BEFORE THE TENNESSEE REGULATORY AUTHORITY

NASHVILLE, TENNESSEE

JANUARY 5, 2000

ORIGINAL

IN RE:	)	
	)	
PROCEEDING FOR THE PURPOSE OF ADDRESSING COMPETITIVE EFFECTS OF CONTRACT SERVICE ARRANGEMENTS FILED BY BELLSOUTH TELECOMMUNICATIONS, INC. IN TENNESSEE	)	**Docket No. 98-00559**

ORDER APPROVING AND ADOPTING SECOND REPORT AND RECOMMENDATION OF PRE-HEARING OFFICER

This matter came before the Tennessee Regulatory Authority ("Authority") at a regularly scheduled Authority Conference held on April 6, 1999, for consideration of the Second Report and Recommendation of Pre-Hearing Officer ("Second Report and Recommendation") filed on March 23, 1999 in this docket. After reviewing the Second Report and Recommendation, the Directors of the Authority voted two to one to approve and adopt the Second Report and Recommendation. A copy of the Second Report and Recommendation is attached to this Order as Exhibit No. 1.

The first Report and Recommendation of the Pre-Hearing Officer was considered by the Directors and approved by a majority of the Directors at a regularly scheduled Authority Conference held on January 19, 1999. In accordance with the approval of the first Report and Recommendation, a second Pre-Hearing Conference was held on February 18, 1999, with Counsel Gary Hotvedt, General Counsel's designee, presiding.

FILE

Pursuant to the Notice issued on February 4, 1999, the parties were required to file motions to compel discovery and any responses to such motions prior to the Pre-Hearing Conference. BellSouth Telecommunications, Inc. ("BellSouth") filed Motions to Compel Discovery. Responses to BellSouth's Motions were filed by Southeastern Competitive Carriers Association ("SECCA"); e.spire Communications ("e.spire"); NEXTLINK Tennessee, Inc. ("NEXTLINK"); MCImetro Access Transmission Services, Inc. ("MCImetro"); Time Warner Communications of the Midsouth, LP ("Time Warner"); and New South Communications, LLC ("New South"). During the Pre-Hearing Conference, several parties requested additional time to file motions to compel discovery. The presiding Pre-Hearing Officer extended the filing schedule to permit other parties to file motions to compel outstanding discovery requests. After reviewing all motions to compel and responses thereto and after considering the comments of the parties during the second Pre-Hearing Conference, the Pre-Hearing Officer issued his rulings in an Initial Order on Motions to Compel Outstanding Discovery ("Initial Order") on March 25, 1999. The Initial Order provided that any motions for reconsideration or objections to the Order would be addressed by the Pre-Hearing Officer at a Pre-Hearing Conference scheduled for April 8, 1999. For this reason, the Initial Order was not considered by the Directors concurrent with the Second Report and Recommendation at the April 6th Conference.

During the February 18th Pre-Hearing Conference, the parties also raised specific issues relating to the progress of this docket. Those issues were taken under advisement by the Pre-Hearing Officer and are addressed in the Second Report and Recommendation. In discussing the recommendations relating to those issues, the Pre-Hearing Officer expressed the opinion that the direction of this docket may be guided by the quality of the parties' discovery responses, because

that information could assist the Authority in determining whether the proceeding should become a rulemaking proceeding and whether grounds existed for a show cause action.

In ruling on BellSouth's motion to compel, the Pre-Hearing Officer ordered discovery responses from all parties, including production of their CSAs for review. In the Second Report and Recommendation, the Pre-Hearing Officer recommended that discovery of the CSAs of competing local exchange carriers ("CLEC") would permit comparisons of those CSAs with BellSouth CSAs. The Pre-Hearing Officer characterized this recommendation as an attempt to look at all CSAs in general, and not as an attempt to expand the scope of this docket. This recommendation was withdrawn by the Pre-Hearing Officer from consideration at Authority Conference because it was the subject of motions and objections that were to be fully considered at Pre-Hearing Conference on April 8, 1999.

