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January 21,2004

Kentucky Public Service Commission
Mr. Thomas M. Dorman
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Held for Supreme Ct
1-23

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

Dear Mr. Dorman:

Enclosed for filing is the Post-Hearing Brief of AT&T in the above-captioned proceeding.

Very truly yours,

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By: Henry Walker

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COMMONWEALTH OF KENTUCKY

BEFORE THE PUBLIC SERVICE COMMISSION

January 21, 2004

In the Matter of:

INQUIRY INTO THE USE OF CONTRACT SERVICE ARRANGEMENTS BY TELECOMMUNICATIONS CARRIERS IN KENTUCKY	)))	CASE NO. 2002-00430

POST-HEARING BRIEF OF AT&T COMMUNICATIONS OF THE SOUTH

I. Introduction

AT&T Communications of the South Central States, LLC ("AT&T") submits this Post-Hearing Brief to address the issues raised in the October 23, 2003 hearing in the above-captioned case pertaining to the use of Contract Service Arrangements ("CSAs") by telecommunications carriers. AT&T submits that all incumbent carriers should be required to file CSAs, unredacted, with the Public Service Commission ("Commission"). Otherwise, the customers of Kentucky will lose an important source of protection from discriminatory pricing. Nondominant providers, however, should only be required to file summaries, as these providers lack market power and, therefore, the ability or the incentive to engage in discriminatory or predatory pricing.

II. Background

Pursuant to the Commission's Order dated December 10, 2002 ("CSA Order"), this docket was opened to conduct a review of the Commission's policies with regard to CSAs. After taking a number of steps to reduce regulation of Incumbent Local Exchange Carriers ("ILECs"), the Commission decided to take stock of how these measures are working.

Kentucky's telecommunications customers and ensuring fair and

determine whether some of our decisions relaxing the regulatory

In Case No. 2001-00077, the Commission relaxed the regulation of BellSouth

Telecommunications, Inc.'s Proposed New Procedures for Filing Contract Service

BellSouth to file summaries (which do not include item pricing for the services sold) of CSAs.

by BellSouth caused the Commission "to question whether BellSouth and other carriers are

extent CSAs are appropriate, we welcome comment as to standards that should limit their use

docket is to "determine appropriate policies to safeguard the public interest regarding [CSAs]

and to determine what, if any, amendments to Administrative Regulation 807 KAR 5:011,

Section 13 are appropriate", CSA Order at p. 1.

BellSouth's position continues to be one of advocating reduced regulation even in the

face of the cited cases (CSA Order at pp. 2-3) demonstrating its misuse of the CSA process. For

the reasons set forth below, AT&T recommends an approach that will ensure that the process is

not abused. This is delineated in AT&T's comments in Sections III-V, addressing certain issues

as requested at the October 22 hearing.

III. Interpretation of "Similarly Situated"

At the hearing, the Commissioners asked that the parties address the relationship of the term "similarly situated" to KRS 278.170(1), the statute prohibiting discriminatory pricing. KRS 278.170 states that:

> [no utility shall] 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 similar circumstances or conditions.

KRS §278.170 (2002). The term "similarly situated" is a standard taken from the statute and has long been used in discussing whether discrimination has occurred in terms of the rates customers are charged for utility service. Based on the statute, if two customers are similarly situated, then one customer cannot be denied a rate given to the other customer. The determination of the meaning of "similarly situated" is key in any discriminatory rate analysis under KRS 278.170(1).

KRS 278.170(1) was interpreted in *National Southwire Aluminum Co. v. Big Rivers Electric Corp.*, 785 S.W.2d 505 (Ky. Ct. of App. 1990) ("*Big Rivers*"). In *Big Rivers*, the court reviewed a decision by the Commission which allowed Big Rivers Electric Corporation, a cooperative, to charge a variable rate for electricity provided to its two largest customers. *Id.* at 506-507. At the time, Big Rivers was experiencing great financial difficulty because of debt

