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October 13, 2000

David Waddell
Executive Secretary
Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, TN 37243-0505

In Re: Complaint of Discount Communications against BellSouth Telecommunications
Docket No. 00-00230

Dear David:

Please find enclosed the original and thirteen copies of Discount Communications, Inc.'s Petition to Reconsideration in the above-captioned proceeding. Copies have been forwarded to parties.

Sincerely,

BOULT, CUMMINGS, CONNERS & BERRY, PLC

By: Henry Walker

HW/nl
Attachment

BEFORE THE TENNESSEE REGULATORY AUTHORITY
Nashville, Tennessee

IN RE: COMPLAINT OF DISCOUNT COMMUNICATIONS, INC. AGAINST BELLSOUTH TELECOMMUNICATIONS, INC.	))))	Docket No. 00-00230

PETITION TO RECONSIDER

Discount Communications, Inc. ("Discount") respectfully requests that the Tennessee Regulatory Authority (the "Authority") reconsider that portion of its final Order, released September 28, 2000, which, contrary to federal law and the language in the parties' resale agreement, permits BellSouth Telecommunications, Inc. ("BellSouth") to charge Discount a higher, wholesale price for "Lifeline" telephone service than BellSouth charges its own retail customers for the same service.

Argument

I. The Authority's decision conflicts with the language of the parties' resale agreement and mistakenly quotes instead from BellSouth's tariffs.

Although no where addressed in the Authority's Order, the resale agreement (the "Agreement") between BellSouth and Discount, signed on March 12 and 13, 1998, explicitly provides in Section IV B (emphasis added):

> Resold services are subject to the same terms and conditions as are specified in for such services when furnished to individual end users of the Company in the appropriate section of the Company's tariffs.

Just four months earlier, on November 14, 1997, BellSouth had amended its tariffs for Lifeline service in Tennessee in order to comply with the FCC's instructions as set forth in the "Universal Service" Order, issued on May 8, 1997. See Exhibit 1.

In what BellSouth described as a "revenue neutral" filing (tr. I, 124), the Company repealed the old method for providing Lifeline service and substituted a new one, which is still in effect today. *Id.*, 133-136. Under the old method, BellSouth offered Lifeline-eligible customers "Message Rate Service" at the normal tariffed rate but included thirty-five additional, local calls at no extra charge. *Id.*, at 129-130. The estimated value of those additional calls was \$3.50. *Id.*, at 135.

Pursuant to the FCC's instructions, BellSouth introduced a new Lifeline plan in November, 1997. Instead of offering Lifeline customers discounted, Message Rate Service, BellSouth offered them flat-rated residential service along with a "federal credit" of \$7.00 and a "state credit" of \$3.50. As revised, the tariff read (Section A3.31.1):

> A. The Lifeline program is designed to increase the availability of telecommunications services to low income subscribers by providing a credit to monthly recurring local service to qualifying residential subscribers. Basic terms and conditions are in compliance with the FCC's Order on Universal Service in FCC 97-157....
>
> C. Federal baseline support of \$5.25 is available for each Lifeline service and is passed through to the subscriber. An additional \$3.50 credit is provided by the Company. Supplemental federal support of \$1.75, matching one half of the Company contribution, will also be passed along to the

> Lifeline subscriber. The total Lifeline credit available to an eligible customer in Tennessee is $10.50. The amount of credit will not exceed the charge for local service. . . .

That was BellSouth's Lifeline tariff as it existed in March, 1998, when BellSouth and Discount signed the resale agreement at issue in this case. Under the plain language of Section IV B of the Agreement, BellSouth was required to offer Lifeline service to Discount "subject to the same terms and conditions" as specified "in the appropriate section of the Company's tariffs" for offering that service "to an individual end user of the Company."

Nothing could be more clear. "At the time the [Agreement] was entered into,"[1] BellSouth's tariff provided that Lifeline service would be made available to "eligible customers" along with federal and state credits totaling $10.50. Based on the language of the Agreement, BellSouth is required to offer Lifeline service to Discount "subject to [those] same terms and conditions."

