

required to include these features. Such an approach would make no practical sense because it would raise production costs require all purchasers to buy a feature that most will never use, and may not address the individual needs of all people who need an accessibility feature. The solution also misdirects resources away from the development of better technological solutions for people with disabilities. The critical issue is not whether every car has a particular accessibility feature installed regardless of the driver's needs, but whether all drivers who need a particular accessibility feature can obtain a car with the relevant feature in the marketplace.

The same analysis applies to the equipment addressed by Section 255. The relevant inquiry is not whether every piece of information technology equipment contains an identical set of accessibility solutions but whether individuals who need particular accessibility features are able to get them in the marketplace. Thus, the Commission should conclude that manufacturers meet the Section 255 accessibility standard when they either (i) offer the requested accessibility solutions within a product family, or (ii) manufacture equipment for which accessibility solutions are available in the marketplace through other manufacturers.

B. Compatibility

Section 255 provides that where accessibility is not readily achievable, manufacturers must ensure that equipment is compatible with "existing peripheral devices or specialized [CPE] commonly used" by those with

disabilities.³² The FCC tentatively defines “commonly used” equipment as “affordable and widely available”³³ with a “specific telecommunications functionality.”³⁴ In addition, the FCC proposes to adopt the five criteria identified by the Access Board³⁵ as a “starting point” for assessing compatibility.³⁶ The Commission should adopt rules that harness the IT marketplace’s “plug and play” dynamic, and allow voluntary industry standards bodies to develop standard interfaces that will ensure compatibility of peripheral devices and specialized CPE

1. Compatibility Produces Accessibility In The IT Marketplace

The IT marketplace, as discussed above, is driven by a “plug and play” dynamic. Under this approach, all customers - disabled and non-disabled alike - purchase a combination of components to assemble systems that best meets their needs. Each component of an IT system -- the printer, modem, monitor, keyboard or other input device, software applications, storage devices, sound and video cards and other peripherals -- is available in a wide variety of models, depending on the functions, performance qualities, and features the user wants or needs. Although these components often are purchased separately, various standard hardware and software interfaces enable the components to operate as

³² 47 U.S.C. § 255(d).

³³ *NPRM* at ¶ 90.

³⁴ *NPRM* at ¶ 84.

³⁵ *NPRM* at ¶ 92. These criteria require: TTY connection and signal compatibility, “external access to all information and control mechanisms”; “connection point for external audio processing devices” and “compatibility of controls with prosthetics.”

³⁶ *Id.*

a customized system. Thus, just as any consumer can add a particular component or software application to address his or her own information technology needs, the plug-and-play, compatibility-based systems approach allows those with disabilities to easily and flexibly adapt their systems to meet particular accessibility needs. In short, for the IT market, compatibility equals accessibility. In order to preserve the benefits of this systems approach, the Commission should therefore look to "compatibility" when it evaluates whether a manufacturer of a particular IT product has satisfied Section 255.

Moreover, just as the FCC's rules should not suggest that every company's products must comply with each of the input and output functions identified in the Access Board's guidelines neither should they suggest that products must be compatible with every type of peripheral device or specialized CPE. The Access Board's guidelines, which the *NPRM* proposes to adopt, run counter to this flexibility by being overly specific and detailed.³⁸ The FCC should instead rely on a market-wide view and find that, where the IT market as a whole produces equipment that is compatible with peripheral devices and specialized CPE when readily achievable, the requirements of Section 255 have been satisfied.

³⁸ ITI is particularly concerned that TTY compatibility presents difficult technical issues for IT equipment. These same concerns were raised by commenters in the *TRS Rulemaking*, wherein the Commission indicated that it may address interconnectivity between digital devices and TTY equipment in a separate proceeding. *TRS Rulemaking* at ¶ 79. ITI strongly supports the need for a separate rulemaking to address these issues and urges the FCC to defer adopting rules requiring TTY compatibility in this proceeding until it has had an opportunity to explore the technical obstacles associated with such a requirement.