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[1] *See In the Matter of: Boyland Kennel, Inc., Complainant v. Boone Co. Water District, Defendant*, Case No. 96-218, *Order* (May 23, 1996) (finding that the utility could not depart from its filed rates, the Public Service Commission stated that "KRS 278.170(1) imposes an affirmative obligation upon a utility to charge and collect its prescribed rates. *KRS 278.170(1) requires a utility to treat all similarly situated customers in substantially the same manner.* If a utility fails to collect from a customer the full amount required by its filed rate schedule, it effectively grants a preference in rates to that customer as it allow[s] him to pay less than other customers for the same service.") (emphasis added); *In the Matter of: The Contract Filing of Kentucky Utilities Co. To Provide Electric Service To North American Stainless*, Case No. 2000-542, *Order* (December 19, 2001) (stating that "[we do not believe it is appropriate to withhold rate information because disclosure would ensure that each customer could learn the rates given to other similarly situated customers. Pursuant to KRS 278.170(1), customers are entitled to nondiscriminatory rates."); *See also In the Matter of: Computer Innovations, Complainant v. BellSouth Telecommunications, Inc., Defendant*, Case No. 2001-00068, Order (December 18, 2002).

incurred from the construction of a new generator. *Id.* at 509. The Commission found that because Big Rivers was so extremely dependent on these two customers (aluminum companies which purchased 70 percent of Big Rivers' electricity), it was important to help keep these customers in business. *Id.* The Commission reasoned that by allowing Big Rivers to charge a variable rate (under which the aluminum companies would pay more when aluminum prices fell and more when the prices rose), the odds that its two largest customers would stay in business would increase, thereby increasing Big Rivers' ability to weather its economic difficulties. *Id.*

The two aluminum companies challenged the imposition of the variable rate, arguing that it was discriminatory and violated KRS 278.170. *Id.* at 514. In reviewing its imposition, the court pointed out that the companies' own experts first suggested the rate. *Id.* at 507. Furthermore, the Commission had found that "the rate is likely to produce, over time, the same amount of revenue that would be produced under a conventional, flat rate." *Id.* at 509. Moreover, the court noted that the rate was imposed by the Commission in order to help the companies, and thus Big Rivers, stay in business. *Id.* at 508.

In addressing the issue of whether the variable rate was discriminatory, the court stated that "[e]ven if some discrimination actually exists, Kentucky law does not prohibit it per se. According to KRS 278.170(1), we only prohibit 'unreasonable difference.'" *Id.* at 514. Outlining what is to be considered in deciding whether there is in fact an "unreasonable difference" in rates charged to customers, the court stated that "KRS 278.030(3) allows reasonable classifications for service, patrons, and rates by considering the 'nature of the use, the quality used, the quantity used, the time when used, and any other reasonable consideration.'" *Id.*

Applying these factors, the court stated that [illegible] to produce those large amounts of electricity. *Id.* at 515. Thus, they should help pay for the generator that made the provision of electricity to them possible. *Id.* The Commission had [illegible] would not be disturbed. *Id.*

[illegible] cases that led to the opening of this docket. *See In the Matter of: SPIS.net v. BellSouth Telecommunications, Inc.*, Case No. 2001-00099, Order (December 19, 2002) ("*SPIS.net Order*"); *CSA Order* at pp. 2-3. It arose from a complaint filed by SPIS.net alleging that BellSouth had offered SPIS.net a rate for a regulated service which BellSouth had given to one of SPIS.net's competitors. *Id.* at p. 2.[2] SPIS.net alleged that the discriminatory prices violated KRS 278.170. *Id.* BellSouth, however, argued that the rate charged to SPIS.net's competitor was proper in that it was in response to an offer made to the competitor by AT&T. *Id.* at pp. 3-4.

In addressing the complaint, the Commission had to decide whether the difference in prices was "reasonable." In determining the reasonableness of the price difference, the Commission considered whether the existence of a competitive offer was a proper factor to be included in the "similarly situated" analysis. *Id.* In discussing the statute and what it means to be "similarly situated," the Commission stated that "We have not previously held that two customers are not similarly situated for purposes of receiving the same price for a utility service on the sole basis that one has received a competitive offer while another has not." *Id.* at p. 6.

