COMMONWEALTH OF KENTUCKY

BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

INQUIRY INTO THE USE OF CONTRACT SERVICE ARRANGEMENTS BY TELECOMMUNICATION CARRIERS IN KENTUCKY	))))	CASE NO. 2002–00456

O R D E R

The Commission opened this docket to consider the use of Contract Service Arrangements ("CSAs") and special tariffs by telecommunications companies. All telecommunications companies were invited to participate. Through data requests the Commission compiled the record in this proceeding and held an informal conference. BellSouth Telecommunications, Inc. ("BellSouth"), Kentucky ALLTEL, Inc. ("ALLTEL"), Cincinnati Bell Telephone Company ("Cincinnati Bell") and the Electric and Water Plant Board of the City of Frankfort, Kentucky ("Frankfort Plant Board") filed testimony and participated in a hearing. Briefs were filed by the Attorney General, AT&T Communications of the South Central States, Inc. ("AT&T"), BellSouth, Cincinnati Bell, ALLTEL, the Frankfort Plant Board, Sprint Print, Inc. d/b/a SPIS.net, Kentucky Bandwidth, Inc. and a group calling themselves "CLEC Respondents."[1]

Administrative Regulation 807 KAR 5:011, Section 13 requires every utility to file "true copies of all special contracts entered into governing utility service" unless a

[1] Cinergy Communications Company, ICG Telecom Group, Intermedia Communications, Inc., NuVox Communications, Inc., MCI Telecommunications, MCIMetro Access Transmission Services, LLC and Time Warner Telecom.

deviation pursuant to regulation or an exemption pursuant to statute has been granted. The purpose of this proceeding is to review whether the Commission's relaxation of these requirements for BellSouth Telecommunications, Inc. in Case No. 2001-00077[2] has disadvantaged telecommunications customers and carriers who no longer are able to review the full CSAs. We held in that case that BellSouth no longer needed to file its increasingly numerous CSAs for Commission review. Instead, we have accepted a summary page that lists the name, type of service, cost of service, and revenues from the service of the CSAs into which BellSouth has entered during the previous month.

These CSAs are effective upon signature. The Commission reviews the list and may question or inquire as to the details of any of the CSAs and may reject any inappropriate CSA. All other incumbent local exchange carriers ("ILECs") and competitive local exchange carriers ("CLECs") are required to file their CSAs on 30 days' notice to the Commission for approval. Long-distance carriers may file CSAs on one day's notice.

In relaxing our requirements regarding BellSouth's CSAs, we intended to ensure that BellSouth was not unfairly subjected to regulatory requirements that disadvantaged it as opposed to its competitors. It appeared at that time that, given the competitive conditions of the marketplace, detailed review of each CSA was no longer necessary. However, our action in that docket may well have disadvantaged other telecommunications carriers, CLECs, and customers who no longer are able to review the full CSAs.

[2] Case No. 2001-00077, BellSouth Telecommunications, Inc. Proposed New Procedures for Filing Contract Service Arrangements and Promotions.

In this docket we also address whether BellSouth and other carriers are providing services under CSAs when they should be providing service at tariffed rates. Standards to limit the use of CSAs and provide objective criteria for pricing services have been considered. Moreover, the Commission has considered whether the existence of competition should be a factor in determining whether two customers are "similarly situated" so that they are entitled to the same rate.[3]

There are three central issues in this proceeding:

1. Whether the use of CSAs priced at rates other than the tariffed price, where the services are identical to those offered in the tariff and the CSAs are not on file with the Commission, violates KRS 278.160(1) and (2). KRS 278.160(1) provides, in pertinent part, "Each utility shall file with the commission…schedules showing all rates and conditions for service established by it and collected or enforced." KRS 278.160(2) states as follows:

> No utility shall charge, demand, collect, or receive from any person a greater or less compensation for any service rendered or to be rendered than that prescribed in its filed schedules, and no person shall receive any service from any utility for a compensation greater or less than that prescribed in such schedules.