2. Creation Of A List Of “Commonly Used” Equipment Would Inhibit Manufacturer Flexibility And Innovation And Increase costs

The FCC seeks comment on whether as an information source for individuals with disabilities, it should maintain a list of “commonly used” components which it defines as “widely available.”³⁹ As an initial matter, the definition of “commonly used” should be modified to require not only that devices be “widely available,” but also *widely* purchased by people with disabilities. Mere availability of a product in itself does not capture the degree to which a product is in use.

ITI opposes the creation of a mandatory list of “commonly used” equipment because such a list would create all the wrong incentives and lead to all the wrong results. The maintenance of such a list would create a powerful if not irresistible incentive for manufacturers of specialized equipment to obtain list-status, regardless of whether their equipment is “affordable” for consumers or meets the “widely available” test. Policing entries on the list would require the Commission and manufacturers subject to Section 255 to engage in burdensome and costly monitoring. The list would reduce the incentive and available resources for a manufacturer subject to Section 255 to develop innovative solutions for unlisted equipment by, e.g., partnering with specialized providers to develop new accessibility solutions. The list would also reduce the flexibility and resources available to manufacturers subject to Section 255 for the development

³⁹ NPRM at ¶ 90

of new and innovative products, since any new product would have to be designed "to the list."

Finally, the need for such a list is questionable. Marketplace forces already have produced voluntary, industry-led processes to develop standards for interconnection and interoperability that have permitted innovation to flourish. The FCC's compatibility rules should support industry trends towards interoperable component equipment and user-customized system options which maximize the customer bases for IT products rather than discouraging innovation by providing exclusive listings of compatible equipment. To the extent that the Commission wishes to provide a purely informational database, so that people with disabilities can more easily find out about compatibility solutions currently available, ITI would support such a data depository to promote the dissemination of such information as discussed in Section IV.G below.

3. Hardware Complies With Section 255 If It Is Compatible With Software That Enables Accessibility

The Commission's compatibility rules should recognize the fundamental differences between traditional telephony products and IT products. If IT hardware products are compatible with the software which provides the accessibility options for individuals with disabilities, the Commission should find that the hardware satisfies compatibility standards.

IT products are invariably associated with software. It is typically software, in conjunction with hardware, that enables an IT appliance to be

compatible with peripheral devices or specialized CPE. In the *NPRM*, the Commission confirms that “Section 255 reaches only those aspects of accessibility to telecommunications over which equipment manufacturers . . . subject to our authority have direct control, such as the design of equipment [.]”⁴⁰ A hardware manufacturer has “direct control” only over the hardware design and whether it is compatible with software that enables accessibility, not over the software itself. Hardware manufacturers therefore should be found in compliance with Section 255 if their equipment is compatible with software that contains accessibility features.

C. The “Readily Achievable” Standard

Section 255 provides that manufacturers must make their equipment accessible or compatible to people with disabilities only where “readily achievable.” The *NPRM* properly recognizes that the “readily achievable” standard must take into account practical economic factors that are applied on a flexible, case-by-case basis to produce reasonable conclusions.⁴¹

In general, ITI supports the Commission’s efforts to incorporate practical economic realities and technical considerations into its “readily achievable” standard. For example, the proposed definition of “feasibility” properly recognizes the technological limitations manufacturers face in deploying accessibility solutions, such as whether the accessibility feature for a particular disability is inconsistent with the installation or operation of other accessibility

⁴⁰ *NPRM* at ¶ 79 (emphasis added).

⁴¹ *NPRM* at ¶ 99.

solutions or requires technology that is not yet available. In addition, the proposed “expense” and “practicality” prongs of the Commission’s framework properly consider opportunity costs and net costs, market considerations and cost recovery. Accessibility features are not “readily achievable” if the costs of developing and/or deploying them in equipment discourage manufacturers from offering the equipment in the first place or result in a price that suppresses consumer demand even if the equipment is introduced into the marketplace. Finally, ITI endorses the Commission’s tentative conclusion that there should be no requirement to upgrade or retrofit products already offered in the market if accessibility features become readily achievable after the product’s introduction.

