COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

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

CINCINNATI BELL TELEPHONE COMPANY'S POST-HEARING BRIEF

Cincinnati Bell Telephone Company ("CBT") hereby tenders its Post-Hearing Brief in the above-referenced proceeding.

I. SUMMARY OF CBT'S POSITION

The Commission has permitted utilities under its jurisdiction to enter into special contracts or contract service arrangements ("CSAs") in accordance with 807 KAR 5:011, Section 13 for many years. Thus, even before the enactment of the Telecommunications Act of 1996 ("the Telecom Act"), the Commission acknowledged that telecommunications providers needed flexibility to compete and offer service at off-tariff rates in some instances. Similarly, the General Assembly recognized that rate flexibility was in the public interest when it enacted KRS 278.512 in 1992 and authorized and encouraged the Commission to adopt rules and regulations in light of "a changing environment, giving due regard to the interests of consumers, the public, the providers of telecommunications services, and the continued availability of good telecommunications services."[1] In accordance with KRS 278.512, the Commission has approved alternative regulation plans for certain carriers, including CBT.

[1] KRS 278.512(1)(c).

Today, CBT and other providers use CSAs to address the unique service requirements of its customers. CBT is also permitted to enter into CSAs pursuant to its Alternative Regulation Plan ("the Plan"). The Plan, which is set forth in CBT's General Exchange Tariff, was approved by this Commission in January 1999 after a finding that it balanced the interests of CBT, consumers and the public. The Plan specifically authorizes CBT to enter into CSAs in response to competition as well as in other unique circumstances. CBT currently complies with the Plan and the conditions surrounding the use of CSAs as set forth therein.

CBT believes that CSAs and, more specifically, the pricing flexibility inherent to CSAs are crucial to its ability to compete head-to-head with competitive providers in today's telecommunications marketplace. CBT must have the ability to respond to competition not only from the competitive local exchange carriers ("CLECs") which are present in CBT's operating area but also from alternative providers such as wireless, satellite, cable, voice over IP ("VOIP") and, more recently, electric utilities. Because the Commission does not regulate the rates these providers charge for service, CBT will be at a competitive disadvantage if its ability to use CSAs is different from its competitors' ability to use CSAs. More importantly, however, Kentucky consumers will be disadvantaged if CBT cannot fully compete for their business on the same terms as its competitors. CBT must also have the flexibility to respond to the unique service requirements of certain customers. Without this flexibility, CBT risks simply losing the customers as well as the customers' contributions to the joint and common costs of maintaining the network. Such a result is not in the interest of the entire body of ratepayers which will be required to make up the difference in lost contributions.

For these reasons, CBT contends that the rules governing the use of CSAs should be the same for all service providers who offer service to customers at rates that are different than their

general tariffed rates. CBT further urges the Commission to refrain from adopting burdensome or unnecessary rules surrounding the use of CSAs which serve to dampen providers' ability to respond to customers needs quickly and effectively. Such rules are unnecessary to prevent unreasonable discrimination among customers in violation of KRS 278.170(1). As explained further below, the existence of competition or other unique circumstances makes the provision of service to CSA customers different than the provision of service to other customers such that it is permissible to maintain different rates for these customers.

Finally, CBT contends that rather than adopting new regulations to govern CSAs, the Commission should consider adopting the Joint Proposal prepared by CBT, Kentucky ALLTEL, and BellSouth. The proposal sets forth standards for all telecommunications providers to following in the use of CSAs, while minimizing the filing requirements for CSAs. Further, the Joint Proposal enables the Commission to monitor the use of CSAs and investigate the rates, terms and conditions of service for CSAs as appropriate. In this way, the Joint Proposal enables the Commission "to reduce regulation while protecting Kentucky's telecommunications customers and ensuring fair and equitable treatment of both incumbent carriers and new entrants."[2]

II. BACKGROUND

On December 19, 2002, the Commission initiated this proceeding for the purpose of investigating the practices and policies of Kentucky's telecommunications carriers with respect to CSAs.[3] In its *December 19th Order*, the Commission set forth a procedural schedule for the

[2] *December 19th Order* at 1-2.
[3] In the Matter of Inquiry Into the Use of Contract Service Arrangements by Telecommunications Carriers in Kentucky, Case No. 2002-00456, Order, December 19, 2002. ("*December 19th Order*")

proceeding and stated that the guiding principles were to be the pro-competitive provisions of KRS 278.512 and the Telecom Act as well as KRS 278.160 and KRS 278.170.[4] The Commission further stated that it would examine the policy implications associated with setting parameters to govern a carrier's ability to set prices based on competition and whether the existence of competition should be a factor in determining whether two customers are "similarly situated" and thus entitled to the same rate. Finally, the Commission stated that it wished to explore the legal and policy implications of permitting a carrier to establish a special tariff for which only one unnamed customer qualifies.[5]

The Commission thereafter amended its procedural schedule and clarified that it intended for all carriers to submit CSAs in this proceeding.[6] The participants were directed to respond to data requests from the Commission as well as to respond to discovery requests from the parties.[7] Pre-filed testimony and pre-filed rebuttal testimony was subsequently filed by the participating carriers.

Upon the request of BellSouth Telecommunications, Inc. ("BellSouth"), the initial hearing was postponed. Thereafter, CBT requested that the Commission convene an informal conference to provide an opportunity for the participants and staff to discuss certain procedural concerns as well as possible resolution of some key issues in the proceeding. At the informal conference held on August 11, 2003, the parties and Commission staff discussed a number of issues

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[4] Id. at 1.
[5] Id. at 3-4.
[6] *In the Matter of Inquiry Into the Use of Contract Service Arrangements by Telecommunications Carriers in Kentucky*, Case No. 2002-00456, Order, January 28, 2003. ("*January 28th Order*")
[7] As provided by the Commission's *January 28th Order*, CBT filed information requests on four of its competitors—Time Warner Telecom L.P., MCImetro Access Transmission Services LLC, ICG Telecom Group, and NuVox

including possible settlement of the proceeding, the existing CSA requirements and the application of those requirements to all carriers, the format of the public hearing, etc. In addition, CBT proposed that an industry workshop be convened to address some issues raised during the course of the informal conference. The stated goal of the industry workshop was to develop consensus among the parties and to present the Commission with a proposed solution.[8]

By order dated August 18, 2003, the Commission rescheduled the public hearing for October 23, 2003. On September 2, 2003, CBT filed a request for an industry workshop as suggested at the informal conference. The Commission granted the request, and the a second informal conference/workshop was held on October 1, 2003. Prior to the workshop, CBT submitted a proposed agenda as well as a draft proposal for the industry participants' consideration.[9]

At the industry workshop, the participants discussed a number of issues related to the proceeding as well as the draft proposal filed by CBT on September 26, 2003. Thereafter, BellSouth, Kentucky ALLTEL, and CBT filed a joint motion for consideration of the Joint Proposal on October 8, 2003. The Joint Proposal filed on October 8, 2003, was an amended version of the draft discussed at the workshop. The Joint Proposal had been modified to reflect suggestions and concerns raised during the workshop discussion. A public hearing was held at the Commission's offices on October 23, 2003.

