

Before the  
Federal Communications Commission  
Washington, D.C. 20554

CC Docket No. 88-616

In the Matter of

BOC Notices of Compliance with  
CEI Waiver Requirements for  
Market Trials of Enhanced Services

#### MEMORANDUM OPINION AND ORDER

Adopted: December 29, 1988; Released: January 30, 1989

By the Chief, Common Carrier Bureau:

#### I. INTRODUCTION

1. On August 24, 1988, Southwestern Bell Telephone Company (SWBT) filed a Petition for Waiver of Certain CEI Requirements for Enhanced Services Trials (petition). SWBT requests (1) authority to conduct enhanced voice and data gateway market trials in Houston, Texas beginning March 1, 1989 under a set of five conditions that it states are designed to avert anticompetitive effects; and (2) general authority to conduct any enhanced service market trial under the set of five conditions. Twelve parties filed comments on the petition, and five parties filed reply comments.<sup>1</sup> In this order, pursuant to the authority delegated to us by the Commission,<sup>2</sup> we approve SWBT's waiver requests, subject to the conditions discussed below.

#### II. BACKGROUND

2. The *Computer III* orders permit a Bell Operating Company (BOC) to offer a specific enhanced service on an unseparated basis, before its Open Network Architecture (ONA) plan is approved, only after it files and receives approval of a Comparably Efficient Interconnection (CEI) plan for the service.<sup>3</sup> Under the Commission's CEI requirements, a BOC must provide interconnection opportunities and other basic services to competing enhanced service providers (ESPs) on an "equal access" basis.<sup>4</sup> The Commission has discretion to waive this rule on a showing of special circumstances that justify an exemption.<sup>5</sup>

#### III. DESCRIPTION OF PETITION

3. SWBT requests two different CEI waivers. First, it requests a waiver of certain CEI requirements to allow it to conduct a market trial of voice and data gateway services for one year in Houston, beginning March 1, 1989.<sup>6</sup> SWBT states that this trial will be a mass market application and will represent the first significant opportunity to test the general appeal and viability of gateway services in the U.S.<sup>7</sup> It claims that the trials will introduce thousands of subscribers to the benefits of Information Age services.<sup>8</sup>

4. SWBT proposes to abide by five conditions during the gateway trial. It says these conditions will act as safeguards to avert anticompetitive practices in the absence of full adherence to CEI rules and regulations:

1. The trials will be of a reasonable limited duration (e.g., approximately one (1) year).
2. All enhanced service trial costs will be treated in full accordance with SWBT's approved Cost Allocation Manual (CAM).
3. SWBT will in no way assure end user trial participants that it will be offering the enhanced services at some future time.
4. SWBT will not make any assurances to end user trial participants regarding what price SWBT will charge for the enhanced service if ever offered by SWBT.
5. SWBT will make any special underlying basic service facilities involved in its trial available to a reasonable number of other ESPs during the trial period, under the same terms, conditions and costs, and generally in the same central offices, on a first-come, first-served basis.<sup>9</sup>

5. In addition to requesting a waiver for the Houston gateway trial, SWBT petitions for general authority enabling it, and any other BOC, to conduct future enhanced service trials when the BOC satisfies the above-mentioned five conditions. It states that the *Computer III* orders have not specifically addressed the conditions under which market trials can occur.<sup>10</sup> SWBT claims that such trials are frequently critical to the development of desirable enhanced services and that such trials present far fewer competitive concerns than full-scale offerings. SWBT states that the application of "full CEI" requirements to mere enhanced service market trials would deter BOCs from conducting trials and would sacrifice the benefits such trials can bring.<sup>11</sup> We address the specific gateway waiver request first, and then the request for authority to perform general enhanced service trials.

#### IV. GATEWAY WAIVER ISSUES

##### A. Service and Trial Description

6. SWBT states that its proposed Houston trial of data and voice gateways will test the market acceptance and technical aspects of gateway services. In the voice trial, end users will use their regular touch-tone telephones to access a series of voice menus designed to help them connect through the gateway to a number of information providers. In the data trial, the end user will use a terminal and a screen to access the gateway information services.<sup>12</sup>

7. SWBT will utilize existing basic network trunking and switching facilities to connect end users to its gateway. The gateway will purchase certain basic network services, including private lines and Microlink II (SWBT's packet switching service), from SWBT under existing tariffs. The gateway will also purchase automatic number identification (ANI), which will provide it with the telephone number of gateway users for billing purposes. SWBT currently uses ANI for its own toll service billing purposes, but has not heretofore made ANI available on

an unbundled basis to ESPs. SWBT proposes to provide ANI during the trial, both to its affiliate and to competing ESPs, on a state-specific tariff basis.<sup>13</sup>

8. SWBT will provide private lines to connect the information providers' data bases to a "System Operator," which apparently will be another company, under the existing state private line tariff or interstate access tariffs.<sup>14</sup> The System Operator will be positioned between SWBT's network and the information providers' data bases and will generally administer interconnection with the gateway. The System Operator, not SWBT, will own and operate all the equipment used to provide the gateway functions, although the gateway service will welcome users to the "Southwestern Bell Gateway Service" or some similar phraseology. SWBT will have input into the design of the gateway equipment.<sup>15</sup>

## B. Adequacy of Service and Trial Description

### 1. Positions of the Parties

9. A number of parties state that SWBT's waiver request is unduly vague. For example, ADAPSO states that SWBT's waiver request must state the specific purpose of the trial-- e.g. what is known and why the test is being conducted outside the laboratory. It also requests a description of the facilities that will be used during the testing period, as well as an estimate or listing of the subscribers that SWBT expects to participate in the trial. It states that we need this information to determine if the proposed trial is reasonable in scope, purpose, and duration, and that ESPs need the information to prepare for meaningful test participation.<sup>16</sup> ANPA urges full public disclosure of SWBT's contracts with Systems Operators to assure proper scrutiny.<sup>17</sup> Telenet states that SWBT's waiver request is deficient for failing to state what basic services would be provided, where they would be provided, and at what prices. It states that the proposal is so vague that it is impossible to determine what the trial might achieve.<sup>18</sup> Tymnet states that SWBT fails to describe precisely which CEI requirements are to be waived and why waiver is necessary. It requests information regarding the geographic areas and number of participants included in the test. It suggests that BOCs be required to provide a complete and accurate description of the test to be performed, including necessary technical information, to allow Commission review.<sup>19</sup>

