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January 21, 2004
VIA HAND DELIVERY

Thomas M. Dorman, Executive Director
Public Service Commission
211 Sower Boulevard
P.O. Box 615
Frankfort, KY 40602-0615

Re: Case No. 2002-00456, Inquiry into the Use of Contract Service Arrangements by Telecommunications Carriers in Kentucky

Dear Mr. Dorman:

Enclosed please find the original and ten (10) additional copies of the Brief of SPIS.net and Kentucky Bandwidth, Inc. to be filed in the above-referenced proceeding on behalf of SPIS.net and Kentucky Bandwidth, Inc. The additional copy is to be stamped with the date of receipt/filing and returned to us in the enclosed self-addressed stamped envelope.

Thank you for your assistance in this matter.

Sincerely,

Benjamin D. Allen

Enclosures

COMMONWEALTH OF KENTUCKY

BEFORE THE PUBLIC SERVICE COMMISSION

IN THE MATTER OF:	)	
	)	
INQUIRY INTO THE USE OF CONTRACT SERVICE ARRANGEMENTS BY TELECOMMUNICATIONS CARRIERS IN KENTUCKY	)	**Case No. 2002-00456**
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BRIEF OF SPIS.NET and KENTUCKY BANDWIDTH, INC.

COME Sprint Print, Inc., d/b/a SPIS.net and Kentucky Bandwidth, Inc., ("collectively SPIS"), by and through counsel, and for their Brief state as follows:

STATEMENT OF THE CASE

The Commission opened this case on December 19, 2002, in order to examine the use of contract service arrangements ("CSAs") by Kentucky telecommunications carriers and determine whether public interests in transparency and competition demand that the Commission require telecommunications carriers to file all CSAs. In addition, the Commission expressed its intention to consider whether it should set specific standards governing when carriers may sell services through a CSA rather than by generally applicable tariffs. The Commission opened this case in response to two prior cases in which the Commission found that a telecommunications carrier used CSAs inappropriately, Case Nos. 2001-00099[1] and 2001-00068.[2] In Case No. 2001-00099, the Commission held that BellSouth Telecommunications, Inc. ("BellSouth") acted inappropriately under KRS 278.170 by not offering the same rate for primary rate interface

[1] *SPIS.net v. BellSouth Telecommunications, Inc.*

[2] *Computer Innovations v. BellSouth Telecommunications, Inc.*

("PRI") line service to SPIS as it did to Hopkinsville Electric, Inc, a SPIS internet service provider competitor in the region. In reaching this conclusion, the Commission held that KRS 278.170 demanded equal treatment since SPIS and Hopkinsville Electric were similar in both the volume and term commitments of their services and that SPIS had requested "like and contemporaneous service under the same or substantially the same conditions."[3] The conclusions reached in these cases and the Commission's decision in Case No. 2001-00077 that BellSouth could file monthly summaries of its contracts rather than file the actual CSAs, prompted the Commission's current general review of the use of CSAs by telecommunications utilities and the extent to which filing CSAs with the Commission is necessary.

After the submission of numerous data requests and other filings, the parties held an informal "Industry Workshop" at the Commission's offices on October 1, 2003. Prior to that informal conference, BellSouth, Cincinnati Bell Telephone Company ("Cincinnati Bell"), and Kentucky ALLTEL, Inc. ("ALLTEL") submitted a Joint Industry Proposal for the establishment of new standards for CSAs that would apply to all Kentucky telecommunications providers, including Incumbent Local Exchange Carriers ("ILECs"), Competitive Local Exchange Carriers ("CLECs"), and Interexchange Carriers ("IXCs"). The Proposal does not include a mandate that telecommunications providers submit all of their CSAs to the Commission.[4] Under the Proposal, providers are required to submit signed copies of individual CSAs only upon request by the Commission. In the event that the Commission requests the submission of a CSA, the carrier would be allowed to redact the customer name and address from the contract.[5] In addition, the Proposal states that a carrier would be allowed to enter into a CSA "in order to meet competition

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[3] *See* December 19, 2002 Order in Case No. 2001-00099, at 9 (quoting KRS 278.170(1)).
[4] Joint Industry Proposal to Kentucky PSC for CSA Standards, October 1, 2003, § 2(b).
[5] *Id.* § 2(c).