Communications, Inc. When these carriers declined to respond to CBT's information requests, CBT moved the Commission to compel responses. By order dated June 16, 2003, the Commission denied CBT's motion to compel.

[8] See Commission Staff's Informal Conference Memorandum dated August 19, 2003. See also CBT's comments with respect to the memorandum dated August 25, 2003.

III. LEGAL ARGUMENT

A. In light of the ever-growing competition in today's telecommunications marketplace, the Commission should affirm that CSAs and the pricing flexibility inherent in CSAs are in the public interest.

In recognition of the presence of competition and innovation in the provision of telecommunications services, KRS 278.512 provides, in pertinent part, that:

> (b) [f]lexibility in the regulation of rates of providers of telecommunications service is essential to the well-being of this state, its economy, and its citizens; and
> (c) [t]he public interest requires that the Public Service Commission be authorized and encouraged to formulate and adopt rules and policies that will permit the commission…to regulate and control the provision of telecommunications services to the public *in a changing environment*, giving due regard to the interest of consumers, the public, and providers of the telecommunications services….(Emphasis added.)

In keeping with these findings, the statute permits the Commission to exempt telecommunications services or products or telecommunications providers "from any or all of the provisions of Chapter 278 or to adopt alternative requirements for establishing rates and charges for any service."[10] It was in accordance with this authority that the Commission approved CBT's alternative regulation plan in January 1999.[11]

The objective of CBT's Plan is to "permit [CBT] to meet customers' needs and to enhance the efficiency of providing telecommunications services in Kentucky."[12] The Plan further specifies that "[CSAs] shall be used to provide [CBT] with flexibility to price according to individual customers' needs" and that CBT may enter into CSAs for any of its services "in

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[9] See CBT filing dated September 25, 2003.
[10] KRS 278.512(2).
[11] *In the Matter of The Application of Cincinnati Bell Telephone Company for Authority to Increase and Adjust Rates and Charges and to Change Regulations and Practices Affecting Same*, Case No. 98-292, Order, January 25, 1999.
[12] CBT's General Exchange Tariff PSCK No. 3, Section 2.1, at 2.

response to competition or other unique circumstances."[13] The Plan provides that a CSA is deemed approved upon its execution. Following execution of the agreement, the CSA is filed with the Commission on thirty (30) days notice. Unless the Commission takes action with respect to a CSA within the 30 days, the CSA is considered approved.[14]

The marketplace has become dramatically more competitive since the initial approval of CBT's Plan. (Tr. at 20-21.) Now, in addition to CLECs vying for customers, there is competition from wireless, satellite, and VOIP providers, with telephony over cable and electric facilities rapidly becoming a reality. These providers are not required to serve all customers, and they generally choose to serve only the most attractive or lucrative customers in any given market. Thus, while CBT and incumbent providers are required by law to provide service to every customer, with very limited exceptions, competitors can "pick and choose" which customers to serve. (Tr. at 22.)

As permitted by the Plan, CBT has entered into CSAs with customers that have been offered service by one or more competitors. As explained by Mr. Ringo at the Hearing, CBT generally becomes aware of the offer directly from the customer, either during a routine call to check on an existing customer or where an existing or prospective customer calls CBT to request a rate quote. CBT accepts the customer's word that it has been approached by a competitor based on the fact that CBT has one or more CLECs collocated in each of its Kentucky central offices. Under these circumstances, CBT does not require (and does not believe it should require) that the customer produce proof of an actual competitive offer. (Tr. at 33-35.) With this information, CBT evaluates the characteristics of the particular customer and the customer's

[13] Id. at 7.
[14] Id.

telecommunications needs in order to determine if the customer is an appropriate candidate for a CSA offering. If CBT determines that a CSA is appropriate, CBT designs an offer to meet the customer's service requirements at a specified rate.[15] The rate is not always lower than that of the competitor, but the rate is generally lower than the rate available to other customers as set forth in CBT's General Exchange Tariff. (Ringo Pre-filed Testimony at 8.) Responding to the customer's needs and having the pricing flexibility to make an offer to the customer is precisely the result contemplated by CBT's Plan.

In accordance with its Plan, CBT can also enter into a CSA where the nature of the customer and the types and quantities of services requested by the customer can be characterized as "unique circumstances." As Mr. Ringo explained in his pre-filed testimony, "unique circumstances" might arise where the customer has the option of building a private network rather than purchasing service from CBT or where the customer has unusual service characteristics, requires a unique service arrangement or unique combinations of services, and/or purchases a high volume of service. (Ringo Pre-filed testimony at 10.) These unique circumstances give customers leverage such that they can demand certain requirements of the provider or obtain service by other means. Here again, CBT's Plan provides the flexibility needed to negotiate a CSA, thereby permitting CBT to provide service at a rate below the generally available tariffed rate in order to retain the customer. (Ringo Pre-filed Testimony at 8; Tr. at 27.)

The pricing flexibility afforded by CSAs is essential to CBT's ability to compete head-to-head with competitive service providers and to respond to customers' needs quickly and

[15] Any combination of regulated and unregulated services is subject to KRS 278.514 and the Commission's rules related to cross-subsidization.

effectively. In approving CBT's Plan, the Commission found that the use of CSAs in this manner was in the public interest. That finding remains true and should be affirmed.

The clear "winner" under the implementation of the Plan is the customer who is able to choose among the offers made by one or more service providers, including CBT. In today's competitive marketplace, customers not only expect but also demand that providers provide them with optimal services and at a competitive rate. If a customer cannot get what it wants from one provider, the customer will look to another. Clearly, the promotion of competition in this manner is one of the primary goals of the Telecom Act as well as KRS 278.215.

The not-so-obvious winners under both the competitive and "unique circumstances" scenarios, however, are the remaining customers on CBT's network, particularly in light of its carrier of last resort obligations. Even though the individual CSA customer may get a lower rate than a customer who purchases services under a provider's tariff, the entire customer base benefits to the extent that the CSA customer makes some contribution to the fixed costs of creating, maintaining and operating the network and providing service. The CSA customer's contribution to these costs means that the entire customer base will <u>not</u> have to pick up the entire loss of those contributions. In this way, a provider's ability to use the CSA in response to competition and in unique circumstances balances the interests of the CSA customer as well as the remaining body of ratepayers. For these reasons, the Commission should affirm that CSAs and the pricing flexibility they afford are in the public interest pursuant to KRS 278.512.

B. <u>CSAs are currently filed with the Commission in accordance with KRS 278.160.</u>

KRS 278.160 provides that utilities, including telecommunications providers, must file a schedule or tariff showing all rates and conditions of service established by it and collected or enforced. The statute further provides that a utility may not charge any customer a greater or less

compensation for any service rendered or to be rendered than that prescribed in its filed schedules.[16] The statute embodies what is known as the "filed rate doctrine" and ensures that carriers only charge those rates which have been duly filed and approved by the Commission.[17]

In accordance with KRS 278.160, the Commission adopted regulations (see 807 KAR 5:001) to govern the filing of tariffs with the Commission. Section 13 of 807 KAR 5:011 provides for the use of CSAs with the following language:

> Every utility shall file true copies of all special contracts entered into governing utility service which set out rates, charges or conditions of service not included in its general tariff. The provisions of this administrative regulation applicable to tariffs containing rates, rules and administrative regulations, and general agreements, shall also apply to the rates and schedules set out in said special contracts, so far as practicable.

