BEFORE THE TENNESSEE REGULATORY AUTHORITY

AT NASHVILLE, TENNESSEE

February 3, 2000

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 FOURTH REPORT AND RECOMMENDATION OF THE PRE-HEARING OFFICER

This matter came before the Tennessee Regulatory Authority ("Authority") at a regularly scheduled Authority Conference held on July 13, 1999, for consideration of the Fourth Report and Recommendation of Pre-Hearing Officer ("Fourth Report and Recommendation") filed on July 8, 1999. A copy of the Fourth Report and Recommendation is attached to this Order as Exhibit 1.

At the June 8, 1999 Authority Conference, the Directors voted to open contested cases and to grant interventions in two individual Contract Service Arrangement ("CSA") dockets (Docket Nos. 99-00210 and 99-00244). The Authority also considered the Pre-Hearing Officer's Third Report and Recommendation and approved the recommendation that those individual CSA dockets be consolidated with this proceeding. Further, at the June 8th Conference, the Authority directed the parties to file briefs on the following threshold issues:

1. The burden of proof in this docket.

2. The nature of relief available:

   a. Whether that relief should be only prospective.

   b. Whether that relief will apply to BellSouth and its affiliates and assigns.

3. Whether proceeding with this docket as a contested case is consistent with the Court of Appeals decision in the case *Tennessee Cable TV v. Public Serv. Com'n*, 844 S.W.2d 151 (Tenn. App. 1992).

4. Whether Contract Service Arrangements may be approved by the Authority contingent upon the conclusion of this docket and subject to abrogation or modification based upon the decision of the Authority in this docket.

Briefs on the foregoing threshold issues were submitted on June 15, 1999 by Southeastern Competitive Carriers Association ("SECCA"), NEXTLINK Tennessee, Inc. ("NEXTLINK") and e.spire Communications ("e.spire")[1] (joint brief), Time Warner Communications of the Midsouth, LP ("Time Warner") and New South Communications, LLC ("NewSouth") (joint brief), BellSouth Telecommunications, Inc. ("BellSouth") and the Consumer Advocate Division of the Attorney General's Office ("Consumer Advocate"). MCImetro Access Transmission Services, Inc. ("MCImetro") and AT&T Communications of the South Central States, Inc. ("AT&T") adopted the brief filed by SECCA, NEXTLINK and e.spire. During a Pre-Hearing Conference held on June 24, 1999, the parties provided oral comments to supplement their briefs on the threshold issues.

On the issue of burden of proof, the parties expressed agreement that the nature of this proceeding would dictate the answer to that question. If the proceeding focused on the validity of a CSA, BellSouth would have the burden of proof unless the CSA had already been approved. Once a CSA had been approved, a party filing a complaint against such CSA would have the

[1] e.spire withdrew from this proceeding on June 23, 1999.

burden of proof. If this matter developed into a show cause action against BellSouth, then in accordance with Tenn. Code Ann. § 65-2-109, and upon issuance of a show cause order from the Authority, BellSouth would have the burden of proof. On the issue of the nature of relief, the parties were in agreement that any form of relief should be prospective in form. BellSouth and the intervenors disagreed on the issue of whether that relief would also apply to an affiliate or assign of BellSouth.

After reviewing the briefs and hearing oral argument from the parties, the Pre-Hearing Officer issued the Fourth Report and Recommendation which contained his initial determinations of the threshold issues as briefed by the parties and his recommendations as to the future conduct of this proceeding. The Pre-Hearing Officer's recommendations directly address the question of the nature of this proceeding and in so doing, contain proposed resolutions to the threshold issues. In the Fourth Report and Recommendation, the Pre-Hearing Officer made the following three (3) recommendations:

1. That the Authority open a rulemaking docket to examine the use of CSAs on an industry-wide level. This recommendation recognized that 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).

2. That because of the commonality of issues, all applicable issues from the approved List of Issues in this proceeding (Docket No. 98-00559) should be considered in the context of the two individual contested case CSA dockets (Nos. 99-00210 and 99-00244). The parties were in agreement that because the two individual CSA dockets involve the question of approval of the two CSAs by the Authority, BellSouth has the burden of proof as to the validity of the CSAs in both of those dockets. The Pre-Hearing Officer recommended that the nature of

the relief in the two contested case dockets would be specific approval or denial of the CSAs under consideration. Any findings in the individual CSA dockets as to general issues involving CSAs could be applied prospectively by the Authority to BellSouth CSAs either pending or filed after such a determination.