In its final Order, the Authority did not address this argument or the language in Section IV B of the Agreement. The Authority purports to quote from the Agreement (Order, at 12) and, based on that quotation, concludes that BellSouth is not required to pass on to Discount the $3.50 "state credit" that BellSouth gives to its own end users. According to the Authority (at 12), "The resale agreement required Discount [as opposed to BellSouth] to provide the state Lifeline credit . . ." *Id.*

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[1] As quoted from *Petition of Brooks Fiber*, TRA docket 98-00118, Initial Order, at p. 11. Affirmed August 17, 1998. In that case, as in this one, the Authority interpreted and enforced the parties interconnection agreement in light of the law and regulatory rulings in effect at the time the agreement was signed.

The Authority simply misread the evidentiary record. The quoted language on which the Authority relied is <u>not</u> in the resale Agreement. It is, in fact, language taken from tariff amendments filed by BellSouth in October, 1999, eighteen months after the Agreement was signed. Although the Order states in a footnote (41) that the quoted language is from the "Resale Agreement, Section 1 C. Description of Service," the language relied on by the Authority is from "Section 1C. Description of Service" in BellSouth's tariff, not the Agreement.

The key question in this case is how to interpret and apply the parties' resale agreement. BellSouth cannot unilaterally change the rates and terms set forth in the Agreement by a subsequent tariff filing. The question before the Authority thus hinges on the language of the Agreement itself interpreted in light of the understanding of the parties and the legal and regulatory decisions in effect at that time. If the Authority examines the language of the Agreement, instead of BellSouth's subsequent tariff amendments, the Authority must conclude that BellSouth cannot sell Lifeline service to Discount under different terms and conditions than BellSouth sells Lifeline service to its own end users.[2]

Discount concedes that both the resale agreement and BellSouth's tariffs in effect at the time the Agreement was signed also contain additional and, in some cases, conflicting language referring to Lifeline rates and services. By March, 1998, however, as BellSouth itself has admitted, that additional language had already been rendered obsolete and inapplicable by the

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[2] By refusing to pass through the $3.50 state credit to Discount, BellSouth is able to charge Discount $7.55 a month for Lifeline while charging BellSouth's retail customers only $6.15 for the same service. See Exhibit 10.

FCC's "Universal Service" order and by superceding language in BellSouth's 1997 tariff amendments.

That outdated language is contained in an attachment to the Agreement designated as "Exhibit B." The exhibit contains a footnote, number 4, which describes how Discount is supposed to provide Lifeline service in Tennessee. Evidently written when Lifeline was still offered as a discounted, Message Rate Service *(i.e*, prior to BellSouth's 1997 tariff amendments), the footnote states:

> 4. Lifeline/LinkUp services may be offered only to those subscribers who meet the criteria that BellSouth currently applies to subscribers of these services. In Tennessee, Discount Communications must further discount the wholesale Message Rate Service to Lifeline customers with a discount which is no less than the minimum discount that BellSouth now provides. Discount Communications is responsible for recovering the Subscriber Line Charge from the National Exchange Carriers Association interstate toll settlement pool just as BellSouth does today. The maximum rates that Discount Communications may charge for Lifeline Service shall be capped at the flat retail rate offered by BellSouth.

Except for the first and last sentences, every requirement for the offering of Lifeline service described in that footnote had — by the time the Agreement was signed — already been superceded by federal law and BellSouth's 1997 tariff amendments which eliminated "Message Rate Service" from the Lifeline tariff and substituted the $3.50 state credit.

BellSouth itself later acknowledged that footnote 4 had been supplemented by legal and regulatory changes. On October 5, 1999, BellSouth proposed to Discount that the entire footnote be struck from the parties' Agreement and the following language substituted:

> Lifeline/LinkUp services may be offered only to those subscribers who meet the criteria that BellSouth currently applies to subscribers

> of these services as set forth in sections A3 and A4 of the BellSouth General Subscriber Services Tariff.

A copy of this offer from BellSouth was attached to BellSouth's "Reply Brief" filed April 7, 2000, in this docket. For convenience, a copy is also attached to this brief.

