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Before the
FEDERAL COMMUNICATIONS COMMISSION FCC 96-205
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of Section 273(d)(5) of the Communications Act of 1934, as Amended by the Telecommunications Act of 1996 -- Dispute Resolution Regarding Equipment Standards	)	GC Docket No. 96-42

Report and Order

Adopted: May 7, 1996; Released: May 7, 1996

By the Commission:

I. INTRODUCTION

1. The Telecommunications Act of 1996,[1] amended the Communications Act by creating new sections 273(d)(4) and (d)(5), which set forth procedures to be followed by non-accredited standards development organizations (NASDOs),[2] such as Bellcore, when these organizations promulgate industry-wide[3] standards and generic requirements[4] for telecommunications

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[1] Pub. L. No. 104-104, 110 Stat. 56 (1996).

[2] As defined in section 273(d)(8)(E), "[t]he term 'accredited standards development organization' means any entity composed of industry members which have been accredited by an institution vested with the responsibility for standards accreditation by the industry." 47 U.S.C. § 273(d)(8)(E). Thus, for example, Bell Communications Research, Inc. (Bellcore) would not be an accredited standards development organization and is subject to the section 273 procedures. H.R. Cong. Rep. No. 230, 104th Cong., 2d Sess. 39 (1996).

[3] As defined in section 273(d)(8)(C), "[t]he term 'industry-wide' means activities funded by or performed on behalf of local exchange carriers for use in providing wireline telephone exchange service whose combined total of deployed access lines in the United States constitutes at least 30 percent of all access

equipment. Typically, as in the case of Bellcore, carriers fund these voluntary standard setting activities in order to assist the carriers in developing standards to guide their subsequent purchases of telecommunications equipment.

2. In this Report and Order, the Commission adopts rules to implement new section 273(d)(5), which requires the Commission to prescribe a default dispute resolution process when technical disputes arise between the NASDO and any parties who fund the standards setting activities of the NASDO. In accordance with the statute, this "default" procedure would be used only when all funding parties are unable to reach agreement as to a means for resolving technical disputes. As described below, we have decided that disputes governed by section 273(d)(5) should be resolved in accordance with the recommendation of a three-person expert panel, selected by both the disputing party and the NASDO, with the recommendation subject to disapproval by a vote of three-fourths of the other funding parties.

II. BACKGROUND

3. As detailed in the Notice of Proposed Rulemaking (NPRM), the purpose of this proceeding is to establish dispute resolution procedures in accordance with new section 273(d)(5) of the Act.[5] Section 273(d)(5) was enacted in conjunction with other procedures, set forth in section 273(d)(4), that impose new procedural requirements on voluntary standards setting activities by NASDOs, such as Bellcore, which is owned by the regional Bell operating companies (RBOCs). As indicated above, Bellcore sets voluntary standards to assist in the carriers' purchase of telecommunications equipment. The statutory procedures generally require more openness and fairness in the standards setting process, particularly in light of the potential that, under other provisions of the Telecommunications Act, the BOCs may be permitted to engage in the manufacture of telecommunications equipment.[6]

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lines deployed by telecommunications carriers in the United States as of the date of the enactment of the Telecommunications Act of 1996." 47 U.S.C. § 273(d)(8)(C).

[4] As defined in section 273(d)(8)(B), "[t]he term 'generic requirement' means a description of acceptable product attributes for use by local exchange carriers in establishing product specification for the purchase of telecommunications equipment, customer premises equipment, and software integral thereto." 47 U.S.C § 273(d)(8)(B).

[5] 61 Fed. Reg. 9966 (1996).

[6] 47 U.S.C. §§ 273(d)(4), (e).

4. To foster more open procedures, under new section 273(d)(4), a NASDO is required to issue a public invitation to interested industry parties to fund and participate in setting any industry-wide standards or generic requirements. Further, such funding and participation must be allowed "on a reasonable and nondiscriminatory basis, administered in such a manner as not to unreasonably exclude any interested industry party."[7] In the event of disputes on technical issues, the NASDOs and funding parties must also attempt to develop a dispute resolution process.[8] Section 273(d)(5) requires the Commission to prescribe within 90 days of the section's enactment a dispute resolution process to be used if the parties cannot agree to a dispute resolution process.[9]

5. Specifically, section 273(d)(5) provides:

> [W]ithin 90 days after the date of enactment of the Telecommunications Act of 1996, the Commission shall prescribe a dispute resolution process to be utilized in the event that a dispute resolution process is not agreed upon by all the parties when establishing and publishing any industry-wide standard or industry-wide generic requirement for telecommunications equipment or customer premises equipment pursuant to paragraph (4)(A)(v). The Commission shall not establish itself as a party to the dispute resolution process. Such dispute resolution process shall permit any funding party to resolve a dispute with the entity conducting the activity that significantly affects such funding party's interests, in an open, nondiscriminatory, and unbiased fashion, within 30 days after the filing of such dispute. Such disputes may be filed within 15 days after the date the funding party receives a response to its comments from the entity conducting the activity. The Commission shall establish penalties to be assessed for delays caused by referral of frivolous disputes to the dispute resolution process.