3. That the Authority should conduct an investigation to determine whether there is sufficient cause to justify the commencement of a show cause proceeding relative to whether the termination provisions in BellSouth's existing tariffs are punitive in nature and have an anti-competitive effect on the local telecommunications market.

As to each of the three above-referenced proceedings, the Pre-Hearing Officer asserted that the burden of proof and the nature of relief available would be peculiar to each proceeding and further recommended that the relief in each proceeding should be prospective only. The Pre-Hearing Officer was not of the opinion that individual CSAs should be contingent upon the outcome of any particular proceeding and expressed concern that a contingent approval of a CSA involving a third party customer might raise impairment of contract issues under either state contract or constitutional law. The Pre-Hearing Officer did not recommend that the Authority approve specific CSAs whose terms and conditions would be subject to alteration at a later date.

On July 9, 1999, BellSouth filed objections to the Fourth Report and Recommendation. At the July 13th Conference, the parties were permitted to make comments during the Authority's consideration of the Fourth Report and Recommendation and of BellSouth's objections. In considering the comments of the parties and objections of BellSouth, the Directors also permitted the Pre-Hearing Officer the opportunity to comment on the Fourth Report and Recommendation.

After reviewing the Fourth Report and Recommendation, and after considering the comments of the parties and the Pre-Hearing Officer, as well as the objections submitted by BellSouth, the Directors voted unanimously to approve recommendation numbers one (1) and

two (2). However, only a majority of the Directors voted to approve recommendation number three (3).[2]

IT IS THEREFORE ORDERED THAT:

1. The Fourth 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.

2. BellSouth's objections to the Fourth Report and Recommendation are denied.

Melvin J. Malone, Chairman

* * *

H. Lynn Greer, Jr., Director

Sara Kyle, Director

ATTEST:

K. David Waddell, Executive Secretary

[2] Director Greer did not vote to support recommendation number three (3) because he was of the opinion that a show cause action would be redundant to the initiation of a rulemaking proceeding addressing both the competitive effects of CSAs and the legitimacy of termination provisions.

* * * Director Greer voted not to support Recommendation No. 3 in the Fourth Report and recommendation.

BEFORE THE TENNESSEE REGULATORY AUTHORITY

NASHVILLE, TENNESSEE

JULY 8, 1999

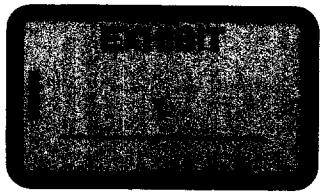
IN RE:	)	
	)	
PROCEEDING FOR THE PURPOSE OF ADDRESSING COMPETITIVE EFFECTS OF CONTRACT SERVICE ARRANGEMENTS FILED BY BELLSOUTH TELECOMMUNICATIONS, INC. IN TENNESSEE	)	**Docket No. 98-00559**

FOURTH REPORT AND RECOMMENDATION OF PRE-HEARING OFFICER

Over the course of the past three years, the Directors of the Tennessee Regulatory Authority ("Authority") have reviewed and rendered decisions concerning numerous Contract Service Arrangements ("CSAs") filed by BellSouth Telecommunications, Inc. ("BellSouth"). The number of CSAs filed by BellSouth for approval by the Authority has increased steadily since the passage of the federal and state telecommunications acts.

Travel of the Case

At a regularly scheduled Authority Conference held on July 7, 1998, during consideration of certain CSAs filed by BellSouth, the Directors voted to open a docket for the purpose of addressing the competitive effects of CSAs filed by BellSouth in Tennessee. The Directors also appointed a Pre-Hearing Officer for the purpose of preparing this matter for consideration by the Directors. In opening this generic contested case docket, of particular concern to the Authority was the potential impact that certain contract and tariff



termination provisions in the CSAs may have on the development of competition in the local exchange carrier market. An Order reflecting the action of the Directors was entered on August 12, 1998.

The first Pre-Hearing Conference in this docket was held on September 2, 1998. During that conference a list of issues was developed and a procedural schedule governing discovery was established. The parties conducted discovery over the course of the next several months. Issues that were raised by the parties concerning the scope of this proceeding were initially addressed in the First Report and Recommendation filed by the Pre-Hearing Officer on January 15, 1999. In approving that Report by a 2 to 1 vote, the Authority reiterated its position that the focus of this proceeding would be BellSouth CSAs.

