

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

In the Matter of

THE BELL ATLANTIC TELEPHONE  
COMPANIES

Offer of Comparably Efficient  
Interconnection to Providers  
of Gateway Services

**MEMORANDUM OPINION AND ORDER**

Adopted: January 18, 1989; Released: January 30, 1989

By the Chief, Common Carrier Bureau:

**I. INTRODUCTION**

1. On October 11, 1988, the Bell Atlantic Telephone Companies (Bell Atlantic) filed an Amendment to CEI Plan (amended plan) in response to the *Gateway Order*.<sup>1</sup> That order approved Bell Atlantic's CEI plan for gateway service, but required Bell Atlantic to submit additional information regarding its proposed electronic mail and computer storage services. The American Newspaper Publishers Association (ANPA) filed comments requesting additional clarifications, and Telenet filed comments supporting the amended plan. Bell Atlantic filed a reply, and ALC filed a reply in opposition to the amended plan. In this order, pursuant to the authority delegated to us by the Commission,<sup>2</sup> we approve Bell Atlantic's amended CEI plan for electronic mail service and computer storage service.

**II. DESCRIPTION OF THE AMENDMENT**

**A. Electronic Mail Service**

2. Bell Atlantic states that its electronic mail service will route, store, and deliver messages that a user enters into a terminal device such as a personal computer. Bell Atlantic describes such electronic mail features as "broadcast" delivery of electronic messages and a "bulletin board" capability.<sup>3</sup>

3. Subscribers will access Bell Atlantic's electronic mail service principally through the Bell Atlantic gateway by selecting electronic mail from the gateway menu. However, subscribers may directly access the electronic mail service by calling either the Bell Atlantic Public Data Network access number or that of an interLATA provider.<sup>4</sup> Bell Atlantic states that the presence of electronic mail service on its gateway will allow for more widespread availability of electronic mail for consumers and small businesses, thus creating a mass market for the services.<sup>5</sup> Bell Atlantic states that the underlying basic services and interfaces required for its electronic mail service are the same as those used for its gateway, and includes diagrams and explanations of the relationship between its electronic mail offering and its gateway.<sup>6</sup>

**B. Computer Storage Service**

4. Bell Atlantic states that its computer storage service enables an enhanced service provider (ESP) to place its data base into a Bell Atlantic-provided computer. It states that this service will help enable ESPs that do not have their own computers to offer information services to the public through the gateway.<sup>7</sup>

5. According to Bell Atlantic, the underlying basic services and interfaces required for its storage service are the same as those used by its gateway.<sup>8</sup> To support this assertion, Bell Atlantic describes how its computer storage service relates to its gateway offering and includes diagrams illustrating such relationships.<sup>9</sup>

**III. COMPLIANCE ISSUES**

**A. Positions of the Parties**

6. Telenet states that it recently entered into an agreement with Bell Atlantic whereby Bell Atlantic will market, under its own name, Telenet's electronic mail service. It believes that Bell Atlantic's amended plan complies with the CEI requirements.<sup>10</sup>

7. ANPA expresses several concerns regarding the amended plan. First, it notes that Bell Atlantic filed a motion with the MFJ court<sup>11</sup> on October 7, 1988 in which it stated that it may use "official" interLATA lines<sup>12</sup> to connect gateway traffic to a centrally located gateway processor.<sup>13</sup> It expresses concern that Bell Atlantic's exclusive use of the official services network would give Bell Atlantic an unfair price and quality advantage. ANPA also raises two concerns that it describes as relating to MFJ compliance issues. First, ANPA notes that Bell Atlantic states that ESPs using Bell Atlantic's storage system may only use software that is compatible with the Bell Atlantic system to edit stored information, and asks how Bell Atlantic will make sure this limitation does not have a discriminatory impact. It states that Bell Atlantic should clarify that the storage system does not impose any restrictions on the information content or editorial format of stored information.<sup>14</sup>

8. Bell Atlantic replies that it has clarified in writing that it will not route interLATA gateway traffic on its official services network, but will obtain interLATA circuits for gateway traffic from interexchange carriers at commercially available rates.<sup>15</sup> It also notes that we have previously found it unnecessary to rule on MFJ compliance issues. Bell Atlantic contends further that as a matter of technological reality, software packages used in concert with its storage service must be technologically compatible with its storage system. This fact, it argues, does not give it any control over the format or editorial content of the databases stored in its storage computer.<sup>16</sup>

9. ALC's reply asserts that although Bell Atlantic told the MFJ court that ESPs will choose the interLATA transport provider to carry traffic from the Bell Atlantic gateway packet assembler/disassembler (PAD) to the ESP, Bell Atlantic is telling us that the end user will choose the interLATA carrier. ALC also criticizes Bell Atlantic for failing to indicate that it will comply with "the onerous billing and collection requirements it has placed on other providers of gateway service providers and information services for the use of the Bell Atlantic billing and collection services". It states that these burdensome requirements would require Bell Atlantic to obtain prior written

permission from every potential electronic mail sender and recipient before Bell Atlantic could employ its billing and collection services, but that Bell Atlantic has not indicated that it would be willing to obtain such written authorization.<sup>17</sup>

#### B. Discussion

10. We approve Bell Atlantic's amended CEI plan to provide electronic mail and computer storage services and find no merit to the few concerns raised by commenters. The amended plan clarifies that the underlying basic services to be used by Bell Atlantic's electronic mail and computer storage services are the exact basic services that will be used by its gateway, and that it will make those basic services generally available under the exact terms and conditions that we approved in its CEI plan for gateway service. Thus, Bell Atlantic has now fully demonstrated that it will comply with the Commission's CEI requirements in the provision of electronic mail and computer storage.