or to account for other unique circumstances," including a situation in which a customer receives an offer from a competing carrier or when it is "reasonable" for the carrier to believe that its customer has received an offer from a competitor.[6] At the informal conference, parties such as the Commission Staff and the Electric and Water Plant Board of the City of Frankfort, Kentucky ("Frankfort Plant Board") questioned whether the rules contained in the Proposal would prevent larger companies from stifling competition from smaller companies by including early termination fees in their CSAs, and whether the disclosure of CSAs under the Proposal would be adequate to permit customers of telecommunications services to compare their service plans with other similarly situated customers. Despite these objections, BellSouth, Cincinnati Bell, and ALLTEL subsequently moved for the Commission to adopt this proposal on October 8, 2003. The Frankfort Plant Board responded by filing proposed amendments to the proposal on October 10, 2003. These amendments would allow carriers to enter into CSAs with a business customer in response to a written or verbal offer made to that customer by a competitor. In addition, the amendments require carriers to keep each individual CSA on their website with the customer name and address redacted or to file unredacted copies with the Commission.[7]

The Commission held an evidentiary hearing in this case on October 23, 2003. Cincinnati Bell, BellSouth, and ALLTEL introduced testimony, and the Commission heard testimony from a witness for the Frankfort Plant Board as to the effects of CSAs on smaller businesses who are competing with larger carriers. At the conclusion of the hearing, the Commission set a deadline of January 21, 2004 for filing and serving briefs.

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[6] *Id.* § 3(a).

[7] *See* Amendments to the Joint Proposal made by the Frankfort Plant Board, filed October 10, 2003.

On the particular issues for which the Commission solicited briefing, SPIS herein addresses (a) the application of KRS 278.170 and (b) whether the Commission has the authority to require the filing of all CSAs. In addition, this brief asserts that specific standards are necessary to govern when services may be sold by CSA rather than by generally applicable tariffs.

ARGUMENT

I. APPLICABILITY OF KRS 278.170

At the October 23, 2003 hearing, the Commission asked how the anti-discrimination provision of KRS 278.170 operates to protect similarly situated customers, noting that the statute prohibits only "unreasonable discrimination."[8] KRS 278.170(1) states:

> 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.

This statute must be read in conjunction with KRS 278.030(3), which allows a utility to establish "reasonable classifications" for service patrons and rates. In *National-Southwire Aluminum Co. v. Big Rivers Elec. Corp.*,[9] the Kentucky Court of Appeals held that in determining whether a utility has violated KRS 278.170, it is necessary to look to a variety of factors concerning the utility's relationship with its customers, including "the nature of the use, the quantity used, the time when used ... and any other reasonable consideration."[10]

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[8] Transcript of Record ("TR"), 215 *ll* 1-21.

[9] 785 S.W.2d 503 (Ky. App. 1990).

[10] *Id.* at 514 (quoting KRS 278.030(3) and affirming Commission approval of variable rate tariffs for aluminum smelters that made a distinction based on market price of electrical power rather than between customers); *see also Marshall County v. So. Cent. Bell Tel. Co.*, 519 S.W.2d 616, 619 (Ky. 1975) (holding that a plaintiff can prove a violation of KRS 278.170 only when it can

The Commission applied KRS 278.170 to protect SPIS in Case No. 2001-00099, holding that SPIS was similarly situated with Hopkinsville Electric and entitled to the same PRI rate. In reaching this conclusion, the Commission noted 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."[11] Similarly, the Commission has found such impermissible discrimination where free utility service was offered to a single individual,[12] line extension costs for new service would be shifted to existing utility customers,[13] and where the utility gave an advantage to itself in comparison to a customer to whom it sold the same service.[14] Thus, the Commission has the authority to strike down a CSA that discriminates between two or more similarly situated customers as an unreasonable preference or difference under KRS 278.170(1), and Commission decisions illustrate situations in which the preference has been found to be "unreasonable."

II. THE AUTHORITY OF THE COMMISSION TO REQUIRE THE FILING OF ALL CSAs

Kentucky administrative regulations require that "[e]very utility shall file true copies of all special contracts entered into governing utility service which set out rates, charges or

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establish that the defendant discriminated between localities "for doing a like and contemporaneous service under the same or substantially the same conditions").

[11] December 19, 2002 Order in Case No. 2001-00099, at 9.

[12] *See* August 15, 2001 Order in Case No. 2001-187, *In the Matter of Mockingbird Valley Sanitation, Inc. for Approval of the Transfer of the Mockingbird Valley Sanitation, Inc. Wastewater Treatment Plant to the Oldham County Sanitation District*, at 7, 10.