During discovery, several disputes arose between the parties, some of which dealt with the relevancy of certain requests in light of the scope of the proceeding. A second Pre-Hearing Conference was held on February 18, 1999, primarily for the purpose of addressing discovery disputes. The Pre-Hearing Officer issued an Initial Order on the Motions to Compel Outstanding Discovery on March 25, 1999. In advance of the Order, a Second Report and Recommendation was issued, on March 23, 1999, which addressed certain threshold and relevancy issues raised by the parties in their motions and during the February 18th Pre-Hearing Conference. In that Report, the Pre-Hearing Officer discussed the potential impact of punitive termination provisions in CSAs and the potential discriminatory effects of CSAs. Following those discussions, the Pre-Hearing Officer recommended that the practices of offering CSAs on an industry-wide basis be addressed through a rulemaking proceeding, but at that time, the Pre-Hearing Officer did not recommend the commencement of a show cause action. The Second Report and

Recommendation was approved by the Authority by a 2 to 1 vote at the April 6, 1999 Conference.

A third Pre-Hearing Conference was held on April 6, 1999, for the purpose of addressing the parties' motions for clarification/reconsideration of the Pre-Hearing Officer's Initial Order on the Motions to Compel Outstanding Discovery. During that Conference, the parties again raised issues concerning the nature of this proceeding. It was the consensus of the parties in attendance that the issue of discrimination as it may relate to the offering of CSAs, whether by BellSouth or by competing local exchange carriers (CLECs), should be examined in the context of a rulemaking proceeding. The Pre-Hearing Officer recommended that a rulemaking be commenced following the completion of discovery between the parties in this proceeding. The Pre-Hearing Officer's rulings on the parties' motions for reconsideration of the Initial Order on the Motions to Compel Outstanding Discovery were contained within an Order issued simultaneously with the Third Report and Recommendation on June 1, 1999. The Third Report and Recommendation as well as this Order generated further discussion from the parties at the June 8, 1999 Authority Conference concerning the nature of the proceeding and the resolution of certain threshold issues. The Third Report and its attached Order were approved by the Authority by a 2 to 1 vote at the June 8, 1999 Authority Conference.

Shortly after the third Pre-hearing Conference, certain parties to this proceeding filed petitions to intervene in four individual CSA dockets[1] being considered by the Authority. As a result of these interventions, the Pre-Hearing Officer recommended in the Third Report that, if contested cases were opened in the individual CSA dockets and the interventions were granted, then the individual CSA dockets should be consolidated with

[1] Docket Nos. 99-00210, 99-00230, 99-00244 and 99-00262.

this proceeding. The commonality of issues pertaining to CSAs in the individual dockets and in this generic docket as well as the fact that discovery had already been substantially completed in this proceeding and could be utilized in the individual CSA dockets were the basis for recommending consolidation.

At the June 8, 1999 Authority Conference, the Directors considered the Third Report and approved the recommendation of consolidation of certain individual CSA dockets with this proceeding by a 2 to 1 vote. By votes of 2 to 1 the Authority approved two of the individual CSA filings (Docket Nos. 99-00230 and 99-00262). In the two remaining individual CSA dockets (Docket Nos. 99-00210 and 99-00244), the Directors voted unanimously to open contested cases and grant the interventions. The Directors did express concern that delay in hearing the individual dockets could result from consolidation with this proceeding. Therefore, in granting the consolidation of these two CSA dockets with this proceeding, the Directors ordered that an aggressive discovery and testimony schedule be established and that a hearing date be set as soon as practicable.

In conjunction with the consideration and approval of the Pre-Hearing Officer's Third Report and Recommendation, the parties were directed to file briefs by June 15, 1999 on a series of threshold issues. The Directors also set a Pre-Hearing Conference to be held on June 24, 1999. A Notice was issued by the Authority on June 15, 1999 that further identified the threshold issues and set the Pre-Hearing Conference. The threshold issues were identified as follows:

1. The burden of proof in this docket.

2. The nature of relief available.
    a. Whether that relief should be only prospective.
    b. Whether that relief will apply to BellSouth and its affiliates and assigns.

