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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

BELLSOUTH COMMENTS

BELLSOUTH CORPORATION

By Its Attorneys

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SUMMARY

By its *Notice* in this proceeding, the Commission proposes to adopt rules to implement Section 273 of the Communications Act of 1934, as amended. Unfortunately, the *Notice* is fraught with proposals that unduly constrain, or create strong disincentives for, BOCs' participation in manufacturing.

Contrary to the implication in the *Notice*, the BOCs already have authority to "provide" telecommunication equipment under a waiver of the MFJ, which is still fully effective pursuant to Section 271(f) of the Act. Further "close collaboration," "research activities," and "royalty agreements" described in Section 273(b) are now fully and immediately permitted, even if any aspect of these activities would have constituted "manufacturing" under the MFJ. Moreover, BOCs may engage in close collaboration with other BOCs, RBOCs, or their affiliates, contrary to the Commission's tentative conclusion.

Activities permitted under Section 273(b) should be given broad definition. Substantial public benefit can flow from active participation by the BOCs in product and service innovation and development through collaboration, research, and royalty arrangements. Conversely, a narrow construction of the range of permitted activities could unduly restrict small manufacturers' access to capital and other resources and otherwise hinder, rather than promote, competitive innovation.

The network information disclosure requirements of Section 273(c) are already fully addressed by the Commission's existing panoply of disclosure rules. Contrary to the Commission's repeated assertions in the *Notice*, its existing rules *were* adopted with the interests of manufacturers in mind, as a review of the origins of those rules demonstrates. Moreover, new

rules tied to different triggering events would be confusing and inconsistent with the Commission's past determination that there should be only one initial disclosure trigger.

Nonetheless, if the Commission does adopt new disclosure rules, it should confirm that those rules attach only to BOCs who actually engage in manufacturing, not to those who merely are permitted to do so by virtue of being authorized under Section 271(d) to provide interLATA service.

The provisions of Section 273(d) regarding standard setting activities should be applied as they are written, rather than gratuitously expanded. Subjecting a variety of "standards-setting" groups to the notice, participation, and publishing process will significantly slow the pace of innovation. Economic literature also confirms that cumbersome standards processes are particularly inefficient for industries with rapidly changing technology. Finally, antitrust analysis also recognizes that standard setting activities can both be procompetitive and provide substantial benefits to consumers, while antitrust enforcement guards against use of standards setting to harm competition.

Like Section 273(c), the nondiscrimination standards of Section 273(e)(1) apply only to BOCs actually engaged in manufacturing. Moreover, that subsection and subsection 273(e)(2) (procurement standards) apply only to the BOC and not to affiliates that do not provide wireline service. Although no rules are necessary to implement these provisions, the Commission should confirm that Section 273(e)(1) and (e)(2) apply only to procurement of telecommunications equipment and CPE, not to other procurement activities.

Finally, the Commission should not attempt to issue rules implementing the joint planning provisions of Section 273(e)(3), at least until after the Commission has completed its inquiry

under Section 256. Moreover, the analysis of whether any joint planning activity is consistent with antitrust laws is necessarily fact dependent. Thus, it is impossible to draw careful, comprehensive, anticipatory, bright-line distinctions between joint network planning that will or will not pass muster under the rule of reason. Because the Commission cannot grant antitrust immunity to joint planning participants, the Commission must not adopt rules the compliance with which could subject a BOC to treble damages liability under antitrust laws.

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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

BELLSOUTH COMMENTS

BellSouth Corporation ("BellSouth") submits these Comments in response to the Commission's *Notice of Proposed Rulemaking*[1] in the above referenced proceeding.

By its *Notice*, the Commission proposes to adopt rules to implement Section 273 of the Communications Act of 1934, as amended.[2] The Commission writes that it aims to "encourage robust competition for manufactured products through the increased availability of network planning information and fair and open forums for establishing equipment standards and for certifying equipment."[3] The most intuitive cure for this perceived general lack of manufacturing competition would be to increase the number of manufacturing firms by encouraging entry by BOCs and others. Unfortunately, the *Notice* is fraught with proposals that unduly constrain, or create strong disincentives for, BOCs' participation in manufacturing. In these Comments,

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[1] *Implementation of Section 273 of the Communications Act of 1934, as amended by the Telecommunications Act of 1996*, CC Docket No. 96-254, *Notice of Proposed Rulemaking*, FCC 96-472 (rel'd Dec. 11, 1996) ("*Notice*").

[2] 47 U.S.C. §§ 151 *et seq.*

[3] *Notice* at ¶ 6.