As evidenced by the regulation, the Commission has viewed special contracts or CSAs as individualized tariffs governing the relationship between a carrier and a contract customer. Although some CLECs have argued that they have been excused from the filing requirement by virtue of the Commission's order in Administrative Case No. 370,[18] the requirement that CSAs be filed with the Commission is in keeping with the filed rate doctrine in that the CSAs must be filed with and approved by the Commission. In this way, CSAs are treated the same way that carriers' general tariffs are treated. Moreover, in accordance with the filed rate doctrine, the filing of CSAs as individualized tariffs preserves the Commission's exclusive jurisdiction over the reasonableness of rates and service provided under a CSA pursuant to KRS 278.040(2). The

[16] KRS 278.170(1).
[17] See *Commonwealth ex. rel. Chandler v. Anthem Insurance Companies, Inc.*, Ky. App., 8 S.W. 3d 48 (1999) (although not applied in Kentucky by name, the filed rate doctrine has been recognized in Kentucky in principle); See also *Boone County Sand and Gravel Company, Inc. v. Owen County Rural Electric Cooperative Corp.*, Ky. App., 779 S.W.2d 224 (1989) and *Big Rivers Electric Corporation v. Thorpe*, 921 F. Supp. 460.
[18] *In the Matter of Exemptions for Providers of Local Exchange Service Other Than Incumbent Local Exchange Carriers*, Administrative Case No. 370, Order, January 8, 1998.

Commission, on its own motion or at the request of a customer, has the authority to investigate the rates, terms, or conditions of a CSA in accordance with KRS 278.260. The filed rate doctrine serves to prevent a CSA customer from commencing a judicial action to challenge the reasonableness of the rates, terms or conditions of a CSA.[19]

Although the Commission can choose to exempt CSAs from the requirement that they be filed in accordance with KRS 278.512, as explained further in Subsection F., below, Commission staff has indicated that the Commission intends for all carriers to file CSAs (or a summary in the case of BellSouth) in order to provide service to customers at rates that are different from those set forth in the carriers' general exchange tariffs. Thus, KRS 278.160 applies to CSAs unless or until the Commission modifies the rule requiring providers to file CSAs with the Commission.[20]

C. The "filed rate doctrine" since the passage of the Telecom Act.

At the conclusion of the public hearing held on October 23, 2003, the parties to the proceeding were specifically directed to brief certain issues including the following: Has the filed rate doctrine, as embodied by KRS 278.160, survived the passage of the Telecom Act? Stated another way, is the doctrine relevant in a competitive market for telecommunications services? CBT maintains that the filed rate doctrine continues to be relevant in today's competitive marketplace to the extent that the Commission continues to require that CSAs be filed with the Commission.

[19] See *Commonwealth ex. rel. Chandler v. Anthem Insurance Companies, Inc.*, Ky. App., 8 S.W. 3d 48 (1999); See also *Katz v. MCI Telecommunications Corp.*, 14 F. Supp. 2d 271, 273 (1998).

[20] The filing requirement vis-à-vis CLECs and interexchange carriers ("IXCs") was discussed at both Informal Conferences. Although counsel for certain CLECs has suggested that Administrative Case No. 370 exempted CLECs from the CSA filing requirement, other CLECs currently file CSAs with the Commission. Whether CLECs and IXCs are required to file CSAs under the Commission's rules is, therefore, anything but clear.

The "filed rate doctrine" was first discussed by the United States Supreme Court with respect to the Interstate Commerce Act ("ICA") in *New York, New Haven & Hartford Railroad Co. v. Interstate Commerce Commission*, 200 U.S. 361 (1906). There, the U.S. Supreme Court stated that the purpose of the ICA was "[t]o secure equality of rates as to all and to destroy favoritism, these last being accomplished by requiring the publication of tariffs and by prohibiting secret departures from such tariffs, and forbidding rebates, preferences and all other forms of undue discrimination."[21] Because the tariff filing provisions of the Communications Act of 1934 were modeled after similar provisions in the ICA, the filed rate doctrine has been applied to the Communications Act as well.[22] As in the ICA, "rate filing was Congress's chosen means of preventing unreasonableness and discrimination in charges" by telecommunications providers.[23] KRS 278.160 mirrors Section 203(a) of the Communications Act of 1934, which requires common carriers to file tariffs with the Federal Communications Commission ("FCC"), and Section 203(c), which provides that common carriers may not "extend to any person any privileges or facilities in such communications, or employ or enforce any classifications, regulations, or practices affecting such charges, except as specified in such [tariff]."[24]

Although the viability of the filed rate doctrine has been called into question in recent years as a result of deregulatory initiatives, United States Supreme Court upheld the doctrine as recently as 1998 in *AT&T v. Central Office Telephone*, 524 U.S. 214, 118 S. Ct. 1956, 141 L. Ed. 2d 222 (1998). There, Central Office Telephone ("COT") sought damages for breach of contract

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[21] Id. at 391.
[22] See *MCI Telecommunications Corp. v. American Telephone and Telegraph Co.*, 512 U.S. 218, 229-230 (1994); see also ABC v. FCC, 643 F.2d 818, 820-21 (D.C. Cir. 1980) ("To understand the purposes of the Communications Act… we must look to the legislative history of the Interstate Commerce Act of 1887, for the Communications Act borrowed its language and purpose from the Interstate Commerce Act.")
[23] *MCI Telecommunications Corp. v. American Telephone and Telegraph Co.*, 512 U.S. 218, 230 (1994).
[24] 47 U.S.C. §203(a) and (c).

and for tortious interference with contractual relations. These state law claims were based on the allegation that the relationship between AT&T and COT was not limited to AT&T's filed tariff but also included "certain understandings" COT's president had derived from reading AT&T's brochures and from talking to AT&T's representatives.[25] The issue to be determined was whether the tariff requirements of the Section 203 of the Communications Act preempted the respondent's state law contract and tort claims.

In its analysis of the case, the Court examined its historical precedent with respect to the filed rate doctrine and stated that "[w]hile the filed rate doctrine may seem harsh in some circumstances…its strict application is necessary to 'prevent carriers from intentionally misquoting' rates to shippers as a means of offering them rebates or discounts, the very evil the filing requirement seeks to prevent."[26] Because COT asked for privileges which were not included in AT&T's tariff, the Court found that the state law claims were barred by the filed rate doctrine.[27] Thus, the Court affirmed that, where there is a tariff on file with the FCC, the filed tariff governs the relationship between carrier and the customer with respect to the rates and services included in the tariff.