3. Whether proceeding with this docket as a contested case is consistent with the Court of Appeals decision in the case of Tennessee Cable Television Association v. Tennessee Public Service Commission, 844 S.W. 2d 155 (Tenn. App. 1992)

4. Whether Contract Service Arrangements may be approved by the Authority upon the conclusion of this docket and subject to abrogation or modification based upon the decision of the Authority in this docket.

Briefs on these issues were submitted on June 15, 1999 by SECCA, NEXTLINK and e.spire[2] (joint brief), Time Warner and NewSouth Communications, L.P. (joint brief), BellSouth Telecommunications, Inc. and the Consumer Advocate Division. MCI Telecommunications, Inc. and AT&T adopted the brief filed by SECCA, NEXTLINK and e.spire.

June 24, 1999 Pre-Hearing Conference

A Pre-Hearing Conference was held on June 24, 1999, for the purposes of considering the briefs filed by the parties, further refining the issues in this proceeding and establishing a procedural schedule. In attendance at the Pre-Hearing Conference were the following parties:

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

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. In addition, **Dana Shaffer,** Esquire, appeared on behalf of NEXTLINK;

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;

MCImetro - **Jon E. Hastings**, Esquire, Boult, Cummings, Conners & Berry, 414 Union St., 1600, P. O. Box 198062, Nashville, TN 37219-8062. In addition, **Susan Berlin**, Esquire appeared by telephone;

[2] e.spire withdrew from this proceeding by way of Henry Walker's letter of June 23, 1999.

Consumer Advocate, Office of the Attorney General - **L. Vincent Williams**, 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 30309.

1. Discussion of Threshold Issues

During the Pre-Hearing Conference, the parties were permitted to provide oral comments to supplement their briefs on the threshold issues. As to the issue of which party has the burden of proof, the parties were in agreement that the nature of this proceeding would dictate the answer to that question. The parties agreed that if this matter developed into a show cause action against BellSouth, then BellSouth would have the burden of proof after the issuance of a show cause order from the Authority. If the proceeding focused on the validity of a CSA, BellSouth would have the burden of proof unless the CSA had already been approved. Once the CSA had been approved, if a party filed a complaint against the tariff, such complaining party would have the burden of proof.

On the issue of the nature of relief, the parties again responded that resolution would depend upon the nature of the proceeding. The parties were in consensus that any form of relief would probably have to be prospective in form. BellSouth and the intervenors disagreed on the issue of whether that relief would also apply to an affiliate or assign of BellSouth.

As to the impact of the case of *Tennessee Cable Television Association v. Tennessee Public Service Commission,* the intervenors agreed that since the issue of industry-wide practices will be considered in a rulemaking proceeding, that issue has been rendered moot. Finally, the issue of whether the Authority could approve CSAs contingent

upon the outcome of this docket was discussed at great length. Counsel for SECCA and NEXTLINK argued that a CSA is no different than a tariff, that the Authority may revisit its decision on tariffs and after making a sufficient showing, subsequently modify or alter such tariffs,. Counsel for BellSouth argued against the Authority's ability to modify or alter CSAs that have already been approved by the Authority, reasoning that the Authority previously found them to be compliant with Tennessee law and the rules of the Authority. Counsel for BellSouth acknowledged that the Authority could alter provisions in CSAs, such as termination provisions, on a going forward basis.

2. **Discussion of Discovery Issues**

During the Pre-Hearing Conference, counsel for BellSouth made an oral motion to compel responses to outstanding discovery requests. BellSouth had not received responses from AT&T and Time Warner to specific requests as directed in the Order Compelling Outstanding Discovery. The parties resolved the issue by agreeing to provide responses and make the CSAs available to BellSouth no later than five (5) days from the date of the Pre-Hearing Conference. The production of these CSAs would be in accordance with the terms of the Protective Order entered in this proceeding.

BellSouth also raised concerns over the adequacy of certain supplemental responses, stating that the competing CLECs had failed to identify with specificity which CSAs are at issue as being anticompetitive. The parties acknowledged that the BellSouth CSAs had been made available to them and that they had examined the CSAs. BellSouth argued that to the extent that the parties would have the burden of challenging particular CSAs, BellSouth is entitled to have the parties identify the particular CSAs which they contend are anticompetitive rather than respond with generalizations as to why particular CSAs are deemed anticompetitive.

Counsel for AT&T asserted that if the parties are contending that BellSouth engaged in a program to use CSAs to block competition in the local telecommunications market, then all CSAs since that time would be anticompetitive. Further, AT&T asserted that if it had a concern about a specific CSA then it would identify that CSA. However, if its concern was a general concern about the overall program of BellSouth CSAs, then a general response to the question would be responsive.