Thus, as described in new section 273(d)(5), the Commission's

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[7] Id.

[8] Id.

[9] 47 U.S.C.§ 273(d)(5).

dispute resolution process must be conducted in an open, non-discriminatory and unbiased fashion and so that disputes are resolved within 30 days of the filing of the dispute. The process is triggered only if all funding parties fail to agree to a process for resolving technical issues. Section 273(d)(5) also requires the Commission to establish penalties to be assessed for delays caused by referral of frivolous disputes to the dispute resolution process.[10]

6. In the NPRM, we invited members of the public to comment on our proposal to require binding arbitration as the dispute resolution process.[11] We asked commenters to address the methods for selecting an arbitrator or neutral and whether the Commission should make its employees available to serve in that capacity.[12] In addition, we invited commenters to submit alternative proposals to implement this statutory provision.[13] Finally, the NPRM solicited proposals or recommendations concerning the types of penalties that should be assessed for delays caused by the referral of frivolous disputes to the dispute resolution process.[14]

7. We received comments from the following entities: 1) Bell Atlantic; 2) Bellcore; 3) BellSouth Corporation and BellSouth Communications, Inc. (BellSouth); 4) Corning Incorporated (Corning); 5) Telecommunications Industry Association (TIA); and 6) U.S. West, Inc. (U.S. West). Reply comments were received from: 1) Ameritech; 2) American National Standards Institute (ANSI); 3) Alliance for Telecommunications Industry Solutions (ATIS); 4) Bellcore; 5) BellSouth; 6) Corning; 7) Northern Telecom, Inc. (Nortel); 8) Pacific Bell; 9) SBC Communications, Inc. (SBC); 10) SpecTran Corp; and 11) TIA. The Commission also received late-filed reply comments from MCI and ex parte submissions from Bellcore, Corning and Nortel.

III. DISCUSSION

A. Commission's Binding Arbitration Proposal

8. In the NPRM, we sought comment on a binding arbitration as a method that could be used to satisfy the statutory dispute

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[10] Id.

[11] 61 Fed. Reg. at 9966-9967, ¶3-¶6.

[12] Id. at 9967, ¶6.

[13] Id. at 9966, ¶2.

[14] Id. at 9967, ¶8.

resolution default provision requirement.[15] We observed that this approach appeared consistent with the stated purpose of section 273(d)(5), set forth in the Conference Report, to "enable all interested parties to influence the final resolution of the dispute without significantly impairing the efficiency, timeliness and technical quality of the activity."[16] In addition, the NPRM concluded that binding arbitration seemed to be the only feasible dispute resolution process in view of the 30 day deadline for completion of the process.[17]

9. For a variety of reasons, the commenting parties overwhelmingly opposed the binding arbitration proposal set forth in the NPRM.[18] The parties generally agreed with Corning's view in its initial comments that binding arbitration would not adequately take into account the broad impact of standards-related disputes on industry participants other than the NASDO and the participating party who invokes the dispute resolution process.[19] The commenters also indicated it would be difficult to identify a neutral arbitrator to resolve these highly technical issues and to arbitrate these issues within the 30-day time frame required by the law. TIA also stated that the use of arbitrators would lead to "compromise" solutions that were inappropriate in view of the technical nature of these disputes.[20] Others, including Bellcore and U.S. West, believed that imposing binding arbitration, without the consent of the parties, was inconsistent with the voluntary nature of the underlying standards process.[21]

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[15] See note 10, supra.

[16] Id. at 9967, ¶3.

[17] Id. at ¶4.

[18] See comments of Corning at ii, 6-7; comments of Telecommunications Industry Association (TIA) at 2-3; comments of Bellcore at i, 16-18; comments of Bell Atlantic at 2; comments of U.S. West at 2-3; comments of BellSouth at 2-3; comments of Nortel at 4; reply comments of Pacific Bell at 1; reply comments of Alliance for Telecommunications Industry Solutions (ATIS) at 2; reply comments of BellSouth at 1; reply comments of SBC at 2; reply comments of Corning at 2; reply comments of Bellcore at 1. But see late-filed comments of MCI at 1.

[19] Comments of Corning at 6.

[20] Comments of TIA at 2-3.

[21] Comments of Bellcore at i, 16; comments of U.S. West at 3.

10. For example, as U.S. West observed, nothing in the Telecommunications Act alters the fact that standards setting activities by both accredited and non-accredited entities, continue to remain voluntary, depending almost entirely on the good faith of the individual funding entities for their ultimate success or failure.[22] Bellcore further observed in its comments that generic requirements complement standards which by their very nature are not binding on anyone, vendors or purchasers.[23] While noting that generic requirements provide valuable technical information to exchange carriers, Bellcore underscored the fact that such requirements "only have meaning if exchange carriers choose to use them and if suppliers choose to conform their products to them."[24]

11. In late-filed comments, one commenter, MCI, supported the Commission's binding arbitration proposal, finding it preferable to either of two alternative proposals, discussed more fully below, that had been submitted by Corning (Corning I) and Bellcore.[25] As discussed below, however, we conclude that a second proposal submitted by Corning (Corning II) resolves many of the defects that had been evident in both the Corning I and Bellcore alternatives. This proposal also appears to be superior in some respects to the Commission's proposal to use binding arbitration. Therefore, as explained below, we have decided not to use binding arbitration as the default dispute mechanism under section 273(d)(5). We will instead use the alternative procedure proposed by Corning, the Corning II proposal, with some modifications.