10. In response, SWBT agrees to furnish a description of the terms, conditions, and charges in the contracts with its gateway Systems Operators relating to the basic services involved (except confidential provisions).<sup>20</sup> It also lists the CEI conditions for which it requests waivers, and provides additional technical information.<sup>21</sup> The SWBT reply reveals that the trial test site is Houston, although SWBT states that it is impossible to specify how many Houston residents will participate in the trial.<sup>22</sup>

### 2. Discussion

11. We find that SWBT has provided sufficient information for us to determine the propriety of its gateway waiver request. SWBT has already supplied most of the information requested by commenters, and we do not find that additional information is required. SWBT supplemented its petition with information regarding its contracts with gateway Systems Operators, technical information, and clarified that the trial would be conducted

in Houston. We do not need additional details at this time. We could not reasonably expect SWBT to provide more detail because the trial is to be conducted for the purpose of enabling SWBT to obtain additional information to determine whether and how it may offer gateway service in the future. Moreover, the specifics of the trial are likely to change over the course of the trial. We require SWBT to file a CEI plan for gateway service if it desires to offer the service following the trial. That plan will contain more information than is necessary here.

## C. Propriety of Waiver For Gateway Service

### 1. Positions of the Parties

12. AIS, the designated Systems Operator for SWBT's audio gateway, supports the gateway waiver request, and states that full CEI review for BOC enhanced service trials unnecessarily hinders BOC entry to these markets. It argues that BOCs, gateway designers such as AIS, and other ESPs, lack sufficient information to design gateway services, and that mass market and technical trials are essential to clarify customer demand. AIS says that the CEI process forces BOCs to obtain approval for "detailed CEI plans and, arguably, to invest in the additional equipment and facilities necessary to accommodate all unaffiliated ESPs that wish to participate in the trials."<sup>23</sup>

13. USV, the designated Systems Operator for SWBT's data gateway, also supports SWBT's gateway waiver request. It states that the existing telephone network provides the most cost-effective vehicle to deliver information services, and that it is not feasible to begin operation of gateways without reasonable opportunities to test the technical and marketing assumptions of a variety of possible services and arrangements.<sup>24</sup> CompuServe generally supports the gateway service request.<sup>25</sup>

14. BellSouth supports the gateway waiver request, arguing that development of a versatile and robust information services market is one of the Commission's public interest priorities. It states that flexible regulatory policies are needed to encourage BOCs to experiment, through field trials, with varying technologies and service offerings. It concludes that waivers based on SWBT's five conditions will "eliminate the regulatory delays and administrative inefficiencies" associated with redundant waiver proceedings.<sup>26</sup> Bell Atlantic supports the gateway waiver request to help streamline the administrative process and quickly provide the benefits of enhanced services to the public. It contends that CEI review has caused "substantial delays" in the introduction of new services.<sup>27</sup>

15. ADAPSO supports full CEI review for market trials such as the gateway trial proposed by SWBT. It states that SWBT provides no justification for a market trial waiver-- e.g., it states that SWBT is silent as to why it is unable to use traditional research tools, such as market studies, rather than a market trial, and states that SWBT makes no showing that CEI review is overly burdensome. ADAPSO states that market trial waivers will afford an unfair advantage to BOCs and that BOCs could become entrenched in the market through below-cost pricing of services during unregulated trials.<sup>28</sup>

16. ATSI urges rejection of the gateway waiver request. It states that SWBT does not justify waiver of the requirements to (1) file CEI plans; (2) comply with CPNI rules; and (3) provide basic services to all ESPs that request

them. It concludes that the slight burden of CEI review is "far outweighed by the opportunity for fair competition in the enhanced services marketplace."<sup>29</sup>

17. MCI opposes SWBT's request, labeling it a thinly disguised plea for reconsideration of the CEI requirements that SWBT has previously opposed in the *Computer III* proceeding. It states that the Commission specifically recognized some degree of delay in CEI review, yet nevertheless adopted CEI as a "essential enforcement mechanism" to prevent discrimination. It says the Commission also recognized that CEI review could cause some costs.<sup>30</sup> MCI also states that SWBT has offered no justification for its proposed waiver.<sup>31</sup>

18. Telenet claims that SWBT's waiver request is unsubstantiated and would undercut the Commission's objectives.<sup>32</sup> Likewise, Tymnet states that SWBT's gateway waiver request is not sufficiently detailed but that the information that SWBT has provided suggests that CEI safeguards should not be waived for the trial.<sup>33</sup>

19. In reply, SWBT, BellSouth, AIS, and USV stress their belief that the proposed trial is required to generate the information necessary for the development of gateway services on a wide scale in this country. SWBT states that it is unable to file a full CEI plan at this time because it is unsure about exactly how, when, and where the gateway will be made available. It states that several companies have tried and failed at mass market gateway offerings, and it seeks a waiver to be able to have maximum flexibility in developing a successful gateway offering.<sup>34</sup> It also states that CEI plan review could result in substantial delays, and that it makes no sense to go through the time and expense of filing and defending a CEI plan for a service that it is not yet sure it wishes to offer.<sup>35</sup> It states that market surveys alone are no substitute for the feedback that can be garnered when trial participants have "hands-on" experience with the gateway over a period of time.<sup>36</sup> SWBT concludes that it has proposed a long list of safeguards for its proposed trial that fully respond to concerns raised by the trials.<sup>37</sup>

## 2. Discussion

20. In evaluating a request for waiver of a Commission rule, we consider the special circumstances that could justify an exemption from that rule.<sup>38</sup> The fact that an agency "may discharge its responsibilities by promulgating rules of general application . . . does not relieve it of its obligation to seek out the 'public interest' in particular cases."<sup>39</sup> As a general matter, an applicant seeking a waiver of a rule "must plead with particularity the facts and circumstances which warrant such action" and provide supporting detail of its claim.<sup>40</sup> In addition to these general standards for evaluating waiver requests, the Commission has provided specific guidance in the *Computer III* proceeding regarding the circumstances in which a waiver of the CEI requirements may be appropriate. In particular, the *Phase I Reconsideration* states that a waiver may be appropriate if a BOC wishes to undertake a trial of a new technology for a limited time with small test groups of users.<sup>41</sup>