The Pre-Hearing Officer is not convinced that the burden of proof determines whether a party's answer to a discovery request is adequate. BellSouth is entitled to find out through discovery whether the parties contend that specific CSAs are anti-competitive and if so, to learn which of those CSAs are at issue. If the parties are alleging that a program or scheme caused the BellSouth CSAs to become anticompetitive, then the parties can assert that contention as a response. As AT&T has articulated, if the concern is a general concern then the parties cannot be compelled to specify particular CSAs. Nevertheless, where there are concerns about a specific CSA or about the type of language or provisions in a specific CSA, the parties must provide that specific information to BellSouth and that specific information must be provided as a part of discovery. The Pre-Hearing Officer directs that the parties comply with the above decision within seven (7) days of approval of this Report. These discovery requests and responses would be incorporated as part of the discovery in the two individual CSA dockets (Nos. 99-00210 and 99-00244) as per the consolidation of these dockets with this proceeding.

Recommendations

The parties submitted excellent briefs addressing the threshold issues in this proceeding. Discussion of the threshold issues during the June 24th Pre-Hearing Conference once again turned to the question of the nature and purpose of this docket.

Through the briefs and through the oral comments at the Pre-Hearing Conference, it is clear that the parties agree that resolution of the significant threshold issues is dependent on the nature of this proceeding. One such issue is the question of who has the burden of proof. The answer to that issue, as well as to the issue of the nature of the available relief is clearly linked to a determination of the nature of the proceeding.

Over the past eleven months, certain courses of action have been revealed within the context of this proceeding as the parties have participated in the Pre-Hearing Conferences, engaged in discovery and have discussed and submitted briefs on significant issues. Furthermore, the activity in individual CSA dockets has impacted the course of this proceeding. The following recommendations directly address the question of the nature of this proceeding and in so doing, contain proposed resolutions to the threshold issues. In essence, the recommendations break this docket down into three separate arenas: a rulemaking proceeding, a contested case proceeding and a show cause proceeding.

As to each of the three proceedings, the burden of proof and the nature of relief available will be peculiar to that proceeding. The Pre-Hearing Officer believes that the relief in each proceeding should be prospective only. The Pre-Hearing Officer does not believe that individual CSAs should be contingent upon the outcome of any particular proceeding. The Pre-Hearing Officer has concerns that a contingent approval of a CSA that involves a third party customer may raise impairment of contract issues under either contract or constitutional law. Unless all parties to the CSA and the intervenors agreed to such a contingent approval, the Pre-Hearing Officer is reluctant to recommend to the Authority that it should approve specific CSAs and then alter the terms and conditions of those CSAs at a later date.

Concerning the issue of the nature of relief, the parties have raised the question of whether CSAs that are a part of an anti-competitive scheme or are discriminatory can be considered void or voidable contracts. In this regard, certain parties have argued that relief would be retrospective in that where a contract or CSA is illegal and deemed void, the agreement is vitiated from its inception. Further, certain parties have argued that any CSA that was entered into during the time in which an anti-competitive scheme or plan was in effect, would be void.

While general contract law supports the proposition that illegal contracts are void from their inception, the Pre-hearing Officer is of the opinion that there would need to be a specific finding as to the specific CSAs which were indeed a part of that scheme before any CSAs could be deemed void. The same reasoning would go to findings of discrimination in the offering of CSAs. The Authority would need to make a specific finding of discrimination relative to a specific CSA and not rely on a general finding of discriminatory practices in the offering of CSAs. For those reasons the Pre-Hearing Officer is of the opinion that as to CSAs already in effect, specific complaints should be filed alleging that such CSAs are anti-competitive and/or discriminatory.

After considering the original purpose of this docket and after reviewing the discovery and the issues for determination, the Pre-Hearing Officer makes the following recommendations:

1. The Authority should open a Rulemaking docket to address industry-wide CSAs.

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. Authority 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 sheer volume of CSAs filed by BellSouth for approval begs the question of whether these CSAs are, in fact, being entered into because of special circumstances. Issues 1(B), 3 and 4 of the approved List of Issues in this proceeding examine the implications of offering services through CSAs instead of tariff arrangements. Increased offerings of CSAs have the potential of weakening the general provisions of the tariff which are designed to ensure that all customers receive nondiscriminatory rates, terms and conditions.

