice of Proposed Rule Making ("*NPRM*") which the Commission issued in the above-captioned proceeding on April 20, 1998.[1] In the *NPRM*, the Commission seeks comment on how best to implement Congress's directives regarding access to telecommunications services and customer premises equipment ("CPE") by persons with disabilities, as set forth in Section 255 of the Communications Act, as amended.[2]

Implementation of Section 2.55 of the Telecommunications Act of 1996: Access to Telecommunications Services, Telecommunicutions Services, Telecommunicutions Equipment and Customer Premises Equipment by Persons with Disabilities, Notice of Proposed Rulemaking, WT Docket No. 96-198, FCC 98-55 (1998) (hereinafter "*NPRM*").

Section 255 was added to the Communications Act by Section 101 of the Telecommunications Act of 1996. See Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996).

As set forth more fully below, CEMA strongly supports the production of telecommunications equipment and CPE that is accessible to, and usable by, persons with disabilities. Such accessible equipment, however, should be made available in such a way that does not unnecessarily discourage technological innovations or increase the prices paid by the general public for mass-market equipment. Most importantly, equipment manufacturers should be afforded the flexibility to provide accessible equipment in the most cost-effective manner.

I. INTRODUCTION

A. Identification And Interest Of CEMA

CEMA's members design, manufacture, import, distribute and sell a wide variety of consumer electronics equipment, including cordless telephones, personal computers, answering machines, television receivers, cable set-top boxes, VCRs, camcorders, audio equipment, and in-home network wiring and equipment. As an association of companies that manufacture consumer electronics equipment that can be used with telecommunications services, CEMA has an interest in ensuring that *both* mass-market consumers *and* persons with disabilities have quality equipment available at affordable prices.

B. Summary Of Position

CEMA supports the purposes of Section 255, but urges the Commission to implement this section in an economically realistic manner. CEMA is involved in various activities to increase access for those with disabilities, including participation in the Telecommunications Access Advisory Committee ("TAAC") which has made recommendations for guidelines for the implementation of this section. Thanks to the efforts of CEMA, its members, and other like-minded organizations, the needs of persons with

disabilities are met through specialized products and growing markets. Where demonstrated deficiencies exist, CEMA and its members will be responsive.

The NPRM demonstrates an unfortunate propensity to intrude into every level of economic decisionmaking by manufacturers and distributors. CEMA urges that Commission implementation of Section 255 be limited to areas within its own jurisdiction and expertise. The Commission must be careful not to expand upon the statutory definition of "readily achievable" or to broaden the application of Section 255 beyond the limits set in the statute. Accordingly, Section 255 should apply only to equipment that is intended to be used for telecommunications. In enforcing Section 255. the Commission should rely primarily on informal measures, not on detailed implementation rules, such as those applicable to complaints under Sections 207 and 208, in addressing the accessibility concerns of the disabled. Finally, the Commission must take all the steps necessary to ensure that any Section 255 implementation rules are not unduly burdensome to small manufacturers; it should also adopt those rules that serve to minimize the economic impact of this rulemaking on small entities.[3]

[3] See Regulatory Flexibility Act, 5 U.S.C. §§ 601-602, as amended by the Contract with America Advancement Act of 1996, Pub. L. No. 104-121, 110 Stat. 847 (1996).

II. THE COMMISSION'S IMPLEMENTATION OF SECTION 255 SHOULD BE LIMITED TO AREAS WITHIN ITS OWN JURISDICTION AND EXPERTISE.

A. The Commission Does Not Have Adequate Statutory Authority To Promulgate Mandatory Rules Implementing Section 255.

In the *Notice of Inquiry"* and in the *NPRM,* the Commission relies upon rulemaking authority derived from Sections 4(i), 201(b), and 303(r) of the Communications Act, as amended, to implement its proposed framework for Section 255.[5] The Commission claims that the absence of statutory language to the contrary provides the Commission the necessary authority to implement Section 255 through rulemaking.[6] CEMA must reiterate its disagreement with this conclusion.