21. Under the circumstances presented by SWBT, we believe that a limited waiver of the CEI requirements is justified. The *Phase I Reconsideration* specifically recognized the propriety of CEI waivers for limited trials. Such waivers are especially appropriate for new and largely untested services, such as the gateway proposed by SWBT, because optimal technical configurations and general mar-

ket acceptance are not well established. We will not require SWBT to file a detailed CEI plan for gateway service before it conducts limited tests necessary to determine whether and how it will offer the service. Such a CEI plan would not be useful because the interface information and other CEI arrangements specified in the plan could very well change, both as a trial progresses and based on the results of a completed trial. Moreover, strict CEI requirements prior to limited testing may be unduly burdensome and counterproductive. We will not discourage the testing of new services through unnecessary regulation. It is particularly important to encourage gateway services because the development of successful and widespread gateway services may prove to be a key to the mass provision of Information Age services. In addition, the results of this trial should provide SWBT with all the information it needs to file a complete CEI plan for gateway service, which it must do as a necessary precondition to offering gateway service in any areas or time periods, or under any conditions, other than those specified in this order.

22. While some commenters raise the possibility that SWBT could derive an unfair advantage by using a "trial" period to establish itself as a gateway service provider before competitors could provide the same service on an equal basis, we find that the limited nature of the trial that we authorize and the conditions that we attach to this waiver authorization will be sufficient to avoid any unfair advantage.

## D. Proposed Waiver Conditions

### 1. Duration of the Trial

#### a. Positions of the Parties

23. A number of parties dispute SWBT's proposal to limit trials to "approximately one year." ADAPSO suggests that trials should be limited to "a few weeks or months."<sup>42</sup> MCI also states that one year is too long for a trial because it would allow BOCs to gain an unfair competitive advantage.<sup>43</sup> Other parties do not oppose a one-year trial period, but argue that we should specify the time limit and not accept SWBT's undertaking to limit its trial to "approximately" one year. For example, ANPA asks us to set a specific time limit for the trial, and supports limiting trials to 12 months absent an "extraordinary showing of exceptional circumstances."<sup>44</sup> CompuServe agrees that trials should be limited to one year.<sup>45</sup> Tymnet states that SWBT is unduly "vague" about its one year limit, and states that trials should have a definite "end date" which is communicated to participants.<sup>46</sup>

24. The SWBT reply clarifies its "intent to limit its trials to 12 months," and states that it will notify the Commission in advance if there are "exceptional circumstances warranting an extension." It notes that Bell Atlantic received a six-month waiver to conduct trials for a coin messaging trials, and states that "a much longer time is required for SWBT's gateway trials since they will be much more complex than Bell Atlantic's coin messaging trial, will involve a mass market rather than only 900 coin phones, and will constitute a much newer communications concept that will require time for customers to become comfortable enough to try it regularly."<sup>47</sup> Supporting SWBT, AIS suggests that we adopt a flexible approach to a time limit for trials. It states that a strict

one-year limit fails to accommodate the major technical and service changes that may be required during the course of the trial.<sup>48</sup> Likewise, USV supports a flexible time limit, arguing that trials should be allowed to continue until necessary regulatory approvals have been obtained, or until interest in the trial ends.<sup>49</sup>

25. In addition, SWBT filed an *ex parte* letter stressing that it needs authority to conduct its gateway trial for at least a twelve-month period. SWBT cites several experiences with mass market gateways in this country and abroad as evidence that at least a year will be required before it can generate sufficient interest among information providers and end users to obtain statistically valid research results. It also chronicles the months that will be required for it and a gateway contractor to place the approximately 30,000 terminals that will be distributed for the trial. It further contends, based on its description of its introduction of other new services, that it will take months for users to become familiar with novel gateway services. It concludes that a twelve-month trial period will be "critical" to the success of the gateway trial.<sup>50</sup>

#### b. Discussion

26. The *Phase I Reconsideration* held that CEI waivers for enhanced service trials might be appropriate, but only for a limited time period. Generally speaking, limited waiver periods are preferable in the CEI context, since such waivers lessen the time that a BOC can offer an unregulated service without filing a complete CEI plan. Based on our analysis of SWBT's petition, however, we conclude that a waiver of one year is warranted due to the circumstances of the proposed gateway trial. As noted by SWBT, terminal placement for purposes of the gateway trial will itself take several months to complete. This justifies a longer trial period than we found was required in the other waiver petitions that we have addressed. Moreover, as SWBT observes, the gateway trial is the first mass market trial proposal that we have considered, and involves a novel service that may require a number of months to generate sufficient interest among information providers and end users to produce the type of information that SWBT requires to determine whether and how it will offer gateway service on an ongoing basis under an approved CEI or ONA plan. For these reasons, we grant SWBT's request to conduct a one-year gateway trial.

#### 2. Use of Cost Accounting Manuals

27. As its second proposed condition, SWBT states that all enhanced service trials will be treated in full accordance with its approved CAM. No party comments on this provision. We believe that this is a necessary condition for the conduct of any enhanced service marketing trial and require SWBT to follow it as part of its waiver authorization.

#### 3. Representations to End Users

28. SWBT also states that it will not make any assurances to end user trial participants regarding (1) the offering of the enhanced services by SWBT after the conclusion of the trials; and (2) the price it will charge for enhanced services if ever offered after the trials. In response, ANPA suggests that we require SWBT to offer an "affirmative written disclosure to all trial participants" that the trial is limited and that there are no future guarantees regarding services.<sup>51</sup> The SWBT reply agrees to

ANPA's suggestion that it affirm to all users that trials are limited and that nothing should be inferred regarding the future availability of services. Specifically, SWBT states that "in trials involving small numbers of specific end users, all the disclosures will be made, in writing, to each participant." In mass market trials, SWBT proposes to provide notice to each ESP, and will employ some means, such as public notices in the local media, bill inserts, or some other effective means, designed to make the local population aware.<sup>52</sup> We find that SWBT's modified proposal is sufficient to ensure that end users understand that services and prices offered during the trial may not be available on an ongoing basis. We require SWBT to adhere to that proposal.