In addition, specific issues were developed in this proceeding which address 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. Through Tenn. Code Ann. §§ 65-4-122, 65-5-204(a) and 65-5-208(c), 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 other service providers offer CSAs could result in equally unjust discrimination or undue preferences.

The Pre-Hearing Officer has expressed the opinion that the question of the appropriate parameters of a CSA is one ripe for a rulemaking proceeding which would address the industry-wide use of CSAs. Issues (Nos. 5, 6, 6(A), 6(B), 7, 8 and 9) on the approved List of Issues are best suited for resolution through a rulemaking proceeding. In order for Authority rules governing the offering of CSAs to adequately address potential anticompetitive concerns and discriminatory concerns, there must be guidelines provided to identify "similarly situated customers" in instances of potential discrimination, and to control the usage of term requirements or termination charges in CSAs so as to minimize or eliminate any anticompetitive effects of CSAs. Information gathered in the present proceeding will assist in formulating proposed rules for consideration in a rulemaking proceeding.

While this proceeding was initiated to examine BellSouth CSAs, discovery of both the CSAs of BellSouth and of the intervenors has suggested a review of CSAs on an industry-wide basis. The Authority has approved the Pre-Hearing Officer's earlier recommendations that the Authority initiate a rulemaking proceeding through the opening of another docket, as soon as practicable, for the purpose of promulgating rules that will address industry-wide practices of offering Contract Service Arrangements. This

rulemaking proceeding will resolve in part the above referenced issues which were approved for consideration in this docket.[3]

2. The Authority should consider issues from this docket through the contested case proceedings in Docket Nos. 99-00210 and 99-00244

On June 8, 1999, the Authority opened contested cases and granted intervention status to NEXTLINK Tennessee, Inc. ("NEXTLINK"), the Southeastern Competitive Carrier Association ("SECCA"), and Time Warner Telecom of the Mid-South, L.P. ("Time Warner") in Docket Nos. 99-00210 and 99-00244. Adopting the recommendation of the Pre-Hearing Officer, the Authority consolidated these two dockets with this proceeding for the purposes of discovery and conducting a hearing on the issues in the individual dockets as well as those issues common to this proceeding.

In petitioning for the opening of a contested case in these dockets and for permission to intervene, the intervenors have made claims that BellSouth's CSAs have been negotiated with customers as a part of a program which results in such contracts being "unjust, unreasonable, discriminatory and anti-competitive."[4] SECCA claims that the CSAs "illegally impede members' ability to compete."[5] Time Warner asserts that the CSAs in Docket Nos. 99-00210 and 99-00244 are below the statutory price floor.[6] The intervenors also claim that BellSouth's CSAs are discriminatory because they are not offered to similarly situated customers.[7]

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[3] This initial recommendation was approved by the Authority at the April 6, 1999 Conference. Even in voting against the Second Report as a whole, Director Kyle supported the recommendation that a rulemaking proceeding be commenced. A second recommendation was approved by the Authority at the June 8, 1999 Conference.

[4] SECCA/NEXTLINK – "Supplement to Petitions to Intervene" May 7, 1999, p. 2 (Docket No. 99-00210).

[5] SECCA – "Petition to Intervene" April 28, 1999, p. 1 (Docket No. 99-00244).

[6] Time Warner – "Amended Petition to Intervene and Complaint for Contested Case Proceeding" May 7, 1999, p. 2 (Docket Nos. 99-00210 and 99-00244).

[7] Id.

The issues raised by the intervenors in these two dockets are included in and incorporate most of the issues from the List of Issues approved by the Authority for consideration in this proceeding. The parties acknowledged during the June 24th Pre-Hearing Conference that the general issues in this proceeding as they may pertain to individual CSAs are a part of the issues that may be raised in the context of the individual CSA dockets. The parties were also in agreement that because the two dockets address CSAs that are awaiting approval by the Authority, BellSouth has the burden to prove their validity in both of these dockets. Because of the commonality of issues, the Pre-Hearing Officer **recommends** that the approved List of Issues in this proceeding (No. 98-00559) be considered in the context of the two individual CSA dockets (Nos. 99-00210 and 99-00244).[8]

During the June 24th Pre-Hearing Conference, a schedule was established for conducting discovery and the filing of testimony in these two dockets. Based upon a preliminary schedule, the Pre-Hearing Officer proposed the earliest hearing date for these two dockets as August 3, 1999. When attorneys for BellSouth announced that they could not be available for a hearing during that week in August, the Pre-Hearing Officer advised the parties that a hearing date would be proposed in this Report. In addition, the proposed schedule that follows varies slightly from the schedule discussed with the parties at the Pre-Hearing Conference. Based upon the information provided by the parties and upon a review of the Authority's calendar, the Pre-Hearing Officer **recommends** the following schedule for the filing of discovery and pre-filed testimony and for the hearing in these dockets:

[8] A copy of the approved List of Issues is attached to this Report as Exhibit A.