Notably, the plain text of Section 255 does not direct the Commission to prescribe rules on accessibility for the disabled. Rather, Congress expressly decided that the Commission should *not* establish accessibility regulations by excluding specifically those provisions in both the House and Senate bills which would have authorized the Commission to impose such regulations. The Conference Report notes that no requirement for FCC regulations on accessibility were present in Section 262(e) of the Senate bill. This requirement was contained in Section 262(g).[7] The Conference Report further indicates that the conferees decided to adopt subsections (a), (b), (c), (d), and (e) of new Section 262.[8]

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4 *Implementation of Section 25.5 of the Telecommunications Act of 1996: Access to Telecommunications Services, Telecommunications Equipment and Customer Premises Equipment by Persons with Disabilities,* Notice of Inquiry, 11 FCC Rcd 19152 (1996).

5 *NPRM* at ¶¶ 24-28.

6 *Id.* at ¶ 24.

7 *Id.* at ¶ 24.

8 *Id.* at ¶ 135.

Section 262(g) — the provision that contained directions to adopt regulations on accessibility — was specifically excluded. Similarly, the Conference Report notes that Section 249(c) of the House bill directed the Commission to establish regulations. This provision was also left out of the final draft as the conferees decided to adopt the Senate provision instead of the House provision.[9] As was the case with Section 262(g) of the Senate bill, Section 249(c) of the House bill was excluded.

The Commission must not ignore Congressional judgments in drafting the language of Section 255, which specifically omitted language that would have directed the Commission to promulgate mandatory standards requiring accessibility features to be incorporated into telecommunications equipment. CEMA submits that the language and history of the statute speak for themselves, and that Congress did not give the Commission a mandate to enact substantive rules that extend beyond the express requirements of this section, Rather than the lengthy and confusing discussion of the substantive requirements of Section 255 found in the NPRM, the Commission should restrict itself to simplified enforcement procedures that focus on correcting any demonstrated deficiencies among manufacturers and providers in meeting the telecommunications needs of the disabled.

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[9] Section 249(d) of the House bill was the only exception to the conference decision to adopt the Senate bill.

B. The Access Board's Guidelines Should Not Be Considered Determinative In The Commission's Implementation Of Section 255.

The Commission's authority to promulgate rules implementing Section 255 becomes even more attenuated given that it proposes to modify the Access Board's *voluntary guidelines* and essentially proposes to adopt these as mandatory rules." CEMA believes that if the Commission intends to issue rules implementing Section 255, it should not consider the Board's guidelines determinative on any issue. It will be the Commission, not the Access Board, that will be called upon to enforce Section 255 regulations, and to defend its enforcement measures when challenged by affected parties.

According the Access Board's guidelines any deference in the implementation of FCC regulations would also be contrary to congressional intent, as evinced by the legislative history. As the Commission itself notes, "Section 255 directs the Access Board to develop equipment accessibility guidelines 'in conjunction with' the Commission. . . ."[11] It is clear from this language that Congress did not intend for the Access Board (or the Commission, for that matter) to prescribe mandatory requirements on a unilateral basis.

In contrast to its purpose under Section 255, Congress intended a different role for the Access Board under the Americans with Disabilities Act ("ADA").[12] As the Commission notes, "the ADA explicitly provides that the Board's guidelines establish minimum requirements for implementation by other agencies."[13] With respect to Section 255.

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10 *NPRM* at ¶ 29-30.

11 *Id.* at 29.

12 Pub. L. No. 101-336, 104 Stat. 327-378 (1990) (codified at 42 U.S.C. §§ 12101-122213).

13 *NPRM* at ¶ 29 n.55.

there is no indication of any Congressional intent that the Board's guidelines establish any type of requirement. CEMA thus maintains that the Board's guidelines should be treated as guidelines, and that they should not serve as a springboard for the Commission to leap into areas in which its jurisdiction is questionable.

III. CONGRESS DID NOT INTEND FOR THE COMMISSION TO EXPAND UPON THE STATUTORY DEFINITION OF "READILY ACHIEVABLE" OR ON THE APPLICATION OF SECTION 255.

A. Section 255 Expressly Incorporates The ADA Definition Of "Readily Achievable."

Both the text and legislative history of Section 255 indicate that Congress intended for the definition of "readily achievable" to be identical with the definition contained in the ADA. By incorporating the ADA definition, Congress clarified that the Commission's standards for determining whether manufacturers are in compliance with Section 255 should be no different from the standard for "readily achievable" under the ADA.[14] CEMA strongly urges the Commission to resist the apparent temptation to broaden the definition of this crucial term in its implementation of Section 255. Any expansion of the definition beyond the ADA definition risks a conflict between the Commission's interpretation of its own authority under the Communications Act, and the express directions Congress provided for the implementation of Section 255.