[2] Hopkinsville Electric was under contract with BellSouth to pay $650 for PRI service while SPIS.net was forced to pay $741.41 for the same service. It is important to note that the Commission determined that the two companies were "comparable" regarding their volume and term commitments. *See Id.* at pp. 2, 9.

The factors set forth in *Big Rivers* (which do not include [illegible]) were considered." *Id.* at p. 8. Furthermore, the Commission pointed out that BellSouth itself, in its Statement of Generally Available Terms, does not include the existence of an offer from a competitor in defining what it means to be [illegible] service differently from customer to customer based on the single difference that one customer [illegible] *Id.* at p. 9. Thus, the Commission determined that because SPIS.net had requested the same [illegible] received the lower rate. SPIS.net was entitled to the lower rate as well. *Id.*

[illegible] the Commission expressed concern over the CSA issues raised in the case:

> [illegible] than tariffed rates. Our previous decisions, in which we have relaxed our regulatory authority with the intention of ensuring that [illegible] consider whether our determination in Case No. 2001-00077[3] has improperly denied both customers and competitive local exchange carriers access to information necessary to buy wisely. We also will consider the policy implications of current CSA practices of BellSouth and Kentucky's other LECs, determine whether the public interest demands that we require all CSAs to be filed in the future thereby ensuring transparency and permitting both customers and CLECs the access necessary to buy and resell services, and determine whether we should set specific standards governing when services may be sold by CSA rather than by generally applicable tariffs.

Id. at pp. 9-10.

[3] As noted *infra* at p. 2, Case No. 2001-00077 allowed BellSouth to file only monthly summaries of its CSAs, instead of actual CSAs.

While KRS 278.170 does state that there can be [illegible] who are willing to agree to the commitments in another customer's contract are entitled to the terms of that contract." *Id.* at p. 6. The appellate court in *Big Rivers* did sustain the seemingly [illegible] the situation at issue here, where the rates to be scrutinized are not being set by the Commission [illegible] going out of business. Thus, the factual situation in *Big Rivers* lends no guidance to the present [illegible] and import of customers being "similarly situated" and has found that the existence of an offer [illegible] Therefore, the statute itself, *Big Rivers*, the Commission's own orders, as well as filings in other [illegible] not met if customers using the same type, quantity, quality, etc. of service, i.e. they are "similarly situated," are charged different rates.

IV Administrative Case No. 370

The second issue the parties were asked to address was whether Administrative Case No. 370 relieved all competitive local exchange carriers ("CLECs") of the duty to file [illegible] Regulation 807 KAR 5:011, §13, which addresses Special Contracts, states that:

> Every utility shall file true copies of all special contracts entered into governing 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.

807 KAR 5:011, §12. Pursuant to KRS 278.512, the Commission [illegible] is in the public interest." See KRS 278.512 (2002).

In Administrative Case No. 370, the Commission, citing KRS 278.512 as authority, [illegible] *Interexchange Carriers, Long-Distance Resellers, Operator Service Providers and Customer-Owned Pay Telephone Companies with Exemption from Certain Provisions of Local Exchange Service Other Than Incumbent Local Exchange Carriers*, Administrative Case Nos. 359 and 370, *Order* (August 9, 2001) ("*Order*"). Some CLECs have interpreted the case as having exempted all CLECs from the requirement to file CSAs. While there is no language in the *Order* directly [illegible] CLECs no longer must file CSAs, this result could be reached through negative implication, as the *Order* does list several obligations the CLECs must continue to meet and does not list the filing of CSAs. *Order* at pp. 5-6. Whether or not that was the intent of the *Order*, it is AT&T's position that, as a matter of public policy, nondominant providers, which lack market power, should not be required to file CSAs.