The Pre-Hearing Officer recommended that this matter proceed through the completion of discovery and, at the conclusion of discovery, the Authority should explore initiating a rulemaking proceeding which would address the practices of offering CSAs on an industry-wide basis. In this regard, several options are available to the Authority. This docket could be converted into a rulemaking proceeding or could be consolidated with the current "Fresh Look" rulemaking proceeding (TRA Docket No. 98-00046). Alternatively, the Authority could decide to close this docket and initiate a new rulemaking proceeding. The Pre-Hearing Officer did not recommend the commencement of a show cause action at the present time, but did not rule out such a possibility. If specific facts were developed demonstrating the existence of unlawful, discriminatory or anticompetitive practices, a show cause proceeding could then be initiated against the offending carrier.

The Directors voted two to one to approve the Second Report and Recommendation, as amended by the Pre-Hearing Officer at the Conference.[1]

IT IS THEREFORE ORDERED THAT:

1. The Second Report and Recommendation of the Pre-Hearing Officer, attached to this Order as **Exhibit 1**, is approved and is incorporated into this Order as if fully rewritten herein.

Melvin J. Malone, Chairman

H. Lynn Greer, Jr., Director

* * *

Sara Kyle, Director

ATTEST:

K. David Waddell, Executive Secretary

*Director Kyle did not vote with the majority.

[1] In voting not to approve the Second Report, Director Kyle expressed concern over whether expanding the scope of discovery to provide for discovery of all CLEC special contracts would result in expanding the scope of the docket overall. She also expressed her position that this matter should move forward with a rulemaking proceeding to examine all contract service arrangements.

BEFORE THE TENNESSEE REGULATORY AUTHORITY

NASHVILLE, TENNESSEE

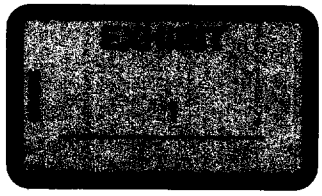
March 23, 1999

IN RE:	)	
	)	
PROCEEDING FOR THE PURPOSE OF ADDRESSING COMPETITIVE EFFECTS OF CONTRACT SERVICE ARRANGEMENTS FILED BY BELLSOUTH TELECOMMUNICATIONS, INC. IN TENNESSEE	)	**Docket No. 98-00559**

SECOND REPORT AND RECOMMENDATION OF PRE-HEARING OFFICER

On August 12, 1998, the Tennessee Regulatory Authority ("Authority") entered an Order that opened a docket for the purpose of addressing the competitive effects of contract service arrangements ("CSAs") filed by BellSouth Telecommunications, Inc. in Tennessee and appointed General Counsel as a Pre-Hearing Officer to act for the purpose of identifying issues, deciding on petitions to intervene, setting filing schedules, conducting status conferences, and otherwise preparing this matter for consideration by the Directors. The first Report and Recommendation of the Pre-Hearing Officer was filed on January 15, 1999, and was considered by the Directors at a regularly scheduled Authority Conference held on January 19, 1999. At that Conference, the Report and Recommendation was approved by a majority of the Directors.

Recommendation Number 6 of the first Report and Recommendation proposed "that another Pre-Hearing Conference be convened to deal with the parties' objections to discovery



requests in light of the Authority's decisions concerning the scope of this proceeding and to discuss the possible revision of issues in light of the Authority's decisions, the parties' discovery responses and the parties' anticipated comments." By a majority vote, the Authority decided to maintain the scope of this proceeding as originally articulated in its Order of August 12, 1998.

On January 25, 1999, in accordance with the approval of the Report and Recommendation, a Notice was issued setting a second Pre-Hearing Conference for February 5, 1999. In a letter dated January 26, 1999, BellSouth requested that the Conference be rescheduled and advised the Pre-Hearing Officer that it would be filing motions to compel responses to certain discovery. A Re-Notice was issued on February 4, 1999, setting the Pre-Hearing Conference for February 18, 1999 and establishing a schedule of filing dates by which any party could file a motion to compel and/or respond to a motion to compel that had been served on it. In addition, the Re-Notice stated that the Pre-Hearing Conference would be conducted for the purposes of: 1) consideration of discovery issues; 2) further refinement of the issues; and 3) establishing a schedule to completion.