#### 4. Allocation of Underlying Facilities

##### a. Positions of the Parties

29. SWBT proposes to make any special underlying basic facilities involved in its trial available to a reasonable number of other ESPs during the trial period on a "first-come, first-served basis." It defines a "special" basic service as one that is not generally available under tariff, such as calling number delivery over CAMA-ANI trunks. It states that it does not have the technology to ubiquitously deploy calling number delivery and that it would be unduly expensive to make the service generally available given the exploratory nature of the Houston trial. It further states that state commissions would likely disallow the expense associated with making the service generally available "so that an unknown and unlimited number of ESPs could experiment with potential new services that may never be offered."<sup>53</sup>

30. A number of commenters oppose SWBT's proposal for allocating special basic services. ADAPSO argues that SWBT must state in advance the number of ESPs that will be eligible to participate in the trial. It argues that SWBT need not build all facilities necessary to allow all ESPs to participate, but "there will undoubtedly be situations in which only insignificant modifications" would have to be made to accommodate all interested ESPs.<sup>54</sup> ANPA suggests that facilities be allocated on a "share-and share-alike" basis in which there is no favoritism for SWBT.<sup>55</sup> ATSI agrees that there is no basis for giving SWBT "first choice" as to underlying facilities. It states that our rules require that competing ESPs have an "equal" opportunity to test CEI. It proposes that if there are facilities limitations at a site, then all ESPs should share equally. Thus, it says, if there are two trial ports available for a year, and four interested ESPs, each ESP (including the BOC affiliate) should have full use of a port for six months.<sup>56</sup> CompuServe suggests that we "stress" the importance of nondiscrimination when facilities are limited and investigate allegations by ESPs of unfair treatment.<sup>57</sup>

31. Telenet says that SWBT would retain too much discretion over allocation of underlying basic service facilities under SWBT's proposal.<sup>58</sup> It states that by limiting the availability of basic services, SWBT guarantees itself an unfair competitive advantage, at least during the trial period. Even worse, Telenet claims, SWBT would continue to be the beneficiary of any customer base it acquired under the discriminatory circumstances that it proposes.<sup>59</sup> Likewise, Tymnet states that a BOC should be able to test new services only if it ascertains ESP interest in the service before the trial, and then provides adequate facilities for interested ESPs.<sup>60</sup> Tymnet is particularly con-

cerned that SWBT seeks to provide calling-number delivery over CAMA-ANI trunks, which it states many ESPs have previously requested. It opposes allowing SWBT to provide this important service for its enhanced services without making it available to third party ESPs.<sup>61</sup>

32. In contrast to parties that state that SWBT retains too much discretion in allocating special basic services, Bell Atlantic and BellSouth contend that SWBT proposes to surrender too much discretion. Bell Atlantic states that frequent technical changes are necessary for new basic services, and that BOCs would not have the flexibility they need to make such changes if they were required to offer such services to competing ESPs. It suggests that interconnection for competing ESPs is appropriate only if no new basic services are involved.<sup>62</sup> BellSouth states that there are significant problems with allocating trial facilities on an equal basis, including limits on existing facilities, and the extra cost and delay to provide additional facilities. BellSouth states that these burdens would discourage trials, thereby defeating the purpose of trials. BellSouth suggests that a first-come, first-served rule is sufficient for the allocation of facilities.<sup>63</sup>

33. The SWBT reply proposes to "make every effort" to provide the facilities necessary for CAMA-ANI to all ESPs that wish to purchase the service. It anticipates that it will need about 40% of the available CAMA-ANI trunks in Houston to run the trial, leaving 60% available to competing ESPs.<sup>64</sup> In the event there are insufficient facilities to meet all requests, SWBT proposes in the alternative to: (1) shorten its own trial period to create additional facilities availability; (2) decrease the quantity of facilities it uses for its own trials; (3) arrange for all of the interested ESPs to agree to trial durations and facilities quantities that constitute reasonable compromises; (4) build additional facilities as soon as possible (with ESPs bearing the cost of such facilities); or (5) utilize some combination of the above.<sup>65</sup>

#### b. Discussion

34. The requirement that BOCs provide equal access for competing ESPs to basic network services is a cornerstone of our CEI safeguards to ensure that BOCs and ESPs compete on a "level playing field" in the provision of enhanced services. We recognize that it may not be economically reasonable for SWBT to make available in the short term certain basic services that are not yet widely deployed, but we find, as an application of this equal access principle, that SWBT should be equally constrained with competing ESPs in the event of a shortage of CAMA-ANI trunks. We find that SWBT's five proposed options are adequate means of responding to such a shortage in accord with this equal access principle. In its proposal, SWBT commits to ensuring equal access to basic network services through limiting the facilities that it uses for its trial (either by decreasing the length of its trial or by decreasing the amount of circuits that it uses), by negotiating an equitable decrease in facilities usage among all parties requesting facilities, including its own enhanced services operations, or by building additional facilities.<sup>66</sup> We require SWBT to notify us 15 days before the commencement of their trial in the event it can not meet all requests for underlying basic services by competing gateway providers, and to describe the steps it is taking, consistent with its five proposed options, to resolve the shortage.<sup>67</sup> We believe that these conditions will ensure

that SWBT's enhanced gateway operations do not benefit from any undue competitive advantage during the course of the gateway trial.

