STATE OF TENNESSEE

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December 5, 2002

Sara Kyle, Chairman
Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, TN 37243-0505

00-00702

Re: Rulemaking Proceeding-Regulations for Term Arrangements for Telecommunications Services

Dear Chairman Kyle:

Enclosed is an original and thirteen copies of the Consumer Advocate Responses to Tennessee Regulatory Authority Questions in the above-referenced matter. Copies are being furnished to counsel of record for interested parties.

Sincerely,

Timothy Phillips,
Assistant Attorney General

cc: Counsel of Record
52476

BEFORE THE TENNESSEE REGULATORY AUTHORITY
NASHVILLE, TENNESSEE
December 5, 2002

IN RE:	)	
	)	
RULEMAKING PROCEEDING -	)	
REGULATIONS FOR TERM	)	**DOCKET NO.**
ARRANGEMENTS FOR	)	**00-00702**
TELECOMMUNICATIONS SERVICES	)	

CONSUMER ADVOCATE RESPONSES TO TENNESSEE REGULATORY AUTHORITY QUESTIONS

Comes the Attorney General for the State of Tennessee, through the Consumer Advocate and Protection Division (CAPD), pursuant to the Tennessee Regulatory Authority (TRA) Notice of November 27, 20002, and hereby responds to the questions set forth by Director Deborah Taylor Tate.

I. INTRODUCTION

1. The Consumer Advocate and Protection Division (CAPD) welcomes the opportunity to provide its comments to persuade the Tennessee Regulatory Authority (TRA). Regulation via the filed-tariff doctrine, with its predisposition against price-discrimination between consumers, cannot and should not be abandoned by pervasive use of special contracts, known as Contract Service Arrangements (CSAs), which are employed by telecommunications service providers who respond to competition in Tennessee's telecommunications markets. The filed-tariff doctrine and CSAs can coexist in Tennessee's regulation of the telephone industry in particular, provided appropriate rules are developed and enforced by the TRA.

2. The CAPD believes that neither the current CSA rules nor the absence of CSA rules serve the larger purpose of continuing the development of competitive telecommunications markets in Tennessee while also affording Tennessee's consumers protection against undue price discrimination. The larger purpose is served and met by the rules the Consumer Advocate and Protection Division has proposed in this rulemaking docket. CAPD's comments provide the basis for its opinion.

3. For the record, the CAPD objects to proceeding in this manner, where written comments are the only form of inquiry. At its meeting in July 2002, the TRA's four directors approved a much broader and more vigorous approach to the CSA problem, including the right to discovery and a hearing including the right to present and cross-examine witnesses. The CAPD reserves the rights granted to it at the meeting.

II. CURRENT CSA RULES IN QUESTION

A. CSA RULES FOR UTILITIES IN GENERAL

4. 1220-4-1-.07 - Special Contracts. Special contracts between public utilities and certain customers prescribing and providing rates, services and practices not covered by or permitted in the general tariffs, schedules or rules filed by such utilities are subject to supervision, regulation and control by the Commission. A copy of such special agreements shall be filed, subject to review and approval.

B. CSA RULES FOR TELEPHONE SERVICE PROVIDERS

5. 1220-4-8-.07 - (3) Special Contract Provisions; (a) Special contracts and any tariffs for interconnection services shall comply with the provisions of Rule 1220-4-8-.10; (b) Special contracts with end users which are not unduly discriminatory shall be permitted. However, the Commission shall be notified of the existence of the contract upon execution, and shall be provided with a written summary of the contract provisions including a description of the services provided. The Commission shall make a copy of the summary available for inspection by any interested party. A copy of the contract shall be made available for Commission review upon request; (c) Any special pricing package contract, or discount, shall be made available to any similarly situated customer satisfying the required terms and conditions of the special agreement upon request.

III. TRA QUESTION ONE

6. Should new CSA rules be proposed for the continued review and approval of CSAs? Is the current rule sufficient for this purpose?

IV. CAPD RESPONSE TO QUESTION ONE

7. New rules are needed because the current rules are insufficient to handle the tension between the filed-tariff doctrine and the CSAs in the arena of telecommunications, where the "similarly situated" standard is used to restrict the availability of CSAs. Under the "similarly situated" standard, CSAs must be offered to all "similarly situated" customers; that is, a CSA should not give unfair preference to a single customer. Otherwise the CSA would violate Tenn. Code Ann. § 65-4-122 prohibition on unjust discrimination, as the Attorney General stated in the letter of May 31, 2002, to the TRA regarding proposed CSA rules:

> *....Thus while competition has expanded the circumstances in which special contracts may be appropriate, the filed rate doctrine has not been abandoned. The governing Tennessee statutes have not been amended, and the TRA has not deregulated telecommunications services in Tennessee. The presumption is always against a special contract rate and in favor of the general rate.*
>
> *The TRA has the statutory duty to ensure that special contracts are allowed only when special circumstances justify a departure from the general tariffs. And it must also ensure that any special rate is realistically and in practice made available to all customers who are similarly situated.*