Some aspects of the Commission’s proposed standard require additional refinement, however, such as the Commission’s presumptions regarding the resources available to a manufacturing entity and the ability of manufacturers to absorb unrecoverable costs. In addition, the proposed standard should take into account the effect of a “fundamental alteration” on IT equipment, the availability of equipment on a marketwide basis and the product cycle for equipment in considering timing issues. Finally, it is crucial for the Commission’s “readily achievable” standard to incorporate an assessment of “compatibility” in order to accurately reflect the fundamental differences between the marketplace for IT appliances and that for traditional telephony products. Each of these aspects of the standard are discussed in turn in the following paragraphs.

1. Resources Available To The Manufacturing Unit

The *NPRM* tentatively concludes that the “financial resources of the organization that has legal responsibility for and control over, a telecommunications product should be presumed to be available to make that product” Section 255 compliant.⁴² The *NPRM* further provides that the presumption may be rebutted by proof that the responsible manufacturing unit has access to either additional or fewer financial resources than would be available through the legally responsible entity⁴³

The *NPRM* refers to organizations that have “legal responsibility” for and control over a product but does not otherwise describe the relationship between the entities that would constitutes “legal responsibility.” The Commission must elaborate on the factors it will use to identify entities with “legal responsibility” for a product or to determine when such a relationship exists between a manufacturer and affiliated entities.

In any event, the *Notice* improperly assumes that the resources of such an entity will be available to the manufacturing unit. In the IT equipment market, manufacturers typically rely on manufacturing units or product teams with autonomous budget authority. Manufacturers rely on separate budget centers for a variety of valid business reasons. For example, separate budget authority enables companies to test whether a new product or product line is viable without hidden cross-subsidies from other product lines.

⁴² *NPRM* at ¶ 109

⁴³ *Id.*

Although the FCC on several occasions makes clear that its rules are designed to reach those entities which exert control over the components they assemble,⁴⁴ the corporation which exerts “legal responsibility” for the manufacturing sub-unit often will not control the design and development of the telecommunications product nor will the financial resources available to the corporation as a whole be available to the sub-unit. Yet the *NPRM* would impose on equipment manufacturers a potentially burdensome presumption that, due to the corporate structures typical of IT markets, will seldom have any meaningful application.⁴⁵ Instead, the FCC’s rules should simply identify corporate resources as one factor the FCC will balance in its readily achievable analysis, without establishing presumptions that are inconsistent with a necessarily fact-specific scenario.

Second, in order to fairly evaluate the extent to which the financial resources of an affiliated entity are relevant to a “readily achievable” analysis, the Commission should also consider the extent to which the marketplace can support a particular product. As discussed below, a manufacturing unit may have the resources needed to design, develop and sell a particular accessibility

⁴⁴ *NPRM* at ¶ 60

⁴⁵ The *NPRM*’s proposal also could lead to discrimination based on the size of the manufacturer. Based on the “legal responsibility” criteria, a smaller manufacturer competing with the manufacturing unit of a larger manufacturer in the same equipment market would be exempt from accessibility requirements, whereas the manufacturing unit would not, even where the resources available to each are the same and adding the accessibility features is no more readily achievable for one than the other. The manufacturing unit would therefore be left with two choices: to offer the product with the required accessibility features at a higher price, making the product less competitive, or to keep prices competitive and absorb the additional costs. Under either scenario, the manufacturing unit would be at a competitive disadvantage compared to the smaller manufacturer. In contrast, ITI’s proposal would accurately capture the relevant resource

feature, but the high costs of doing so or the small consumer base for such a product would result in a product that is unaffordable.⁴⁶ Because the IT marketplace is highly competitive, with low entry and exit barriers, companies must quickly abandon a product line if accessibility requirements drive prices or

level for a manufacturing unit and would therefore help to avoid these potential marketplace distortions.

