FEDERAL COMMUNICATIONS COMMISSION

47 CFR PART 1

[WT Docket No. 96–198; FCC 98–55]

Implementation of Section 255 of the Telecommunications Act of 1996: Access to Telecommunications Services, Telecommunications Equipment, and Customer Premises Equipment by Persons With Disabilities

AGENCY: Federal Communications Commission.

ACTION: Notice of proposed rulemaking.

SUMMARY: This Notice of Proposed Rulemaking (NPRM) is an important step in the Commission's effort to increase the accessibility of telecommunications services and equipment to Americans with disabilities. The NPRM proposes a framework for implementing section 255 of the Communications Act of 1934 (Act), which requires telecommunications equipment manufacturers and service providers to ensure that their equipment and services are accessible to persons with disabilities, to the extent it is readily achievable to do so. In addition, if accessibility is not readily achievable, section 255 requires manufacturers and service providers to ensure compatibility with existing peripheral devices or specialized customer premises equipment commonly used by individuals with disabilities to achieve access, to the extent it is readily achievable to do so. The NPRM first explores the Commission's legal authority to establish rules implementing section 255. The NPRM then seeks comment on the interpretation of specific statutory terms that are relevant to the proceeding. Finally, the NPRM seeks comment on proposals to implement and enforce the requirement that telecommunications equipment and services be made accessible to the extent readily achievable. The actions proposed in the NPRM are needed to ensure that people with disabilities are not left behind in the telecommunications revolution and consequently isolated from contemporary life.

DATES: Comments are due on or before June 30, 1998, and reply comments are due on or before August 14, 1998. Written comments by the public on the proposed information collections are due on or before June 30, 1998. Written comments must be submitted by OMB on the proposed information collections on or before July 21, 1998.

ADDRESSES: Federal Communications Commission, Office of the Secretary, Room 222, Washington, D.C. 20554. In addition to filing comments with the Secretary, a copy of any comments on the information collections contained in the NPRM should be submitted to Judy Boley, Federal Communications Commission, Room 234, 1919 M Street, N.W., Washington, DC 20554, or via the Internet to jboley@fcc.gov, and to Timothy Fain, OMB Desk Officer, 10236 NEOB, 725–17th Street, N.W., Washington, D.C. 20503, or via the internet to fain__t@a1.eop.gov.

FOR FURTHER INFORMATION CONTACT: John Spencer, Mindy Littell, or Susan Kimmel, 202–418–1310. For additional information concerning the information collections contained in the NPRM, contact Judy Boley at 202–418–0214, or via the Internet at jboley@fcc.gov.

SUPPLEMENTARY INFORMATION: This is a synopsis of the NPRM in WT Docket No. 98–198, FCC 98–55, adopted April 2, 1998, and released April 20, 1998. The complete text of the NPRM is available for inspection and copying during normal business hours in the FCC Reference Center (Room 239), 1919 M Street, N.W., Washington, D.C., and also may be purchased from the Commission's copy contractor, International Transcription Services (ITS, Inc.), (202) 857–3800, 1231 20th Street, N.W., Washington, D.C. 20036. Alternative formats of the full text of the NPRM are available to persons with disabilities in the following forms: computer diskette, large print, audio cassette, and Braille, by contacting Martha Contee at (202) 418–0260, TTY (202) 418–2555, or at mcontee@fcc.gov, or Ruth Dancey at (202) 418–0305, TTY (202) 418–2970, or at rdancey@fcc.gov. The full text of the NPRM can also be downloaded at http://www.fcc.gov/dtf/section255.html.

All relevant and timely comments will be considered by the Commission before final action is taken in this proceeding. To file formally in this proceeding, participants must file an original and five copies of all comments, reply comments, and supporting comments. If participants want each Commissioner to receive a personal copy of their comments, an original and nine copies must be filed. Comments and reply comments will be available for public inspection during regular business hours in the Commission's Reference Center and through ITS, Inc., the Commission's duplicating contractor.

For purposes of this proceeding, the Commission waives those provisions of the rules that require formal comments to be filed on paper, and encourages parties to file comments electronically. Electronically filed comments that conform to the guidelines specified in this summary will be considered part of the record in this proceeding and accorded the same treatment as comments filed on paper pursuant to Commission rules. To file electronic comments in this proceeding, parties may use the electronic filing interface available on the Commission's World Wide Web site at: <http://dettifoss.fcc.gov:8080/cgi-bin/ws.exe/beta/ecfs/upload.hts>. Further information on the process of submitting comments electronically is available at that location and at: <http://www.fcc.gov/e-file/>.

Paperwork Reduction Act

The NPRM contains a proposed information collection. The Commission, as part of its continuing effort to reduce paperwork burdens, invites the general public and OMB to comment on the information collections contained in the NPRM, as required by the Paperwork Reduction Act of 1995, Public Law No. 104–13. Public comments are due on or before June 30, 1998. Written comments must be submitted by OMB on the proposed information collections on or before July 21, 1998. Comments should address: (1) Whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (2) the accuracy of the Commission's burden estimates; (3) ways to enhance the quality, utility, and clarity of the information collected; and (4) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology.

OMB Approval Number:

Title: Implementation of Section 255 of the Telecommunications Act of 1996: Access to Telecommunications Services, Telecommunications Equipment, and Customer Premises Equipment by Persons with Disabilities, Notice of Proposed Rulemaking, WT Docket No. 96–198.

Form No.:

Type of Review: New Collection.

Respondents: Complainants, Telecommunications Equipment Manufacturers, and Telecommunications Service Providers.

Number of Respondents: 1,000 prospective complainants annually will report accessibility problems or file complaints using the Commission's ''fast-track'' problem resolution method,

and may be asked to provide the Commission with further information later in the process. This should take approximately 2 hours per response, for a total annual burden of about 2,000 hours. There will be no estimated annual cost. Approximately 1,000 equipment manufacturers and service providers annually are expected to be involved in resolving these complaints. It is estimated that these steps will take approximately 6.50 hours per respondent for a total annual burden of 6,500 hours. The estimated annual cost is $720,000. Additionally, 78,830 telecommunications equipment manufacturers and service providers annually are expected to provide a list of contacts for disability access complaints. And it is possible that 78,830 telecommunications equipment manufacturers and service providers will have equipment or services which will receive a seal or other imprimatur from a consumer or industry group that identifies the service or equipment as in compliance with section 255. Satisfying these burdens will likely take slightly more than 1 hour per respondent for a total annual burden of 78,830 hours, and no annual cost.

Total Number of Respondents: 79,830.

Total Annual Burden: 87,330 hours.

Total Annual Cost: $720,000.

Frequency of Response: Occasional.

Needs and Uses: The information filed as part of a complaint, if the proposal made by the Commission in the NPRM is adopted, will be reviewed by the Commission and by the pertinent entity to develop a solution to the problem. The information filed by the consumer after a complaint is resolved, if the proposal made by the Commission in the NPRM is adopted, will be used by the Commission to verify that the complainant is satisfied that either the impediment to accessibility no longer exists or that a practical solution could not be reached. Any demonstrations made by manufacturers and service providers that accessibility was considered in the equipment or service design process will be used by the Commission to evaluate compliance with the intent of section 255. The interim and final reports submitted by these entities will be used by the Commission to track the progress of resolution of complaints. Rebuttals to assertions of resource availability will help determine whether a particular accessibility measure is a readily achievable solution to an accessibility problem. The list of contacts who are responsible for telecommunications access complaints in each company will be used to speed the complaint process and to increase the likelihood of settlement between parties before the complaint reaches the Commission. The seal or imprimatur from a consumer or industry group that identifies a service or equipment as in compliance with section 255 will be used to inform consumers about the accessibility of particular products or services and will serve as an incentive for compliance by manufacturers and service providers.

Synopsis of Notice of Proposed Rulemaking

1. The Commission adopts this NPRM as an important step in opening the telecommunications revolution to the 54 million Americans with disabilities. Section 255 of the of the Communications Act (section 255), as added by the Telecommunications Act of 1996 (1996 Act)[1] mandates that telecommunications equipment manufacturers and service providers must ensure that their equipment and services are accessible to persons with disabilities, to the extent that it is readily achievable to do so.[2] This goal has become increasingly important as the ability to utilize the benefits of telecommunications technology has become more critical to fully participating in American society. Congress gave the Commission two specific responsibilities: (1) to exercise exclusive jurisdiction with respect to any complaint filed under section 255, and (2) to coordinate with the Architectural and Transportation Barriers Compliance Board (Access Board) in developing guidelines for accessibility of telecommunications equipment and customer premises equipment (CPE).

2. This proceeding was initiated by Notice of Inquiry (NOI) adopted on September 16, 1996 (61 FR 50465). Additionally, in February 1998, the Access Board issued accessibility guidelines *(Access Board Order)* with respect to equipment (63 FR 5608, February 3, 1998). The NPRM is the next step in establishing a record on which to base the Commission's final rules implementing section 255.

3. The NPRM first explores the Commission's legal authority under section 255, and tentatively concludes that the Commission has authority to establish rules to implement section 255. The NPRM also considers other issues related to Commission jurisdiction, including the relationship between the Commission's authority under section 255 and the guidelines established by the Access Board.

4. The NPRM then seeks comment on the interpretation of specific statutory terms that are used in section 255. Many of the terms are defined elsewhere in the Act, and the Commission seeks comment on its tentative view that it is bound by these definitions in the context of section 255. Other terms have been incorporated from the Americans with Disabilities Act.[3] The Commission seeks comment on how these terms can be made workable in the context of telecommunications services and equipment. In particular, the NPRM addresses certain aspects of the term ''readily achievable,'' contained in section 255. The Commission proposes to adopt the ADA definition, but also proposes to establish specific factors to define ''readily achievable'' in the telecommunications context.

5. Finally, the NPRM sets forth proposals to implement and enforce the requirement of section 255 that telecommunications offerings must be accessible to the extent readily achievable. The NPRM also contains proposals based on the requirement that, if accessibility is not readily achievable, manufacturers and service providers must ensure compatibility with existing peripheral devices or specialized customer premises equipment commonly used by individuals with disabilities to achieve access, to the extent it is readily achievable to do so. The centerpiece of these proposals is a ''fast-track'' process designed to resolve many accessibility problems informally, providing consumers with quick solutions and freeing manufacturers and service providers from the burden of more structured complaint resolution procedures. In cases where fast-track solutions are not possible, however, or where there appears to be an underlying failure to comply with section 255, the Commission would pursue remedies through more conventional processes. In both cases, in assessing whether service providers and equipment manufacturers have met their accessibility obligations under section 255, the Commission would look favorably upon demonstrations by companies that they considered accessibility throughout their development of telecommunications services and equipment.

I. Statutory Authority

6. The NPRM considers the scope of the Commission's rulemaking authority and finds that, in section 255, Congress enacted broad principles that require

[1] Public Law 104–104, 110 Stat. 56 (1996).

[2] 47 U.S.C. 255.

[3] Public Law 101–336, 104 Stat. 327 (1990) (codified at 42 U.S.C. 12101–12213) (ADA).

interpretation and implementation in order to ensure an efficient, orderly, and uniform regime governing access to telecommunications services and equipment. As a result, the Commission tentatively concludes that this regime can best be implemented if it adopts specific guidance concerning the requirements of section 255, which will enable the Commission to carry out its enforcement obligations under the Act effectively and efficiently.