Friday, July 9, 1999	Filing of Discovery Requests
Friday, July 16, 1999	Filing of Discovery Responses
Friday, July 23, 1999	Filing of Direct Testimony
Friday, July 30, 1999	Filing of Rebuttal Testimony
Wednesday, August 4, 1999	Filing of Reply Testimony
Tuesday, August 17 and Wednesday, August 18, 1999	Hearing Dates

The nature of the relief in these two contested case dockets would be specific approval or denial of the CSAs under consideration. Any findings as to the general issues could be applied prospectively to the consideration of BellSouth CSAs either pending at the time of or filed after the decision of the Authority.

3. The Authority should open a separate docket for the purpose of initiating a show cause action addressing whether the termination liability provisions in the existing tariffs (GSST and PLST) of BellSouth are punitive in nature and have an anti-competitive impact on the local telecommunications market.

Since the opening of this docket, BellSouth has continued to file CSAs on an ongoing basis. The CSAs filed by BellSouth before and after the opening of this docket contain a variety of formulas for calculating the termination charges required to be paid by the customer in the event of an early cancellation of the CSA. Some CSAs have their own termination provisions from which termination charges originate. The Authority has denied CSAs where it has found that the language in the termination provision was too vague and did not sufficiently inform the CSA customer of the amount of termination charges that may be incurred in the event of an early termination.[9] CSAs containing termination provisions which applied the termination liability charges in the General

[9] See Docket Numbers: 98-00300, 98-00341 denied at the June 2, 1998 Authority Conference; 98-00399 denied at the July 7, 1998 Authority Conference; and 98-00520 denied at the August 18, 1998 Authority Conference.

Subscriber Service Tariff ("GSST") for particular services offered in the CSA have been approved by the Authority on the basis that the language in the GSST is clear as to the *calculation* of termination charges.[10] Other CSAs filed by BellSouth containing termination charge provisions relating in part to applicable termination charge language in the GSST have been approved on the ground that the termination charges in the existing GSST have been previously approved.[11] Regardless of whether the termination charges are derived from the GSST, termination charges that are excessive and unreasonable may have a chilling effect on competition in the local telecommunications market, as well as run afoul of state contract law principles as expressed by Tennessee courts.

In addition to the termination charges, the sheer volume of CSAs being filed by BellSouth for Authority approval suggests avoidance of the GSST and of the Authority's special contract rule (Rule 1220-4-1-.07) in the marketing of certain services.. The issue of the potential anticompetitive effects of CSAs has come into focus with the increase in the number of CSAs filed by BellSouth. Further, the CSAs filed by BellSouth and considered by the Authority have consistently contained lengthy term requirements and questionable termination charges.

In the Second Report and Recommendation, approved by the Authority on April 6, 1999, the Pre-Hearing Officer discussed the potential impact of punitive termination provisions in CSAs on competition in the local telecommunications market. The Pre-Hearing Officer stated the following is this regard:

> Tennessee case law demonstrates that, while the courts permit the recovery of reasonable costs from the breaching party through termination or early

[10]See Docket Numbers: 98-00381, 98-00391 approved at the July 7, 1998 Authority Conference; and 98-00402, 98-00408, 98-00417, 98-00419, 98-00437, 98-00442, 98-00445 approved at the July 21, 1998 Authority Conference.

[11] See Docket Numbers: 98-00513 approved at the November 17, 1998 Authority Conference; 98-00612 approved at the January 12, 1999 Authority Conference; 98-00898 approved at the January 19, 1999 Authority Conference; and 98-00430, 98-00485 approved at the February 2, 1999 Authority Conference.