### 5. Prior Notice to ESPs

#### a. Positions of the Parties

35. ANPA states that as a condition of a waiver for the Houston trial, we should require SWBT to give notice of the trial to interested ESPs in appropriate general and trade publications, and through the FCC and state commissions.<sup>68</sup> ATSI urges us to require SWBT to give six months notice of any trial.<sup>69</sup> SWBT responds that it has already given notice of the trials to ESPs by virtue of filing the petition with the Commission, and because the proposal has been covered in the press. It agrees to publish additional special public notices in the major trade publications.<sup>70</sup> It disagrees with ATSI that six months notice is necessary. SWBT claims that 90 days is an appropriate period for prior notice to ESPs because the *Phase I Order* required that BOCs give ESPs 90 days advance notice for ONA services introduced after approval of ONA plans.<sup>71</sup> However, it notes that it filed its petition in August and does not intend to begin the gateway trial until March 1989, so that ESPs will have had more than six months advance notice of the trial.<sup>72</sup>

#### b. Discussion

36. We agree that it would be useful for the BOCs to give ESPs 90 days advance notice of proposed trials so that ESPs can make appropriate plans regarding possible participation in the trials. We will not require more than 90 days notice because we believe a longer notification period is generally unnecessary and potentially burdensome to BOCs. SWBT has already provided what will be more than 90 days advance notice of the gateway trial to interested ESPs.<sup>73</sup>

### 6. Tariffs

#### a. Positions of the Parties

37. SWBT states that its gateway trials will involve local basic services so that state tariffing is appropriate. It notes that the Bureau approved this approach in the *Bell Atlantic Gateway Order*.<sup>74</sup> SWBT also states that it will employ customer-specific tariffs for ANI because ANI is not available in SWBT's general state tariffs. It plans to use its Special Service Assembly Request (SSAR) state tariff to provide the special basic services necessary for its enhanced service trials. It states that SSARs will apply to all ESPs that request the service, and represent an interim approach that will be available only for the duration of the trials. It further explains that ANI is not yet available in unbundled form, since the technology required for ubiquitous deployment of ANI is not yet widely deployed in SWBT's network. It claims that the use of customer-specific tariffs will also allow it to experiment in advance of filing CEI tariffs to determine the effective and efficient tariff for the service.<sup>75</sup> In its *ex parte* letter, SWBT commits to filing customer-specific tariffs for ANI that feature identical unit charges for circuits of equivalent distance from the central office.<sup>76</sup>

38. Telenet states that SWBT must file federal tariffs for basic service elements (BSEs) that are expected to be used in interstate services.<sup>77</sup> ANPA requests clarification of why SWBT will use "customer specific" state tariffs for ANI.<sup>78</sup>

#### b. Discussion

39. The *BOC ONA Order* approves the provision of intrastate ONA services on the basis of state tariffs, but it also requires the BOCs to establish federally tariffed basic service arrangements (BSAs) and BSEs.<sup>79</sup> Those interstate tariffs will be subject to review for compliance with federal tariffing principles. Because the Commission's existing Part 69 rules for access tariffs must be modified to implement this requirement, the Commission announced its intention to initiate a separate Rule Making to amend Part 69.<sup>80</sup> Until Part 69 is amended, the BOCs may implement their CEI plans by filing CEI/ONA service tariffs at the state level.<sup>81</sup> BOCs will not be required to file interstate tariffs for such services during this interim period, although BOCs who desire to file interstate CEI/ONA tariffs may seek appropriate waivers of Part 69 rules to do so. Accordingly, we approve SWBT's tariffing proposal on an interim basis, while placing SWBT on notice that it may be required to file additional federal tariffs when the Commission completes its Part 69 Rule Making.

### 7. CPNI

#### a. Positions of the Parties

40. SWBT states that the annual notice requirement for CPNI is unwarranted in a trial context. It also states that it has already begun sending an annual notice.<sup>82</sup> ADAPSO states that CPNI protections must apply to trials.<sup>83</sup> ATSI states that SWBT does not justify waiver of the CPNI rules. It argues that SWBT is attempting to avoid complying with "even the minimal safeguards inherent in the current rule in order to gain access to competitively important information."<sup>84</sup> Telenet states that the waiver request is deficient for "non-adherence" to CPNI rules.<sup>85</sup>

41. SWBT responds that it is proposing to observe CPNI rules. While it argues that the CPNI notice requirement is unwarranted for trials, it states that it sent out annual CPNI notice for enhanced services to its Houston customers between August 22, and September 21, 1988. Thus, it asserts, it is in compliance with the annual notice requirement.<sup>86</sup>

#### b. Discussion

42. We disagree with SWBT that the annual CPNI notice requirement is unwarranted for market trials. To the contrary, we find that the customer privacy and competitive concerns that led the Commission to establish the CPNI notice requirement for BOC enhanced service offerings generally apply as well to BOC enhanced service market trials. However, we agree that SWBT has complied with the annual notice requirement by sending that notice.

## V. GENERAL WAIVER ISSUES

#### A. Positions of the Parties

43. The parties that support waiver of the Commission's CEI rules for SWBT's proposed gateway service trial (SWBT, AIS, USV, Bell Atlantic, and BellSouth) generally

support SWBT's request for general waivers from the Commission's CEI rules, available to all BOCs, to conduct limited technical and marketing trials. As noted above,<sup>87</sup> these parties claim that the CEI process requires a degree of specificity and commitment that is inappropriate before a BOC tests a service and is characterized by burdensome costs and delays. They believe that regulatory flexibility is required to allow BOCs to conduct enhanced services trials that BOCs view as critical to the development of the enhanced services industry in the United States. These parties argue that the five conditions proposed by SWBT will effectively prevent the BOCs from engaging in any anti-competitive practices during the course of the trials. In addition, SWBT states that general waivers will eliminate the need for redundant waiver proceedings.<sup>88</sup> It denies that general waivers will create an incentive for BOCs to delay ONA implementation, arguing that it is unreasonable to expect that a BOC would trade the ability to offer all enhanced services under an ONA plan for the ability to conduct limited trials.<sup>89</sup>

44. ADAPSO advocates full CEI review for all market trials. It says that SWBT has provided no justification for such a general waiver, and that a general waiver will afford unfair competitive advantages to the BOCs.<sup>90</sup> ANPA opposes general waivers because the Commission lacks "any substantial body of experience with CEI or CEI-waived trials that would justify such a sweeping abandonment of rules."<sup>91</sup> ATSI also opposes general waivers, since each region has a different "track record" for treatment of competing ESPs, and because each enhanced service presents different technical and marketing issues. It suggests that it would be an "abdication of FCC responsibilities to grant the broader waiver."<sup>92</sup> Although it basically supports the limited gateway waiver, CompuServe opposes general waivers. It states that CEI is already a waiver of sorts, and believes that blanket waivers would remove incentives for BOCs to implement acceptable ONA programs. It also states that SWBT has not shown that CEI review is a disincentive to the introduction of new services.<sup>93</sup> MCI contends that SWBT has failed to justify its request for CEI waivers and that its request for general waivers is overly broad.<sup>94</sup>

