BellSouth Telecommunications, Inc.
333 Commerce Street
Suite 2101
Nashville, TN 37201-3300

joelle.phillips@bellsouth.com

Joelle J. Phillips
Attorney

615 214 6311
Fax 615 214 7406

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VIA HAND DELIVERY

Hon. Sara Kyle, Chairman
Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, TN 37238

In Re: *Tariff Filing to Modify Language Regarding Special Contracts*
Docket No. 03-00366

Dear Chairman Kyle:

Enclosed are the original and fourteen copies of BellSouth's Brief Regarding Time for CSAs to Become Effective Pursuant to Chapter 41 of the Tennessee 2003 Public Acts. Copies of the enclosed are being provided to counsel of record.

Cordially,

Joelle Phillips

JJP:ch

BEFORE THE TENNESSEE REGULATORY AUTHORITY
Nashville, Tennessee

In Re: *Tariff Filing to Modify Language Regarding Special Contracts*

Docket No. 03-00366

Request for Declaratory Order Interpreting the Language of Public Chapter 41 of Tennessee 2003 Public Acts Regarding the Effective Date of Contract Service Arrangements Filed With the Authority

BELLSOUTH TELECOMMUNICATIONS, INC.'S BRIEF REGARDING TIME FOR CSAs TO BECOME EFFECTIVE PURSUANT TO CHAPTER 41 OF THE TENNESSEE 2003 PUBLIC ACTS

BellSouth Telecommunications, Inc. ("BellSouth") files this *Brief Regarding Time for CSAs to Become Effective Pursuant to Chapter 41 of the Tennessee 2003 Public Acts* and respectfully shows the Tennessee Regulatory Authority ("Authority" or "TRA") as follows:

INTRODUCTION

After the flurry of filings during the last two weeks, as well as the multitude of briefs and arguments presented on CSAs over the last several years, it now appears that the questions regarding CSAs have finally come down to this:

> **May the Authority permit CSAs to be effective immediately upon filing, consistent with its current rules and the new statute?**

The answer is both simple and clear – yes.

The current TRA Rule governing ILEC CSAs does not require a tariff filing nor does it impose any particular waiting period before discounted prices, negotiated by business customers, can become effective. The new statute, likewise, imposes no waiting period and, in fact, requires the Authority to presume that these negotiated

CSAs for business customers are valid absent a substantial evidentiary showing to the contrary. Together, this rule promulgated by the agency and this statute enacted by the General Assembly clearly authorize the TRA to permit CSAs to become effective when filed and to be set aside only after a showing of illegality is made.

The TRA was correct to decide, as it did by a unanimous panel vote during the June 2 Agenda Conference, that all future CSAs should be effective upon filing and should not be set aside unless sufficient showing of illegality is made.

DISCUSSION

I. The TRA Rule that Governs ILEC CSAs is Rule 1220-4-1-.07. That Rule Does Not Require, or Even Reference, Filing of Special Contracts as Tariffs.

TRA Rule 1220-4-1-.07 provides as follows:

> 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.

Pursuant to this Rule, the TRA is well within its authority to permit the CSAs to become effective when filed, as no notice period or other specific review process is set. The rule contains no requirement that special contracts be filed as tariffs, and consequently, the rules regarding time periods for tariff review clearly are inapplicable. Prior to enactment of the new statute,[1] BellSouth's practice was to do more than what this rule requires in order to address the potential for a claim of price discrimination.

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[1] Public Chapter 41 provides as follows:

> AN ACT to amend Tennessee Code Annotated Section 65-5-201, to establish that special rates and terms are valid when reached through negotiation between a public utility and a business customer.

In the past, BellSouth has chosen to seek approval of each of its CSAs as a tariff applicable to the one customer with whom the CSA was negotiated, but also available to all similarly-situated customers. Consistent with this approach, BellSouth filed a tariff page for each CSA, so that the special rates provided to the CSA business customer actually became part of the tariffed rates for BellSouth, when approved by the Authority.

The Authority never ordered BellSouth to treat CSAs as tariffs, and TRA rules do not require a tariff for a CSA or "special contract". Certainly no CLEC submits its CSAs as tariffs or subjects its CSAs to the rules governing tariffs.

For its part, BellSouth had chosen, prior to the enactment of the statute, to file tariffs for its CSAs solely in order to ensure that the special rates contained in those CSAs would not be held to constitute a discriminatory departure from BellSouth's tariffed rate for those services. Because the CSA rates were submitted and became part of the tariff approved by the Authority, it was clear that the negotiated rate was not a departure from, but rather part of, the tariff. BellSouth adopted the practice of tariffing its CSAs, not out of any legal obligation, but, instead, because the tariff process

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BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF TENNESSEE:

SECTION 1. Tennessee Code Annotated, Section 65-5-201, is amended by adding the following language at the end of the section:

Notwithstanding any other provision of state law, special rates and terms negotiated between public utilities that are telecommunications providers and business customers shall not constitute price discrimination. Such rates and terms shall be presumed valid. The presumption of validity of such special rates and terms shall not be set aside except by complaint or by action of the TRA directors, which TRA action or complaint is supported by substantial evidence showing that such rates and terms violate applicable legal requirements other than the prohibition against price discrimination. Such special rates and terms shall be filed with the authority.

SECTION 2. This act shall take effect upon becoming a law, the public welfare requiring it.

provided a logical mechanism to address the price discrimination issues that repeatedly had been raised (though never proven) by the CAD regarding CSAs.

While BellSouth made tariff filings to implement its CSAs in Tennessee, BellSouth never made such tariff filings in any of its other states. Clearly then, tariffing has not been deemed necessary for purposes of effectuating federal resale requirements in those states. The lack of "tariffed" CSAs in other states has resulted in no resale restrictions elsewhere in BellSouth's region.

Notwithstanding BellSouth's decision to proceed with using tariff filings in order to address price discrimination allegations made under the prior law in Tennessee, there has never been any specific statutory requirement that "special rates" be tariffed, and there is no such law today. Instead, the law, in the past, simply empowered the Authority to approve "special rates" just as it was empowered to fix rates under its general rate-making authority. The current mandates that such special rates for business customers will no longer be fixed by the Authority, but, instead, shall be negotiated by the customers and "presumed valid" by the TRA.

Pursuant to the language of the new statute, the TRA is now limited in the factors on which it can rely in order to set aside negotiated CSA rates. Under the old law, the TRA's general rate-making authority permitted it to consider policy goals in determining whether a rate was just and reasonable, but the new statute provides that these special rates and terms may only be set aside upon complaint or TRA action supported by substantial evidence showing that the rates and terms violate legal requirements other than the prohibition against price discrimination. The new law conclusively establishes an area of pricing, namely negotiated pricing for business customers, which is inherently

distinct and excepted from the regulated rates encompassed by the TRA's more general rate-making power. This negotiated pricing is clearly a distinct, statutorily-sanctioned process of reaching a price that constitutes a specific legislative departure from traditional, policy-driven rate-making.

There is no legal requirement that special contracts incorporating special rates and terms must be "tariffed" (and there never has been). Moreover, with the enactment of Public Chapter 41, there is now no logical reason for tariffing CSAs, which are now exempt from any price discrimination concern. Because the General Assembly has directed that such rates are to be "presumed valid", the TRA would exceed its statutory grant of authority if it required BellSouth to include such special rates and terms in its tariff as a condition of validity. Even if any general tariffing requirements arguably could have been deemed applicable to CSAs in the past, such requirements clearly were abrogated by the newly-amended statute, which specifically states that its provisions are applicable "notwithstanding any other provision of state law".

In many ways, the issue of whether "to tariff or not to tariff" is an example of form over substance. Submission of tariffs in this context served two purposes: (1) review by the Authority to determine validity and (2) public notice. Cases discussed repeatedly in the CSA Rulemaking docket, including, for example, New River Lumber Co. v. Tennessee Railroad Co., 283 S.W. 867, 873-74 (Tenn. 1921), specifically focus upon the need to avoid secret, discriminatory departures from the rates that are set by an agency possessing statutory power to make rates. In the case of CSAs, under the new law, no review is required in order to determine validity because it is presumed by the statute, and discrimination is no longer an issue. Review process only becomes

necessary when a party presents a complaint supported by substantive evidence. Additionally, public notice is satisfied by filing an unredacted copy with the Authority, which contract becomes an open record, just as any tariff would be.

With the change in law, there no longer exists any reason – procedural, practical or legal – to submit tariff filings for the purpose of effectuating CSAs. To the contrary, the General Assembly has spoken clearly in establishing that such rates are valid by mandatory statutory presumption, without any requirement that the TRA impose a review period otherwise applicable to tariffs. Imposing a new requirement of tariffing will necessarily involve a procedural hurdle, and this would undermine the legislative creation of the presumption.