7. Additionally, the Commission finds that the language of section 255 indicates that Congress intended to confer upon the Commission broad substantive authority to implement the requirement that telecommunications equipment and services be accessible, and gives the Commission exclusive authority to enforce that mandate. The Commission views the Access Board's equipment guidelines as a starting point for the implementation of section 255 and stresses the importance of striving to interpret section 255 in a way that ensures that telecommunications services and equipment will be treated consistently. The Commission seeks comment on its tentative conclusion that, while it has discretion regarding use of the Access Board's guidelines in developing its comprehensive implementation scheme, the Commission proposes to accord the guidelines substantial weight in developing regulations and in developing a broader structure for implementation.

8. The Commission determines that if Congress had intended to permit complaints under section 255 only against common carriers, and not manufacturers, the statute would say so explicitly. The Commission seeks comment on whether there is any basis for concluding that damages, pursuant to sections 207 and 208 of the Act or otherwise, are available with respect to entities other than common carriers. In addition, the Commission affirms that section 255 forecloses civil actions for damages brought under section 207. The exclusive jurisdiction established in the statute for Commission consideration of complaints, in combination with the preclusion of private rights of action, does not allow for private litigation. The Commission seeks comment on this conclusion.

II. Statutory Definitions

A. Scope of Statutory Coverage

(1) ''Telecommunications'' and ''Telecommunications Service''

9. Section 255 applies to ''manufacturer[s] of telecommunications equipment or customer premises equipment'' and ''provider[s] of telecommunications service,'' and section 251(a)(2) applies only to ''telecommunications carrier[s'] * * * network features, functions, or capabilities.''[4] The Commission tentatively concludes that, to the extent these phrases are broadly grounded in the Act, they require no further definition, and the Commission need only elucidate their application in the context of section 255. To the extent specific terms arise solely in connection with section 255, however, the Commission will consider whether further definition or clarification is appropriate. The Commission notes that the use of the term ''telecommunications'' in the statute may have the effect of excluding from the coverage of section 255 a number of services that might be desired by consumers. Only those services which are considered to be ''telecommunications services'' are subject to regulation under Title II of the Act. ''Information services,'' such as voice mail and electronic mail, are excluded from regulation.

10. Many services are considered telecommunications services and, therefore, are clearly subject to the requirements of section 255. The Commission recognizes, however, that there are some important and widely used services which, under the Commission's interpretation, fall outside the scope of section 255 because they are considered information services. Given the broad objectives Congress sought to accomplish by its enactment of section 255, the Commission seeks comment on whether Congress intended section 255 to apply to a broader range of services.

(2) ''Provider of Telecommunications Service''

11. Because the Act does not define ''provider of telecommunications service,'' the NPRM proposes some clarifications regarding aspects of this phrase as used in section 255. With respect to section 255, the Commission believes that Congress intended to use the term ''provider'' broadly, to include entities that supply or furnish telecommunications services, as well as entities that make available such services. The Commission therefore proposes that all entities offering telecommunications services to the public should be separately subject to section 255, without regard to accessibility measures taken by the service provider who originates the offering. For example, the statute does not exclude resellers from the definition of telecommunications service provider. The NPRM seeks comment on this proposal.

12. Additionally, the NPRM proposes to subject a provider of telecommunications service to the requirements established in sections 255(c) and 255(d) only to the extent that it is providing telecommunications services. The Commission seeks comment on whether this proposal is practical if a provider is using the same facilities to offer telecommunications services and services not meeting the statutory definition.

(3) ''Manufacturer of Telecommunications Equipment or Customer Premises Equipment''

13. Section 255(b) of the Act provides that ''[a] manufacturer of telecommunications equipment or customer premises equipment shall ensure that the equipment is designed, developed, and fabricated to be accessible to and usable by persons with disabilities, if readily achievable.''[5]

(a) *Equipment.* 14. The NPRM finds that section 255 does not distinguish between or set out separate accessibility requirements for telecommunications equipment and customer premises equipment (CPE). The Commission tentatively concludes that these terms encompass all equipment used in the provision of telecommunications service, whether collocated with a user or found elsewhere in a telecommunications system. The Commission further tentatively concludes that section 255 applies to all such equipment the same requirement of functional accessibility. In short, to the extent end users must interact with equipment to use telecommunications services, section 255 applies. The NPRM invites comment on this view.

15. The NPRM seeks comment on possible approaches to resolving practical difficulties presented when inaccessibility may be due to multiple elements of a telecommunications system.

16. The Commission next proposes that section 255 apply to multi-use equipment only to the extent the equipment serves a telecommunications function. The NPRM solicits comment on this proposal, and in particular on practical aspects of its application. What, for example, is the obligation of a manufacturer who produces equipment apparently intended for a non-telecommunications application, but that finds use in connection with a

[4] 47 U.S.C. 255, 251(a)(2).

[5] 47 U.S.C. 255(b).

telecommunications service subject to section 255?

17. Regarding software products, the NPRM notes that the definition of telecommunications equipment includes ''software integral to such equipment (including upgrades).'' [6] Given that the focus of section 255 should be on functionality, the Commission tentatively views software as simply one method of controlling telecommunications functions. The NPRM thus proposes to treat software integral to telecommunications equipment the same as equipment or telecommunications services, and seeks comment on this proposal.

18. On the other hand, the Commission notes that the statutory definition of CPE does not include a corresponding explicit reference to software. Where a CPE manufacturer markets products that include software, the Commission sees no reason to treat the bundled software differently from any other component of the equipment. Where software to be used with CPE is marketed separately from the CPE, however, the Commission believes that the software itself would not be subject to section 255, and that it could not even be considered to fall within the statutory definition of CPE. Further, the Commission believes that software manufacturers would not be directly subject to section 255 for software bundled with the CPE of other manufacturers. The NPRM seeks comment on these issues, and in particular on the practical aspects of applying this distinction.

(b) Manufacturer. 19. The NPRM tentatively concludes that section 255 should be construed to apply to all manufacturers offering equipment for use in the United States, regardless of their location or national affiliation. The Commission seeks comment on this proposal.

20. Regarding the question of how section 255 should apply to manufacturers involved in the production of multiple-source equipment, the NPRM proposes to adopt the ''final assembler'' approach taken by the Access Board guidelines. The Commission seeks comment on this proposal.

21. The NPRM also tentatively concludes that the term ''manufacturer'' generally would not include post-manufacturing distribution entities such as wholesalers and retailers. Where the manufacturing and distributing entities are affiliated, however, or where the distributing entities provide customer support services commonly offered by manufacturers of equipment subject to section 255, the Commission tentatively finds that it may be desirable either to treat the distributor as a ''manufacturer'' or to assign to the final assembler responsibility for the distributor's accessibility efforts. The Commission seeks comment on the types of arrangements between manufacturers and distributors that could present these situations, including private brand arrangements, and seeks comment on effective ways of dealing with them.

(4) ''Network Features, Functions, or Capabilities''

22. Section 251(a)(2) of the Act requires that a telecommunications carrier not install network features, functions, or capabilities that do not comply with the guidelines and standards established pursuant to section 255. The Act does not expressly define ''network features, functions, and capabilities,'' but it does provide examples as part of its definition of ''network element.'' [7] The Commission recently explored this area from the standpoint of interconnection in some detail in the *Local Competition Order* (61 FR 45476, August 29, 1996). The NPRM therefore tentatively concludes that the phrase ''network features, functions, or capabilities'' does not require further interpretation in this proceeding.

23. The NOI sought comment on the relationship between the duty of carriers under section 251(a)(2) and the duty of equipment manufacturers and service providers under section 255. Based on the limited comments received on this issue, the NPRM tentatively concludes that section 251(a)(2) governs carriers' configuration of their network capabilities. It does not make them guarantors of the decisions of service providers regarding how to assemble services from network capabilities, and it does not impose requirements regarding accessibility characteristics of the underlying components.

24. The Commission invites further comment on these views, on specific situations that might bring section 251(a)(2) into play, and on recommended approaches to address likely problems. The Commission also seeks comment regarding the relationship between the enforcement procedures established by section 252 for interconnection agreements and the Commission's exclusive enforcement authority under section 255. Additionally, the Commission seeks comment regard how responsibility for any guidelines or standards for accessibility and compatibility of equipment or services to be adopted in this proceeding should be apportioned between (1) the underlying manufacturer or provider of a network element; and (2) the carrier that incorporates that element into its network to provide a feature, function, or capability.

B. Nature of Statutory Requirements

25. Other essential terms used in section 255 are not native to the Act, but have their roots in the ADA and other disability law. For these terms, the Commission takes special note of the expertise and recommendations of the Access Board. However, the Commission tentatively concludes that it is bound to interpret section 255 in light of the broader purposes of the 1996 Act and of the Communications Act itself.

(1) ''Disability''

26. Section 255(a)(1) of the Act provides that ''[t]he term 'disability' has the meaning given to it by section 3(2)(A) of the [ADA].'' The ADA defines ''disability'' as: [8]

- 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.

The NPRM proposes to follow what the Commission considers to be the mandate of section 255 by using without modification or enhancement the ADA definition of ''disability.'' In order to provide guidance for equipment manufacturers and service providers seeking to increase accessibility of their offerings, however, the NPRM also proposes to use the Access Board's list of categories of common disabilities that should be considered in analyzing equipment and service offerings under section 255. The Commission notes that it does not view the list as either exhaustive or final. The Commission seeks comment on these proposals, and invites suggestions for additional ways of making the definition of ''disability'' useful to industry and consumers.

(2) ''Accessible to and Usable by''

27. Section 255 requires that equipment and telecommunications services be ''accessible to and usable by individuals with disabilities, if readily achievable.'' The Access Board guidelines define ''usability'' as meaning ''that individuals with disabilities have access to the full functionality and documentation for the

[6] 47 U.S.C. 153(45).

[7] 47 U.S.C. 153(29).

[8] 42 U.S.C. 12102(a)(2).

product, including instructions, product information (including accessible feature information), documentation, and technical support functionally equivalent to that provided to individuals without disabilities,'' and define ''accessibility'' as compliance with sections 1193.31 through 1193.43 of the Access Board's rules. The Commission proposes to adopt the Access Board's definition of ''usability'' as part of the Commission's definition of ''accessible to and usable by.'' The Commission tentatively concludes that there is no reason to distinguish the two terms for purposes of section 255, and will use the term ''accessibility'' in the broad sense to refer to the ability of persons with disabilities to actually use the equipment or service by virtue of its inherent capabilities and functions.

28. The Access Board guidelines define equipment accessibility as including a list of functions. In addition, section 1193.37 of the Access Board's rules calls for a pass-through of ''cross-manufacturer, non-proprietary, industry-standard codes, translation protocols, formats or other information necessary to provide telecommunications in an accessible format.'' The Commission believes the Access Board's definition of accessibility and the related Appendix materials in the Access Board's order provide an appropriate basis for evaluating accessibility obligations under section 255, and proposes to adopt them as part of the definition of ''accessible to and usable by.'' The Commission also proposes that such an evaluation should include not only use of the equipment itself, but also support services akin to what is provided to consumers generally to help them use equipment. The NPRM seeks comment on this proposal and on how the Commission might apply the Access Board's mandate that CPE ''pass through'' accessibility information. Further, the Commission invites comment on criteria that would constitute service accessibility.

