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Washington, D.C. 20554

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Federal Communications Commission
Office of Secretary

In the Matter of Implementation of Section 273 of the Communications Act of 1934, as amended by the Telecommunications Act of 1996	CC Docket No. 96-254

COMMENTS OF NORTHERN TELECOM INC.

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SUMMARY

In addressing the development of safeguards to apply to the BOCs' entry into manufacturing, Nortel believes the Commission should be guided by several broad principles. The first such principle is the old maxim of "if it isn't broken, don't fix it." Many successful processes are already in place to deal with several of the issues raised in this proceeding, such as the current methods for information dissemination. The Commission should allow such processes to continue, and not alter them simply for the sake of change.

Likewise, the Commission should avoid duplicating or reinventing protections that are already in place. As an example, the antitrust laws (and enforcement by the Justice Department, Federal Trade Commission and/or State Attorneys General) serve to deter or punish anticompetitive actions. Replicating those laws in separate Commission regulations could create unnecessary regulatory burdens.

Nortel is also concerned that the Commission not inadvertently stifle innovation in the industry by placing excessive or unnecessary restrictions on collaborative efforts between the Bell Operating Companies ("BOCs") and independent manufacturers. The Commission should strive to develop safeguards that are progressive in moving towards an open, competitive market. At the same time, the safeguards should not unintentionally restrict existing collaborative practices that are acceptable and work well in the current environment.

With these general principles in mind, Nortel offers its responses to specific questions raised in the *Manufacturing*

Safeguards NPRM. The Commission should not alter the network disclosure obligation timing requirements from the deadlines now in effect under Computer III. With respect to the level of disclosure, Nortel urges the Commission not to require that proprietary or confidential information be publicly available.

With respect to defining "standards," Nortel suggests that the key concept be an industry agreement arrived at through a defined process. Nortel also believes that even upon the sale of Bellcore by the BOCs, the Commission should still adopt safeguards to the extent that Bellcore becomes both a manufacturer and develops equipment standards. Nortel does not believe that the Commission needs to adopt any additional safeguards to address the potential abuse of the standards development process at this time; rather, the Commission should continue to monitor the situation to determine whether problems actually develop.

Nortel is concerned that Bellcore's current practice of limiting participants in the standards development process may require some refinement because their current obligation to join in is "front loaded," that is, potential participants must make a one-time decision at the very beginning of the process as to whether or not to participate.

Nortel does not believe that any changes are needed to the Part 15 or Part 68 regulations. Nortel also concurs with the Commission's assessment that procurement safeguards need to apply only with respect to BOCs engaged in manufacturing. Finally, Nortel believes that the term "related persons" should be

narrowly defined and that the Commission should not adopt any new enforcement mechanisms to apply to non-carrier manufacturers.

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Implementation of Section 273 of the Communications Act of 1934, as amended by the Telecommunications Act of 1996	)	CC Docket No. 96-254

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Northern Telecom Inc. ("Nortel") hereby comments on the Commission's Notice of Proposed Rulemaking addressing the new obligations imposed on local exchange carriers by the Telecommunications Act of 1996 ("1996 Act") with respect to, inter alia, manufacturing safeguards.[1/] Under the 1996 Act, the Bell Operating Companies ("BOCs") will be permitted to engage in manufacturing activities under certain conditions, including compliance with safeguards developed by the Commission and receipt of authority to provide in-region long distance services.[2/] The *Manufacturing Safeguards NPRM* sets forth a proposed framework for Commission oversight of the BOCs'

1/ Implementation of Section 273 of the Communications Act of 1934, as amended by the Telecommunications Act of 1996, CC Docket No. 96-254, FCC 96-472, released December 11, 1996 (hereafter cited as "*Manufacturing Safeguards NPRM*").

2/ 47 U.S.C. § 273. The BOCs were prohibited from providing or manufacturing customer premises equipment ("CPE") or telecommunications equipment under the modification of final judgment, although they were permitted to market CPE. United States v. American Tel. and Tel. Co., 552 F. Supp. 131, 190 (D.D.C. 1982).

manufacturing activities that is intended to promote a competitive marketplace through the increased availability of network and planning information and the preclusion of discriminatory BOC conduct. Nortel supports these goals, and offers these comments as a means of helping the Commission achieve them.