II. The New Statute Eliminates the Primary Legal Issue, Price Discrimination, that Has Been Raised in the Past in Opposition to CSAs. The Clear Intent of the Legislature Was to Remove this Cloud and Ensure Immediate Effectiveness for All CSAs, for ILECs and CLECs Alike.

The introduction of presumed validity for CSAs represents a significant change in Tennessee. The TRA must not undermine the intended practical effect of this new concept by imposing time-consuming regulatory hurdles where a presumption is required by law. The TRA must be guided by the statute's language.

Under Tennessee law, words in statutes are to be given their ordinary meaning. Tennessee courts have consistently recognized the requirement that statutes be construed to give the ordinary and natural meaning to terms in the statute. "When approaching statutory text, courts must also presume that the legislature says in a statute what it means and means in a statute what it says there." BellSouth Telecommunications v. Greer, 972 S.W.2d 663,674 (Tenn. App. 1997) (holding that the TRA erred and exceeded its statutory authority when it failed to approve BellSouth's

application for a price regulation plan as required by the terms of T.C.A. § 65-5-209(c)). The lesson provided by the overwhelming Tennessee authority regarding statutory construction in the context of regulatory agencies is clear: where statutes plainly direct an action or resolve an issue, an agency errs and will be reversed when it ignores that legislative directive.

The term "presumption" is ordinarily defined as the act of supposing something to be true without proof. Specifically, in the legal context, the term "presumption" means "a legal device which operates in the absence of other proof to require that certain inferences be drawn." Black's Law Dictionary, Sixth Edition. Applied in this statute, the term means that the special rates and terms, by operation of the statute, shall[2] be presumed valid – in other words, the statute establishes the mandatory inference of validity without proof or other process by the TRA. Consequently, when the CSA is filed, it is presumed valid. The only time its validity can be altered is when substantial proof is presented, evidencing some violation of law. The only requirement imposed by the statute is filing of the rates and terms with the Authority.

The statute provides for no waiting period prior to effectiveness of these negotiated special rates,[3] and the statute clearly establishes that there can be no

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[2] Tennessee, like most states, has long recognized the significance of terms like "shall" or "must" appearing in statutes. These terms indicate the imposition of a mandatory requirement rather than a merely permissible option. *Stiner v. Powells Valley Hardware Co.*, 75 S.W.2d 406, 408 (Tenn. 1934) (noting that the word "shall" appearing in a statute denotes an imperative). The language in the statute directing that the negotiated rates "shall be presumed valid" imposes a mandatory requirement with no room for the exercise of discretion to impose additional substantive or procedural requirements as a condition of implementing these rates and terms.

[3] Had the legislature merely intended to resolve the lingering debate at the TRA about price discrimination – or merely intended to "bless" the existing level process at the TRA – it would not have needed to create a presumption. The fact that the General Assembly created a presumption, rather than merely authorizing the TRA to accept such rates, in its discretion, without the price discrimination concern, demonstrates that the statute is designed to streamline the CSA process and obviate the need for the existing level of scrutiny of CSAs. To conclude that the TRA should continue to subject CSAs to a 30-day waiting window before recognizing the validity of such rates would be the equivalent of turning a

regulatory rate-fixing action required by the TRA, because such rates are instead to be presumed valid. As noted above, given its ordinary meaning, a presumption is a legal device that operates without proof or action by a proponent. Given that no action should be taken, it logically follows that no waiting period is warranted before the special rates and terms are effective. Imposition of a waiting period before parties can obtain the benefit of a mandatory statutory presumption is simply an arbitrary regulatory action.

Notably, in contrast to the Tennessee statute, some other states have enacted statutes in which a presumption of validity is qualified or limited by the explicit creation of a waiting or notice period that must elapse before the presumption of validity is effectuated. For example, the Florida statute provides that utilities may set or change the rate for nonbasic services and the rate shall be presumptively valid "on 15 days notice." See Section 364.051(6), Florida Statutes. In stark contrast to the Florida legislation, however, the Tennessee statute imposes no notice or waiting period. Without such an explicit reference to a delay, it is illogical to construe the statute to permit any such delay before effectuation of a statutorily-presumed, valid rate. Obviously, the TRA would be well within its power to permit immediate effectuation of CSAs, subject to suspension if the CSA is later shown to violate the law, given the lack of any reference to a notice or waiting period in the statute.

Clearly the Tennessee General Assembly knows how to qualify a presumption by requiring that the presumption only arises after some act, like the passage of time, is done or not done. See, for example, TCA § 50-6-235 (establishing presumption of "reasonable effort" to arise ***only after*** physician takes certain steps); T.C.A. § 66-29-135

blind eye to the legislature's action. The General Assembly created a new presumption, and that effort must be recognized rather than ignored.

(establishing presumption of abandonment of gift certificate to arise ***only after*** it remains unclaimed for 5 years after it becomes payable). These examples demonstrate that the General Assembly knows perfectly well how to draft a statute that qualifies or limits the operation of a legal presumption. In this case, however, the legislature chose to impose no such limitations or qualifications, and AT&T is wrong to suggest that the TRA should impose any such limitation on the operation of the presumption created by law.

In addition, the use of the term "set aside" is also instructive. Rather than stating that the Authority may "deny" or "reject" a CSA after a showing of illegality, the statute instead directs that the presumption of validity of the rate may be "set aside" in that situation. The term "set aside" is used in the legal context to mean "to reverse, vacate, cancel, annul or revoke a judgment, order, etc." Blacks Law Dictionary, Sixth Ed. This choice of words is therefore consistent with the notion that the rates have already gone into effect because the term is used to describe an action to "undo" something such as an order or judgment already in place. This supports the conclusion that the statute requires immediate effectuation of CSAs because, otherwise, there would be nothing in place to "set aside" upon a complaint or action by the Directors in which the Authority found some aspect of the CSA to violate the law. Thus, AT&T's argument that the immediate effectiveness undermines the ability of parties to present evidence of an illegal CSA is simply wrong – the statute clearly states that CSAs would be "set aside" in such an event. The legislature clearly intended the CSAs to be effective unless and until "set aside." The decision about whether such a remedy is "good enough" to protect AT&T is a decision left to the legislature. Motivated by the evidence of competition for

business rates in Tennessee, the legislature has made the decision that the presumption is appropriate and the after-the-fact, set-aside remedy is sufficient.

The legislative history relating to the statute further supports immediate implementation of CSAs and notes that "[t]his bill reduces the current delay of and implementation of those rates, and the special contracts are presumed valid and after they are taken to the TRA …." It is clear from this legislative history that the intent of the legislature was to reduce any period of delay after negotiation of the special rate and term and before implementation of such rates by replacing the need for review of such rates with a presumption of validity. Moreover, Senator Trail's written reasons for his vote expressly state his understanding that the statute would bring about "immediate effectiveness" of negotiated rates with incumbent carriers. *See* Trail Letter, attached as Exhibit A.

The TRA has recognized and discussed on several occasions the legislature's intent in enacting Public Chapter 41. On May 12, Hearing Officer Director Tate noted that the General Assembly has spoken "clearly regarding the validity of the instrument themselves. Also, comments by the sponsors during the session in both committee and on the floor indicate their intent to impose less regulation rather than more in this particular area." Tr. at pp. 16-17. Director Miller, during that same Conference, noted that the statute greatly affected the then-pending docket by rendering "many of the comments filed by the parties in [that] docket … no longer relevant." Tr. at p. 14. On Monday, June 23, during the Special Authority Conference, Chairman Kyle discussed her motion and the deliberation on that motion during the June 2 Conference noting, "This legislation was to solve problems that maybe those of us in the regulatory field

haven't yet solved. The 1996 and the 1995 Telecom Acts were put into place so that we could move out of regulating. Maybe we didn't move fast enough. Legislation was needed to help us along. I find that's where we are today." Tr. at p. 5. In these and other comments by the Directors, it is clear that the Authority has properly recognized Public Chapter 41 as a statute intended to bring about a more streamlined and less onerous process for the handling of CSAs.

III. BellSouth's Tariff and its Filings of CSAs Since Passage of the New Statute Provide the TRA Staff with Ample Material to Review CSAs and to Make Recommendations to the Directors in the Event that the Staff Find Cause for Concern Regarding a Particular CSA.

BellSouth's practice exceeds the requirements of the statute, the TRA's rule, and BellSouth's revised tariff. Specifically, BellSouth provides ample material to the Staff with each CSA.