2. Whether a utility's use of differently priced CSAs for customers buying a regulated service is "discriminatory" in violation of KRS 278.170(1). KRS 278.170(1) provides as follows:

> No utility shall, as to rates or service, give any unreasonable preference or advantage to any person or subject any person to any unreasonable prejudice or disadvantage, or establish or maintain any unreasonable difference between localities or between classes of service for doing a like

[3] December 19, 2002 Order at 3.

and contemporaneous service under the same or substantially the same conditions.[4]

Also to be considered: (a) whether an ILEC is giving an "unreasonable preference" when it offers a lower price to a customer because that customer has a choice of providers, while charging a higher price to a customer who has no choice; (b) whether the statutory words "under the same or substantially the same conditions" can be interpreted to refer to a competitive, as opposed to a non-competitive, environment; and (c) whether ILECs' practice of bundling in CSAs their unregulated services (such as high speed DS3 service) with their regulated services (such as Primary Rate Interface ("PRI")) – lowering the price of the latter to sell more of the former – is appropriate.

3. Whether the provision of CSAs as contemplated by the local exchange carriers violates the CLECs' right to resell service at an avoided cost off the ILECs' tariffed rates pursuant to 47 U.S.C. § 251(c)(4).

CURRENT COMMISSION TREATMENT OF BELLSOUTH'S CSAs

KRS 278.160, which codifies the filed rate doctrine in Kentucky, requires all terms and conditions for a utility's service to appear in its filed rate schedules. The filed rate doctrine exists in part to prevent utilities from discriminating in the prices they charge for the same service among different ratepayers. The Commission has historically accepted different pricing based upon volume and term commitments, and it has been understood that, pursuant to KRS 278.170, customers who are willing to commit to the volume and term commitments in another customer's contract are entitled

[4] See also KRS 278.260 (authorizing the PSC to rule on a complaint that "any rate…is unreasonable or unjustly discriminatory").

to the terms of that contract. CSAs were viewed as an unusual way of dealing with a unique customer, rather than the usual way for a utility to do business.

However, since 1999, when the Commission's database was begun, BellSouth has entered into more than 1,000 CSAs. The sheer number of CSAs entered into by BellSouth indicates that many of these customers are "similarly situated," and that the terms to which they have agreed could just as well appear in a tariff. It is extremely burdensome for a regulatory agency to review all such agreements to determine whether they are discriminatory and to ensure that all customers entitled to the contract receive it.

In the first year that the Commission accepted monthly reports in lieu of the contracts themselves, BellSouth entered into 482 of those CSAs. The report does not include the prices paid by the customers. It includes only the contracting party's name, the services provided, and the revenues associated with the contract. Thus, the CSAs are no longer on file with the Commission and are unavailable to customers who might want to request the rates given to another customer or to CLECs who might want to exercise their right under the Telecommunications Act to resell those CSAs. There appears to be a particular issue with ISDN service: although it is a tariffed, regulated service, there are dozens of "special" contracts for this service. BellSouth has previously informed the Commission that, in fact, "approximately 60% of the Primary Rate ISDN services we provide are sold out of the tariff."[5]

[5] BellSouth Response to Data Request, No. 7, filed June 25, 2001, in Case No. 2001-00077.

Of primary concern in opening this investigation is that the issue of the effect of CSA filings on customers, as opposed to the effect on competitors, was not fully treated in Case No. 2001-00077.

CASES THAT LED TO THIS INVESTIGATION

In SPIS.net v. BellSouth[6] the Commission determined that SPIS.net had requested from BellSouth a "like and contemporaneous service under the same or substantially the same conditions" per KRS 278.170, and that its volume and term commitments were comparable to those of Hopkinsville Electric. The Commission concluded that pricing the same service differently from customer to customer, based on the single difference that one customer has received (or is alleged to have received) an offer, is inappropriate pursuant to KRS 278.170.[7] The Commission thus required BellSouth to provide PRIs to SPIS.net at the contract terms and conditions specified in the contract with Hopkinsville Electric.

In Computer Innovations v. BellSouth[8] the Commission determined that Computer Innovations appeared to be similarly situated with Hopkinsville Electric, and, therefore, the Commission required BellSouth to make PRI service available to Computer Innovations at the same rates applicable to Hopkinsville Electric.

