

BEFORE THE
Federal Communications Commission
WASHINGTON, D.C.

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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

REPLY COMMENTS OF
THE TELECOMMUNICATIONS INDUSTRY ASSOCIATION

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March 26, 1997

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SUMMARY

In their initial comments, the Regional Bell Operating Companies (RBOCs) repeatedly urge the Commission to construe the provisions of Section 273 in a manner which, if accepted, would undermine the entire statutory framework for RBOC entry into manufacturing. Toward this end, several of the RBOCs go so far as to assert that they are already free to engage in manufacturing through any "affiliate" other than the BOCs themselves, a construction which would render the entry provisions adopted by Congress in Section 273(a) meaningless. The RBOCs go on to urge the Commission to interpret the provisions of Section 273(b) as granting the BOCs themselves immediate authority to engage in a broad range of manufacturing activities, without complying with the safeguards established for such activities under the 1996 Act. In contrast to their expansive construction of Section 273(b), the RBOCs at every opportunity attempt to avoid or minimize their statutory obligations under Sections 273(c), (d), and (e), by advancing specious arguments designed to sharply limit the application of these provisions and reduce their effectiveness in addressing the competitive concerns that led Congress to adopt them.

The Commission should reject these transparent attempts to circumvent the pro-competitive regulatory framework established in the 1996 Act. As TIA's initial comments indicate, the risks to competition in equipment markets are likely to increase in the near term, and market forces clearly are inadequate to contain these risks. Accordingly, it is essential that the Commission construe, implement, and enforce the safeguards established in Section 273 and related provisions in a manner which allows these provisions to fulfill their intended purpose and ensures that the benefits of a competitive equipment marketplace are preserved.

TIA's specific responses to various issues addressed by the RBOCs and others in their initial comments are described below.

BOC MANUFACTURING AUTHORIZATION

- The RBOC argument that BOC "affiliates" are already free to manufacture is wholly at odds with the statutory scheme and should be rejected. Adoption of the RBOCs' proposed construction would render Section 273(a) nonsensical and, as a practical matter, meaningless.
- TIA agrees that the Section 273(a) joint manufacturing restriction does not bar a BOC from engaging in "close collaboration" with any manufacturer, including BOC affiliates, so long as the latter term is properly construed to preclude direct BOC involvement in activities which constitute "manufacturing," as defined under the MFJ.
- The Commission clearly cannot and should not modify and substantially narrow the statutory definition of the term "manufacturing" provided in Section 273(h), as some RBOCs have suggested.

BOC COLLABORATION, RESEARCH, AND ROYALTY AGREEMENTS

- Adoption of the broad construction of Section 273(b)(1) advanced by the RBOCs would effectively repeal the authorization and joint manufacturing provisions of Section 273(a), as well as the "separate affiliate" requirement of Section 272(a). To avoid this result, the term "close collaboration" should be narrowly construed to allow BOCs to work with manufacturers in cooperative activities which do not constitute manufacturing, to the extent necessary to ensure effective interconnection and interoperation of products designed for use in or connection to the BOC's network.
- Similarly, the research/royalty provisions of Section 273(b)(2) do not authorize the BOCs themselves to engage in activities that constituted "manufacturing" under the MFJ, as the RBOCs allege. Rather, this provision allows a BOC to license intellectual property resulting from permissible (i.e., "generic") basic and applied research activities on reasonable, non-discriminatory terms and receive royalties which are not tied to the BOC's own purchases.

INFORMATION DISCLOSURE REQUIREMENTS

- The Commission should reject the RBOCs' attempt to exempt BOCs that are not engaged in manufacturing from the information disclosure requirements of Section 273(c). The RBOCs' proposed construction conflicts with the express terms and underlying purposes of the statute.
- Contrary to the RBOCs' claims, the existing network disclosure rules are not intended to, and do not, satisfy the requirements of Section 273(c). As the Commission has recognized, Section 273(c) is designed to meet the special needs of manufacturers seeking to design equipment for use in or connection to BOC networks.
- Accordingly, TIA again urges the Commission to adopt rules implementing the requirements of Section 273(c), 272(c)(1), and 273(e) which effectively ensure that all manufacturers are afforded timely and non-discriminatory access to information that affects their ability to design network equipment and CPE that interconnects and interoperates effectively with BOC network facilities.

BELLCORE; STANDARDS/CERTIFICATION PROVISIONS

- The Commission should reject RBOC efforts to secure adoption of an unduly narrow definition of the term "standards" for purposes of Section 273(d) and related provisions.
- In order to determine definitively whether Bellcore will be permitted to manufacture following its proposed sale to SAIC, it is not sufficient to look only at whether the RBOCs have retained "ownership" interests in Bellcore. Consistent with the provisions of Section

273(d)(1), the Commission also must gather sufficient information to make an informed judgment as to whether the RBOCs, individually or collectively, will retain de jure or de facto "control" over Bellcore.