Each CSA is filed in unredacted form. In addition, a description of the CSA is also provided for the Staff's use. BellSouth provides these materials as open records, which the TRA may post or make available in whatever manner it believes to be efficient. In addition, BellSouth has provided the Staff with a reference to cost materials already on file with the Authority, which materials demonstrate the above-cost nature of the pricing in the CSA. BellSouth affirms in a cover letter that each CSA is above cost and references the cost-materials on file with the Authority supporting this affirmation. BellSouth includes in its CSAs, a reference to the Termination Liability provisions in its tariff for term contracts and states that such tariffed termination liability is applicable to Tennessee CSAs. Each CSA also notes that the CSA may be assigned for the purpose of resale to a certified reseller. Each CSA notes that the customer has competitive choices available for its telecommunications services.

With these materials, the Staff can continue to review CSAs, to determine whether the CSA is consistent with any legal requirements still in effect, and can advise the Directors as to its conclusions.

IV. The Arguments Raised to Date by AT&T and the CAD Lack Merit.

A. AT&T's Latest Filing on Friday Afternoon, June 20, Contained Misleading Information and Inaccurate Statements.

1. AT&T wrongly characterizes this Panel's earlier vote as mere "comments" or, alternatively, as a violation of the Open Meetings Act.

In its *Reply to BellSouth's Response in Opposition to AT&T's Petition to Intervene*, which was filed with the Authority on Friday, June 20, AT&T contends that the motion made and vote taken during the June 2, 2003 Agenda Conference constituted mere "oral remarks made by Chairman Kyle" and that such "comments concerning another pending case ... cannot legally bind the Authority or any party since the other case was not before the agency at that time." AT&T goes on to assert that "any decision on a pending case which is not properly before the agency would violate the open meetings statute and would be void." AT&T *Reply* at pp. 8 and 9. AT&T is wrong.

First, it is clear from the transcript that Chairman Kyle did not merely "comment" on the handling of CSAs pursuant to Public Chapter 41. Rather, she made a specific motion, which carried by a unanimous vote from the Panel.[4] Moreover, Chairman

[4] Chairman Kyle: ... and I also move that as a result of the passage of Public Chapter 41, all future CSAs negotiated between telecommunications providers and business customers shall become effective upon filing with the Authority and that CSAs shall not be set aside except by complaint or by action of the TRA directors, which TRA actions or complaint is supported by substantial evidence showing that the rates and terms of such CSAs violate applicable legal requirements other than the prohibition against price discrimination.
Director Tate: Second.
Director Jones: I agree.

Kyle's comments during the June 23 Special Conference further clarified that it was her intention not merely to "comment", but rather her understanding was that a motion was made and that motion carried.[5]

AT&T fails to cite any specific provision of the open meetings statute in support of its vague allegation that this action is void. Tennessee Code Annotated §§ 8-44-101, *et. seq.*, known commonly as the Sunshine Law or the Open Meetings Act, effectuates the policy of the state of Tennessee that the formation of public policy and decisions is public business, not to be conducted in secret. The Authority has long recognized its obligation to conduct business in a fashion consistent with the Open Meetings Act.

Consistent with the Act, the TRA regularly publishes its Agenda for conference meetings and holds those meetings in a manner open to the public. Clearly, the June 2 Agenda Conference complied in all respects with the requirements of the Open Meetings Act. Moreover, the handling, not only of specific CSAs noted on the June 2 Agenda Conference, but also Chairman Kyle's motion with respect to future CSAs, was completely proper under the provisions of the Open Meetings Act. While AT&T makes no specific citation explaining its allegation that the action of the panel was void pursuant to the Open Meetings Act, it appears that AT&T is suggesting that, because there was no specific reference on the Conference Agenda indicating that the

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Transcript of Tennessee Regulatory Authority Conference, June 2, 2003, pp. 62, line 20 – 63, line 8.

[5] Specifically, Chairman Kyle noted: "I made a motion in three separate panels that stated: I move that as a result of the passage of Public Chapter 41, all future CSAs negotiated between telecommunications providers and business consumers shall become effective upon filing with the Authority. All of my fellow Directors agreed and voted for this motion. For this reason, it is my position that the Authority did interpret the new statute, finding that CSAs are effective upon filing. No contested case is needed to interpret the statute. Let me say before I move my motion, that all that I just read to you and repeating what I have read before was said, gave you all a heads up to get your filings in here. You had the time." Tr. at p. 10.

discussion of future CSAs might be held, the vote was not properly noticed. AT&T cites no caselaw, or even a specific statutory reference, in support of this allegation.

To properly consider AT&T's allegation, it is necessary to look at the context in which the motion was raised. At the May 12 Agenda Conference, the Directors, sitting as a rulemaking panel, discussed at length the effect of the new legislation on the then-pending rulemaking docket addressing CSAs. The Directors unanimously approved the recommendation of Director Tate, which closed the rulemaking docket in recognition that the new statute mooted the salient issues being addressed in that rulemaking docket. At that Conference, the Hearing Officer's recommendation was approved by the Directors on motion by Director Miller. Director Miller's motion provided that the rulemaking docket would be closed and that all CSAs previously allowed to become effective pending the outcome of the docket would be placed on the next Authority Conference for resolution. In his statements explaining his motion, Director Miller went on to note that the new statute greatly impacted the CSA docket. Director Miller recommended that the CSAs then pending would be placed on the Agenda with the appropriate panels for determination. It was clear from this public discussion of Director Miller's motion that the CSAs would be considered in the context of the new statute. In light of all of the discussion related to CSAs and the new statute during that docket, all of which was consistent with the Open Meetings Act, it was completely clear that the placement of the CSAs on the next docket was for the purpose of consideration, in light of, and in the context of, the new statute and that the agency would be considering the effect of the new statute on CSAs.

AT&T's failure to cite any specific provision of the open meetings statute, or to even supply a citation for the open meetings statute itself, is consistent with AT&T's haphazard, 11th-hour filings and strategy in this matter. A party, such as AT&T, whose representatives were in attendance during both the May 12 and Jun 2 Agenda Conferences, and who has had ample opportunity to seek clarification or reconsideration of a clear motion made during the June 2 conference, cannot seriously contend that Chairman Kyle's motion or the panel's vote took place in secret or in violation of the open procedure required by Tennessee law. The failure to cite any specific provision voiding that action or any case-law construing the act to prohibit the motion is indicative of the lack of merit in AT&T's argument. Moreover, had AT&T seriously believed that the actions at the Agenda Conference were in violation of either the open meetings statute or any other law, AT&T's remedy was to seek clarification, reconsideration or appeal of that action during the period provided by statute for review of agency actions. AT&T failed to do that, and, instead, sought to attack the agency's interpretation of the statute through an untimely petition to intervene and convene a contested case relating to a tariff. The Open Meetings Act was designed to give the public the right to monitor the decision-making processes of agencies and government bodies. It was not intended to provide fodder for legal gamesmanship or to provide an excuse for the failure to seek review for a decision with which a party disagrees.

AT&T further argues that BellSouth's filing of the tariff demonstrates that BellSouth, too, believed that Chairman Kyle's "language about the treatment of future CSAs" was not dispositive of this issue. This contention is flatly wrong. The fact is that BellSouth filed its tariff in response to Staff questions regarding the treatment of future

CSAs. Specifically, the TRA Staff informed BellSouth of its concerns that parties reviewing BellSouth's tariff might be confused by the fact that, in the past, the tariff contained references to CSAs, while, in the future, based on the TRA's interpretation of the statute, BellSouth would not be filing tariffs for CSAs. BellSouth agreed that it was logical to include a notation in the tariff explaining the change in the handling of CSAs and referring any interested party to the TRA in order to obtain information about CSAs. In short, the TRA Staff's suggestions regarding the tariff are logical, and the revision to the tariff will assist any person reviewing it by clarifying where CSAs can be found.

2. AT&T attempts to suggest that BellSouth has taken an inconsistent position in Kentucky, but AT&T makes a selective, out-of-context citation. Taken in context, it is clear that BellSouth's position in Kentucky is consistent and correct.