BellSouth urges the Commission to exercise restraint, to avoid imposing rules where none are required by the Act, and to follow the "policy of the United States to encourage the provision of new technologies and services to the public."[4]

I. Scope of Manufacturing Authorization and Close Collaboration

BellSouth fully agrees with the Commission's tentative conclusion that Section 273(a) allows a BOC to manufacture telecommunications equipment and CPE once it is authorized "to offer interLATA service in *any* of its in-region states."[5] Such a conclusion is mandated by both the clear meaning of the statute and, as pointed out by the Commission, the legislative history of the Act.[6] However, contrary to the implication in the *Notice*, the BOCs already have the authority to "provide" telecommunications equipment because of a waiver entered by the Court responsible for supervision of the Modification of Final Judgment ("MFJ") on March 2, 1995.[7] Of course, this waiver is still fully effective pursuant to Section 271(f) of the Act.[8]

BellSouth also agrees with the Commission's conclusion that the meaning of "manufacture" includes "manufacturing" as defined under the MFJ,[9] with one important distinction. Section 273(a) must be read in conjunction with Section 273(b) to the effect that the activities described in 273(b), some of which were prohibited or restricted for purposes of the MFJ, are not manufacturing for purposes of application of the statute and are, therefore,

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[4] 47 U.S.C. § 7(a).

[5] *Notice* at ¶ 8 (emphasis added).

[6] *Notice* at ¶ 8, n. 23.

[7] *United States v. Western Electric Co., Inc.*, Civil Action No. 82-0192 (HHG) (D.D.C. March 2, 1995).

[8] 47 U.S.C. § 271(f).

[9] *Notice* at ¶ 10.

immediately permitted. The Act itself makes this clear by stating in both 273(b)(1) and (b)(2) that "[s]ubsection (a) shall not prohibit a Bell operating company from" engaging in the described activities.

Moreover, 273(b)(1) confirms that "[s]ubsection (a) shall not prohibit a Bell operating company from engaging in close collaboration with *any* manufacturer."[10] "Any" manufacturer certainly includes unaffiliated BOCs, RBOCs, and their affiliates. As a result, the Commission's tentative conclusion that 273(b)(1) does not permit close collaboration between any combination of BOCs, RBOCs, and affiliates[11] is precluded by the clear language of the statute.

The language of Section 273(a) on which the Commission relies for its tentative conclusion only precludes "such manufacturing" with unaffiliated BOCs and their affiliates.[12] "Such manufacturing" can only be read as to apply to manufacturing for which 271(d) relief is required. Therefore, because no Section 271(d) relief is required to engage in the activities permitted by 273(b), the BOCs, either directly or through affiliates, can engage in close collaboration with unaffiliated BOCs and their affiliates. Similarly, although not addressed by the Commission, BOCs can participate in certain research arrangements and royalty agreements with unaffiliated BOCs and their affiliates. Furthermore, the language of Section 273(a) mandates that a BOC, either directly or through an affiliate, be permitted to engage in the activities set forth in

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[10] 47 U.S.C. § 273(b)(1) (emphasis added).

[11] *Notice* at ¶ 11.

[12] 47 U.S.C. § 273(a) ("[N]either a Bell operating company nor any of its affiliates may engage in *such manufacturing* in conjunction with a Bell operating company not so affiliated or any of its affiliates.") (emphasis added).

Section 273(b) prior to obtaining authority to offer interLATA service pursuant to Section 271(d).

The Commission also elicits comments regarding types of activities that would constitute "close collaboration."[13] Neither the statute nor the legislative history in any way limits the concept of close collaboration. Moreover, to be consistent with the nation's policy objective of "encourag[ing] the provision of new technologies and services,"[14] close collaboration must be given a broad meaning. Limiting close collaboration would only serve to slow down the development and improvement of both the telecommunications network and the equipment attached to it. Close collaboration should include any activities conducted jointly by a BOC and any manufacturer, including activities that if conducted by the BOC alone could constitute manufacturing under Section 273(a). This would allow a BOC or its affiliate to participate in all stages of the design and development process with a manufacturer, including the BOC's own 272 affiliate once the BOC has met the requirements of Section 271(d). Clearly, of course, the BOC cannot present the manufacturer with detailed design specifications developed solely by the BOC or participate in the fabrication of the finished product, but otherwise the BOC can collaborate with the manufacturer in a wide range of design and development activities.

Similarly, BOCs should be able to engage in virtually any research activities related to manufacturing. Even under the MFJ the BOCs had broad latitude to engage in research activities.[15]

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[13] *Notice at* ¶ 11.