[14] See Conference Report at 120.

B. Section 255 Should Only Apply To Equipment That Is Intended to Be Used For Telecommunications.

CEMA generally agrees with the Commission's tentative conclusion that Section 255 applies to "equipment used in the provision of telecommunications service."[15] The Commission must not broaden this coverage, however, to include equipment that is used only tangentially in combination with telecommunications services. There is danger that the Commission's application of Section 255 would be overly broad if the Commission decides that multi-use equipment should be subject to Section 255. In the case of multi-use equipment, the Commission should apply Section 255 only to the extent that the equipment is designed for telecommunications functions, and is *intended to be used for the provision oj' telecommunications services.*

In this respect, CEMA supports the Commission's proposal to apply Section 255 to "multi-use equipment only to the extent that the equipment serves a telecommunications function."[16] CEMA cautions, however, that Section 255 should not be applied to equipment "apparently intended for a non-telecommunications application, but that finds use in connection with a telecommunications service subject to Section 255."[17] CEMA believes that applying Section 255 to multi-use equipment could deter beneficial innovations -- particularly those designed to facilitate the convergence of communications technologies. Televisions, video recorders, and home audio equipment, and personal computers, for example, do not come within the Commission's proposed application of Section 255. However, given the

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15 *NPRM* at ¶ 49.

16 *Id.* at ¶ 53.

17 *Id.*

speed at which technological advances occur in this industry, it is not inconceivable that such equipment may someday have the capability to carry out telecommunications functions, The Commission should not inadvertantly deter such technological convergence by needlessly subjecting manufacturers of non-telecommunications equipment to Section 255.

The Commission also should not stray beyond the statutory boundaries of Section 255 by embarking upon the regulation of equipment intended for non-telecommunications applications. Only "telecommunications equipment" and "customer premises equipment" ("CPE"), as defined by the 1996 Act, come within the ambit of Section 255. Although the Telecommunications Act's definition of these terms and the "telecommunications services" made possible by such equipment is broad, it is clear that Section 255 was intended to apply only to equipment used for some form of connection to the public network." Section 255 should not apply to an intercom system or a set of monitors used for one-way communications (e.g., baby monitors) or short-range, two-way voice communication (e.g., family radio), because neither would terminate on the public switched network.

The Commission consistently has found that equipment not used for telecommunications purposes must remain unregulated in order to foster competition and innovation." Thus, even before the AT&T divestiture, the Commission embraced the benefits of competition in the market for CPE, and opted against "impos[ing] an artificial, uneconomic

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18 The Joint Explanatory Statement states that the definition of "telecommunications" is derived from the Modification of Final Judgment, a decision that dealt solely with the Bell System's services and equipment. As the definition of "customer premises equipment" references the term "telecommunications," it is apparent that the former term should encompass only equipment that is utilized with network services,

19 *See, e.g., Carterfone*, *13* FCC 2d 420, *recon. den.* 14 FCC 2d 571 (1968).

constraint on either the design of CPE or the use to which it is put."[20] In allowing the market for equipment to develop without excessive intervention, the Commission has found that:

> this policy has afforded consumers more options in obtaining equipment that best suits their communication or information processing needs. Benefits of this competitive policy have been found in such areas as improved maintenance and reliability, improved installation features including ease of making changes, competitive sources of supply, the option of leasing or owning equipment, and competitive pricing and payment options.[21]

The Commission should maintain this approach, in order to allow the market to address the needs of customers in need of accessible equipment.

IV. THE COMMISSION'S PROPOSED FACTORS MUST BE CONSISTENT WITH A STRICT READING OF "READILY ACHIEVABLE" UNDER SECTION 255.

A. Cost Should Be The Primary Factor In Determining Whether An Equipment Modification is "Readily Achievable" Under Section 255.

In the *NPRM*, the Commission acknowledges the ADA's limited definition for "readily achievable"[22] and proposes to use this approach in its application of Section 255.[23] CEMA agrees generally with this definition, and with the factors the Commission proposes to use in assessing whether an accommodation is "readily achievable" under Section 255.[24] CEMA

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20 In the Matter of Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry), 77 FCC 2d 384,438 (1980).