AT&T attempts to obscure the issue by referencing a BellSouth-prepared document regarding "presumptively valid" ***tariffs*** in other BellSouth states. Obviously, tariffs are not the issue because there is no rule requiring CSAs to be filed as tariffs. AT&T attempts to use this document to support its inaccurate assertion that "BellSouth knows presumptive validity does not mean effective immediately." Had AT&T intended for the TRA to get the complete and accurate picture, however, it might well have referenced the ***entire filing*** from which it drew the chart that it filed in its June 20 pleading.[6] That pleading, taken in its entirety, includes the following statement regarding what "presumptive validity" is not: "Presumptive validity does not preclude the Staff or an intervenor from challenging the tariff. ***However, the tariff would become***

[6] This citation was one more instance in which AT&T's choice to file on Friday afternoon was frustrating and potentially prejudicial to BellSouth. AT&T's "citation" for the pleading did not include a title or date of the pleading from which the chart was drawn. It literally took BellSouth hours to locate the pleading from the short description, leaving BellSouth no time to file a response setting the story straight. This is an example of why last-minute filings should be scrutinized with skepticism.

effective and remain effective while it is under challenge." *Materials and Memorandum*, dated January 6, 2003, Case No. 2002-00276 Before Kentucky PSC at p. 3. Accordingly, even the pleading from which this chart is drawn recognizes that presumptive validity may well involve immediate effectiveness during the time that the agency may review a presumptively-valid tariff or during the time that a tariff may be challenged. Consequently, this perspective is completely consistent with the argument being made with respect to CSAs in Tennessee.

More to the point, however, AT&T filed a chart drawn from one Kentucky docket in which the concept of ***presumptively valid tariffs*** was being discussed. AT&T chose not to file, however, a more relevant chart, prepared by BellSouth and filed in Kentucky in the docket in which ***CSAs*** were being considered (a docket in which AT&T has participated as a party). That chart compares the procedures governing CSAs in other states. It is clear from this chart that CSAs are not treated like tariffs in any other state in BellSouth's region. *See* Exhibit B (Chart filed on Mach 24, 2003 with the Kentucky Public Service Commission in Docket PSC 2002-00456 *Inquiry into the Use of Contract Service Arrangements by Telecommunications Carriers in Kentucky.*) AT&T simply makes the assertion that CSAs must be tariffs, and all of its arguments flow from that incorrect premise.

AT&T relies strongly on BellSouth's statements made ***before*** enactment of the statute regarding filing its CSAs as tariffs. AT&T goes so far as to say that "here is how BellSouth's own attorney recently described the TRA's current rules on CSAs: 'Pursuant to the current rule, BellSouth's CSAs are publicly filed as tariffs.'" The flaw in this argument is as clear as the rules of grammar. Clearly, the sentence quoted by

AT&T describes how BellSouth filed its CSAs. It does not describe the rule governing CSAs. At the time, as noted in the filing quoted by AT&T, BellSouth was filing its CSAs as tariffs. There is no argument about this point. The fact that BellSouth did so, however, is quite different from the fact AT&T is trying to demonstrate, which is what the rule required.

Now that the law has changed, BellSouth's decision to file CSAs as tariffs, even though the rule did not require it to do so, has also changed. There is no need for this process. It is not required, and BellSouth's decision to do it in the past under different circumstances is of no persuasive authority now that the law has changed.

3. AT&T's unflattering and unwarranted characterization of Senator Trail's written reasons for his vote misses the point. Senator Trail's rationale is completely consistent with the statute.

AT&T's characterization of Senator Trail's letter to the Senate clerk containing his written reasons for the vote on Public Chapter 41 is not persuasive. While AT&T is certainly entitled to its opinion regarding the motivations regarding a particular legislator, BellSouth believes its assertions are unwarranted and unreasonable. More importantly, they are irrelevant.

Legislative history is a tool which can be used to inform the meaning of statutes. While it is true that legislative history cannot be used to undermine the plain language of a statute, there is nothing in Senator Trail's letter to the Senate Clerk that is inconsistent with the language contained in Public Chapter 41. The fact is that the language in the new statute speaks of presumption and the statute includes no reference to a requirement for filing of CSAs as tariffs or for any other waiting period before such special contracts can become effective.

Senator Trail's letter provides helpful insight into his interpretation of the language of the statute. As one of the statute's sponsors, the fact that he believed the statute to accomplish reduced regulatory burden and quicker implementation is quite relevant to the agency's decision about how to implement CSAs. Nothing in the statute prohibits the TRA from allowing BellSouth's CSAs to become effective upon filing. Moreover, Senator Trail's written reasons for his vote make it quite clear that such a procedure would be completely consistent with his motivation for voting for the statute.

4. AT&T's mischaracterizes the discussions between BellSouth and the TRA telecom staff.

AT&T misunderstands the statements contained in BellSouth's white paper regarding the TRA Staff. BellSouth's white paper references statements made by TRA Staff suggesting that a tariff is required for any rate charged to any customer. The TRA Staff has never taken the position with BellSouth that it had reached any final decision about a recommendation to the Directors regarding the need for a tariff to implement a CSA. The TRA Staff's statement regarding the need for a tariff was simply one of many statements and questions raised during discussions with the Staff about changes resulting from the new statute. To the extent that AT&T characterizes that statement and the reference in BellSouth's white paper as a difference in opinion between the TRA Staff and BellSouth, BellSouth believes that this is inaccurate. It is BellSouth's understanding that the TRA's telecom staff believed that the changes to BellSouth's tariff were logical and warranted, and BellSouth is not aware of any unresolved issue raised by the TRA Staff. Certainly to the extent any such issues were outstanding, the telecom staff could have issued a data request regarding such matters.

B. The Consumer Advocate's Petition Mischaracterizes the Applicable TRA Rules Governing CSAs.

The Consumer Advocate's petition parrots AT&T's complaint and wrongly asserts that various TRA tariffing rules are applicable to CSAs. CSAs or special contracts are simply not synonymous with tariffs. No party has cited any authority to the contrary. No case has been cited, no statute has been cited, and no TRA rule has been cited that equates the two.[7] The sole basis for the contention that Contract Service Arrangements must be filed as tariffs is the fact, as discussed above, that BellSouth has, in the past, filed its CSAs as tariffs.

The bottom line is simply this: BellSouth filed its CSAs in the past as tariffs in order to address price discrimination issues. When it filed CSAs as tariffs, then the tariffing rules applied. Now that the law no longer presents a reason for BellSouth to file its CSAs as tariffs, BellSouth does not intend to do so. In the absence of BellSouth's own choice to file CSAs as tariffs, there can be no link between the rules governing tariffs and the specific rule governing special contracts. No party has established any basis for this connection.

It is well within the discretion of the TRA to construe its own rule providing that contracts are subject to supervision, regulation, control, review and approval by the TRA to permit the TRA to allow such CSAs to be effective upon filing and to permit the TRA Staff to review the materials filed with CSAs and to engage in an actual full-blown review of those CSAs only when a complaint substantiated by evidence is filed. Clearly,

---

[7] In fact, the concept that tariffs serve as surrogate for a contract, when no contract exists, is a well recognized proposition in regulatory law. The TRA's own rules also recognize the concept that contracts and tariffs are not the same. For example, Rule1220-4-8-.01(bb) notes that "Tariffs function in lieu of a contract between an end user and a service provider." Nothing in the TRA's rules suggests that it is necessary for parties to have a tariff (which serves as a surrogate in lieu of a contract) ***and*** contract.

this is what the TRA has already voted to do; clearly this is what Senator Trail's letter indicates that legislator believed the TRA should do, and clearly, no party has come forth with any authority pursuant to which such a process could be held violative of any statute or rule.

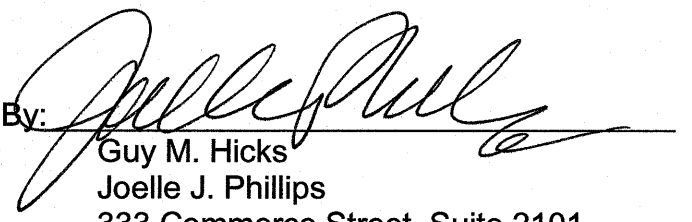
CONCLUSION

CSAs have always been a proper method of delivering the benefits of competition to customers. Even when the law formerly required advance approval of CSAs and applied the prohibition against unjust discrimination in this context, CSAs were proper because the competitive realities of competition justified those CSAs. The new law, which provides for presumptive validity of CSAs and which removes any requirement relating to price discrimination, is a positive step toward a less regulated and even more competitive market for business customers in Tennessee.

AT&T now urges the TRA reverse its June 2 unanimous decision, ignore the clear legislative history and be diverted by previously-resolved claims regarding CSAs. Instead, the TRA should view the new statute as a clear statement from the General Assembly to keep moving down the road to a more and more competitive market and to turn its attention away from the old issues surrounding CSAs. The TRA was right to interpret the statute, as it did during the June 2 conference, as a clear indication that the legislature intended to speed the process of delivering CSA discounts to businesses in Tennessee. Pursuant to the existing rule and to BellSouth's tariff, the Authority is well within its statutorily-granted power to do as the legislature intended and to enter a declaratory ruling that, pursuant to the new statute, and the TRA's existing rules, BellSouth's tariff is consistent with the new statute.

