BEFORE THE TENNESSEE REGULATORY AUTHORITY

NASHVILLE, TENNESSEE

AUGUST 9, 1999

IN RE:	)	
	)	
BELLSOUTH TELECOMMUNICATIONS, INC.	)	**DOCKET NO.**
TARIFF FILING TO OFFER CONTRACT	)	**98-00898**
SERVICE ARRANGEMENT (TN 98-4146-00)	)	
	)	

ORDER GRANTING APPROVAL OF BELLSOUTH CONTRACT SERVICE ARRANGEMENT (TN 98-4146-00)

This matter came before the Tennessee Regulatory Authority ("Authority") on the tariff filing of BellSouth Telecommunications, Inc. ("BellSouth") for approval to offer Contract Service Arrangement No. TN 98-4146-00 ("CSA"). BellSouth filed Tariff No. 98-00898 on December 22, 1998, with a proposed effective date of January 22, 1999. The Directors of the Authority considered this matter at a regularly scheduled Authority Conference held on January 19, 1999. Based upon careful consideration of the tariff filing and the attachments thereto, the Authority finds and concludes the following:

1. The purpose of this CSA is to provide Aggregated WatsSaver Service to the customer identified in the filing. Aggregated WatsSaver Service provides business customers with a guaranteed per minute toll rate that is based upon the customer's commitment to a certain volume of toll usage.

2. The term of this CSA is thirty-six (36) months and it is designed to provide Aggregated WatsSaver Service at an overall rate comparable to competitive alternatives.

Through this CSA, BellSouth is offering the customer a total discount of 35% off the general tariff rate during the term of the contract.

3. In an attachment to the contract, this CSA contains a termination clause that provides that termination liability is calculated on the same basis as Section A20.3.8.E.3 of the General Subscriber Services Tariff ("GSST"). The termination liability provisions in both the attachment and the GSST specify the charge to be assessed to any customer who terminates the agreement prior to the end of the term.

4. After reviewing the termination clause contained in this CSA, the Authority determines that this clause is sufficiently clear so that in the event of termination of the CSA, any charges to be assessed are unambiguous.[1] Upon concluding that the parties to the CSA are knowledgeable in what they are doing in the contracting process and that the customer understands the consequences of the termination liability provisions from the

[1] When reviewing certain termination clauses in other CSAs which are not contingent upon termination liability provisions contained in the GSST, both Chairman Malone and Director Greer have found the language of such clauses to be vague and imprecise, and further, that such clauses raise reasonable questions relative to the liability that could be incurred by the customer if a CSA is prematurely terminated at the customer's request.

In approving a similar CSA, Director Greer stated: "I'm somewhat concerned that we're not dealing with companies who by and large are being taken advantage of by some huge multinational corporation that's enforcing some kind of contract on them. We're dealing with multistate companies who are very knowledgeable in what they're doing.

These are contracts basically between big boys, so to speak. They're not contracts between BellSouth and a small company that doesn't know what they're doing. That's one of my frustrations with the docket. I've expressed my frustrations, I think, also with you as to what I think are harsh termination clauses in some of these contracts. In this one, I do not see the same problem." Transcript of January 12, 1999 Authority Conference, p. 11.

At that time, Director Kyle responded: "Not only, as you stated, are these contracts between intelligent people who are certainly aware of their actions, but it puts me in a position that always sticks out in the front of my mind; I'm in a competitive environment. I don't like to step back and nitpick and be in a position to regulate over and over when I'm supposed to be going in the opposite direction.

But I would agree with – based on those comments, I would agree with Director Greer on approving this one." (*id.*, p. 12).

tariff, a majority[2] of the Authority determines that in this docket the CSA should be granted.

IT IS THEREFORE ORDERED THAT:

BellSouth Telecommunications, Inc. Tariff No. 98-00898, which seeks approval of Contract Service Arrangement No. TN 98-4146-00, is hereby granted.

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Melvin J. Malone, Chairman

H. Lynn Greer, Jr., Director

Sara Kyle, Director

ATTEST:

K. David Waddell, Executive Secretary

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[2] So as to be consistent with his votes on November 17, 1998 and January 12, 1999 relative to similar CSAs, Chairman Malone voted no and referred to his comments of January 12, 1999 in Docket No. 98-00612.

* * * Chairman Malone voted against approval.

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IN RE:	)	
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BELLSOUTH TELECOMMUNICATIONS, INC.	)	**DOCKET NO.**
TARIFF FILING TO OFFER CONTRACT	)	**98-00898**
SERVICE ARRANGEMENT (TN 98-1665-00)	)	

DISSENTING OPINION OF CHAIRMAN MALONE

Consistent with my comments and votes on other similar contract service arrangements ("CSAs"), I respectfully dissent. As my position with respect to CSAs similar to the one at issue here is well-documented in the records of the Tennessee Regulatory Authority ("TRA" or "Authority"), I will not elaborate too greatly on the subject here.

The Authority has acknowledged on countless occasions that it is the policy of the State of Tennessee "to foster the development of an efficient, technologically advanced, statewide system of telecommunications services by *permitting competition in all telecommunications services markets*, and by permitting alternative forms of regulation for telecommunications services and telecommunications services providers." Tenn. Code Ann. § 65-4-123 (emphasis added). To this end, "the regulation of telecommunications services and telecommunications services providers shall protect the interests of consumers without unreasonable prejudice or disadvantage to any telecommunications services provider[.]" *Id.* Further, we have often cited Section 253(a)

of the federal Telecommunications Act of 1996 which provides: "In general. - No State or local statute or regulation, or other State or local legal requirement, may prohibit, or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service." Finally, while TRA Rule 1220-4-1-.07 permits utilities to enter into special contracts, it remains the responsibility of the Authority to ensure that said rule is not used in ways clearly not contemplated thereunder and/or contrary to other relevant laws.

