

DOCKET FILE COPY ORIGINAL

RECEIVED

JUN 30 1998

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

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

In the Matter of)

Implementation of Section 255 of the)
Telecommunications Act of 1996)

WT Docket No. 96-198

Access to Telecommunications Services,)
Telecommunications Equipment, and)
Customer Premises Equipment)
By Persons With Disabilities)

To: The Commission

COMMENTS OF NEXTEL COMMUNICATIONS, INC.

NEXTEL COMMUNICATIONS, INC.

Robert S. Foosaner
Vice President and Chief Regulatory Officer

Lawrence R. Krevor
Director - Government Affairs

Laura L. Holloway
General Attorney

1450 G. Street, NW
Suite 425
Washington, D.C. 20005
(202) 296-8111

Date: June 30, 1998

No. of Copies rec'd 045
List A B C D E

TABLE OF CONTENTS

SUMMARY i

I. INTRODUCTION 1

II. DISCUSSION 4

 A. Application of Section 255 To Wireless
 Telecommunications Services Means Ensuring
 Disabled Americans Access to Communications
 "On the Move." 4

 B. The Commission Must Provide A Reasonable
 Enforcement Process 7

III. CONCLUSION. 11

SUMMARY

Nextel Communications, Inc. ("Nextel") respectfully submits these Comments on the Federal Communications Commission's ("Commission") proposals to implement Section 255 of the Communications Act of 1934, as amended by the Telecommunications Act of 1996 ("the Act"). Section 255 requires manufacturers and telecommunications service providers to provide disabled Americans access to telecommunications services to the extent such access is "readily achievable." While Congress sought to provide the competitive and technological benefits of the Act to all Americans, Congress also recognized that providing such access can involve complex and expensive upgrades and alterations to a provider's products and services. The Commission's response is to ensure that Section 255 is implemented pursuant to the balanced approach Congress established in the Act.

The Commission can fulfill the requirements of Section 255 by permitting carriers and manufacturers to implement various product lines to meet the needs of particular disabled Americans rather than attempting to incorporate all of the capabilities needed to address visual, hearing, speech, cognitive, motor and other disabilities in a single handset or service. A product line approach is reasonable and rational, and is fully consistent with Congress' intent in Section 255. As applied to Commercial Mobile Radio Services, such as those provided by Nextel, it would ensure that all users have the essential capability of wireless communications: to communicate while "on the move" without the counterproductive constraints of "one size fits all" regulation.

Additionally, in imposing Section 255's requirements, the Commission must consider the provider's financial resources, the needs of the overall consumer marketplace, and the time that will be required to develop the necessary products and services for disabled Americans.

The Commission should establish a rational enforcement process that protects the rights of all parties while expediting resolution of Section 255 compliance questions. Permitting complaints from any party, as the Commission has proposed, whether or not they are within the zone of interests protected by Section 255 or have any "case" or "controversy" with the provider or manufacturer, is misguided and contravenes basic constitutional principles. The Commission's proposal to avoid resolving standing arguments -- and thereby presumably speed the complaint process -- ignores the equally important rights of carriers and manufacturers to be free from frivolous, harassing and abusive complaints, and is far outweighed by the sheer numbers of complaints the Commission is likely to face if complainants need not demonstrate standing to bring a complaint.

Finally, the Commission must provide carriers and manufacturers more than five days to respond to a Section 255 complaint. Nextel agrees that these complaints should be addressed and resolved expeditiously; 30 days is more reasonable and would protect against the likelihood of inaccurate or incomplete responses prompted by a five-day deadline. Carriers and manufacturers also are entitled to assurance that a proceeding has

reached its conclusion. A reasonable statute of limitations, e.g. two years, should apply to all Section 255 complaints, and Section 1.718 of the Commission's rules should apply to these complaints, thus requiring complainants, unsatisfied with the results of an informal complaint, to file a formal complaint within six months of the informal complaint resolution.

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

In the Matter of)
)
Implementation of Section 255 of the)
Telecommunications Act of 1996) WT Docket No. 96-198
)
Access to Telecommunications Services,)
Telecommunications Equipment, and)
Customer Premises Equipment)
By Persons With Disabilities)

To: The Commission

COMMENTS OF NEXTEL COMMUNICATIONS, INC.

I. INTRODUCTION

Pursuant to the Federal Communications Commission's ("Commission") Notice Of Proposed Rule Making ("Notice") in the above-referenced proceeding,^{1/} Nextel Communications, Inc. ("Nextel") respectfully submits these Comments on the Commission's proposals to implement Section 255 of the Communications Act of 1934, as amended by the Telecommunications Act of 1996 ("the Act").^{2/}

Nextel is the Nation's largest provider of wide-area Specialized Mobile Radio ("SMR") services, providing consumers two-way mobile telephone service, push-to-talk dispatch service (also known as "Direct Connect") and paging services all in a single handset. This unique combination of services, employing Motorola's

^{1/} Notice of Proposed Rule Making, FCC 98-55, released April 20, 1998.

