

TIA's proposed rules provide for the use of appropriate non-disclosure agreements in cases where Section 273(c) requires disclosure of proprietary or confidential information.⁶³ In such instances, any license fees or other conditions imposed on access to information disclosed pursuant to Section 273(c) must be reasonable and applied on a non-discriminatory basis.⁶⁴

B. Non-Discrimination Requirements [Section 273(c)(2)-(c)(3); NPRM ¶¶ 26-28]

As TIA has previously indicated,⁶⁵ activities undertaken pursuant to the Section 273(b)(1) "close collaboration" provision are not exempt from the non-discrimination requirements of Section 272(c)(1) or the disclosure requirements of Section 273(c). The Commission should reject RBOC attempts to create a broad exemption from the statutory disclosure requirements for such activities,⁶⁶ but should instead adopt rules which enforce the clear mandate of the statute to ensure that the BOCs provide access to information which affects the design of equipment for use in or connection to their networks on a timely and non-discriminatory basis.⁶⁷

⁶³ TIA Comments at 25; Appendix A, Proposed Section 53.303(f). The Commission should make it clear that the fact that information which falls within the scope of Section 273(c) may be considered confidential or proprietary cannot be used to shield the BOC from compliance with the statute.

⁶⁴ See Bellcore Comments at 13; Comments of Northern Telecom Inc. ("NorTel Comments") at 7.

⁶⁵ TIA Comments at 25-26.

⁶⁶ See e.g., SBC Comments at 10, urging the Commission to construe Section 273(c)(1) as applying "only to Section 273(a) manufacturing authority and not to Section 273(b) activities."

⁶⁷ See TIA Proposed Rules, Section 53.303(b)(2).

V. **BELLCORE; STANDARDS/CERTIFICATION PROVISIONS** [Section 273(d); NPRM ¶¶ 31-62]

A. **Definitional Issues** [Section 273(d)(8); NPRM ¶¶ 31-34]

In their comments, the RBOCs decline to propose a comprehensive definition of the term "standards" for purposes of Section 273(d), but instead urge the Commission to adopt a narrow definition and/or create a variety of exceptions which clearly are designed to avoid or substantially minimize the potential impact of these provisions on current or future BOC activities.⁶⁸ TIA continues to believe that the definition of "standard" included in its proposed rules,⁶⁹ which is based on the current proposed revision to OMB Circular No. A-119, is appropriate for use in implementing the provisions of Section 273(d) and the related non-discrimination requirements of Section 272(c)(1). As TIA indicated in its initial comments, while it is generally appropriate to incorporate in the definition of "standard" a "single company" exclusion similar to that contained in the OMB's revised circular, it would be wholly inconsistent with the underlying purposes of Sections 272 and 273 to completely exclude the development of technical specifications for BOC network interfaces or procurement specifications.⁷⁰

B. **Bellcore Manufacturing** [Section 273(d)(1); NPRM ¶¶ 35-38]

In its comments, Bellcore concurs with the NPRM's tentative conclusion that upon consummation of the sale to Science Applications International Corporation ("SAIC") Bellcore

⁶⁸ See e.g., BellSouth Comments at 22-24; PacTel Comments at 6-7.

⁶⁹ See TIA Proposed Rules, Section 53.3.

⁷⁰ TIA Comments at 27. While the requirements of Section 273(d)(4) may not attach to such activities (see discussion in Section V.E. *infra*), the Commission should make it clear that the provisions of Section 273(d)(2) and the non-discrimination requirements of sections 272(c)(1) and 273(e) are applicable to such activities.

will be permitted to begin manufacturing telecommunications equipment and CPE in accordance with sections 273(d)(1)(B) and (d)(3).⁷¹ As TIA noted in its initial comments, a definitive determination as to whether the Bellcore manufacturing restriction will apply after the proposed sale cannot be made in the absence of more specific details concerning the proposed transaction and future relationships between and among the RBOCs (individually and collectively), Bellcore, SAIC, and the new National Telecommunications Alliance ("NTA") to be formed by the RBOCs and supported by Bellcore.⁷² Bellcore argues "it is inappropriate and unnecessary to broadly inquire into the pending sale," asserting that "the Bellcore sale has no relevance to the matters at issue in this Section 273 proceeding (other than the manufacturing limitation that applies to Bellcore until it is sold). . . ."⁷³ This argument is clearly circular, in that it assumes the answer to the very question that triggers the need for additional information. In attempting to avoid further inquiry, Bellcore goes on to advance a construction of Section 273(d)(1)(B) that is at odds with the language of the statute. In this regard, Bellcore asserts (erroneously) that the Commission's NPRM "proposes to apply the more than one BOC constraint to ownership: by two [RBOCs]; by one [RBOC] and one [BOC] owned or controlled by another [RBOC]; and by two BOCs not under the ownership or control of the same [RBOC]" and indicates that it "believes that this is a correct conclusion."⁷⁴ However, the language used in Paragraph 37 of the NPRM, like the

⁷¹ Bellcore Comments at 7.