February 18, 1999, Pre-Hearing Conference

A second Pre-Hearing Conference was held on February 18, 1999. Due to a family medical emergency General Counsel Richard Collier was unavailable and Counsel Gary Hotvedt, General Counsel's designee, presided over the second Pre-Hearing Conference as Interim Pre-Hearing Officer.

Parties in Attendance

In attendance at the second Pre-Hearing Conference were the following parties:

BellSouth Telecommunications, Inc. - **Guy M. Hicks**, Esquire, 333 Commerce Street, Suite 2101, Nashville, TN 37201; and **Bennett Ross**, Esquire, 675 W. Peachtree St., Suite 4300, Atlanta, GA 30375;

e.spire, NEXTLINK and Southeastern Competitive Carriers Association ("SECCA") **Henry Walker**, Esquire, Boult, Cummings, Conners & Berry, 414 Union St., #1600, P. O. Box 198062, Nashville, TN 37219-8062;

Time Warner Communications of the MidSouth, LP and New South Communications, LLC - **Charles B. Welch, Jr.,** Esquire, 511 Union Street, Suite 2400, Nashville, TN 37219;

MCI - **Jon E. Hastings**, Esquire, Boult, Cummings, Conners & Berry, 414 Union St., 1600, P. O. Box 198062, Nashville, TN 37219-8062;

Sprint Communications Company, LP, **Carolyn Tatum Roddy**, Esquire, 3100 Cumberland Circle, Atlanta, GA 30339;

Consumer Advocate, Office of the Attorney General - **L. Vincent Williams**, Esquire, and **Vance Broemel**, Esquire, 426 5th Avenue, N., 2nd Floor, Nashville, TN 37243.

AT&T Communications of the South Central States, Inc. ("AT&T") - **James P. Lamoureux**, Esquire, 1200 Peachtree St., NE, Atlanta, GA 3030. Mr. Lamoureux participated by telephone.

Motions to Compel

Pursuant to the Re-Notice issued on February 4, 1999, motions to compel responses to discovery requests were required to be filed not later than February 10, 1999. Any responses to such motions were to be filed not later than February 16, 1999. BellSouth filed Motions to Compel Discovery on February 10, 1999. SECCA, e.spire, NEXTLINK, MCI, Time Warner and New South filed their responses to BellSouth's Motions on February 16, 1999. Without objection from other parties, Sprint's response was accepted on February 18, 1999. During the Pre-Hearing Conference on February 18, objections to the filing schedule were raised by several of the parties. These parties requested additional time to file motions to compel discovery. The Interim Pre-Hearing Officer extended the filing schedule to permit

other parties to file motions to compel outstanding discovery requests not later than 12:00 Noon on Monday, February 22, 1999, with facsimile copies concurrently served on all parties. Any responses to such motions to compel were required to be filed not later than 12:00 Noon on Friday, February 26, 1999. SECCA, NEXTLINK and e.spire and the Consumer Advocate filed Motions to Compel on February 22, 1999. BellSouth filed its responses to these motions on February 25, 1999.

After reviewing all motions to compel and responses thereto and after considering the comments of the parties in the record from the second Pre-Hearing Conference held on February 18, 1999, the Pre-Hearing Officer has ruled on these Motions to Compel. The Pre-Hearing Officer's Initial Order on Motions to Compel Outstanding Discovery will be issued separately from this Report and Recommendation.

Issues Raised at the Second Pre-Hearing Conference

During the second Pre-Hearing Conference, in the course of addressing the three items set forth in the Re-Notice, the parties raised certain related issues which were discussed at length before the Interim Pre-Hearing Officer. The parties were advised that these issues would be taken under advisement and subsequently addressed in this Report and Recommendation. The related issues raised by the parties are paraphrased as follows:

1. What is the Authority's purpose for this docket?

2. Whether this docket's resulting investigation is leading to a show cause hearing or to a rulemaking hearing?

3. Who has the burden of going forward, and who has the ultimate burden of proof?

4. What is the appropriate role for and what is expected of the intervenors in this proceeding?

5. Whether the staff of the Authority should participate in this proceeding as a party?

6. What are the appropriate parameters of a CSA?

Discussion of Issues Raised by the Parties

The issues set forth above go to the heart of this proceeding and should be resolved to some extent at this stage in the proceeding to provide guidance to the parties. The following discussion contains the analysis and recommendations of the Pre-Hearing Officer with respect to these issues.