[14] 47 U.S.C. § 7(a).

[15] *See, e.g., United States v. Western Electric Co., Inc.*, 675 F. Supp. 655, 668 n. 58 (D.D.C., 1987).

Moreover, broad definitions of close collaboration and research would serve the public interest by permitting more flexible "partnering" arrangements between BOCs and manufacturers. Some projects are too large or too risky for a single firm to handle. Corporate partnering facilitates sharing or allocation of risk. Partnering also brings together complementary resources. If one firm can invent products but cannot sell them, and another can sell them but not invent, a collaborative arrangement makes eminent sense. Partnering may also enable parties to overcome market barriers that are insurmountable to them individually.[16]

For these reasons, it is in the public interest not to limit unnecessarily the research activities of a major proportion of the American telecommunications industry. Such activity is necessary to develop and improve the nation's telecommunications network and ensure that this country maintains its technological lead in the world marketplace. Unnecessary restrictions on research would merely hinder the development of telecommunications equipment and CPE to the detriment of consumers, resellers, and other users of the telecommunications network.

Section 273(b)(2) also permits BOCs to enter into royalty agreements with manufacturers of telecommunications equipment. The Commission seeks an appropriate definition of the term "royalty."[17] BellSouth agrees that a broad definition better serves the public interest.[18] As the

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[16] *See*, Badaracco, Jr., J. L., *The Knowledge Link: How Firms Compete Through Strategic Alliances* (Boston: Harvard Business School Press, 1991) 7-8. Other ways in which partnering can lead to efficiencies and economies, and therefore potentially lower prices to consumers, have also been identified. *See, e.g.*, Harrigan, K. R., *Managing for Joint Venture Success* (Lexington: Lexington Books, 1986) 16 (cost and risk sharing (reduction of uncertainty), obtaining resources where there is no market, obtaining financing, avoiding duplication of efforts and facilities, shared brands and distribution channels, window on new technologies, shared managerial talent, influence industry standards, creation of more effective competitors, and toehold entry into new markets).

[17] *Notice* at ¶ 12.

Commission correctly notes, such a "broad interpretation would give the BOCs wider latitude in structuring business transactions, and minimize regulatory interference in the market."[19] Such an interpretation also is consistent with the intent of the Commission to "advance competition and to reduce regulation in telecommunications markets."[20] In addition, the broader "per-unit" definition cited by the Commission is widely used in the industry. There is no reason to believe that Congress intended a different meaning when the term is well understood to have a common meaning in the industry.

Moreover, the hypothetical concerns raised by the Commission as possible support for a narrower definition of royalty are unfounded and ignore the realities of today's telecommunications regulatory framework and marketplace. For example, the Commission implies that if a BOC could obtain a per unit royalty it would have an incentive to purchase inferior and more expensive equipment.[21] Not only would such practice be prevented by the procurement safeguards of Section 273(e), and in BellSouth's case, by its own procurement guidelines, but it also would make no sense in a competitive marketplace for a BOC to try to compete by offering inferior network services or products. Indeed, allowing BOCs to recover royalties provides them the incentive to develop products that are likely to be sold to other telecommunications service providers throughout the world. BOCs have no incentive to limit their own royalty potential by developing inferior products. Finally, the replacement of traditional

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[18] *Notice* at ¶ 12, quoting Black's Law Dictionary 1331 (6th ed. 1990) ("[Royalty] may be defined more broadly . . . as 'compensation for the use of property . . . expressed as a percentage of receipts from using the property or as an account per unit products.'").

[19] *Notice* at ¶ 12.

[20] *Notice* at ¶ 7.

[21] *Notice* at ¶ 12.

rate of return regulation by price cap and other similar regulatory regimes has removed whatever theoretical incentives to cross subsidize manufacturing operations may have existed in the past.

The Commission's concern appears to be based, in part, on a perception that a BOC's collection of royalties on its own purchases and the consequential reduction in the BOC's net cost is inherently not desirable.[22] Contrary to this implication, however, there is nothing wrong with a BOC seeking lower prices for equipment, as long as it does so in a manner consistent with Section 273(e), state regulatory requirements and other legal obligations, such as the antitrust laws. In addition, the BOCs, like other entities, only receive royalties if they have provided something of value to the manufacturer, either intellectual property or advance funding for the manufacture of the product. The latter is especially important to small manufacturers, many of whom lack the financial wherewithal to undertake the manufacture of sophisticated products without funding from a BOC or other potential user of the product. In order to permit and encourage competition in the telecommunications equipment manufacturing industry, the Commission should not attempt to adopt a limited definition of royalty. A broad definition is consistent with the common usage and understanding in the industry, will further the procompetitive goals of the Act, and will support American competitiveness in the international marketplace.