45. Telenet states that blanket waivers are totally inconsistent with the procompetitive objectives of CEI and would invite the BOCs to abandon CEI on a wholesale basis.<sup>95</sup> Tymnet states that general waivers are inconsistent with *Computer III* goals and will allow BOCs to ignore CEI safeguards. It states that the BOCs themselves control the "delay and cost" associated with CEI, noting that the CEI process moves quickly if the BOC fully describes the enhanced service at issue. It states that upon a grant of general CEI waivers for market trials of enhanced services, there would be an incentive for BOCs to attempt to avoid rigorous CEI review by styling all their new service offerings as trials.<sup>96</sup>

#### B. Discussion

46. For the same reasons that we conditionally approve SWBT's CEI waiver request for gateway service, we grant SWBT's request for a CEI waiver enabling it, and any other BOC, to conduct enhanced service market trials subject to the specific conditions described below. As discussed above, the *Phase I Reconsideration* authorizes waiver of the CEI rules in certain circumstances.<sup>97</sup> A CEI waiver for market trials will allow BOCs to conduct limited trials to determine whether and how they will offer

enhanced services on an ongoing basis. Of course, BOCs must file CEI plans for any services that they will offer on an ongoing basis prior to the approval of their ONA plan. This regulatory flexibility should provide an incentive for BOCs to conduct trials that may well result in the development of important enhanced services for the public. We are confident that the BOCs will not benefit from any undue competitive advantage by virtue of running the trials in the absence of full CEI safeguards due to the limited nature of the trials<sup>98</sup> and the following conditions, which are generalizations of the conditions discussed above for SWBT's gateway trial:

1. The CEI waiver will only be applicable to limited market trials of up to eight months duration.<sup>99</sup>
  2. The costs of all market trials must be allocated in full accordance with approved Cost Allocation Manuals.
  3. BOCs that conduct market trials must inform end user trial participants that services and prices available during the trial may not be available after the close of the trial.
  4. Competing ESPs must receive equal access, at equivalent prices, for all basic network services used in the trial.<sup>100</sup>
  5. ESPs must be informed of trials ninety days in advance of a trial.
  6. CPNI and network disclosure rules must be observed.
47. BOCs that are willing and able to meet these conditions must notify us in writing ninety days before the proposed commencement of a market trial.<sup>101</sup> This notice should describe the trial and fully explain how all of our conditions will be satisfied. On receipt of the notice, we reserve the right to request more information regarding the plan, to invite public comment on any or all aspects of the plan, and to attach further conditions to the trial as necessary.<sup>102</sup> Assuming the proposed trial fits within the waiver conditions established above, we will take no further action regarding the BOC waiver notice, in which case the trial may commence at the end of the ninety-day waiting period. BOCs that desire to conduct market trials on different terms than we have set forth may file a petition for waiver. We are confident that these rules will ensure that administrative delays are minimized for routine market trials, but will preserve our ability to examine and modify any trial proposals that may raise potential anticompetitive problems.

#### VI. ORDERING CLAUSES

48. IT IS HEREBY ORDERED, that pursuant to Sections 1, 4(i) and (j), 201, 202, 203, 205, 218, and 405 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i) and (j), 201, 202, 203, 205, 218, and 405, and 5 U.S.C. § 553, and authority delegated thereunder pursuant to Sections 0.91 and 0.291 of the Commission's rules, 47 C.F.R. §§ 0.91 and 0.291, SWBT's Petition for Waiver of Certain CEI Requirements for Enhanced Services Trials is APPROVED, subject to the conditions described herein.

#### FEDERAL COMMUNICATIONS COMMISSION

Gerald Brock  
Chief, Common Carrier Bureau

#### APPENDIX A

**Party Filing CEI Waiver Petition**  
Southwestern Bell Telephone Company (SWBT)

#### Parties Filing Comments

Association of Data Processing Service Organizations (ADAPSO)  
American Newspaper Publishers Association (ANPA)  
Association of Telemessaging Services International, Inc. (ATSI)  
Audio Information Services (AIS)  
Bell Atlantic Companies (Bell Atlantic)  
BellSouth Corporation (BellSouth)  
CompuServe Incorporated (CompuServe)  
MCI Telecommunications Corporation (MCI)  
Telenet Communications Corporation (Telenet)  
Tymnet-McDonnell Douglas Network Systems Company (Tymnet)  
U.S. Videotel (USV)  
Mountain States Telephone and Telegraph Company, Northwestern Bell Telephone Company, and Pacific Northwest Bell Telephone Company (US West)

#### Parties Filing Reply Comments

AIS  
BellSouth  
SWBT  
USV  
US West

#### Party Filing Remarks

T.J. Lowenhaupt, Inc. (Lowenhaupt)

#### FOOTNOTES

<sup>1</sup> A list of commenters appears in Appendix A. The abbreviations used in the Appendix for the various parties appear throughout this order.

<sup>2</sup> See 47 C.F.R. §§ 0.91 and 0.291 (1987)

<sup>3</sup> Amendments of Sections 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry), *Report and Order*, 104 FCC 2d 958 (1986) (*Phase I Order*), *modified on reconsideration*, 2 FCC Rcd 3035 (1987) (*Phase I Reconsideration*), *aff'd on further reconsideration*, 3 FCC Rcd 1135 (1988) (*Phase I Further*

Reconsideration). See also Report and Order, 2 FCC Rcd 3072 (1987) (Phase II Order), modified on reconsideration, 3 FCC Rcd 1150 (1988) (Phase II Reconsideration).

