

**BEFORE THE TENNESSEE REGULATORY AUTHORITY**

**NASHVILLE, TENNESSEE**

January 15, 1999

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REGULATORY AUTH.

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OFFICE OF THE  
EXECUTIVE SECRETARY

**IN RE:**

**PROCEEDING FOR THE PURPOSE OF**  
**ADDRESSING COMPETITIVE EFFECTS OF**  
**CONTRACT SERVICE ARRANGEMENTS FILED**  
**BY BELL SOUTH TELECOMMUNICATIONS, INC.**  
**IN TENNESSEE**

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**Docket No. 98-00559**

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**REPORT AND RECOMMENDATION OF PRE-HEARING OFFICER**

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At a regularly scheduled Authority Conference held on July 7, 1998, the Directors of the Tennessee Regulatory Authority ("Authority") voted unanimously to open a docket for the purpose of addressing the competitive effects of contract service arrangements ("CSAs") filed by BellSouth Telecommunications, Inc. in Tennessee. The Directors also voted to appoint the General Counsel to serve 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. An Order dated August 12, 1998 was entered reflecting the action of the Directors.

**THE PRE-HEARING CONFERENCE**

On August 14, 1998, a Notice of Pre-Hearing Conference was sent to the general subscribership list of the Authority setting a Pre-Hearing Conference and requesting any interested parties to file a Motion to Intervene and a list of proposed issues by August 24,

1998. A Pre-Hearing Conference was held on September 2, 1998, pursuant to that Notice. The Pre-Hearing Conference was scheduled for the purposes of considering motions to intervene, considering issues to be addressed in this proceeding and setting a procedural schedule.

**Parties in Attendance**

In attendance at the 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

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

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

AT&T Communications of the South Central States, Inc. ("AT&T") - **James P. Lamoureux**, Esquire, 1200 Peachtree St., NE, Atlanta, GA 30309;

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

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

Carolyn Tatum Roddy representing Sprint Communications Company, LP, requested to participate by telephone, but after technical problems developed, she disconnected and did not participate in the Pre-Hearing Conference.

### **Petitions to Intervene**

At the Pre-Hearing Conference, the Pre-Hearing Officer considered petitions to intervene that had been filed. In the Notice setting the Pre-Hearing Conference, interested parties were directed to file motions to intervene in this proceeding not later than August 24, 1998, if they desired to participate in the Pre-Hearing Conference. All petitions set forth sufficient grounds for granting intervention. Those petitions that were timely pursuant to the Notice for the purposes of participating in the Pre-Hearing Conference were filed by: MCImetro Access Transmission Services, Inc. ("MCImetro"); AT&T Communications of the South Central States, Inc. ("AT&T"); BellSouth Telecommunications, Inc. (BellSouth"); NEXTLINK Tennessee, Inc. ("NEXTLINK"); Southeastern Competitive Carriers Association ("SECCA"); New South Communications, LLC ("New South"); Time Warner Communications of the Midsouth, LP ("Time Warner"); and Sprint Communications Company, LP ("Sprint"). The Pre-Hearing Officer granted the petitions of those parties for leave to intervene in this proceeding.

The Consumer Advocate Division of the Attorney General's Office ("Consumer Advocate") and e.spire Communications ("e.spire") filed untimely according to the Notice. Without objection, the Pre-Hearing Officer granted those petitions to intervene and those parties participated in the Pre-Hearing Conference.

### **Issues for Consideration in this Proceeding**

Pursuant to the Notice setting the Pre-Hearing Conference, each party desiring to participate in this proceeding was requested to file a list of proposed issues. Lists of proposed issues were filed by BellSouth, AT&T, SECCA, Time Warner and New South, and the

Consumer Advocate. Those lists of issues were reviewed and considered by the Pre-Hearing Officer in developing a list of proposed issues for determination in this proceeding. A list of proposed issues for determination was prepared and was distributed to the parties at the Pre-Hearing Conference.

Following extensive discussions concerning issues in the proceeding, the parties agreed to the proposed list of issues with the following comments:

1. If a party finds that the answer to either Issue 1 or Issue 2 is "yes," the party may propose solutions or remedies to address the anticompetitive and/or discriminatory effects of CSAs on the local telecommunications market in presenting a response to those issues.

2. The question of whether CSAs for services, rates, or practices covered in the general tariff are allowable pursuant to TRA rules may be raised and treated under Issue 3 as part of the "circumstances" under which CSAs should be offered.

3. Whether CSAs for individual services are being offered at or below cost may be treated under Issue 2 as a possible anticompetitive and/or discriminatory effect in the local telecommunications market.

A copy of the list of issues formulated for use in this docket is attached to this Report and Recommendation as **Exhibit A.**<sup>1</sup> The parties acknowledged that the issues can change as this matter proceeds.