8. There are other Tennessee statutes that require public utilities to treat their customers fairly and equally with respect to their special contract offerings. Tenn. Code Ann. § 65-4-115 prohibits public utilities from adopting any practice, such as a system of special contracts, that is unjust, unreasonable, unduly preferential or discriminatory. Tenn. Code Ann. § 65-5-204 proscribes public utilities from (1) imposing any unjustly discriminatory or unduly preferential rate; and (2) adopting any unjust or unreasonable classification based on rates. Accordingly, a public utility's individual CSAs as well as its general CSA practice, must be reasonable, just, and nondiscriminatory toward consumers.

A. TELECOMMUNICATIONS IS THE FOCUS OF THE RULEMAKING

1. Rule 1220-4-1-.07 Is Inadequate For Telecommunications

9. The market-focus of all the parties in this case is the telecommunications arena, rather than gas, electricity or water. Of the various industries regulated by the TRA, only the telecommunications industry was present at the procedural meeting called by Director Tate on Monday, November 25 at 4PM, when the TRA's questions were presented to the parties. This rulemaking does not involve nor has ever involved the electric, gas and water industries, whose clear lack of interest is shown by their absence from the meeting and the lack of any communications whatsoever on their part with regard to this rulemaking. Therefore, telecommunications is the focus of this rulemaking.

2. Rule 1220-4-1-.07 Does Not Control 1220-4-8-.07

10. In rule 1220-4-8-.07 the standard of "similarly situated" is the threshold which determines if a CSA constitutes undue discrimination. The term does not appear in rule 1220-4-1-.07. Therefore, the rules are fundamentally different and independent from each other – neither one encompasses the other. Rule 1220-4-1-.07 does not control 1220-4-8-.07.

B. THE "SIMILARLY SITUATED" PROBLEM IN TENNESSEE REGULATION

1. Time-Table Of "Similarly Situated" Events Affecting Tennessee Regulatory Policy

11. 1974 – May: Rule 1220-4-1-.07 is certified

12. 1998 – June: Rule 1220-4-8-.07 is effective

13. 1998 – October: FCC decides that a "similarly situated" condition must be "narrowly tailored" by state regulators:

> *We further note, however, that limiting the resale of CSAs to similarly situated customers, on a general basis, may be [emphasis added by CAPD] a reasonable and non-discriminatory resale restriction because it is sufficiently narrowly tailored [emphasis added by CAPD].*
>
> *In the Matter of Application of BellSouth Corporation, BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc., for Provision of In-Region, InterLATA Services in Louisiana, FCC 98-271, 13 FCC Rcd. 20,599, 1998 WL 712899 ¶ 316 (FCC Oct. 13, 1998).*

14. 1999 – August: Hearings in TRA Docket 98-00559 occur: BellSouth witness Mr. Frame under oath testifies: "BellSouth has repeatedly stated that it will offer these CSAs or any other CSA to any similarly situated customer." *[Randall Frame, Direct Examination, Tennessee Regulatory Authority, Docket 98-00559, page 13, lines 14-15]*. Therefore, limiting availability of CSAs to similarly situated consumers is a general and on-going practice in Tennessee. Mr. Frame was cross-examined by Mr. Sanford:

> *Q. My question is similarly situated customers. What is BellSouth Telecommunications' position as to the proper test or criteria or standard to follow in determining whether a customer is similarly situated?*
>
> *A. I believe we have in our discovery responses answered that. We have no process in place for identifying similarly situated customers....*
>
> *Q. So there is no body of knowledge that you're aware of that deals with that issue of similarly situated?*
>
> *A. No....*
>
> *Q. ...Do you know whether any Tennessee statute prohibits, quote, discrimination,...*
>
> *A. I believe that it does. I do not know the statute."*
>
> *[Randall Frame, Cross-Examination by Mr. Sanford, Direct Comments, Tennessee Regulatory Authority, Docket 98-00559, Volume 1D page 191, line 15 to page 193, line 6].*

15. 1999 - August to 2002-September: TRA approves over 500 CSAs submitted by BellSouth, which continues to limit a CSA's availability to "similarly situated" end users.

16. 2002 – May: Office of the Attorney General returns TRA's proposed rules for CSAs.

17. 2002 – July: The National Association of Regulatory Utility Commissioners, an organization where the TRA is an active member, passes a "Resolution on Telecommunications Consumer Bill of Rights," which says in part: "Non-Discrimination: Every consumer should have the right to be treated equally to all other similarly situated consumers, free of prejudice or disadvantage."

18. 2002 – September: In Docket No. 00-00079 the TRA approves interconnection agreements between BellSouth and AT&T and TCG MidSouth, where BellSouth and its competitors agree that end users are "similarly situated" even if such users are served by a competitor. The quotations below are from the agreement between BellSouth and AT&T, an agreement identical to the one between BellSouth and TCG. The underlined emphasis on "similarly situated" has been added by CAPD.