I. Introduction

Nortel is keenly interested in this proceeding to develop BOC manufacturing safeguards. Nortel is the leading global supplier, in more than 100 countries, of digital telecommunications systems to businesses, universities, local, state and federal governments, the telecommunications industry, and other institutions. The company employs more than 23,000 people in the United States in manufacturing plants, research and development centers, and in marketing, sales and service offices across the country. Nortel expects that it will have several different relationships with the BOCs as a result of their ability to become manufacturers of telecommunications equipment and CPE: (i) Nortel is currently a supplier of telecommunications equipment to the BOCs; (ii) Nortel may collaborate with the BOCs, engage in research activities, or possibly enter into royalty agreements with the BOCs both prior to and after they become manufacturers; (iii) Nortel expects to compete against the BOCs when they become manufacturers; (iv) Nortel obtains network information from the BOCs that it uses in its manufacturing activities; and (v) Nortel provides network information to the

BOCs in its role as a telecommunications equipment supplier. All of these relationships may be affected by the regulatory framework adopted in this *Manufacturing Safeguards NPRM*.

Before responding to the particular questions raised in the *Manufacturing Safeguards NPRM*, Nortel offers several broad principles that it believes should guide the Commission in adopting final rules in this proceeding. The first such principle is the old maxim of "if it isn't broken, don't fix it." Many successful processes to deal with several of the issues raised in this proceeding are already in place, such as the current methods for information dissemination. The Commission should allow such processes to continue, and not alter them simply for the sake of change.

In a similar vein, Nortel also suggests that the Commission avoid duplicating or reinventing protections that are already in place. As an example, the antitrust laws (and enforcement by the Justice Department, Federal Trade Commission and/or State Attorneys General) serve to deter or punish anticompetitive actions. Replicating those laws in separate Commission regulations could create unnecessary regulatory burdens.

Nortel is also concerned that the Commission not inadvertently stifle innovation in the industry by placing excessive or unnecessary restrictions on collaborative efforts between the Bell Operating Companies ("BOCs") and independent manufacturers. The Commission should strive to develop safeguards that are progressive in moving towards an open, competitive market. At the same time, the safeguards should not

unintentionally restrict existing collaborative practices that are acceptable and work well in the current environment. Manufacturers of telecommunications equipment benefit greatly from being able to work closely with their customers -- the carriers -- particularly because those carriers are well-positioned to understand and appreciate the present and future needs of the ultimate customers for services -- the end users.

II. Responses to Specific Questions in the Notice

With these broad principles in mind, Nortel now turns to some of the specific questions raised in the *Manufacturing Safeguards NPRM*.

A. The Current Timing for Network Disclosure Works Well

In paragraph 19 of the *Manufacturing Safeguards NPRM*, the Commission seeks guidance on the timing of the required disclosure regarding protocols and technical requirements used for network connection. The Commission recognizes the potential dangers from advance publicity that is too early, thereby resulting in a dampening of demand for current products. On the other hand, inadequate notice may hamper manufacturers' ability to bring products to market in a timely manner. As a general matter, Nortel believes that the present network disclosure timing adequately balances these competing concerns.[3/]

3/ Under the current regulations, the BOCs' disclosure obligation is triggered at two points in time: at the "make/buy" (continued...)

The Commission also inquires as to whether it should include an exemption for *bona fide* equipment trials. Nortel believes the Commission should provide such an exemption. In light of the complexity of telecommunications equipment and the need to ensure that it can interact with other network elements, early field trials are essential. Requiring disclosure of the particulars of new equipment being used for experimental or market development trials would unnecessarily broadcast to competitors detailed information on innovative activities, and thereby chill necessary research and development. The Commission thus should exempt *bona fide* equipment trials from the Section 273(c)(1) disclosure obligations (as it previously had with respect to the Section 251(c)(5) disclosure requirements).