^{2/} 47 U.S.C. Section 255.

digital iDEN technology, allows users to access multiple services through a single provider with a single bill each month. Nextel currently offers iDEN services throughout a substantial portion of the U.S., including 79 of the Nation's top 100 markets. Accordingly, Nextel has a significant interest in the outcome of this proceeding.

Section 255 of the Act requires, among other things:

- (1) 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 individuals with disabilities, if readily achievable.3/
- (2) A provider of telecommunications service shall ensure that the service is accessible to and usable by individuals with disabilities, if readily achievable.4/

Additionally, "whenever the requirements of [the above sections] are not readily achievable, such a manufacturer or provider shall ensure that the equipment or service is compatible with existing peripheral devices or specialized customer premises equipment commonly used by individuals with disabilities to achieve access, if readily achievable."5/

In adding Section 255 to the Act, Congress intended to ensure that disabled Americans have access to new and advanced telecommunications services. Congress also recognized, however, that providing such access can involve difficult, complex and

3/ 47 U.S.C. Section 255(b).

4/ 47 U.S.C. Section 255(c).

5/ 47 U.S.C. Section 255(d).

expensive upgrades and alterations to a provider's products and services. Thus, Congress limited Section 255's accessibility and/or compatibility requirements to those instances where it is "readily achievable." This balanced approach ensures that disabled Americans have access to telecommunications services that might otherwise be unavailable to them, while also ensuring that the needs and desires of other consumers are not jeopardized in the process.

Requiring, for example, a mobile telephone handset that is large enough for a visually-impaired person to read the buttons, or a physically-challenged person with limited motor abilities to depress them, would not fulfill the mass market's desire for smaller, lightweight mobile telephones that fit in a shirt pocket. In such circumstances, a "readily achievable" solution is to provide a larger mobile unit for the visually-impaired person, and perhaps incorporating in this or another model a touch-sensitive keypad to meet the needs of a physically-challenged user, while continuing to produce and develop smaller telephones for the broad consumer market. Thus, for example, Nextel should have the flexibility to develop, in concert with its manufacturers, a line of iDEN products to meet the needs of particular disabilities, to the extent a particular product line is "readily achievable" and would not require a fundamental alteration of the iDEN service, rather than attempting to address both the input and output capabilities needed to address visual, hearing, speech, cognitive, motor and other disabilities in a single handset or service.

Nextel fully supports Congress' Section 255 goals and encourages the Commission to establish rational, common-sense rules and regulations that will provide disabled Americans improved access to wireless communications services while not impeding the ongoing innovation and technological advancements that, as the Commission recently recognized, have driven the industry to "produce telecommunications devices . . . that were not imagined only a few years ago."^{6/} The Commission's rules implementing Section 255 will not be successful unless they recognize that modifications designed for every disability listed in proposed rule section 1193.41 may often be unavoidably incompatible with continuing innovation for the mass market. Congress' directive that providers and manufacturers provide disabled access only to the extent it is "readily achievable" requires a cost-benefit analysis in implementing Section 255. Congress did not intend for Section 255 to dictate future product and service development, but that it require manufacturers and service providers to consider the needs of and provide access for the disabled to telecommunications services whenever reasonably and readily achievable.

II. DISCUSSION

A. **Application of Section 255 To Wireless Telecommunications Services Means Ensuring Disabled Americans Access to Communications "On the Move."**

In the Third Report and Order in GN Docket No. 93-252, wherein the Commission concluded that all Commercial Mobile Radio Services ("CMRS") are "substantially similar" and therefore entitled to

^{6/} Third Report To Congress at p.5.

regulatory parity, the Commission found that "[t]he common characteristic of mobile services customers is their need to communicate electronically on a real-time basis (or virtually real-time basis) while they are 'on the move.'"^{7/} Wireless telecommunications services, therefore, are distinguished from other telecommunications services by their ability to allow users - - whether mass market consumers or disabled Americans - - to maintain their mobility while communicating with others. This aspect of wireless communications is critical to the analysis of Section 255's application to CMRS providers as it distinguishes wireless communications from all other telecommunications providers.