V. Termination Penalties and Length of Contract Requirements

The third issue the parties were asked to address at the hearing was termination penalties and length of contract requirements. These penalties and contract requirements, when instituted by incumbent providers, are usually anti-competitive in nature, for it is highly likely that the customer had no leverage with the incumbent when the customer entered into the arrangement thus making it difficult for a customer to leave the incumbent's service when a competitive

alternative emerges.[4] The longer a customer is locked into a contract, the more likely it is that the customer will not be able to take advantage of competitive alternatives. Such requirements are typically imposed when the customer has little bargaining power, leaving the customer no choice but accept service subject to these termination [illegible] an incumbent to pass along large termination penalties to either a customer or a competitor is contrary to public policy. Furthermore, the imposition of lengthy contract term requirements exacerbates the problem if termination penalties are calculated based on the length of the contract -- the longer the customer is locked in the contract, the higher the termination penalties would be. Given that the "pro-competitive provisions" of the state and federal telecommunications statutes are the guiding principles for this proceeding (see, CBR Order at n.1), AT&T submits that the Commission should consider a proceeding to examine termination penalties and length of contract requirements instituted by incumbent providers.

The Commission could also explore placing a cap on the penalties assessed by incumbents. For example, in BellSouth's General Subscriber Services Tariff in Tennessee, BellSouth caps termination penalties in the following manner:

> A2.4.10 Payment Plans And Options For Contract Services
>
> E. Disconnects
>
> 1. When a service or rate element included under a PBCS arrangement is terminated without cause prior to expiration of the tariff term plan, a termination liability charge will apply. Unless the tariff provisions governing a particular service provide otherwise, for tariff term plans entered into

[4] Termination penalties and contract term requirements instituted by nondominant providers do not raise the same problem, as these providers are assumed to have entered into arms' length agreements with their customers.

charge will not exceed the lesser of:

a The sum of repayments of discounts received during the previous twelve (12) prorated amount of any discounted or waived non-recurring charges, and the preparation, implementation or tracking charges; or

amount if the tariff term plan is four (4) years or less; or twenty-four (24%) percent of the average annual revenues of the tariff than four (4) years. Term plan revenue is the total revenue billable under the term plan entered into by the customer. Average billable under the term plan divided by the number of years in the term plan.

BellSouth Telecommunications, Inc. Tariff FCC No. 1, Section 5.4.1(E)(1) (Effective August 15, 2001). Because of the anticompetitive effects of large termination

should take a closer look at these matters.

VI Filed Rate Doctrine

The fourth issue the parties were asked to address at the hearing was the current applicability of the filed rate doctrine. The basic premise of the filed rate doctrine is that all rates are to be filed with the Commission and similarly situated customers are to receive the same rates. The doctrine is personified in KRS 278.160, which states that:

(1) Under rules prescribed by the commission, each utility shall file with the commission, within such time and in such form as the commission designates, schedules

it and collected or enforced. The utility shall keep copies

any person a greater or less compensation for any service rendered or to be rendered than that prescribed in its filed

prescribed in such schedules.

KRS 278.160(1) provided the statutory authority for 807 KAR 5:011, which is the

be filed under 807 KAR 5:011(13). Thus, the filed rate doctrine plainly encompasses CSAs. As

to exempt carriers from regulations if the agency finds that granting the exemptions is in the

developed to the point where the filed rate doctrine should no longer be applied, the Commission

dominant carriers to file CSAs.

VII Conclusion

AT&T urges the Commission to adopt a policy which would work to prevent discriminatory pricing and further competition. To this end, AT&T requests that the Commission require all incumbent carriers to file all CSAs, unredacted, with the Commission. Furthermore, AT&T requests that the Commission require all nondominant carriers to file summaries of their CSAs. This policy would provide the transparency necessary to help prevent discriminatory and predatory pricing on the part of incumbents, while at the same time, the

policy would not place regulatory requirements on nondominant [illegible]

[illegible] power. Moreover, as a part of that policy,

AT&T strongly urges the Commission to refuse to allow ILECs to price services differently to customers solely because a competitor exists. Instead, the Commission should form a policy in

[illegible] would include the telecommunications service market and the provider seeking the ability to

[illegible] the Commission should adopt Ameritech's position and

reject the Joint Industry Proposal submitted by the ILECS, as it places absolutely no restrictions

[illegible] used solely to lock up customers and impede competition.

Respectfully submitted

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