⁷² See TIA Comments at 28-30.

⁷³ Bellcore Comments at ii. [Emphasis added]

⁷⁴ Id. at 26. [Emphasis added]

language adopted in the statute, does not refer to whether Bellcore is owned by more than one unaffiliated BOC, but rather whether it is an "affiliate" of more than one such entity.

As TIA has previously observed, an "affiliate" relationship can arise by virtue of a BOC's retention of ownership or "control" of Bellcore.⁷⁵ In order to determine whether Bellcore retains such a relationship with more than unaffiliated "BOC" or "successor or assign thereof," it therefore is not sufficient to look only at whether the BOCs have retained "ownership" interests. Clearly, in order to determine definitively whether the manufacturing restriction still applies, the Commission must gather sufficient information to make an informed judgment as to whether the BOCs' individually or collectively will retain de jure or de facto "control" over Bellcore even after the proposed sale to SAIC. As TIA has noted, a number of factors would appear relevant to such a determination, including the specific terms of the proposed transaction, any agreements or understandings that may affect future relationships between the BOCs and Bellcore, the volume and percentage of Bellcore's revenues attributable to its dealings with the BOCs in relation to its business with other entities, and any rights retained by the BOCs with respect to Bellcore's activities or assets (e.g., intellectual property created in the course of its RBOC-funded research activities) following the proposed sale.

C. Protection of Proprietary Information [Section 273(d)(2); NPRM ¶¶ 39-42]

In its comments, Bellcore asserts that Section 273(d)(2) applies to the establishment of standards or generic requirements by any entity, including accredited standards development organizations ("SDOs").⁷⁶ TIA continues to believe that Congress did not intend to

⁷⁵ See TIA Comments at 29; 47 U.S.C. § 273(d)(8)(A); 47 U.S.C. § 153(33).

⁷⁶ Bellcore Comments at 26-27.

regulate the activities of accredited SDOs under Section 273(d).⁷⁷ However, TIA agrees with Bellcore that, with respect to non-accredited groups, this section "reaches associations such as the ATM Forum and ad hoc and permanent industry groups, to the extent that such entities develop telecommunications standards or generic requirements within the meaning of Section 273," and that "determining compliance with [ISO 9000] requirements is a species of 'certification' under Section 273(d)."⁷⁸

D. Manufacturing by Certifying Entities [Section 273(d)(3); NPRM ¶¶ 43-48]

In its comments, Bellcore contends that "it is somewhat unclear as to which activity [i.e., manufacturing or certification] is to be placed in the separate affiliate," and states that it "believes that placing either certification or manufacturing in a separate affiliate . . . would satisfy the statute."⁷⁹ For reasons described in its reply comments in CC Docket No. 96-150, TIA disagrees with Bellcore's reading of the statute, and believes that the language adopted in sections 273(d)(3)(A)-(C) clearly contemplates that a certifying entity's manufacturing activities must be conducted through a separate affiliate.⁸⁰

⁷⁷ See TIA Comments at 31. To the extent such entities are deemed to be subject to Section 273(d)(2), TIA believes that its current practices are consistent with the requirements of this section.

⁷⁸ Bellcore Comments at 27; TIA Comments at 32. As TIA indicated in its initial comments, the Commission should clarify that the term "certification" does not encompass technical specifications and related interoperability testing activities undertaken by individual manufacturers. Id.

⁷⁹ Bellcore Comments at 28.

⁸⁰ See TIA Reply Comments, CC Docket No. 96-150 (September 10, 1996) at 25-27. TIA does not object to the placement of Bellcore's certification activities in a separate affiliate, so long as separation is maintained between Bellcore's manufacturing activities and its certification and other ratepayer-funded activities. Id.