⁴⁶ See discussion *infra* Section III.C.3.

returns to non-competitive levels. In other words, the resources available to a manufacturer may have little or no relevance to whether accessibility to a product is “readily achievable.” The Commission’s standards should therefore focus on the impact of accessibility requirements on affordability to the consumer, not just cost impact to the manufacturer.

2. “Fundamental Alteration” In Equipment

In its guidelines, the Access Board properly included “whether the accessibility solution results in a fundamental alteration of the product” in the readily achievable analysis.⁴⁷ This factor, as noted by the Access Board, derives directly from the “undue burden” standard in the Americans with Disabilities Act of 1990 (“ADA”)⁴⁸, which establishes the “scope of a public accommodation’s duty to provide auxiliary aids and services,” such as text telephones and assistive learning devices⁴⁹

Although the FCC considers product alterations as part of its “marketability” factor, the *Notice* does not separately address “fundamental alteration.” Such alterations can so degrade the underlying purpose and nature of a product that, even if the price impact is insignificant, the product becomes unmarketable. For example, a laptop IT appliance no longer serves its light weight, portable function if accessibility requirements force a manufacturer to incorporate additional equipment that significantly increases the weight of the

⁴⁷ Appendix to 36 CFR Part 1193 - Advisory Guidance, Subpart A, Paragraph 3(d).

⁴⁸ Americans with Disabilities Act of 1990, 42 U.S.C. § 12101, *et seq.*

⁴⁹ *Telecommunications Act Accessibility Guidelines*, Docket No. 97-1, 63 Fed. Reg. 5614 (Feb. 3, 1998) (to be codified at 36 C.F.R. pt. 1193)

appliance. For this reason, “fundamental alteration” should, as in the Access Board’s guidelines, be treated as a separate factor.

3. Manufacturer Ability To Recover Costs And Affordability For Consumers

The *NPRM* states that there is no assumption in Section 255 that manufacturers “*must* be able to fully recover” the incremental costs associated with adding an accessibility feature.⁵⁰ A standard that ignores the recoverability of manufacturing costs, however and requires manufacturers to absorb unrecoverable cost burdens, will squelch competitive market forces chill innovation, and slow the development of accessibility solutions.

The “readily achievable” factors are intended to be based on the “letter and spirit” of the ADA. However, the burden imposed under Section 255 is fundamentally different from that contemplated by the ADA. The ADA assessment of “readily achievable” considers the difficulty and the discrete, non-recurring costs of a single entity’s long-term modifications to its gross physical environment to accommodate employees and members of the public with disabilities. These modifications typically involve relatively simple engineering and design solutions. The one-time non-recurring costs associated with these modifications can be absorbed over time.

By contrast, changes to a company’s design and manufacturing process like those contemplated by the *NPRM* and the Access Board’s guidelines force recurring costs onto manufacturers that can multiply over time as existing

⁵⁰ *NPRM* at ¶ 115.

products are upgraded or modified to respond to changes in technology. These recurring and/or escalating costs either force manufacturers out of the market (because they cannot recover their costs) or price products out of the market and beyond the reach of the consumers who would benefit from them.

Unrecoverable cost burdens in the IT marketplace would have a significant impact on a manufacturer's ability to continue in a competitive environment.

The *NPRM* also seeks comment on the extent to which manufacturers and service providers should take into account the affordability of accessible products in assessing cost recovery. Because a manufacturer's ability to absorb costs is determinative of its survival in the marketplace, the impact of an accessibility feature on the consumer affordability of products is again a key factor to which FCC must give considerable weight. The Commission cannot adopt a standard that would compel manufacturers to produce equipment at prices that suppress demand. Nor should manufacturers be compelled to produce equipment regardless of whether any demand in fact exists.

This does not mean that individuals whose needs are not being met by the marketplace will be denied the solutions they need. IT manufacturers continually consult individuals with disabilities to address their needs. Incorporating affordability into the readily achievable analysis will ensure that people with disabilities will have affordable equipment to choose from and manufacturers will not be required to manufacture products that consumers cannot afford. Manufacturers can devote their resources to designing and

developing potential accessibility solutions that may be more widely beneficial and economically practicable.