In the agreements at attachment 1, page 8:

3 General Provisions

3.25 BellSouth and AT&T shall provide local and toll dialing parity to each other with no unreasonable dialing delays. Dialing parity shall be provided for all originating telecommunications services that require dialing to route a call. BellSouth and AT&T shall permit similarly situated telephone exchange service end users to dial the same number of digits to make a local telephone call notwithstanding the identity of the end user's or the called party's telecommunications service provider.

In the agreements at attachment 1, page 11:

4.6 Routing to Directory Assistance, Operator and Repair Services

4.6.2 All routing shall permit AT&T end users to dial the same telephone numbers for AT&T directory assistance, local operator service and repair that similarly situated BellSouth end users dial for reaching equivalent BellSouth services.

In the agreements at attachment 2, page 12:

3. Local Loops

3.6.3 AT&T will be responsible for isolating troubles on SL2 loops. Once AT&T has isolated a trouble to the BellSouth provided loop, AT&T will issue a trouble report to BellSouth on the loop. BellSouth will take the actions necessary to repair the loop if trouble actually exists. BellSouth will repair these loops in the same time frames that BellSouth repairs similarly situated loops to its end users.

3.6.5.1 ...BellSouth will repair these loops in the same time frames that BellSouth repairs similarly situated loops to its end users.

In the agreements at attachment 3, Page 21:

4. Network Design And Management For Interconnection
4.15 Local Dialing Parity...
BellSouth and AT&T shall permit similarly situated telephone exchange service end users to dial the same number of digits to make a local telephone call notwithstanding the identity of the end user's or the called party's telecommunications service provider.

2. Local Telephone Companies Have A Procedure To Determine If End Users Are "Similarly Situated"

19. In August 1999 Mr. Frame testified, "*We have no process in place for identifying similarly situated customers.*" But as of September 2002, BellSouth and its local competitors appear to have such a process, as evidenced by the interconnection agreements. If the local telephone industry had no method to determine how end users are "similarly situated," then large numbers of end users in Tennessee would be treated differently with regard to dialing parity, routing, loop maintenance and other functions.

20. There is no record in Docket 00-00079 of an established meaning for "similarly situated." Therefore, the TRA on its own motion should open an investigation or other evidentiary procedure and have the local telephone service providers come forward to place into the record the process they use to determine when end users are similarly situated. Since thousands of end users must be similarly situated with regard to dialing parity, routing, loop maintenance, then some of those end users should be similarly situated with regard to CSAs. By having the local telephone industry come forward with its process, the meaning of "similarly situated" could be more quickly established.

3. Consumers Have No Way Of Knowing If They Are Similarly Situated For CSAs

21. Until there is a body of knowledge established regarding the conditions that make consumers similarly situated, consumers can not initiate a request for similar treatment. Until then, every CSA has the appearance of being a unique contract for a unique consumer who is not "similarly situated" to any other consumer. Thus there is little chance that the rates filed under a CSA will be utilized by more than one consumer. Therefore, CSAs have the appearance of undue discrimination.

22. As of today's date no two consumers in Tennessee can identify themselves as being similarly situated with regard to a CSA, or with regard to dialing parity, routing and loop maintenance.

4. Current Administrative Rules Of The TRA Do Not Allow The Agency To Identify Similarly Situated Customers

23. The TRA's rules do not specify if a similarly situated determination is made by the staff of the TRA or by the TRA directors themselves via an order. Therefore, similarly situated consumers can not be recognized, identified or otherwise consistently distinguished from case to case.

24. Since there is an absence of any criteria on similarly situated, a case-by-case determination could vary according to who makes the decision. If the determination were made by a TRA staff member, then each determination could vary according to who is assigned to the matter. If the determination were made by TRA directors in a contested case, then each determination could vary according to the composition of the TRA panel, which is composed of 3 directors randomly chosen from the 4 appointed directors. If the determination were made by the service provider, a determination could have the appearance of being self-serving, in the sense that there is no independent verification of the service provider's decision.

C. CURING THE ARBITRARY DETERMINATION OF "SIMILARLY SITUATED"

25. The arbitrary determination of the term "similarly situated" can be cured by acquiring information about the conditions and circumstances that give a cohesive, understandable meaning to the term. This would create a body of knowledge which would allow CSAs to move forward without being a means for undue discriminatory pricing.