29. The NPRM next reiterates the Commission position, as stated in the NOI, that section 255 reaches only those aspects of accessibility to telecommunications over which equipment manufacturers and service providers subject to the Commission's authority have direct control, such as the design of equipment or the manner in which a telecommunications service is delivered to users. The Commission seeks comment on this position. Similarly, if a person with a disability is able to use CPE such as a screen-reading terminal, but finds that a telecommunications service is not usable because the terminal cannot generate a screen display from the data provided through the service, this would also present an issue of inaccessibility, but the cause of the inaccessibility might be the service, or the equipment, or both. The Commission also seeks comment on what accessibility obstacles are encountered by persons with disabilities that are attributable to telecommunications service or equipment characteristics. To the extent that service accessibility is determined by network equipment, including integral software, how should the Commission distinguish between accessibility obstacles attributable to network equipment, and those attributable to service providers?

(3) ''Compatible With''

(a) ''Peripheral devices or specialized CPE''. 30. Where accessibility is not readily achievable, section 255(d) 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.''[9] 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.'' 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.'' The Board further explains its definitions as follows:

> [T]he term peripheral devices commonly refers to audio amplifiers, ring signal lights, some TTY's, 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. Specialized [CPE] should be considered a subset of [CPE], and . . . manufacturers of specialized [CPE] should make their products accessible to all individuals with disabilities, including the disability represented by their target market, where readily achievable.

31. The NPRM seeks comment on these definitions, but tentatively concludes that it is not necessary to distinguish between peripheral devices and specialized CPE. The NPRM further tentatively concludes that the reference in section 255(d) to equipment and devices ''commonly used * * * to achieve access'' identifies products with a specific telecommunications functionality. In contrast, devices such as hearing aids, which have a broad application outside the telecommunications context, may be used in conjunction with peripheral equipment or specialized CPE, but are not themselves considered specialized CPE or peripheral devices under the Act. The NPRM seeks comment on this issue.

(b) ''Commonly used''. 32. The NPRM next considers criteria for determining when equipment subject to section 255 is ''commonly used.'' In light of the specific definitions set out in the Access Board guidelines, the NPRM seeks further comment with regard to when devices and CPE should be considered ''commonly used,'' as described in the statute. The NPRM also seeks comment regarding whether and to what extent the cost of CPE or peripheral devices should be considered in determining whether the CPE or peripheral device may be deemed to be commonly used by persons with disabilities. The Commission's tentative view is that the CPE or peripheral device must be affordable and widely available in order to be considered ''commonly used'' by persons with disabilities. The Commission also notes that a listing of such ''commonly used'' components could be a valuable source of information to apprise persons with disabilities of the available technologies, and the Commission seeks comment regarding whether and how a listing could be maintained.

(c) Compatibility. 33. Several commenters note that ensuring compatibility requires coordination among, *e.g.*, manufacturers of specialized customer premises equipment, network equipment and CPE manufacturers, and service providers. The Access Board lists five criteria for determining compatibility, subject to applicability: (1) External access to all information and control mechanisms; (2) connection point for external audio processing devices; (3) compatibility of controls with prosthetics; (4) TTY connectability; and (5) TTY signal compatibility. The NPRM proposes to adopt these five criteria. The Commission recognizes, however, that these criteria might need to be broadened to account for likely technological advances in both telecommunications and accessibility products, either now or in the future, as developments warrant. The NPRM seeks

[9] 47 U.S.C. 255(d).

comment on this proposal, and on these views.

(d) Other matters. 34. Finally, the NPRM requests commenters to address how the definition of ''readily achievable'' should apply to the obligations of manufacturers and service providers to provide compatibility pursuant to section 255(d). Specifically, the NPRM seeks comment regarding the extent to which the same factors that are used to determine whether accessibility is readily achievable can or should also be used to determine whether compatibility is readily achievable. Commenters are also asked to address how the goal of compatibility can be met without hampering competition or the development of new technologies.

(4) ''Readily Achievable''

(a) General. 35. Section 255 requires accessibility to the extent it is 'readily achievable.' Section 255(a)(2) provides that ''[t]he term ''readily achievable'' has the meaning given to it by section 301(9) of [the ADA],'' which states: [10]

The term ''readily achievable'' means easily accomplishable and able to be carried out without much difficulty or expense. In determining whether an action is readily achievable, factors to be considered include—

(A) the nature and cost of the action needed under [the ADA];

(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.

The NPRM tentatively concludes that ''readily achievable,'' as defined by the ADA and incorporated by section 255, simply means ''easily accomplishable and able to be carried out without much difficulty or expense.'' The Commission believes that this broad definition is applicable to telecommunications equipment and services.

36. It is also the Commission's tentative view that the four factors set out with the ADA definition of ''readily achievable'' should be construed as the ADA describes them: factors to be considered in applying the definition in the ADA setting. Given the differences between architectural barriers and telecommunications barriers, it is the Commission's tentative view that the ADA factors should guide, though not constrain, the development of factors that more meaningfully reflect pertinent issues and considerations relevant to telecommunications equipment and services. The Commission intends that any factors developed in this rulemaking will be applied appropriately to the facts of particular cases, and will not operate so as to inadvertently impede efforts to arrive at reasonable judgments in each case. The Commission seeks comment on these tentative conclusions.

(b) Telecommunications factors. 37. The Commission believes a useful framework for analyzing whether a particular telecommunications accessibility feature is ''readily achievable'' involves looking at three areas: (1) Is the feature feasible? (2) What would be the expense of providing the feature? (3) Given its expense, is the feature practical? The Commission seeks comment on these proposed factors. The Commission especially seeks comment on the practical implications of various options: their effect on the development and marketing of accessibility features, on the pace of innovation, and on the administrative costs associated with implementation and enforcement measures.

38. A difficult aspect of determining whether a particular accessibility feature is readily achievable involves determining whether it is practical, given the expenses involved. In determining the practicality of providing a particular accessibility feature, the Commission believes it is appropriate to consider the resources available to the provider to meet the expenses associated with accessibility, the potential market for the product or service, the degree to which the provider would recover the incremental cost of the accessibility feature, as well as issues regarding product life cycles. Because the ultimate determination of whether it is readily achievable to make a particular product offering accessible to users with a particular disability may be complex and will depend on the particular circumstances of the case, the nature and extent of section 255 obligations will generally have to be evaluated and refined on a case-by-case basis, as the Commission resolves complaints of non-compliance. The Commission seeks comment on this general approach, as well as on the following specific elements of practicality.

(i) Resources

39. The NPRM examines various ways to consider the resources of firms of varying characteristics, in a manner which would not distort competitive incentives, including the relationship between parent and subsidiary corporations, and tentatively finds most compelling the view 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. The NPRM therefore proposes to establish a presumption that the resources reasonably available to achieve accessibility are those of the entity legally responsible for the equipment or service that is subject to the requirements of section 255. The NPRM also proposes, however, that this presumption may be rebutted in a complaint proceeding or other enforcement proceeding in two different respects:

- On the one hand, the assets and revenues of another entity (*e.g.*, parent or affiliate) that is not legally responsible for the equipment or service involved may still be treated as available for purposes of achieving accessibility under section 255, if it is demonstrated that those assets and revenues are generally available to the entity that does have legal responsibility for the equipment or service.
- On the other hand, the general presumption can also be rebutted by a respondent showing that the sub-unit (*e.g.*, corporate division or department) actually responsible for the product or service in question does not have access to the full resources of the corporation or equivalent organization of which it is a part.

40. The Commission tentatively concludes that this presumption may potentially serve as an effective guard against evasive practices. In any event, the NPRM proposes that the Commission will determine what resources are reasonably available on a case-by-case basis in the context of complaint proceedings or other enforcement proceedings, because the variety of organizational forms and other circumstances make development of quantitative standards by the Commission impracticable. The NPRM seeks comment on these proposals.

(ii) Market Considerations

41. The NPRM discusses the scope of the accessibility requirement in terms of how the provision of either conflicting accommodations for different

[10] 42 U.S.C. 12181(9).

disabilities, or accommodations that would address multiple disabilities but would make the offering technically or economically impracticable, should be viewed under the ''readily achievable'' standard. The NPRM also seeks comment on how to incorporate market considerations into an evaluation of whether particular accessibility features are practicable. Additionally, the NPRM invites comment on how accessibility reductions should be treated.

(iii) Cost Recovery

42. The Commission also believes it is appropriate to consider the extent to which an equipment manufacturer or service provider is likely to recover the costs of increased accessibility. The Commission explains that 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. Rather, the Commission merely finds that cost recovery is a factor that a company should weigh in making its determination of what is readily achievable. The NPRM further seeks comment on the extent that service providers and manufacturers should consider affordability of accessible products when making cost recovery assessments.

(iv) Timing

43. Several comments address accessibility obligations over the course of a product life cycle, especially as it relates to improved accessibility technology. The Commission phrases the timing question broadly, by asking how product life cycles should be taken into account in making ''readily achievable'' determinations. Given that section 255 has been in effect since February 1996, and in light of the Commission's tentative conclusion that timing issues should be considered as an element of ''readily achievable,'' the Commission believes that a general ''grace period'' for compliance is not warranted. The NPRM, however, seeks comment on this view.

III. Implementation Processes

44. The NPRM next proposes measures that will put section 255 into action, ensuring manufacturers and service providers are in compliance with the requirement that their products must be accessible, to the extent readily achievable, and providing relief for consumers when there are compliance problems. The Commission's proposals rest on two principles: (1) Responsiveness to consumers; and (2) efficient allocation of resources. The NPRM therefore proposes 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. The Commission has made every effort to fashion proposals that will reduce administrative burdens for all who might be involved in the complaint process, and invites suggestions for still further improvements.

45. Thus, the NPRM proposes a two-phase program for dealing with consumer issues arising under section 255. In the first phase, consumer inquiries and complaints will be referred to the manufacturer or service provider concerned, who will have a short period of time to solve the complainant's access problem and informally report to the Commission the results of its efforts. Matters or disputes that remain unresolved may proceed to a second-phase dispute resolution process.

A. Fast-Track Problem-Solving Phase

46. An important part of the Commission's proposal is an informal, ''fast-track'' process designed to solve access problems quickly and efficiently. If the proposed framework is adopted, this process would function as follows:

- The process would be initiated by the submission of a complaint.
- Upon receipt of a complaint, the Commission would promptly forward the complaint to the manufacturer or service provider (or both) whose offerings are the subject of the complaint, and set a deadline for a report of action taken to resolve the complaint.
- During the period prescribed, or during an extension period granted for good cause, the manufacturer or provider would attempt to solve the complainant's problem regarding the accessibility or compatibility of the provider's service or equipment. During this time, the Commission staff would be available to both the complainant and the respondent to provide information and informal assistance upon request.
- By the end of the fast-track phase, the respondent would be expected to informally report to the Commission the results of its efforts to solve the problem that is the subject of the complaint.
- The Commission would evaluate the respondent's report. The matter would be closed if it appeared that the complainant's access problem had been solved and there was no underlying compliance problem, or if the matter was outside the scope of section 255.
- On the other hand, the matter would proceed to a second phase of dispute resolution processes if the problem remained unsolved and there was a question of whether an accessibility solution was readily achievable, or if it appeared there was an underlying problem regarding the respondent's compliance with its section 255 accessibility obligations.

47. The Commission believes that the proposed fast-track process will frequently permit complainants and respondents to resolve disputes before requiring any use of additional Commission processes. In addition, the burden on all parties is intended to be minimal under the Commission's proposal, and the process encourages the rapid, informal solution of access problems. The Commission seeks comment on the general outline and on the more specific aspects of this fast-track process.