- TIA disagrees with Bellcore's assertion that Section 273(d)(3) allows it to choose whether to place manufacturing or certification activities in a separate affiliate, and believes that this section clearly contemplates that it is the certifying entity's manufacturing activities that must be conducted through a separate affiliate.
- In applying the provisions of Section 273(d)(4), the Commission should take care to ensure that to the extent that RBOC joint purchasing activities encompass the development of "industry-wide" standards or generic requirements, they are conducted in a manner consistent with the requirements of this section.
- TIA reiterates its request for the adoption of Commission guidelines, addressing the funding of activities that fall within the scope of Section 273(d)(4), which provide for entry/exit at various stages and the use of a "sliding-scale" approach to funding, with voting rights allocated on a "one vote per company" basis.
- Bellcore's proposed construction of the standard established in Section 273(d)(6) for termination of the requirements imposed in sections 273(d)(3) and (d)(4) clearly conflicts with the express requirements of the statute, and must be rejected.

BOC PROCUREMENT

- Construing the provisions of Section 273(e) as applicable only to BOCs that are actually engaged in manufacturing, as the RBOCs have suggested, would be contrary to the language and underlying purposes of this section, which includes provisions barring BOC discrimination in favor of "affiliates" or "related persons" and requires "each" BOC, without exception, to purchase solely on the basis of "price, quality, delivery, and other commercial factors."
- In implementing the requirements of Section 273(c)(1), the Commission should reject the inappropriately narrow definitions of the term "related persons" advanced by the RBOCs, and should instead adopt TIA's proposed definition, which is designed to ensure that the BOCs do not discriminate in favor of non-affiliates in which they have a significant financial interest.
- Consistent with the approach adopted in its Non-Accounting Safeguards Order, the Commission should resist RBOC efforts to narrow the scope of the statutory terms "equipment," "services," and "software." In addition, the Commission should clarify that the phrase "other commercial factors," as used in Section 273(e)(2), does not allow a BOC to accord preferential treatment to its "affiliates" or "related persons."

- TIA reiterates its support for the NPRM's observations concerning the inadequacy of traditional complaint-based enforcement techniques, and again urges the Commission to require each BOC to prepare and submit for approval plans describing the standards and procedures to be adopted by the BOC to ensure compliance with the requirements established in Sections 272 and 273 of the Act.
- TIA also continues to believe that the adoption of appropriate reporting and record retention requirements is essential in order to ensure the availability of information necessary for effective monitoring and enforcement.

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**REPLY COMMENTS OF THE
TELECOMMUNICATIONS INDUSTRY ASSOCIATION**

The Telecommunications Industry Association ("TIA"), by its attorneys, hereby submits its reply to initial comments submitted in response to the Commission's Notice of Proposed Rulemaking ("NPRM") in the above-captioned proceeding.¹

I. INTRODUCTION [NPRM ¶¶ 1-7]

The Telecommunications Act of 1996 ("1996 Act") establishes a framework for allowing regional Bell Operating Company ("RBOC") entry into manufacturing, while at the same time preserving the competitive nature of telecommunications equipment and customer premises equipment ("CPE") markets.² As the Commission has recognized,³ the statutory scheme adopted by the Congress, in an effort to ensure that the benefits of the current dynamic, vigorously competitive equipment marketplace are maintained, has three core elements. First, pursuant to

¹ Notice of Proposed Rulemaking, In the Matter of Implementation of Section 273 of the Communications Act of 1934, as amended by the Telecommunications Act of 1996, FCC 96-472, 62 Fed. Reg. 3638 (January 24, 1997).

² NPRM, Paragraph 4.

³ Id.

Section 273(a), authority to engage in manufacturing is tied to the receipt of "in-region" interLATA authorization in at least one state within the relevant RBOC's region.⁴ Second, all activities that fall within the definition of "manufacturing" established under the MFJ, without exception, must comply with the separate affiliate requirements and other "generic" safeguards established in Section 272.⁵ Third, the RBOCs must comply with the requirements imposed in Section 273 and the Commission's implementing regulations.

In their comments, the RBOCs repeatedly urge the Commission to construe the provisions of Section 273 in a manner which would undermine the statutory framework adopted by the Congress and render each of the three core elements of that framework meaningless or, at best, substantially less effective in fulfilling their intended purpose. As an initial matter, several of the RBOCs assert that upon enactment of the 1996 Act, they were free to engage in manufacturing activities through any "affiliate" without complying with the "in-region" interLATA authorization requirement established in Section 273(a), so long as the "affiliate" is not itself a "BOC."⁶ In a further effort to undercut the effectiveness of the regulatory framework established in Sections 272 and 273, the RBOCs urge the Commission to construe the provisions of Section 273(b) as granting the Bell Operating Companies ("BOCs") themselves broad authority to engage

⁴ 47 U.S.C. § 273(a). Section 271(f) provides a specific, limited exception to this requirement for manufacturing activities authorized by the District Court under the Modification of Final Judgment ("MFJ") prior to enactment of the 1996 Act. 47 U.S.C. § 271(f).