[13] *See* September 23, 1987 Order in Case No. 9926, *In re Application of Lexington-South Elkhorn Water District and Kentucky-American Water Co. for the Approval of the Purchase by Kentucky-American Water Co. of the Assets of Lexington-South Elkhorn Water District, for Approval of Rates to be Charged for Service within the Boundaries of Lexington-South Elkhorn Water District after Acquisition, and for a Certificate of Convenience and Necessity Authorizing the Construction of Certain Improvements*, at 4.

[14] *See* November 30, 2000 Order in Case No. 99-484, *IgLou Internet Services, Inc. v. BellSouth Telecommunications, Inc.*, at 11-12.

conditions of service not included in its general tariff."[15] The Commission's decisions in Administrative Case No. 370[16] implicitly relieve all but the ILECs of this requirement. However, these decisions to fully or partially exempt telecommunications carriers from the filing requirements of KRS 278.160[17] were taken pursuant to KRS 278.512(2), which permits the Commission to lift or alter — "to the extent that it deems reasonable" — statutory requirements relating to the provision of telecommunications products or services. The statute specifically provides that the Commission may reverse or further modify any such exemption:

> The commission, ... after notice and hearing, if requested, may vacate or modify any orders granting an exemption or establishing alternative requirements if it determines by clear and satisfactory evidence that the findings upon which the order was based are no longer valid, or that the exemption or modifications are no longer in the public interest.[18]

The mandate that the Commission retain jurisdiction to revisit any alteration of the statutory scheme of regulating telecommunications utilities[19] is consistent with the express legislative finding that the public interest requires giving the Commission flexibility in the regulation of telecommunications "giving due regard to the interests of consumers, the public, the providers ..., and the continued availability of good telecommunications service."[20]

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[15] 807 KAR 5:011, § 13 (emphasis added).

[16] Administrative Case No. 370, *Exemptions for Providers of Local Exchange Service Other than Incumbent Local Exchange Carriers*, January 8, 1998. On reopening, August 8, 2000, Administrative Case No. 370 was consolidated with Administrative Case No. 359, *Exemption for Interexchange Carriers, Long-Distance Resellers, Operator Service Providers and Customer-Owned, Coin-Operated Telephones, and Exemptions for Providers of Local Exchange Service other than Incumbent Local Exchange Carriers.*

[17] The regulation requiring every utility to file special contracts, 807 KAR 5:011, § 13, prescribes rules for meeting the standard in KRS 278.160(1) that "each utility shall file with the commission ... schedules showing all rates and conditions for service established by it and collected or enforced."

[18] KRS 278.512(5) (emphasis added).

[19] *Id.*

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

There is "clear and satisfactory evidence" that the diminished CSA filing requirements are "no longer in the public interest." The public interest in fostering a competitive but fair market for telecommunications services strongly supports a filing requirement for CSAs. Customers should have the ability to raise complaints with the Commission that challenge certain CSAs on grounds of price discrimination. However, BellSouth, Cincinnati Bell, and ALLTEL argue that CSAs should not be filed with the Commission because they claim that this would give their own competitors an unfair competitive advantage by disclosing the names of those customers with whom they have CSAs. This argument ignores the reasons behind the filing requirement and the position of customers such as SPIS. A rule that relieves CLECs from their obligation to file CSAs publicly with the Commission would greatly inhibit the ability of customers such as SPIS to compare the prices offered to others, discern whether these customers are receiving a like and contemporaneous service, and raise claims of discrimination with the Commission.[21] For example, in Case No. 2001-00099, the evidence established that SPIS realized only by happenstance that it was being discriminated against by BellSouth's pricing of PRIs, after the terms of the discriminatory CSA came up in a conversation between a SPIS representative and a representative of the entity receiving the unreasonable preference.[22]

The importance of allowing customers to inspect CSAs and compare the prices given to their competitors is demonstrated by the fact that CSAs represent a departure from the publicly filed tariffs and by the fact that ILECs such as BellSouth possess a tremendous amount of market

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[21] It is not clear that a customer who contacts his carrier to inquire whether it has provided a CSA to its competitor would receive any information. Mr. Ruscilli admitted that he was not sure whether BellSouth could provide any information relating to the details of another customer's CSA upon request by an inquiring customer. *See* TR, p. 97 *ll* 19-p. 98 *ll* 1-9.