Discount did not respond to BellSouth's proposal which would have corrected the Agreement to conform to federal law, BellSouth's 1997 tariff amendments, and the parties' own practices. Discount has never purchased BellSouth's Message Rate Service for resale to Lifeline customers and BellSouth has never required Discount to comply with that provision of the Agreement. Both parties presumably understood that footnote 4 was already obsolete by the time the Agreement was signed. In fact, it would have been impossible for Discount to comply with footnote 4 since, by March, 1998, BellSouth was no longer offering discounted Message Rate Service under its Lifeline tariff.

Similarly, BellSouth's tariffs also formerly contained language that was, by March, 1998, inconsistent with federal law and other, more recently amended sections of the Lifeline tariff. In March, 1998, Section A3.31.2A8 of BellSouth's tariff, evidently written when Message Rate Service was still being offered to Lifeline customers, provided:[3]

> Resale of Lifeline is subject to the conditions set forth in the Second and Final Order of Arbitration Awards dated January 23, 1997 (Docket Nos. 96-01152 and 96-01271).

Just like footnote 4 in the Agreement, however, the provisions regarding Lifeline service as "set forth in the Second and Final Order of Arbitration" referred to the resale of Message Rate

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[3] A copy of that tariff page is attached.

Service and were inapplicable to — and inconsistent with — the provision of Lifeline service in Tennessee after November, 1997.[4] In acknowledgment of that, BellSouth itself deleted this tariff provision in October, 1999. See TRA docket 99-00774, amendments to BellSouth's Lifeline tariff.

In other words, neither BellSouth nor Discount complied with the language in the tariff which referred to the AT&T and MCI arbitration awards. Both parties have consistently treated that language as having been superceded by federal law and BellSouth's more recently filed Lifeline amendments.

Discount therefore submits that neither the language in footnote 4 of the Agreement nor the outdated reference in BellSouth's tariff to the 1996 arbitration awards should be given any weight in interpreting the Agreement as it was understood by the parties in March, 1998. By that time, Lifeline service was offered by BellSouth as a flat-rated service with a $10.50 credit paid to eligible end users. Under the plain language of the Agreement, Discount was and is entitled to purchase Lifeline service from BellSouth under those same "terms and conditions." Discount therefore asks the Authority to reconsider its decision in light of this argument which was not addressed in the final Order.

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[4] The applicable language from the Arbitration awards is quoted in footnote 29 of the TRA's final Order in this case. The language states, " AT&T or MCI shall purchase BellSouth's Message Rate Service at the stated tariff rate, less the wholesale discount. AT&T and MCI must further discount the wholesale Message Rate Service to Lifeline customers with a discount which is no less than the minimum discount that BellSouth now provides."

II. <u>The Authority's finding that there is insufficient evidence to conclude that the cost of Lifeline service is built into BellSouth's current rates is unsupported by the record.</u>

Discount also respectfully requests that the Authority reconsider its finding that "Discount failed to provide sufficient evidentiary data in support of its contention that BellSouth effectively collects the state subsidy portion of Lifeline twice — once from Discount because the state Lifeline credit is not flowed through, and once again through an implicit subsidy built into BellSouth's current rates." Order, at 13.

That finding is crucial to the Authority's implicit conclusion that its "interim policy" of requiring resellers like Discount "to fund the state subsidy portion of Lifeline from internal sources" is "competitively neutral," "equitable," and "nondiscriminatory" as the FCC and the federal Telecom Act require. See Order, footnote 40.

Discount respectfully submits that the uncontradicted evidence in the record demonstrates that the state subsidy portion of Lifeline service is collected from all of BellSouth's wholesale and retail customers through the ratemaking process and that there is an "implicit subsidy" in BellSouth's current rate structure which compensates the carrier for the cost of providing Lifeline service to every eligible customer in BellSouth's territory. When one of those customers switches from BellSouth to Discount, BellSouth must pass on the $3.50 state subsidy just as it passes on the federal credit. By allowing BellSouth to keep the state credit, the Authority's "interim policy" is discriminatory and anti-competitive, contrary to federal law.