B. Commenters' Alternative Proposals

12. In addition to proposing the use of binding arbitration, the NPRM invited commenters to submit alternative proposals. We noted that other methods of alternative dispute resolution included, for example, mediation, neutral evaluation, and hybrids of these methods.[26] In response, two very different alternative proposals were initially submitted, one by Corning, a manufacturer of fiber optics equipment, and another by Bellcore.

13. The Corning I proposal involved referral of the technical dispute to an accredited standards development

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[22] Comments of U.S. West at 2.

[23] Comments of Bellcore at 17.

[24] Id. at 5 and 17.

[25] Late-filed reply comments of MCI at 1-3.

[26] 61 Fed. Reg. at 9967, ¶ 5.

organization (SDO). Many parties commented on this proposal. Although comment was somewhat divided, much of the comment was sharply critical of the proposal. For example, Bellcore and many of the BOCs believed that the Corning I proposal was inconsistent with congressional intent because it excluded the funding parties from participating in resolution of the technical dispute, even though the funders played a major role in funding the NASDO's work and would be most affected by any dispute resolution.[27] They also pointed out that there was no assurance that the SDOs had procedures in place that would enable resolution of the dispute within the 30 day statutory time period. They further believed that the process would often lead to no resolution at all of key technical issues, thereby frustrating the essential purpose of NASDOs to create standards that lead to efficiencies and interoperability within the communications industry. Similarly, in its late filed comments, MCI opposed the Corning I proposal because it was unlikely to result in a binding decision.[28]

14. The two organizations representing relevant SDOs who commented were divided on the Corning I proposal. One of these, TIA, approved the proposal, but the other organization, ATIS, strongly criticized the proposal as promoting "forum shopping."[29] ATIS further stated that its Committee T1, which develops standards for network interfaces, could not accommodate the statutorily mandated 30 day resolution period.[30] Similarly, the two manufacturing companies who commented were divided, with one commenter, SpecTran Corp., supporting the Corning I proposal, and the other, Nortel, strongly disagreeing with it as inviting forum shopping and abuse.[31]

15. Bellcore's original proposal is discussed below, in the context of modifications to it suggested by Corning. In response to the Bellcore proposal, Corning submitted a second proposal, which it characterized as a compromise proposal, and which incorporated many features of the dispute resolution proposal that had been submitted by Bellcore.[32] For the reasons discussed below, we conclude that Corning's latest proposal, which we shall

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[27] Comments of Bellcore at 3-4, 7; comments of BellSouth at 4.

[28] Late-filed reply comments of MCI at 3.

[29] Comments of TIA at 2-3; reply comments of ATIS at 4-5.

[30] Reply comments of ATIS at 4.

[31] Comments of Nortel at 2-3; comments of SpecTran at 1.

[32] Ex Parte submission of Corning at 1.

refer to as the Corning II proposal, is generally consistent with the dispute resolution procedure envisioned by Congress in section 273(d)(5). In addition, we believe the Corning II proposal avoids many of the practical and other problems associated with both the Corning I and Bellcore proposals. We have therefore decided to adopt, with some modifications, the Corning II proposal, which is described and discussed below.

C. The Corning II Proposal

16. As indicated above, the dispute resolution rule we adopt in this proceeding is based on a proposal suggested by Bellcore that has been modified by Corning. The Corning II proposal retains many significant features of the original Bellcore proposal that were praised by those commenters who preferred Bellcore's proposal over Corning I. Most significantly, unlike the Corning I plan, the Corning II variation does not require that technical disputes be resolved in forums other than the NASDO. Bellcore's original plan, and the Corning II variation adopted here, permit the funding parties to resolve these disputes internally. To that extent, we believe that the Corning II proposal is consistent with Congress's intent that the process we select should enable all interested parties to influence the final resolution of the dispute.

17. Corning, however, suggests several changes to Bellcore's proposal that we believe will better enable the resolution of disputes in an "open, non-discriminatory and unbiased fashion," consistent with section 273(d)(5). For example, some commenters, primarily Corning and MCI, expressed concern that the Bellcore proposal afforded too much power to the BOCs and Bellcore in controlling resolution of any disputes.[33] The Corning II variation makes five major changes to Bellcore's plan. Most of those changes, we believe, better promote the statutory objectives of fair, unbiased decisionmaking. In response to ex parte comments from Bellcore, however, we have modified some aspects of the Corning II proposal to develop the dispute resolution default process we now adopt.[34]

18. Tri-Partite Panel. The Corning II proposal permits the disputant to select only one dispute resolution approach. Under the approach proposed by Bellcore, the funding parties could, by majority vote, choose among several "default" options for resolving disputes. These options included "escalating" the dispute to higher decisionmaking bodies within the NASDO; resolution of the dispute by a majority of those funding the

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[33] Reply comments of Corning at 14-16; late-filed comments of MCI at 2.