<sup>4</sup> Phase I Order, 104 FCC 2d at 1036, para. 147. A CEI plan must also satisfy other nonstructural safeguards governing the use of customer proprietary network information (CPNI), disclosure of network information, and nondiscrimination reporting. *Id.* at 1020, para. 115; Phase I Reconsideration, 2 FCC Rcd at 3042, paras. 49-50. The BOCs must also satisfy the cost allocation requirements of the *Joint Cost Order*, which established compliance filing requirements that are separate from the CEI requirements. See *Joint Cost Order*, 2 FCC Rcd 1298 (1987), modified on reconsideration, 2 FCC Rcd 6283 (1987) (*Joint Cost Reconsideration Order*), further recon., FCC 88-355 (released Nov. 18, 1988).

<sup>5</sup> Section 1.3 of the Commission's rules provide that "[a]ny provision of the rules may be waived by the Commission on its own motion or on a petition if good cause therefor is shown." 47 C.F.R. § 1.3 (1986); See also *WAIT Radio v. FCC*, 418 F. 2d 1153, 1157 (D.C. Cir. 1969), cert. denied, 409 U.S. 1027 (1972).

<sup>6</sup> Petition at 5.

<sup>7</sup> *Id.* at 2.

<sup>8</sup> *Id.* at 5-6.

<sup>9</sup> *Id.* at 8. SWBT defines a "special" underlying basic service facility as one that is not generally available under tariff, such as calling number delivery over Centralized Automatic Message Accounting-Automatic Number Delivery (CAMA-ANI) trunks. *Id.* at 9. In addition to the five conditions, SWBT proposes to give reasonable advance public notice of the availability of trial facilities to unaffiliated ESPs. *Id.* at 11. However, it states that the annual CPNI notice requirement is unwarranted in a trial context. *Id.*

<sup>10</sup> *Id.* at 3. SWBT distinguishes between technical and market trials. It defines "technical" trials "as ones that focus on the functional characteristics involved, such as how the enhanced service equipment works or how it interfaces with the network, rather than the market characteristics related to a potential enhanced service offering." *Id.* at 8. It defines "market" trials as ones that "focus on the market characteristics of a potential enhanced service, such as the relative desirability of various features/feature packages or price sensitivity levels." *Id.* US West states that the Commission has already granted permission for the BOCs to engage in purely technical trials without CEI plan approval in a series of orders approving enhanced services research and development waivers. See, e.g., *Ameritech and US West Waiver Petitions for Enhanced Services Research and Development*, 2 FCC Rcd 4662 (1987). The series of waivers noted by US West permitted the BOCs to engage in limited research and development prior to the approval of their CAMs. Those research and development waivers authorize the BOCs to conduct technical trials, but not to conduct market trials. As SWBT suggests, technical trials focus on functional characteristics, such as how enhanced equipment works or how it interfaces with the network. Prior orders relating to technical trials may be applicable if no charge is assessed for the service that is the subject of the technical trial and the trial is limited in geographic scope and numbers of participants. We note that the Houston gateway trial, for which SWBT will assess a charge and which is available to millions of Houston residents, would not qualify under these standards as a limited technical trial. Accordingly, BOCs have authority to conduct technical trials under the research and development waivers, but must file CEI plans or qualify for CEI waivers, as discussed in this order, in order to conduct market trials. We note that the costs for all technical trials

conducted pursuant to the research and development waivers must be treated in accordance with approved Cost Allocation Manuals.

<sup>11</sup> Petition at i-2.

<sup>12</sup> *Id.* at 6.

<sup>13</sup> As discussed below, there are limits to SWBT's ability to provide ANI trunks at this time. See para. 34, *supra*.

<sup>14</sup> Petition at 6-7.

<sup>15</sup> *Id.*

<sup>16</sup> ADAPSO Comments at 5-8.

<sup>17</sup> ANPA Comments at 5.

<sup>18</sup> Telenet Comments at 3, 5.

<sup>19</sup> Tymnet Comments at 9-12.

<sup>20</sup> SWBT Reply at 12-13.

<sup>21</sup> *Id.* at 22-23, Appendices 2 & 3.

<sup>22</sup> *Id.* at 25.

<sup>23</sup> AIS Comments at 1-4.

<sup>24</sup> USV Comments at 1-3.

<sup>25</sup> CompuServe Comments at 3-4.

<sup>26</sup> BellSouth Comments at 1-2.

<sup>27</sup> Bell Atlantic Comments at 1-2.

<sup>28</sup> *Id.* at 10-11.

<sup>29</sup> ATSI Comments at 4-5.

<sup>30</sup> MCI Comments at 6-11.

<sup>31</sup> *Id.* at 15-17.

<sup>32</sup> Telenet Comments at 3.

<sup>33</sup> Tymnet Comments at 8.

<sup>34</sup> SWBT Reply at 4.

<sup>35</sup> *Id.* at 14-15.

<sup>36</sup> *Id.* at 26.

<sup>37</sup> *Id.* at 33.

<sup>38</sup> See *WAIT Radio v. FCC*, 418 F. 2d at 1157.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> Phase I Reconsideration, 2 FCC Rcd at 3067, n. 161. The fact that the Commission specifically provided for CEI waivers for certain enhanced service trials rebuts MCI's suggestion, noted above, that the Commission rejected CEI waivers for such trials. The language MCI cites demonstrates that the Commission rejected certain BOC suggestions to amend CEI procedures in general, but the Phase I Reconsideration explicitly recognized a CEI waiver alternative for trials under certain circumstances. Likewise, the specific waiver provision in the Phase I Reconsideration rebuts comments by a number of parties that grant of SWBT's waiver request would "gut" the CEI rules. The Commission clearly intended to permit CEI waivers for limited trials as part of the regulatory process for BOC entry into enhanced services markets.

<sup>42</sup> ADAPSO Comments at 6.

<sup>43</sup> MCI Comments at 15.

<sup>44</sup> ANPA Comments at 4.

<sup>45</sup> CompuServe Comments at 5.

<sup>46</sup> Tymnet Comments at 10, 12.

<sup>47</sup> SWBT Reply at 5-6.

<sup>48</sup> AIS Reply at 5-6.

<sup>49</sup> USV Reply at 3.