⁵ 47 U.S.C. § 272(a); also see TIA Comments at 13, n.31. Previously-authorized manufacturing activities must be brought into compliance with the requirements of Section 272 within one year following enactment. See 47 U.S.C. § 272(h).

⁶ See discussion in Section II.A. below.

in activities which fall within the MFJ definition of "manufacturing."⁷ In addition, at every opportunity, the RBOCs advance constructions of the statutory requirements established in Sections 273(c), (d), and (e) that are designed to limit the application of these provisions to the BOCs and related entities, and sharply reduce their effectiveness in addressing the competitive concerns that led to their adoption.⁸

The Commission should reject these transparent attempts to undermine the pro-competitive framework for RBOC entry into manufacturing established by the Congress. As TIA has previously indicated, the risks to competition in equipment markets which Congress sought to address are likely to increase in the near term, rather than diminish.⁹ The Commission clearly cannot and should not rely on market forces to adequately contain these risks.¹⁰ Accordingly, it is absolutely essential that the Commission construe and implement the manufacturing safeguards established in Section 273 and related provisions in a manner which allows these provisions to fulfill their intended purpose, in order that the benefits of a competitive equipment marketplace may be preserved.

⁷ See discussion in Sections III.A. and III.B. below.

⁸ See discussion in Section IV, V, and VI below.

⁹ See TIA Comments at 5.

¹⁰ See, e.g., Reed E. Hundt, Chairman, FCC, text of speech before the National Association of Regulatory Utility Commissioners Communications Committee, Access Reform and Universal Service: Into the Thick of It (February 25, 1997) at 3-4, noting that "[a]s incumbents get into long distance, there is a real prospect that the incumbent LECs' share of total telecommunications revenues will go up as opposed to down, at least during the early phases. . . . Indeed, it could be a decade before we see the more widely distributed market shares that typically characterize robust competition."

II. BOC MANUFACTURING AUTHORIZATION [Section 273(a); NPRM, ¶¶ 8-10]

A. Timing of BOC Entry [NPRM ¶ 8]

In their initial comments, four of the RBOCs (Ameritech, Southwestern Bell Corporation, and Bell Atlantic and NYNEX, filing jointly) argue that the Section 273(a) authorization requirement applies only to the "BOCs" themselves, and assert that BOC subsidiaries and other "affiliates" have been free to engage in manufacturing activities from the time the 1996 Act became law.¹¹ The Commission should emphatically reject this construction of the statute, which if accepted would effectively negate the statutory scheme adopted by Congress for allowing RBOC entry into manufacturing. The RBOCs' argument is predicated on an assumption that the omission of the word "affiliate" from the authorization language adopted in Section 273(a) necessarily implies that BOC affiliates are free to manufacture without such authorization. However, this inference is wholly at odds with the overall statutory framework, which is not designed to allow the BOCs themselves to become manufacturers of telecommunications equipment and CPE, but rather to permit RBOC entry through one or more affiliates, subject to the separation requirements and other "generic" safeguards established in Section 272 and the manufacturing-specific requirements of Section 273.

In its discussion of Section 273(a), Ameritech itself observes that "the meaning of some parts of Section 273 must be discerned from Congress's evident purpose, rather than from the particular words it chose to use."¹² In this regard, the "resolved issues" statement offered by

¹¹ See Ameritech Comments at 4-5; Bell Atlantic/NYNEX Comments at 2-4; Southwestern Bell Corporation Comments ("SBC Comments") at 3-4. Significantly, the remaining three RBOCs chose not to advance this argument in their comments.

¹² Ameritech Comments at 4. Indeed, the RBOCs would be the first to argue that the omission of the word "affiliate" from other sections of the 1996 Act which work to their

Senator Hollings, the chief Congressional proponent of RBOC manufacturing, for inclusion in the record during the Senate's consideration of the House-Senate Conference Agreement, describes the statutory framework ultimately adopted by the Congress in the following manner:

Manufacturing: The RBOCs are allowed into manufacturing after they are permitted into long distance in any one State in their region. The RBOC must use a separate affiliate.¹³

There is no indication whatsoever in the legislative history of the 1996 Act that Congress intended to allow the RBOCs to engage in manufacturing through "affiliates" of the BOCs, without first meeting the authorization requirement of Section 273(a).¹⁴ Moreover, to infer an enormous "loophole" of this nature would render Section 273(a) nonsensical and, as a practical matter, meaningless, in violation of the most basic rule of statutory construction, i.e., that "[a] statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant . . ."¹⁵ Accordingly, the RBOCs' effort to eviscerate this provision must be rejected.

advantage, e.g. Section 272(h), which grants the "BOCs" a one-year transition period to bring previously-authorized activities into compliance with the requirements of Section 272, should not be construed to exclude BOC "affiliates."