In applying Section 255 to CMRS services, the Commission must ensure that all users are provided the ability to communicate while on the move. Providing this capability cannot be achieved with a "one-phone-fits-all" approach. While creating such a phone, *i.e.*, a mobile phone that is usable by persons with any of the disabilities listed in proposed rule section 1193.41, may be possible, but it is not readily achievable, and would not likely provide adequate mobile communications services to disabled Americans. For example, as the mobile unit grew more complex to address the various needs of the visually, hearing, speech and/or physically impaired, it could become too complicated for the cognitively impaired. Or, conversely, a mobile phone designed to meet the needs of the cognitively impaired might deprive other

^{7/} Third Report and Order, 9 FCC Rcd 7988 (1994) at para. 58.

disabled users of specialized features and functions they need. Additionally, if that same phone was marketed to the mass consumer market, those consumers would likely be deprived of the small, sleek multi-feature mobile phones they are demanding from manufacturers and service providers.

The reasonable, balanced approach to Section 255 requires that manufacturers and service providers have the flexibility to choose a product line approach to meeting the accessibility and compatibility needs of disabled Americans. To the extent a particular mobile phone can be designed specifically for a particular disability or set of disabilities, within the Act's "readily achievable" framework, carriers and manufacturers should be free to address the needs of the disabled in this manner.

In developing products and services to achieve access to telecommunications for the disabled, Congress intended the Commission to consider the costs and benefits of the required product and service alterations. The readily achievable limitation on the manufacturer's/carrier's obligations expresses Congress' intentions to balance the application of Section 255 against the resources and abilities of the provider/manufacturer. As the courts have stated in interpreting the Americans With Disabilities Act ("ADA"), the relief available to a disabled American is dependant partly upon "the financial strength of the defendant against which [he/she] proceeds."^{8/} Additionally, accomplishing

^{8/} *Neff v. American Dairy Queen Corp.*, 58 F.3d 1063, 1069 n. 15 (5th Cir. 1995).

readily achievable access to telecommunications services incorporates a temporal element. As one court has found, that which is "easy to accomplish in one year may not be easily accomplishable in one day so a determination of what is 'readily achievable' depends upon the passage of time."^{9/}

Congress intended a common sense approach to providing access to telecommunications services for the disabled. The readily achievable limitation included in Section 255 ensures that carriers and manufacturers are not required to fundamentally alter their products and services to meet the accessibility requirements nor are they required to take actions that could significantly impact the design and development of innovative new products and services for the broader consumer market. While any number of product alterations may be possible, Congress recognized that not every possible alteration is in the public interest nor would any and every product alteration promote the goals of the Act. Therefore, Nextel looks forward to implementing Section 255's requirements in a reasonable, rational and balanced manner.

B. The Commission Must Provide A Reasonable Enforcement Process

In Section 255(f), Congress provided that nothing in Section 255 "shall be construed to authorize any private right of action to enforce any requirement of this section or any regulation thereunder."^{10/} Additionally, Congress provided that "[t]he

^{9/} *First Bank National Ass'n v. Federal Deposit Insurance Corp.*, 79 F.3d 362, 371 (1995).

^{10/} 47 U.S.C. Section 255(f).

Commission shall have exclusive jurisdiction with respect to any complaint under this section."^{11/} Nextel agrees with the Commission's tentative conclusion that Congress provided parties no private right of action to enforce the accessibility provisions of Section 255.^{12/} The Commission has exclusive jurisdiction over the enforcement of Section 255, and it should implement that enforcement authority in a reasonable and rational manner.

The Commission's proposal to permit complaints from any party, however, whether or not they have an interest that is protected by Section 255, is misguided, inconsistent with the Administrative Procedures Act,^{13/} inconsistent with the "case" or "controversy" requirements in Article III of the United States Constitution,^{14/} and could result in harassment of manufacturers and service providers, and abuse of the Commission's processes. Standing, as the Supreme Court has stated, "is part of the common understanding of what it takes to make a justiciable case."^{15/} Although Article III of the U.S. Constitution applies to the use of judicial powers, Nextel submits that the standard also applies to complaints brought under an agency's adjudicative authority, and that Congress would have specifically eliminated the standing

^{11/} **Id.**

^{12/} Notice at para. 34.

^{13/} 5 U.S.C. Section 551 *et seq.*

^{14/} U.S. Const. art. III, Section 2.

^{15/} *Steel Co. v. Citizens for a Better Environment*, 118 S.Ct. 1003, 1015 (1998) (quoting *Whitmore v. Arkansas*, 494 U.S. 149, 155 (1990)).

requirement under Section 255 if it had intended an exception to this fundamental tenant of jurisprudence.