Despite the fact that the filed rate doctrine has existed for nearly a hundred years, however, the FCC has suggested that the doctrine is obsolete, at least with respect to interstate, domestic long distance services. In its proceeding to detariff the interstate, domestic interexchange services of non-dominant interexchange carriers, the FCC concluded that that detariffing long distance services "would eliminate possible invocation by carriers of the filed

[25] *AT&T v. Central Office Telephone*, 524 U.S. 214, 220, 118 S. Ct. 1956, 141 L. Ed. 2d 222 (1998). ("*AT&T v. COT")*
[26] *Maislin Industries, U.S., Inc. v. Primary Steel Inc.*, 497 U.S. 116, 127, 111 L. Ed. 2d 94, 110 S. Ct. 2759 (1990).
[27] *AT&T v. COT* at 235.

rate doctrine."[28] The FCC required carriers to withdraw their paper tariffs for domestic long distance mass market services. In place of paper tariffs, carriers are required to post the rates, terms and conditions of service on their Internet Web sites or, if they did not have a Web site, to make this information available at a central location. Similar requirements also applied to carriers offering contract tariff offerings and other long-term service arrangements.[29] Under this scheme, the relationship between the carrier and customer as to rates and service is no longer governed by a tariff or contract tariff on file at the FCC; instead, the carrier-customer relationship is also subject to state law claims which might otherwise be barred by the filed rate doctrine.[30] Given legal precedent in favor of the filed rate doctrine, however, the FCC's authority to abandon the filed rate doctrine is questionable at best.[31]

Contrary to the FCC's position, the filed rate doctrine has been cited recently by the Kentucky Court of Appeals in *Commonwealth ex. rel. Chandler v. Anthem Insurance Companies, Inc.*, Ky. App., 8 S.W. 3d 48 (1999). There, the Court stated that while the filed rate doctrine had not been applied in Kentucky by name, the principle had nevertheless been recognized in Kentucky.[32] The Court reasoned that the filed rate doctrine provides that tariffs

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[28] *In the Matter of Policy and Rules Concerning the Interstate, Interexchange Marketplace*, Notice of Proposed Rulemaking, 11 FCC Rcd 7141 (1996). ("*Detariffing NPRM"*).

[29] See Domestic, Interexchange Carrier Detariffing Order Takes Effect; Common Carrier Bureau Implements Nine-Month Transition Period, Public Notice, May 9, 2000. Following an extension of the transition period, the FCC's order detariffing such services finally went into effect on July 31, 2001

[30] See Justice Steven's dissent in *AT&T v. COT* at 238 wherein Justice Stevens cites *Nader v. Allegheny Airlines, Inc.* 426 U.S. 290, 300, 48 L.Ed.2d 643, 96 S.Ct. 1978 (1976) as an example of the Court's permitting a state law claim despite the filed rate doctrine. See also *Commonwealth ex. rel. Chandler v. Anthem Insurance Companies, Inc.*, Ky. App., 8 S.W. 3d 48, 55 (1999) wherein the Court found that the filed rate doctrine barred ratepayers from seeking damages for approved rates but did not shield insurance copies from all liability under the Consumer Protection Act.

[31] See "Detariffing and the Death of the Filed Tariff Doctrine: Deregulating in the 'Self' Interest," 54 Fed. Comm. L.J. 281 (March 2002).

[32] *Commonwealth ex. rel. Chandler v. Anthem Insurance Companies, Inc.*, Ky. App., 8 S.W. 3d 48 (1999).

adopted by a regulatory agency are not subject to collateral attack in court, thereby ensuring that the rates are not discriminatory (i.e., that a rate payer who brings suit does not get more favorable rates that one who does not) and that the agency's primary jurisdiction to set reasonable rates is upheld.[33] The Court further concluded that the filed rate doctrine was simply a special application of the general principle that legislative functions (e.g. ratemaking) are beyond the scope of judicial power. Based on this view of the doctrine, the Court concluded that the debate surrounding the viability of the filed rate doctrine was moot.[34]

Thus, notwithstanding the FCC's opinion regarding the filed rate doctrine with respect to interstate, domestic long distance services, the decisions by the United States Supreme Court and the Kentucky Court of Appeals cited above indicate that where a tariff or contract is filed with the Commission, the doctrine continues to dictate that the relationship between the contracting parties is governed by the filed tariff or CSA.

D. CSAs are not unreasonably discriminatory in violation of KRS 278.170(1).

As stated in its *December 19th Order*, the Commission intends to examine the use of CSAs in light of the prohibition against unreasonable discrimination as set forth in KRS 278.170(1). The Commission further stated that it would examine whether the existence of competition should be a factor in determining whether two customers are "similarly situated" and thus entitled to the same rate. In essence, the Commission asks whether it is reasonable for carriers to treat CSA customers differently than the general body of ratepayers and whether it is reasonable to charge CSA customers a rate which may be lower than the rate charged to other customers. CBT contends that the answer to both questions is yes.

[33] Id. at 53.
[34] Id.

KRS 278.170(1) states 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. (Emphasis added.)

CBT submits that charging CSA customers a different rate than that set forth in a carrier's general exchange tariff is not unreasonable discrimination for two important reasons—(1) carriers are permitted to establish reasonable classifications of their service, patrons, and rates and (2) carriers are permitted to treat customers differently so long as the difference is not unreasonable.

First, KRS 278.030(3) specifically permits a carrier to use reasonable classifications of its service, customers, and rates and outlines the factors that can be used in establishing such classifications. The statute states as follows:

> Every utility may employ in the conduct of its business suitable and reasonable classifications of its service, patrons and rates. The classifications may, in any proper case, take into account the nature of the use, the quality used, the quantity used, the time when used, the purpose for which used, and any other reasonable consideration.

In accordance with that statute, it is reasonable and legal for a carrier to take into account the existence of competition or a customer's unique circumstances to determine whether a customer should be offered service via a CSA rather than the general tariff. In addition to the other factors listed in the statute, the presence of competitive alternatives or a customer's unique circumstances is appropriately deemed an "other reasonable consideration" permitted by the statute. Moreover, by granting carriers the authority to enter into CSAs pursuant to KRS 278.160 and by granting certain carriers the authority to do so under KRS 278.512, the Commission has acknowledged that carriers need the flexibility to treat customers differently in

certain instances. It is, therefore, in keeping with KRS 278.030(3) for providers to treat customers who have competitive alternatives as a separate class of customers from the general body of ratepayers. It is also reasonable for providers to treat some CSA customers differently from other CSA customers as well as from the general body of ratepayers where the customers are unique or different for other reasons. [35]

Secondly, because these customers have competitive alternatives or are unique for other reasons, the services provided under CSA's are not provided "under the same or substantially the same conditions" as the service provided to the general body of ratepayers. The existence of competition or the customer's unique circumstances necessarily alters the conditions under which service is provided. Because the conditions of service are different, it is reasonable for carriers to price services differently with respect to the class of customers with competitive alternatives. Competitors "pick and choose" the customers to whom they want to offer service. They may chose to offer service to a very select group of customers in a given market, say call centers, but not offer service to other customers who would appear similar in nature. Thus, while the call center and another customer may purchase identical services, the call center has a competitive alternative while the other customer does not. The very fact that the call center has a competitive alternative makes the circumstances under which service is provided to it different from the provision of service to other customers which do not have competitive alternatives.