¹³ 142 Congressional Record S689 (daily ed. February 1, 1996).

¹⁴ The excerpt from the discussion of Section 273(a) in the House-Senate Conference Report cited in SBC's Comments at 4 merely restates the statutory language, which plainly must be read in the context of the overall framework adopted in the 1996 Act.

¹⁵ Norman J. Singer, Sutherland Stat. Const. § 46.06 (5th ed. 1992). The RBOCs' proposed construction of Section 273(a), if accepted, also would render superfluous the language in Section 271(f) expressly providing that Section 273 shall not "prohibit a [BOC] or affiliate" from engaging in previously-authorized activities. [Emphasis added]

B. Joint Manufacturing Prohibition [NPRM ¶9]

In its comments, Ameritech expresses support for the NPRM's tentative conclusion regarding the relationships covered by the joint manufacturing prohibition in Section 273(a),¹⁶ but argues that "this conclusion must not be extended so far as to forbid close collaboration among the BOC regions under Section 273(b)."¹⁷ Other RBOCs also take the position that Section 273(a) does not bar BOCs and their affiliates from engaging in "close collaboration" with other unaffiliated BOCs, RBOCs, or their affiliates.¹⁸

As TIA's initial comments indicate, so long as Section 273(b)(1) is properly construed, TIA agrees that a BOC is free to engage in "close collaboration" with any manufacturer, including the BOC's own Section 272 separate affiliate or the separate affiliates of any other affiliated or unaffiliated BOC or RBOC.¹⁹ Indeed, TIA believes that the avoidance of any conflict between the Section 273(a) prohibition and the provisions of Section 273(b)(1) provides yet another reason for the Commission to confirm that the latter provision does not authorize the BOCs to engage in activities which fall within the scope of "manufacturing," as defined under the MFJ.²⁰

¹⁶ As TIA observed in its initial comments, the NPRM identified some but not all of the relationships encompassed within the Section 273(a) joint manufacturing prohibition. See TIA Comments at 7.

¹⁷ Ameritech Comments at 7.

¹⁸ See Bell Atlantic/NYNEX Comments at 6-7; BellSouth Comments at 3; SBC Comments at 2-3; U S West Comments at 10-12.

¹⁹ See TIA Comments at 13-14, n. 32.

²⁰ TIA believes that adoption of an appropriately narrow construction of Section 273(b)(1) provides the only means of bringing "true internal consistency" to Section 273 in a manner consistent with the overall scheme and underlying purposes of the statute. In contrast, the

C. Definition of "Manufacturing" [NPRM ¶10]

In their joint comments, Bell Atlantic and NYNEX acknowledge that "there is no substantive distinction between the term 'manufacturing' as used in Section 273(h) and 'manufacture' as used elsewhere in the section; both incorporate the decree definition."²¹ Similarly, U S West, like TIA, concurs with the Commission's tentative conclusion that the verb "manufacture" should be construed in a manner consistent with the statutory definition of "manufacturing" and that both terms encompass the activities identified by the District Court as "manufacturing," which include not only the fabrication of telecommunications equipment and CPE, but also the design and development of hardware and software that is integral to such products.²² Yet, incredibly, at least one RBOC urges the Commission to define these terms for purposes of Section 273 in a manner that substantially reduces the scope of activities encompassed with the definition of "manufacturing" under the MFJ.

In its comments, Pacific Telesis Group ("PacTel") urges the Commission, notwithstanding the statutory definition adopted in Section 273(h), to "define 'manufacturing' narrowly," and asserts that "[n]othing in Section 273 requires that the definition include design or development activities, for example, despite the Commission's tentative conclusion to the

approach which Ameritech proposes (see Ameritech Comments at 11-14) merely creates an artificial distinction between "conjunctural manufacturing" and "close collaboration" which, if adopted, would only compound the competitive risks arising from the RBOCs' overly expansive construction of Section 273(b)(1). See discussion at Section III.A infra.

²¹ Bell Atlantic/NYNEX Comments at 5.