E. Standards and Certification Activities [Section 273(d)(4); NPRM ¶¶ 49-58]

**1. Development of Industry-Wide Standards, Generic Requirements
[Section 273(d)(4)(A); NPRM ¶¶ 49-54]**

For reasons described in Section V.A., supra, TIA is concerned that the construction of Section 273(d)(4)(A) not be narrowed to exclude activities that these provisions were plainly intended to address. To the extent that the exclusions for "joint purchasing" activities proposed by several of the RBOCs⁸¹ are limited to the establishment and issuance of Requests for Proposal ("RFPs") that include procurement specifications referencing applicable industry standards or generic requirements, TIA agrees that such activities would not appear to fall within the intended scope of this provision. However, if the activities of a joint purchasing group extend to the development of new or revised "industry-wide" standards or "generic requirements," as defined in Section 273(d)(8), they clearly must be conducted in a manner consistent with the requirements of Section 273(d)(4).⁸²

With regard to the funding of activities which fall within the scope of Section 273(d)(4)(A), the comments submitted by Northern Telecom Inc. ("NorTel") express concern 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 to not unreasonably exclude any interested party.'"⁸³ TIA

⁸¹ See e.g., Ameritech Comments at 26; SBC Comments at 14.

⁸² In either event, such activities would of course remain subject to the non-discrimination requirements of Section 272(c)(1) and 273(e).

⁸³ NorTel Comments at 12. [Emphasis in original] In particular, NorTel notes that "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," and states that it "would prefer a fairer investment process that is not so inflexible and completely 'front loaded.'" Id. at 12-13.

shares NorTel's concerns in this area, and urges the Commission to establish guidelines of the sort described in TIA's initial comments, providing 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.

2. Product Certification [Section 273(d)(4)(B); NPRM ¶ 55]

TIA concurs with Bell Atlantic/NYNEX's observation that the criteria used to test network products may vary depending on "the type of product being tested and the role that it will serve in the network."⁸⁴ Where "industry-accepted testing methods and standards" are not available for a particular product, TIA agrees that the provisions of the statute are satisfied so long as the testing procedures are established in good faith, and are written, available upon request to any manufacturer, and applied in a non-discriminatory manner.⁸⁵

3. Anticompetitive Practices [Section 273(d)(4)(C)-(D); NPRM ¶¶ 56-57]

TIA's position remains as stated in its initial comments. With regard to the treatment of proprietary technology incorporated in "industry-wide" standards or generic requirements, TIA notes that at least one RBOC, SBC, has joined TIA in urging the Commission to "adopt ANSI's policy as a model for developing Commission rules in this area."⁸⁶

⁸⁴ Bell Atlantic/NYNEX Comments at 17.

⁸⁵ Id.

⁸⁶ SBC Comments at 18. Similarly, in its comments, ANSI itself urges the Commission to "hold non-accredited standards developing organizations (NASDOs) to the same requirements that accredited standards setting bodies must meet." ANSI Comments at 4

F. Termination of Requirements [Section 273(d)(6); NPRM ¶¶ 59-61]

TIA strongly urges the Commission to reject Bellcore's proposed construction of the standard established in Section 273(d)(6). The fact that "another entity is engaged in analogous work, and that it has the capability of doing what Bellcore is doing"⁸⁷ plainly is not a sufficient basis for relief under the statute, which specifically requires a showing that "commercially viable alternatives" exist and are in fact "providing" the relevant product standards, generic requirements, or certification services to customers.⁸⁸ The fact that another entity may be technically "capable of developing comparable standards or generic requirements addressing the same subject matter as Bellcore's"⁸⁹ alone clearly does not meet the Act's standard.

VI. BOC EQUIPMENT PROCUREMENT [Section 273(e); NPRM, ¶¶ 63-74]

A. Scope of Application [Section 273(e); NPRM ¶ 63]

For reasons described in TIA's initial comments and Section IV.A. supra, TIA urges the Commission to confirm that the requirements of Section 273(c) apply to all BOCs. To construe these requirements as applicable only to those RBOCs that are actually engaged in manufacturing⁹⁰ would be contrary to the express terms and underlying intent of this section, which includes provisions explicitly barring BOCs from discriminating in favor of BOC "affiliates"

⁸⁷ Bellcore Comments at 40. [Emphasis added]

⁸⁸ In addition, the "alternative sources" whose existence must be demonstrated prior to a grant of relief under Section 273(d)(6) must be independent entities that are not directly or indirectly owned, operated, or in any way controlled by the entity seeking relief under this provision of the Act.

⁸⁹ Bellcore Comments at 39.