<sup>50</sup> *Ex parte* letter from Martin E. Grambow, to Ms. Donna R. Searcy, filed December 6, 1988.

<sup>51</sup> ANPA Comments at 4.

<sup>52</sup> SWBT Reply at 6-7.

<sup>53</sup> Petition at 9-10.

<sup>54</sup> ADAPSO Comments at 6-7.

<sup>55</sup> ANPA Comments at 5.

<sup>56</sup> ATSI Comments at 6-9.

<sup>57</sup> CompuServe Comments at 5.

<sup>58</sup> Telenet Comments at 4.

<sup>59</sup> *Id.* at 5.

<sup>60</sup> Tymnet Comments at 12.

<sup>61</sup> *Id.* at 11.

<sup>62</sup> Bell Atlantic Comments at 2-4.

<sup>63</sup> BellSouth Reply at 3-4.

<sup>64</sup> SWBT notes that its CEI plan for Voice Messaging Service was recently authorized. It estimated that it required 50% of the available capacity of a particular type of basic service facility for that service. SWBT Reply at n. 11.

<sup>65</sup> *Id.* at 10-11.

<sup>66</sup> We require SWBT to apply one or more of its first three proposals for achieving equitable reductions among ESPs (including its own enhanced operations) in the number of requested ANI circuits in the event of any facilities shortage, prior to applying its fourth proposal to build additional facilities to be charged to ESPs.

<sup>67</sup> Although SWBT states that it currently has a limited ability to provide ANI trunks to competing ESPs, it plans to offer 60% of the available ANI trunks to competing ESPs, and notes that it has not yet received a firm request for the service.

<sup>68</sup> ANPA Comments at 5.

<sup>69</sup> ATSI Comments at n. 15.

<sup>70</sup> SWBT Reply at 11-12.

<sup>71</sup> *Id.* at 20, citing *Phase I Order*, 104 FCC 2d at 1068, para. 221.

<sup>72</sup> SWBT Reply at 20.

<sup>73</sup> SWBT is required to observe the network disclosure rules outlined in the *Computer III* orders. See Telenet Comments at 4; *Phase II Order*, 2 FCC Rcd at 3087-88, paras. 107-112. However, all basic services that SWBT will provide to its gateway are existing services or are unbundled versions of existing services for which technical information has already been disclosed. *Ex parte* letter from Martin E. Grambow, SWBT, to Ms. Donna Searcy, Secretary, FCC, filed December 13, 1988 (December 13 *ex parte* letter) at 3.

<sup>74</sup> Petition at 29-30, citing Bell Atlantic Telephone Companies, Offer of Comparably Efficient Interconnection to Providers of Gateway Services, 3 FCC Rcd 5772 (1988).

<sup>75</sup> SWBT Reply at 7-8.

<sup>76</sup> December 13 *ex parte* letter at 2-3. Because SWBT will not be collocating its gateway equipment in its central offices, it will not enjoy any inherent competitive advantage from the use of distance-sensitive tariffs for ANI.

<sup>77</sup> Telenet Comments at 4.

<sup>78</sup> ANPA Comments at 4-5.

<sup>79</sup> Filing and Review of ONA Plans, *Memorandum Opinion and Order*, FCC 88-381 (released Dec. 22, 1988) (*BOC ONA Order*) at paras. 271-282.

<sup>80</sup> *Id.*

<sup>81</sup> SWBT adequately explains why it will use customer-specific tariffs for certain basic services during the trial. While we recognize that such tariffs could raise potential discrimination concerns, we interpret SWBT's representation that each of its customer-specific tariffs will feature equivalent charges as an

undertaking that competing ESPs will be able to obtain services from these tariffs at rates and on terms no less favorable than those available to SWBT's enhanced operations. Subject to this nondiscrimination condition, we approve SWBT's tariffing proposals.

<sup>82</sup> Petition at 11.

<sup>83</sup> ADAPSO Comments at 7.

<sup>84</sup> ATSI Comments at 3-4.

<sup>85</sup> Telenet Comments at 5.

<sup>86</sup> SWBT Reply at 17; December 13 *ex parte* letter at 3.

<sup>87</sup> See *supra* paras. 5, 12-14.

<sup>88</sup> Petition at 13.

<sup>89</sup> SWBT Reply at 22.

<sup>90</sup> ADAPSO Comments at 10-12.

<sup>91</sup> ANPA Comments at 6.

<sup>92</sup> ATSI Comments at 4.

<sup>93</sup> CompuServe Comments at 6-7.

<sup>94</sup> MCI Comments at 12-13.

<sup>95</sup> Telenet Comments at 7.

<sup>96</sup> Tymnet Comments at 4-7.

<sup>97</sup> See *supra* note 41.

<sup>98</sup> We describe such trials as limited because the number of people and areas served by the trials will be limited in scope. For example, we approve SWBT's gateway market trial because, although it involves a large number of potential participants, it is confined to a single metropolitan area. Likewise, we approved Bell Atlantic's proposed market trial for coin messaging services, which is to be offered in several different areas, but on a much smaller scale in each area than the Houston gateway trial. See Bell Atlantic Telephone Companies, Petition for Waiver of CEI Requirements to Perform Technical Trials of Coin Messaging Service, 3 FCC Rcd 5741 (1988). While we do not establish any rigid limits on numbers of participants or areas served, we caution BOCs that we will treat proposals to conduct tests involving an excessive number of participants and geographic areas as the initial stages of an enhanced service "offering". This waiver does not extend to such an offering.

<sup>99</sup> BOCs that can demonstrate a unique need to conduct a trial in excess eight months, such as the equipment distribution requirements faced by SWBT for the Houston gateway trial, may petition us for special consideration.

<sup>100</sup> BOCs should use reasonable means of providing notice to ESPs of proposed enhanced service trials such as publication of notices in major telecommunications trade publications. See *supra* paras. 35-36.

<sup>101</sup> These notices should be filed with the Secretary's office in CC Docket No. 88-616.

<sup>102</sup> We will periodically publish public notices for any BOC enhanced service waiver notices that we have received. We will list the name of the BOC filing the waiver notice and the type of enhanced service that it proposes to test.