(1) Initial Contact With Commission

48. The NPRM first proposes to encourage any consumer who has not directly contacted the manufacturer or service provider before contacting the Commission to do so, and the Commission will provide contact information for that purpose. Consumers would also be invited to contact the Commission again if the problem is not resolved satisfactorily. The Commission seeks comment on this proposal.

49. Further, because section 255 complaints will involve offerings overseen by various Commission bureaus and offices, and because consumers may be unfamiliar with these organizational differences, the Commission anticipates establishing a central Commission contact point for all section 255 inquiries and complaints. The NPRM seeks comment on measures the Commission should take to ensure that persons with disabilities are made aware of their opportunity to address inquiries and complaints to a central contact point at the Commission.

50. The NPRM proposes that persons with disabilities may submit their complaints by any accessible means, including, for example, letter, Braille, facsimile, electronic mail, internet, TTY, audio cassette, or telephone call. The NPRM also proposes, however, to make available a complaint form, but not to require its use for the initiation of a section 255 complaint. In whatever form a complaint is received, however, the Commission will need to ascertain at least the following information before it can proceed:

- Complainant contact information: Name, mailing address, and preferred

contact method (letter, telephone number, TTY number, facsimile number, or electronic mail address).

- Identification of the equipment or service complained of, and the name (and, if known, the address) of its manufacturer or provider.
- A description of how the equipment or service is inaccessible to persons with a particular disability or combination of disabilities.

The Commission seeks comment on what additional information, if any, would tend to provide a clearer description of the difficulty complained of, without requiring excessive or irrelevant information. In any event, the Commission would retain discretion to request from complainants additional information that would help it to rapidly address the request.

(2) Provider Contact

51. The Commission's fast-track proposal envisions initially referring complaints to the manufacturer or service provider (or both, as appropriate). This will necessitate obtaining a list of contact points for each manufacturer and service provider subject to section 255. The NPRM solicits comment on a range of questions pertinent to the establishment and maintenance of such a list of contacts and on whether to require firms to provide accessibility contact information directly to consumers and, if so, how. The Commission seeks comment on these matters and also on whether the process should include a notification to the complainant that the complaint has been referred and, if so, what information the notification should include.

(3) Solution Period; Report

52. Upon receipt of a complaint, the Commission would promptly forward it to the manufacturer or service provider (or both) whose offerings are the subject of the complaint, and set a deadline for a report of action taken to resolve the complaint. The NPRM seeks comment on appropriate customer service standards for complaint forwarding. The NPRM also seeks comment on whether the Commission should forward complaints as submitted, regardless of format, or whether it should forward ''translations'' or transcripts of complaints submitted in formats such as Braille.

53. The NPRM next proposes an action report deadline of five business days from the date the complaint is forwarded, as a reasonable balance between providing sufficient time for respondents to study the complaint, gather relevant information, identify possible accessibility solutions, and, most importantly, work with the complainant to solve the access problem if possible, and providing accessibility as soon as practicably possible. The NPRM invites comment on this proposal.

54. The NPRM also proposes that a provider may file an interim report and a request for additional time in situations where a period of five business days (for example) may be enough time for a provider to assess a problem and begin to resolve it, but may not be long enough to complete the resolution. The Commission seeks comment on this proposal and also on how to provide a mechanism for either party (or the Commission) to terminate the fast-track phase and proceed to traditional dispute resolution processes, where it appears the fast-track process is not leading to a mutually satisfactory resolution.

55. By the end of the fast-track process, the manufacturer or service provider is expected to report informally to the Commission regarding whether the complainant has been provided the access sought, and if not, why it has not. To put the circumstances of the particular accessibility complaint in context, it might also be appropriate for the respondent to report generally its procedures for ensuring product accessibility. In order to provide flexibility in this process, the Commission proposes that such reports may be submitted by telephone call, electronic mail, facsimile or hard-copy letter. The Commission seeks comment on this proposal.

56. Finally, to ensure the integrity of the fast-track process by encouraging a sharing of information between complainant and respondent, the NPRM proposes to require that respondents provide copies of their reports to complainants. To avoid formalizing and stifling the process, however, the NPRM also seeks comment not only on this proposal, but on how to satisfy this requirement in the case of telephonic or other oral reports.

(4) Commission Evaluation

57. At the end of the fast-track process, the NPRM proposes that the Commission would consider both (1) the success of the respondent in providing an appropriate access solution, if possible; and (2) whether there appeared to be an underlying compliance problem, regardless of whether the particular complainant had been satisfied. That review would determine whether further action was required, as follows:

- If it appeared that the complainant's access problem had been satisfactorily solved (or that accessibility was not readily achievable) and there was no indication of an underlying problem of compliance with section 255, the matter would be closed by the Commission.
- If it appeared that the complaint did not involve matters subject to section 255, the matter would be closed.
- If it appeared that the complainant's access problem had been satisfactorily resolved but there was an indication of an underlying compliance problem, the Commission would undertake further dispute resolution efforts to determine the nature and magnitude of the problem, and take appropriate action.
- If it appeared that the access problem had otherwise not been satisfactorily resolved, or if the respondent failed to submit a timely resolution report, the Commission would initiate further resolution processes.

58. The NPRM also proposes that the Commission's evaluation of a resolution report not necessarily be limited to the respondent's initial report, but might also include additional information requested from the respondent or the complainant, discussions with accessibility experts from industry, disability groups, or the Access Board, or review of prior or other pending complaints involving the respondent. Further, to the extent a respondent's report asserted that accessibility was not readily achievable, the claim would be evaluated using the same factors that would be used during a phase-two dispute resolution proceeding. The Commission seeks comment on these proposals.

59. The NPRM proposes that the Commission would communicate its determination to both the complainant and the respondent in writing. If the Commission concluded that no further action was warranted because the matter lies outside the scope of section 255, further information may be supplied that would assist the consumer in seeking relief through other possible avenues. If the determination was to proceed to dispute resolution proceedings, pertinent information relating to initiating those processes would be noted. The Commission seeks comment on this aspect of the fast-track proposal.

60. Finally, the NPRM notes that if the Commission's fast-track determination was that the matter should be closed, information would be provided to assist a complainant who disagreed with that determination and wished to pursue the complaint to phase-two dispute resolution. The Commission proposes

not to require any particular method for complainants to communicate their desire to continue to further stages of dispute resolution, but to leave the method to the complainant's discretion, in the same manner as the complaint filing above. The NPRM seeks comment on these proposals.

B. Use of Traditional Dispute Resolution Processes

(1) Informal Dispute Resolution Process

61. For those section 255 complaints that are not resolved under fast-track procedures, the NPRM proposes to resolve most of these complaints pursuant to informal, investigative procedures, which the Commission considers to be more efficient and flexible than formal procedures. To accommodate special circumstances, however, the NPRM also proposes to establish formal adjudicatory procedures, to be employed only where the complainant requests such resolution and the Commission consents. Finally, 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 NPRM seeks comment on this general procedural framework, and on other specific issues discussed in the full text of the NPRM.

62. The NPRM seeks comment on the Commission's proposal 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, or otherwise. The NPRM also proposes not to establish any time limit for the filing of a complaint under section 255. The Commission seeks comment on these proposals, on the relationship of section 415 of the Act to the Commission's complaint authority in section 255, and on the need for regulatory parity between equipment manufacturers and service providers.

63. In order to avoid confusion regarding when a respondent must answer a complaint in the dispute resolution phase, and to provide an efficient transition from the phase-one fast-track process to the phase-two dispute resolution process, the NPRM proposes to specify the due date in the Commission's written notice initiating the dispute resolution phase. Given the likely complexity of many section 255 complaints, the Commission proposes generally to allow 30 days for a respondent to answer a complaint, computed from the date of the written notice. The Commission would, however, retain the discretion to specify a shorter or longer response date based upon the nature of the complaint and the totality of the circumstances. The NPRM also proposes to require that a respondent must serve a copy of the answer on the complainant and on any other entity it implicates in its answer. The NPRM additionally proposes a reply period of 15 calendar days for the person who filed the original pleading to respond to answers, subject to Commission adjustment in specific cases. The NPRM seeks comment on these proposals.

64. In the interest of ensuring that the dispute resolution processes for section 255 are as accessible as possible, the NPRM proposes not to require any particular format for submissions from complainants or respondents. Because telephonic and other non-permanent oral presentations would not provide an appropriate record for decision making, however, the Commission proposes to require that submissions be in a permanent format. The Commission seeks comment on these proposals, and on any other related issues.

65. Commission consideration of section 255 complaints may often involve evaluation of information which may be considered proprietary business data, including a company's resources available to achieve accessibility. The Commission is sensitive to the need to protect the confidentiality of such information, and does not want to discourage its submission where relevant to the decision-making process. The Commission's rules already provide confidentiality for proprietary information in certain cases. (See, e.g., 47 CFR 0.457(d), 0.457(g), 0.459, and 1.731.) The Commission seeks comment on whether, in the particular context of section 255, existing rules and procedures for review of confidentiality requests strike the best balance between reasonable expectations of confidentiality and open decision-making.

(2) Formal Dispute Resolution Process

66. While the Commission anticipates that most complaints not resolved under fast-track procedures will be adjudicated pursuant to the informal procedures previously discussed, the NPRM proposes to reserve the right to apply a more formal, adjudicatory mechanism in which complainants accept the primary burden of pursuing relevant facts, with attendant rights (such as the right of discovery) and obligations. The NPRM is not proposing specific language for section 255 adjudicatory process rules, but proposes to model them on the common carrier formal complaint procedures set out in §§ 1.720 through 1.736 of the Commission's Rules, modified somewhat to take into account the inherent differences between traditional common carrier complaint issues and accessibility issues under section 255, as specified in the full text of the NPRM. The Commission seeks comment on these variations.

67. The NPRM also does not propose 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. Under the Act, however, the Commission is required to impose a filing fee for formal complaints directed against common carriers, unless it can be demonstrated that waiving the fee would be in the public interest. The NPRM seeks comment on the circumstances under which the Commission should waive or lower this fee, and on other fee-related questions as indicated in the full text of the NPRM.

68. The NPRM finds that section 255 complaints need not be resolved within the five-month deadline established in section 208(b) of the Act. The NPRM finds that, because section 255 establishes Commission authority to prescribe complaint procedures, separate from authority conferred under section 208, any time limits for resolving complaints under section 208 do not apply.

(3) Alternative Dispute Resolution Process

69. The NPRM proposes to make available alternative dispute resolution (ADR) procedures such as arbitration, conciliation, facilitation, mediation, settlement negotiation, and other consensual methods of dispute resolution for resolving section 255 complaints not resolved under the fast-track process. The Commission tentatively concludes that ADR could be an effective tool for dealing with conflicts arising under section 255, while avoiding the expense and the delay of adversarial proceedings. The Commission seeks comment on these views generally, and on related questions as detailed in the full text of the NPRM.

70. Apart from their role in an ADR process, there may be other ways in which neutral parties with special expertise in accessibility matters could help the Commission resolve complaints. Outside experts and committees can perform a valuable consultative function, helping businesses and consumers to develop

accessibility solutions as telecommunications products and services are being developed. The NPRM invites comment on the role that such parties could serve to help speed resolution of complaints.

71. Other groups with accessibility expertise may well develop out of the process by which section 255 is being implemented and as accessibility efforts become more widespread. The Commission might rely on outside experts to gather and evaluate data needed to resolve accessibility questions. The Commission seeks comment on the utility of relying on such experts and on what provisions might be made to accomplish this objective.