Respectfully submitted,

BELLSOUTH TELECOMMUNICATIONS, INC.

By: 

Guy M. Hicks
Joelle J. Phillips
333 Commerce Street, Suite 2101
Nashville, TN 37201-3300
615/214-6301

Exhibit A

SENATOR LARRY TRAIL
16th SENATORIAL DISTRICT
BEDFORD, MOORE AND RUTHERFORD COUNTIES

SUITE 8A, LEGISLATIVE PLAZA
NASHVILLE, TENNESSEE 37243-0216
PHONE: (615)741-1066
FAX: (615) 741-9349

107 N. MAPLE STREET
MURFREESBORO, TN 37130
(615) 895-9890

Senate Chamber
State of Tennessee
NASHVILLE

COMMITTEES

COMMERCE, LABOR AND AGRICULTURE

EDUCATION

JUDICIARY

SELECT COMMITTEE ON CHILDREN AND YOUTH
CHAIR

May 29, 2003

Russell Humphreys
Chief of Staff
1 Legislative Plaza
Nashville, TN 37243

Dear Russell,

Pursuant to Senate Rule 61, I am supplying to the Clerk these statements explaining my reasons for my vote on Senate Bill 523 for entry into the record.

This bill provides an important benefit to business customers in Tennessee. Pursuant to the terms of this bill, these customers will be able to enjoy immediate effectiveness of discounted telephone rates, which they negotiate with any telephone utility, whether competitive local exchange carrier or incumbent.

The Tennessee Regulatory Authority has, prior to enactment of this law, overseen contract service arrangements implementing negotiated discount rates. This regulatory process has been different for competitive local exchange carriers as compared to incumbent local exchange carriers. In light of the significant developments in the competitive market in Tennessee for business telephone services, these differences are no longer warranted. Specifically, the delays associated with this review process as applied to CSAs with incumbent carriers are bad for Tennessee business and must be stopped. Under this new legislation, these CSAs will be presumed valid and go into effect upon filing with the TRA.

These changes are warranted by the significant competitive landscape in Tennessee, and they are needed in order to assist Tennessee business in getting the benefit of the rates they negotiate. The practical reality is that businesses, particularly in the current economy, should not face regulatory obstacles that slow the implementation of discounts. Rather, these businesses need and deserve to reap the benefit of discounts immediately. For all of these reasons, I believe Senate Bill 523 is an important and necessary step in continuing the move toward a more competitive telecommunications market in Tennessee. Both Chairman Head in the House and I have chosen to sponsor and support this important legislation to accomplish these important goals.

Very Truly Yours,

Larry Trail

Senator Larry Trail

Exhibit B

BELLSOUTH

BellSouth Telecommunications, Inc.
601 W. Chestnut Street
Room 407
Louisville, KY 40203

Dorothy.Chambers@BellSouth.com

Dorothy J. Chambers
General Counsel/Kentucky

502 582 8219
Fax 502 582 1573

March 24, 2003

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

Re: Inquiry Into the Use of Contract Service Arrangements by Telecommunications Carriers in Kentucky
PSC 2002-00456

Dear Mr. Dorman:

Enclosed for filing in the above-captioned case are BellSouth Telecommunications, Inc.'s Responses to the Commission's December 19, 2002, and January 28, 2003, Data Requests.

Due to technical difficulties, the Attachments to Item No. 1 are not available today. BellSouth plans to file these Attachments with the Commission on March 25, 2003, in CD-ROM format, along with a petition seeking protection of the information identified as confidential.

One paper copy and a CD-ROM of today's filing are provided to the Commission. A CD is provided to all parties of record.

Very truly yours,

Dorothy J. Chambers

Enclosures

cc: Parties of Record

484688

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served on the individuals on the attached Service List by mailing a copy thereof, this 24th day of March 2003.

Dorothy J. Chambers

SERVICE LIST – PSC 2002-00456

Sylvia Anderson
AT&T Communications of the South Central States
1200 Peachtree Street, N.E.
Suite 8100
Atlanta, GA 30309

Murray Barr
ICG Telecom Group, Inc.
180 Grand Avenue, Suite 450
Oakland, CA 94612

Melissa Burris
MCIMetro Access Transmission Services, Inc.
6 Concourse Parkway, Suite 3200
Alpharetta, GA 30328

Robert A. Bye
Cinergy Communications Co.
8829 Bond Street
Overland Park, KS 66214

Hon. Ann Louise Cheuvront
Office of the Attorney General
Utility & Rate Intervention Division
1024 Capital Center Drive, Suite 200
Frankfort, KY 40601

W. A. Gillum
Mountain Telephone Cooperative, Inc.
405 Main Street
P. O. Box 399
West Liberty, KY 41472-0399

Stephen R. Byars
ALLTEL Kentucky, Inc.
P. O. Box 1650
Lexington, KY 40588-1650

Susan Berlin, Esq.
Intermedia Communications, Inc.
c/o MCI Telecommunications Corp.
Concourse Corporate Center Six
6 Concourse Parkway, Suite 3200
Atlanta, GA 30328

James Campbell
Gearheart Communications Co., Inc.
d/b/a Coalfields Telephone Co.
5 Laynesville Road
Harold, KY 41635

Dr. Bob Davis
113 Pebble Beach
Georgetown, KY 40324

William K. Grigsby
Thacker-Grigsby Telephone Co.
9500 Communications Lane
P. O. Box 789
Hindman, KY 41822

Hon. William R. Atkinson
Sprint Communications Co.
3065 Cumberland Blvd.
Mailstop GAATLD0602
Atlanta, GA 30339

Trevor R. Bonnstetter
West Kentucky Rural Telephone
237 N. 8th Street
P. O. Box 649
Mayfield, KY 42066-0649

Keith Gabbard
Peoples Rural Telephone
P. O. Box 159
McKee, KY 40447

James Hamby
Highland Telephone Cooperative, Inc.
P. O. Box 119
7840 Morgan County Highway
Sunbright, TN 37872

Jeff Handley
TDS – Telecom South East Division
9737 Cogdill Road, Suite 230
Knoxville, TN 37932-3374

Hon. C. Kent Hatfield
Middleton & Reutlinger
2500 Brown & Williamson Tower
Louisville, KY 40202

William W. Magruder
Duo County Telephone
1021 W. Cumberland Avenue
P. O. Box 80
Jamestown, KY 42629

Hon. James R. Newberry, Jr.
Wyatt, Tarrant & Combs, LLP
Lexington Financial Center
250 W. Main Street, Suite 1700
Lexington, KY 40507

John Powell
Computer Innovations
P. O. Box 539
Richmond, KY 40476

Hon. W. Brent Rice
Hon. David A. Cohen
McBrayer, McGinnis, Leslie & Kirkland, PLLC
201 E. Main Street, Suite 1000
Lexington, KY 40507

F. Thomas Rowland
North Central Telephone
872 Highway 52 Bypass
P. O. Box 70
Lafayette, TN 37083-0070

Hon. John N. Hughes
124 W. Todd Street
Frankfort, KY 40601

Hon. Thomas A. Marshall
212 Washington Street
P. O. Box 223
Frankfort, KY 40601

Harlon E. Parker
Ballard Rural Telephone
159 W. 2nd Street
P. O. Box 209
LaCenter, KY 42056-0209

Thomas E. Preston
Foothills Rural Telephone
1621 Kentucky Route 40W
P. O. Box 240
Staffordsville, KY 41256

Mark Romito
Cincinnati Bell Telephone Col.
201 E. 4th Street
P. O. Box 2301
Cincinnati, OH 45201-2301

David Sandidge
Electric and Water Plant Board of the City of Frankfort
317 W. 2nd Street
Frankfort, KY 40601

Darrell Maynard
SouthEast Telephone, Inc.
106 Power Drive
P. O. Box 1001
Pikeville, KY 41502-1001

John A. Powell
AEEP, Inc.
205 S. 3rd Street
Richmond, KY 40475

Clinton Quenzer
Logan Telephone
P. O. Box 97
10725 Bowling Green Road
Auburn, KY 42206

Robin H. Taylor
BellSouth BSE, Inc.
400 Perimeter Center Terrace
North Terraces Bldg., Suite 220
Atlanta, GA 30346

Craig Winstead
SPIS.net
P. O. Box 1250
Dulin Street
Madisonville, KY 42431

Daryl Wyatt
South Central Telecom, LLC
1399 Happy Valley Road
P. O. Drawer 159
Glasgow, KY 42141-0159

J. D. Tobin, Jr.
Allison T. Willoughby
Brandenburg Telephone Co.
200 Telco Road
P. O. Box 599
Brandenburg, KY 40108

A. D. Wright
e-Tel, LLC
607 Broadway
Paducah, KY 42001

Hon. Katie Yunker
Yunker & Associates
P. O. Box 21784
Lexington, KY 40522-1784

REQUEST: Provide full and complete copies of all CSAs entered during 2001 and 2002, or, in the alternative, if such CSAs are on file with the Commission, a list of those CSAs and their effective dates. For each CSA, provide:

a. Customer name.
b. Effective date.
c. Expiration date.
d. Description of services included.
e. Unique conditions involving the service.
f. Total value of the contract.
g. A price-out of the contract
h. A price-out of the same services as provided under tariff, if applicable.
i. The net savings to the customer in total and on a per unit basis.
j. Details concerning installation or other fees waived pursuant to the CSA.
k. Details concerning recurring rates suspended or waived pursuant to the CSA.