[34] See generally, ex parte submission of Bellcore.

standards development effort; or, resolution of the dispute based on the recommendation of a three-party expert advisory panel. The Corning II variation, in contrast, retains only the option of using a three-party expert panel, with one panelist selected by the disputing party, another selected by the NASDO, and a third panelist selected jointly by the panelists representing the NASDO and disputing party. Persons who participated in the generic requirements or standards development process, including the disputing party and the NASDO, are eligible to serve on the panel. As with Bellcore's proposal, this three-member panel, by majority vote, would make a written recommendation concerning the dispute.

19. Several parties, including MCI, criticized some of the dispute resolution options permitted under Bellcore's proposal, particularly the escalation and majority vote options, because these options appeared to give the BOCs undue power in resolving disputes.[35] We agree that the Corning II proposal, which retains only the option of using a tri-partite expert panel, is superior in terms of avoiding the potential that the BOCs or Bellcore would unduly dominate decisionmaking.

20. In commenting on the Corning II proposal, however, Bellcore continues to believe that, while a tri-partite panel should be available as an option and as the fall-back in the event of a deadlock, the funding parties should also be able to use escalation and other procedures.[36] We recognize that this variation on Bellcore's plan removes some of the flexibility that several commenters had applauded in commenting on Bellcore's proposal. We nevertheless conclude that the advantage of the Corning II proposal in terms of avoiding possible unfairness far outweighs any concern about loss of flexibility.

21. Further, as reflected in Corning's comments and in the Corning II proposed rule, disputing parties and Bellcore are also permitted to agree to a means of dispute resolution other than the default procedure provided for in section 273(d)(5). The statutory dispute provision clearly is a remedial measure, which is designed to protect the interests of disputing parties. Hence, the statute merely provides that a disputing party has the option of using the section 273(d)(5) default procedure. Section 273(d)(4) thus states that a disputing party "*may* utilize the dispute resolution procedures established pursuant to [section 273(d)(5)] .... " (Emphasis added.)[37] The default procedure therefore is not mandatory if the disputing party and Bellcore

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[35] Late-filed reply comments of MCI at 2.

[36] April 18, 1996, ex parte letter from Bellcore at 1.

[37] 47 U.S.C. § 273(d)(4).

both agree to select another approach. Accordingly, we believe that parties will not be deprived of desirable flexibility even though we have decided to limit the default dispute resolution procedure to a single approach. We emphasize, as do many of the commenters, that funding parties should adopt their own dispute resolution procedures whenever possible.

22. Override Provision. A second major change to Bellcore's proposal involves the Bellcore provision that would have allowed a majority of the funding parties to reject the recommendation of the tri-partite expert panel. We are sympathetic to the argument that any dispute resolution procedure should permit the funding parties to participate in dispute resolution by having some final say in how the dispute is resolved. Nevertheless, we agree with Corning and other parties, such as MCI and Nortel, who believe that allowing "overrides" by a simple majority of funders may afford too much power to particular blocks of funding parties, including the regional BOCs who currently own Bellcore.[38]

23. To resolve this concern, the Corning II proposal would generally permit funding parties to override a panel recommendation by a vote of three-fourths of the funding parties, excluding the party who invoked the dispute resolution process and the NASDO. Each funding party would have one vote. However, when a funding party has an indirect equity interest in the NASDO or any ownership interest in intellectual property that would be advantaged by the final resolution of the dispute, a decision to reject the recommendation must be by a unanimous vote of the funding parties, again excluding the party which invoked the dispute resolution process and the NASDO.

24. Presumably, due to the regional BOCs' ownership interests in Bellcore, the unanimous vote requirement would apply to Bellcore. Bellcore is concerned that requiring a unanimous vote would permit an affiliate of a disputing party, or another serving as its proxy, to veto the decision of all carriers. Bellcore also believes that Nortel has proposed a reasonable compromise in suggesting that a vote of two-thirds of the funding parties voting be required to reject a panel recommendation.[39]

25. In contrast to the original Bellcore proposal, we think a more stringent "override" proposal offers better protection against biased decisionmaking. We agree with Bellcore that requiring a unanimous vote of funders may be too onerous. However, we think a fair compromise is to require a vote by

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[38] Ex parte submission of Corning at 1, note 1; reply comments of Nortel at 7; late-filed comments of MCI at 2.

[39] Ex parte submission of Bellcore at 1.

three-fourths of the voting funders both to reject a panel's recommendation and to substitute another resolution of the dispute. The three-fourths proposal avoids Bellcore's concern that a unanimous vote requirement affords the disputing party the power to veto the decision of all the carriers. At the same time, the three-fourths requirement also decreases Corning's fear that a simple majority -- or possibly even a two-thirds vote -- affords too much control to the RBOC's.