1. What is the Authority's purpose for this docket?

In its initial Order opening this docket, the Authority expressed its concern over an increase in the filing of BellSouth CSAs and the existence of questionable termination provisions in those CSAs. Since the opening of the docket, BellSouth has continued to file CSAs on an ongoing basis and in an ever increasing volume. The March 16, 1999, Authority Conference bears witness to this pattern. At that Conference, the Directors deliberated on eighteen (18) CSAs, all filed since January 25, 1999.

The CSAs filed by BellSouth before and after the opening of this docket contain a variety of termination charges required to be paid by the customer in the event of an early termination of the CSA. Some CSAs have their own termination provisions from which termination charges originate. The Authority has denied approval of such CSAs where it has found that the language in the termination provision is too vague and does not sufficiently

inform the CSA customer of the amount of termination charges that may be incurred in the event of an early termination. Other CSAs contain termination clauses which provide that the General Subscriber Services Tariff ("GSST") termination liability provisions of particular services offered in the CSA control in the event that the CSA is terminated before the expiration of the term of the CSA. This type of CSA has been approved by the Authority on the basis that the language in the GSST is clear as to the calculation of termination charges. Still other CSAs filed by BellSouth contain a hybrid termination charge provision which sets forth its own termination charge language but may also relate in part to any applicable termination charge language in the GSST. Regardless of whether the termination charges exist in the GSST or in the CSA itself, excessive termination charges may have a chilling effect on competition in the local telecommunications market.

In addition to the termination charges, the sheer volume of CSAs being filed by BellSouth for Authority approval raises questions concerning the avoidance of marketing certain services provided in the GSST and the viability of the Authority's special contract rule (Rule 1220-4-1-.07). Potential discrimination in the offering of CSAs remains an important concern for the Authority.

Authority Rules Governing CSAs.

Several rules exist under which the Authority may review CSAs being offered by telecommunications carriers. Rule 1220-4-1-.07, which governs the Authority's consideration of BellSouth's CSAs, 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.

CSAs being offered by competing local exchange carriers (CLECs) are governed by Authority Rule 1220-4-8-.07(3) which contains the following language:

(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.

The Authority may review CSAs being offered by Interexchange carriers (IXCs) under the provisions in Rule 1220-4-2-.55(g) which, in part, provides as follows:

(g) Special Services or Contracts

1. A summary of any special contracts shall be filed with the Commission. The contract shall be made available to the Commission staff upon request. The Commission shall make a copy of the summary of the special contract available for inspection by any interested party.
2. Special contracts or special pricing packages shall be allowed as long as the service is available at the same rate to any customer meeting the special terms and conditions.

Concern Over Potential Anticompetitive Effects of CSAs

While the Authority rules governing CSAs provide for inspection and approval of CSAs, none of these rules address the issue of the effect on competition that may be created

through the offering of certain CSAs. In fact, it appears that the issue of the potential anticompetitive effects of CSAs began to take shape only after the number of CSAs filed by BellSouth began to increase and the CSAs for consideration by the Authority consistently contained lengthy term requirements and questionable termination charges. These areas of concern are addressed in more detail in the following discussion.

Potential Impact of Punitive Termination Provisions in CSAs.

Specific issues have been developed in this proceeding to address the impact of such term requirements and termination provisions on competition in the local telecommunications market. Issues 1, 1(A), 2, 2(A), 2(B), 4, 5, 6, 6(A) and 6(B) from the List of Issues, approved by the Authority at the January 19th Conference, examine the use of certain CSA provisions and their potential impact on competition in the local telecommunications market. A copy of the approved List of Issues is attached to this Report and Recommendation as **Exhibit A** for ready reference and review.

