COMMONWEALTH OF KENTUCKY

BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

SPIS.NET	)	
	)	
COMPLAINANT	)	CASE NO.
	)	2001-00099
v.	)	
	)	
BELLSOUTH TELECOMMUNICATIONS, INC.	)	
	)	
DEFENDANT	)	

O R D E R

This case concerns a complaint against BellSouth Telecommunications, Inc. (BellSouth) brought by SPIS.net, an Internet service provider (ISP) in western Kentucky, and Kentucky Bandwidth, Inc. (KBI), which is under the same ownership as SPIS.net and which buys the ISDN interface lines, known as primary rate interface (PRI) lines, that enable SPIS.net s dial-up Internet customers to reach the Internet. Hereinafter, the complainants will be jointly referred to as SPIS.net.

Numerous minor allegations made in this docket by SPIS.net were dismissed on May 15, 2002. However, on June 13, 2002, we returned this case to the docket in order to explore at hearing issues concerning the pricing of BellSouth s PRI service to SPIS.net. The public hearing was held on October 1, 2002.

The service at issue constitutes a local call [1] from the ISP customer at his computer to the BellSouth switch to the Internet service provider s routers (its point of presence [POP]). SPIS.net has advanced two arguments against the terms upon which it has obtained PRI service. First, SPIS.net alleges that, because BellSouth offered to reduce the rate of a regulated service (PRI) if SPIS.net would pay more for an unregulated service (T3 dedicated line), BellSouth has violated KRS 278.514 (prohibiting subsidization of an unregulated service by a regulated one). SPIS.net has not, however, shown a violation of KRS 278.514. There is no indication whatever that BellSouth has offered any service below its cost. Accordingly, there has been no cross-subsidization of unregulated services by regulated services. SPIS.net s second argument is more substantial. It claims that the terms upon which it receives the service have subjected it to an unreasonable disadvantage pursuant to KRS 278.170 because it cannot obtain the PRI rate given to a competitor.

There is no dispute that PRI service is regulated; that it appears in BellSouth s tariff; and that BellSouth charges different customers different prices for the service. The issue is whether the difference in the prices is reasonable.

[1] Case No. 2001-00099, Transcript of Evidence (TE) at 60.

From April 1997 to October 2001, the BellSouth tariff price for PRI service was $1,483.[2] However, as BellSouth s witness testified, [u]nder contract pricing, that would begin to go down a little bit.[3] In January 1999, SPIS.net signed a contract service arrangement (CSA) and received the service for $1,290.19 per month. In January of 2000, SPIS.net received a new CSA pricing the service at $1,165.30 per month. On April 16, 2001, it signed yet another CSA pricing the service at $741.41.[4] Approximately 8 months previously, on August 7, 2000, Hopkinsville Electric, a competing ISP in SPIS.net s area, had entered into a CSA pricing PRI service at $650.

SPIS.net learned of the $650 rate from Hopkinsville Electric employees. When SPIS.net asked BellSouth for the $650 rate, it was refused. SPIS.net s witness alleges that, because its competitors can sell ISP service more cheaply than SPIS.net can, it was forced to close its Hopkinsville network in January 2001.[5] SPIS.net continues to provide ISP service in Madisonville.

The predominant issue in this case is SPIS.net s allegation that BellSouth has accorded an unreasonable preference, in violation of KRS 278.170, to Hopkinsville Electric. BellSouth responds that the difference in price is reasonable because it is entitled to provide lower prices for the same service to customers who can obtain a better deal from a BellSouth competitor. In its Answer to the Complaint, BellSouth explains that the Hopkinsville Electric contract was in response to a BellSouth

[2] TE at 97.

[3] TE at 96.

[4] TE at 98.

[5] SPIS.net Brief at 16.

competitor, AT&T. [6] It also asserts that SPIS.net should be held to the 2-year term of its January 2000 contract, and that SPIS.net s decision to enter into the contract was simply a bad business decision. [7] There can be no unreasonable preference unless the customers receiving different prices are comparable, BellSouth argues; and SPIS.net was not comparable to Hopkinsville Electric because SPIS.net already had a contract with BellSouth and Hopkinsville Electric did not.[8] BellSouth asserts that, at the time the January 2000 contract was entered into by SPIS.net, there was no evidence that any other PRI customer was receiving more favorable rates; that discrimination must exist at the time the CSA comes into existence; and that, therefore, there was no discrimination when the January 2000 contract was executed.[9]