The Commission's proposal to avoid resolving standing arguments -- and thereby presumably speed the complaint process -- ignores the equally important rights of carriers and manufacturers to be free from frivolous and harassing complaints, and is far outweighed by the sheer numbers of complaints the Commission will be forced to resolve if there is no requirement to establish an interest in the proceeding. In a competitive marketplace, competitors could use the process improperly to file complaints against each other, advocacy groups with minimal or no relationship to the interests protected by Section 255 could file complaints without limitation, and vendors of specialized products could utilize the process to sell less-than-desirable devices. Standing is an essential element to any legal claim,^{16/} and the Commission cannot simply dismiss it in implementing Section 255. A standing requirement, moreover, would in no way limit or prevent a legitimate, interested, injured party from seeking redress of a Section 255 violation before the Commission.

Similarly, the Commission's proposal to allow carriers and manufacturers only five days to respond to an informal complaint is unreasonable. Nextel recognizes the important interests protected by Section 255 and supports an expedited process for resolving complaints. However, reducing the typical informal complaint response period to five days could actually disadvantage

^{16/} See *Id.*

complainants by causing inaccurate and incomplete responses to meet the shortened deadline.^{17/} Responding to an informal complaint could require the coordination and cooperation of numerous individuals within a carrier's or manufacturer's company -- each of whom may work in various parts of the country, and may rarely interact with one another. It may require coordination among manufacturer personnel and carrier personnel. Thus, simply gathering the relevant information from these disparate sources may require more than five days. Putting that information together in a responsive format to provide to the Commission and the complainant will require additional time. Nextel respectfully submits that a five-day period to respond to informal complaints would likely harm the process more than it would ensure speedy resolution of complaints concerning obligations under Section 255. Nextel proposes that the Commission speed the Section 255 complaint process by maintaining the typical 30-day Section 208 response period and imposing upon itself a sixty-day period for resolving informal complaints.

Finally, the Commission's Section 255 complaint process must include general principles of finality. A reasonable statute of limitations, e.g. two years, should apply to all Section 255 complaints. Additionally, the Commission should impose Section 1.718 of its rules to ensure that a complainant, unsatisfied with the results of an informal complaint, is required to file a formal

^{17/} See 47 C.F.R. Section 1.717. Although the section does not specify a 30-day response period, this is the time within which the Commission typically requires a response.

complaint within six months of the informal complaint resolution.^{18/} Carriers and manufacturers must have some assurance that a particular proceeding has reached its conclusion. The uncertainty associated with an open-ended proceeding could stifle a carrier's/manufacturer's ability to move forward with other accessibility programs, as well as other innovative technological changes for the mass market consumer. Stifling innovation is contrary to the Act and Congress' goals in Section 255.

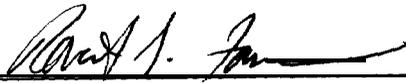
III. CONCLUSION

Section 255 of the Act requires that the Commission implement balanced rules and regulations that promote reasonable and rational accessibility objectives. By requiring product and service alterations that are "readily achievable," Congress recognized that not every imaginable accessibility feature or function is required. The Commission, therefore, should move forward in a manner that promotes access to telecommunications services for all Americans

^{18/} 47 C.F.R. Section 1.718.

while preserving the innovation and technological strides the telecommunications industry has gained in recent years.

Respectfully submitted,

By,  _____

Robert S. Foosaner
Vice President and Chief Regulatory Officer

Lawrence R. Krevor
Director - Government Affairs

Laura L. Holloway
General Attorney

1450 G. Street, NW
Suite 425
Washington, D.C. 20005
(202) 296-8111

Date: June 30, 1998

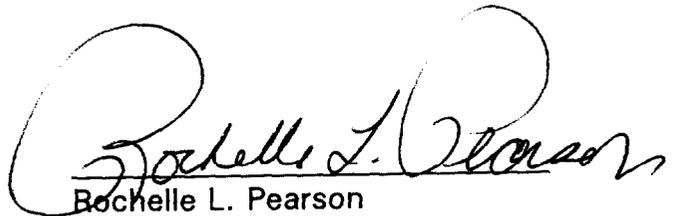
CERTIFICATE OF SERVICE

I, Rochelle L. Pearson, hereby certify that on this 30th day of June 1998, I caused a copy of the attached Comments of Nextel Communications, Inc. to be served by hand delivery to the following:

John Spencer
Attorney Advisor
Policy Division
Wireless Telecommunication Bureau
Federal Communications Commission
2025 M Street, N.W., Room 7002
Washington, D.C. 20554

Melinda Little
Attorney Advisor
Policy Division
Wireless Telecommunication Bureau
Federal Communications Commission
2025 M Street, N.W., Room 7002
Washington, D.C. 20554

Susan Kimmel
Attorney Advisor
Policy Division
Wireless Telecommunication Bureau
Federal Communications Commission
2025 M Street, N.W., Room 7002
Washington, D.C. 20554


Rochelle L. Pearson