The Commission also seeks "comment on the relationship between Section 272(b)(2) and other sections of the Act which may require disclosure of information."[23] Because the very nature of research and development is tentative and may not lead to the development of any product,

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[22] *Notice* at ¶ 12.

[23] *Notice* at ¶ 12.

there is no need to require any additional disclosure of information until the BOC has reached the "make-buy" point in the procurement process. Any requirement of premature disclosure of information would lessen the value of the information gleaned by the BOC and remove a potential incentive to spend the money necessary to engage in research and innovation. The result would be a lessening of activities necessary for America to maintain its competitive edge in telecommunications technology and the concomitant potential result of reliance on foreign manufacturers and loss of business for domestic manufacturers.

II. Information Requirements

Section 273(c) imposes certain information disclosure obligations on BOCs and authorizes the Commission to adopt implementing regulations if any are necessary. To a large extent, the objectives of Section 273(c) are already addressed by information disclosure rules previously adopted by the Commission in analogous contexts. At best, any additional rules would be redundant. More likely, any attempt to craft rules that are uniquely applicable under Section 273 will only make more confusing the current array of overlapping disclosure requirements that has arisen over the years. BellSouth urges the Commission to exercise restraint and to rely on existing rules as the best means of implementing Section 273(c).

As a preliminary matter, however, the Commission should confirm, if it *does* adopt new information disclosure requirements pursuant to Section 273(c), that those requirements apply only to BOCs that are authorized to engage and, in fact, are engaged, in manufacturing. The Commission properly notes that while Section 273(c) may appear on its face to apply to all BOCs, it is merely a subsection of Section 273 of the Act, which otherwise addresses BOC obligations in

the manufacturing context.[24] BellSouth agrees that the requirements of Section 273(c) thus have no bearing outside of that context.

The Commission further suggests in the *Notice*, however, that a BOC may fall within the ambit of Section 273(c) when the BOC is "authorized to manufacture under Section 273(a)."[25] BellSouth believes this is a misreading of Section 273(a) and that, instead, a BOC is subject to Section 273(c) only when it actually engages in manufacturing.

First, a BOC is never "authorized to manufacture under Section 273(a)" in the sense of an affirmative grant of authority to engage in that activity. Rather, a BOC is permitted by operation of law to manufacture telecommunications equipment and CPE when the BOC has been authorized to provide interLATA services pursuant to Section 271(d).[26] There is no separate grant of manufacturing authority. Nor does the Section 271(d) review process include consideration of whether a BOC plans to engage in manufacturing. Rather, the Act simply provides that once a BOC has met the public interest standard of 271(d) and been authorized to provide interLATA services, the BOC is automatically permitted to engage in manufacturing, whether the BOC has any plans for such activity or not.

Moreover, that a BOC is merely permitted to engage in manufacturing should have no bearing on whether the BOC incurs obligations under Section 273. Indeed, the potential ills for which the Commission perceives a need to design safeguards -- as speculative as they are in any

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[24] *Notice* at ¶ 17. Indeed, Section 273 is entitled "Manufacturing By Bell Operating Companies."

[25] *Notice at* ¶ 17.

[26] *See, Joint Statement of Managers*, S. Conf. Rep. No. 104-230, 104th Cong., 2d Sess. 1, 154 (1996) ("*Joint Statement*"). ("The [Conference] agreement *permits* a BOC to engage in manufacturing after the Commission *authorizes* the company to provide interLATA services. . .") (emphasis added).

event, are nonexistent until a BOC takes steps to engage in manufacturing.[27] Until that time, whatever rules the Commission has in place to govern non-manufacturing activities will still be adequate, because that is all the activity in which the BOC is engaged. Application of new requirements to pre-existing activities merely because a BOC is permitted to engage in new activities -- activities in which it may have no plans to engage and for which it did not specifically seek permission -- would make no sense.