RESPONSE: BellSouth is providing the responses to the above request on an enclosed CD-ROM. As described in BellSouth's confidentiality petition, portions of the Attachments to this response are considered proprietary.

CSAs not already on file with the Commission are provided on the enclosed proprietary CD (directory BST_R_PSCDR#1_ATT_032503) in one of two subdirectories as described below:

Subdirectory	Description
PDF Files	CSAs
Duplicate Files	Duplicate unsigned copy of CSAs with poor legibility

Each file is named using the CSA case number. The PDF files were converted from TIF files that BellSouth utilizes for storage of signed contracts. To minimize file size for storage efficiency, the original TIF files are scanned at a low resolution making it difficult to create a searchable PDF file. For this reason, the resulting PDF files are not searchable.

RESPONSE: (continued)

a. See file named "Attachment No.1 Proprietary.xls" on Proprietary CD and file named "Attachment No.1 Edited.xls" on Edited CD in directory BST_R_PSCDR#1a-f_ATT_032503.

b. See above response to Item No. 1a.

c. See above response to Item No. 1a.

d. See above response to Item No. 1a.

e. See above response to Item No. 1a.

f. See above response to Item No. 1a.

g. As ordered by the Commission, a 10% random sample was conducted to select those CSAs for the detailed price-outs requested in Items 1g to 1k. The 78 CSAs selected from the total universe of 780 cases by the sample are identified in file Attachment No.1.xls (CD directory BST_R_PSCDR#1_ATT_032503), Column B. The sample was taken using the RAND function from Excel to develop 85 random numbers between 1 and 780 [RAND()*(780-1)+1]. These values were frozen so that any worksheet recalculations (i.e. the F9 key) would not change the random values. Next, the initial 78 values were placed in ascending order using the Excel data sort tool. For any duplicate values, the next additional random value (i.e. the interval consisting of the 79th to 85th values) was used as a substitute to result in 78 different random cases within the sample. The sample has a confidence level of 95% assurance with a confidence interval of plus or minus 6%.

The resulting price-outs are furnished in directory BST_R_PSCDR#1g-k_032503 on the CD. Each file is named using the CSA case number. Searchable PDF and Excel files are provided in subdirectories Excel Files and PDF Files. The price-outs revealed

RESPONSE: (continued)

some discrepancies between the revenues filed with the Commission and the revenues computed in the price-out. This occurred for twelve of the seventy-eight CSAs in the sample. Notes in the appropriate price-outs explain the reasons for these discrepancies.

h. See above response to Item No. 1g.

i. See above response to Item No. 1g.

j. See above response to Item No. 1g.

k. See above response to Item No. 1g.

REQUEST: Provide a narrative description of your policies regarding entry into CSAs with specific customers, including a description of the manner in which those CSAs are filed or reported to the commissions for the states in which you operate. If you operate in multiple jurisdictions, compare and contrast applicable state requirements. Provide citations to applicable rules in other jurisdictions.

RESPONSE: BellSouth enters into CSAs with specific customers in order to provide competitive prices for the same or equivalent type of service being offered by competitors. In consideration of developing a CSA for a customer, BellSouth considers many factors in evaluating a specific situation. These include the competitive offer being considered, the volume of service, overall revenues at risk, customer willingness to pay and additional business opportunity.

The services offered through CSAs relate to a highly competitive segment of the business market. There are currently over 20 competitive providers serving various segments of the business market in Kentucky. Many of these competitors are large, fully integrated companies such as Adelphia Business Solutions, and NewSouth. These companies, like many others, are capable of offering a variety of telecommunications services under specifically tailored pricing plans.

The matrix set forth below provides a description of the manner in which the CSAs are filed and reported to the Commissions in BellSouth's nine state area, the applicable state requirements as well as all corresponding statutory and/or regulatory citations.

CSA REGULATORY FILING REQUIREMENTS

STATE	CSA FILING REQUIREMENTS	REGULATORY REQUIRING DOCUMENTATION	GENERAL INFORMATION	COST SUPPORT REQUIRED	CONTRIBUTION ANALYSIS	FILE COPY OF SIGNED AGREEMENT
AL	The Company has to provide a copy of the CSA contract, which includes customer name, contract period, the cost data/summary, revenue data, and the competitive documentation to the PSC after the customer has signed the contract. The same applies to V&T CSAs. CSAs on 1FBs can only be done if they are packaged with a non-basic service or product.	This information is filed as per the General Subscriber Services Tariff (GSST) A5.6.1B. "Rates, Charges, Terms and additional regulations, if applicable, for the contract service arrangements will be developed on an individual case basis, and will include all relevant costs, plus an appropriate level of contribution. After acceptance by the customer, the Company will furnish the proposal and appropriate support documentation to the Commission at least 15 days prior to implementation." The same wording is in the Private Line Services Tariff B5.7.1B.	CSAs may be offered on any non-basic service in the GSST and in the Private Line Tariff, as defined in Docket 24499, Order dated 9/20/95. CSAs may be offered for a basic service only if the basic service is offered as part of a package w/non-basic services See Footnote 1.	Yes	Summary	Yes
FL	The Company no longer has to provide anything to the FL PSC for CSAs on an individual basis. However, the Company provides cost support if/when the PSC requests such documentation. CSAs must cover the costs. CSAs can be done on 1FBs only if the basic service (1FB) is offered as part of a package with non-basic services.	The elimination of the quarterly CSA report was ordered in Docket No. 010634-TL, Order No. PSC-01-1588-PAA-TL approved 8/31/2001.	CSAs may be offered on any non-basic service in the GSST & in the Private Line Tariff. CSAs may be offered for a basic service only if the basic service is offered as part of a package w/non-basic services. See Footnote [1].	No	None	No

[1] A V&T Agreement is a CSA and is treated as such.

CSA REGULATORY FILING REQUIREMENTS

GA	The Company provides a summary of each case on a monthly basis on the Georgia Monthly Filing Report which requires one line of data per case. The Company, under trade secret, provides customer name, customer specific information, a single summary number for revenue, and a single summary number for cost. A nondisclosure agreement must be signed before anyone can look at the trade secret copy. CSAs can also be done on IFBs as long as it meets the CSA requirements.	The monthly report was based on verbal agreement between BellSouth GA State Regulatory and the GA PSC Staff with verbal agreement from a GA PSC Commissioner in February 2001.	See Footnote 1 & [2].	Yes	1 Line of Info per CSA (includes cost & rev)	No
KY	The Company provides a summary of each CSA on a monthly basis on the Kentucky Monthly Filing Report which requires one line of data per case.	This information is filed as per the Order in the Matter of BellSouth Telecommunications proposed changes in Procedures for filing Contract Service Arrangements and Promotions – Case No. 2001-077.	See Footnote 1 & 2.	Yes	1 line of Info per CSA (includes cost & rev)	No
LA	CSAs are not filed w/LPSC. However, the PSC requires the Company to maintain the backup and cost support for each case in the event one is challenged. The backup info must meet the PSC standards if challenged. This means that in addition to customer name, location, description of service offered, terms & conditions of the contract, etc., the cost support must demonstrate that the service(s) has/have been offered at a rate level equal to or greater than the cost. Also, for CSAs, the competitive documentation must support offering the CSA in the first place.	The discounted tariff pricing through a CSA was mandated per LPSC Order No. U-22252-D dated 3-22-99.	See Footnote 1 & 2.	No	None	No

[2] CSA may be offered on any service in the GSST & in the Private Line Tariff.

