COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

IN THE MATTER OF:

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

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BRIEF OF THE OFFICE OF THE ATTORNEY GENERAL

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INTRODUCTION

On December 19, 2002 the Public Service Commission, hereafter referred to as Commission, opened this docket to investigate the use of contract service arrangements, hereinafter CSAs, by the telecommunication industry. 807 KAR 5:011 requires that all utilities file at the Commission "true copies of all special contracts entered into governing utility service".

The filing requirement was relaxed for BellSouth Telecommunications, Inc., hereinafter referred to as BellSouth, in its case No. 2001-00077. The reasoning behind allowing the deviation at that time was BellSouth's argument that since the Telecommunications Act of 1996, ILEC telecommunication carriers were filing a larger number of CSAs which was "consuming a significant amount of staff time of BellSouth and the Commission."[1] The previous approval process took around 30 days. BellSouth suggested that the deviation allowed them "the opportunity to compete more efficiently with its unregulated CLECs."[2]

Since the Commission granted the deviation to BellSouth the issue of disadvantaging telecommunication customers and carriers has arisen.[3] These cases raised the question -- are CSA's permitting a violation of KRS 278.170, discrimination as to rates or service?

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[1] BellSouth Telecommunications, Inc. proposed New Procedures For Filing Contract Service Arrangements and Promotion, Case No 2001-077 at page 2.
[2] Id at page 8.
[3] See cases 2001-00099, SPIS.net v. BellSouth Telecommunications, Inc. and Case No. 2001-00068, Computer innovations v. BellSouth Telecommunications, Inc. where BellSouth refused these ISPs the same rate as another ISP in violation of KRS 278.170(1).

FACTS

CSAs originated as a way to allow an entity to obtain utilities during special circumstances such as construction. Their use has been allowed to grow and has become a way to circumvent the tariffs by giving discounted rates to customers. When BellSouth filed its testimony in this case, 40% of its PRI services were being offered by CSAs. (Transcript of Evidence, page 53.) At the time of the hearing, 80% of those subscribing to PRI services were under CSAs. (Transcript of Evidence, page 73.)

The onset of the Telecommunications Act of 1996 to encourage competition in the telecom industry has made enforcing the statutes and the use of CSAs a tough-balancing act. While the Commission wants to take the steps necessary to encourage competition, it still has a duty to assure the statutes are followed and consumers are protected. Though the goal of the Telecommunications Act of 1996 is to have a competitive arena, we have not reached the place where oversight is not necessary. Regulation is still the law. Therefore, the Commission has the duty to decide the best method to accomplish all the obligations required of them--maintain fair, just and reasonable rates and service for the end-user while permitting competition to foster.

During an informal conference, and at the hearing, the ILECs made a proposal to the Commission. (Transcript of Evidence, page 10; Joint Industry Proposal to Kentucky PSC for CSA Standards, October 1, 2003.) This proposal does not require the ILECs to file the contracts with the Commission unless requested by the Commission. (Transcript of Evidence, page 19.) Though the ILECs may feel that this is fair and just, it does not address some of the areas of concern. How can end-users be aware there

are rates out there they may be entitled to if they are not filed anywhere? How do the end-users know that they are not being discriminated against if there is no place to go to see what others are paying? How do resellers know there are contracts they can resell if the contracts are not filed in a place where they are easily accessible?

It is easy to say that an end-user can just call the utility and get a copy of the contracts or ask the customer representative what other contracts have been issued, but is that really reasonable? The company that is being requested to release this information is the same company who has the potential of losing the customer or having to offer a lower price than originally anticipated. Could this be a little like the wolf guarding the hen house?

The Frankfort Electric and Water Plant Board also filed a proposal. (Transcript of Evidence, page 10; The Electric & Water Plant Board of the City of Frankfort, KY. Joint Industry Proposal to Kentucky PSC for CSA Standards, October 10, 2003.) Its proposal requires either the posting of the contract, names and addresses redacted, on a web site or filed with the Commission with no redaction. No other CLEC filed a proposal.

The CLECs do not believe they have to file their contracts at the Commission. They do want the ILECs to have to file their contracts with the Commission. Plus, the CLECs do not want the names and addresses to be redacted. This proposal raises the question of fairness to the ILECs. Should the CLECs be able to use the Commission as a potential customer base?

At the end of the hearing, Chairman Hueslmann had four specific points of concern. During the hearing, the term "similarly-situated" was used in describing the standard of review that was used to determine whether KRS 278.170 had been violated.