26. Standard for Recommended Decision. The Corning II proposal has recommended a third change that improves upon the original Bellcore proposal. Bellcore proposed that the appropriate issue to be resolved by the recommending panel was "whether there is a sound technical basis for the position of the [NASDO] ...." That standard, we believe, unfairly disadvantages the disputant by placing upon it an undue burden to demonstrate that the NASDO's approach is not based on a sound technical basis, instead of focusing more on the relative merits of the two approaches. The Corning II proposal, in contrast, focuses more on the relative merits of the technical arguments by requiring the panel to choose "the option that provides the most technically sound solution that is commercially viable ...."[40] We recognize that the statutory 30-day deadline will create difficulties in resolving the technical merits. Bellcore, for example, objects to the standard proposed by Corning, believing that the panel will be unable to decide within the statutory timeline what is "the most technically sound solution."[41] The statute, however, places no limitation on the types of technical disputes that may be raised by funding parties. We therefore do not believe that the standard for dispute resolution can be limited to whether the NASDO's proposal can be reasonably supported by technical evidence, as Bellcore proposes.

27. For the same reason, we do not agree with Bellcore's view that the panel should be precluded from deciding "that a particular issue is not ready for a decision because there is insufficient technical evidence to support the soundness of any one proposal over any other proposal."[42] Moreover, such a recommendation would not necessarily lead to the absence of a decision on a standard, as Bellcore claims. As indicated above, even if that were the panel's recommendation, the funders would still be able to select a technical standard by a two-third's vote.

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[40] Ex parte submission of Corning at 3.

[41] Ex parte submission of Bellcore at 3.

[42] Id.

28. Finally, Bellcore believes that "commercial viability" should not be part of the decisional basis, claiming that such a basis may go beyond the technical matters contemplated by section 273(a)(5).[43] Bellcore also believes such a standard may involve economic analysis and competitively sensitive business information, data that may be difficult for the panel to obtain.[44]

29. We think that in resolving technical disputes it may well be appropriate to consider the complexity and practical feasibility of particular technical solutions in some circumstances. However, we also believe that the decisional standard proposed by Corning places undue emphasis on commercial and cost-related issues not the technical issues.[45] We shall therefore modify the standard to state that a panel is not precluded from taking into account the complexity of technical approaches and other practical considerations in deciding which option is most technically sound.

30. Disclosure Requirements. The Corning II proposal also includes a new disclosure provision requiring that any party in interest submitting information for consideration by the panel must disclose its ownership of intellectual property that may be advantaged or disadvantaged by the final decision, and that the panel must consider this information in making its recommendation.[46] This provision seems designed to lead to decisionmaking that is more fully informed about the possible biases of commenting parties and to result in technical standards that may be met by a broader spectrum of equipment manufacturers. Bellcore objects to this proposal. It states that ANSI-accredited standards development organizations encourage early disclosure of intellectual property rights, but do not require it. Bellcore also believes that requiring disclosure of intellectual property rights would inhibit funding and participation in the activities of the NASDO.

31. We believe the disclosure provisions suggested by Corning are generally consistent with requirements of ANSI-accredited standards organizations. The TIA Engineering Manual, for example, has a policy of encouraging early disclosure of essential patents, and requires its Committees to ask at the beginning of each meeting where a potential standard is being considered whether there is knowledge of essential patents, the

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[43] Id. at 4.

[44] Id.

[45] Ex parte submission of Nortel.

[46] Ex parte submission of Corning at 2.

use of which may be essential to the standard being developed. Moreover, the fact that the question was asked will be recorded in the meeting report, along with any affirmative responses. Similarly, ANSI's patent policy requires that, prior to approval of any proposed standard, any licenses will be made available to applicants without compensation or "under reasonable terms and conditions."[47]

32. We think that the Corning II proposal that parties submitting information to the panel disclose similar information is generally consistent with these ANSI requirements. However, we shall modify the Corning II proposal somewhat to make it more consistent with the rule followed by the TIA Engineering Manual. Specifically, the rule will require that the panel ask commenting parties whether there is knowledge of patents, the use of which may be essential to the standard or generic requirement being considered. In addition, the fact that the question was asked along with any affirmative responses may be recorded and considered in the panel's recommendation. We do not believe that such a requirement will affect funding and participation in NASDOs. The requirement applies only to those who submit comments to the expert panel, and moreover, such requirements have apparently not discouraged participation in ANSI accredited standards development organizations. In addition, Nortel points out that there appears to be no precedent for ANSI-accredited bodies to link voting rights to intellectual property interests. We see no reason, therefore, to disqualify the holders of such interests from voting on the recommendations of the tri-partite panel.

33. Costs of Dispute Resolution. Finally, whereas the Bellcore proposal had required the disputing party to bear the entire cost of the default dispute resolution procedure, the Corning-Bellcore variation requires that the cost of resolving disputes be absorbed by all of the funding parties. This modification, in our view, better ensures that disputants are not unduly discouraged from raising technical issues. In addition, all of the funding parties should benefit from the fairer and more open resolution of these technical questions. It is therefore fitting that they should all share in the cost.

34. In summary, we believe that the statutory objectives can be best fulfilled by the new Corning II approach, with some modifications. This approach incorporates the best aspects of the Bellcore proposal and modifies them to achieve the goal of unbiased decisionmaking. The proposal to utilize a tri-partite expert panel to make recommendations resolving disputes, with a provision that allows the funding parties to override the recommendation, also ensures that, as Congress intended, all of

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[47] Reply comments of ANSI at 4.

the funding parties are able to participate in influencing the final outcome. The approach is set out in detail in the Appendix.