In order to ensure that individuals with disabilities have the same opportunities to benefit from technological innovation as other customers, the FCC must give manufacturers flexibility to respond to the market. Imposing unrecoverable cost burdens on manufacturers will distort the competitive IT market, disrupt the accessibility efforts of existing manufacturers, and ultimately reduce the volume and variety of accessibility solutions brought to market.

4. Availability Of Equipment Marketwide

In evaluating whether accessibility is practical and cost-effective, the FCC should consider the extent to which an accessibility solution already is available in the marketplace through other manufacturers. As discussed in Section II, above, the underlying policies of Section 255 are vindicated regardless of whether a single manufacturer is producing accessibility solutions or whether the market as a whole is producing accessible equipment. If the Commission ignores the accessible products produced by other manufacturers when the Commission assesses the accessibility of the equipment produced by one manufacturer, the Commission will discourage manufacturers from specializing, which will effectively slow the pace of technological innovation, unnecessarily increase the cost of all equipment, and divert resources from the development of new accessibility solutions. The Commission should therefore consider whether accessible equipment is available marketwide in determining whether

accessibility or compatibility is “readily achievable” for a particular piece of equipment produced by a manufacturer

5. Product Life Cycle

The *NPRM* tentatively concludes that, because the Commission will consider timing issues as part of its practicality assessment, the Commission need not establish a fixed grace period for existing products during which manufacturers would not be required to modify such products to include an accessibility feature.⁵¹ The Notice properly recognizes that “reasonable periods of time” are required “to incorporate new accessibility solutions into products under development,” and tentatively concludes that Section 255 does not require manufacturers to modify a product once it is introduced into the market in order “to incorporate subsequent, readily achievable access features.”⁵² Both of these observations are sound and should be adopted. However, any final rule must be more specific; the Notice’s reference to “reasonable time periods” is ambiguous.

Product life cycles are a reliable and appropriate measure for determining whether accessibility modifications to a product are readily achievable. Modifying a production line before a production cycle ends can be both inefficient and uneconomic. To the extent that there is any uncertainty as to whether compliance requirements will take into account production cycles, manufacturers would be discouraged from innovating or introducing beneficial product revisions. The *Notice*’s reference in this context to the February, 1996

⁵¹ *NPRM* at ¶ 120

⁵² *Id.*

enactment of Section 255 is inapposite. So long as technological advances can change the ready achievability of accessibility or compatibility during the product cycle for equipment, manufacturers are entitled to the certainty and predictability of a grace period keyed to product life cycles

6. "Compatibility" As A Factor In Assessing Ready Achievability

Section 255 requires that, where "readily achievable," equipment must be compatible with specialized equipment and peripheral devices for people with disabilities if the equipment cannot be made "accessible." The Commission should interpret the statute to permit consideration of compatibility when assessing whether accessibility is readily achievable. This approach is necessary to preserve the "plug and play" environment for IT equipment which uses the compatibility of building block components to maximize consumer choice regarding equipment configurations and system solutions. Indeed, from the perspective of individuals with disabilities who would benefit from customized accessibility solutions using IT technologies compatibility often is preferable to accessibility in terms of flexibility, choice, and quality

The Commission's goal should be to interpret the statute in a way that furthers Congressional objectives and produces the best solution for people with disabilities. Where that solution is produced by compatibility between standard building blocks and specialized components assembled into a system tailored to the individual's unique needs, the Commission's rules should prefer

compatibility. Accordingly, the Commission should include an assessment of compatibility as part of determining whether accessibility is “readily achievable.”