B. The Commission Should Not Require Public Disclosure of Confidential or Proprietary Information

Paragraph 24 of the *Manufacturing Safeguards NPRM* seeks guidance on the proper level of disclosure of technical information and protocols. As a general matter, the Commission suggests that such disclosure should be at the highest level of disaggregation "feasible," *i.e.*, "possible or practical." The

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3/ (...continued)
point to entities that execute appropriate non-disclosure agreements, and to the public at large twelve months prior to the introduction of the new service or network change. In addition, if the "make/buy" point is less than twelve months prior to a BOC's planned implementation of a network change, then the BOC may provide public notice at that point, and need not provide the full twelve months public notice; in no case, however, is a BOC allowed to provide less than six months public notice. See generally, Amendment to Sections 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry), 2 FCC Rcd 3072, 3091-93 (1987).

Commission recognizes, however, that there may be adverse impacts from requiring disclosure at too great a level of detail, including the inhibition of innovation and competition that would likely result from mandating disclosure of confidential or proprietary information. Particularly troublesome, in Nortel's view, would be the disclosure of proprietary and confidential information on equipment being used for experiments or market trials.

Nortel is troubled by a new disclosure obligation that would result in its confidential and proprietary information being disclosed to competing manufacturers. Nortel previously expressed its concerns in response to the NPRM on interconnection, urging the Commission to require an incumbent local exchange carrier to disclose only the relevant interfaces or protocols, but not requiring the carrier to disclose additional, detailed information.[4/] Nortel also indicated in its earlier filed comments that the Commission should also ensure that any new disclosure obligations do not compromise the carriers' or manufacturers' intellectual property rights.

Nortel recognizes the theoretical potential for an incumbent local exchange carrier to attempt to use proprietary information to preclude or delay entry by competitors, or potentially even as a means of hampering the competitors' business operations.[5/] That theoretical risk, however, must be

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4/ See, generally, Nortel Comments in CC Docket No. 96-98, submitted May 20, 1996.

5/ E.g., Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98, 11 FCC Rcd 15505 (1996) at ¶ 287.

balanced against the very real adverse effects that would result from disclosure of confidential or proprietary information, while also taking into account the Commission's enforcement powers with regard to a carrier's abuse of proprietary or confidentiality claims.

Considering all of these factors, Nortel believes that the demarcation point for required public disclosure should be at a level that excludes proprietary and confidential information. Forcing disclosure of proprietary information will stifle innovation by telecommunications equipment manufacturers, and thereby repress growth of the telecommunication industry. Such a policy would thus be adverse to the public interest.

Nortel recognizes that there may be instances where a competing manufacture will require access to proprietary information in order to develop competing or complementary equipment. Nortel believes that the burden should be on the company seeking access to the proprietary information to justify the need and demonstrate an inability to replicate the information feasibly. In those circumstances, the Commission could then require such access so long as the company seeking the information enters into a licensing and royalty agreement, on reasonable terms, with the owner of the proprietary information.

C. Definition of "Standards"

Paragraph 34 of the *Manufacturing Safeguards NPRM* addresses the issues surrounding the definition of "standards" in order to ensure that the standards development process is open

and accessible to the public. The Commission acknowledges that the certification and standard-setting processes may present opportunities for anticompetitive behavior, particularly as the BOCs begin manufacturing telecommunications equipment.

Nortel proposes the following definition for purposes of Section 273 of the 1996 Act:

> A "Standard" is a technical specification for an interface between networks (public or private), or between networks and customer premises equipment, or a technical specification for telecommunications equipment, customers premises equipment and software integral thereto, that represents an industry agreement arrived at through a *defined process*.
>
> Specifications produced by non-accredited groups would be considered Standards under the Act, if these criteria are met.

Examples might be specifications adopted by various "Forum" groups operating under a charter and related bylaws which set forth a defined process.

A distinction is sometimes made between a standard, which may have options or ambiguous language, and a more precise Implementation Agreement ("IA"), which ensures interoperability because all variables are specified. Frequently an IA is based upon an existing standard and is developed in a group different than the one that developed the standard. However, a Standard may be sufficiently well-defined to ensure interoperability and an IA may be developed without a separate underlying Standard. An IA should be considered a Standard under the Act, if it meets the definition specified above.

