Testimony of
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before the
Senate Committee on Commerce, Science and Transportation
Subcommittee on Communications, Technology and the Internet
"Innovation and Inclusion: The Americans with Disabilities Act at 20"
May 26, 2010

Chairman Kerry, Ranking Member Ensign, and Members of the Subcommittee:

Thank you for the opportunity to appear before you today to discuss modernizing the laws providing accessibility to communications for disabled Americans by covering new and developing Internet Protocol-based and video programming technologies.

I am Walter McCormick, President and CEO of the USTelecom Association. USTelecom represents innovative companies ranging from some of the smallest rural telecoms in the nation to some of the largest companies in the U.S. economy. Our members offer a wide range of services across the communications landscape, including voice, video, and data over local exchange, long distance, Internet, and cable networks. What unites our diverse membership is our shared determination to deliver those services to all Americans — a commitment we know this Subcommittee shares.

Our industry has a long history of supporting communications access for people with disabilities. In fact, it reaches back to the very foundations of our business. People often forget that Dr. Alexander Graham Bell was himself a teacher of the deaf and that Bell's invention of the telephone in 1876 grew out of his efforts to devise a hearing assistance device. The primary financial backers of Bell's electrical experiments were the grateful parents of some of his students.

But our industry's commitment to the disabilities community did not stop there. Bell Labs and Western Electric were pioneers in the development of the first hearing aids and artificial larynxes. We later participated in the establishment and deployment of telecommunications relay services. Both AT&T and Verizon offer mobile devices that not only provide text-to-speech access to phone features, but to web pages as well. Many of our members provide specialized offerings, such as free directory assistance, or text- and data-only plans, so that people who are deaf or have hearing loss will not pay for voice communications services they are unable to use.

Our commitment to bringing the benefits of telecommunications to all Americans, including those with disabilities, is also mirrored by our work in the legislative arena. As we approach the 20th anniversary of the Americans with Disabilities Act this July, I would note that one of the first completed, and least controversial, sections of that landmark legislation was Title

IV, which mandated the establishment of a nationwide telecommunications relay service by 1993. In 1994 and 1995 we continued our efforts in this area, working with the disability community to develop and support what is now section 255 of the Communications Act. That section requires providers to ensure that telecommunications services and equipment are accessible to and usable by people with disabilities. I am also pleased to note the bulk of those provisions were developed in this Committee.

In 2008, Mr. Chairman, your colleague from Massachusetts, Representative Ed Markey, raised the question of whether it was time to update section 255 of the Communications Act to reflect the reality of our industry's shift to IP-based communications and the advent of new video programming technologies. Representative Markey encouraged us to work with the disability community and taking a page from the history of section 255's development, we began a series of discussions with the disability community, represented by the Coalition of Organizations for Accessible Technology (COAT).

Our discussions with COAT would take over 15 months and more than 40 legislative drafts to complete. While time consuming, these discussions were also illuminating. We were able to identify more precisely the needs of the disability community and to target the bill to address those needs. We also gained an understanding of their frustrations with how the current processes and procedures at the Federal Communications Commission work to delay and inhibit their ability to bridge the communications gap for their members. Our joint work is largely reflected in Representative Markey's introduction in June 2009 of H.R. 3101, the 21st Century Communications and Video Accessibility Act.

The FCC's consideration and development of the National Broadband Plan in late 2009 and early 2010 gave us yet another opportunity to work with the disabilities community to ensure recognition of their needs as we enter an era in which IP-based technologies will provide the basis for most if not all electronic communication. We were particularly delighted by the inclusion of Recommendation 9.10 in the National Broadband Plan, which states that "Congress, the FCC and the Department of Justice should modernize accessibility laws, rules and related subsidy programs." We are also pleased the Commission has already begun to implement Recommendation 9.9 to establish an Accessibility and Innovation Forum, the first meeting of which is scheduled in July. We believe our experience working closely with COAT, replicated on a broader scale and on a more systematic basis, will hasten the advancement of broadband accessibility.

We also appreciate Senator Pryor's introduction earlier this month of S. 3304, the "Equal Access to 21st Century Communications Act," and its co-sponsorship by you, Chairman Kerry, and Senators Dorgan and Conrad. It is the next important step in the process of updating the nation's laws governing access to advanced communications technology for people with disabilities. In general, S. 3304 is designed to extend disability access provisions applicable to legacy telecommunications and video services to IP-enabled services and equipment and to new video programming technologies. The legislation also acknowledges that section 255 of the Act, with its limitation to telecommunications services and equipment, does not encompass many of

the services that people routinely use today. Thus, the bill appropriately places the treatment of advanced communications for these purposes under Title VII of the Communications Act.

Among the bill's most helpful additions to current law are enforcement procedures that will put remedies for noncompliance on a fast track, something sorely lacking today; Lifeline and Linkup support for Internet access services and advanced communications for those who meet those programs' eligibility requirements; and the establishment of an Advisory Committee on Emergency Access and Real Time Text to provide recommendations to the FCC and to the Senate and House Commerce Committees regarding the actions necessary to ensure interoperable real time text communications as part of the migration to a national IP-enabled network, a critical public safety need for disabled Americans in the 21st century.

The legislation would also achieve what the FCC was unable to do in 2000: ensure that video description capability is made widely available, not just for television broadcasts but also for certain video programming distributed over the Internet, the place where more and more Americans are watching video today. Methods to improve the conveyance of emergency information by means of video will also be required under S. 3304, and closed captioning will be similarly advanced to include Internet distribution. Equipment that receives and plays back video programming will be required to have closed captioning, video description, and accessible emergency information capability.