21 *Id.* at 439.

22 The ADA defines "readily achievable" as "easily accomplishable and able to be carried out without much difficulty or expense." See Section 255(a)(2) of the Communications Act, 47 U.S.C. § 255(a)(2).

23 *NPRM* at ¶ 94.

24 As noted above in Section III of these comments, however, the Commission need not expound substantive rules elucidating these factors, particularly if the complexities and ambiguities of such rules were to mirror the discussion in the *NPRM*, thus generating needless controversies.

must emphasize, however, that expense and practicability factors must be accorded substantial weight. By incorporating the ADA's definition of "readily achievable," Congress sought to ensure that a manufacturer's obligation to modify the equipment it produces would reflect its financial ability to do so. CEMA cautions that the expense and uncertainties created through the imposition of regulations under Section 255 must not be allowed to deter innovation in a consumer electronics marketplace that is highly competitive.

As the Commission has acknowledged, the expenses of compliance could manifest themselves in a variety of different ways. In many cases, significant resources must be available to an equipment provider to meet the expense associated with making its products accessible. The provider must have the necessary staff, finances, and facilities to design accessible products or to make the necessary modifications to its product lines. As the Commission noted, certain solutions for implementing an accessibility feature may require the hiring of expert staff to solve technological design problems.[25] CEMA agrees with this concern. In addition, CEMA agrees that opportunity costs must also be factored into the analysis.[26]

The Commission has no authority to require manufacturers to absorb any of the costs for making products accessible nor would any such requirement prove to be good public policy. In the first place, it is axiomatic that supply and demand, not costs, dictate the prices of goods supplied in a competitive marketplace; so any attempt by regulation to limit the pass-through of the costs of accessibility features is bound to create market distortions. If manufacturers were required to absorb the costs of accessibility features, the Commission

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[25] *Id.* at ¶ 104.

would create a major disincentive for product development. In a highly competitive market. there is little incentive for manufacturers to create a product if the product cannot make a reasonable profit, based on their ability to pass through costs that the market will bear. CEMA therefore urges the Commission to factor in a manufacturer's ability to fully recover the incremental cost of the accessibility feature into its expense calculation. This would take into account any economic disincentives for manufacturing new products, limit needless controversies about manufacturers' responsiblities, and provide for a clear calculus as to whether accessibility is "readily achievable" or not.

B. The Financial Resources of A Parent Company Should Not Be Considered In Determining What Equipment Modifications Are "Readily Achievable."

In addition to factoring in the cost of equipment modifications, the Commission must also consider the ability of the manufacturer to bear the cost of modifications. The Commission must not allow such modifications to subject manufacturers to undue burdens. This is particularly important with respect to small businesses engaged in manufacturing products subject to Section 255. It is also important with respect to the manufacturing subsidiaries of large companies. CEMA agrees with the Commission's finding in this respect: in its calculations to assess whether an accommodation is "readily achievable," the Commission must consider the financial resources directly controlled by the unit responsible for the design and production of the equipment.

Modern corporations do not generally subsidize their various business units. A business unit that cannot turn a profit within the parameters set by corporate leadership will be discontinued. The *NPRM* suggests that this type of economic decisionmaking should now be altered to promote product accessibility, but it can suggest no clear guidelines as to how this is

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[26] *Id.*

to be accomplished.[27] The Commission should abandon this approach to formulating regulations that make ordinary economic considerations secondary to ill-formed and uncertain non-economic considerations. Instead, manufacturers must be permitted to exercise the economic judgment forged in the marketplace in their determinations whether the inclusion of accessibility features is "readily achievable."

c. **Manufacturers Should Not Be Required To Provide Accessibility Features In Each Product They Develop.**

CEMA believes that the Commission's feasibility calculation should not be the focus of its inquiry to determine whether an accessibility feature is "readily achievable." Integral to the definition of "readily achievable" is the assumption that the costs imposed on a manufacturer will not be difficult to bear. As CEMA has noted above, by incorporating the ADA definition of "readily achievable" Congress intended that the costs imposed on manufacturers would be reasonable, and not unduly burdensome. Clearly, the definition Congress provided for "'readily achievable" would not allow the Commission to impose requirements to provide accessibility features in *every* product. Given the dynamics of the marketplace, such a reading of the standard would be ill-conceived and would present insurmountable design obstacles. CEMA believes that it should be possible to satisfy accessibility requirements through other products already available in the market. In the past, competition has responded to demand created by disabled users of telecommunications and customer-premises equipment. CEMA sees no reason why this would not continue to occur in the absence of mandatory rules broadly prescribing accessibility features in multitudes of