In individual CSA dockets, BellSouth has espoused the position that it should be entitled to recover, in the event of early termination of the agreements, the reasonable and foreseeable costs it has incurred in the administration and implementation of CSA agreements. In general, Tennessee law allows recovery of all damages which are the normal and foreseeable result of the breach of a contract. *Wilson v. Dealy*, 222 Tenn. 196, 434 S.W.2d 835 (1968), *Bush v. Cathey*, 598 S.W.2d 777 (Tenn. App. 1979). Notwithstanding this general principle of contract law, Tennessee courts are reluctant to uphold contractual provisions requiring payment of damages by the breaching party which amount to the payment of penalties.

Most of the cases in Tennessee addressing the issue of penalties or forfeitures involve an analysis of contracts containing liquidated damages provisions. *See, Kendrick v. Alexander*, 844 S.W.2d 187, 190 (Tenn. App. 1992); *V. L. Nicholson Co. v. Transcon Investment & Financial Ltd.*, 595 S.W.2d 474 (Tenn. 1980). In one such case, the Tennessee Supreme Court interpreted the term "liquidated damages" to mean a sum stipulated and agreed upon by the parties at the time they enter their contract, to be paid to compensate for injuries should a breach occur. *V. L. Nicholson Co. v. Transcon Investment & Financial Ltd.*, at 484. In discussing liquidated damages provisions, the Court held: "The amount stipulated should be reasonable in relation to the terms of the contract and the certainty with which damages can be measured; there must exist a reasonable relationship between the amount and what might reasonably be expected in the event of a breach." *Id.* at 484.

In Tennessee, a liquidated damages provision must be both reasonable in relation to the anticipated damages from breach and not grossly disproportionate to the actual damages that occur. When there is doubt whether a provision is intended to be liquidated damages or a penalty, the court must construe it as a penalty. *Beasley v. Horrell*, 864 S.W.2d 45 (Tenn. App. 1993), citing *Testerman v. Home Beneficial Life Ins. Co* , 524 S.W.2d 664, 668 (Tenn. App. 1974). Tennessee courts have consistently held that "even if the amount designated as liquidated damages bears a reasonable relationship to the amount of foreseeable damages from breach, courts will not enforce a provision that results in a forfeiture of an amount greatly in excess of the amount of actual damages." *Harmon v. Eggers*, 699 S.W.2d 159, 163 (Tenn. App. 1985) (quoting *Eller Brothers, Inc. v. Home Federal Savings & Loan Assn.*, 623 S.W.2d 624, 628 (Tenn. App. 1981)). Tennessee courts do not favor penalties. *Harmon v. Eggers*, at 163.

Tennessee case law demonstrates that, while the courts permit the recovery of reasonable costs from the breaching party through termination or early cancellation provisions of contracts (such as CSAs), provisions allowing the recovery of amounts that are grossly disproportionate to actual costs may be deemed penalties by courts and thereby rendered unenforceable. Of course the issue of enforceability of a contract is an issue that exists between BellSouth and the CSA customer. Nevertheless, it may be appropriate for the Authority to consider, as a part of its consideration of the entire CSA for approval, whether certain termination charges in a CSA constitute a penalty.

Where termination charges in a particular CSA are the linked to the GSST and those termination charges display characteristics of being a penalty, it may be appropriate for the Authority examine the termination provisions in the GSST. Most of the termination charges that exist in the GSST were originally considered and approved by the Tennessee Public Service Commission prior to the enactment of the Telecommunications Act of 1996. While such termination provisions may have been acceptable in a monopolistic market environment, the progression of that market toward competition and the General Assembly's pronouncement of the State's policy in Tenn. Code Ann. § 65-4-123 may require a reexamination of the GSST or, at the very least, a reexamination of the termination charges that are set forth therein to determine their impact on competition.

Potential Impact of Increased Number of CSAs Being Offered.

In addition to the existence of punitive termination charges in specific CSAs and in the GSST, there exists an issue regarding the number of CSAs being offered by BellSouth. Rule 1220-4-1-.07 allows companies to provide "rates, services and practices not covered by or permitted in the general tariffs, schedules or rules filed by such utilities," i.e., to provide

service under unique and special circumstances not generally experienced by the general body of customers. The increasing volume of CSAs being filed by BellSouth for approval calls into question whether these CSAs are, in fact, being entered into because of special circumstances. At some point in time, with the ever increasing number of CSAs in the market place, the GSST becomes antiquated. In addition, with such a large percentage of services provided under special contracts, it appears that the offering of CSAs by BellSouth is becoming the rule rather than the exception. Issues 1(B), 3 and 4 of the approved List of Issues in this proceeding examine potential consequences of not only the increased use of CSAs but also the implications of offering services through CSAs instead of the GSST. Increased offerings of CSAs can weaken the general provisions of the GSST that are designed to ensure that all customers receive nondiscriminatory rates, terms and conditions.