²² See NPRM, Paragraph 10; U S West Comments at 6; TIA Comments at 7-8; Information Technology Industry Council Comments ("ITI Comments") at 8, n.9.

contrary."²³ While conceding that "in the context of the MFJ the term [manufacturing] included design and development," PacTel claims that "Section 273 dictates a different conclusion," arguing that "Sections 273(b)(1) and (2) must 'trump' the MFJ definition because they explicitly exclude design, development, and research from Section 273's scope."²⁴ However, as TIA explained in its initial comments, neither of these provisions explicitly or implicitly authorizes the BOCs to engage in activities that fall within the scope of the MFJ definition of "manufacturing."²⁵ Similarly, there is no basis whatsoever in the language or legislative history of Section 273 for PacTel's further argument that "the term 'manufacturing' should not be defined to include every act of fabrication in which a BOC might engage," but instead "should only include production-scale fabrication -- production conducted formally or on a large scale."²⁶

If PacTel's proposed definition of "manufacturing" were adopted, the BOC themselves would be permitted to engage in every aspect of the manufacturing process, other than

²³ Comments of Pacific Telesis Group ("PacTel Comments") at 3. [Emphasis in original].

²⁴ Id.; also see BellSouth Comments at 2-3, asserting that "the activities described in Section 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, immediately permitted."

²⁵ See TIA Comments at 12-16.

²⁶ PacTel Comments at 3-4. In its comments, PacTel also asserts that "Judge Greene explicitly excluded test equipment from the MFJ's manufacturing ban." Id. at 4. However, the only "explicit" determination made by the District Court in the decision cited by PacTel was a decision to deny Southwestern Bell's request for a declaratory ruling that the MFJ permitted the RBOCs to "design, develop, and sell electronic test equipment." United States v. Western Electric Co., Civ. No. 82-0192 (D.D.C. February 16, 1989) slip op. at 8.

the final "production-scale" fabrication of the product. This construction clearly conflicts with the express terms and underlying purposes of Section 273, and must therefore be rejected.

III. BOC COLLABORATION, RESEARCH, AND ROYALTY AGREEMENTS
[Section 273(b); NPRM ¶¶ 11-12]

A. Close Collaboration [Section 273(b)(1); [NPRM ¶ 11]

In their comments, the RBOCs urge the Commission to adopt an expansive view of Section 273(b) which if adopted would allow the BOCs themselves to engage in a broad range of "manufacturing" activities, as defined in the MFJ. In this regard, BellSouth asserts that in construing Section 273(b)(1) "close collaboration must be given a broad meaning" which should encompass "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)."²⁷

Similarly, the definition of "close collaboration" proposed by SBC in its comments encompasses "any activity required to produce a new product, except for the processing and fabrication of the hardware and software to a finished product."²⁸

As the discussion in Section II.B. above indicates, the RBOCs also have argued that the Section 273(a) joint manufacturing prohibition does not apply to "close collaboration" under Section 273(b)(1), and that they therefore are free to engage in activities which fall within

²⁷ BellSouth Comments at 4. [Emphasis added]. The only limitations BellSouth is willing to acknowledge are quite narrow, i.e., "the BOC cannot present the manufacturer with detailed design specifications developed solely by the BOC or participate in the fabrication of the finished product. . . ." Id.

²⁸ SBC Comments at 4. While certain of the specific activities included in SBC's proposed definition of "close collaboration" (e.g., product testing) have always been permitted, the full range of activities allowed under either the BellSouth or SBC definitions encompasses virtually all of "manufacturing," as defined under the MFJ.

the scope of this provision with other unaffiliated RBOCs, BOCs, or their affiliates.²⁹ The practical effect of this construction of Section 273(a), if combined with a broad definition of close collaboration which encompasses virtually all facets of "manufacturing," would be to repeal the authorization and joint manufacturing restrictions of Section 273(a), as well as the "separate affiliate" requirement of Section 272(a).³⁰

In order to maintain the integrity and viability of the statutory framework, it is essential that the Commission adopt an appropriate construction of Section 273(b)(1), one which is consistent with the legislative history and purposes of this provision and the overall statutory scheme. As TIA demonstrated in its initial comments,³¹ when all of these factors are considered, it is clear that Section 273(b)(1) should be narrowly construed to allow a BOC to work closely with all manufacturers, including its own Section 272 affiliate(s), to develop generic specifications and engage in other cooperative activities (e.g., product testing) which do not constitute manufacturing, to the extent necessary to ensure effective interconnection and interoperation of products designed for use in or connection to the BOC's network.

²⁹ See e.g., BellSouth Comments at 3, asserting that "because no Section 271(d) relief is required in order to engage in the activities permitted by Section 273(b), the BOCs, either directly or through affiliates, can engage in close collaboration with unaffiliated BOCs and their affiliates."

³⁰ Such a construction, if accepted by the Commission, threatens to undermine the other, non-structural safeguards established in Sections 272 and 273 as well. See e.g., SBC Comments at 10, arguing that the disclosure requirements of Section 273(c)(1) should be construed to "apply only to Section 273(a) manufacturing authority and not to Section 273(b) activities."