During the Pre-Hearing Conference, issues were raised which encompassed the scope and nature of this proceeding. These issues were presented as follows:

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<sup>1</sup> Issue No. 8 was amended during the Pre-Hearing Conference to include the words "if any," at the request of BellSouth and without objection from the parties.

1. BellSouth's assertion that the scope should be expanded to include the competitive effects of CSAs offered by competitors and not limited only to those CSAs being offered by BellSouth.

2. The Consumer Advocate's assertion that Docket No. 97-01105 should be consolidated with this proceeding.

3. The assertion of e.spire, NEXTLINK and SECCA that property management contracts offered by BellSouth should be treated as CSAs and considered in this proceeding.

A discussion of these issues, together with the Pre-Hearing Officer's recommendations, is set forth in a separate section below.

#### **Proprietary Agreement**

During the Pre-Hearing Conference, the parties asserted that they would need to examine BellSouth CSAs in order to be able to make a determination of whether the termination provisions or other provisions of BellSouth CSAs in general, are anticompetitive.

The Consumer Advocate suggested the possibility of a confidentiality agreement with respect to the information he found in Docket No. 97-01105, to the extent that BellSouth would authorize the Consumer Advocate to share that information with the other parties. The Consumer Advocate offered this proposal as a way to help the intervening parties narrow their questions and to keep BellSouth from being unduly burdened. BellSouth declined to so release the Consumer Advocate from its proprietary agreement in that docket.

The Conference was recessed for a period of time to permit the parties to discuss the possibility of entering into a proprietary agreement to permit the inspection and review of BellSouth CSAs. The parties reached an agreement in this regard.

The intervening parties agreed to limit the disclosure of the CSAs to the attorneys, staff and third-party expert witnesses. The Protective Order itself would provide that the CSA contracts would be made available for inspection by the attorneys. To the extent that an attorney requested copies of CSAs, they would be given copies in full with nothing redacted but those copies would be shared only with other attorneys, legal staff such as paralegals, and third-party witnesses. The copies would not be shared with other employees or other in-house people outside of the legal department at this juncture.

BellSouth agreed that the stipulation would not apply to the Consumer Advocate because he was not in the same situation. The Consumer Advocate would be subject to the protective order and be obligated to treat the CSAs as proprietary documents, however, since no one working for him was a competitor of BellSouth, the concern was not the same.

To the extent one of the parties intends to use the CSA contract in the case or wants to share the CSA contract with a person outside of the legal department or an outside nonthird-party witness, BellSouth would attempt to resolve its concerns and address the concerns of the other parties. However, if the parties are unable to resolve their disputes, the parties would be able to bring their disputes to the Pre-Hearing Officer's attention. The CSAs themselves will be secured by the attorneys and kept in their office. BellSouth agreed to draft a Protective Order containing the specific language of this agreement and then circulate it among the parties for review and signature. The Protective Order would then be submitted to the Pre-Hearing Officer for entry.

A Protective Order was entered on September 16, 1998, the parties have agreed to treat Contract Service Arrangement ("CSA") contracts between a customer and a telecommunications carrier as confidential information subject to the terms of the Order.

### **Discovery**

The intervening parties expressed their need to review the BellSouth CSAs before propounding discovery requests. The parties agreed that BellSouth would make the CSAs available for inspection, pursuant to the Protective Order, prior to the discovery requests. The parties agreed to the following limitation on discovery requests:

1. For the first round of discovery - 30 requests including subparts.
2. For the second round of discovery - 15 requests, including subparts.

In light of the number of parties and the anticipated number of discovery requests, BellSouth requested at least 30 days to respond to the first round of discovery. BellSouth's request was not opposed by the intervening parties. BellSouth agreed to file objections to discovery requests within two (2) weeks of the requests.

The Consumer Advocate suggested that potential deposition time be built into the discovery schedule. The Pre-Hearing Officer declined to rule on the necessity of depositions, at this time, indicating that such might require a showing of need.

The Pre-Hearing Officer proceeded to build in a second round of discovery requests for one week after the first round responses are due. The second round would be limited to fifteen interrogatories, including subparts. In the event that BellSouth had objections to those requests, BellSouth could file its objections within a week. The responses to the second round of discovery would be due in three weeks.

### **Proposed Schedule for Discovery**

September 16, 1998	Discovery Requests Due
October 1, 1998	Objections to Discovery Requests Due
October 14, 1998	Responses to Discovery Requests Due
October 21, 1998	Second Round of Discovery Requests Due ( if necessary)
October 28, 1998	Objections to Second Round of Discovery Request Due
November 13, 1998	Responses to Second Round of Discovery Requests Due

Responses and objections to discovery will be served on all parties and filed with the Authority. In the event that parties serve discovery on each other, these dates would apply to responses and any objections that the parties file in response to that discovery.