[22] *See* Transcript of Record for October 1, 2002, hearing in Case No. 2001-00099 ("TR 2001-00099"), TR, p.33 *l* 19-p. 35 *l* 12. The record in Case No. 2001-00099 was incorporated into the record of this case by the Commission's initial order, December 19, 2002, at 2.

power through their incumbency within the relevant market. In Case No. 2001-00099, the Commission noted that an ILEC has the "power to affect, through its pricing of services, which competitors (in both telecommunications and Internet service) are able to survive."[23] In addition, the FCC recently reported that 79% of the zip codes in Kentucky have no local telephone competition, the fourth highest percentage in the nation.[24]

The Joint Industry Proposal put forth by BellSouth, Cincinnati Bell, and ALLTEL fails to address these concerns. Instead of requiring CLECs, ILECs, and IXCs to file CSAs with the Commission, the Proposal only requires carriers to provide such contracts upon request by the Commission. In addition, the Proposal allows carriers to submit CSAs with the customer name and address redacted from the contract.[25] This provision presumes that information regarding the rates and services provided in a competitor's CSA is easily accessible to a similarly-situated consumer such as SPIS to allow them to bring a complaint with the Commission. However, this presumption is incorrect. In order to determine whether they are being subjected to an unreasonable disadvantage under KRS 278.170, it is necessary for customers to know the rates and conditions of service to others;[26] thus, it is necessary to make such contracts practicably available to customers. This purpose is furthered by hewing to the requirement of 807 KAR 5:011 § 13 and mandating that carriers file their CSAs with the Commission.

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[23] December 19, 2002 Order in Case No. 2001-00099, at 7.

[24] *See* Supplemental Testimony of Edward H. Hancock, October 9, 2003 (citing a June 2003 report by the FCC on "Local Telephone Competition") (emphasis added). In Case No. 2001-00099, it was established that BellSouth's failure to provide a like service at a like price put SPIS at a competitive disadvantage and led to a narrowing of the options for Internet users in a Kentucky community. *See* TR 2001-00099, p. 42 *ll* 15-20.

[25] Joint Industry Proposal to Kentucky PSC for CSA Standards, October 1, 2003, § 2(b), (c).

[26] In his testimony before the Commission, John Hullings admitted that BellSouth has no way of assuring that it is not offering a CSA to a customer who the Commission might deem to be similarly situated with another one of its customers. *See* TR, p.133 *ll* 4-10.

Finally, concerns over the disclosure of the CSA customer's name and address are insufficient to allow the routine redaction of such information from CSAs filed with the Commission. KRS 278.160(1) specifically requires that a utility "keep copies of its [rate and conditions] schedules open to public inspection under such rules as the commission prescribes." In addition, the Commission previously held that BellSouth could not treat contract customer names as confidential since the names did not meet the threshold requirement for confidential treatment under the Kentucky Open Records Act[27] because such information was not in BellSouth's sole control.[28] To redact such information from CSAs filed with the Commission would thus make it more difficult for a customer to learn whether a similarly situated competitor is receiving an unreasonable advantage in rates and services.

The proposed amendments to the Proposal made by the Frankfort Plant Board puts forth a reasonable process for the filing of CSAs. Under the Plant Board's proposal, a carrier can either choose to place all of their CSAs on their individual websites with the customer name and address redacted or file unredacted copies with the Commission.[29] Provided that the CSAs provided on the Internet are searchable and include general geographic information, this measure would do much to ensure that customers have practicable access to these contracts in order to determine whether they are being discriminated against.

III. PROPOSED STANDARDS GOVERNING THE USE OF CSAs

The Proposal's broadly worded standards for when carriers may use CSAs would put no practical constraints on the arbitrary substitution of discriminatory terms and conditions in CSAs

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[27] KRS 61.872 to .884.

[28] *See* September 28, 2001 Order in Case No. 2001-00077.

[29] *See* Amendments to the Joint Proposal made by the Frankfort Plant Board, filed October 10, 2003, § 2(e), (f).

for the generally-applicable tariff. By statute and rules promulgated by this Commission, the default mode for a utility in transacting business with its customers is under its tariff.[30] Long-standing practice allows a utility to depart from its tariff by means of a special contract with a given customer; however, special contracts are not meant to be a substitute for use of tariff pricing in the ordinary course of business.[31] Under a standard that allows carriers to use CSAs "in order to meet competition or in other unique circumstances," it is difficult to imagine a situation in which a carrier would not be permitted to use CSAs and avoid adherence to its filed tariff. The Proposal does not define what "other unique circumstances" means, leaving this determination to the carrier, who can presumably use a CSA whenever it feels that it is in the carrier's best interests. Thus, rather than impose real standards upon the use of CSAs, the Proposal treats CSAs as the norm rather than an exception to general tariff requirements imposed by KRS 278.160.