BellSouth s argument on this point is persuasive, as far as it goes. However, BellSouth itself reopened contract negotiations with the Complainant and signed, on April 16, 2001, *after* the date of its contract with Hopkinsville Electric, a new contract

[6] Case No. 2001-00099, BellSouth Answer, at Paragraph 13. See also TE at 100, testimony of Tony Taylor (The competitor in that situation was AT&T with a recurring price of $575 and no charge for nonrecurring or installation charges.). SPIS.net claims there was no such offer, and that no such offer was possible, as Cinergy stated that the $650 price was below its cost. TE at 81; SPIS.net Brief at 9-10. SPIS.net also disputes BellSouth s assertions that it lowered the SPIS.net prices, changing existing contracts, based on competitive offers. SPIS.net said it did not receive such offers in all instances in which BellSouth changed SPIS.net s contract prices. TE at 64; SPIS.net Brief at 10-11.

[7] BellSouth Brief at 7.

[8] BellSouth Answer, Case No. 2001-00099, at Paragraph 14. SPIS.net s response is that BellSouth itself has frequently changed contract terms before the expiration of the contract.

[9] BellSouth Reply Brief at 3-4.

with Complainant in which PRIs were priced at $741.44.[10] As BellSouth correctly points out, when it is unlawful for any person to discriminate in price between different purchasers of commodities, the contract s provisions must be evaluated at the time the contract is made. [11] The current SPIS.net PRI contract was signed April 16, 2001, at a time when Hopkinsville Electric had already received the $650 rate. In addition, BellSouth s witness, Tony Taylor, stated that there are not substantial differences in terms of the volume between SPIS.net and Hopkinsville Electric.[12]

The remaining issue is the extent to which the existence of a competitive offer is a factor in determining whether two customers are similarly situated so that they should receive service at the same price.

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 to prevent utilities from discriminating in the prices they charge for the same service among different ratepayers. Mincron SBC Corp. v. WorldCom, Inc., 994 S.W.2d 785 (Tex. App. Dist. 1 1999). The court in Advamtel, LLC v. AT&T Corp., 118 F.Supp.2d 680 (E.D. Va. 2000) declared that, under federal antidiscrimination law and the filed-rate doctrine, separate agreements between carriers are permitted, but only under circumstances that do not affect the rate filed under the tariff . Because the services in issue were covered by a filed tariff, the parties were precluded from entering

[10] BellSouth Reply Brief, Exhibit 1.

[11] BellSouth Reply Brief, at 3, quoting Texas Gulf Sulphur Co. v. J.R. Simplot Co., 418 F.2d 793, 806 (9th Cir. 1969).

[12] TE at 184.

into separate contractual arrangements to modify the tariff rates. (Citations omitted.) This Commission, like other state commissions, has historically accepted different pricing in special contracts based upon volume and term commitments. However, it has been understood that, pursuant to KRS 278.170, customers who are willing to agree to the commitments in another customer s contract are entitled to the terms of that contract. 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 and contemporaneous service under the same or substantially the same conditions.

We have not previously held that two customers are not similarly situated for purposes of receiving the same price for a utility service on the sole basis that one has received a competitive offer while another has not.[13]

We have, however, permitted non-telecommunications utilities to enter into lower-than-tariffed rate special contracts with customers who realistically could obtain service from another supplier. Other state commissions have done the same. In Consumers Power Co. v. Michigan Public Service Comm n, 572 N.W.2d 222 (Mich. App. 1997), for example, a court upheld a public utility commission s decision to permit a gas utility to enter into such a contract with an industrial customer who threatened bypass. The commission had so ruled on the basis that the ratepayers would be better

[13] We have, of course, accepted special telecommunications pricing for the purpose of meeting competition for a service; however, that acceptance has not been extended to a policy of individual pricing based upon a specific customer s alleged individual experience with competitive offers without regard to geographic proximity or eligibility for the same competitive offers.

served if the large customer stayed on the system and paid at least some of the fixed costs of the system. The Michigan Commission, however, required the utility s shareholders to bear some, and perhaps all, of any revenue shortfall that resulted; and the court upheld the Michigan Commission s discretion to do so. SPIS.net emphasizes in its brief the safeguards that apply when gas utilities provide special rates to meet competition, citing Administrative Case No. 297[14] and the Columbia Gas tariff requiring, among other things, a customer affidavit demonstrating that it has installed operable capacity for long-term use of an alternative energy source.[15] SPIS.net contrasts these tariffed meeting-competition provisions with the lack of tariffed safeguards for BellSouth s use of CSAs.