D. Funding Parties

35. The commenters were divided over the meaning of the term "funding party." Corning and TIA take the position that Congress intended to allow any interested party access to the alternative dispute resolution process.[48] While acknowledging that sections 273(d)(4) and (d)(5) refer to "funding parties," Corning argues that the clear intent of the statute was only to provide a basis for determining the legitimacy of parties interested in participating in NASDO processes.[49]

36. To put this in perspective, Corning explained that the direct costs of Bellcore's generic requirements were traditionally borne by the affected carriers, with vendors generally making some form of "in-kind" contributions, i.e., technical presentation or technical support.[50] Corning also argues that, under the new statute, funding levels may not be used as an exclusionary device. In this same vein, TIA maintains that a funding party should not be defined by the amount that the party contributed to funding the standards setting activities but rather, by "any amount that demonstrates the party shows a responsible interest in the proceeding."[51] TIA suggests that parties could meet this requirement by posting a performance bond.[52]

37. In response, Bellcore and the RBOC's state that, since there was no congressional debate on section 273(d), the Commission must look to the plain language of the statute. As noted by Bellcore, section 273(d)(4)(A)(v) provides that "a funding party may utilize the dispute resolution procedures established pursuant to paragraph (5)" and section 273(d)(5) states that "[s]uch dispute resolution process shall permit any funding party to resolve a dispute ...."[53] Bellcore thus opposes TIA's performance bond proposal, concluding that if a vague genuine interest and not actual funding is to be the standard,

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[48] Reply comments of TIA at 2.

[49] Reply comments of Corning at 12.

[50] Id.

[51] Comments of TIA at 3-4.

[52] Id.

[53] Reply comments of Bellcore at 10-11.

this could open the door to a variety of ill-motivated though colorable "technical" disputes that the section 273(d)(5) process should not promote.[54]

38. We conclude that the language of the statute clearly supports that only a funding party is permitted to invoke the dispute resolution process contained in Section 273(d). The statute expressly provides that a party may become a funder after a public invitation is issued to interested industry parties "to fund and to participate" and that only a "funding party" may invoke dispute resolution. Moreover, consistent with the clear language of the statute, we think that only parties who are willing to provide actual funding to support the standards setting process may utilize the statutory dispute resolution process. We thus do not agree with TIA's suggestion that merely by posting a performance bond an entity may become a funding party, nor with Corning that "in-kind" contributions are necessarily adequate.

39. At the same time, section 273(d)(4)(A)(2) of the statute expressly requires that funding and participation be allowed on "a reasonable and nondiscriminatory basis, administered in such a manner as not to unreasonably exclude any interested industry party." We therefore believe that the statute requires that NASDOs must make reasonable and nondiscriminatory efforts to ensure that the funding requirement is not manipulated so as to unreasonably exclude outside participants.

E. Referral of Frivolous Disputes

40. Section 273(d)(5) directs the Commission to establish penalties for delays caused by the referral of frivolous disputes to the Commission's default process. Both Bellcore and Corning endorsed the proposal made in our NPRM to rely on section 1.52 of the Commission's rules to define the term "frivolous dispute." Section 1.52 requires that any document filed with the Commission be signed by the party or attorney and that such signature certifies that the person has read the document, that there is good ground to support it, and thus it is not filed for the purpose of delay.

41. Other commenters either offered alternate suggestions or raised concerns with our proposal. For example, we were referred to the "sham" exception to antitrust immunity enjoyed by parties under the Noerr-Pennington doctrine.[55] Another party referred us to the standards used by federal courts to determine

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[54] Id. at 7-9.

[55] Comments of Corning at 13.

whether complaints are filed in good faith.[56] Another commenter questioned whether we need to assess the motive of the disputant if the claim has no legitimate basis.[57]

42. We recognize that any attempt to give meaning to the term "frivolous" is inherently difficult, as reflected by attempts the courts have made to grapple with similar problems. We have decided, however, to be guided by our existing rule which appears to be as workable as any of the alternatives suggested. Thus, the party responsible for referring a dispute to our process does so with the understanding that the dispute, as defined in section 1.52, is not frivolous, is supported by good ground, and is not filed for the purpose of delay.

43. In seeking comment on the penalties that should be assessed against delaying parties, the NPRM asked whether the Commission should rely on its forfeiture authority contained in section 503(b) of the Communications Act, or whether other penalties should be imposed "such as barring the party from further participation in the standards development processes or the imposition of costs on the complainant if its complaint is found to be frivolous."[58] The NPRM also sought comment on whether procedural protections were necessary to protect the party subject to the dispute.[59] In this connection, commenters were asked to consider whether there should be a citation and subsequent misconduct before the assessment of such forfeitures.[60]

44. U.S. West argued that "punitive actions being taken to prevent frivolous invocation of the mediation process" were unnecessary and emphasized that the Commission could later adopt rules if necessary.[61] Bellcore argued against the imposition of penalties by the tri-partite panel, emphasizing that the panel's role is a "technical one, not a legalistic penalty-imposing one."[62] In addition, Bellcore proposes that the remedy of barring further participation should "be reserved to address only

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[56] See Rule 11 of the Federal Rules of Civil Procedure; comments of Bellcore at 23.