IV. ENFORCEMENT MECHANISMS

The *NPRM* proposes a three-stage complaint process, starting with a “fast track problem solving phase”, which is intended to encourage informal resolution of Section 255 inquiries and complaints, and ending with a formal dispute resolution process, which would be triggered only upon complainant request and where permitted by the FCC.⁵³ ITI supports the Commission’s efforts to establish an enforcement process that would encourage rapid resolution of complaints and limit the need to resort to formal dispute resolution procedures. ITI is concerned, however, that the complaint procedures and corresponding defenses proposed in the *NPRM* will have the contrary effect, unnecessarily complicating resolution processes, exhausting Commission resources, and triggering significant concerns regarding treatment of confidential and proprietary information.

A. Direct Contact With The Equipment Manufacturer As A Precondition To An FCC Complaint

The *NPRM* properly recognizes the expediency of implementing a process that “identifies and solves accessibility problems with minimal government intervention as soon as possible.”⁵⁴ At the same time, it proposes

⁵³ *NPRM* at ¶ 126.

⁵⁴ *NPRM* at ¶ 124.

that all inquiries or complaints regarding Section 255 accessibility must first be routed through the Commission, which will then forward the complaint or inquiry to the manufacturer.⁵⁵ Rather than encouraging potential complainants and manufacturers to resolve concerns outside of the enforcement process, the proposed rules encourage individuals with any Section 255 accessibility issues to contact the FCC before contacting the manufacturer. Thus, the rules invite parties to treat simple requests for information as if they were complaints, and promise to shower the FCC with a barrage of calls and paperwork that the Commission will be required to field and coordinate before it even determines whether there is, in fact, a problem that merits Commission intervention. In short, the approach outlined in the *NPRM* is at odds with the Commission's stated preference for efficient, informal dispute resolution.

The Commission's ability to effectively and efficiently enforce Section 255 hinges on its implementation of a dispute resolution process that will reserve the Commission's limited resources for true accessibility disputes. Only by requiring direct manufacturer contact as a prerequisite to filing a complaint can the Commission successfully discourage the filing of frivolous inquiries and complaints and eliminate complaints that are the result of misinformation (or a lack of information) regarding the solutions currently available in the marketplace.⁵⁶

⁵⁵ Although the Notice encourages potential complainants to contact the manufacturer or service provider directly to resolve accessibility claims, it proposes to impose no requirement on complainants to do so. *NPRM* at ¶ 126.

⁵⁶ For similar reasons, the Commission should exercise its discretion to adopt a standing requirement with which claimants must comply in order to file a complaint against a

The manufacturer is in the best position to resolve accessibility problems quickly and efficiently, and should be given the opportunity to do so without being distracted by cumbersome, time-consuming, and resource-intensive proceedings. The Commission should therefore adopt rules that require potential complainants to attempt to resolve any problem by first contacting the manufacturer and giving the manufacturer a reasonable opportunity to respond.⁵⁷

B. Fast Track Response Time Of Five Business Days

The proposed rules provide that manufacturers will have only five business days to respond to inquiries or complaints forwarded to them during the fast track phase. Where “substantial efforts” are made to resolve an accessibility problem, the manufacturer could provide an “informal progress report” and request an extension of time.⁵⁸ But accessibility claims may be complex and involve more than one unit within a company. A response time of five business days is patently insufficient to route the inquiry or complaint to the correct employee, much less investigate and resolve it. If the Commission

manufacturer. See *California Association of the Physically Handicapped, Inc. v. FCC*, 778 F.2d 823, 826 (DC Cir. 1985). By allowing any person (or entity) to file a complaint regardless of whether that person is disabled, is a customer of the manufacturer, or has been injured by the manufacturer’s alleged failure to provide accessibility, the Commission’s approach virtually guarantees frivolous complaints. In contrast, a standing requirement would discourage complainants from pursuing speculative accessibility claims.

⁵⁷ Of course, in order to establish successful communication between manufacturers and consumers, it is essential that manufacturers clarify the mechanisms by which consumers should contact manufacturers regarding Section 255 complaints. To this end, ITI supports rules which would require manufacturers to maintain and update accurate contact information, but which would allow manufacturers the flexibility to determine which procedures will best ensure proper handling of inquiries and complaints.