Discriminating between customers on the basis that one claims to have received a competing offer, as suggested in the Proposal,[32] is beyond the bounds of reasonable classifications allowed by KRS 278.030(3). Such a distinction does not base different prices on differences in competitive circumstances; the availability of truly competitive alternatives does not depend on the particular identity of the customer.[33] Likewise, the Proposal ignores the clear

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[30] *See generally* KRS 278.160; 807 KAR 5:011.

[31] *See In re: Elimination of certain reporting requirements for incumbent local exchange carriers*, Florida Public Service Commission Docket No. 010634-TL, Order No. PSC-01-1588-PAA-TL, 2001 Fla. PUC LEXIS 917 (July 31, 2001) at *5 ("[W]e also believe standardization of rates is a goal which should be pursued and that the principles of fairness and nondiscriminatory treatment embodied in the tariffing process should not be wholly supplanted through contracts negotiated to meet the exigencies of competition.").

[32] *See* Joint Industry Proposal to Kentucky PSC for CSA Standards, October 1, 2003, § 3.

[33] If it did, an exception for "competition" would swallow the general rule outlawing discrimination.

holding of the Commission 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."[34] Furthermore, there is no practical way to independently verify whether a CSA was employed in a permitted situation. For example, a carrier could effect an unreasonable preference for a customer without anything other than an internally-generated document claiming that a competitive offer was made. As demonstrated in Case No. 2001-00099, such evidence can prove to be unreliable and subject to manipulation.[35]

Contrast the Proposal, which allows discrimination between customers on the basis of claimed competitive offers or market conditions, with the provisions for meeting competition established by the Commission for natural gas local distribution companies ("LDCs") in Administrative Case No. 297.[36] These provisions require that service be provided without discrimination and that the need for specialized pricing be documented and fully supported.[37] The LDCs have meeting-competition tariffs that respect the non-discrimination mandate and are structured in a way to allow effective Commission oversight.[38] None of the LDCs charge less than the tariff price for transporting or delivering gas to the end user without requiring individual, verifiable proof from the customer of the competitive alternative; none discriminate

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[34] December 19, 2002 Order in Case No. 2001-00099, at 9.

[35] *See generally*, TR 2001-00099, p. 64 *ll* 9-18 (testimony of SPIS's representative that no competitive offer had been made to SPIS sharply contrasted with the discrepancies present in BellSouth's internal database offered as rebuttal evidence); TR 2001-00099, p. 72 *ll* 10-20 (testimony from SPIS's representative that there were no competitive offers, as claimed, behind the CSAs offered to SPIS in 1999 and 2000).

[36] *An Investigation of the Impact of Federal Policy on Natural Gas to Kentucky Consumers and Suppliers.*

[37] May 29, 1987 Order in Administrative Case No. 297, at 53-54; *see also id.* p. 69-70 (Ordering ¶¶ 7-8).

[38] *See e.g.*, Columbia Gas P.S.C. No. 5, 1st Rev'd Sheet No. 42 ¶¶3, 4 and 1st Rev'd Sheet No. 43 (effective November 1, 1994).

between their customers on the basis of competitive conditions alone. The LDCs' "meeting-competition" programs are plainly stated in their tariffs, treat all customers alike, and base their prices on market conditions. The Proposal has none of these safeguards.

As demonstrated by the facts in Case Nos. 2001-00068 and -000099 and the testimony in the present investigatory proceedings, the use of CSAs in Kentucky has created problems for both carriers and customers such as SPIS. Having transparent and practicable access to individual CSAs is important, but enforcement of the policies against unreasonable discrimination between customers cannot be accomplished if the use of CSAs becomes rampant. The Proposal put forth by BellSouth, Cincinnati Bell, and ALLTEL imposes no real standards allowing for oversight of the use of CSAs and opens the door for such contracts to swamp the general tariff requirement and eviscerate the anti-discrimination provisions of KRS 278.170. Such an outcome would result in a detriment not only to telecommunications customers, but would ultimately harm the interests of carriers as well. Therefore, a more stringent standard governing CSAs is necessary to ensure that use of CSAs benefits both customers and carriers in Kentucky.

WHEREFORE, SPIS and KBI, respectfully request that the Commission:

A. reject the Joint Industry Proposal filed on October 8, 2003; and

B. exercise its authority pursuant to KRS 278.512 to adopt procedures to ensure the effective and reasonable use of customer service arrangement contracts.

Respectfully submitted,

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By: _____

ATTORNEYS FOR SPIS.NET AND KBI

CERTIFICATE OF SERVICE

I hereby certify that on this the 21 day of January, 2004, a copy of the foregoing Brief was served by first class mail, postage pre-paid, on the individuals on the attached Service List.

_____

Attorney for SPIS.net and KBI