11. We are unpersuaded by criticisms of the amended plan. First, Bell Atlantic adequately answers ANPA's concern that Bell Atlantic will gain an anticompetitive advantage from routing interLATA gateway traffic on its official services network by clarifying in writing that it will not use its official services network to carry such gateway traffic. Second, we will not rule on ANPA's MFJ compliance concerns. We have consistently held that the MFJ restrictions are independent of the CEI requirements and we will approve all plans that satisfy Commission requirements.<sup>18</sup>

12. ALC notes that ESPs, rather than gateway end users, will choose the interLATA transport provider to carry traffic from the gateway PAD to the ESP, but that electronic mail end users will choose the interLATA transport provider to carry traffic between Bell Atlantic's electronic mail and gateway processors. Generally, when an ESP is located outside the LATA in which a gateway processor is located, the ESP, rather than an end user, will choose the interLATA transport provider to carry interLATA traffic from the ESP to the gateway processor. However, Bell Atlantic proposes to require electronic mail end users to choose an interLATA transport provider.<sup>19</sup> ALC asserts that these practices "highlight sources of discrimination and inconsistencies which raise questions regarding Bell Atlantic's honest commitment to the CEI process . . ." ALC has not demonstrated that these Bell Atlantic practices raise any questions under the Communications Act or the Commission's CEI requirements.<sup>20</sup>

13. Likewise, ALC suggests that Bell Atlantic has imposed "onerous" billing and collection requirements on competing gateway providers. However, ALC provides no explanation of what those allegedly onerous requirements are, and none are evident based on the record before us. We approved this aspect of Bell Atlantic's proposal in the *Gateway Order* on an interim basis, noting that it represented to us that if it offers billing service to itself for the gateway service, it will provide the service to all ESPs under the same terms and conditions.

#### IV. ORDERING CLAUSES

14. 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, Bell Atlantic's Amendment to CEI Plan to provide electronic mail and computer storage services IS APPROVED.

#### FEDERAL COMMUNICATIONS COMMISSION

Gerald Brock  
Chief, Common Carrier Bureau

#### FOOTNOTES

<sup>1</sup> Bell Atlantic Telephone Companies, Offer of Comparably Efficient Interconnection to Providers of Gateway Services, *Memorandum Opinion and Order*, 3 FCC Rcd 6045 (1988) (*Gateway Order*). The *Gateway Order* summarizes in detail Bell Atlantic's proposed CEI arrangements for its gateway service. See *id.* at paras. 3-4, 19-20.

<sup>2</sup> See 47 C.F.R. §§ 0.91 and 0.291 (1987). See also Filing and Review of ONA Plans, *Memorandum Opinion and Order*, FCC 88-381 (released Dec. 22, 1988) (*BOC ONA Order*) at para. 184.

<sup>3</sup> Amendment at Attachment A, p. 2.

<sup>4</sup> *Id.* at Attachment A, p. 2-3.

<sup>5</sup> *Id.* at Attachment A, p. 4.

<sup>6</sup> *Id.* at 3-4.

<sup>7</sup> *Id.* at 2-3.

<sup>8</sup> *Id.* at Attachment B.

<sup>9</sup> *Id.*

<sup>10</sup> Telenet Comments at 2.

<sup>11</sup> The "MFJ Court" is the U.S. District Court for the District of Columbia that supervises the Modified Final Judgment (MFJ), the antitrust decree that required the divestiture of the Bell Operating Companies (BOCs) from AT&T. *United States v. American Tel. & Tel. Co.*, 552 F.Supp. 131 (D.D.C. 1982); *aff'd sub. nom. Maryland v. United States*, 460 U.S. 1001 (1983).

<sup>12</sup> "Official services" are certain court authorized interLATA BOC internal communications and BOC communications with customers. See *United States v. Western Electric Company, Inc.*, 569 F. Supp. 990, 1097 (D.D.C. 1983).

<sup>13</sup> ANPA Comments at 3, *citing* Bell Atlantic's Motion for a Declaratory Ruling Approving its Proposed Gateway Architecture, No. 82-0192 (D.D.C. filed Oct. 7, 1988).

<sup>14</sup> ANPA Comments at 2-4.

<sup>15</sup> Bell Atlantic Reply at 2-3, *citing* *Ex Parte* Letter from David E. Berry, Bell Atlantic, to Gerald Brock, Chief, Common Carrier Bureau, FCC, dated October 11, 1988; *Ex Parte* Letter from Donald E. Lavin, Bell Atlantic, to Ms. Donna Searcy, Secretary, FCC, filed October 14, 1988.

<sup>16</sup> Bell Atlantic Reply at 4.

<sup>17</sup> ALC Reply at 2-3.

<sup>18</sup> See, e.g., *Gateway Order* at paras. 41, 56.

<sup>19</sup> Bell Atlantic says it adopted this end user selection requirement to avoid MFJ compliance questions. *Ex Parte* letter from James J. Farrell, Bell Atlantic, to Ms. Donna R. Searcy, Secretary, FCC, filed December 22, 1988. Bell Atlantic states that an argument could be made if it selected the interLATA trans-

port provider for its electronic mail service that it would be providing, as a reseller, interexchange service in violation of the MFJ. *Id.*

<sup>20</sup> We note that ALC did not file comments, but raised its arguments for the first time in a reply pleading. This pleading does not in fact address any issues raised in the comments, but simply raises questions that could and should have been included in a first-round comment. As a result, no party, including Bell Atlantic, had an opportunity to respond to ALC's complaints in the normal pleading cycle. The practice of raising arguments for the first time in a reply that could have been raised in initial comments is disfavored and can affect the weight we attach to such arguments. We caution parties to avoid this practice.