[35] See *Cincinnati Bell Telephone Company's Proposed Offering for an Educational Rate for Asymmetrical Digital Subscriber Line TurboSpeed* Service, Case No. 2002-00388, Order, March 17, 2003 finding that CBT has created a separate class of services for which a reduced rate is reasonable. See also *Louisville & Jefferson County Met. Swr. Dist. v. Joseph E. Seagram & Sons*, 307 Ky. 413, 211 S.W.2d 122 (1948) which states that "…a system of classification founded upon a natural and reasonable basis, with a logical relation to the purposes and objectives of the authority granted [to establish reasonable classifications], does not offend the principle of equal rights under the law." *Marshall County v. South Central Bell Telephone Company*, 519 S.W.2d 616, 619 (Ky. 1975) citing KRS 278.030 and stating that the Commission's authority to regulate rates "does not embrace the authority to compel a utility…to forgo the use of reasonable classifications as to service and rates."

Even if two customers each have competitive alternatives, however, they may not be "similarly situated" for other reasons. It is also appropriate for carriers to consider the unique service requirements, volume and term commitments, cost of service, etc. in evaluating whether a particular customer is an appropriate candidate for a CSA. Because of the unique circumstances or other differences, CSA customers may not be similarly situated to one another or to the general body of ratepayers. Thus, a difference in rates among customers is not per se unreasonable in violation of KRS 278.170(1).

The holding in *National-Southwire Aluminum Co. v. Big Rivers Elec. Corp.*, 785 S.W.2d 503, 514 (Ky. App 1990) supports CBT's position. There, the court upheld a variable electric rate for aluminum smelters stating that "even if some discrimination actually exists, Kentucky law does not prohibit it per se. According to KRS 278.170(1), we only prohibit '*unreasonable* prejudice or disadvantage' or an '*unreasonable* difference.'" (Emphasis added.) Again, different rates are warranted in the face of competition or where the unique circumstances otherwise warrant different treatment.

The case decided by the United States Court of Appeals for the District of Columbia Circuit's, *Sea-Land Service, Inc. v. ICC*, 238 U.S. App. D.C. 165; 738 F.2d 1311 (1984) also supports this position. There, the Court rejected the petitioners' claim that two contract rate arrangements were inherently discriminatory in violation of the ICA's nondiscrimination provision. The Court reasoned that changes in ratemaking made the inference that contract rates were per se discriminatory unjustified. The Court found that the Interstate Commerce Commission ("ICC") had permitted carriers to enter into contracts where there were differences

in costs to provide service and competitive conditions so long as the carrier offering the contract rates made them available to all similarly situated shippers of like commodities.[36]

For these reasons, the presence of competitive alternatives or other unique circumstances makes the conditions of service different for a certain class of customers, i.e. CSA customers, such that a difference in rates is reasonable and not in violation of KRS 278.170(1).

E. Termination charges are necessary aspects of CSAs as actual damages stemming from early termination of a CSA cannot be readily determined; termination charges are mutually beneficial to CSA parties.

At the October 23, 2003 hearing, the Commission requested the parties to discuss termination charges (Tr. at 216) and whether such charges were harmful to competition. (Tr. at 216-217) Furthermore, the Commission requested comments regarding the length of time CSAs are effective and the role that contract length has in the competitive market. (Tr. at 217). CBT asserts that termination charges and contract length work together to provide the CSA customer and the provider with a mutually beneficial agreement. Accordingly, commercially accepted termination charges should be permitted in order to ensure that both parties receive the benefit of their agreement.

Under the typical and common terms of a CSA, a customer agrees to purchase a provider's services for a specified period of time. In CBT's case, for example, customers have the flexibility to choose the length of the contract, ranging from one to five years. In exchange for this flexibility, the provider is obligated to provide service(s) to that customer at a specified

[36] *Sea-Land Service, Inc. v.* ICC, 738 F.2d 1311, 1316-1317 (1984). The Court sites the ICC policy that a determination of whether shippers are similarly situated is best made on a case-by-case basis. The policy provides that contract rates offered to one shipper but not another will not constitute discrimination where the circumstances and conditions of service are not substantially similar. The policy further provides that differences in the cost of serving individual shippers and in competitive circumstances can justify different rates.

price which is generally below the tariffed rates.[37] The value to the customer is the reduced price for service over time, while the provider benefits from having a secure revenue stream over the same specified period of time.

As Mr. Ringo explained in both his pre-filed and hearing testimony, flexibility in pricing via CSAs is particularly important to ILECs in today's competitive marketplace. (Ringo Pre-filed Testimony at 5.) CSAs allow ILECs to remain competitive in the face of bids from CLECs and other competitive providers of the same or similar services. (Ringo Pre-filed Testimony at 28.) There must be safeguards in CSAs, however, to ensure that the pricing flexibility CSAs offer CBT and other providers is not used by customers to the disadvantage of the provider as well as the provider's other customers.

As explained above, an ILEC's competitors generally market their services to the most attractive and lucrative customers. Because these providers do not have carrier of last resort responsibilities, they generally have significantly less overhead costs to provide service than do ILECs. Thus, competitive providers typically differentiate themselves on price, offering the same or similar services provided by an ILEC at a discount from the ILEC's tariffed rate. (Ringo Pre-Filed Testimony at 15.) Because competitive providers target specific customers, a customer who has already negotiated and committed to a CSA with another provider may seek to terminate its agreement early in favor of another provider's offer. If a customer can cancel its CSA without commercially adverse consequences, a primary purpose of CSAs, namely to ensure stability of price and service for both the customer and provider for a specified period of time,

[37] CBT also enters into CSAs in accordance with the volume and term discounts set forth in its Exchange Rate Tariff and General Exchange Tariff. The rates for these CSAs are, therefore, included in CBT's tariff. See, for example, TRUNK Advantage, "Terms and Services," attached as Exhibit A.

will be lost. Thus, if a customer commits to a CSA, there must be some commercial consequences if that customer terminates the CSA early and without cause. A specified termination fee enables the customer to determine whether it is financially prudent for the customer to terminate the contract early and pay the applicable termination charge or to continue under the CSA until its expiration. Further, a specified termination fee protects the customer from having to pay unknown charges for early termination. In this way, a termination fee serves the interest of both the CSA provider and the CSA customer.

If a CSA is terminated early, the service provider suffers damage. However, because such damages involve more than simply a loss of revenue, the actual amount of the damage is difficult to quantify. For example, the network planning and engineering process takes into consideration the anticipated demand that all customers, including CSA customers, will make on the network during a particular period of time. A provider may decide that it should deploy additional facilities in a particular part of its network in order to accommodate the demand on the network and provide adequate service to a CSA customer as well as the remaining customers. In purchasing and deploying additional facilities, the provider may make capital expenditures it would not otherwise make but for the projected demand on the network. If a CSA customer terminates the agreement early, the CSA customer may no longer make any demand on the network. As a result, the provider may have invested capital unnecessarily or earlier than necessary based on a CSA customer that is no longer on the network.