1. Federal Government's Treatment Of Similarly Situated

26. Federal agencies provide examples of defining the term "similarly situated," and could be adopted by the TRA. Both the FCC and the FERC engaged in analysis to determine the meaning of "similarly situated."

a) FERC's handling of similarly situated

27. The Federal Energy Regulatory Commission provides an example with regard to natural gas pipelines. At 93 FERC ¶ 61,277, ANR Pipeline Company v. Transcontinental Gas Pipe Line Corporation (Docket No. CP98-74-003), the FERC ruled:

> *...based on three separate analyses, each constituting an independent basis for our decision, ...the evidence supported granting ANR's complaint. First, we found that Transco treated similarly-situated requests for interconnects differently without reasonable justification, [8] and that such treatment violated section 4(b) of the Natural Gas Act. Section 4(b) prohibits any natural-gas company, "with respect to any transportation or sale of natural gas subject to the jurisdiction of the Commission," from making or granting "any undue preference or advantage to any person" and from subjecting "any person to any undue prejudice or disadvantage," or maintaining "any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service." We found that no meaningful difference had been shown between ANR's request, which was denied, and the prior requests of six interstate pipelines (pre-1989) and 50 other parties (post-1989), which were granted.*
>
> ---
>
> [8] *The Commission has used the concepts of "similarly-situated" or "similarly entitled" to identify those parties entitled to similar treatment by a natural gas company to assure non-discriminatory conduct under the Natural Gas Act. See, e.g. Sebring Util.Comm'n v. FERC, 591 F.2d 1003 (5th Cir.), cert. denied, 444 U.S. 879 (1979).*

*ANR Pipeline Company v. Transcontinental Gas Pipe Line Corporation, Docket No. CP98-74-003, 93 F.E.R.C. 61,277, 2000 WL 1839639 *2 (FERC Dec. 14, 2000).*

b) FCC's handling of similarly situated

28. The FCC provides examples with regard to telecommunications companies. In FCC Docket No. 98-223, *In the Matter of Petition for the Extension of the Compliance Date under Section 107 of the Communications Assistance for Law Enforcement Act [CALEA] (September 10, 1998)* the agency granted approximately 30 major carriers an extension to comply with CALEA requirements because the carriers were similarly situated to each other. At paragraph one:

This extension applies to all telecommunications carriers which are similarly situated to the petitioners, i.e., those telecommunications carriers that are proposing to install or deploy, or having installed or deployed, any equipment, facility or service prior to the effective date of section 103 for that part of the carrier's business on which the new equipment, facility or service is used.

In the Matter of Petition for the Extension of the Compliance Date under Section 107 of the Communications Assistance for Law Enforcement Act, FCC 98-223, 13 Communications Reg. (P&F) 432, 1998 WL 601289 ¶ 1 (FCC Sept. 11, 1998).

29. The FCC emphasized analysis as a substitute for intrusive regulation in FCC Docket No. 99-279 (CC Docket No. 98-141), In re Applications of AMERITECH CORP., Transferor, AND SBC COMMUNICATIONS INC., Transferee, For Consent to Transfer Control of Corporations Holding Commission License and Lines Pursuant to Sections 214 and 310(d) of the Communications Act and Parts 5, 22, 24, 25, 63, 90, 95 and 101 of the Commission's Rules. At part V.C pages 49-51:

"In this section, we analyze the effect of the proposed merger on the ability of regulators and competitors to use comparative analyses of the practices of similarly-situated independent incumbent LECs to implement the Communications Act in an effective, yet minimally intrusive manner. Such comparative practices analyses, referred to by some commenters as "benchmarking," provide valuable information regarding the incumbents' networks to regulators and competitors seeking, in particular, to promote and enforce the market-opening measures required by the 1996 Act and the rapid deployment of advanced services. Without the use of this tool, regulators would be forced, contrary to the 1996 Act and similar state laws, to engage in less efficient, more intrusive regulatory intervention in order to promote competition and secure quality service at reasonable rates for customers. We find that the proposed merger of SBC and Ameritech would pose a significant harm to the public interest by severely handicapping the ability of regulators and competitors to use comparative practices analysis as a critical, and minimally-intrusive, tool for achieving the Communications Act's objectives."

In re Application of Ameritech Corp., Transferor, and SBC Communications, Inc., Transferee, FCC 99-279, 14 FCC Rcd. 14,712, 1999 WL 1337659 ¶ 101 (FCC Oct. 8, 1999).

30. The FCC carried out such an analysis in FCC Docket No. DA 97-411 (File No. E-96-04), In the Matter of William G. Bowles Jr. P.E d/b/a Mid Missouri Mobilfone, Complainant, v. United Telephone Company of Missouri. The FCC concluded at paragraph 21:

> *Because the service in question, Type 2 interconnection, is a single type of service, it is by definition a "like" service.[82] According to Commission decisions, a LEC's interconnection obligations are the same for all CMRS providers. [83] CMRS cellular providers are, therefore, similarly situated for purposes of the type of interconnection to which they are entitled. [84]*