⁵⁸ NPRM at ¶ 137

adopts a five-day deadline, it can expect the vast majority of manufacturers to waste time and resources drafting informal progress reports and requests for extension of time before they can begin any investigation of the consumer's accessibility concerns.

For the informal, fast track process to work as a practical matter, the rules implementing the process must be consistent with practical realities. ITI supports a 60-day response time as both reasonable and necessary to ensure that manufacturers have sufficient opportunity to match a complainant with the appropriate accessibility expert within the company, research potential solutions, and provide a written response incorporating the level of detail expected by the Commission. A period any shorter will compromise the manufacturer's ability to respond to the complaint with the solution best suited to the consumer's needs.⁵⁹

C. Confidentiality Rules Applicable To Section 255 Complaints

The *NPRM* proposes that, at the conclusion of the fast track phase, the manufacturer should be required to informally report the results of its efforts to resolve the problems identified in the complaint (including any explanation as to why such problems could not be resolved) and provide copies of such reports to the complainants. The Commission has requested comment on whether the existing confidentiality rules "strike the best balance" between confidentiality

⁵⁹ Where necessary, the Commission also should forward complaints in translation (e.g., where a complaint is filed in Braille). Manufacturers must be able to understand a complainant's claims and share a common understanding with that of the FCC. Untranslated complaints will prevent a manufacturer from responding quickly to complaints and inquiries forwarded by the FCC, and would be inconsistent with the Commission's emphasis on expediting the fast track process.

concerns and “open decision-making” in the Section 255 context.⁶⁰ The Commission’s existing confidentiality rules are inadequate for this purpose without revision and clarification.

In most, if not all, cases, the reporting requirement proposed in the *Notice* will require manufacturers to disclose highly competitively-sensitive or proprietary information regarding their costs, design, and/or manufacturing processes. Although ITI supports a complaint process that permits the free flow of information among the manufacturer, the complainant, and the Commission, the Commission’s existing rules governing confidentiality for information provided to the FCC are ambiguous and incomplete, and will not adequately protect manufacturers who provide proprietary information in response to a Section 255 complaint⁶¹

The Commission should therefore clarify the confidentiality rules that will apply under Section 255 and require complainants to sign non-disclosure agreements for information provided during the complaint process. In addition, the Commission should make a per se finding that documentation, including pleadings, submitted by a manufacturer in response to an accessibility complaint that raises ready achievability issues, constitutes competitively sensitive information. The FCC should affirm that such information will be accorded confidential treatment upon request by the manufacturer, regardless of whether

⁶⁰ *NPRM* at ¶ 153.

⁶¹ This concern is particularly acute given the broad standing requirement proposed by the Commission, see discussion *infra* note 56. which would allow competitors to file complaints and be entitled to discovery

a request for disclosure under the Freedom of Information Act is filed by a third party.⁶²

D. Deadline For Formal Dispute Resolution

The FCC requests comment on whether it should establish a deadline by which complainants must request formal dispute resolution once an informal complaint process is completed. ITI advocates a filing deadline of no more than 30 days. Such a deadline will provide certainty and finality to manufacturers who are the subject of informal complaints. A 30 day deadline is reasonable and not burdensome for complainants since, according to the proposed rules, complainants would not be required to refile the complaint submitted in the informal processes in order to pursue a formal complaint.

E. Product Families And Marketplace Availability As Complete Defenses To Section 255 Complaints

The *NPRM* outlines three defenses to Section 255 complaints: (a) that the accessibility problem lies outside the scope of Sec. 255, (b) that the product is, in fact, accessible, and (c) that accessibility is not readily achievable. In addition, the *NPRM* indicates the FCC also will consider (i) the respondent's good faith efforts to comply with Section 255 by taking actions that would increase the accessibility of product offerings early in the design process (e.g.,

⁶² See 47 C.F.R. § 0.461.

self-assessment, external outreach, internal management processes, providing user information and ongoing support); and (ii) whether the manufacturer offers other functionally similar products in the same product family that would resolve the accessibility problem, provided that the manufacturer can demonstrate that the “product line” increases the overall accessibility of the provider’s offerings.