De facto standards, which are technical specifications determined by market conditions rather than by industry agreement, should not be considered Standards under the Act. Nor

should requirements imposed on the industry by dominant entities, which are another type of *de facto* standard, be considered as Standards under the Act. The reason for such exclusion is because in these situations (i) there is no defined process to regulate, (ii) it would impose regulations on a company's technical specifications that is adopted by other market players, thus inadvertently bringing that company under regulation, and (iii) remedies already exist to deal with market abuses by dominant entities.

The *Manufacturing Safeguards NPRM* also seeks comment on the definition of the term "industry" in the context of Section 273(d). The only section in which the term "industry" appears, Section 273(d)(4)(A)(ii), addresses the obligation of standard setting entities who are not accredited standards development organizations to invite and not to exclude (on a reasonable and non-discriminatory basis) any interested industry party. Nortel believes that the guidelines presently used by Committee T1 or other standards development organizations for purposes of ensuring openness and accessibility provide perfectly acceptable models that could be applied in the Section 273(d) context as well.

D. Impact of the Sale of Bellcore

Paragraph 38 of the *Manufacturing Safeguards NPRM* requests comment on whether the consummation of the impending sale of Bellcore to SAIC would result in Bellcore no longer being deemed an affiliate of a BOC, and thus eligible to begin manufacturing. Nortel concurs with the *Manufacturing Safeguards*

NPRM interpretation of the statute, that the absolute bar on manufacturing would no longer be applicable. Before Bellcore is allowed to manufacture, however, Nortel believes that adequate safeguards must be in place to mitigate against conflicts of interest between parts of a company whose substantial business is establishing standards and/or certifying telecommunications equipment, and parts of a company whose substantial business is manufacturing.

For example, Nortel believes that the Commission must implement safeguards to ensure that a company's manufacturing operations contributes to and influences the standards developing processes on a co-equal basis with other industry participants. Although the absence of an affiliation with the BOCs eliminates some of the risks of possible anticompetitive behavior in the manufacturing arena, the dual role of manufacturer and standards setting or certifying entity presents the possibility of abuse. Thus, Nortel urges the Commission to put into effect the necessary safeguards before Bellcore begins to manufacture.

E. The Commission Correctly Interpreted the Non-Discrimination Obligations of the BOCs

Paragraph 48 of the *Manufacturing Safeguards NPRM* addresses the statute's nondiscrimination provisions, which prohibit a BOC from favoring its manufacturing affiliate. Nortel agrees with the Commission's tentative analysis. Congress intended through enactment of Section 273(d)(3)(C) to prohibit all discrimination, *i.e.*, acting on the basis of prejudice in favor of its manufacturing affiliate. It is this potential for

abuse that forms the core of the problem, and which led to years of litigation in the courts and at the Commission.[6]

F. No Additional Safeguards Are Needed Now to Address Potential Abuses of the Standards Development Process by Large Carriers

Paragraph 50 of the *Manufacturing Safeguards NPRM* seeks input on whether to apply procedures governing non-accredited standards bodies (such as Bellcore) to activities, including research and development, conducted by large carriers, individually or in consortia, and other entities (which can include manufacturers), which may result in the establishment of standards or specifications. While Nortel appreciates the fact that there may be opportunities for anticompetitive abuse of the standards-setting activities or other similar types of activities, Nortel is wary of implementing additional safeguards merely because of such a possibility.

As reflected in our comments above with respect to Paragraph 34, Nortel recognizes that there is always the potential for abuse by one or more dominant market entities to "end run" defined processes for establishing standards to create *de facto* standards. However, Nortel believes that this *potential* alone does not provide sufficient grounds to extend to additional situations prophylactic measures that can often impede innovation and reveal competitive information.