³¹ See TIA Comments at 12-14.

B. BOC Research, Royalty Agreements [Section 273(b)(2); NPRM ¶ 12]

Consistent with their overall strategy, the RBOCs generally urge the Commission to construe the provisions of Section 273(b)(2) in an expansive manner. In this regard, several of the RBOCs urge the Commission to give a broad reading to the "research" provisions of Section 273(b)(2)(A), and suggest that this provision allows the BOCs to engage in activities that constitute "manufacturing" as defined under the MFJ. In particular, U S West asserts that "Congress modified the definition of 'manufacturing' to make it clear in Section 273(b)(2) that research by the BOCs related to manufacturing (i.e., research related to the product design, development, as well as fabrication of telecommunications equipment and CPE) is not prohibited under the Act."³² However, as TIA observed in its initial comments, Section 273(b)(2)(A) merely states that the BOCs are not barred from engaging in activities that are "related to" manufacturing; it does not authorize the BOCs themselves to engage in "manufacturing," as that term was defined under the MFJ.³³ While TIA agrees with BellSouth's observation that the BOCs had considerable latitude to engage in research activities under the MFJ,³⁴ which permitted them to engage in basic and applied research of a "generic" nature that might subsequently be used in the manufacture of telecommunications equipment or CPE, the 1996 Act specifically provided that "manufacturing" activities, including any product-specific R&D, are to be undertaken only through the BOCs' separate affiliates. To construe Section 273(b)(2)(A) as allowing the BOCs

³² U S West Comments at 12; also see BellSouth Comments at 4, asserting that "BOCs should be able to engage in virtually any research activities related to manufacturing."

³³ TIA Comments at 15.

³⁴ BellSouth Comments at 4.

themselves to engage in "manufacturing" activities would be squarely at odds with the "separate affiliate" requirement established in Section 272(a) , and would be inconsistent with the legislative history of the 1996 Act, which reflects a conscious decision by the Congress (in the House-Senate Conference) to delete language included in the Senate bill that would have authorized the BOCs to engage in product-specific "design" activities immediately upon enactment.³⁵

In their comments, the RBOCs also seek to expand the scope of "royalty agreements" encompassed within Section 273(b)(2)(B). As the Commission has recognized,³⁶ the provisions of sections 273(b)(2)(A) and (B) are related, in the sense that subparagraph (B) provides a basis for a BOC to license and receive compensation for the use of intellectual property created as a result of the "research" activities described in subparagraph (A).³⁷ Yet Ameritech and several other RBOCs urge the Commission to construe this provision more broadly, to include arrangements under which a BOC funds the design and development of a particular product by a manufacturer and, in return, receives "royalties" on sales of the product.³⁸ Ameritech concedes that arrangements of this sort constituted prohibited "manufacturing" under the MFJ,³⁹ but argues that "[b]y including Section 273(b)(2) in the Act, Congress made permissible . . .

³⁵ See TIA Comments at 15, n.35 and sources cited therein.

³⁶ NPRM, Paragraph 12.

³⁷ As at least some of the RBOCs appear to acknowledge, this reading of the statute is consistent with accepted definitions of the term "royalty." See e.g., SBC Comments at 6 ("In its broadest sense, the term 'royalty' connotes monetary payment for access to intangible intellectual property rights.").

³⁸ See Ameritech Comments at 15-16; BellSouth Comments at 7.

³⁹ Id. at 16, n.18, citing United States v. Western Electric Co., 12 F.3d 225, 228 (D.C. Cir. 1993).

'funding/royalty' arrangements that otherwise would have been prohibited by the Act's ban on 'manufacturing'.⁴⁰

As TIA has previously demonstrated, the presumption that Section 273(b) authorizes the BOCs to engage directly in "manufacturing" is wholly inconsistent with the express terms of the statute, which requires all "manufacturing" activities undertaken by a BOC to be conducted through a separate affiliate.⁴¹ Moreover, as the Commission's NPRM indicates, the statutory context in which the term "royalty agreements" appears strongly suggests that this provision was intended to refer to agreements for the licensing to manufacturers of intellectual property created by the BOCs in the course of "research" activities undertaken pursuant to Section 273(b)(2)(A).⁴² Accordingly, the broader construction advanced by Ameritech should be rejected.⁴³

⁴⁰ Ameritech Comments at 16.

⁴¹ See TIA Comments at 13, n.31.

⁴² As TIA indicated in its initial comments, in order to avoid anticompetitive discrimination and cross-subsidization arising from ratepayer-funded research activities, the Commission should make it clear that intellectual property resulting from permissible research activities undertaken by a BOC, either on its own or with, through, or on behalf of an "affiliate," must be made available to all manufacturers on reasonable, non-discriminatory terms and conditions. See TIA Comments at 16-17.