ITI agrees that the three defenses Identified by the Commission should be considered complete defenses to any Section 255 complaint. However, the Commission’s rules should also recognize both the value of developing specialized expertise regarding the needs of particular disabilities as well as the inherent inefficiency of requiring all manufacturers to produce products that address every disability. As discussed in Section II, above, where an individual manufacturer (or the market as a whole) produces equipment accessible to and usable by individuals with particular disabilities (where readily achievable), the Congressional policies and intent underlying Section 255 have been vindicated, and the individual’s needs have been served

Thus, the Commission’s rules should provide that, where a manufacturer can demonstrate the existence of (i) accessible products for substantially similar prices within the same product family, (ii) functionally similar products with accessibility features offered by other manufacturers, or (iii) products that do not raise the accessibility issue complained of but that resolve the accessibility obstacle, the manufacturer has raised a complete defense to an accessibility claim and is therefore not in violation of Section 255.

F. Damages In Complaints Against Non-Carriers

The *NPRM* seeks comment on whether there is “any basis” for finding that damages awarded under Sections 207 and 208 may be awarded against non-common carriers.⁶³ Under the Communications Act, there is not.

Section 207 addresses the recovery of damages by “[a]ny person claiming to be damaged by any *common* carrier subject to the provisions of this Act[.]”⁶⁴ Similarly, Section 208 refers specifically to those “complaining of anything done or omitted to be done by any *common* carrier subject to this Act[.]”⁶⁵ Finally, Section 255 states only that nothing therein gives complainants a private right of action and that the Commission “shall have exclusive jurisdiction with respect to any Complaint under this Section.” Neither Section 207 nor Section 208 explicitly or implicitly provides for damages from parties other than common carriers. Nor does Section 255 confer additional authority upon the FCC to impose damages. The Commission lacks the statutory authority to adopt rules providing for the recovery of damages from non-carriers

G. Miscellaneous Implementation Issues

Finally, the *NPRM* requests comment on other measures the Commission might take to “foster increased accessibility” of telecommunications equipment and services. In particular, the *NPRM* questions whether the Commission should (i) establish a clearinghouse of information regarding disabilities issues

⁶³ *NPRM* at ¶¶ 33, 172.

⁶⁴ 47 U.S.C. § 207 (emphasis added).

⁶⁵ 47 U.S.C. § 208 (emphasis added).

and accessibility solutions; (ii) publish information on a manufacturer's or service provider's performance in providing accessible products and/or designate a "seal" or mark that signifies a manufacturer's compliance with Section 255; or (iii) develop a peer review process to "complement" the implementation of Section 255.

1. Establishment Of A Clearinghouse

In its comments responding to the *Notice of Inquiry*,⁶⁶ ITI urged the Access Board and Commission to identify mechanisms by which individuals with disabilities could communicate their needs to the manufacturing community and by which manufacturers could identify or solicit information about the needs of individuals with disabilities. One idea advocated by ITI was the establishment of a clearinghouse to collect information from manufacturers concerning specialized equipment available for individuals with disabilities and to collect information from individuals with disabilities regarding their unmet needs or problems with existing equipment.

Although ITI continues to strongly support the creation of a depository for current information on accessibility solutions and products targeted to particular disabilities, this clearinghouse/depository should not be deemed a legally binding obligation imposed on manufacturers⁶⁷. Nor should any information

⁶⁶ *In the Matter of Implementation of Section 255 of the Telecommunications Act of 1996, Access to Telecommunications Services, Telecommunications Equipment, and Customer Premises Equipment By Persons with Disabilities*. WT Docket No. 96-1 98, Notice of Inquiry, 11 F.C.C.R. 19152 (rel. Sep. 19, 1996).

⁶⁷ Although ITI refers to an "equipment clearinghouse", presumably this information depository would be useful both for manufacturers and service providers.