Nortel suggests instead that the Commission monitor the situation and take action subsequently if warranted. At this

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6/ See, generally, *Manufacturing Safeguards NPRM* at ¶¶ 2-3.

stage, Nortel believes the Commission should merely define "indicators" that reveal if and when a company or a group of companies is systematically abusing a dominant market position to create and use *de facto* standards. The Commission could then impose procedures governing non-accredited standards bodies if these "indicators" reflect the likely existence of abuses. An example of an "indicator" would be whether a certain percentage of a company's purchases are based on *de facto* standards set by that company or a consortia of which that company is a member, versus standards created by a defined process.

G. Any Standard Setting Funding Requirements Should Not Be "Front Loaded"

Paragraph 54 of the *Manufacturing Safeguards NPRM* concerns, *inter alia*, limiting participation in standards setting efforts of non-accredited standards organizations to funding parties. While Nortel agrees in principle that participants should fund their participation in standards-setting activities of non-accredited standards development organizations ("SDOs"), it has concerns that the initial efforts to implement this process by Bellcore *do not meet* the statute's standard of being "administered in such a manner as not to unreasonably exclude any interested industry party."

Specifically, the current process does not allow a gradual buy-in, wherein interested parties can assess at various stages a continued investment in a particular standard setting activity, based, for example, on the scope of the standard, its content, and the identity of the other investing parties.

Instead, a company presently interested in participating must make a go/no-go decision up front with little information and a relatively high entry fee. Nortel would prefer a fairer investment process that is not so inflexible and completely "front loaded."

H. No Change to the Current Part 15 and Part 68 Requirements Are Necessary

Paragraph 61 of the *Manufacturing Safeguards NPRM* addresses the interrelationship between the 1996 Act's provision of a sunset for the Commission's safeguards adopted pursuant to Section 273 and the current certification, registration and equipment authorization programs (Part 15 and Part 68). Nortel agrees with the Commission that these Part 15 and Part 68 processes are working well, as evidenced by the highly competitive nature of the CPE market in the United States. These rules are competitively neutral, while also adequately protecting the network and the marketplace. Nortel thus believes there is no grounds under the standards set forth in Section 273(d)(6) to revise or to sunset these Rules.

I. BOC Equipment Procurement Provisions Should Apply Only to BOCs Engaged in Manufacturing

Paragraph 63 of the *Manufacturing Safeguards NPRM* questions whether the statutory provisions governing BOC equipment procurement and sales should apply to all BOCs, or just to those BOCs that are authorized to manufacture telecommunications equipment. Nortel urges the Commission to

apply a more narrow interpretation that would limit the applicability of discriminatory procurement rules only to those BOCs that are engaged in telecommunications equipment manufacturing, and only with respect to the equipment they manufacture. Nortel believes that the Commission is ill-equipped to take on the role of a "procurement oversight" agency, and that Congress did not intend to impose such a burden on the Commission (or on BOCs that do not have a manufacturing affiliate).

The *Manufacturing Safeguards NPRM* suggests that the requirements, except for those contained in Section 273(e)(4), apply to all BOCs. Nortel believes that the Commission has interpreted this section too broadly. Nortel believes that a proper reading of the legislative history indicates that the requirements contained in Section 273(e) only apply to BOCs engaged in manufacturing. Section 273 itself is entitled "Manufacturing by Bell Operating Companies," thus limiting any application therein to BOCs which have been authorized to engage in manufacturing. The language in Section 273(e) must then be read with that limitation. Paragraphs (1), (2), (3) and (5) place requirements on the local exchange carrier (the BOCs are defined as those providing local exchange service), where the BOC itself or an affiliate have been authorized to engage in manufacturing. Paragraph (4), however, dealing with sales to other local exchange carriers, places a restriction on the manufacturing entity itself, whether the BOC manufactures either through a separate affiliate, or, after the separate affiliate requirement of Section 272 sunsets, manufactures itself.