Concern Over the Potential Discriminatory Effects of CSAs.

Besides addressing the potential anticompetitive effects of CSAs, the issues in this proceeding have been tailored to examine the potential discriminatory effects in the local telecommunications market that may be created by BellSouth's use of CSAs. Issues 2, 2(C), 2(D), 7 and 8 of the approved List of Issues discuss the creation of criteria and procedures for identifying "similarly situated customers" as well as the potential discriminatory effects of CSAs. While portions of the CSA Rules cited above imply that special contracts or special pricing packages must not be utilized as a vehicle for unjust discrimination, those rules do not contain explicit criteria for establishing the existence of discrimination in the offering of CSAs.

Tenn Code Ann. §§ 65-4-122 and 65-5-204(a) provide statutory authority for prohibiting discriminatory practices in the offering of CSAs. Tenn Code Ann. § 65-4-122 provides in pertinent part as follows:

> (a) If any common carrier or public service company, directly or indirectly, by any special rate, rebate, drawback, or other device, charges, demands, collects, or receives from any person a greater or less compensation for any service of a like kind under substantially like circumstances and conditions, and if such common carrier or such other public service company makes any preference between the parties aforementioned such common carrier or other public service company commits unjust discrimination, which is prohibited and declared unlawful.
>
> (b) Any such corporation which charges, collects, or receives more than a just and reasonable rate of toll or compensation for service in this state commits extortion, which is prohibited and declared unlawful.
>
> (c) It is unlawful for any such corporation to make or give an undue or unreasonable preference or advantage to any particular person or locality, or any particular description of traffic or service, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic or service to any undue or unreasonable prejudice or disadvantage.
>
> Tenn. Code Ann. § 65-5-204(a) provides:
>
> (a) No public utility shall:
>
> (1) Make, impose, or exact any unreasonable, unjustly discriminatory or unduly preferential individual or joint rate, or special rate, toll, fare, charge, or schedule for any product, or services supplied or rendered by it within this state;
>
> (2) Adopt or impose any unjust or unreasonable classification in the making or as the basis of any rate, toll, charge, fare, or schedule for any product or service rendered by it within this state.

Under Tenn Code Ann. § 65-4-122(a), "unjust discrimination" and unreasonable or undue preferences are prohibited. The language of the statute contemplates that certain forms of discriminatory or preferential conduct may not be unjust, undue or unreasonable and

therefore, would not be in violation of that statute. Thus, if circumstances create a situation where some form of discrimination or preference exists, there would be a violation of that statute only when that discrimination or preference rises to the level or is of a certain magnitude to be considered unjust, undue or unreasonable. It would appear that in most instances, a finding of unjust discrimination or of undue or unreasonable preference under this statute would require a factual determination on a case by case basis. This analysis would also apply to Tenn. Code Ann. § 65-5-204(a).

In addition to the foregoing statutes, Tenn. Code Ann. § 65-5-208(c) provides a prohibition against discriminatory and anticompetitive practices as follows:

> Effective January 1, 1996, an incumbent local exchange telephone company shall adhere to a price floor for its competitive services subject to such determination as the authority shall make pursuant to § 65-5-207. The price floor shall equal the incumbent local exchange telephone company's tariffed rates for essential elements utilized by competing telecommunications service providers plus the total long-run incremental cost of the competitive elements of the service. When shown to be in the public interest, the authority shall exempt a service or group of services provided by an incumbent local exchange telephone company from the requirement of the price floor. The authority shall, as appropriate, also adopt other rules or issue orders to prohibit cross-subsidization, preferences to competitive services or affiliated entities, predatory pricing, price squeezing, price discrimination, tying arrangements or other anti-competitive practices.