CSA REGULATORY FILING REQUIREMENTS

MS	CSAs are not provided to the Commission but are subject to provision upon request of the PSC, but so far have not been requested.	This information is filed as per the General Subscriber Services Tariff A5.6.1B. The same wording is in the Private Line Services Tariff B5.7.1B.	See Footnote 1 & 2.	No filing is required, but send an email to MS Regulatory indicating the Rate Authorization has been released.	None	No
NC	The Company files a list of case numbers with service description for CSAs once a month, along with a sample copy of a blank CSA contract.	The contract information is filed as per the Order Authorizing Price Regulation; DOCKET NO. P-55, SUB 1013; dated 6/2/96. Page 5, Para. VI. B.	See Footnote 1 & 2.	No	None	No
SC	On a monthly basis, the Company provides a list showing the agreement date and the case number of all CSA contracts signed during the month to the Commission. Individual contracts and cost information are not furnished to the Commission. From the list furnished to them, the Commission Staff selects three (3) cases to sample/audit. The Staff requests BellSouth to furnish them a copy of the signed contract and revenue/cost information on these three cases. CSAs can also be done on 1FBs.	A BellSouth letter to the PSC in June 2001 and the PSC acknowledgement in a Commission Directive (June 12, 2001) is the authority to file the case number and contract date monthly with the PSC Staff.		No	1 line of Info per CSA (case # & date). (Signed Contract & Revenue /Cost summary is provided on selected 3 cases selected by the Commission to be sampled/ audited per month)	Normally, No. (But, Signed Contract & Revenue /Cost summary is provided on selected 3 cases selected by the Commission to be sampled/ audited per month)
TN	All special contracts are filed with the Tennessee Regulatory Authority as tariffs. These filings include an Executive Summary (a brief one page summary), a tariff page, a copy of the signed contract (which includes a Tennessee Addendum wherein both parties acknowledge that various competitive alternatives are available), and under separate cover, proprietary cost support. The cost support includes a USOC-specific analysis to show contribution and revenue to ensure that the special contract is above cost. These Tariffs are filed in A5 and B5.	The requirement for TRA review and approval of special contracts is set forth in the Authorities Rules, specifically the General Public Utilities Rules, Chapter 1220 – 4 –1 - .07: SPECIAL CONTRACTS.	See Footnote 1 & 2.	Yes	Detailed (under proprietary cover).	Yes

REQUEST: To what extent should a telecommunications carrier be permitted to price its services differently depending on the existence of a competitor that is willing to serve some customers but not others?

a. If you believe different pricing in such instances is appropriate, what level of objective evidence showing the actual existence of a competitive offer for the services in question should be required?

b. If you do not believe that different pricing in such instances is appropriate, what would be the financial result to carriers who would no longer be able to price services based on competition?

RESPONSE: In competitive markets where competitors are willing to serve some customers and not others, a telecommunications carrier must be permitted flexibility to differentiate among customers. For instance, ILECs' competitors can and do target specific classes of customers in specific geographic areas where they believe the ILEC may be vulnerable. The ILEC should be free to target a competitive response to the same customer or group of customers.

Tailoring the price of a service to a specific customer or group of customers can improve overall efficiency and increase overall consumer welfare. Given this, ILECs operating in competitive markets should be allowed considerable latitude in determining their individual pricing strategies. For instance, in a competitive environment, several variables and customer characteristics are relevant when determining what price is to be offered. One relevant variable is the nature and extent of the competition itself. Others may include the volume of services requested by the customer, the total billed revenue of the customer and the impact the loss of that revenue will have on the carrier's business. Price differentiation among customers may also be based upon other criteria relevant to competitive issues such as the potential that a particular customer will generate additional revenue by purchasing integrated service packages or bundles.

RESPONSE: (Con't)

It would be unwise to sustain a regulatory policy where a telecommunications carrier (even if that carrier is an ILEC) that discounts to some customers must discount to all customers. Under such a regulatory structure, it would be uneconomic for sellers that face competition only for some customers to reduce prices to all customers. Competitive rivals would, of course, be aware of such a regulatory restriction, and would not find it necessary to compete as vigorously to obtain customers. The result of such a requirement would be that consumers would be deprived of the low prices as well as the enhanced and innovative services that result from competition on the merits.

When effective competition exists in any given market, direct evidence of a specific competitive offering is unnecessary. In Kentucky, it is objectively verifiable that there are competitive providers offering substitute or functionally equivalent telecommunications services to customers or groups of customers in competition with BellSouth for a variety of services in practically every market. For instance, the number of CSAs that BellSouth has in place in Kentucky (as shown in response to Item No. 1) indicates the number of times BellSouth has found it necessary to lower its prices for a service in order to respond to a competitive situation. This represents only a portion of the contracts that BellSouth actually offered to customers, because customers have frequently chosen a competitor's service despite BellSouth's attempt to compete for the customer's business.

REQUEST: Would you support or oppose a policy requiring that all customers for regulated services in the same geographic area or market receive the same prices, on the theory that if a competitor is in the area it may reasonably be assumed that a competitive offer is available to all customers in the area?

a. If such a policy were adopted, how should the geographic area or market for which prices should be uniform be defined?

b. If you oppose such a policy explain the reasons for your opposition.

RESPONSE: BellSouth would oppose a policy requiring that all customers in the same geographic area receive the same prices for regulated competitive services. In a fully competitive environment, it is not necessary to develop additional regulatory policies to govern the way in which competitive services, although regulated, are offered. This Commission has confirmed in its competition proceedings that BellSouth has opened its markets for local competition, and has put in place the framework for competition in any geographic area BellSouth serves in Kentucky. BellSouth has lost over 200,000 lines to competitors, and a majority of those lines were for BellSouth business customers. It is the customers in this competitive business market who are the recipients of the CSAs at issue in this proceeding. Continued flexibility in the way BellSouth and other ILECs that experience such competition are allowed to price their services is critical to this transition into a fully deregulated market.

CSAs permit an ILEC like BellSouth to reduce prices to customers that face competition without simultaneously reducing prices to all customers, and this flexibility permits the ILEC to compete more aggressively for customers where competition exists. If BellSouth did not have this flexibility, BellSouth would frequently find it uneconomical to meet competition. This is because, if BellSouth were required to reduce its price to all customers in order to lower a price to customers that faced competition, BellSouth would reduce its profit on all customers in order to win the business of those customers that face competition. Also, competitors would know that BellSouth was restrained in its ability to

RESPONSE: (Con't)

discount and would feel less need to price aggressively. CSAs thus promote competition generally, not just from regulated ILECs like BellSouth, but from all carriers.

Also, Competitive Local Exchange Carriers (CLECs), unlike the ILECs, are able to pick the geographic areas, the customers that they will serve and the services that they will offer. A policy that requires ILEC's to provide all customers in a geographic area the same price for services offered at lower prices on a limited basis, such as those included in the CSAs filed currently, would effectively limit competition in that area by eliminating BellSouth as a competitive alternative. The overall effect on consumers is fewer choices and less aggressive price competition in the market.

Pricing flexibility like that allowed under the current CSA process, and possible in other alternative pricing plans (such as a metro plan with a range of rates established for a specific geographic area, in which the actual rate offered to an individual customer would depend, in part, on what competitive alternatives were available to that customer), allows all providers to compete for those customers. Such competition would therefore benefit consumers because of the multiple provider options and resulting lower prices that would be available to them.

Further, if the Commission were nonetheless to adopt a policy of requiring uniform pricing throughout a geographic area or market, there would be obvious difficulties in drawing the boundaries of the area or market. Of course, the guiding principle should be to draw the boundaries "to match" the area in which the competitive offer exists. Because there are many different providers offering telecommunications services in Kentucky, each of which operates in different areas and targets different groups of

RESPONSE: (Con't)

customers, and these providers are continually introducing new offers into the market, it may not be easy to define the geographic area in which any offer applies.

REQUEST: Would a requirement that all CSAs be filed publicly with the Commission ensure transparency and permit both customers and CLECs the access necessary to buy, resell, and notify the Commission of alleged violations of law?

RESPONSE: If the Commission continues to regulate CSAs, BellSouth believes that its current publicly filed contract summary information is sufficient and an appropriate publication of information. Under the current summary filing process, BellSouth provides the contract number, customer name, type of service and total cost and revenue for each CSA. The current process provides an acceptable balance between the costly and laborious task of filing (for the Company) and processing (for the Commission) every contract in detail and supplying the appropriate information for the Commission's review.

With regard to transparency for CLECs, in a competitive environment it is very likely that a CLEC would become aware of a CSA for a customer during a competitor's normal course of doing business with its customers or potential customers. Subject to the terms of the CLEC's interconnection agreement, the CLEC may request to resell a CSA in question.