(4) Defenses to Complaints

72. In response to an accessibility complaint or an investigation conducted on the Commission's initiative without a prior complaint, the Commission tentatively finds that it seems likely that the most common defenses mounted by a manufacturer or service provider would involve a claim that: (1) The product in question lies beyond the scope of section 255; (2) the product in question is in fact accessible; or (3) accessibility is not readily achievable. The first two defenses are relatively straightforward, but claims of the third kind are likely to present formidable difficulties. The Commission believes it would be useful to set out for comment some tentative views on use of a ''readily achievable'' defense.

73. To the extent an offering subject to section 255 is not accessible, it is incumbent upon an offeror making a ''readily achievable'' defense to establish facts to support the claim. In addition to the factors used to determine whether an accessibility action is readily achievable, it is also appropriate to give some weight to evidence that a respondent made good faith efforts to comply with section 255 by taking actions that would tend to increase the accessibility of its product offerings, both generally and with respect to the particular product that is the subject of the complaint. Examples of the sorts of measures that would be credited by the Commission are set out in the Access Board guidelines and in the Appendix to the Access Board Order. The NPRM notes, however, that the Board's guidelines should not be viewed as a ''laundry list'' of requirements all firms subject to section 255 must adopt. Rather, each firm should consider the guidelines in light of its situation and the degree to which its products have or lack accessibility features, and then adopt those features that will help it provide the accessibility section 255 requires.

74. The Commission seeks comment on these and other accessibility measures that might be suitable for equipment manufacturers. Further, while the Access Board's focus was limited to equipment manufacturers, the measures it describes generally have analogs applicable to service providers. The Commission therefore specifically seeks comment on measures suitable for service providers. In addition, the Commission seeks comment on whether firms subject to section 255 should be required to provide information regarding how consumers can contact them with respect to accessibility issues, and whether such notice should also include information involving how to contact the Commission in case of accessibility problems, and if so, what information should be required and how it should be provided.

C. Penalties for Non-Compliance

75. Section 255, on its face, makes no special provision for penalties for manufacturers or service providers found to violate its requirements. Given the importance of the accessibility mandate, the Commission believes that it should employ the full range of penalties available under the Act in enforcing section 255. The Commission believes that the Act provides for the following sanctions, which the Commission proposes to apply, as appropriate, given the nature and circumstances of a violation:

- Section 503(b) of the Act provides a system of forfeitures for willful or repeated ''failure to comply with any of the provisions of [the] Act or of any rule, regulation, or order issued by the Commission under [the] Act * * *.''
- At the end of an adjudication, the Commission would usually issue an order setting out its findings and directing prospective corrective measures. It is conceivable these orders might be the result of settlements with respondents, in the nature of consent decrees, if circumstances warrant. In any event, violation of a section 255 order could result in the imposition of a section 503(b) forfeiture.
- Section 312 of the Act provides for the revocation of a station license or construction permit, for the willful or repeated violation of or failure to observe any provision of the Act.
- Section 312 of the Act also provides for the issuance of a cease and desist order directed to a station licensee or construction permit holder, for the willful or repeated violation of or failure to observe any provision of the Act. The Commission believes Sections 4(i) and 208 of the Act provide a basis for such an order with respect to non-licensees.
- Sections 207 and 208 of the Act provide for the award of damages for violations by common carriers and, arguably, others.
- The Commission seeks comment on whether there is a basis for ordering the retrofit of accessibility features into products that were developed without such features, when including them was readily achievable.

The Commission invites comment about these and other possible remedies to enforce section 255 of the Act.

D. Additional Implementation Measures

76. The NPRM notes that other existing Commission processes (and associated forms) may provide efficient vehicles for requirements that may be developed in this proceeding, such as information collection, or for providing notice to firms dealing with the Commission that they may be subject to section 255. The NPRM seeks comment on whether such existing processes might provide additional options for fostering product accessibility. Further, given that sections 207 and 208 of the Act provide an alternate vehicle for submitting complaints that section 255 has been violated, in the case of common carriers, the NPRM seeks comment on whether to modify the existing common carrier complaint rules with respect to section 255 complaints so as to incorporate the kinds of processes the NPRM has proposed for complaints filed under section 255.

77. Finally, the Commission believes there are other measures the Commission itself might take, or might encourage others to take, to foster increased accessibility of telecommunications products. These include:

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

• Development of peer review processes to complement the proposed implementation measures.

The Commission particularly invites comment regarding the practical aspects of implementing these or other similar implementation measures.

IV. Interim Treatment of Complaints

78. As noted earlier, section 255 became effective upon enactment on February 8, 1996. Until the Commission adopts procedural rules in this proceeding, complaints alleging violations of section 255 may be filed pursuant to Section 1.41 of the Commission's Rules (47 CFR 141) and other general procedural rules (47 CFR 1.45–1.52). Complaints against common carriers may also be filed pursuant to the common carrier complaint rules set out in Part 1, Subpart E of the Commission's Rules (See 47 CFR 1.711, 1.716–1.718, 1.720–1.736).

79. Because the Commission has existing complaint processes in place which enable it to address complaints on a case-by-case basis, the NPRM declines to establish interim rules. Furthermore, the NPRM does not find it necessary to establish specific interim procedures.

80. Although the Commission recognizes that the proposals set forth in the NPRM have no binding effect until formally adopted, they may serve as guidance to parties concerning factors the Commission would likely consider in a complaint proceeding. The Commission urges potential complainants and defendants to take particular note of interpretations of key terminology and the emphasis on accessibility analysis throughout the design process. In addition, the Access Board guidelines and the related Appendix materials may be instructive to affected entities in determining their obligations under section 255 during this interim period.

V. Administrative Matters

A. Ex Parte Presentations

81. The NPRM is a ''permit-but-disclose'' notice and comment rulemaking proceeding. *Ex parte* presentations are permitted, provided they are disclosed as provided in Commission rules. See generally 47 CFR 1.1202 , 1.1203, 1.1206(a).

B. Initial Regulatory Flexibility Analysis

82. As required by section 603 of the Regulatory Flexibility Act, the Commission has prepared the following Initial Regulatory Flexibility Analysis (IRFA) of the expected impact on small entities of the proposals suggested in this document. Written public comments are requested on the IRFA. These comments must be filed in accordance with the same filing deadlines as comments on the rest of the NPRM but they must have a separate and distinct heading designating them as responses to the IRFA. The Commission's Office of Public Affairs, Reference Operations Division, shall send a copy of the NPRM, including the IRFA, to the Chief Counsel for Advocacy of the Small Business Administration in accordance with paragraph 603(a) of the Regulatory Flexibility Act. Public Law 96–354, 94 Stat. 1164, 5 U.S.C. 601 *et seq.* (1981).

(1) Need for, and Objectives of, Proposed Action

83. This rulemaking proceeding was initiated to propose means of implementing and enforcing section 255 of the Act, as added by the Telecommunications Act of 1996. This section is intended to ensure that telecommunications equipment and services will be accessible to persons with disabilities, if such accessibility is readily achievable. If accessibility is not readily achievable, then the telecommunications equipment and services are to be made compatible with specialized customer premises equipment or peripheral devices to the extent that so doing is readily achievable.

84. Given the fundamental role that telecommunications has come to play in today's world, the provisions of section 255 represent the most significant governmental action for people with disabilities since the passage of the Americans with Disabilities Act of 1990. Public Law 101–336, 104 Stat. 327 (1990) (codified at 42 U.S.C. 12102(2)(A), 12181(9)) (ADA). Inability to use telecommunications equipment and services can be life-threatening in emergency situations, can severely limit educational and employment opportunities, and can otherwise interfere with full participation in business, family, social, and other activities. The Commission must do all it can to ensure that people with disabilities are not left behind in the telecommunications revolution and consequently isolated from contemporary life.

85. The Commission sets forth proposals to implement and enforce the requirement of section 255 that telecommunications offerings be accessible to the extent readily achievable. The centerpiece of these is a ''fast-track'' process designed to resolve many accessibility complaints informally, providing consumers quick solutions and freeing manufacturers and service providers from the burden of more structured complaint resolution procedures. In cases where fast-track solutions are not possible, however, or where there appears to be an underlying noncompliance with section 255, the Commission would pursue remedies through more conventional processes. In both cases, in assessing whether service providers and equipment manufacturers have met their accessibility obligations under section 255, the Commission would look favorably upon demonstrations by companies that they considered accessibility throughout the development of telecommunications products.

(2) Legal Basis

86. The proposed action is authorized under sections 1, 4(i), 10, 201, 202, 207, 208, 255, 303(b), 303(g), 303(j), 303(r) and 403 of the Communications Act, 47 U.S.C. 151, 154(i), 160, 201, 202, 207, 208, 255, 303(b), 303(g), 303(j), 303(r), 403.

(3) Description and Number of Small Entities Involved

87.The NPRM will apply to manufacturers of telecommunications equipment and customer premises equipment (CPE). In addition, telecommunications service providers of many types will be affected, including wireline common carriers and commercial mobile radio service (CMRS) providers. To the extent that software is integral to a telecommunication function, software developers or manufacturers may also be affected.

88. Commenters are requested to provide information regarding how many entities (overall) and how many small entities would be affected by the proposed rules in the NPRM. It should be noted that the resources of the regulated entity are taken into account in the determination of whether accessibility of a given product or service is readily achievable. Thus, there is an inherent consideration of the financial burden on the entity in its obligation to provide accessibility: if not readily achievable, the legal obligation is removed. However, all regulated entities are required to assess whether providing accessibility is readily achievable. Thus, an important issue for RFA purposes is not the absolute cost of providing accessibility, but, rather, the extent to which the cost of performing an assessment as to whether an accessibility feature is readily achievable is unduly burdensome on small entities.

89. The RFA directs agencies to provide a description of and, where feasible, an estimate of the number of small entities that may be affected by the proposed rules, if adopted. The RFA generally defines the term ''small entity'' as having the same meaning as the terms ''small business,'' ''small organization,'' and ''small governmental jurisdiction.'' In addition, the term ''small business'' has the same meaning as the term ''small business concern'' under the Small Business Act. A small business concern is one which: (1) Is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration (SBA).[11] A small organization is generally ''any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.''[12] Nationwide, as of 1992, there were approximately 275,801 small organizations.[13] The Commission further describes and estimates the number of small entity licensees and other covered entities that may be affected by the proposed rules, if adopted.

a. *Equipment manufacturers.* 90. The following chart contains estimated numbers of domestic entities that may be affected by this rulemaking. The data from which this chart was developed includes firm counts that reflect product lines not involved in telecommunications, as defined by the 1996 Act, and also includes overlapping firm counts and firms deliberately commingled to avoid disclosing the value of individual firms' equipment shipments for the reporting period.