⁹⁰ See e.g., Ameritech Comments at 8; Bell Atlantic/NYNEX Comments at 19; BellSouth Comments at 25.

or other "related persons," and requiring "each [BOC]" to make its purchasing decisions solely on the basis of "an objective assessment of price, quality, delivery, and other commercial factors."⁹¹

B. Non-Discrimination Requirements [Section 273(e)(1); NPRM ¶¶ 64-67]

The Commission should reject the RBOCs' attempt to limit the scope and effectiveness of Section 273(e)(1), and should adopt TIA's proposed definition of the term "related persons," which is designed to ensure that the BOCs do not discriminate in favor of non-affiliates in which they have a significant financial interest.⁹² Adoption of the narrow definitions advanced by the RBOCs⁹³ would only encourage such discrimination, which would be contrary to the underlying goals of Section 273. The Commission also should make it clear that this subsection requires BOCs to make an affirmative effort to ensure that products manufactured by "unrelated persons" receive serious, unbiased consideration in the procurement process.⁹⁴

⁹¹ See 47 U.S.C. § 273(e)(1)(B), 47 U.S.C. § 273(e)(2).

⁹² See TIA Comments at 50. TIA's proposed definition would include entities in which a BOC has an equity or equivalent interest, royalty interest, or other material interest which gives the BOC a direct, ongoing stake in the revenues from a particular manufacturer's business or products.

⁹³ See e.g., SBC Comments at 21-22, arguing that royalty arrangements and joint ventures with a non-"affiliate" manufacturer should not make such entities "related persons." Also see Ameritech Comments at 33; PacTel Comments at 10.

⁹⁴ See TIA Comments at 46-47.

C. **BOC Procurement Standards** [Section 273(e)(2); NPRM ¶ 68]

Consistent with the approach adopted in its Non-Accounting Safeguards Order,⁹⁵ the Commission should decline to narrow the scope of the terms "equipment," "services," and "software," as the RBOCs have suggested.⁹⁶ In addition, the Commission should clarify that the term "other commercial factors" does not allow a BOC to accord preferential treatment to particular suppliers based on their status as an "affiliate" or a "related person."⁹⁷

D. **Enforcement Mechanisms** [NPRM ¶ 69]

The Commission's NPRM properly recognizes the inadequacy of traditional, complaint-based enforcement techniques and the need for additional mechanisms to ensure that the requirements of Section 273(e) are implemented and enforced effectively.⁹⁸ In this regard, TIA once again urges the Commission to require the BOCs to prepare and submit for public comment and Commission approval plans describing the standards and procedures which they will employ to ensure compliance with the requirements of Sections 272 and 273.⁹⁹ In addition, the

⁹⁵ First Report and Order, In the Matter of Implementation of Sections 271 and 272 of the Communications Act, as amended, FCC 96-489 (released December 24, 1996) ("Non-Accounting Safeguards Order"), Paragraphs 216-217.

⁹⁶ See Ameritech Comments at 34-36; BellSouth Comments at 26-27; PacTel Comments at 11; SBC Comments at 22-23.

⁹⁷ Compare Bell Atlantic/NYNEX Comments at 21, n.59, conceding that the factors considered in selecting a particular product "may not, of course, include the BOC's equity ownership in the vendor." [Emphasis added]

⁹⁸ NPRM, Paragraph 69. The assertion that there is "no basis for the suggestion in the Notice that a manufacturer may be unwilling to complain about a procurement for fear of losing future sales" (Bell Atlantic/NYNEX Comments at 21) files in the face of economic reality and industry experience.

⁹⁹ See TIA Comments at 49, 52. As BellSouth acknowledges, "virtually all BOCs already have in place, in part because of the requirements of the MFJ, detailed procurement

Commission should adopt appropriate reporting and record retention requirements,¹⁰⁰ and utilize the biennial audits required under Section 272(d) as well as spot examinations of BOC procurement records to ensure BOC compliance.¹⁰¹

guidelines." BellSouth Comments at 26. Accordingly, the imposition of a requirement of the sort proposed by TIA should not be unduly burdensome.

¹⁰⁰ In this regard, each BOC should be required to submit annual reports detailing the dollar value of their overall purchases, and separately identifying the total value of the BOC's purchases of products manufactured by "affiliates" and "related persons," in appropriately-disaggregated product categories. In addition, BOCs should be required to retain all procurement-related documents for at least two years after the procurement process has been completed, or until the conclusion of any audit, investigation, or other proceeding addressing the relevant purchase(s), whichever is later.

¹⁰¹ See TIA Comments at 52.

IX. CONCLUSION

The Commission should reject the RBOCs' efforts to construe the provisions of Section 273 in a manner which would prevent them from achieving their intended purpose, and instead should adopt appropriate rules implementing these provisions in a manner consistent with TIA's comments in this proceeding.

Respectfully submitted,



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