### **ISSUES RAISED AS TO THE SCOPE OF THIS PROCEEDING**

At the Pre-Hearing Conference, the Pre-Hearing Office did not view it within his authority to expand the scope of this proceeding. The Authority August 12, 1998 Order sets forth that scope as follows:

With the entry of this Order, a docket is hereby opened for the purpose of addressing the competitive effects of Contract Service Arrangements filed by BellSouth Telecommunications, Inc. In Tennessee.

The following presents a discussion of the three issues concerning the scope of this proceeding raised at the Pre-Hearing Conference.

#### **1. BellSouth Telecommunications Inc.'s Motion to Expand Scope of Proceeding**

On September 18, 1998, BellSouth filed its "Motion to Expand Scope of Proceeding." By this Motion, BellSouth seeks to expand the scope of this proceeding to include



consideration of contract service arrangements entered into by BellSouth's competitors. In support of its Motion, BellSouth asserts that the issues the Authority will consider in this proceeding are applicable to the "use of special contracts by every regulated carrier in the State;" and that, out of a sense of fair play and administrative efficiency, the Authority should "consider the competitive effects of special contracts in general." (BellSouth's Motion, p. 1.) BellSouth contends that the Authority and its predecessor, the TPSC, have permitted the use of "special contracts" and that both agencies have in place rules dealing not only with special contracts offered by ILECs, but also have similar rules pertaining to special contracts offered by CLECs and IXC's. In addition, BellSouth is of the opinion that competing carriers have entered into special contracts with their customers, and that such contracts and tariffed extended service arrangements require customers to pay a specified fee in the event of customer termination.

In its first set of discovery requests, BellSouth attempted to discover information concerning other CSAs by specifically requesting information pertaining to the CSAs offered by other carriers. BellSouth's discovery requests were served on AT&T, MCI Metro, e.spire, Time Warner, NewSouth, NEXTLINK, Sprint, the Consumer Advocate and SECCA. In Data Request No. 6, BellSouth specifically asks whether the competing carrier has entered into any CSAs since January 1, 1994. In Data Request No. 8, BellSouth asks whether any CSA entered into by the carrier has provisions pertaining to the assessment of termination charges. All parties, with the exception of Sprint, objected to these questions as being irrelevant because they were outside of the scope of this proceeding.<sup>2</sup> Sprint answered both

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<sup>2</sup> SECCA did not file a response to BellSouth's First set of Data Requests.

questions in the negative stating that, at this time, it has not entered into any CSAs with its customers in Tennessee.

In addition to objecting to the nature of the data requests by BellSouth, NEXTLINK, SECCA and e.spire filed a joint response to BellSouth's motion on September 29, 1998. Time Warner and NewSouth filed a joint response to the BellSouth motion on October 15, 1998. These parties assert that the scope of the docket is to address the effects of BellSouth CSAs and not the effects of CSAs filed by BellSouth's competitors. The positions taken by these intervening parties are consistent with the Authority's articulation of the scope of this proceeding as set forth in the Authority's August 12, 1998, Order. NEXTLINK, SECCA and e.spire further assert that since BellSouth is the predominate carrier in the local telecommunications market, it is the only entity capable of engaging in anticompetitive conduct. Time Warner and NewSouth state that "BellSouth's strategic use of CSAs has increased dramatically" since the enactment of legislation permitting competition. Further, Time Warner and NewSouth contend that such usage is designed to place "new market entrants at a competitive disadvantage."

As asserted by NEXTLINK, SECCA and e.spire, BellSouth's request to include all competing carriers in this proceeding could have the effect of converting this proceeding into a generic rulemaking docket. 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). At the present time, the Authority has determined that the scope of this proceeding is to address the "competitive

**effects of Contract Service Arrangements filed by BellSouth Telecommunications, Inc.”**

Therefore, this proceeding and the decisions rendered herein are not meant to be used as a template to curtail or regulate behavior of a large segment of those entities regulated by the Authority, rather, the specific purpose is to examine possible anticompetitive effects that may be created or maintained through BellSouth’s use of CSAs.