> *[82] The D.C. Circuit has made clear that, in a section 202(a) analysis, a determination of "likeness" turns on the functional equivalency test. In particular, the Commission must exclude consideration of "cost differentials and competitive necessity" when evaluating likeness, as such factors may be considered "only when determining whether the discrimination is unreasonable or unjust." MCI, 917 F.2d at 39.*
>
> *[83] CMRS Order, 9 FCC Rcd at 1498 ("[I]n determining the type of interconnection that is reasonable for a commercial mobile radio service system, the LEC shall not have authority to deny to a CMRS provider any form of interconnection arrangement that the LEC makes available to any other carrier or other customer unless the LEC meets its burden of demonstrating that the provision of such interconnection arrangement . . . either is not technically feasible or not economically reasonable."); Third Radio Common Carrier Order, 4 FCC Rcd at 2376 ("[W]e emphasize that, like a cellular system, a paging carrier is entitled to choose the most efficient form of interconnection for its network, and the BOCs may not dictate an RCC's type of interconnection.").*
>
> *[84] Moreover, in the CMRS Order, the Commission specifically found that if a LEC is providing interconnection to a CMRS licensee and denies interconnection of the same type and at the same rate to a private mobile radio service ("PMRS") provider, "the carrier will bear the burden of establishing why this would not constitute . . .unreasonable discrimination in violation of section 202(a)." CMRS Order, 9 FCC Rcd at 1500-01. It would be inconsistent for a PMRS provider to be deemed similarly situated to either a CMRS paging provider or a CMRS cellular provider with regard to requesting interconnection, while a CMRS paging provider and a CMRS cellular provider, that are explicitly equally entitled to request either Type 1 or Type 2 interconnection, are not considered similarly situated with regard to requesting interconnection.*

In the Matter of William G. Bowles, Jr. P.E. D/B/A Mid Missouri Mobilfone v. United Telephone Company of Missouri, DA 97-1441, 12 FCC Rcd. 9840, 1997 WL 383651 ¶ 21 (FCC July 11, 1997).

31. Since federal agencies make similarly situated analyses, state agencies can, too. The procedures adopted by the federal agencies support the use of analyses to determine when consumers are similarly situated with regard to CSAs in Tennessee.

2. Similarly Situated Analyses Do Not Have To Be Complex Or Intrusive

32. Since the consumer and the service provider both agree that the consumer merits special treatment in the form of a special contract that departs from the general tariff, a similarly situated analysis is a way to validate the service provider's and consumer's mutual decision. The analysis assures that special treatment is not a form of undue discrimination against all the other consumers who do not have the benefits of a CSA.

3. FCC's Policy Is To "Narrowly Tailor" The Meaning Of "Similarly Situated"

33. Without rules, CSAs become a means for service providers to depart from their tariffs and discriminate against consumers totally at the providers' discretion, without benefit of the TRA's review. This may be beneficial to the Competitive Local Exchange Carriers (CLECs) who compete with BellSouth, because there is no particular federal rule constraining their CSAs.

34. However, the incumbent's CSAs are constrained by federal rules. Those constraints are relaxed only if the incumbent's CSAs have been evaluated for discriminatory potential by a state regulatory agency.

35. According to the FCC, any service sold by an incumbent telephone company to an end user must be available for resale. A CSA is a retail service sold to an end user, and BellSouth is the incumbent in Tennessee. If CSA availability is restricted to similarly situated consumers without giving a substantive meaning to "similarly situated," then the public policy of Tennessee with regard to Tennessee's incumbent service provider will be far different from the policy set by the FCC.

36. The FCC's policy on whether "similarly situated" rises to undue discrimination stems from:

> *FCC Docket No. 96-182 (Common Carrier Docket 96-98), In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 (April 19,1996) Para. 175*

FCC Docket No. 96-325 (Common Carrier Dockets 96-98, 95-185) Local Competition Order, First Report and Order, In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, (August 8, 1996) Para. 939.

FCC Docket No. 98-271 (Common Carrier Docket 98-121) Application of BellSouth Corporation, BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc., for Provision of In-Region, InterLATA Services in Louisiana (October 13, 1998) Paras. 316 & 317.

37. In FCC Docket 96-182 at paragraph 175 of its notice, the FCC gave its opinion on how resale restrictions would be judged:

"We also seek comment on what limitations, if any, incumbent LECs should be allowed to impose with respect to services offered for resale under section 251(c)(4). Should the incumbent LEC have the burden of proving that a restriction it imposes is reasonable and nondiscriminatory? Given the pro-competitive thrust of the 1996 Act and the belief that restrictions and conditions are likely to be evidence of an exercise of market power, we believe that the range of permissible restrictions should be quite narrow. We seek comment on this view. We also seek comment on whether, and if so how, the resale obligation under section 251(c)(4) extends to an incumbent LEC's discounted and promotional offerings."

In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, FCC 96-182, 11 FCC Rcd. 14,171, 1996 WL 191792 ¶ 175 (FCC Apr. 19, 1996).