Product class/ code	Product description	Estimated firm count	Comments
36611	Switching and switchboard equipment.	84	Includes central office switching equipment, PBX equipment, cellular mobile switching equipment.
36613	Carrier line equipment and modems	89	Includes repeaters, multiplex equipment, channel banks, subscriber loop and carrier line equipment, and modems.
36614	Other telephone and telegraph equipment.	215	Includes single line, ISDN, key and public pay telephone sets, cordless handsets, data communications equipment, video conferencing equipment, voice and call message processing equipment, call distributors, facsimile equipment.
36631	Communications systems and equipment.	346	Includes mobile cellular equipment, conventional and trunked system equipment, SONET-standard equipment.
36632	Broadcast, studio, and related electronic equipment.	172	Includes cable equipment possibly used to provide telephone service, such as subscriber equipment.
35715	Personal computers and workstations.	89	Includes personal computers with CPE capabilities.
35716	Portable computers	35	Typically with attached display.
35771	Computer peripheral equipment, not elsewhere classified.	259	Excludes common storage, scanning, and other peripherals itemized in census source document. Intended to include peripherals used for telecommunication function, and specialized CPE used in conjunction with computers. Includes keyboards, manual input devices such as mouses and scanners, voice recognition equipment (88 firms).
36798	Printed circuit assemblies	648	Includes communications printed board assemblies (211 firms) and ''other electronics,'' including office equipment and point of sales (182 firms) that would commonly involve telecommunications functions.
35751	Computer terminals	57	Includes remote batch terminals, displays, etc. For distributed computer systems involved in telecommunications, remote terminals and other components are probably essential to ensuring accessible telecommunications capabilities.
35772	Parts and subassemblies for computer peripherals and input/output equipment.	72	Includes funds transfer devices and point of sale terminals (29 firms).

b. Software. 91. Due to the convergence between telecommunications equipment, telecommunications services and the software used to control and regulate each, software developers and producers may be viewed as regulated entities under section 255. This is particularly true of software that is used to make traditional telecommunications devices operate with CPE designed for specific disabilities. The Commission seeks comment on the impact of its proposed rules on the small businesses within this industrial category.

c. Telecommunications service entities. (i) Introduction. 92. Commenters are requested to provide information regarding how many providers of telecommunications services, existing and potential, will be considered small businesses. The SBA has defined a small business for Radiotelephone Communications (SIC 4812) and Telephone Communications, Except Radiotelephone (SIC 4813), to be small entities when they have fewer than 1,500 employees.

93. The Commission seeks comment as to whether this definition is appropriate in this context. Additionally, the Commission requests each commenter to identify whether it is a small business under this definition. If the commenter is a subsidiary of another entity, this information should be provided for both the subsidiary and the parent corporation or entity.

94. The United States Bureau of the Census reports that, at the end of 1992, there were 3,497 firms engaged in providing telephone services, for at least one year. This number contains a variety of different categories of carriers, including local exchange carriers, interexchange carriers, competitive access providers, cellular carriers, other mobile service carriers, operator service providers, pay telephone providers, personal communications services (PCS) providers, covered specialized mobile

[11] Small Business Act, 15 U.S.C. 632 (1996).

[12] 5 U.S.C. 601(4).

[13] 1992 Economic Census, U.S. Bureau of the Census, Table 6 (special tabulation of data under contract to Office of Advocacy of the U.S. Small Business Administration).

radio providers, and resellers. It seems certain that some of those 3,497 telephone service firms may not qualify as small entities or small incumbent local exchange carriers (LECs) because they are not ''independently owned and operated.'' For example, a PCS provider that is affiliated with an interexchange carrier (IXC) having more than 1,500 employees would not meet the definition of a small business. The Commission tentatively concludes that fewer than 3,497 telephone service firms are small entity telephone service firms or small incumbent local exchange carriers.

95. According to the Telecommunications Industry Revenue: Telecommunications Relay Service Fund Worksheet Data (*TRS Worksheet*), there are 3,459 interstate carriers.[14] These carriers include, *inter alia*, local exchange carriers, wireline carriers and service providers, interexchange carriers, competitive access providers, operator service providers, pay telephone providers, providers of telephone toll service, providers of telephone exchange service, and resellers.

(ii) Wireline Carriers and Service Providers. 96. The SBA has developed a definition of small entities for telephone communications companies except radiotelephone (wireless) companies. The Census Bureau reports that, there were 2,321 such telephone companies in operation for at least one year at the end of 1992.[15] According to the SBA definition, as noted, a small business telephone company other than a radiotelephone company is one employing fewer than 1,500 persons. All but 26 of the 2,321 non-radiotelephone companies listed by the Census Bureau were reported to have fewer than 1,000 employees.

97. Thus, even if all 26 of those companies had more than 1,500 employees, there would still be 2,295 non-radiotelephone companies that might qualify as small entities or small incumbent LECs. The Commission does not have information regarding the number of carriers that are not independently owned and operated, and thus is unable at this time to estimate with greater precision the number of wireline carriers and service providers that would qualify as small business concerns under the SBA definition. Consequently, the Commission estimates that there are fewer than 2,295 small telephone communications companies other than radiotelephone companies.

(A) Incumbent Local Exchange Carriers. 98. Neither the Commission nor SBA has developed a definition for small providers of local exchange services. The closest applicable definition under the SBA rules is for telephone communications companies other than radiotelephone (wireless) companies. The most reliable source of information regarding the number of LECs nationwide of which the Commission is aware appears to be the data that the Commission collects annually in connection with the *TRS Worksheet.* According to the Commission's most recent data, 1,376 companies reported that they were engaged in the provision of local exchange services. Although it seems certain that some of these carriers are not independently owned and operated, or have more than 1,500 employees, the Commission is unable at this time to estimate with greater precision the number of LECs that would qualify as small business concerns under the SBA definition. Consequently, the Commission estimates that there are fewer than 1,376 small incumbent LECs.

99. Because the small incumbent LECs subject to these rules are either dominant in their field of operations or are not independently owned and operated, they are excluded (consistent with the Commission's prior practice) from the definition of ''small entity'' and ''small business concerns.'' Accordingly, the Commission's use of the terms ''small entities'' and ''small businesses'' does not encompass small incumbent LECs. Out of an abundance of caution, however, for regulatory flexibility analysis purposes, the Commission will consider small incumbent LECs within this analysis and use the term ''small incumbent LECs'' to refer to any incumbent LEC that arguably might be defined by SBA as a ''small business concern.''

(B) Interexchange Carriers. 100. Neither the Commission nor SBA has developed a definition of small entities specifically applicable to providers of interexchange services. The closest applicable definition under the SBA rules is for telephone communications companies except radiotelephone (wireless) companies. The most reliable source of information regarding the number of IXCs nationwide is the data that the Commission collects annually in connection with the *TRS Worksheet.* According to the Commission's most recent data, 149 companies reported that they were engaged in the provision of interexchange services. The Commission does not have information on the number of carriers that are not independently owned and operated, nor have more than 1,500 employees, and thus the Commission is unable at this time to estimate with greater precision the number of IXCs that would qualify as small business concerns under the SBA definition. Consequently, the Commission estimates that there are fewer than 149 small entity IXCs.

(C) Competitive Access Providers and Competitive Local Exchange Carriers. 101. Neither the Commission nor SBA has developed a definition of small entities specifically applicable to providers of competitive access services (CAPs) and competitive local exchange carriers (CLECs). The closest applicable definition under the SBA rules is for telephone communications companies except radiotelephone (wireless) companies. The most reliable source of information regarding the number of CAPs and CLECs nationwide is the data that the Commission collects annually in connection with the *TRS Worksheet.* According to the Commission's most recent data, 119 companies reported that they were engaged in the provision of competitive access services. The Commission does not have information on the number of carriers that are not independently owned and operated, nor have more than 1,500 employees, and thus is unable at this time to estimate with greater precision the number of CAPs that would qualify as small business concerns under the SBA definition. Consequently, the Commission estimates that there are fewer than 119 small CAPs.

(D) Operator Service Providers. 102. Neither the Commission nor SBA has developed a definition of small entities specifically applicable to providers of operator services. The closest applicable definition under the SBA rules is for telephone communications companies except radiotelephone (wireless) companies. The most reliable source of information regarding the number of operator service providers nationwide is the data that the Commission collects annually in connection with the *TRS Worksheet.* According to the Commission's most recent data, 27 companies reported that they were engaged in the provision of operator services. The Commission does not have information on the number of carriers that are not independently owned and operated, nor have more than 1,500 employees, and thus is unable at this time to estimate with greater precision the number of operator service

[14] Federal Communications Commission, Common Carrier Bureau, Industry Analysis Division, Carrier Locator: Interstate Service Providers, Figure 1 (Types of Interstate Service Providers) (Nov. 1997) (*TRS Data*).

[15] U.S. Department of Commerce, Bureau of the Census, 1992 Census of Transportation, Communications, and Utilities: Establishment and Firm Size, at Firm Size 1–123 (1995) (1992 Census).

providers that would qualify as small business concerns under the SBA definition. Consequently, the Commission estimates that there are fewer than 27 small operator service providers.

(E) Pay Telephone Providers. 103. Neither the Commission nor SBA has developed a definition of small entities specifically applicable to pay telephone providers. The closest applicable definition under SBA rules is for telephone communications companies except radiotelephone (wireless) companies. The most reliable source of information regarding the number of pay telephone providers nationwide is the data that the Commission collects annually in connection with the *TRS Worksheet.* According to the Commission's most recent data, 533 companies reported that they were engaged in the provision of pay telephone services. The Commission does not have information on the number of carriers that are not independently owned and operated, nor have more than 1,500 employees, and thus is unable at this time to estimate with greater precision the number of pay telephone providers that would qualify as small business concerns under SBA definition. Consequently, the Commission estimates that there are fewer than 533 small pay telephone providers.

(F) Resellers (Including Debit Card Providers). 104. Neither the Commission nor SBA has developed a definition of small entities specifically applicable to resellers. The closest applicable SBA definition for a reseller is a telephone communications company except radiotelephone (wireless) companies. However, the most reliable source of information regarding the number of resellers nationwide is the data that the Commission collects annually in connection with the *TRS Worksheet.* According to the Commission's most recent data, 345 companies reported that they were engaged in the resale of telephone service. The Commission does not have information on the number of carriers that are not independently owned and operated, nor have more than 1,500 employees, and thus the Commission is unable at this time to estimate with greater precision the number of resellers that would qualify as small entities or small incumbent LEC concerns under the SBA definition. Consequently, the Commission estimates that there are fewer than 345 small entity resellers.

(iii) International Service Providers. 105. The Commission has not developed a definition of small entities applicable to licensees in the international services. Therefore, the applicable definition of small entity is the definition under the SBA rules applicable to Communications Services, Not Elsewhere Classified (NEC) (13 CFR 120.21). This definition provides that a small entity is expressed as one with $11.0 million or less in annual receipts. According to the Census Bureau, there were a total of 848 communications services, NEC, in operation in 1992, and a total of 775 had annual receipts of less than $9.999 million. The Census report does not provide more precise data. Many of these services do not have specified uses and it is uncertain, at this point in time, if they will ultimately provide telecommunications services.

(A) International Public Fixed Radio (Public and Control Stations). 106. There are 15 licensees in this service. The Commission does not request or collect annual revenue information, and thus is unable to estimate the number of international public fixed radio licensees that would constitute a small business under the SBA definition.

(B) Fixed Satellite Transmit/Receive Earth Stations. 107. There are approximately 4,200 earth station authorizations, a portion of which are Fixed Satellite Transmit/Receive Earth Stations. The Commission does not request or collect annual revenue information, and thus is unable to estimate the number of the earth stations that would constitute a small business under the SBA definition.

(C) Fixed Satellite Small Transmit/Receive Earth Stations. 108. There are 4,200 earth station authorizations, a portion of which are Fixed Satellite Small Transmit/Receive Earth Stations. The Commission does not request or collect annual revenue information, and thus is unable to estimate the number of fixed satellite transmit/receive earth stations may constitute a small business under the SBA definition.