[57] Comments of Corning at 13.

[58] 61 Fed. Reg. 9967 at ¶8.

[59] Id.

[60] Id.

[61] Comments of U.S. West at 8.

[62] Comments of Bellcore at 23.

a pattern of abuse, and not an isolated act"[63] and Corning maintains that it "could substantially impair the subject company's ability to compete in the manufacture and marketing of products which are the subject of the relevant NASDO activities" and is "neither required not authorized by the statute."[64] Finally, Bellcore advocates that, in cases where the Commission determines that a frivolous dispute was referred to the dispute resolution process, in addition to imposing forfeitures as proposed in the NPRM, we should require "the party raising a frivolous claim to bear all costs of dispute resolution, and compensating the funding parties for delay."[65]

45. We have concluded that, in light of the above comments, at this time, violations for filing frivolous disputes can be handled best pursuant to our forfeiture authority under section 503(b) of the Communications Act. While we clearly expect referrals of frivolous disputes to be rare occurrences, we will not hesitate to revisit this issue, if necessary, to determine whether more severe penalties should be imposed.

F. Sunset Provision

46. In its initial comments, Corning urged the Commission to make clear that an applicant seeking removal of the requirements of sections 273(d)(3) or 273(d)(4) provide appropriate documentary evidence to support such a request.[66] Bellcore, in response, believes Corning's request is premature.[67] We agree that adoption of evidentiary requirements at this time appears premature. The statute prescribes a public comment period on any such application. We believe we will be in a better position to evaluate the adequacy of the support for any particular application after we have received comment on it.

IV. PROCEDURAL MATTERS

47. **Final Regulatory Flexibility Analysis.** Pursuant to the Regulatory Flexibility Act of 1980, the Commission's final analysis is as follows:

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[63] Id. at 23-24.

[64] Comments of Bellcore at 24; comments of Corning at 15.

[65] Comments of Bellcore at 23.

[66] Comments of Corning at 16.

[67] Comments of Bellcore at 24.

Reason for Action

The Telecommunications Act of 1996 permits a Bell Operating Company, through a separate subsidiary, to engage in the manufacture of telecommunications equipment and customer premises equipment after the Commission authorizes the company to provide in-region interLATA services. As one of the safeguards for the manufacturing process, the Telecommunications Act of 1996 amended the Communications Act by creating a new section 273, which sets forth procedures for a "non-accredited standards development organization," such as Bell Communications Research, Inc., to set industry standards for manufacturing such equipment. The statutory procedures allow outside parties to fund and participate in setting the organization's standards and require the organization and the funding parties to attempt to develop a process for resolving any technical disputes. Section 273(d)(5) requires the Commission "to prescribe a dispute resolution process" to be used in the event that all parties cannot agree to a mutually satisfactory dispute resolution process. 47 U.S.C. § 273(d)(5). The purpose of this Report and Order is to implement Congress's goal by prescribing a dispute resolution process which "enable[s] all interested parties to influence the final resolution of the dispute without significantly impairing the efficiency, timeliness and technical quality of the activity." H.R. Conf. Rep. No. 230, 104th Cong., 2d Sess. 39 (1996).

Summary of the Issues Raised by the Public Comments in Response to the Initial Regulatory Flexibility Analysis

There were no comments submitted in response to the Initial Regulatory Flexibility Analysis.

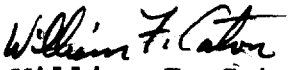
Significant Alternatives Considered

The Notice of Proposed Rulemaking in this proceeding offered a binding arbitration proposal and solicited alternative proposals from the commenters. The commenters overwhelmingly opposed the binding arbitration proposal. Alternative proposals were also submitted by the commenters. The regulation selected, a tri-partite expert panel, fulfills the specific statutory parameters of section 273 -- that the process shall permit resolution "in an open, non-discriminatory and unbiased fashion within 30 days after the filing of such dispute" and that the process will "enable all interested parties to influence the final resolution of the dispute without significantly impairing the efficiency, timeliness and technical quality of the activity."

48. Accordingly, IT IS ORDERED That Subpart Q, Part 64 of the Commission's rules IS ADOPTED effective 30 days from publication in the **Federal Register** as set forth in the **Appendix** attached hereto.

49. The action taken herein is taken pursuant to sections 4(i), 4(j), 273(d)(5), 303(r) and 403 of the Communications Act, 47 U.S.C. §§ 154(i) and (j), 273(d)(5), 303(r) and 403. For further information on this proceeding, contact Sharon B. Kelley, Office of the General Counsel, Administrative Law Division, (202) 418-1720.

FEDERAL COMMUNICATIONS COMMISSION



William F. Caton
Acting Secretary

Attachment

APPENDIX

Part 64 of Title 47 of the Code of Federal Regulations is amended to read as follows:

PART 64 Miscellaneous Rules Relating to Common Carriers

1. The authority citation for Part 64 continues to read as follows:

Sec. 4, 48 Stat. 1066, 1082, as amended; 47 U.S.C. 154, unless otherwise noted. Interpret or apply secs. 201, 218, 226, 228, 48 Stat. 1070, as amended, 1077; 47 U.S.C. 201, 218, 226, 228, unless otherwise noted.