Discount submitted testimony from Mr. Archie Hickerson who discussed this issue not only as an expert but as someone with direct, personal knowledge of Tennessee's Lifeline program and the Authority's ratemaking decisions over the last decade. Tr. I, 127-174.

Mr. Hickerson explained that the cost of funding Lifeline, including the $3.50 state credit, was recovered from BellSouth's ratepayers in 1991, when the program was first established. Tr. I, 130-131. That expense was built into BellSouth's annual revenue requirement in the Company's subsequent rate case in 1993. *Id.,* 131. That expense remained in the rate structure in effect in June, 1995, when BellSouth petitioned to be regulated under a "price cap" plan, (*Id.*, at 139) and were in effect in November, 1997, when BellSouth made a "revenue neutral" tariff filing to change the Lifeline program from thirty-five extra calls to a $3.50 credit (*id.*, at 135-136). That implicit subsidy is still in effect today. *Id.*, at 139, 169-171. The point was so obvious to Mr. Hickerson that he told BellSouth's attorney, "I thought we all agreed that Bell is currently collecting that subsidy through its rates." *Id.*, 173.

There is no evidence in the record to contradict Mr. Hickerson's testimony on this issue. In fact, BellSouth witness Ms. O'Bannon not only admitted that she had no basis upon which to dispute Mr. Hickerson (tr. III, at 575) but candidly admitted that she had never been involved in a rate case, had no training in rate-base regulation (*id.*, at 543-544), and did not know what Tennessee's "deferred revenue account" was (*id.*, at 551-552) or anything about BellSouth's last rate case in Tennessee. *Id.*, at 552-553. She did, however, agree with Discount that BellSouth currently generates its share of the Lifeline credit "through the state regulation process" (*id.*, at 620) and agreed that if the Tennessee Commission had, in fact, incorporated the expense of funding Lifeline into BellSouth's rate structure, that subsidy would still be in BellSouth's rates. *Id.*,at 569-570. Ms. O'Bannon even conceded that, if there was a Lifeline subsidy still built into BellSouth's rates, it would be appropriate to pass that subsidy through to resellers. *Id.*, at 566-568, 572-573.

Under questioning from the bench, Ms. O'Bannon insisted that from what she could tell by reading the ratemaking orders of the Tennessee Public Service Commission, the Commission had not included the cost of Lifeline in BellSouth's rates, *Id.*, 566-573. But when asked if she disputed Mr. Hickerson's testimony that the cost of Lifeline was, in fact, built into BellSouth's rates in the 1993 rate case, she answered, "I don't know much about that" (*id.*, at 553), and agreed that she "had no basis upon which to disagree or agree with Mr. Hickerson's description of what happened" in that case. *Id.*, at 575.

In light of the testimony of Mr. Hickerson and Ms. O'Bannon, Discount respectfully submits that there can be no conclusion fairly drawn from the record but that the state's share of the Lifeline credit is built into the existing rate structure of BellSouth and every other incumbent, local exchange carriers whose rates have been set to cover the carrier's costs of providing service (*i.e.*, the carrier's "annual revenue requirement"; see tr. I, at 131.) Even after BellSouth adopted a "price cap" form of regulation, BellSouth told the Authority in November, 1997, that the $3.50 credit provided to BellSouth's Lifeline customers would have no revenue impact (*i.e.*, "revenue neutral") since the cost of the program was covered by BellSouth's existing rate structure. Tr. I, 133-134. See Exhibit 1.

As the Authority's Order recognized (at p. 12, footnote 40), federal law does not "prescribe the methods states must use to generate intrastate Lifeline support," but the FCC cautioned that any such method must be "competitively neutral" and must be "equitable" and "non-discriminatory" as required by Section 254 of the federal Telecommunications Act.

If, as the record conclusively shows, Tennessee's share of the Lifeline program is now — and always has been — generated through an implicit subsidy built into the rate structure of incumbent local exchange carriers, the Authority's decision in this case plainly discriminates against resellers and places them at a competitive disadvantage.