Finally, the language of Section 273(a) confirms that the requirements of Section 273, including Section 273(c), attach only to BOCs that actually engage in manufacturing and not to those who are merely permitted to do so. Section 273(a) provides:

> A Bell operating company may manufacture and provide telecommunications equipment, and manufacture customer premises equipment, if the Commission authorizes that [BOC] to provide interLATA service under section 271(d), subject to the requirements of this section and the regulations prescribed thereunder.[28]

As discussed above, interLATA authorization is the condition precedent to a BOC's being permitted to manufacture. Once crossing that threshold, the BOC "may manufacture." If the

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[27] The Commission perhaps has already recognized as much, asserting in the *Notice* that "[t]he legislative safeguards of Section 273(c) reduce the potential of anticompetitive conduct . . . by a network owner *that also manufactures* network equipment." *Notice* at ¶ 16 (emphasis added). A network owner that does not also manufacture should not be subject to safeguards designed to affect the relationship between a network owner and its manufacturing operation.

[28] 47 U.S.C. § 273(a). As the *Joint Statement* explains, Section 273 was adopted as a new section derived from the provisions of Section 222 of the underlying Senate bill. That section was intended to "remove the restrictions on manufacturing imposed by the MFJ on the BOCs under certain conditions, and allows [sic] those companies *to engage in manufacturing subject to certain safeguards.*" *Joint Statement* at 154, 152 (emphasis added). Thus, the legislative history also confirms that the conditions of Section 273 are intended to attach to BOCs that engage in manufacturing, not to those who merely obtain Section 271 interLATA authorization.

BOC does manufacture, it is undertaking an activity that is "subject to the requirements of [Section 273]." A BOC that does not manufacture, however, undertakes no activity that is "subject to the requirements of [Section 273]." Accordingly, until a BOC engages in manufacturing, neither the information disclosure requirements of Section 273(c) nor any regulations prescribed thereunder apply to that BOC.

Even for BOCs that do engage in manufacturing, the Commission does not need to create a new set of disclosure requirements to achieve the goals of Section 273(c). Contrary to the Commission's repeated intimations in the *Notice*, the issues raised by a network owner's affiliation with a manufacturing operation have been squarely addressed previously and, in fact, were the foundation of the existing disclosure obligations previously imposed on the BOCs. No new rules are necessary to address the interests of manufacturers.

The Commission repeatedly, but erroneously, suggests that its existing panoply of network information disclosure rules have failed to take adequately into consideration the interest of manufacturers. For example, following a cursory summary of network disclosure rules adopted in prior proceedings, the Commission asserts that "current rules . . . address the needs of other carriers, information service providers (ISPs), enhanced service providers (ESPs), and other members of the public for information about network capabilities, but not the specific needs of manufacturers who wish to develop new network products."[29] Similarly, the Commission suggests that disclosure at the "make/buy point" -- the triggering event for many existing disclosure rules -- now somehow "may not fully address the information needs of

[29] *Notice* at ¶ 18 (footnotes omitted).

manufacturers."[30] Finally, the Commission claims that "[its] rules have not, until now, focused specifically on the needs of manufacturers for information affecting the design of end user equipment."[31] Through all of these assertions, the Commission seriously understates the role the interests of manufacturers has played in the formulation of existing disclosure requirements.

As the Commission notes, all carriers, not just the BOCs, are already subject to a variety of network information disclosure obligations under different orders or regulations of the Commission.[32] However, while the Commission summarily recites or alludes to these rules in the *Notice*, it fails to depict accurately the purpose, circumstances, or meaning of these rules, particularly as far as the interests of manufacturers are concerned.

For example, the Commission refers generally to Section 68.110(b) of its rules, which requires all carriers to disclose network changes "[i]f such changes can be reasonably expected to render any customer's terminal equipment incompatible with telephone company communications facilities, or require modification or alteration of such terminal equipment, or otherwise materially affect its use or performance."[33] This requirement, the Commission has previously concluded, "obviously includes *advance notice to equipment manufacturers to ensure that they will be able to produce on a timely basis* new equipment which will conform to specification changes, appropriate modification to existing equipment, or additional equipment which might be used with existing deployed equipment."[34] Similarly, the Commission has properly recognized that the "all

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[30] *Notice* at ¶ 22.

[31] *Notice* at ¶ 28.

[32] *Notice* at ¶ 15.

[33] *Notice at* ¶ 18, *quoting* 47 C.F.R. § 68.110(b).

[34] *Computer & Business Equipment Manufacturers Association; Petition for Declaratory Ruling Regarding Section 64.702(d)(2) of the Commission's Rules and the Policies of the Second* (Continued...)

carrier rule" includes the obligation of "all carriers owning basic transmission facilities [to release] *all* information relating to network design . . . insofar as such information affects . . . the manner in which interconnected CPE operates."[35] As with the Section 68.110(b) rule, the "all carrier" rule's concern with the operation of interconnected CPE obviously must include adequate disclosure to manufacturers to enable them to respond to the carrier's network changes.