(D) Fixed Satellite Very Small Aperture Terminal (VSAT) Systems. 109. These stations operate on a primary basis, and frequency coordination with terrestrial microwave systems is not required. Thus, a single ''blanket'' application may be filed for a specified number of small antennas and one or more hub stations. The Commission has processed 377 applications. The Commission does not request or collect annual revenue information, and thus is unable to estimate of the number of VSAT systems that would constitute a small business under the SBA definition.

(E) Mobile Satellite Earth Stations. 110. There are two licensees. The Commission does not request or collect annual revenue information, and thus is unable to estimate whether either of these licensees would constitute a small business under the SBA definition.

(F) Space Stations (Geostationary). 111. Commission records reveal that there are 37 space station licensees. The Commission does not request or collect annual revenue information, and thus is unable to estimate of the number of geostationary space stations that would constitute a small business under the SBA definition.

(G) Space Stations (Non-Geostationary). 112. There are six Non-Geostationary Space Station licensees, of which only one system is operational. The Commission does not request or collect annual revenue information, and thus is unable to estimate of the number of non-geostationary space stations that would constitute a small business under the SBA definition.

(iv) Wireless Telecommunications Service Providers. 113. The Commission has not yet developed a definition of small entities with respect to the provision of CMRS services. Therefore, for entities not falling within other established SBA categories (*i.e.*, Radiotelephone Communications or Telephone Communications, Except Radiotelephone), the applicable definition of small entity is the definition under the SBA rules applicable to the ''Communications Services, Not Elsewhere Classified'' category. This definition provides that a small entity is one with $11.0 million or less in annual receipts (13 CFR 120.21). The Census Bureau estimates indicate that of the 848 firms in the ''Communications Services, Not Elsewhere Classified'' category, 775 are small businesses. It is not possible to predict which of these would be small entities (in absolute terms or by percentage) or to classify the number of small entities by particular forms of service.

(A) Cellular Radio Telephone Service. 114. The Commission has not developed a definition of small entities applicable to cellular licensees. Therefore, the applicable definition of small entity is the definition under the SBA rules applicable to radiotelephone companies. This definition provides that a small entity is a radiotelephone company employing no more than 1,500 persons. The size data provided by SBA does not enable the Commission to make a meaningful estimate of the number of cellular providers which are small entities because it combines all radiotelephone companies with 500 or more employees.

115. The Commission therefore has used the 1992 Census of Transportation, Communications, and Utilities,

conducted by the Bureau of the Census, which is the most recent information available. That census shows that only 12 radiotelephone firms out of a total of 1,178 such firms which operated during 1992 had 1,000 or more employees. Therefore, even if all 12 of these large firms were cellular telephone companies, all of the remainder were small businesses under the SBA definition. The Commission assumes that, for purposes of its evaluations and conclusions in this IRFA, all of the current cellular licensees are small entities, as that term is defined by SBA. In addition, although there are 1,758 cellular licenses, the Commission does not know the number of cellular licensees, since a cellular licensee may own several licenses.

(B) Broadband Personal Communications Service. 116. The broadband PCS spectrum is divided into six frequency blocks designated A through F. Pursuant to Section 24.720(b) of the Commission's Rules, the Commission has defined ''small entity'' for Block C and Block F licensees as firms that had average gross revenues of less than $40 million in the three previous calendar years. This regulation defining ''small entity'' in the context of broadband PCS auctions has been approved by SBA.

117. The Commission has auctioned broadband PCS licenses in all of its spectrum blocks A through F. The Commission does not have sufficient data to determine how many small businesses under the Commission's definition bid successfully for licenses in Blocks A and B. As of now, there are 89 non-defaulting winning bidders that qualify as small entities in the Block C auction and 93 non-defaulting winning bidders that qualify as small entities in the D, E, and F Block auctions. Based on this information, the Commission concludes that the number of broadband PCS licensees that would be affected by the proposals in the NPRM includes the 182 non-defaulting winning bidders that qualify as small entities in the C, D, E, and F Block broadband PCS auctions. Note that the number of successful bidders is not necessarily equivalent to the number of licensees, yet it is the best indicator that is currently available.

(C) Specialized Mobile Radio. 118. Pursuant to Section 90.814(b)(1) of the Commission's Rules, the Commission has defined ''small entity'' for geographic area 800 MHz and 900 MHz Specialized Mobile Radio (SMR) licenses as firms that had average gross revenues of less than $15 million in the three previous calendar years. This regulation defining ''small entity'' in the context of 800 MHz and 900 MHz SMR has been approved by SBA.

119. The proposals set forth in the NPRM may apply to SMR providers in the 800 MHz and 900 MHz bands. The Commission does not know how many firms provide 800 MHz or 900 MHz geographic area SMR service, or how many of these providers have annual revenues of less than $15 million.

120. The Commission recently held auctions for geographic area licenses in the 900 MHz SMR band. There were 60 winning bidders who qualified as small entities under the Commission's definition in the 900 MHz auction. Based on this information, the Commission concludes that the number of geographic area SMR licensees affected by the proposals set forth in the NPRM includes these 60 small entities.

121. Based on the auctions held for 800 MHz geographic area SMR licenses, there were 10 small entities currently holding 38 of the 524 licenses for the upper 200 channels of this service. However, the Commission has not yet determined how many licenses will be awarded for the lower 230 channels in the 800 MHz geographic area SMR auction. There is no basis to estimate, moreover, how many small entities within the SBA definition will win these licenses. Given the facts that nearly all radiotelephone companies have fewer than 1,000 employees and that no reliable estimate of the number of prospective 800 MHz SMR licensees can be made, the Commission assumes, for purposes of its evaluations and conclusions in this IRFA, that all of the licenses will be awarded to small entities, as that term is defined by SBA.

(D) 220 MHz Service.

122. Licensees for 220 MHz services that meet the definition of CMRS may be providers of telecommunications service. The Commission has classified providers of 220 MHz service into Phase I and Phase II licensees. There are approximately 3,800 non-nationwide Phase I licensees and 4 nationwide licensees currently authorized to operate in the 220 MHz band. The Commission has estimated that there are approximately 900 potential Phase II licensees. These licenses were scheduled to be auctioned in May 1998, but the auction has been delayed pending resolution of petitions for reconsideration.

123. At this time, however, there is no basis upon which to estimate definitively the number of 220 MHz service licensees, either current or potential, that are small businesses. To estimate the number of such entities that are small businesses, the Commission applies the definition of a small entity under SBA rules applicable to radiotelephone companies. This definition provides that a small entity is a radiotelephone company employing no more than 1,500 persons. However, the size data provided by the SBA do not allow the Commission to make a meaningful estimate of the number of 220 MHz providers that are small entities because they combine all radiotelephone companies with 500 or more employees.

124. The Commission therefore uses the 1992 Census of Transportation, Communications, and Utilities, conducted by the Bureau of the Census, which is the most recent information available. Data from the Census Bureau's 1992 study indicate that only 12 out of a total 1,178 radiotelephone firms which operated during 1992 had 1,000 or more employees—and these may or may not be small entities, depending on whether they employed more or less than 1,500 employees. But 1,166 radiotelephone firms had fewer than 1,000 employees and, therefore, under the SBA definition, are small entities. However, the Commission does not know how many of these 1,166 firms are likely to be involved in the provision of 220 MHz service.

(E) Mobile Satellite Services (MSS). 125. Mobile Satellite Services or Mobile Satellite Earth Stations are intended to be used while in motion or during halts at unspecified points. These stations operate as part of a network that includes a fixed hub or stations. The stations that are capable of transmitting while a platform is moving are included under Section 20.7(c) of the Commission's Rules as mobile services within the meaning of sections 3(27) and 332 of the Act. Those MSS services are treated as CMRS if they connect to the Public Switched Network (PSN) and also satisfy other criteria of section 332. Facilities provided through a transportable platform that cannot move when the communications service is offered are excluded from 47 CFR 20.7(c).

126. The MSS networks may provide a variety of land, maritime and aeronautical voice and data services. There are eight mobile satellite licensees. At this time, the Commission is unable to make a precise estimate of the number of small businesses that are mobile satellite earth station licensees and could be considered CMRS providers of telecommunications service.

(F) Paging. 127. Private and Common Carrier Paging. The Commission has proposed a two-tier definition of small businesses in the context of auctioning licenses in the Common Carrier Paging

and exclusive Private Carrier Paging services. Under the proposal, a small business will be defined as either (1) an entity that, together with its affiliates and controlling principals, has average gross revenues for the three preceding years of not more than $3 million; or (2) an entity that, together with affiliates and controlling principals, has average gross revenues for the three preceding calendar years of not more than $15 million. Because the SBA has not yet approved this definition for paging services, the Commission will utilize the SBA's definition applicable to radiotelephone companies, *i.e.*, an entity employing no more than 1,500 persons. At present, there are approximately 24,000 Private Paging licenses and 74,000 Common Carrier Paging licenses. According to the most recent Telecommunications Industry Revenue data, 364 carriers reported that they were engaged in the provision of either paging or other mobile services, which are placed together in the data. The Commission does not have data specifying the number of these carriers that are not independently owned and operated or have more than 1,500 employees, and thus is unable at this time to estimate with greater precision the number of paging carriers that would qualify as small business concerns under the SBA's definition. Consequently, the Commission estimates that there are fewer than 364 small paging carriers that may be affected by the proposed rules, if adopted. The Commission estimates that the majority of private and common carrier paging providers would qualify as small entities under the SBA definition.

(G) Narrowband PCS. 128. The Commission has auctioned nationwide and regional licenses for narrowband PCS. The Commission does not have sufficient information to determine whether any of these licensees are small businesses within the SBA-approved definition. At present, there have been no auctions held for the MTA and Basic Trading Area (BTA) narrowband PCS licenses. The Commission anticipates a total of 561 MTA licenses and 2,958 BTA licenses will be awarded in the auctions. Those auctions, however, have not yet been scheduled. Given that nearly all radiotelephone companies have fewer than 1,500 employees and that no reliable estimate of the number of prospective MTA and BTA narrowband licensees can be made, the Commission assumes that all of the licenses will be awarded to small entities, as that term is defined by the SBA.

(H) Air-Ground Radiotelephone Service. 129. The Commission has not adopted a definition of small business specific to the Air-Ground Radiotelephone Service, which is defined in Section 22.99 of the Commission's rules. Accordingly, the Commission will use the SBA definition applicable to radiotelephone companies, *i.e.*, an entity employing no more than 1,500 persons. There are approximately 100 licensees in the Air-Ground Radiotelephone Service, and the Commission estimates that almost all of them qualify as small under the SBA definition.

(I) Local Multipoint Distribution Service (LMDS). 130. LMDS licensees may use spectrum for any number of services. It is anticipated that the greatest intensity of use will be for either radio telephone or pay television services. SBA has developed definitions applicable to each of these services, however, because pay television is not a telecommunications service subject to section 255, it is not relevant to this IRFA.

131. The Commission has not developed a definition of small entities applicable to LMDS licensees, which is a new service. In the LMDS Order (62 FR 16514, Apr. 7, 1997) the Commission adopted criteria for defining small businesses for determining bidding credits in the auction, but the Commission believes these criteria are applicable for evaluating the burdens imposed by section 255. The Commission defines a small business as an entity that, together with affiliates and controlling principals, has average gross revenues not exceeding $40 million for the three preceding years. Additionally, small entities are those which together with affiliates and controlling principals, have average gross revenues for the three preceding years of more than $40 million but not more than $75 million.

132. Upon completion of the auction 93 of the 104 bidder qualified as small entities, smaller businesses, or very small businesses. These 93 bidders won 664 of the 864 licenses. The Commission estimates that all of these 93 bidders would qualify as small under the SBA definitions, but the Commission cannot yet determine what percentage would be offering telecommunications services.