**2. Consumer Advocate’s Request to Consolidate Docket No. 97-01105**

The Consumer Advocate filed as part of his issues list and initiated at the September 2, 1998, Pre-Hearing Conference a discussion concerning the consolidation of TRA Docket No. 97-01105 with this proceeding. Docket No. 97-01105 was initiated upon a request of the Consumer Advocate to obtain information concerning twenty-three (23) specific BellSouth CSAs. On July 22, 1998, the Consumer Advocate filed comments concerning the CSAs his office had reviewed within the context of that docket.<sup>3</sup> The Consumer Advocate’s comments set forth his position that the BellSouth CSAs in question violate Tenn. Code Ann. §§ 65-4-115 and 65-4-122, because they are unjust, unreasonable and/or unduly discriminatory or preferential. At the Pre-Hearing Conference, counsel for BellSouth responded to the consolidation issue stating that this proceeding is in the nature of a “general investigation” of CSAs and should not be expanded to include the Consumer Advocate’s allegations as to specific CSAs. Further, the Consumer Advocate could move forward with Docket No. 97-01105 and seek the initiation of a contested case proceeding therein, if he so desired.

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<sup>3</sup> The following tariff numbers represent the CSAs that were the subject of the Consumer Advocate’s inquiry in Docket No. 97-01105: 97-134, 97-135, 97-136, 97-137, 97-138, 97-144, 97-145, 97-146, 97-148, 97-149, 97-152, 97-153, 97-154, 97-163, 97-164, 97-167, 97-169, 97-170, 97-171, 97-172, 97-173, 97-174, and 97-186.

### **3. Request of NEXTLINK, SECCA and e.spire to Include Property Management Contracts in the Scope of this Proceeding**

Counsel for NEXTLINK, SECCA and e.spire requested that the Pre-Hearing Officer consider including within the scope of this proceeding property management contracts that BellSouth has entered into with various building owners and property managers. Counsel's comments centered on the notion that these property management contracts should be considered CSAs, and therefore included in this matter. Counsel for BellSouth responded that such contracts are not contracts with end-users and therefore should not be considered herein. Further, BellSouth argued that it has never entered into these property management contracts in Tennessee, nor did BellSouth intend to do so. As such, these types of arrangements are irrelevant to the scope of this proceeding as outlined by the Authority's Order of August 12, 1998.

#### **RECOMMENDATIONS:**

1. After considering the comments of the parties at the Pre-Hearing Conference and after a review of BellSouth's Motion and the responses thereto, BellSouth's data requests and the objections of the parties, the Authority's Order of August 12, 1998, and Tennessee Cable TV v. Public Serv. Com'n, 844 S.W.2d 151 (Tenn. App. 1992), the Pre-Hearing Officer **recommends** that the Authority deny BellSouth's Motion to Expand. In recommending denial of the Motion, the possibility of opening a rulemaking docket to address the effects of CSAs in general is not being foreclosed. This option is always available to the Directors if a determination is made that CSAs filed by other carriers may have adverse competitive effects

in the emerging competitive environment. This recommendation is consistent with the original intent of the Directors in opening this docket.

2. After considering the comments of all counsel at the Pre-Hearing Conference, the pleadings in Docket No. 97-01105 as well as the Authority's Order of August 12, 1998, the Pre-Hearing Officer **recommends** that the Authority deny the Consumer Advocate's request to consolidate Docket No. 97-01105 with this proceeding. Denying the Consumer Advocate's request to consolidate does not foreclose any action the Authority may wish to take with respect to the disposition of Docket No. 97-01105.

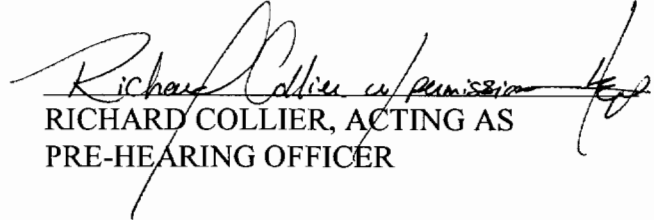
3. After considering the comments of all counsel at the Pre-Hearing Conference and the Authority's Order of August 12, 1998, the Pre-Hearing Officer **recommends** that the Authority deny the request of NEXTLINK, SECCA and e.spire to include property management contracts as within the scope of this proceeding. This recommended action is consistent with the Authority's intent to address "the competitive effects of [CSAs] filed by BellSouth in Tennessee."

4. After reviewing the discovery responses of the parties, the Pre-Hearing Officer **recommends** that the scope of this proceeding remain as articulated in the Authority's August 12, 1998, Order.

5. The Pre-Hearing Officer **recommends** that the Authority instruct the parties to submit comments pertaining to any additional issues that may have arisen through discovery in this matter.

6. The Pre-Hearing Officer **recommends** 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.

  
RICHARD COLLIER, ACTING AS  
PRE-HEARING OFFICER

ATTEST:

  
EXECUTIVE SECRETARY

DATE: 1/15/99

**LIST OF ISSUES**  
**DOCKET NO. 98-00559**

**IN RE: PROCEEDING FOR THE PURPOSE OF ADDRESSING COMPETITIVE EFFECTS  
OF CONTRACT SERVICE ARRANGEMENTS FILED BY BELL SOUTH  
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?