While it may be possible for the provider to reclaim and reuse a portion of the facilities deployed, it is difficult to quantify the costs of doing so. More importantly, it is difficult to quantify the actual damage resulting from a capital expenditure that proves to be unnecessary, especially where the carrier may have foregone or limited capital expenditures for other purposes

in order to deploy the additional facilities needed to serve a CSA customer. A provider's ability to maintain and operate its network efficiently and effectively also affects the provider's ability to provide service at its tariffed rates to its remaining customers. Accordingly, CBT utilizes CSAs that contain termination charges, which apply if the customer cancels service without cause before the end of the service term.

Customers are free to terminate a CSA prior to its expiration, but CBT contends that the Commission should not preclude providers from including early termination fees in CSAs. (Ringo Pre-Filed Testimony at 29.) More specifically, CBT urges the Commission to continue to allow termination charges (which function in the same manner as liquidated damages for other contracts) to compensate providers for damages sustained when a CSA is terminated early and without cause. Liquidated damages are permitted under Kentucky law and can be reasonably applied to the termination clauses included in CSAs.

Specifically, Kentucky law allows for liquidated damages if such damages are "reasonable in the light of anticipated or actual harm…[if there are] difficulties of proof of loss" or it is in some other way infeasible to obtain an adequate remedy.[38] The test generally used by Kentucky courts to determine whether a liquidated damage provision is reasonable requires an analysis of: (1) whether the actual damage sustained would be difficult to determine; and (2) whether the amount fixed as liquidated damages is not grossly disproportionate to the sustained damages.[39] Moreover, Kentucky courts generally consider liquidated damages to be a beneficial tool to ensure that there is no uncertainty regarding damages in the event of a breach. This is particularly true when the contracting parties are both businesses and are aware of the

[38] KRS 355.2-718.

implications of the contract provisions.[40] If the contracting parties agree to a sum of liquidated damages, "a court is not free to disregard [the] provision…. It can do so only if, from the language of the contract, the damages at issue are actually ascertainable."[41] Furthermore, a liquidated damages clause is *presumed* to be reasonable, and if one party wants to repudiate the provision, that party has the burden of proof.[42] (Emphasis added). "In order for a court to find that a liquidated damage provision is an unenforceable penalty, the party arguing against the provision must demonstrate that in the time and place of the contract, the amount of stipulated damages far exceeds the damages that would actually flow from a breach."[43] Because of the nature of the damages that flow from early termination of a CSA, actual damages cannot be easily estimated or quantified, particularly from a network perspective as explained above. Therefore, CBT's CSAs contain termination clauses that are reasonable as compared to the resulting harm.

In order to protect the interests of the parties to the CSA as well as the interests of the remaining ratepayers, CSAs must include a termination fee that contemplates payment upon the early termination of the agreement. The CSAs used by CBT, for example, typically include one of two types of termination fees. The first type requires a customer who terminates a CSA before its expiration to pay the difference between the rates contained in the CSA and the tariffed rates for the individual services provided under the CSA. The second type of termination fee requires a customer to pay the contract price for the period of time remaining for the CSA. Both

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[39] See *Wehr Constructors Inc. v. Warren Public Judiciary Corp.,* 769 S.W.2d 51, 55 (Ky. Ct. App. 1998)(citations omitted).
[40] See *Mattingly Bridge Co., Inc. v. Holloway and Son Construction Co.*, 694 S.W.2d 702, 706 (Ky. 1985).
[41] See *The Traveler's Insurance Co. v. Corporex Properties, Inc.* 798 F. Supp. 423, 428 (E.D. Ky. 1992).
[42] See *In re Yost*, 54 B.R. 818 (W.D. Ky. 1985)
[43] Id. at 822.

types of termination fees are included in CBT's approved tariffs. Since both parties to the CSA agree that the termination fee set forth in the particular CSA will be paid in the event of early termination, neither the difference between the tariff and CSA rates nor the full contract amount can be said to be disproportionate to the damage. For this reason, the Commission must give an agreed early termination provision its full effect.[44]

CSAs are also subject to detailed negotiations whereby CBT and the customer can modify the termination fees and the terms surrounding early termination. For instance, CBT would consider another type of early termination clause, such as a combination of the existing types, in order to secure a CSA with a customer. The length of time for a CSA is also negotiable by the parties. These negotiations allow the parties to weigh the risks and benefits of the CSA and to come up with a mutually beneficial contract. Accordingly, CBT requests that the termination clauses and length of CSAs continue to be at discretion of the provider and its customers.

F. KRS 278.512 grants the Commission the authority to exempt CSAs from the filing requirements of KRS 278.160 if doing so is in the public interest.

In the Joint Proposal submitted by CBT, Kentucky ALLTEL, and BellSouth ("Joint Parties"), the Joint Parties recommended that the Commission adopt the following guidelines for all telecommunications carriers providing service in Kentucky:

a. Companies may enter into CSAs in order to meet competition or in other unique circumstances.
b. There are no filing requirements for these contracts or supporting information, except that the companies are required to file copies of signed contracts along with supporting cost information upon request from the Commission or staff. CLECs will not be required to file cost information in support of any CSA.
c. If the Commission or staff requests the filing, companies will be allowed to redact the customer name and address on the contract that is filed for the public record.

[44] See *Travelers Insurance Co.*, 798 F. Supp. at 428.

The Joint Proposal further specified that the need to meet competition or to account for other unique circumstances include any or all of the following circumstances:

a. A customer has an offer (written or oral) from a competitor or, because of general knowledge of the level of competition in an area or market segment, it is reasonable for a company to believe that a customer has an offer from a competitor;
b. Competitive offers have been made to customers in an area or market segment via some form of media or other communication;
c. A company determines that it should give a customer a discount in recognition of the customer maintaining a specified service or group of services for a specified period of time;
d. A company determines that it should give a customer a discount in recognition of the total billed revenue a customer brings to the company or total volume of services purchased by the customer; and
e. A company determines that it should give a customer a discount in recognition of the potential that the customer will generate additional revenue by purchasing integrated service packages or bundles.

KRS 278.512 gives the Commission broad power to adopt the Joint Proposal, thereby eliminating the filing of CSAs except at the Commission's request, if it finds that doing so is in the public interest. (Tr. at 20.) CBT submits that the filing of CSAs by providers is not necessary to protect the interests of consumers or competitors, especially given the fact that not all providers currently file CSAs with the Commission today. The Commission can properly eliminate the filing of CSAs based on the public interest criteria set forth in KRS 278.512(3), while retaining its jurisdiction over the rates, terms and conditions of CSAs pursuant to KRS 278.260.

First, the Commission need not consider criteria KRS 278.512(3)(a) as there is no evidence to suggest that eliminating the filing requirement for CSAs will affect the extent to which competing telecommunications services are available from competitive providers in the relevant market. Although the filing of CSAs with the Commission may provide competitors with "a one-stop shopping database" from which to target particular customers, a competitor

must have already have the ability to provide service to the customer through resale of the ILECs services or through UNE-based or facilities-based competition in order for a filed CSA to be useful in the first place. (Tr. at 21.) Moreover, a CSA is simply an agreement to sell a tariffed service(s) at a price which differs from the tariffed rate(s). Thus, the filing of a CSA is not necessary for a competitive provider to know what services another competitor is capable or willing to offer. In other words, the filing of a CSA simply irrelevant to whether services are available from competitive providers.