(J) Rural Radiotelephone Service. 133. The Commission has not adopted a definition of small entity specific to the Rural Radiotelephone Service. A significant subset of the Rural Radiotelephone Service is the Basic Exchange Telephone Radio Systems (BETRS). The Commission will use the SBA's definition applicable to radiotelephone companies, i.e., an entity employing no more than 1,500 persons. There are approximately 1,000 licensees in the Rural Radiotelephone Service, and the Commission estimates that almost all of them qualify as small entities under the SBA's definition.

(K) Wireless Communications Services. 134. This service can be used for fixed, mobile, radiolocation and digital audio broadcasting satellite uses. The Commission defined small business for the wireless communications services (WCS) auction as an entity with average gross revenues of $40 million for each of the three preceding years, and a very small business as an entity with average gross revenues of $15 million for each of the three preceding years. The Commission auctioned geographic area licenses in the WCS service. In the auction, there were seven winning bidders that qualified as very small business entities, and one that qualified as a small business entity. The Commissin concludes that the number of geographic area WCS licensees affected includes these eight entities.

(L) 39 GHz Band. 135. The Commission has not developed a definition of small entities applicable to 39 GHz band licensees. Therefore, the applicable definition of small entity is the definition under the SBA rules applicable to radiotelephone companies. This definition provides that a small entity is a radiotelephone company employing no more than 1,500 persons. Since the Regulatory Flexibility Act amendments were not in effect until the record in this proceeding was closed, the Commission was unable to request information regarding the potential number of small businesses interested in the 39 GHz frequency band and is unable at this time to determine the precise number of potential applicants which are small businesses.

136. The size data provided by SBA does not enable the Commission to make a meaningful estimate of the number of cellular providers which are small entities because it combines all radiotelephone companies with 500 or more employees.[16] The Commission therefore has used the 1992 Census of Transportation, Communications, and Utilities, conducted by the Bureau of the Census, which is the most recent information available. That census shows that only 12 radiotelephone firms out of a total of 1,178 such firms which operated during 1992 had 1,000 or more

[16] U.S. Small Business Administration 1992 Economic Census Employment Report, Bureau of the Census, U.S. Department of Commerce, SIC 4812 (radiotelephone communications industry data adopted by the SBA Office of Advocacy).

employees. Therefore, a majority of 39 GHz entities providing radiotelephone services could be small businesses under the SBA definition.

137. However, in the 39 GHz Band NPRM and Order, 61 FR 02452, Jan. 26, 1996, the Commission proposed to define a small business as an entity that, together with affiliates and attributable investors, has average gross revenues for the three preceding years of less than $40 million. The Commission has not yet received approval by the SBA for this definition. The Commission assumes, for purposes of its evaluations, that nearly all of the 39 GHz licensees will be small entities, as that term is defined by the SBA.

(4) Reporting, Recordkeeping, and Other Compliance Requirements

138. As the Commission has noted, the objective of section 255 is for persons with disabilities to have increased access to telecommunications. Both equipment manufacturers and telecommunications service providers are obligated to provide accessibility for persons with any one or more of different disabilities to the extent that it is readily achievable for them to do so. So, in the broadest sense, compliance consists of the on-going, disciplined, and systematic effort to provide the greatest level of accessibility. Much of the NPRM deals with behaviors which demonstrate that such effort and would be looked upon favorably in the event of a filed complaint.

139. The only actual recordkeeping requirement that the Commission proposes is for each covered entity to provide a point of contact for referral of consumer problems. This person would represent the covered entity during the ''fast-track problem-solving'' phase which would precede the filing of any form of complaint. In the NPRM, the Commission suggests and seeks comment on a one-week period in which the manufacturer or service provider should resolve the customer's problem. Although the Commission wishes to encourage speedy responses, it recognizes that there may be circumstances which call for an extension of the time period. In such instances, the Commission reserves the discretion to grant requests. The Commission seeks comment on whether the one-week time period, and whether the informal means of requesting extensions would be disproportionately burdensome on small businesses.

140. Despite the lack of any formal recordkeeping requirement, in order to respond to ''fast-track'' inquiries, companies may chose to keep records at their own discretion on the way the company has chosen to implement its own disability initiatives. This self-imposed recordkeeping will enable them to respond in a more timely fashion. Likewise the Commission seeks comment on whether this implicit burden needs to be recognized, and, if so, whether there is a disproportionate impact on small businesses.

141. An additional recordkeeping requirement for which the Commission seeks comment would be to have equipment manufacturers acknowledge their section 255 obligations on the same form used for filing for equipment authorization with the Office of Engineering and Technology. (See 47 CFR 2.901–2.1093.) Similarly, the Commission seeks comment on which of the filings for telecommunications service providers would provide a comparable opportunity to indicate awareness of their own section 255 obligations. Another option, beyond the scope of section 255 and thus requiring a separate rulemaking, might be to design a consolidated form to be used by service providers for reporting all required information to the Commission and including awareness of entities' section 255 obligations as one small part. Although the Commission perceives the section 255 reporting burden to be minimal, as in checking off a box on a form required for other purposes, the Commission requests comment on how such requirements can be modified to reduce the burden on small entities and still meet the objectives of this proceeding.

(5) Steps Taken To Minimize Significant Economic Impact on Small Entities, and Significant Alternatives Considered

142. In the Notice of Inquiry, the Commission sought comment on three possible approaches for implementing and enforcing the provisions of section 255: (1) Rely on case-by-case determinations; (2) issue guidelines or a policy statement; or (3) promulgate rules setting forth procedural or performance requirements intended to promote accessibility.[17]

143. The NPRM principally proposes procedural requirements as a practical, common sense means to ensure that consumers with disabilities have access to telecommunications services and equipment.

144. The use of case-by-case determinations exclusively, in lieu of any rules, was considered but tentatively discarded in the NPRM because it was believed that in a rapidly changing market with unpredictable technological breakthroughs, the slow development of case law would not be sufficient to guide covered entities to an understanding of their accessibility obligations.

145. The issuance of guidelines or a policy statement was also considered but tentatively discarded, because of the Commission's view that a greater degree of regulatory and administrative certainty will best serve the interests of both consumers and businesses (including covered entities) that must comply with section 255. Guidelines or a policy statement might serve the purpose of informing case-by-case determinations in complaint proceedings and lending some predictability of outcomes in these proceedings. Moreover, the Commission tentatively decided that, in order for accessibility to be addressed in a pro-active manner, equipment manufacturers and service providers should have clear expressions of the demands section 255 places on their operations before the beginning of the design process. The Commission tentatively concluded, however, that the potential drawbacks of exclusive reliance on case-by-case determinations as a means of implementing section 255 would not be sufficiently diminished by the adoption of guidelines or a policy statement.

146. Also considered and tentatively rejected by the Commission was the option of promulgating specific performance requirements. Such an approach—under which the Commission would attempt to establish an array of specific parameters for features and functions across a broad range of telecommunications services and equipment—was viewed as potentially burdensome to covered entities, as well as being fraught with other potential problems. For example, rapid changes in technology could make Commission performance requirements obsolete in rapid fashion. This would make it necessary for the Commission to frequently revise its performance requirements in order to attempt to keep pace with these technological changes. These frequent revisions would impose burdens on covered entities and potentially cause confusion in the telecommunications marketplace. In addition, the Commission tentatively has decided that the promulgation of rules governing the design process, would impose burdens on covered entities whose resources would be better

[17] Implementation of Section 255 of the Telecommunications Act of 1996: Access to Telecommunications Services, Telecommunications Equipment, and Customer Premises Equipment by Persons with Disabilities, WT Docket No. 96–198, Notice of Inquiry, 11 FCC Rcd 19152, 19163 (para. 7) (1996) (*Notice of Inquiry*).

spent in achieving and improving accessibility.

147. As a result of the Commission's tentative decision to rely primarily on procedural rules, it has taken several steps to minimize burdens on all regulated entities. First, the Commission has sought to provide incentives to industry for early and on-going consideration of accessibility issues. In particular, the Commission will look favorably upon efforts to implement the Access Board's guidelines such as formalizing self-assessment, external outreach, internal management, and user information and support to address accessibility issues. Second, the Commission has attempted to unravel the statutory terminology to give guidance on the interpretation of key language within the telecommunications context. For example, ''readily achievable'' is explored in great depth to explicate feasibility, expense, and practicality elements. Third, the Commission has intended to fashion efficient, consumer-friendly means of dealing with problems. By instituting a pre-complaint process in a fast-track, problem-solving phase, the Commission is attempting to implement the objectives of the statute in a cooperative, as opposed to adversarial, manner. The Commission welcomes comments on the extent to which the tentative approach it has adopted in the NPRM is likely to further the goals of section 255 without creating an unfair economic impact on small entities.

148. The Commission believes it has reduced burdens wherever possible. For burdens imposed by achieving accessibility, the structure of the statute inherently acknowledges varying degrees of economic impact. The ''readily achievable'' standard is proportional, not absolute, thereby adjusting the burden of providing accessible features to be commensurate with the resources of the covered entity.

149. For burdens associated with enforcement, the innovation of the ''fast-track'' problem solving phase is an outgrowth of the desire to find immediate, practical solutions to consumers' problems in obtaining accessible or compatible equipment and services. It is anticipated that the pre-complaint process will significantly reduce the number of complaints, thus minimizing the burden on all covered entities of providing a legal defense. Furthermore, the range of choices for resolving complaints is designed to reduce costs to the opposing parties. Encouraging the use of streamlined informal complaints or alternative dispute resolution processes is primarily to benefit individual plaintiffs who may be persons with disabilities with limited financial resources, but should similarly enable covered entities to defend at lesser cost.

150. To minimize any negative impact, however, the Commission seeks comment on the nature of incentives for small entities, which will redound to their benefit. The Commission will continue to examine alternatives in the future with the objectives of eliminating unnecessary regulations and minimizing significant economic impact on small entities. The Commission seeks comment on significant alternatives interested parties believe it should adopt.

(6) Federal Rules Which Overlap, Duplicate, or Conflict With These Rules

151. Section 255(e) directs the Access Board to develop equipment accessibility guidelines ''in conjunction with'' the Commission, and to periodically review and update the guidelines. The Commission views these guidelines as a starting point for the implementation of section 255, but because they do not cover telecommunications services, the Commission must necessarily adapt these guidelines in its comprehensive implementation scheme. As such, it is the Commission's tentative view that the proposed rules do not overlap, duplicate, or conflict with the Access Board Final Rule, 36 CFR Part 1193.

VI. Ordering Clauses

152. Accordingly, it is ordered, pursuant to sections 1, 4(i), 8(d), 8(g), 201, 202, 207, 208, 251(a)(2), 255, 303(r), 307, 312, 403 and 503(b) of the Communications Act, 47 U.S.C. 151, 154(i), 158(d), 158(g), 201, 202, 207, 208, 251(a)(2), 255, 303(r), 307, 312, 403, 503(b), that notice is hereby given of the proposed regulatory changes described in the NPRM, and that comment is sought on these proposals.

153. It is further ordered that the Commission's Office of Public Affairs, Reference Operations Division, shall send a copy of this NPRM, including the Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

List of Subjects in 47 CFR Part 1

Administrative practice and procedure, Individuals with disabilities, Reporting and recordkeeping requirements, Telecommunications.

Federal Communications Commission.

Magalie Roman Salas,

Secretary.

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