⁴³ To the extent that "funding/royalty" arrangements are found to be permissible under Section 273(b)(2)(B) or otherwise, funded manufacturers should be deemed "related persons" for purpose of Section 273(e). See TIA Comments at 50. In addition, the Commission should exercise its authority under Section 273(g) to impose conditions on such arrangements to reduce the risk of cross-subsidization, similar to those described by the Court of Appeals in the case cited by Ameritech (see 12 F.3d at 235), including in particular a requirement that bars the receipt by a BOC or BOC affiliate of royalties that are tied to the BOC's own equipment purchases.

IV. BOC INFORMATION DISCLOSURE REQUIREMENTS [Section 273(c); NPRM ¶¶ 13-30]

A. Information on Protocols and Technical Requirements [Section 273(c)(1); NPRM ¶¶ 13-25]

1. Nature and Scope of Disclosure Requirements

Having advanced a variety of flawed arguments which seek to negate or minimize the authorization and joint manufacturing requirements of Section 273(a), while substantially expanding the scope of activities which the BOCs themselves may engage in under Section 273(b), the RBOCs devote the balance of their comments to arguments designed to substantially limit the scope of their statutory obligations under Sections 273(c), (d), and (e). In this regard, six of the seven RBOCs argue that the requirements of this subsection apply only to those BOCs that are actually engaged in manufacturing.⁴⁴

As the Commission has recognized, the provisions of Section 273(c) apply "on their face" to all BOCs.⁴⁵ While the RBOCs make much of the fact that Section 273 is entitled "Manufacturing by Bell Operating Companies,"⁴⁶ section headings typically are given little, if any, weight in statutory interpretation.⁴⁷ Moreover, the fact is that there are a number of provisions

⁴⁴ See Ameritech Comments at 8; Bell Atlantic/NYNEX Comments at 9; BellSouth Comments at 8; PacTel Comments at 11; SBC Comments at 8. The seventh RBOC, U S West, takes the more "moderate" position that Section 273(c) applies only to BOCs that are "authorized to manufacture" pursuant to Section 273(a). U S West Comments at 18.

⁴⁵ NPRM, Paragraph 17.

⁴⁶ See e.g., BellSouth Comments at 9, n.24; PacTel Comments at 11; U S West Comments at 18-19.

⁴⁷ While such headings may be considered in cases where the meaning of the statutory language is ambiguous, "[a]s a rule the words of the heading being more general will not control the more specific words of the act, except as their generality may indicate a wider

within Section 273, most notably the standards and certification provisions adopted in Section 273(d),⁴⁸ which even the RBOCs concede are applicable to entities other than BOCs engaged in manufacturing. As TIA indicated in its initial comments, limiting the application of Section 273(c) to BOCs that are presently engaged in manufacturing might lead the BOCs to withhold or delay the release of information that would otherwise be subject to disclosure, and could encourage discrimination by a BOC in favor of non-"affiliate" manufacturers in which it has a financial interest (e.g., a royalty interest or an equity interest that falls below the affiliation threshold). Accordingly, the Commission should confirm that this provision applies to all BOCs, whether or not they are authorized to manufacture pursuant to Section 273(a) or are actively engaged in "manufacturing" as defined under the MFJ.⁴⁹

In their initial comments, the RBOCs also repeatedly assert that the disclosure requirements imposed on carriers under other statutory provisions, in particular Section 251(c)(5), and Commission rules (i.e., Section 68.110(b) and the Computer III disclosure rules) are adequate to protect the interests of manufacturers which Section 273(c) was designed to address.⁵⁰ However, the intended beneficiaries of the statutory obligations imposed under Section

operation of the act than that disclosed by other words." Singer, supra n.15, § 47.14 [Emphasis added]; also see United States v. Roemer, 514 F.2d 1377, 1380 (2d Cir. 1975) and sources cited therein.

⁴⁸ See e.g., 47 U.S.C. § 273(d)(4).

⁴⁹ In this regard, the Commission should reject SBC's suggestion that Section 273(c)(1) should be read to "apply only to Section 273(a) manufacturing authority and not to Section 273(b) activities." SBC Comments at 10.

⁵⁰ See e.g., Ameritech Comments at 21; BellSouth Comments at 8-10; PacTel Comments at 12; SBC Comments at 10; U S West Comments at 19-20.