Chairman Hueslmann pointed out that KRS 278.170 does not use that terminology. Because CLECs are not regulated, Chairman Hueslmann also asked if the PSC had the authority to require CLECs to file its CSAs with the Commission. He further inquired if maybe the Commission should address termination penalties and the length of the contracts. Chairman Hueslmann final question was since the onset of competition, if the "filed rate doctrine" should be abolished. (Transcript of Evidence pages 215-217.)

While all his concerns raised by Chairman Hueslmann are very important and need to be looked into, the Office of the Attorney General contemplates they will be covered adequately by the other parties. Therefore, his office will only address the question on whether the "filed rate doctrine" should be abolished.

DISCUSSION

SHOULD THE "FILED RATE DOCTRINE" BE ABOLISHED?

In the 1800's, it was discovered that some carriers were giving "preferential treatment" to some of the shippers. See S. Rep No. 46, 49th Cong. 1st Sess. 179-200 (1886). To discourage the "secret deals", the filed rate doctrine was established. 49 USC §1976 (a).

Though the filed rate doctrine has never been officially applied in Kentucky by name, the principle has been discussed in many Kentucky cases. (See dicta in Chandler v. Anthem Ins. Companies, Inc., Ky. App, 8 S.W. 3d 48 (1999.) The filed rate doctrine provides that ratepayers may not bring a claim against a utility for the rates that are being charges if the rates were approved by a government agency. Keogh v.

Chicago & Northwestern Railway Co., 260 U.S. 156, 162, 67 LEd 183, 187 (1922). Square D. Company v. Niagara Frontier Tariff Bureau, 476 U.W. 409 (1986).

Though the statute that requires telecommunication companies to file its rates may have originated during a total monopoly arena and we are now trying to move towards a competitive arena, the underlying reasoning behind the doctrine is still true today. The filed rate doctrine is there to protect the consumers. Essential Communications Systems, Inc. v. American Telephone & Telegraph Co. 610 F2d 1114, 1121 (3rd Cir 1979). The question of abolishing the doctrine arose because we are heading towards competition, but the doctrine can also protect competition. It originated in a competitive field.

The doctrine originated because carriers were giving special treatment to some shippers. By giving some of the shippers these lower rates, this could have caused the shippers that were not getting the lower rates to be unable to compete or stay in business. If the purpose behind the document is viewed in the consumer's point of view and not the telecommunication company, the same principal still applies today. For example, if you are an end-user business and to run your business you need access to a phone line, the cost of that access may be a large part of your expense. To stay in business you need to keep your expenses to a minimum. If your competitor gets its access cheaper, its expenses will be less, so it can afford to stay in business, or because its expenses are less, it can afford to offer the service at a cheaper price, therefore, getting the customers. You are out of business. There is one less competitor. If we are talking ISPs, and the telecommunication carrier is also offering ISP service, they have just knocked off a competitor. If contracts are filed, and the end-

user business can see what other end-user business are paying, they can demand the same rate and if they go out of business, it will not be because it was being treated unfairly by the telephone carrier.

Though the doctrine may have been created to protect the consumers, by having rates on file, the utility and the Commission could also be protected from unnecessary lawsuits citing discrimination or overcharging. H.J., Inc. Northwestern Bell Telephone Co., 954 F2d 485, 489 (8th Cir., 1992.) Without documents available for consumer review, the impact on the Commission due to the possibility of more complaints addressing the rates that are being charged could be phenomenal. The time that BellSouth mentioned being used to review the contracts may now be used to review complaints. By having the documents filed and Commission approval, the complaints are limited to unreasonable discriminatory charges.

CONCLUSION

Before the Commission chooses to take steps to abolish the doctrine, they need to ask themselves whether the necessity of the doctrine protects the regulatory process in a way that further the doctrine's goal of protecting the consumers interests and the market. Carriers Traffic Service, Inc., v. Anderson, Clayton & Co., 881 F2d 475, 482 (7th Cir 1989).

The Attorney General respectfully submits that the filed rate doctrine does not need to be abolished. Having the contracts filed at the Commission could aid in

competition. It originated in a competitive arena and because there is competition is not a reason that it should be abolished.

Respectfully submitted,

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CERTIFICATION

This certifies that a true copy of the foregoing Brief was served upon the parties that participated in the hearing, by mailing a copy of same first class mail, postage this 21st day of January, 2004.

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