There are, of course, key differences between telecommunications and gas utilities. Gas utilities special contracts providing off-tariff prices are approved to protect the ratepayers of these rate-regulated monopoly utilities from even greater loss. Moreover, gas utilities deal with such situations on a relatively rare basis and specify the situations in which special circumstances may apply. In contrast, telecommunications utilities are no longer protected monopolies, and gas utilities generally do not possess an ILEC s power to affect, through its pricing of services, which competitors (in both telecommunications and Internet service) are able to survive.[16] Accordingly, we do not

[14] An Investigation of the Impact of Federal Policy on Natural Gas to Kentucky Consumers and Suppliers (Order dated May 29, 1987).

[15] SPIS.net Brief at 15.

[16] Hopkinsville Electric and SPIS.net are competitors who are located very near to each other. In fact, they are on the same street.

find the existence of gas utility contracts that provide lower than tariffed prices dispositive here, and look to other sources for guidance.

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 considering whether an unreasonable utility preference has occurred, the Commission must look to the nature of the use, the quantity used, the time when used and any other reasonable consideration.

BellSouth, in its Statement of Generally Available Terms on file with the Commission, Document #431055v3, provides a strikingly similar set of criteria when, in explaining that CSAs may be resold to similarly situated end-users, it defines similarly situated to mean customers whose quantity of use and time of use, and [whose] manner and costs of service, are the same. Thus, BellSouth itself does not define similarly situated based on the existence of competition to provide the service.

Judicial discussions 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). Here, the customers needs are the same, even if their bargaining power apparently is not. As the court in Investigation into Three Special Contracts Filed by New England Telephone and Telegraph Co., d/b/a Verizon, 172 Vt. 405, 415, 779 A.2d 693 (2001),

held, an ILEC s conditional right to seek to enter special contracts under Section 229 [providing, under Vermont law, for special utility contracts] does not trump its statutory duty to offer nondiscriminatory rates to all customers. Id. at 415.

The record before us demonstrates that SPIS.net has requested from BellSouth a like and contemporaneous service under the same or substantially the same conditions [17] and that its volume and term commitments are comparable to those of Hopkinsville Electric. SPIS.net should, therefore, receive the same PRI rate as Hopkinsville Electric, retroactive to April 16, 2001, the effective date of the contract into which it entered after Hopkinsville Electric obtained the $650 rate. We emphasize that our decision today does not prohibit BellSouth, or any other ILEC operating in Kentucky, from providing special rates to similarly situated customers who are eligible for a competitive offer. We simply conclude 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.

Our resolution of SPIS.net s complaint is not, however, the end of this matter. The facts brought before us here implicate a number of concerns regarding possibly excessive and inappropriate use of CSAs rather than tariffed rates. Our previous decisions, in which we have relaxed our regulatory authority with the intention of ensuring that Kentucky s ILECs are not unfairly disadvantaged by competition, may bear reconsideration. Accordingly, on this date we open Case No. 2002-00456,[18] and

[17] KRS 278.170.

[18] Inquiry into the Use of Contract Service Arrangements by Telecommunications Carriers in Kentucky.

incorporate therein the record of this case and Case No. 2001-00077, in which we held BellSouth would be permitted to file monthly summaries of its contracts, rather than the actual CSAs. In Case No. 2002-00456, we will consider whether our determination in Case No. 2001-00077 has improperly denied both customers and competitive local exchange carriers access to information necessary to buy wisely. We also will consider the policy implications of current CSA practices of BellSouth and Kentucky s other LECs; determine whether the public interest demands that we require all CSAs to be filed in the future, thereby ensuring transparency and permitting both customers and CLECs the access necessary to buy and resell services; and determine whether we should set specific standards governing when services may be sold by CSA rather than by generally applicable tariffs.

The Commission having reviewed the record and having been sufficiently advised, IT IS HEREBY ORDERED that BellSouth shall provide PRIs to SPIS.net at the contract terms and conditions specified in the contract with Hopkinsville Electric, and shall provide a billing adjustment reflecting that the Hopkinsville Electric rate became available to SPIS.net as of April 16, 2001.

Done at Frankfort, Kentucky, this 19th day of December, 2002.

By the Commission

ATTEST:

Executive Director