251(c)(5) are competing service providers, not equipment manufacturers. Accordingly, the focus of the statute and the relevant Part 51 rules is on ensuring the availability of information that is "necessary for the transmission and routing of services using that [LEC's] facilities or network," or that would affect the interoperability of a competing service provider's facilities and networks with those of the incumbent LEC.⁵¹ While information released pursuant to this provision also may be useful to manufacturers, the Commission cannot and should not conclude that the disclosure requirements imposed pursuant to Section 251(c)(5) are adequate to ensure compliance with the requirements of Section 273(c)(1)-(3), which are designed to ensure that all manufacturers are afforded timely and non-discriminatory access to information concerning the BOCs' local networks, and changes thereto, that affects the ability of manufacturers to design equipment for use in or connection to such networks.⁵² Similarly, the existing Part 68 and Computer III rules focus on the disclosure of information that affects the interconnection of other carriers and enhanced service providers or the manner in which CPE connects to the network.⁵³

As the Commission has acknowledged, the existing disclosure rules were not designed to, and do not, address "the specific needs of manufacturers who wish to develop new network products."⁵⁴ While TIA is not averse to exploring ways of eliminating duplicative filings

⁵¹ 47 U.S.C. § 251(c)(5); also see 47 C.F.R. § 51.325(a).

⁵² Contrary to Bellcore's suggestion, the scope of information required in order to design products that interconnect and interoperate effectively with BOC network facilities includes, but is not limited to, information concerning "those signals and functions that are externally visible at an external interface." Bellcore Comments at 12.

⁵³ See NPRM, Paragraph 18; TIA Comments at 19, n.45.

⁵⁴ NPRM, Paragraph 18. In their joint comments, Bell Atlantic and NYNEX suggest that the statute does not require that these needs be addressed, because "the language of the Act itself is limited to disclosure of information only with respect to 'connection with and

or overlap in BOC network information disclosures, TIA urges the Commission to make every effort to ensure that its rules are adequate to meet the specific needs that Section 273(c) was designed to address.⁵⁵

2. Timing of Disclosure

In their comments, the RBOCs generally oppose the adoption of rules that require greater advance notice of network changes than is provided in the current disclosure rules, and urge the Commission to retain the "make/buy" point as the "trigger" for public disclosure.⁵⁶ TIA believes that any potential adverse effects arising from early disclosure are substantially outweighed by the anticompetitive effects arising from delayed and/or discriminatory disclosures of network-related information that affects the ability of competing manufacturers to design new or modified products and bring them to market in a timely manner.⁵⁷ In order to ensure that such information is available on a timely and non-discriminatory basis, consistent with the requirements

use of telephone exchange service facilities.'" Bell Atlantic/NYNEX Comments at 10. However, this language clearly encompasses network-related information that affects the design of new products that "connect with" and/or "use" existing or planned BOC network facilities.

⁵⁵ See TIA Proposed Rules, Section 53.303. In developing its proposed rules, TIA has attempted wherever possible to utilize approaches that are consistent with those reflected in the Part 51 rules adopted by the Commission in implementing the requirements of Section 251(c)(5). TIA is willing to further explore harmonization of the Part 51 rules with those to be adopted in this proceeding, to the extent that this objective can be achieved in a manner consistent with the language and purposes of Section 273.

⁵⁶ See e.g., Bell Atlantic/NYNEX Comments at 12-13; BellSouth Comments at 16-18; SBC Comments at 9.

⁵⁷ See TIA Comments at 20-22; ITI Comments at 12-13.

of sections 273(c), 272(c)(1), and 273(e),⁵⁸ TIA believes it is essential that the Commission adopt rules implementing these statutory provisions that explicitly require a BOC disclosing network-related information to one manufacturer to make such information immediately available to all manufacturers on equal terms and conditions.⁵⁹ With such a rule in place, continued use of the "make/buy" point for purposes of implementing the disclosure requirements of Section 273(c)(1) may be appropriate, so long as it is coupled with a requirement of a minimum of six months advance notice of planned changes to the BOCs' networks.⁶⁰

3. Method of Disclosure

Consistent with its initial comments and the requirements of Section 273(c)(1), TIA again urges the Commission to require that BOC notifications be filed with the Commission in both paper and electronic formats (i.e., an "official" paper copy, as well as diskette copies), in order to ensure the reliability and security of the information contained therein.⁶¹

4. Content of Disclosure

TIA urges the Commission to adopt rules regarding the content of BOC disclosures that are consistent with those described in and appended to its initial comments.⁶²

⁵⁸ See TIA Comments at 21-22.

⁵⁹ Id. at 22.

⁶⁰ Id. at 23. A six-month minimum notice period is essential to ensure that all manufacturers have an opportunity to design and produce competitive equipment which reflects planned changes to BOC networks. TIA also supports adoption of an exemption for "bona fide equipment trials," under the conditions described in TIA's initial comments. Id., n.53.

⁶¹ See TIA Comments at 24; ITI Comments at 14, n.16. TIA is not opposed to the use of Web sites and other on-line distribution channels, so long as the relevant information is also made available in the manner described above.

⁶² TIA Comments at 24-25; Appendix A, Proposed Section 53.303(d).