[27] See *NPRM* at ¶ 109. The *NPRM* discusses whether a subunit does or does not have access to the full resources of the corporation. This reference demonstrates a near-total non-comprehension of corporate decisionmaking. Such a sub-unit has available to it the resources allotted by corporate leadership, nothing more or less.

products. The Commission should make it clear that its purpose in this proceeding is to see that the needs of the disabled are met through a variety of products, but if such needs are being met, not every product must include accessibility features, nor would any practical definition of "readily achievable" mandate such a requirement. The goal of Section 255 is to ensure that persons with disabilities are provided with a selection of accessible telecommunications equipment. So long as this goal is achieved, it should make no difference to the Commission whether manufacturers choose to develop some products for the general public and others specifically for persons with disabilities.

The Commission must also make clear that innovations specifically devoted to improving accessibility are not unnecessarily stifled. As an example, one company could design a product specifically for the use of the hearing-impaired. This company's independent, market-based initiative to meet the needs of this group of consumers should not be discouraged by federal regulations requiring the company to adapt this product for individuals with other, possibly incompatible, needs. The Commission must not discourage this type of initiative by imposing unreasonable burdens on manufacturers. Such an absurd application of Section 255 simply must be avoided.

D. Design And Production Cycles Must Be Taken Into Account In Calculations To Determine "Readily Achievable" Accessibility.

CEMA believes that the life cycle of a product should have no bearing on whether an accommodating feature is "readily achievable." For a manufacturer, the product life cycle is often largely irrelevant to the cost of producing the product. If modifications must be made on a product to incorporate accessibility features, such modifications must be made at the design level. At the production level, such modifications will likely be more costly to implement. In

both instances, such costs are especially difficult for small businesses to bear. The financial concerns of small businesses were taken into account during the implementation of the ADA,[28] and should not be overlooked in the Commission's implementation of Section 255. Thus, CEMA believes that the relevant question remains whether any new costs are engendered by accessibility requirements that would hinder the development of new products.

With respect to the impact of design and production cycles, CEMA agrees with the Access Board that guidelines under Section 255 should be applied "prospectively."[29] This is consistent with CEMA's view that accessible products already in the marketplace that meet the needs of affected disabled persons should satisfy any requirement to modify products already available. The projected roll-out of an accessible replacement product should likewise satisfy requirements to modify existing products. This would allow manufacturers to concentrate their resources on developing new products, instead of redundant ones for which the demand is already being addressed.

V. IN ENFORCING SECTION 255, THE COMMISSION SHOULD RELY PRIMARILY ON INFORMAL MEASURES, NOT ON DETAILED IMPLEMENTATION RULES, IN RESOLVING DISPUTES BETWEEN A COMPLAINANT AND A MANUFACTURER.

In the *NPRM*, the Commission set forth proposals to implement and enforce the requirement of Section 255 that telecommunications offerings be accessible to the extent readily achievable.[30] The Commission proposes a "two-phase program" for dealing with consumers' issues arising under Section 255. In the first phase, also referred to as the "fast-track problem solving phase," the Commission proposes to refer consumer inquiries and

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28 For example, small businesses are given more time to comply with modification provisions of the ADA. See ADA, Pub. L. No. 101-336, 104 Stat. 353, § 310.

29 *NPRM* at ¶ 119.

complaints to the manufacturer or service provider concerned, who will have a five-business-day period to solve the complainant's access problem and informally report to the Commission the results of its efforts. If disputes remain unresolved under fast-track procedures, the Commission indicates that the matter "may proceed" to a "second-phase dispute resolution process." Under the second phase, the Commission proposes to resolve most Section 255 complaints using informal, investigative procedures. For "special circumstances," the Commission proposes to establish formal adjudicatory procedures, to be employed only where the complainant requests such resolution and the Commission, in its discretion, permits the complainant to invoke formal procedures. The Commission also proposes to allow use of alternative dispute resolution procedures, in cases in which the Commission and all parties agree that such procedures are appropriate. The Commission invites comments on this general procedure, including its proposals to enforce the requirements of Section 255.