The surest confirmation that the Commission's existing disclosure obligations already encompass the interests of manufacturers, however, can be found in the Commission's explanation of its *Computer II* disclosure rule, which in turn is the foundation of the current disclosure rules subsequently applied to the BOCs through the *Computer III* and *CPE Relief* proceedings. In the *Computer II Final Decision*, the Commission adopted a rule requiring public disclosure of "all information relating to network design and technical standards and information affecting changes to the telecommunications network which would affect either intercarrier interconnection or the manner in which customer premise equipment is attached to the interstate network prior to implementation and with reasonable advance notice."[36] In the subsequent *CBEMA Order*,[37] the Commission responded to a petition by an association of manufacturers asking it to describe precisely what was required by this disclosure obligation. Review of that decision confirms that

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Computer Inquiry, FCC 83-182, *Report and Order*, 93 F.C.C. 2d 1226, 1229 (emphasis added) (rel. May 9, 1983) (*"CBEMA Order"*).

[35] *Notice* at ¶ 15, *quoting Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry), Memorandum Opinion and Order on Reconsideration*, 84 FCC2d 50, 82-83 (1980) *aff'g in part and modifying in part*, 77 FCC2d 384 (1980) (*"Computer II Final Decision"*), *further recon.*, 88 FCC2d 512 (1981), *aff'd sub nom Computer and Communications Indus. Ass'n v. FCC*, 693 F.2d 198 (D.C. Cir. 1982), *cert. denied*, 461 U.S. 938 (1983) (*"Computer II"*).

[36] 47 C.F.R. 64.702(d)(2).

[37] *See*, note 34, *supra*.

existing disclosure requirements were built on the interest of manufacturers, at least as much as on the interests of other service providers.

For example, the Commission determined that the disclosure obligation of *Computer II* "encompasses network information which is relevant to the competitive provision of CPE or enhanced services and [on] which AT&T's research and manufacturing affiliates rely."[38] Moreover, the Commission noted that absent the application of such a rule, "[Western Electric's] manufacturing operations could be geared up years in advance of any competitor's manufacturing."[39] The Commission also defined the nature of the information to be disclosed as being "sufficiently broad in scope and defined in detail to permit offerors of CPE and enhanced services to design service and equipment which will be completely interoperable with the basic network."[40] Clearly, the Commission's rule was addressing more than the needs of other service providers and was specifically inclusive of the interests of equipment manufacturers.[41]

Further, the extension of this rule to the BOCs upon divestiture, and the Commission's subsequent application of it when granting the BOCs structural relief for CPE, again shows the Commission's continuing awareness of and concern for manufacturers' interests, notwithstanding that the BOCs themselves were foreclosed from manufacturing opportunities. Thus, the rule was

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[38] *CBEMA Order*, 93 FCC2d at 1237.

[39] *Id.* at 1240.

[40] *Id.* at 1238.

[41] Nor is it material that the *Computer II* rules were adopted as part of a set of safeguards for AT&T's CPE and enhanced service subsidiaries, rather than a manufacturing affiliate. As this Commission has recognized, "[t]he AT&T separate subsidiary [required by *Computer II*] was permitted to undertake some joint activities with its affiliates . . . including . . . manufacturing CPE." *Furnishing of Customer Premises Equipment and Enhanced Services by American Telephone and Telegraph Company*, 102 FCC2d 655, n. 17 (1985).

applied in the *CPE Relief Order* to redress the concern that "the BOCs may have some ability to design new network services or change network technical specifications to favor their own CPE *or that of a preferred manufacturer*."[42] In light of this historically consistent deference to the interests of manufacturers in the development of the network information disclosure rules, the Commission would be in error to conclude that current rules have not adequately taken those concerns into account.

Indeed, a number of the issues the Commission now asserts to be of peculiar interest to manufacturers are issues with which the Commission has specifically contended and resolved in the past. No need exists now to reinvent the wheel to continue to accommodate manufacturers' interests as BOCs are permitted to participate in that activity.[43] Instead, the Commission need only refer back to its previous decisions to divine the appropriate resolution of concerns posited in the *Notice*.

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[42] *In the Matter of Furnishing of Customer Premises Equipment by the Bell Operating Telephone Companies and the Independent Telephone Companies*, 2 FCC Rcd 143, 150 (1987) ("*CPE Relief Order*") (subsequent history omitted).