Similarly, the existing ability and willingness of competitive providers to make functionally equivalent or substitute services readily available does not depend on whether a CSA is or is not filed with the Commission. KRS 278.512(3)(b) requires the Commission to take this matter into consideration. The competitor either has or does not have the ability and willingness to provide equivalent or substitute service to a customer. Furthermore, the competitor must make an individual assessment of the customer in order to know what the customer's telecommunications needs are and whether it is able meet those needs. Finally, the Commission does not need to consider KRS 278.512(3)(c) as the filing of CSAs with the Commission has no bearing on the number and size of competitive providers of service.

Criteria (d), on the other hand, is relevant to the Commission's consideration of the Joint Proposal. KRS 278.512(3)(d) requires that the Commission consider the overall impact of the proposed regulatory change on the continued availability of existing services at just and reasonable rates. CBT asserts that eliminating the CSA filing requirement will have no adverse impact for two reasons. First, the Commission will continue to review and approve providers' generally available tariffs to ensure that they are just and reasonable in accordance with KRS 278.160. These tariffs cover the majority of telecommunications consumers throughout

Kentucky. More importantly, however, the Commission does not need to monitor the rates set forth in individual CSAs in a competitive marketplace. Market forces will ensure the reasonableness of the rates, terms and conditions of service under a CSA. If the rates, terms or conditions of service under a CSA are unreasonable, customers will simply take their business to another provider. Furthermore, because the rates under a CSA are typically lower than the tariffed rates for the component services, providers have no incentive to enter into CSAs except in response to competition or other limited circumstances. If they were to enter into CSAs indiscriminately, providers would simply forego revenue unnecessary. Providers will only seek to use CSAs to secure a customer's business in response to competitive pressures and the need to respond to the customer's unique circumstances.

Moreover, as the Commission reasoned in its decision in Administrative Case No. 370, the Commission will continue to have authority to investigate the reasonableness of rates prescribed by a CSA on its own motion or upon a customer's complaint pursuant to KRS 278.260, whether or not CSAs are exempt from filing.[45] As set forth in the Joint Proposal, the Commission can request to see a particular CSA and supporting documentation at its discretion. If the Commission finds that the rates, terms or conditions of a CSA are not reasonable or are unreasonably discriminatory, the Commission can order a just and reasonable rate to be followed in the future pursuant to KRS 278.270. In sum, the Commission will continue to have jurisdiction to investigate the reasonableness of rates and services provided under a CSA even if the CSA filing requirement is eliminated.[46]

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[45] *In the Matter of Exemptions for Providers of Local Exchange Service Other Than Incumbent Local Exchange Carriers*, Administrative Case No. 370, Order, January 8, 1998.

[46] See *Orloff v. FCC et. al.*, U.S. Ct. of Appeals (D.C. Cir.), Docket No. 02-1189, 2003 U.S. App. LEXIS 26163 (decided Dec. 23, 2003). The Court reasoned that while CMRS providers were not required to file tariffs pursuant

KRS 278.512(3)(e) requires that the Commission consider whether there are adequate safeguards to prevent carriers from using regulated services to subsidize nonregulated or exempted services. CBT submits that the filing of CSAs is not necessary to prevent such cross-subsidization. KRS 278.514 and the regulations which have been adopted pursuant to that statute require a provider of nonregulated services to keep separate accounts for those services and to allocate costs between regulated and nonregulated service in accordance with Commission rules. The statute also imposes penalties for violations of the statute. In addition, the portion of the CSAs filed with the Commission generally sets forth only the regulated services to which the customer subscribes. CSAs do not generally include the nonregulated services such customer premises equipment, data services, wireless services, etc. to which the customer may subscribe. As Mr. Ringo explained at the Hearing, "[a]ny contract that would be filed with this Commission may not be a complete representation of the services that the customer is buying from us…. the full set of services that [a] customer is buying from us are not even on file with this Commission." (Tr. at 24-25.) For these reasons, the filing of CSAs with the Commission will not provide the Commission with sufficient information to determine whether a provider is engaged in the cross-subsidization of nonregulated services. Thus, exempting CSAs from the filing requirement does not affect the Commission's ability to enforce KRS 278.514.

Exempting CSAs from the filing requirement also does not affect the Commission's efforts to promote the universal availability of basic telecommunications services at affordable rates or the need of providers to respond to competition. KRS 278.512(3)(f) requires the

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to Section 203 of the Telecom Act, Section 202 prohibiting unjust or unreasonable discrimination could be implicated. Citing to an earlier opinion of the Court, *MCI Worldcom v. FCC*, 209 F.3d 760 at 766 (D.C. Cir. 2000), the Court concluded that the FCC was "entitled to value the free market, the benefits of which are well-established" in considering whether a providers sales concessions were reasonable.

Commission to consider these criteria as well. Unlike their competitors, ILECs, like CBT, have carrier of last resort obligations and must maintain and operate their network in order to provide service to virtually all customers in the ILEC's operating area. For this reason, CBT believes that CSAs are crucial to its continued viability in a competitive marketplace. If ILECs did not have the ability to use CSAs to respond to competition or in other unique circumstances, ILECs would simply lose customers to other providers whose costs to provide service are generally lower than an ILEC's costs. Eventually, the loss of business customers would require ILECs to raise the rates for its remaining customers. In this way, the ability of providers to use CSAs can have a very real affect on the universal availability of basic services from ILECs. The *filing* of CSAs, however, has no impact on universal service or on the Commission's ability to promote universal service.

While providers' ability to use CSAs impacts their ability to respond to competition, the filing requirement does not affect providers' ability to compete. In fact, the filing of CSAs may serve to dampen competition in that a provider may use CSAs filed with the Commission as its exclusive marketing tool rather than aggressively marketing service to a broad range of customers.[47] CBT also disagrees that the Commission's exemption for BellSouth, which permits

[47] See CBT's Petitions for Reconsideration filed on April 20, 2002 and October 4, 2002 in *Cincinnati Bell Telephone Company's Petition for Confidential Treatment of Certain Terms and Conditions of an Individual Customer Contract*, Case No. 2002-2004. CBT cited the potential for competitors to use the identity of customers who enter into CSAs as a marketing tool in support of its request for confidential treatment of CSA customers' names and addresses. CBT argued that the information should be exempt from public disclosure pursuant to KRS 61.878(1)(c) because disclosure of the information causes CBT competitive disadvantage vis-à-vis its competitors. Although the Commission denied CBT confidential treatment of the information on this basis, CBT reasserts that such disclosure causes it to be competitively disadvantaged now that it has come to light that many competitors do not file CSAs with the Commission whatsoever. CBT also cited the federal requirement that it protect individual customers' customer proprietary network information ("CPNI"), 47 U.S.C. §222, in support of an exemption from public disclosure pursuant to KRS 61.878(1)(k). CBT believes protection of individually identifiable CPNI is not only required by federal law but that disclosure of CPNI should be at the discretion of the interested customer.

it to file summary information rather than the full CSA, may have "disadvantaged" CLECs who can no longer review the full CSA. As mentioned earlier, this proceeding has brought to light the fact that not all providers are currently filing CSAs with the Commission in the first place. Under these circumstances, the Commission should be concerned about leveling the playing field for all providers rather than whether the filing of summary information has disadvantaged CLECs in particular. By eliminating the filing requirement for all providers, the Joint Proposal does just that—it requires all carriers to play by the same rules so that one class of providers is not disadvantaged to another class. Moreover, as explained during the course of the hearing, providers have a variety of means to learn about competitive offers by other providers.