2. A new subpart Q is added to read as follows:

Subpart Q - Implementation of Section 273(d)(5) of the Communications Act: Dispute Resolution Regarding Equipment Standards

Sec.
64.1700 Purpose and Scope.
64.1701 Definitions.
64.1702 Procedures.
64.1703 Dispute Resolution Default Process.
64.1704 Forfeiture.

AUTHORITY: 47 U.S.C. § 273(d)(5).

§ 64.1700 Purpose and Scope.

The purpose of this subpart is to implement the Telecommunications Act of 1996 which amended the Communications Act by creating section 273(d)(5), 47 U.S.C. § 273(d)(5). Section 273(d) sets forth procedures to be followed by non-accredited standards development organizations when these organizations set industry-wide standards and generic requirements for telecommunications equipment or customer premises equipment. The statutory procedures allow outside parties to fund and participate in setting the organization's standards and require the organization and the parties to develop a process for resolving any technical disputes. In cases where all parties cannot agree to a mutually satisfactory dispute resolution process, section 273(d)(5) requires the Commission to prescribe a dispute resolution process.

§ 64.1701 Definitions.

(a) For purposes of this subpart:
(1) the terms "accredited standards development organization," "funding party," "generic requirement," and "industry-wide" have

the same meaning as found in 47 U.S.C. § 273.

§ 64.1702 Procedures.

If a non-accredited standards development organization (NASDO) and the funding parties are unable to agree unanimously on a dispute resolution process prior to publishing a text for comment pursuant to 47 U.S.C. § 273(d)(4)(A)(v), a funding party may use the default dispute resolution process set forth in section 64.1703.

§ 64.1703 Dispute Resolution Default Process

(a) **Tri-Partite Panel**. Technical disputes governed by this section shall be resolved in accordance with the recommendation of a three-person panel, subject to a vote of the funding parties in accordance with subsection 64.1703(b). Persons who participated in the generic requirements or standards development process are eligible to serve on the panel. The panel shall be selected and operate as follows:

(1) Within two (2) days of the filing of a dispute with the NASDO invoking the dispute resolution default process, both the funding party seeking dispute resolution and the NASDO shall select a representative to sit on the panel.

(2) Within four (4) days of their selection, the two panelists shall select a neutral third panel member to create a tri-partite panel.

(3) The tri-partite panel shall, at a minimum, review the proposed text of the NASDO and any explanatory material provided to the funding parties by the NASDO, the comments and any alternative text provided by the funding party seeking dispute resolution, any relevant standards which have been established or which are under development by an accredited-standards development organization, and any comments submitted by other funding parties.

(4) Any party in interest submitting information to the panel for consideration (including the NASDO, the party seeking dispute resolution and the other funding parties) shall be asked by the panel whether there is knowledge of patents, the use of which may be essential to the standard or generic requirement being considered. The fact that the question was asked along with any affirmative responses shall be recorded, and considered, in the panel's recommendation.

(5) The tri-partite panel shall, within fifteen (15) days after being established, decide by a majority vote, the issue or issues raised by the party seeking dispute resolution and produce a report of their decision to the funding parties. The tri-partite panel must adopt one of the five options listed below:

(A) the NASDO's proposal on the issue under consideration;

(B) the position of the party seeking dispute resolution on the issue under consideration;

(C) a standard developed by an accredited standards

development organization that addresses the issue under consideration;

(D) a finding that the issue is not ripe for decision due to insufficient technical evidence to support the soundness of any one proposal over any other proposal; or

(E) any other resolution that is consistent with the standard described in section 64.1703(a)(6).

(6) The tri-partite panel must choose, from the five options outlined above, the option that they believe provides the most technically sound solution and base its recommendation upon the substantive evidence presented to the panel. The panel is not precluded from taking into account complexity of implementation and other practical considerations in deciding which option is most technically sound. Neither of the disputants (i.e., the NASDO and the funding party which invokes the dispute resolution process) will be permitted to participate in any decision to reject the mediation panel's recommendation.

(b) The tri-partite panel's recommendation(s) must be included in the final industry-wide standard or industry-wide generic requirement, unless three-fourths of the funding parties who vote decide within thirty (30) days of the filing of the dispute to reject the recommendation and accept one of the options specified in subsections 64.1703(a)(5)(A)-(E). Each funding party shall have one vote.

(c) All costs sustained by the tri-partite panel will be incorporated into the cost of producing the industry-wide standard or industry-wide generic requirement.

§ 64.1704 Frivolous Disputes/Penalties.

(a) No person shall willfully refer a dispute to the dispute resolution process under this subpart unless to the best of his knowledge, information and belief there is good ground to support the dispute and the dispute is not interposed for delay.

(b) Any person who fails to comply with the requirements in subsection 64.1704(a) above, may be subject to forfeiture pursuant to section 503(b) of the Communications Act, 47 U.S.C. 503(b).