Through the above quoted statutes, the Authority is certainly equipped to examine and act in situations where unjust discrimination or undue preferences may be the result of the use of CSAs. Nonetheless, the rules that govern CSAs provide no criteria for identifying similarly situated customers nor any methodology for examining potentially discriminatory practices by local telecommunication service providers. Further, incidents of unjust discrimination or undue preferences would not be limited to the use of CSAs by BellSouth.

The manner in which CSAs are offered by other service providers could equally result in unjust discrimination or undue preferences. If CSAs are being offered by any telecommunications service provider so as to provide different rates to similarly situated customers, then approval of such CSAs could result in undue price discrimination among these customers.

This proceeding was initiated to determine whether BellSouth's use of CSAs has an anticompetitive and/or discriminatory effect in the local telecommunications service market. Although there may be some question as to whether any CSA offered by other providers could be anticompetitive given the CLEC's lack of appreciable market share, nevertheless, there remains a distinct possibility that CSAs offered by those other providers could be discriminatory.

The existing rules governing the offering of CSAs do not address potential anticompetitive concerns and do not adequately address discriminatory concerns. Nor are there guidelines in the Authority rules to identify "similarly situated customers" in instances of potential discrimination, or to control the useage of term requirements or termination charges in CSAs so as to minimize or eliminate any anticompetitive effects of CSAs.

2. Whether this docket's resulting investigation is leading to a show cause hearing or to a rulemaking hearing?

As articulated above, the purpose in opening and maintaining this proceeding has been to address the concerns that have emerged as a result of the increased number of CSAs filed by BellSouth for Authority approval. The Pre-Hearing Officer is of the opinion that the direction this proceeding should take at this time is dependent on the quality of information

received through the discovery process. To a certain extent, the discovery propounded by the parties can assist the parties and the Authority in further framing of the issues and thereby help to define alternative courses of action. Unfortunately, the lack of response to certain critical discovery questions impairs the ability to move this proceeding toward either a show cause action or a rulemaking proceeding or both. If a party or parties can substantiate that a specific CSA offered by BellSouth is anticompetitive or discriminatory, BellSouth may be asked by the Authority in a separate proceeding to show cause why the offering of that CSA is not in violation of Tennessee statutes and/or Authority rules. On the other hand, where the issue becomes one of whether CSAs, as a class of contracts, are anticompetitive or discriminatory, a generic rulemaking proceeding involving the entire industry may be in order.

3. Who has the burden of going forward, and who has the ultimate burden of proof?

The question of who has the burden of going forward with the evidence and/or the ultimate burden of proof is dependent on the type of action or actions that may result from this proceeding. The Pre-Hearing Officer is not able at this time to make a determination or recommendation in this regard until this proceeding advances further.

4. What is the appropriate role for and what is expected of the intervenors in this proceeding?

The parties in this proceeding intervened on the basis that their interests, rights, privileges and duties could be effected by the Authority's actions in this case. The Pre-Hearing Officer observes that no party intervened in any of the numerous cases before the Authority in which the Directors have considered individual CSAs. In those cases there may

have been similar interests, rights, privileges and duties of the parties determined by the Authority.

Although the parties have engaged in extensive discovery in this proceeding, the intervenors have not asserted a position toward BellSouth CSAs other than to echo the Authority's concerns that BellSouth's offering of CSAs may result in anticompetitive and/or discriminatory practices. Through the rulings in the attached Order, the Pre-Hearing Officer is opening up discovery for the purpose of determining the parties' respective positions concerning the impact of BellSouth CSAs on the entry of competitors in the marketplace. In addition, this discovery could shed some light on the practice of offering CSAs in general. The information developed from the discovery responses to interrogatories may assist the Authority in making a determination as to whether to proceed with a show cause action and/or a rulemaking procedure.

5. Whether the staff of the Authority should participate in this proceeding as a party?

At this point in the proceeding, the Pre-Hearing Officer recommends that Staff not participate in this proceeding as a party. The Pre-Hearing Officer recommends that this matter proceed at least through the discovery stage for a determination as to whether there are grounds for a show cause action or whether the proceeding should become a rulemaking proceeding.