> 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. (Second Report and Recommendation, March 23, 1999, p. 10)

While this proceeding has been progressing through discovery phase and the refinement of issues, individual CSAs containing questionable termination provisions have been approved by the Authority on the basis that those termination provisions were either linked to or identical to termination provisions as set forth in the GSST or the Private Line Services Tariff (PLST).[12]

Through CSAs offering services out of the tariffs, subscribers commit to extended service periods in exchange for discounts on the normal monthly rates associated with particular services. BellSouth's tariffs (GSST and PLST) provide for the payment of termination charges by customers should the customers fail to fulfill their extended service period commitments under these CSAs. The tariff termination provisions related to the

[12] In Docket No. 98-00513, BST argued that the termination provisions in the CSA came straight out of the general tariff. The CSA in Docket No. 98-00513 was approved by a 2-1 vote at November 17, 1998 Conference. Director Greer used BST's argument as part of his basis for approval. The next CSA approved by the Authority was Docket No. 98-00612. That CSA was approved by a 2-1 vote at the January 12, 1999 Conference. Director Greer stated that his motion to approve 98-00612 was based on his action in 98-00513. The approval of the CSA Docket No. 98-00898 by a 2-1 vote followed at the January 19, 1999 Conference.

particular services offered pursuant to contract payment plans are similar in that most require customers to pay either 100 percent or 90 percent of the remaining amounts due under the plans at the time of service termination.[13] In this proceeding, BellSouth has acknowledged through discovery at least three circumstances in which a CSA customer should pay a termination liability: (1) when the service-specific tariff to which the CSA is subject requires the payment of such termination charges; (2) when BellSouth incurs costs in providing service under the CSA that it cannot recover as a result of the early cancellation or termination of the CSA or had agreed to waive in consideration of the customer entering into the CSA; and (3) when BellSouth and the CSA customer mutually agree to an amount that the parties believe constitutes an acceptable financial incentive for the parties to honor the terms and conditions of the CSA.[14]

The Pre-Hearing Officer recognizes that termination charges are appropriate to recover costs as a result of the early cancellation or termination of service. It is reasonable, as well as just and equitable, for a company to recoup reasonable customer-specific costs linked to service termination or incurred in reliance upon the contract, such as recovery of special construction charges.

Nonetheless, the recovery of excessive termination charges is troublesome. First, recovery of an amount significantly more than actual costs incurred from the termination of a service would not be reasonable under existing contract law and may be deemed a penalty. Further where excessive termination charges recover significantly more than the

[13] For instances, see GSST Section A32.1.1.D.3 (provision requiring payment of 90 percent of remaining amount due to terminate Integration Plus Management Services); GSST Section A40.10.2.B (provision requiring payment of 90 percent of remaining amount due to terminate Fast Packet Transport Services); GSST Section A42.3.2.A.2 (provision requiring payment of 100 percent of remaining amount due to terminate BellSouth Primary Rate ISDN); PLST Section B7.1.2.C.5 (provision requiring payment of 100 percent of remaining amount due to terminate MegaLink Service); and B7.2.2.H.1.c (provision requiring payment of 100 percent of remaining amount due to terminate SynchroNet Service).

[14] BST Response to SECCA, NEXTLINK and e.spire, First Interrogatories, 9/1/98, Item No. 6, Page 1.

remaining portion of customer-specific costs at the time of default the penalty to the customer becomes suggestive of anti-competitive conduct.

The Pre-Hearing Officer is of the opinion that BellSouth's tariff termination provisions which require the customer to pay either 90% or 100% of the remaining amount due under the tariff payment plan could have an adverse effect on competition in the local market and should be examined to determine whether such provisions are excessive in fact. Moreover, most of BellSouth's tariff termination provisions were approved before the onset of any meaningful competition in the local telecommunications market. At that time, a consumer may not have been as concerned about termination of service since there were no alternative providers of similar services. As the local telecommunications market attempts to move toward a competitive environment, the ability to terminate a service without burdensome and costly termination provisions will likely be a significant factor in the consumer's decision to select an available competing service alternative.

For the above reasons, the Pre-Hearing officer **recommends** that the Authority open a docket to initiate a show cause proceeding to address whether the termination provisions in BellSouth's existing tariffs are punitive in nature and have an anti-competitive effect on the local telecommunications market.

Respectfully submitted,

Richard Collier
RICHARD COLLIER, ACTING AS
PRE-HEARING OFFICER

ATTEST:

K. David Waddell, Executive Secretary

DATE: 7/8/99

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