I am by no means asserting that BellSouth should be forbidden to enter into special contracts in the emerging competitive environment. What I am asserting is that we cannot here play the ostrich in the midst of BellSouth's filing of hundreds of special contracts, and we cannot ignore the potential for discriminatory and/or anticompetitive effects, whether intended or unintended. This concern is the very reason the Authority unanimously voted to open the BellSouth CSA case, TRA Docket No. 98-00559. The Authority's concern is particularly heightened insofar as BellSouth, the incumbent historical monopoly provider in Tennessee, continues to serve approximately 78% of the total access lines in the State.

The sole question presented here is not whether this special contract constitutes an arms-length agreement between two (2) sophisticated and knowledgeable parties. By far, the more meaningful and difficult inquiry, and the one with which this agency should be extremely concerned, is whether the filing and approval of this potentially discriminatory and/or anticompetitive CSA is in the public interest in the current environment. Notwithstanding the actions of the majority, which appear to have answered the aforementioned question in the affirmative, it is my opinion that approving this CSA as

submitted, without further scrutiny, is at this juncture not in the public interest. This is particularly evident since the majority's actions, taken without ever attempting to make a well-grounded determination that the potential for unreasonable and substantial, detrimental, discriminatory and/or anticompetitive effects is nonexistent or, at a minimum, too unlikely to cause alarm, cannot under any standard be construed to be in the public interest. Unfortunately, no such determination was made here.

The termination provision contained in the special contract that is the subject matter of this docket requires the customer to pay a cancellation/termination charge that amounts to a 100% buyout.[1] Suffice it to say that the possibility of any competing provider having even the "opportunity" to win this customer is lost for what to the competing provider might be a significant period of time.[2] If the development of competition in the local market is permitted to rest, in no insignificant measure, on the choice that "locked-in" customers will make between selecting an alternative local carrier or the payment of a 90% or 100% buyout to BellSouth, then the vision of both the Tennessee General Assembly and the United States Congress for competition in the local market may be in serious jeopardy.

While I applaud my colleagues for recognizing, as do I, the benefit flowing to the customer under this special contract, it is nonetheless incumbent upon this agency to protect the public interest, both in the long and short terms. The majority may contend

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[1] The CSA at issue here contains a termination provision that requires the customer to pay a termination charge defined as follows: "Unless otherwise specified by tariff, termination charges are defined as all reasonable charges due or remaining as a result of the minimum service period agreed to by the Company and the Subscriber[.]" An attachment to the CSA concerning termination liability states that "The amount to be assessed will be equal to the minimum monthly settlement amount [at the discounted rates] . . . times the number of months remaining in the contract term."

[2]Although ignored by the majority, there remains the important consideration of whether the cancellation/termination charge constitutes a penalty under state law.

that it has protected the public interest in the "short term" by approving a single contract that grants discounted rates to a particular customer. This short-sighted approach, however, albeit well-intentioned, is not enough. If, for instance, CSAs, such as this one, have the unfortunate effect of creating an unintended barrier to entry by tying up the more desirable customers in long term CSAs so that new entrants are unable to extend offers or bid for these same customers, competition, as envisioned by both the Tennessee General Assembly and the United States Congress, may not flourish. The opportunity for Tennesseans to have a choice in the local telephony market may be lost – sacrificed so that a few customers could benefit from discounted rates in the short term. If choices for the provision of local telecommunications services are not later available and providers who would otherwise compete with BellSouth are neutralized by actions such as the majority has taken here, then all Tennesseans, including those few customers who benefited in the "short term" from discounted rates, will be again subjected to a monopolistic environment. Such occurrence would be the most difficult of all tasks to explain to the Tennessee General Assembly who entrusted the development of a pro-competitive environment with this agency. The thought of explaining the error committed here is, to say the least, not comforting.

Further, state law requires telecommunications providers to treat similarly situated customers alike. In sum, if a customer seeks to obtain a service from BellSouth from the general tariff offering, there is no certainty, given the sheer number of CSAs in effect and the large number of services provided thereunder, that there does not exist some CSA customer receiving a discount for that same service. In approving this CSA, the majority merely assumed that this legal requirement had been met.

In the preamble to the Tennessee Telecommunications Act of 1995, the General Assembly proclaimed that "It is in the public interest of Tennessee consumers to permit competition in the telecommunications services market[.]" *Public Chapter No. 408.* Hence, any potential barrier to entry in the telecommunications services market, great or small, must be carefully scrutinized by the Authority. Having acknowledged that the local telecommunications market in Tennessee is "in an embryonic stage" and that the Tennessee General Assembly is "acutely concerned" about promoting competition within Tennessee,[3] the Tennessee Regulatory Authority should not be deterred from carefully scrutinizing this CSA notwithstanding BellSouth's plea that it is standard and beneficial. More is required.

For the foregoing reasons, I am of the opinion that the law and the rules of the Tennessee Regulatory Authority mandate that we carefully scrutinize this particular CSA before approval. Having found that the majority's review failed to evaluate this CSA consistent with state law and the intention of the General Assembly, I am compelled to dissent.

Respectfully submitted,

CHAIRMAN MELVIN J. MALONE

ATTEST:

Executive Secretary

[3] *In Re: Application of BellSouth BSE, Inc. for a Certificate of Convenience and Necessity to Provide Intrastate Telecommunications, TRA Docket No. 97-07505, December 8, 1998, pp. 14-15.*