38. The FCC promulgated its final rules in FCC Docket No. 96-325 at paragraph 939:

We conclude that resale restrictions are presumptively unreasonable. Incumbent LECs can rebut this presumption, but only if the restrictions are narrowly tailored. Such resale restrictions are not limited to those found in the resale agreement. They include conditions and limitations contained in the incumbent LEC's underlying tariff.

In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, First Report and Order, FCC 96-325, 11 FCC Rcd. 15,499, 1996 WL 452885 ¶ 939 (FCC Aug. 8, 1996).

39. In FCC Docket No. 98-271 (CC Docket No. 98-121) the federal agency specifically considered CSAs and similarly situated consumers in the context of the resale issue. At paragraph 316 the FCC concluded:

> *We find unpersuasive claims made by AT&T and Sprint that BellSouth does not comply with this checklist item because it limits the customers to whom a reseller may resell a CSA. BellSouth states that CSAs are available for resale to customers for whom the CSA was not originally designed so long as the resale customer is similarly situated. The Commission concluded in the Local Competition First Report and Order that 'the substance and specificity of rules concerning which discount and promotion restrictions may be applied to resellers in marketing their services to end users is a decision best left to state commissions, which are more familiar with the particular business practices of their incumbent LECs and local market conditions.' We see no reason at this time to change this conclusion. We further note, however, that limiting the resale of CSAs to similarly situated customers, on a general basis, may be [emphasis added by CAPD] a reasonable and non-discriminatory resale restriction because it is sufficiently narrowly tailored [emphasis added by CAPD]. CSA offerings, by their nature, are priced to a specific set of customer needs, sometimes based on a competitive bidding process. To this extent, it is reasonable to assume that BellSouth's ability to offer a particular CSA at a given price will be dependent on certain end user characteristics.*

In the Matter of Application of BellSouth Corporation, BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc. for Provision of In-Region, InterLATA Services in Louisiana, FCC 98-271, 13 FCC Rcd. 20,599,1998 WL 712899 ¶ 316 (FCC Oct. 13, 1998).

40. The FCC's decision in October 1998 post-dates the June 1998 effective date of rule 1220-4-8-.07. The FCC's clear policy is that "similarly situated" is not discriminatory when it is governed through rules set by a state authority. However, in the absence of such rules, "similarly situated" constitutes undue discrimination.

41. At paragraph 317 the FCC concluded:

> *Failure to make CSAs available for resale to aggregations of customers similarly situated to the original CSA end user would unreasonably and discriminatorily limit the benefits of volume discounts to BellSouth end users.*
>
> *Id. at ¶ 317.*

42. The FCC was striving for a careful balance of interests among the various parties that would have an interest in CSAs. The FCC left the balancing-task to the states, expecting them to determine the meaning of "similarly situated." However, Tennessee's CSA rules do not give "similarly situated" any "narrowly tailored" meaning that can be conveyed to the FCC, to consumers, or to the incumbent service provider.

43. The FCC's policy is supposed to apply to state regulatory authorities. In January 1999 the Supreme Court of the United States, in *AT&T Corp.* v. *Iowa Utilities Board*, 525 U. S. 366, 384.385, opined (at footnote 6) "the question in this case is not whether the Federal Government has taken the regulation of local communications competition away from the States. With regard to matters addressed by the 1996 Act, it unquestionably has." AT&T Corp. v. Iowa Utilities Board, 525 U.S. 366, 384-385, 119 S.Ct. 721, 142 L.Ed.2d 835 (1999). Surely the best interests of Tennessee's consumers are served by having rules which give substantive meaning to "similarly situated."

V. TRA QUESTION TWO

44. If a proposed CSA rule is necessary, please provide comments, including the general parameters for each proposed rule and justification for each.

VI. CAPD RESPONSE TO QUESTION TWO

45. The CAPD believes a CSA rule is necessary, and the details of the CAPD's reply are provided in the previous paragraphs. The CAPD has circulated its proposed rules among the parties and has suggested that a "similarly situated" analysis be performed to develop similarly-situated-criteria. The CAPD suggests the analysis include the end user's competitors in Tennessee, the end user's service locations in Tennessee, the end user's annual intra-state tariff-billed volumes for each of the most recent three years, and the general tariffs that apply to the end user.

46. The CAPD understands that these criteria are less than perfect, and is eager and willing to assist in the development of CSA rules. Unfortunately, to date CAPD has received no counter offers or other proposals from any party.

47. The CAPD's proposed rules address three issues that are central to the CSA problem: the meaning of "similarly situated;" the meaning of a "competitive alternative available;" and the meaning of "benefit of the bargain," a phrase the Attorney General used in the letter of May 31, 2002 to the TRA. Since the "similarly situated" issue has already been discussed, the remainder of these comments focus on "competitive alternative available" and the "benefit of the bargain."

48. A CSA and a "competitive alternative" are considered two-sides of the same coin, in the sense that a CSA is a service provider's response to competitive pressure.