As a general matter, CEMA agrees with the Commission's mission to involve service providers and manufacturers in a process that identifies and solves accessibility problems with minimal (if any) government intervention. The procedures set forth in the *NPRM*, however, do not fully reflect such an approach. In implementing a procedural framework, CEMA urges the Commission to rely primarily on informal measures, not detailed implementation rules, in resolving disputes between the complainant and the manufacturer. This favored approach will enable manufacturers to apply their resources to solving access problems along with consumers in an amicable manner, rather than expending valuable time responding to costly and time-consuming procedural requirements. In instances where disputes cannot be resolved informally, CEMA favors the use of alternative dispute resolution

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30 *Id.* at ¶¶ 124-174.

procedures to the extent that all parties agree that such options are appropriate under the circumstances.[31]

Specifically, CEMA urges the Commission to adopt the following six modifications to its procedural framework. First, the Commission should require complainants to demonstrate standing to file a Section 255 complaint. Second, the Commission should establish a time limit for filing a complaint under Section 255. Third, the Commission should require, not just encourage, complainants to contact the manufacturer before lodging a complaint. Fourth, the Commission should provide manufacturers at least 30, not five, business days to try to resolve the complainant's concerns. Fifth, the Commission should institute special protections for proprietary information that may be of issue in such proceedings. Sixth, the Commission should not impose damages or order the retrofit of accessibility features for alleged violations of Section 255, because the Commission has no authority to impose such remedies,

A. The Commission Should Require Complainants to Demonstrate Standing To File A Section 255 Complaint.

CEMA strongly objects to the Commission's proposal not to establish a standing requirement for complaints filed under Section 255.[32] The Commission has not provided a

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31 For the sake of simplicity, CEMA will use the term "complaint" in the discussion below on proceedings involving alleged violations of Section 255 by manufacturers. As stated in its comments on the *NOI* at pp. 16-17, however, CEMA believes that the formal complaint rules formulated by the Commission under the auspices of Sections 207-209 of the Communications Act should apply only to common carriers, not to manufacturers. Instead, the Commission should utilize other existing procedural frameworks, such as those used for notices of apparent liability and cease-and-desist orders, in enforcing Section 255 with respect to manufacturers.

32 *Id.* at ¶ 148.

sufficient legal basis for choosing not to require complainants to establish standing.[33] Allowing parties other than those with disabilities, or those representing them, to file a Section 25.5 complaint would thwart Congressional intent. The very language of the statute makes clear that Congress intended for the Commission to address the accessibility concerns of the disabled, not any would-be complainant that might include competitors, disgruntled former employees, and even "green mail"-type extortionists.[34] Parties filing under this section must be able to demonstrate injury-in-fact. In the context of federal civil actions, for example, the Supreme Court has long recognized that federal judicial power exists "only to redress an injury to the complaining party."[35] Applying this principle, only those with a disability, including organizations acting on behalf of the disabled, should be accorded standing to file a Section 255 complaint.[36]

Without a standing requirement, a complainant who has no interest in product accessibility or who has a purely economic or other improper interest would be permitted to

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33 The Commission simply notes that the statute is silent on the issue of standing, and surmises that imposing a standing requirement would burden the complaint process with disputes relating to standing. *Id.*

34 Even the Commission recognizes that Section 255 was established to address only the complaints of aggrieved parties. In the *NPRM*, the Commission states, "Section 255 has established a new statutory right *for aggrieved parties* to file complaints . . . ." *Id.* at ¶ 2.

35 *Warth v. Seldin, 422* U.S. 490,499 (1975).

36 CEMA recognizes that organizations that represent the interests of the disabled -- such as the American Foundation for the Blind, the National Association for the Deaf, and the National Council on Disability -- may also have standing to file a Section 255 complaint. *See Hunt v. Washington Apple Advertising Comm 'n, 432* U.S. 333, 343 (1977) ("An association may have standing to sue on behalf of its members when its members would otherwise have standing to sue on their own right, the interests it seeks to protect are germane to the organization's purpose and neither the claim asserted nor the relief requested requires the participation of individual members.").