In all the respects cited above, the legislation reflects our discussions with COAT. But we do have some concerns about the Senate version of the legislation, as compared to H.R. 3101, and moving forward we would like to work with the Committee to amend the bill in at least two respects.

First, H.R. 3101 defines "advanced communications" as an "interconnected VoIP service, non-interconnected VoIP service, electronic messaging, and video conferencing." The FCC's National Broadband Plan adopted H.R. 3101's definition of "advanced communications," in its recommendations related to accessibility for Americans with disabilities. S. 3304, by contrast, covers a bundled package that transmits IP based voice, video conferencing and text communications, but leaves entirely to the FCC the determination of whether coverage of any other "application or service accessed over the Internet that provides for voice, video conferencing or text communications" is, in its sole judgment, "necessary."

The consequence of that approach is that the bill inadvertently but unjustifiably distinguishes between technologies that deliver the same or similar services. So, for example, the e-mail services offered by my member companies or by cable companies, which also serve as network providers, may be automatically covered by S. 3304. However, other identical services such as Gmail and Hotmail are only covered if the Commission determines it is "necessary" to do so. Similarly, Internet Protocol phones are now commonplace, as are other Internet applications that substitute for the telecommunications services and corresponding equipment that were dominant in 1996 when section 255 was enacted. Yet while the Senate bill would leave in place the mandatory provisions of section 255 as they apply to traditional

telecommunications and customer premises equipment, and would extend that mandatory treatment to bundled services provided by my members – appropriately, I hasten to add – similar coverage for other newer and potentially more common devices and services would be left to the FCC's discretion. I have attached a chart to my testimony that highlights other examples of similar technological disparities that would be created by this definition.

Such an approach runs counter to the generally acknowledged view that broadband has created a convergence of services for which the "stove-piped" regulatory framework currently found in the Communications Act is not well-suited. Surely, the ability of disabled Americans to communicate in the 21st century should not be dependent on old legal categories that pre-date the development of devices, services, and applications that may not have even been contemplated when those categories were first created. We don't believe the Commission should determine which specific IP applications or services are "necessary" for the purpose of ensuring accessibility to Americans who are deaf, blind, or deaf-blind. All of them are necessary to some or all of that disabled community. And that determination certainly should not be based on factors such as market share or popularity among the population at large.

Prior to passage of the ADA, Americans with disabilities grew justifiably impatient with claims that making public accommodations, public transportation, and communications services and equipment accessible "just couldn't be done," or couldn't be done at reasonable cost. Over and over again, many of those claims were proven wrong. When an industry starts out with the attitude that providing accessibility is too hard, it's not surprising that not much gets done. What our industry has found in the course of the last 25 years is that both we and the disabled community benefit from the certainty and focus that a sound and sensible legal roadmap for achieving accessibility provides. We believe that with such a roadmap, talented engineers and business people across the Internet landscape will respond in good faith to the challenge.

Second, in contrast to the House bill's reliance on well-established, defined, and interpreted terms in disability law such as "readily achievable" and "undue burden," the Senate bill instructs the Commission to apply new accessibility requirements to Internet-based services and equipment where doing so is "achievable." However, S. 3304 provides scant definition of what "achievable" alone is supposed to mean, and there is no other legal guidance we're aware of in this area on which we can rely. The inevitable consequence of this ambiguity will be extended regulatory jockeying and litigation, in which those who would prefer not to undertake the actions required by the FCC, or those who are required to undertake them while their competitors are not, do battle over the meaning of this new and undefined term. Americans with disabilities should not have to wait for those legal battles to play out.

Mr. Chairman, in closing, let me reiterate our commitment to your effort. We hope the committee process will produce a final bill that maximizes disabled consumers' access to advanced services across all platforms and technologies. Americans are more reliant than ever on communications devices and networks in their daily lives, but Americans with disabilities can derive particular benefits from these technologies. As these exciting new technologies evolve, that population could become increasingly disadvantaged if they are denied access to them.

We thank you for your invitation to appear today. USTelecom and its member companies look forward to working with the Subcommittee and this Congress to achieve our shared objective of making the use of broadband as ubiquitous today as electricity, water, and telephone service. Broadband is an essential building block of every modern American community. We pledge our support for making its many opportunities accessible to all Americans. Thank you.

COMPARISON OF HOUSE AND SENATE BILLS

SERVICE OR APPLICATION	H.R. 3101	S. 3304
Advanced Communications	The term "advanced communications" means interconnected VoIP service; non-interconnected VoIP service; electronic messaging; and video conferencing.	The term "advanced communications" means devices and services that transmit a bundle of IP enabled voice, video conferencing and text communications and any application or service accessed over the Internet that provides voice, video conferencing or text communications as determined necessary by the FCC.
User Interface for Internet Access Service	Yes	Yes
Interconnected VoIP (e.g., Vonage)	Yes	Yes
Video Conferencing	Yes	Only if bundled with IP voice and IP based text communications; *otherwise*, *only if FCC finds "necessary" (e.g., Skype video conferencing)*
IP Based Text Messaging	Yes	Only if bundled with IP based video conferencing and IP voice; *otherwise, only if FCC finds "necessary" (e.g., instant messaging by MSN, Yahoo, or AOL, or IP-based text messaging such as Skype SMS)*
E-mail	Yes	Only if bundled with IP based video conferencing and IP voice; *otherwise only if FCC finds "necessary" (e.g., Gmail, Yahoo Mail, HotMail)*
Unbundled Non-IP Based SMS text messaging (e.g., AT&T, Verizon, Sprint)	Yes	No
Other Unbundled Voice Applications (e.g., Google Voice)	No	If the FCC determines necessary