These cases illustrate the effects on customers of CSAs filed at the Commission in summary report format as opposed to complete contracts. In both of these cases,

[6] Case No. 2001-00099, SPIS.net v. BellSouth Telecommunications, Inc.

[7] Id. at 9.

[8] Case No. 2001-00068, Computer Innovations, LLC vs. BellSouth Telecommunications, Inc.

had the Commission not become involved, SPIS.net and Computer Innovations would be receiving similar service at a higher price than their competitor, Hopkinsville Electric.

POSITIONS OF PARTIES

Hundreds of CSAs filed by the carriers in response to data requests have been received. It is evident that CSAs are a prominent way of offering service to customers, primarily business customers. The carriers state that CSAs are used primarily in competitive situations to offer customers lower rates than stated in the general subscriber tariff to secure their businesses. Two proposals were submitted to the Commission for consideration: one by BellSouth, ALLTEL, and Cincinnati Bell; and one by the Frankfort Plant Board.

The joint industry proposal submitted by BellSouth, ALLTEL, and Cincinnati Bell proposes as follows:

1. The standards would apply to all telecommunications carriers.

2. Companies may enter into CSAs in order to meet competition or in other unique circumstances. There are no filing requirements for these contracts or supporting information except upon request for submittal from the Commission or Commission Staff. When requested, ILECs would submit supporting cost information. If any contract were requested by the Commission or Commission Staff, the utility would be allowed to redact the customer name and address.

3. A carrier may use a CSA in response to a customer who has received a written or oral offer from a competitor or based on general knowledge by the carrier of the level of competition in the market; when competitive offers have been made available through some form of media or other communication; when a utility

determines that a volume and term discount would be appropriate in recognition of the customer's maintaining the service; and when a utility determines that a contract is appropriate when the customer may potentially generate additional revenues by purchasing other services.

The Frankfort Plant Board proposes that a utility that offers CSAs in response to a verbal competitive offer obtain a written statement from a customer verifying that the offer was made prior to finalizing the CSA. The Frankfort Plant Board also proposes that CSAs are appropriate when a carrier is responding to a formal request or proposal from a customer seeking a competitive pricing offer.

In response to the joint proposal of BellSouth, ALLTEL, and Cincinnati Bell, AT&T asserts that the proposal will, in effect, make ILECs' filed tariffs obsolete and enable ILECs to engage in widespread discrimination, predatory pricing, and other anti-competitive practices with little regulatory oversight.[9] Moreover, AT&T states that, in compliance with the Commission's procedures, it files all CSAs with the Commission and that these filings are complete and unredacted. AT&T submits that such transparency is the best way to protect the public from discriminatory pricing. According to AT&T, situations when CSAs may be offered according to the joint proposal are so broad as to be meaningless. AT&T also objects to the implication that other carriers or customers would not be able to request copies of CSAs. According to AT&T, this leads to the outcome that the Commission or Commission Staff would only know to request a specific contract if a complaint had been received, but potential complainants would not be in a position to know of contracts if they were kept secret by the ILECs.

[9] AT&T's Response to the joint proposal filed October 17, 2003 at 1.

The CLECs have raised the question of whether they are required to file CSAs at all with the Commission. They argue that the Commission's Orders in Administrative Case No. 370[10] exempted the CLECs from filing CSAs. In that Order the Commission exempted the CLECs from several of the Commission's rules and regulations pursuant to KRS 278.512 and pointed out those rules and regulations that it intended for the CLECs to follow. The Commission stated in the Order that CLECs were still required to file tariffs pursuant to KRS 278.160 and that all other tariffing requirements not specifically enumerated in the Order would be exempted. The regulation for filing special contracts, 807 KAR 5:011, Section 13, was not specifically included as a requirement in the Order.

The CLEC Respondents in this proceeding recommend that the Commission not require CLECs to file CSAs with the Commission, as many of them have been operating under this premise for some time now and feel that a requirement to file CSAs would result in an increased regulation on the carriers. They also argue that CSAs are used in competitive situations and that no party has questioned the use of CSAs for CLECs.