To read the requirements of Section 273 more broadly would mean that Congress intended to replace the normal course of BOC procurement with an entirely new regime, even where the BOC is not engaging in manufacturing. The public policy rationale for the requirements of paragraphs (1), (2), (3), and (5) is that Congress wanted to prohibit the BOC, as a large purchaser and consumer of equipment, from favoring *its own manufacturing operation*. If fact, the House Commerce Committee Report[7/] notes that Congress did not intend to interfere with the normal course of business:

> Section 271(e) addresses the concern of companies that sell equipment to BOCs by requiring that BOCs make equipment procurement decisions based on objective commercial criteria, such as price, quality, delivery, and other commercial factors. *It is not the Committee's intent to impose, or permit the Commission or any other government entity to impose, a government procurement requirement on the BOCs*, or to require that they procure from any particular suppliers.
>
> Nor is it the Committee's intent to have the Commission interfere with the relationships established among the BOCs and their vendors. *The provision is meant to ensure that vendors continue to have the opportunity to pursue BOC business. The provision will assure continuing opportunities for vendors to sell to the BOCs based on usual commercial considerations* without requiring that BOCs make their procurement decisions based on competitive bidding.[8/]

7/ Paragraphs (2), (4) and (5) of Section 273 were included in H.R. 1555 when it passed the Commerce Committee as paragraphs 271(e)(1), (2), and (3), respectively. Only minor, non-substantive changes were made in the enacted version. Also, paragraphs (2), (3), (4), and (5) of Section 273 were included in S. 652 when is passed the Senate Commerce Committee, as subparagraphs 256(c)(2)(A), (B), (C), and (D), respectively. The language passed the Senate also underwent some minor, non-substantive changes. The Conference Committee added paragraph (1).

8/ Rpt. 104-204, Part I 104th Cong. 1st Sess. at 55 (1995) (emphasis added).

The legislative history makes it clear that Congress intends for equipment manufacturers to have an equal opportunity to pursue BOC business as they would have absent the ability of the BOC to engage in manufacturing telecommunications equipment. Like much of the Telecommunications Act of 1996, Congress wanted to ensure that BOCs do not favor their own affiliates, and *vice versa*, when the BOC enters a new, competitive line of business.

Nortel has not observed any problems at present, a situation where none of the BOCs are involved in manufacturing telecommunications equipment. Nortel thus perceives no reason to impose a new series of procurement practice oversight on the BOCs unless they begin manufacturing, when presumably they would have new and increased incentives to discriminate in favor of their own manufacturing affiliate. Imposing unnecessary bureaucracy or paperwork on those BOCs that are not affiliated with a manufacturer would merely increase costs and burdens on those BOCs without any corresponding benefit to the public.

J. Interpretation of "Related Persons" Should Be Narrow and Specific

In Paragraph 67 of the *Manufacturing Safeguards NPRM* concerning BOC procurement and sales, the Commission seeks comment on the meaning of the terms "unrelated persons" and "related persons," and what specific types or relationships would make an entity a "related person" for purposes of Section 273(e). Nortel believes that the Commission should interpret "related persons" narrowly and specifically so as not to preempt existing

business arrangements that the BOCs have with suppliers. An appropriate definition would include all BOC affiliates and any entity in which a BOC has a controlling financial interest.

K. No New Enforcement Mechanisms Are Needed for Non-Carrier Manufacturers

Finally, Paragraph 76 of the *Manufacturing Safeguards NPRM* seeks comment on the need for additional rules to enforce Section 273 for entities that are not common carriers (and thus not subject to Sections 206 to 209 of the Communications Act). Nortel does not believe it is necessary for the Commission to adopt new enforcement mechanisms to apply to manufacturers in general. To the extent that a manufacturer is affiliated with a BOC, the Commission's current authority under Title II is adequate to address any abuses or violations of the Rules. If a non-affiliated manufacturer engages in unlawful anticompetitive activity, then the current antitrust enforcement mechanisms or Commission authority under Sections 501-503 of the Communications Act should be adequate to address any such violations.

III. Conclusion

As described in these comments, Nortel urges the Commission to be circumspect in adopting new requirements or new regulations. For the most part, the current practices have worked well to promote a robustly competitive marketplace for telecommunications equipment and CPE. Any new requirements should be narrowly targeted to address the particular concerns

that may arise because of BOC entry into manufacturing, where there would be greater incentives for discrimination in procurement or standards development activities.

Respectfully Submitted,

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