6. What are the appropriate parameters of a CSA?

The Pre-Hearing Officer is of the opinion that this question is ripe for a rulemaking proceeding which would address the industry-wide use of CSAs. Several issues on the approved List of Issues (Nos. 5, 6, 6(A), 6(B), 7, 8 and 9) are best suited for resolution

through a rulemaking proceeding. Information gathered in the present proceeding can assist in formulating proposed rules for consideration in a rulemaking proceeding.

Recommendations

As articulated in the first Report and Recommendation, the Authority, as is the case with any administrative agency, must enter into rulemaking when "the agency's action is concerned with broad policy issues that affect a large segment of the regulated industry or general public." *Tennessee Cable TV v. Public Serv. Com'n*, 844 S.W.2d 151, 162 (Tenn. App. 1992). In that Report and Recommendation, the Pre-Hearing Officer recommended that the Authority deny BellSouth's Motion to Expand the scope of this proceeding. Nevertheless, in recommending denial of the Motion, the Pre-Hearing Officer stated that the possibility of opening a rulemaking docket to address the effects of CSAs in general was not being foreclosed. The practice of offering CSAs, as an alternative to offering services through the general tariffs creates a fertile ground for discriminatory and anticompetitive practices.

While this proceeding was initiated to examine BellSouth CSAs, it is the recommendation of the Pre-Hearing Officer that through discovery all CSAs should be scrutinized and examined on an industry-wide basis. In this regard, the Pre-Hearing Officer has compelled discovery responses from all parties. The Pre-Hearing Officer **recommends** that at the conclusion of discovery, the Authority should explore initiating a rulemaking proceeding which would address the practices of offering CSAs on an industry-wide basis. At that juncture, there are several directions that this particular proceeding could take. This proceeding could be converted into a rulemaking proceeding with additional notice to

potentially interested parties. It could be consolidated with the current "Fresh Look" rulemaking proceeding (TRA Docket No. 98-00046). In the alternative, the Authority may decide to close this matter and initiate a new rulemaking proceeding.

At the present time, the Pre-Hearing Officer does not recommend the commencement of a show cause action. If, during the course of this proceeding, specific facts are developed that show the existence of discriminatory and anticompetitive practices, the Pre-Hearing Officer can appear before the Authority and request that a show cause proceeding be initiated against the offending carrier.

Respectfully submitted,

Richard Collier
RICHARD COLLIER, ACTING AS
PRE-HEARING OFFICER

ATTEST:

K D Waddell
EXECUTIVE SECRETARY

DATE: March 23, 1999

LIST OF ISSUES
DOCKET NO. 98-00559

IN RE: PROCEEDING FOR THE PURPOSE OF ADDRESSING COMPETITIVE EFFECTS OF CONTRACT SERVICE ARRANGEMENTS FILED BY BELLSOUTH TELECOMMUNICATIONS, INC. IN TENNESSEE

1. Does the practice of entering into contract service arrangements impact competition in the local telecommunications market? If so:

   A. Is the impact the result of the terms and conditions of the contract service arrangements entered into by BST?

   B. Is the impact the result of the number of contract service arrangements entered into by BST?

2. Are there anti-competitive and/or discriminatory effects in the local telecommunications market created by BST's contract service arrangements?

   A. Identify the provision(s) in BST's contract service arrangements that may be anti-competitive.

   B. Discuss the circumstances under which the provision(s) identified in A. above could be anti-competitive.

   C. Identify the provision(s) in BST's contract service arrangements that may be discriminatory.

   D. Discuss the circumstances under which the provision(s) identified in C. above could be discriminatory.

3. Identify and discuss the circumstances under which contract service arrangements should be offered in lieu of extended service arrangements in the general tariff.

4. What are the competitive implications of offering local telecommunications services via contract service arrangements versus the general tariff?

5. In what instances may termination charges be appropriate?

6. Assuming that termination charges are appropriate, how should they be determined for:

   A. contract service arrangements?

   B. extended service arrangements under the general tariff?

7. What criteria should be considered in establishing a definition of "similarly situated customers"?

8. What procedures, if any, should be utilized to identify similarly situated customers?

9. What information should be filed with contract service arrangements and made available to the public?

EXHIBIT A