The CLECs argue that, due to lack of market power, they are unable to be unreasonably discriminatory. The ILECs argue that offering varying types for contractual arrangements with various rates does not constitute unreasonable discrimination.

Although comments were filed by a number of carriers, there was substantial disagreement among the carriers. SouthEast Telephone, Inc. and the Frankfort Plant

[10] Administrative Case No. 370, Exemptions for Providers of Local Exchange Service Other Than Incumbent Local Exchange Carriers.

Board expressed the need for tight controls until substantial competition exists, while BellSouth and Cincinnati Bell were concerned that any level of control would impede the ability to meet competition.

The Attorney General contends that as the use of CSAs has been allowed to grow, this mechanism has become "a way to circumvent the tariffs."[11] According to the Attorney General, the filing of rates is a means to "protect the consumers."[12] The Attorney General also proposes that contracts on file with the Commission "could aid in competition."[13]

IS A CUSTOMER "SIMILARLY SITUATED" IF HE IS WILLING TO ACCEPT THE SAME VOLUME AND TERM COMMITMENTS BUT HAS NO ACCESS TO A COMPETING CARRIER?

Statutes are generally construed according to their plain meaning; if the plain meaning is ambiguous (and the phrase "similarly situated" is somewhat vague in KRS 278.170), one looks to the legislative intent. As this statute has been on the books since the creation of the Public Service Commission, when utility regulation was treated as a monopoly, it is unlikely that the presence of competition was considered a factor in the determination of whether two customers are "similarly situated."

In National-Southwire Aluminum Co. v. Big Rivers Electric Corp., Ky. App., 785 S.W.2d 503, 514 (1990), the Kentucky Court of Appeals explained that, when faced with a claim of utility service discrimination, the Commission must look to "the nature of the use, the quantity used, the time when used…and any other reasonable consideration."

[11] Attorney General Brief at 2.

[12] Id. at 5.

[13] Id. at 6-7.

SPIS.net, Computer Innovations, and Hopkinsville Electric bought the same service for the same use; under this opinion, they would be considered "similarly situated" customers if "quantity used" is similar; and BellSouth did not allege that differences in "quantity" justify treating these customers differently. BellSouth.net, which competes with these Internet Service Providers ("ISPs"), also uses PRIs and may also be "similarly situated" under these criteria.

Moreover, judicial definitions of CSAs do not include issues involving competition. The federal court for the Eastern District of Kentucky has defined "contract service arrangements" as contracts "between a carrier and a specific, typically high-volume customer, tailored to that customer's individual needs." MCI Telecommunications Corp. v. BellSouth Telecommunications, Inc., 40 F.Supp.2d 416 (E.D. Ky. 1999). See also AT&T Communications of the South Central States, Inc. v. BellSouth Telecommunications, Inc., 7 F.Supp.2d 661, 670-71 (E.D.N.C. 1998) (same definition). It would appear that, if the availability of a competitor were relevant, the contract would be defined as a document tailored to a customer's "bargaining power" as well as to its "needs."

BellSouth contends that it needs the flexibility to price services more cheaply to meet competition:

> It is only in circumstances when a competitor's rate is lower than the tariffed rate that BellSouth offers the service through a CSA contract.…Currently, the CSA tool allows the Company to respond to the competitive marketplace.[14]

The Commission concurs with the parties that CSAs now form a vital component of telecommunications carriers' response to competition. CSAs also continue to be invaluable to carriers as they seek to meet customers' unique circumstances. The Commission finds that CSAs, when disclosed by filing with the Commission, violate neither KRS 278.160 nor KRS 278.170.

CONFIDENTIAL TREATMENT OF CSAs

BellSouth argues that public disclosure of the contracts would "provide BellSouth's competitors with an unfair competitive advantage." BellSouth also claims that the contents of the CSAs are "not known outside of BellSouth" and that the disclosure of the information would be an "unwarranted invasion of customers' proprietary information."