49. "Benefit of the bargain" is a term specific to Tennessee's public policy regarding breach of contract. According to the Attorney General's letter of May 31, 2002, a consumer's breach of a CSA contract has certain financial consequences: the consumer's "benefit of the bargain" must be returned to the service provider but any amount greater than the CSA's benefit is a penalty. The Attorney General concluded at page 5 of his May 31, 2002 letter to the TRA: "contractual provisions that are designed to penalize for breach of contract rather than to give the nonbreaching party the benefits of its bargain are unenforceable in Tennessee…"

A. THE CSA AND COMPETITIVE ALTERNATIVES

50. The TRA's current approval-process for BellSouth's CSAs requires the company to file an addendum where the consumer acknowledges that competition was a factor in the consumer's decision to accept the CSA. But the addendum does not answer a central issue regarding a CSA: is it a response to competition or is it a selective and preemptive price reduction to prevent competitors from entering the market in the first place? This issue does not apply to CLECs because they confront the incumbent throughout Tennessee. But it is an issue regarding the incumbent.

1. The CSA As Flexible Pricing In A Competitive Market

51. A CSA is a "special" contract between a Tennessee consumer who purchases telecommunications services and a telecommunications service provider who sells the services, where the services are regulated by the TRA. The CSA allows the service provider to compete for and retain the business of a consumer that might otherwise be lost to the service provider's competitors.

52. The contract is also "special" in the sense that TRA-regulated services are sold to the consumer for prices that are less than the prices in the service provider's general tariff. In the absence of a CSA the purchase and sale of TRA-regulated services in Tennessee are governed by the service provider's general tariff which has been approved by the TRA. The general tariff provides a public record of the prices, terms and conditions that apply to the purchase and sale of the services described in the tariff.

53. BellSouth, through testimony and cross-examination of its witness in TRA Docket No. 98-00559, is the only service provider on-record who identifies the competitive aspect of CSAs. According to the direct testimony of Randall Frame in that docket, his company offers a CSA when "BellSouth has reason to believe that the price of service under its existing tariff offering is not competitive for that particular customer [Randall Frame, Direct Testimony, Tennessee Regulatory Authority, Docket 98-00559, page 4, lines 19-20]." This statement is very similar to the comment made by one service provider who criticized CAPD's proposed rules: "The fact that there is a competitor should be all that is required."

2. The CSA As Discriminatory Pricing To Deter Competition

54. At paragraph 79 in the *FCC's Fifth Report and Order and Further Notice of Proposed Rulemaking [Pricing Flexibility Order] FCC Docket 99-206 (August 5, 1999)*, the federal agency expressed its concern about selling telecommunications service via a contract instead of a general tariff:

> *We are concerned, however, about the possibility that price cap LECs could use.... contract tariffs to individual customers, to engage in exclusionary pricing behavior and thereby thwart the development of competition. Economists have long noted the incentives that monopolists have to reduce prices in the short run and forgo current profits in order to prevent the entry of rivals or to drive them from the market. The monopolist then would be able to raise prices above competitive levels and earn higher profits than would have been possible if the exclusionary pricing behavior had not occurred and competitors had not existed or been deterred from entering the market.*

In the Matter of Access Charge Reform, Fifth Report and Order and Further Notice of Proposed Rulemaking, FCC 99-206, 14 FCC Rcd. 14,221, 1999 WL 669188 ¶ 79 (FCC Aug. 27, 1999)(hereafter "Pricing Flexibility Order").

55. The selling of services through contracts instead of general tariffs has implications for Tennessee's price-cap regulation. The CAPD is concerned that price-cap carriers may attempt to recover lost revenues stemming from discounted contract rates by increasing rates on consumers who do not have the benefit of a CSA. Although price-cap carriers apparently have not attempted such a recovery in the past, the TRA should consider this issue in this proceeding in the interest of establishing a complete set of regulations to guide carriers in their administration of CSAs. This rulemaking is the appropriate venue for treatment of CSAs relative to a price-cap carrier's price regulation plan.

3. FCC's Pricing Flexibility Policy

56. The CAPD does not believe there is a need to recite the FCC's pricing flexibility order here. The FCC's order was challenged but upheld by the United States of Court Appeals (District Of Columbia Circuit). In case No. 99-1395, decided February 2, 2001, the court noted that:

several LECs--BellSouth, Quest, SBC Communications, and Venison--intervene in support of the FCC.

WorldCom, Inc. v. Federal Communications Commission, 238 F.3d 449, 452 (D.C. Cir. 2001).

57. The Court affirmed the FCC's judgment:

...the FCC concluded that its collocation triggers were sufficiently protective of the public interest. This is precisely the sort of "rational legislative-type judgment" the FCC is empowered to exercise and we are required to respect.

Id. at 462.