As one of many competitors in the marketplace, BellSouth is concerned about the availability of detailed CSA information filed with the Commission that in essence creates for competitive providers a "customer shopping list". The information contained in BellSouth's CSA filings are an easy starting place for a competitor to review potential customers, evaluate the types of services these customers are purchasing and the magnitude of revenue potential that exists with these customers. In a competitive market, which is the case for telecommunications services in Kentucky, this type of information is a treasure trove for a competitor's sales force to use in developing a market plan and targeting its services for specific customers. The filing of customer specific information places BellSouth at a market disadvantage by making such detail available to its competitors.

REQUEST: What criteria should govern whether a regulated service should be sold by tariff only or by CSA? Explain fully.

RESPONSE: The presence or absence of competition is the primary criteria that should be considered in deciding if CSAs or some other means of pricing flexibility should be allowed in the marketing of a service. By definition, CSAs are only offered when a tariff rate must be lowered to reach a comparable rate from a competitor.

Clearly in a competitive market, an end user is able to choose among service providers for the services needed. A major decision factor for an end user will be the consideration of the price of the service(s) being offered. Pricing flexibility encourages competition in the marketplace that ultimately provides pricing benefits to the consumer. From the customer's perspective, competition results in lower prices, improved value propositions, and wider selection. The flexibility for market participants to compete on the basis of price is beneficial to the net welfare of customers.

From a market participant's (seller's) perspective, pricing flexibility like that provided with CSAs allows a service provider to respond to competition by making prudent economic responses and is a critical tool that allows BellSouth to remain a viable competitor in this highly competitive marketplace. Any price above cost, even if discounted from a tariff rate, provides contribution for the company. Without the flexibility to compete on the basis of price, a market participant is excluded from participation in the competitive marketplace. Such an anticompetitive exclusion would have a significant negative impact upon the revenues of such a market participant and upon consumers, who would lose the competition that BellSouth would bring to the market.

The provision of price flexibility to market participants encourages competition in the telecommunications marketplace, a condition that is desirable to the public and an objective that should guide regulatory policy. Restricting any market participant from the use of pricing flexibility dilutes the power of the competitive marketplace and ultimately precludes the benefits that competition brings to the end user.

RESPONSE: (Con't)

As the telecommunications market becomes more competitive, the Commission should actually create more pricing flexibility within the tariff structure in addition to the availability of CSAs.

REQUEST: Discuss the impact on competition in particular and on the telecommunications industry in Kentucky in general that would result from deregulation of CSAs.

RESPONSE: Full deregulation of CSA's will have a positive effect on this market segment because it will ensure that customers in this market receive the full benefits of competition. Providers serving these customers must be free to creatively package services, competitively price services, and quickly implement these solutions for customers.

Generally, CSA customers are sophisticated business customers with specialized needs. A number of telecommunications service providers serve this class of customers. Because this market segment is fully competitive, CSA customers expect to receive offers of special price and service plans from a number of service providers. They also expect to negotiate agreements with providers in order to ensure that they obtain the best price for the services required to support their business operations. Hence, protection via regulation for this class of customers is unnecessary. In fact, having a layer of regulation in this process for some or all bidders is not only unnecessary but any regulation ultimately prevents CSA customers from fully realizing the benefits inherent in a competitive market such as innovative services and lower prices.

The majority of states within the BellSouth region have already moved to a more flexible CSA filing requirement. Specifically, Florida, Louisiana and Mississippi do not require the filing of CSA information. Further details on such requirements are found in the Attachment to Item No. 2 of these responses.

Moreover, deregulation of certain competitive services will have similar positive effect. Certain services such as MegaLink, PRI and Frame Relay are being provided to customers in Kentucky by a number of competitive providers including AT&T, MCI Worldcom, Sprint, Cinergy, US LEC, Adelphia, NewSouth, Xpedius. For the provision of Frame Relay service and MegaLink, service, BellSouth also competes against providers of microwave, digital radio and fiber networks.

RESPONSE: (Con't)

The sheer number of CSAs for these types of services is evidence that sufficient competition exists to warrant complete deregulation of these services. For instance, over 50% of the CSAs in Kentucky involve PRI services. In addition, of the more than 3,000 Frame Relay customer connections BellSouth provides in Kentucky, over 65% are provided via CSAs. Two thirds of the time, BellSouth has been forced to offer a rate lower than the tariff rate in order to meet the rate of a competitor.

Full deregulation of these services will allow market forces to ensure that customers receive the best products and services at the competitive prices.

REQUEST: At what level of availability of competitive alternatives in a given market should a service be deregulated pursuant to KRS 278.512? Is it feasible to deregulate a service in one market area of Kentucky and not in another?

RESPONSE: A service should be deregulated when effective competition exists in any given market. Effective competition is present when there are functionally equivalent, competitively priced services available in any given market from an unaffiliated provider. Competitive conditions exist today in many service markets in Kentucky. For instance, as set forth in Item No. 7 above, services such as Frame Relay, PRI and MegaLink are currently being offered by a number of competitive telecommunication providers. BellSouth faces competition in Kentucky not only from CLECs (BellSouth has entered into over 500 interconnection agreements) and resellers, but also from municipals and providers of cable service and wireless service. This Commission has created the conditions for this competition by ensuring open access to BellSouth's network and eliminating nearly all cost barriers to entry for potential competitors. Competitors can now enter the market at relatively low costs by targeting certain customers and certain markets. In these target markets, competitors can undercut BellSouth's prices, collect a profit and exit the market at relatively low cost if they desire. BellSouth's pricing, in turn is also disciplined due to the ability of companies to enter and exit the market.

Due to the manner in which competitors target some markets or market segments as opposed to others, BellSouth believes it may be feasible to deregulate a service in one market area of Kentucky and not in another. Competitive entry has been greatest where pre-entry profit margins have been the largest, namely for large business services and/or for both residential and business services in lower cost urban markets. Therefore, it is possible that competition for services in these markets or market segments has developed and matured more quickly than rural markets that are generally more costly to serve.

REQUEST: What procedures should take place during a Commission case to determine whether a service is sufficiently competitive to be deregulated?

RESPONSE: A Kentucky statute (KRS 278.512) provides a procedure that generates sufficient information for the Commission to make a determination of whether a service is sufficiently competitive to warrant exemption from regulation.

Under the guidelines provided in KRS 278.512, a regulated telecommunications carrier may request that the Commission exempt a specific service from regulation by providing information relative to the criteria established in paragraph (3) (a) through (i) of that statute. The criteria address various aspects of the competitive market for the service, as well as potential effects on other services, customers, and market participants. BellSouth believes that the criteria identified in this statute adequately identify the relevant information that the Commission needs to make an informed decision.

The following excerpt from KRS 278.512 contain the criteria:

(3) In determining public interest, the commission shall consider the following:
(a) The extent to which competing telecommunications services are available from competitive providers in the relevant market;
(b) The existing ability and willingness of competitive providers to make functionally equivalent or substitute services readily available;
(c) The number and size of competitive providers of service;
(d) The overall impact of the proposed regulatory change on the continued availability of existing services at just and reasonable rates;
(e) The existence of adequate safeguards to assure that rates for services regulated pursuant to this chapter do not subsidize exempted services;

RESPONSE: (Con't)

(f) The impact of the proposed regulatory change upon efforts to promote universal availability of basic telecommunications services at affordable rates and upon the need of telecommunications companies subject to the jurisdiction of the commission to respond to competition;
(g) Whether the exercise of commission jurisdiction inhibits a regulated utility from competing with unregulated providers of functionally similar telecommunications services or products;
(h) The overall impact on customers of a proposed change to streamline regulatory treatment of small or nonprofit carriers; and
(i) Any other factors the commission may determine are in the public interest.

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CERTIFICATE OF SERVICE

I hereby certify that on June 30, 2003, a copy of the foregoing document was served on the parties of record, via the method indicated:

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[ ] Mail
[X] Facsimile
[ ] Overnight

Henry Walker, Esquire
Boult, Cummings, et al.
414 Union Street, #1600
Nashville, TN 37219-8062

[ ] Hand
[ ] Mail
[X] Facsimile
[ ] Overnight

Martha Ross-Bain, Esquire
AT&T
1200 Peachtree St., NE, #4068
Atlanta, GA 30309

[ ] Hand
[ ] Mail
[X] Facsimile
[ ] Overnight

Vance Broemel, Esquire
Office of Tennessee Attorney General
P. O. Box 20207
Nashville, Tennessee 37202

[ ] Hand
[ ] Mail
[X] Facsimile
[ ] Overnight

Charles B. Welch, Esquire
Farris, Mathews, et al.
618 Church St., #300
Nashville, TN 37219