[43] That the BOCs were not previously authorized to engage in manufacturing is irrelevant to consideration of whether the existing rules are adequate under Section 273. As noted above, today's rules derive from the *Computer II* rules, which were adopted to govern information flows between AT&T's network services operations and its vertically integrated, but separate, equipment manufacturing, and sales operations. In effect, BOCs that engage in manufacturing will be in a position similar to that of AT&T when the *Computer II* rules were adopted. Moreover, the Commission has already declined to distinguish between AT&T and the post-divestiture BOCs for purposes of the network disclosure rules, finding that "although the BOCs may control the point of access to the network for providers of CPE or enhanced services, in many cases the characteristics of the intercity network rather than those or the local loop will determine whether a given enhanced service or CPE product will operate properly." *CBEMA Order* at 1235-36. There is clearly no need to be more concerned for manufacturers' interests when BOCs, who have virtually zero current manufacturing activity, choose to participate in that activity, than was the Commission when AT&T participated as both a dominant service provider and equipment manufacturer and supplier.

Thus, the Commission's inquiry in regarding the meaning of "protocols" and "technical requirements" and other information that must be disclosed with manufacturers' interests in mind has already been answered.[44] Indeed, in the *CBEMA Order*, the Commission was very explicit with respect to the information that is subject to the disclosure obligation: "The information required includes, for example, (a) circuit quality (transmission speeds, error rates, bandwidths, equalization characteristics, attenuation, transmission delays, quantization effects, non-linearities etc.), (b) performance specifications for switched systems (connection times, queuing delays, blocking probabilities, etc.); and (c) network protocols (message formats, requirements for synchronizing bits, error detection and correction procedures, signaling procedures, etc.)"[45] There is no need for the Commission to establish different requirements, or even to restate existing requirements a different way, because the existing requirements were adopted with the same concerns in mind that the Commission has raised in the *Notice*

Similarly, the Commission's questions regarding the appropriate timing of disclosure and the potential impacts of premature or delayed disclosure on the marketplace[46] have been thoroughly considered. Addressing these issues in the context of AT&T's vertical structure, the Commission defined its task as being "to determine a disclosure point in the planning and development cycle which is sufficiently early to allow the competitors of American Bell to obtain useful planning information, but which, at the same time, is not so early as to discourage innovation, to subject American Bell's competitors to excessive business risks (due to possible

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[44] *Notice* at ¶ 18.

[45] *CBEMA Order* at 1238.

[46] *Notice* at ¶ 19, 22.

cancellation of service development), or to generate anticompetitive chilling effects in the marketing of enhanced services, CPE or basic services by AT&T's competitors."[47] In consideration of these factors, the Commission expressly declined to require disclosure of all communications or discussions between AT&T and its separated affiliate. Instead, the Commission "concluded that the public interest would be better served by requiring disclosure only after AT&T has reached a point of corporate commitment to proceeding with a specific network service or service feature under consideration."[48] Finally, the Commission concluded that the appropriate "point of corporate commitment" was the time at which a decision is made whether to make or buy from a third party the necessary products for the new service, i.e., the "make/buy point."[49]

The same considerations should guide the Commission's deliberations with respect to the necessity of rules under Section 273(c). AT&T -- with its effective dominance in both the manufacturing and services sectors -- has been subject to disclosure obligations at the "make/buy" point for years (as well as the "all carrier rule" and Section 68.110(b) of the Commission's rules). In adopting the "make/buy" point as the triggering event for AT&T, the Commission expressly rejected the notion it now suggests in the *Notice* that the "'make/buy' point may come too late for rival manufacturers."[50] Indeed, to accommodate specifically the needs of rival manufacturers, the Commission clarified that AT&T would be subject to the disclosure obligation when it made a "make/buy" decision regarding any product "the design of which *either* affects the network

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[47] *CBEMA Order* at 1240-41.

[48] *Id.* at 1242.

[49] *Id.* at 1243-45.

[50] *Notice* at ¶ 22.

interface or *relies* on the network interface."[51] No more burdensome rules should be applied to the BOCs.

While it is perhaps mildly ironic that AT&T has divested itself of its manufacturing arm just as the BOCs are gaining manufacturing opportunity, and equally ironic that the BOCs have been making network disclosures at the "make/buy point" even when they have previously not had a real choice between making or buying, it would be totally capricious for the Commission now to adopt a different disclosure standard for BOCs who choose to engage in manufacturing under Section 273.[52] Rather than adopting new rules, the Commission should merely affirm that its existing rules satisfy the information disclosure requirements of Section 273.