Just as the Commission should eliminate the CSA filing requirement for all regulated providers in order to level the playing field among them, the Commission should eliminate the filing requirement so that regulated providers are on a level playing field with nonregulated providers as well. As mentioned earlier, ILECs and CLECs are just two of the players in the telecommunications marketplace. Today, there are numerous providers offering functionally similar telecommunications services such as wireless, satellite, cable and VOIP providers who are not within this Commission's jurisdiction competing for customers' communications "spend" along side of ILECs and CLECs. (Tr. at 105-106) As required by KRS 278.512(3)(g), the Commission should consider whether the exercise of its jurisdiction to require some but not all regulated providers to file CSAs "inhibits" their ability to compete with unregulated providers of functionally similar telecommunications products or services.

To the extent that the CSA filing requirements prevent regulated providers from employing CSAs as frequently as competition or other unique circumstances, these providers are inhibited from competing effectively with nonregulated service providers. For example,

Kentucky ALLTEL's witness, Charles Harwood, testified that Kentucky ALLTEL had filed only one CSA in the last year. (Tr. at 193.) He stated further that Kentucky ALLTEL "may have filed many more" but that the requirement that it file CSAs 30 days in advance was "too time consuming to be effective in responding to customers." (Tr. at 193, citing Pre-filed testimony of S. Mowery at 6.) According to Mr. Harwood, Kentucky ALLTEL was "losing a significant amount of business" because of the lengthy approval process. (Tr. at 195.) Moreover, it appears that the burden of filing numerous CSAs with the Commission is one reason the Commission granted BellSouth's request to modify the filing procedures for CSAs.[48] Thus, the Commission should eliminate the filing requirement for CSAs for all providers in light of the fact that unregulated service providers do not have such filing requirements. In this way, the Commission can encourage competition among all telecommunications providers—regulated and nonregulated alike—by ensuring that all providers can effectively and efficiently meet the needs of customers without unnecessary regulatory constraints.

KRS 278.512(c)(h), the last of the specific criteria the Commission is required to consider, states that the Commission shall consider the impact of a proposed regulatory change for customers of small and nonprofit carriers. While the Joint Proposal seeks to have all providers subject to the same rules for CSAs, CBT contends that customers would not be disadvantaged if providers which currently do so were no longer required to file every CSA with the Commission.

At the Hearing, Mr. Ringo explained that CSAs filed with the Commission do not typically include the nonregulated portions of the agreement. (Tr. at 24.) For this reason, a CSA

[48] See *In the Matter of BellSouth Telecommunications, Inc.'s Proposed Changes in Procedures for Filing Contract Service Arrangements and Promotions*, Case No. 2001-0077, Order, September 28, 2001.

on file with the Commission would not give a customer the full picture with respect to all of the services that may be purchased by a particular CSA customer. As Mr. Ringo stated at the hearing, "each situation is very unique…I don't believe a side by side comparison [of filed contracts] is always appropriate." (Id.) By way of example, Mr. Ringo explained that a customer may have a PBX and may have a contract with CBT to purchase PBX trunks at a discounted rate. The customer may also purchase numerous other services from CBT, although these services would not be included in the CSA on file with the Commission if they are unregulated or if they are purchased at tariffed rates. If another customer seeking to buy only PBX trunks looked at the CSA filed with the Commission, the customer "would be under the impression that they could get [PBX trunks] at that same price, not knowing that the full set of services [the CSA] customer is buying from us are not even on file with this Commission." (Tr. at 24-25). In other words, the customer reviewing the filed CSA and the CSA customer may not be alike or "similarly situated" in terms of the services they purchase from CBT. There may also be differences in terms of volume of service, customer location to certain facilities, unique requirements, etc. In order for the customer reviewing the CSA to know whether it is eligible to receive PBX trunks at the same rate as the CSA customer, the customer will have to discuss its specific service requirements with a CBT account representative.

In addition to speaking to a particular provider's representatives, customers may also become aware potential pricing options by speaking to friends or associates or by calling any number of competitive providers in a market. As Mr. Ruscilli explained at the Hearing, customers become aware of offers from "[a] variety of forums." (Tr. at 96.) Mr. Ruscilli suggested that customers get information from meeting with others in their industry (e.g. trade forums) or from meetings of organizations like the Rotary or Lions Clubs where business leaders

share information with one another. (Id.) The customer can also request offers from numerous service providers to determine which offer is the best for it based on the combination of price and services. In other words, CSAs are not the only or even the most informative means by which customers can get information about the service offerings of a particular provider. In a competitive marketplace, customers are empowered to choose among a number of providers and to play competitors against one another. In this way, customers strive to negotiate the best deal possible. Eliminating the filing requirement for CSAs will not impair customers' ability to be informed consumers of telecommunications services.

For the reasons addressed above, the Commission should find that eliminating the filing requirement for CSAs is in the public interest pursuant to the criteria set forth in KRS 278.512(3). Eliminating the filing requirement will encourage robust competition in the telecommunications marketplace to the benefit of all consumers by leveling the playing field among all providers—regulated and nonregulated—while minimizing regulatory requirements that are no longer necessary to protect the public.

IV. CONCLUSION

CSAs are critically important to today's competitive marketplace. CSAs encourage robust competition among all providers, including ILECs, by giving providers the flexibility to respond to customers' telecommunications needs quickly and effectively. The growth and development of such direct competition was the intent of both the Telecom Act and KRS 278.512, and customers demand nothing less than aggressive competition for their business. The benefits of CSAs extend beyond CSA customers themselves, however. CSAs also ensure the economic stability of ILECs, which continue to bear carrier of last resort responsibilities, to the

benefit of *all* ratepayers. Thus, CSAs serve the public interest by promoting competition as well as the universal availability of service at reasonable rates for all Kentucky citizens.

In order for customers to truly reap the benefits of a competitive market, however, the Commission must ensure that all providers—regulated and nonregulated, ILECs and competitive providers alike—have an equal opportunity to compete. Thus, the rules and regulations concerning the use of CSAs should be the same for all providers. For this reason, CBT encourages the Commission to adopt the Joint Proposal. Adoption of the Joint Proposal will not only level the playing field among all competitors but will serve to eliminate a filing requirement that is no longer in the public interest. The Commission will continue to have jurisdiction to investigate the reasonableness of the rates, terms and conditions of CSAs on its own motion or upon complaint and to ensure that CSAs are not used in a manner which unreasonably discriminates among customers.

For the reasons set forth herein, CBT encourages the Commission to continue to promote competition in the provision of telecommunications services by enabling all providers to use CSAs in response to competition and in other unique circumstances as set forth in the Joint Proposal.

Respectfully submitted,

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EXHIBIT A