First, it is difficult to understand how an ILEC's competitive injury argument meshes with its responsibility to make these very CSAs available for resale to these same competitors. See BellSouth Corp. v. Federal Communications Comm'n, 162 F.3d 678, 682 (C.A. D.C. 1998) (an RBOC must make its CSAs available for resale pursuant to the Section 271 competitive checklist); AT&T v. BellSouth, infra (the Telecommunications Act requires that CSAs be made available for resale to CLECs at a

[14] BellSouth Response to Data Request No. 8, filed June 25, 2001, in Case No. 2001-00077. SPIS.net disputes that a competitive offer actually triggers the decision to lower prices, pointing to its own receipt of lower pricing without a competitive offer, and asserting that there was no AT&T offer to Hopkinsville Electric. The complainants in the cases that led up to this investigation allege that BellSouth's pricing decisions are not tied to any objective criteria.

wholesale discount); MCI v. BellSouth, infra (noting BellSouth's agreement to provide CSAs to CLECs at wholesale because the Federal Communications Commission ("FCC") had said it would not approve BellSouth's Section 271 application in any state restricting the resale of CSAs). If ILECs' competitors may not even see CSAs, how can the competitors resell them? To the extent that competitors' knowledge of the contents of the contracts injures BellSouth, it is an outcome that was intended by Congress.

Next, federal limits on the use of customer proprietary network information ("CPNI") apply to carriers wishing to use the information for marketing purposes. They do not preempt Kentucky's Open Records Law. The Commission has previously rejected this same argument made by Cincinnati Bell.[15] Federal law also requires "contract tariffs" of telecommunications carriers to be filed with the FCC and to be public. 47 U.S.C. § 211(a).

The Commission finds that CSAs must be publicly disclosed. Public disclosure affords the Commission, telecommunications carriers, and customers sufficient information to ensure that rates are not unjustly discriminatory and are made available to all who are similarly situated.

Having considered all of the evidence of record, the Commission hereby finds that BellSouth's practice of filing summaries of CSAs, approved in Case No. 2001-00077, has disadvantaged telecommunications carriers, including CLECs and customers. Thus, the Commission herein requires that BellSouth and all other telecommunications providers file all CSAs with the Commission. This will place all

[15] Case No. 2002-00004, Cincinnati Bell Telephone Company's Petition for Confidential Treatment of Certain Terms and Conditions of an Individual Customer Contract, and Cost Data in Support Thereof, Order dated November 15, 2002.

LECs on equal footing. The CSAs may be effective when signed by the parties, but must be filed within 20 days of execution. Such contracts form part of the "filed schedules" required by KRS 278.160. Cost support for contracts does not need to be filed but must be available from the ILECs upon request by the Commission.

Moreover, the Commission finds that a utility's use of differently priced CSAs for customers is not unreasonable discrimination per se in violation of KRS 278.170 when the contracts are offered in response to competition or otherwise, as long as they are publicly disclosed. The Commission finds that failure to file CSAs with the Commission may violate a CLEC's right to resell such a service pursuant to 47 U.S.C. § 251(c)(4). The publishing of these contracts will ensure that CLECs may resell these services if otherwise authorized to do so.

The availability of CSAs to the public ensures that carriers and customers will have information sufficient to determine if they are receiving preferences similar to those received by others. Failure to disclose these contracts may lead to inappropriate pricing.

IT IS THEREFORE ORDERED, effective the date of this Order, that:

1. The exemption afforded to BellSouth to file summaries of CSAs is hereby revoked.

2. All telecommunications carriers shall file CSAs for local exchange service with the Commission within 20 days of execution of the contracts.

3. CSAs may be effective when signed by the parties. Pursuant to KRS 278.512, carriers are exempted from the 30-day notice requirement for CSAs.

4. Telecommunications carriers may use CSAs in response to competition or otherwise.

5. CSAs shall be available to the public at the Commission.

6. Cost support for CSAs need not be filed with the Commission, but, in the case of ILECs, must be made available to the Commission upon request.

7. The Commission shall retain jurisdiction over complaints arising from CSAs.

8. This proceeding is hereby removed from the Commission's active docket.

Done at Frankfort, Kentucky, this 29th day of April, 2005.

By the Commission

Commissioner W. Gregory Coker did not participate in the deliberations or decision concerning this case.

ATTEST:

Executive Director