III. Standards Setting

In the *Notice*, the FCC proposed a broad expansion of the requirements in Section 273 that would regulate the standard setting process as it affects telephone exchange service. To date,

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[51] *CBEMA Order* at 1244-1245 (emphasis added).

[52] The Commission has previously preempted states from imposing network disclosure rules that would require initial disclosure earlier than the "make/buy" point, concluding, first, that the make/buy point strikes a balance between ensuring timely disclosure of information for the benefit of third parties and preventing premature disclosure that could impair carriers' service development efforts and inhibit innovation carriers and, second, that carriers cannot simultaneously comply with differing state and federal requirements for initial disclosure of network information given that, by definition, initial disclosure can occur only once. *Computer III Remand Proceedings: Bell Operating Company Safeguards and Tier 1 Local Exchange Company Safeguards*, 6 FCC Rcd 7571, 7636 (1991) ("*BOC Safeguards Order*"), *aff'd in part, vacated in part and remanded, California v. FCC*, 39 F.3d 919 (9th Cir. 1994) ("*California III*"), *cert. denied*, 115 S. Ct. 1427 (1995). BOCs are, of course, no more able to make initial disclosure under two separate federal rules than they are able to do under separate state and federal rules. Any Commission decision that required disclosure before the "make/buy" point would upset the balance the Commission has consistently struck between premature and delayed disclosure.

standards that affect telephone exchange service have been set without benefit of such regulatory handicaps.

Section 273(d) should be applied as it is written rather than expanded. There is no evidence that the telecommunications industry lacks for forums, whether "open" or not; no evidence that expanding the applicability of Section 273 would actually create more open forums rather than fewer; and no evidence that more "open" forums would lead to "robust" manufacturing competition. Thus, there is no reason to think that any benefit will result from expanding Section 273.

The costs of broadening the scope of Section 273, however, are likely to be substantial. Broadening its application will slow or thwart the development of interoperable networks and functionalities and impose substantial unnecessary costs on telecommunications and related markets, such as computing, that develop common technical solutions. Such an approach is inconsistent with the Commission's obligation under Section 7(a) and contrary to Congress's "deregulatory" intent in passing the Telecommunications Act.

Section 273 concerns "Manufacturing Limitations for Standard-Setting Organizations." Section 273(d)(4) requires open procedures when an unaccredited standard setting body attempts to influence the market by establishing a standard. By its terms, however, Section 273(d)(4) may apply more broadly to any unaccredited standard setting "entity," regardless of its involvement in manufacturing.[53] Thus, the section applies to "any entity ... that establishes industry-wide standards."[54]

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[53] The *Notice* raises a general concern that discrimination in favor of manufacturing affiliates may occur. *Notice* at ¶¶ 2, 50. To the extent that the standard setting is done by an entity without manufacturing affiliates, this concern is not applicable. In any instance where BOCs are buyers, (Continued...)

The statute thus applies only to legal entities and not to informal groups, as the *Notice* seems to suggest is possible.[55] There is no statutory language or legislative history that suggests any intent to reach informal groups or alliances or their members. Nor is there any reason to extend Section 273(d) to reach entities that begin establishing standards after passage of the Act. Groups that were not establishing standards prior to the Act's passage would not have the ability of existing standard setting bodies to sway the market.[56]

The FCC needs to account for the effect its definition of "entity" could have on the hundreds of formal and informal bodies involved in developing standards and technical solutions for telecommunications networks. While there are hundreds of domestic forums addressing issues related to telecommunications, many groups that could be swept up in an overly broad interpretation of Section 273 are primarily focused on developing computing solutions. In addition, telecommunications and computing solutions must increasingly require world-wide input. An overly broad interpretation would also affect the development of international solutions by international groups.

The Commission seeks comment on "the potential additional scope" of Section 273(d)(4) as it may be applied to the "research, development, or adoption of standards, specifications, or

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not manufacturers, of products that are the subject of a proposed standard, there is no reason to think they would benefit from anything other than the most efficient standard.

[54] The statute defines industry-wide as meaning activities to which LECs with a combined total of more than thirty percent of U.S. access lines contribute funding. 47 U.S.C. § 273(d)(8)(C)

[55] *Notice* at ¶ 50.

[56] New standard setting entities would not only have less influence, their existence would require elimination of Section 273(d)(4) requirements under the sunset provision of Section 273(d)(6). 47 U.S.C. § 273(d)(6) ("requirements of paragraphs (3) and (4) shall terminate ... when the Commission determines that there are alternative sources of standards, generic requirements or product certification.").