4. CAPD Believes FCC's Pricing Flexibility For Channel Terminations Readily Applies To CSAs In Tennessee.

58. The FCC's pricing flexibility order established Metropolitan Statistical Areas as the geographic basis for the use of contract pricing, and rejected statewide application of contracts, as well rejecting individual central offices as a basis for contract tariffs. The FCC's order also applies to various types of services, one of which is especially applicable to this

rulemaking. In its order the FCC noted that "channel terminations between an end office and customer premises serve only a single end user," which is the exact situation of CSAs, since they are aimed at individual end users and are available to "similarly situated" end users. The CAPD believes the FCC's policy works in Tennessee and notes that the incumbent, BellSouth, already has met the FCC's thresholds in major metropolitan areas in Tennessee.

59. Since the federal courts have already determined that the FCC's order was "sufficiently protective of the public interest," the TRA can readily use the FCC's criteria to specify the geographic scope of the incumbent's CSAs in Tennessee.

5. FCC's Pricing Flexibility Policy Did Not Resolve The "Similarly Situated" Issue

60. Even though the FCC settled the issue of competitive alternatives and the geographic scope of contract pricing, the agency did not say that its pricing flexibility policy resolved the "similarly situated" issue. At paragraph 130 of its order the FCC stated: "to the extent that an incumbent LEC attempts to use contract tariffs in an exclusionary manner by targeting them to specific customers, the Commission will enforce the requirement that they make contract tariffs available to all similarly situated customers." Pricing Flexibility Order at ¶ *130.* The TRA still needs to determine the conditions which constitute "similarly situated."

B. THE CSA AND BREACH OF CONTRACT

61. In American jurisprudence the contract has special importance. Its premise is that the capable parties do not induce each other to accept terms that knowingly harm self-interest; therefore, the contract must be the sum of free choices made by sellers and buyers. In the CAPD's discussions with members of the local telephone industry, the service providers have described consumers who agree to CSAs as "sophisticated" and being fully aware of the CSA's complexities. But that assertion is questionable, given the way the service provider fashions the termination charges that seem to be against the consumer's self-interest.

1. General Tariffs Are Not A Basis For The Financial Consequence Of A Consumer's Breach

62. BellSouth's witness, Mr. Frame, testified that his company offers a CSA when "BellSouth has reason to believe that the price of service under its existing tariff offering is

not competitive for that particular customer [Randall Frame, Direct Testimony, Tennessee Regulatory Authority, Docket 98-00559, page 4, lines 19-20]." In that docket it was clear that termination charges were based on the service provider's general tariff. That practice continues in Tennessee.

63. Since the price under the general tariff is not competitive, and since a CSA is regarded as a service provider's response to competitors, then the general economic presumption is that the consumer's range of rational choices no longer includes the general rate. The consumer's rational choices are narrowed to the CSA and the competitors' offerings. Therefore, the consumer's benefit of the bargain stems from the range of rational choices.

64. Thus the consumer agrees to a CSA in lieu of switching economic allegiance from one service provider to another, which is the expected activity in a competitive market. Since the service provider's general rate is not competitive but the CSA rate is, termination charges based on the general rate or that equate or approach the general rate are economic penalties and anticompetitive because the consumer was not considering the general rate as an option. But if this is true, why would the "sophisticated" consumer agree to pay the general rate to terminate the CSA? One answer is that the consumer may not be as "sophisticated" as the service provider suggests.

2. Financial Consequence Of A Consumer's Breach Is Limited To The Consumer's Benefit Of The Bargain

65. Tennessee's Cleo doctrine limits consumer's liability for liquidated damages to the benefit of the bargain. See Guiliano v. Cleo, Inc. 995 S.W. 2d 88 (Tenn. 1999). In the case of a CSA, the consumer's benefit of the CSA bargain is not related to the general tariff of the provider offering the CSA. The consumer's benefit of the bargain is the economic difference between the encroaching competitor's price and the CSA's price of service, because the CSA was compelled by the encroaching competitor.

66. In Tennessee, any CSA which threatens or causes the consumer to pay general tariff prices or its equivalent as the price to terminate a CSA is anticompetitive. In such cases, the CSA's termination charges are a deterrent to competition. They either drive up the competitor's cost of acquiring a new customer or they prevent a consumer from switching service providers even when that decision would be rational, except for the termination charges. The eventual result of this anticompetitive practice is a withering of competition.

67. The consumer's benefit of the bargain includes the cost of facilities dedicated to the consumer's exclusive use and which the service provider can not reuse for any other

consumer. CAPD's proposed rules include termination charges based on the Cleo decision. All CSAs in Tennessee should be amended to reflect Tennessee's public policy.

VII. TRA QUESTION THREE

68. If the current rule is sufficient, discuss the manner in which future CSAs should be addressed.

VIII. CAPD RESPONSE TO QUESTION THREE

69. CAPD does not believe the current rule is sufficient for CSAs, as explained in the prior sections of CAPD's comments.

RESPECTFULLY SUBMITTED,

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