The Authority's decision to adopt its "interim policy" on the funding of Lifeline service necessarily rests on the agency's finding that there is not "sufficient evidentiary data" to conclude that the state Lifeline credit is recovered "through an implicit subsidy built into BellSouth's current rates." Order, at 13. Based on the testimony described above, Discount respectfully asks the Authority to reconsider that finding. If there is a subsidy built into BellSouth's rates, the agency's policy cannot be equitable.

Conclusion

This is a decision that could determine not only the future of Discount Communications but the viability of any reseller trying to reach Lifeline customers. If BellSouth, contrary to the terms of the Resale Agreement, is allowed to charge Discount more for Lifeline service than BellSouth charges its own end users, neither Discount nor any other reseller in that situation can survive. That must not be the Authority's Lifeline policy, "interim" or otherwise.

Respectfully submitted,

BOULT, CUMMINGS, CONNERS & BERRY, PLC

By: ______________________________

Henry Walker
414 Union Street, Suite 1600
P.O. Box 198062
Nashville, Tennessee 37219
(615) 252-2363

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been forwarded via U. S. First Class Mail, facsimile, and/or hand delivery, to the following on this the 13th day of October, 2000.

Patrick Turner, Esq.
BellSouth Telecommunications, Inc.
333 Commerce St. ,
Nashville, TN 37201-3300

Vance Broemel, Esq.
Consumer Advocate Division
Tennessee Attorney General's Office
425 5th Avenue North, Cordell Hull Bldg.
Nashville, TN 37243-0500

Henry Walker

ATTACHMENTS

@ BELLSOUTH

BellSouth Interconnection Services
675 West Peachtree Street, NE
Room 34S91
Atlanta, Georgia 30375

Page Miller
(404) 927-1377
Fax: (404) 529-7839

October 5, 1999

Via FedEx

Mr. Edward Hayes
Discount Communications, Inc.
6647 Steeple Chase
Memphis, TN 38141

Dear Mr. Hayes:

Enclosed for your review and signature are two original copies of an amendment to the Resale agreement between BellSouth and Discount Communications, Inc. The amendment revises the language in Note 4 of Exhibit B to reference the tariff to obtain the criteria for offering Lifeline and LinkUp services.

Please sign both copies of the amendment and return them to my attention. Jerry Hendrix will sign the agreement on behalf of BellSouth, and I will return a fully executed original to you for your files. Furthermore, I will make the necessary arrangements to have the amendment filed with the appropriate state regulatory agencies.

Please feel free to call me at 404-927-1377 if you have any questions relative to the amendment.

Sincerely,

Page Miller

Page Miller
Manager-Interconnection Services

cc: Mr. Jerry Hendrix

AMENDMENT
TO THE
AGREEMENT BETWEEN
DISCOUNT COMMUNICATIONS
AND
BELLSOUTH TELECOMMUNICATIONS, INC.
DATED MARCH 13, 1998

Pursuant to this Agreement. (the "Amendment"), BellSouth Telecommunications, Inc. ("BellSouth") and Discount Communications ("Discount Communications"), hereinafter referred to collectively as the "Parties," hereby agree to amend that certain Resale Agreement between the Parties dated March 13, 1998 ("Agreement").

WHEREAS, BellSouth and Discount Communications entered into a Resale Agreement for the state of Tennessee on March 13, 1998, and;

NOW THEREFORE, in consideration of the mutual provisions contained herein and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the Parties hereby covenant and agree as follows:

1. Note 4 of Exhibit B is hereby revised as follows:

Lifeline/LinkUp services may be offered only to those subscribers who meet the criteria that BellSouth currently applies to subscribers of these services as set forth in sections A3 and A4 of the BellSouth General Subscriber Services Tariff.

2. All of the other provisions of the Agreement, dated March 13, 1998, shall remain in full force and effect.

3. Either or both of the Parties is authorized to submit this Amendment to the respective state regulatory authorities for approval subject to Section 252(e) of the Federal Telecommunications Act of 1996.

IN WITNESS WHEREOF, the Parties hereto have caused this Amendment to be executed by their respective duly authorized representatives on the date indicated below.

Discount Communications

By: ______________________

Name: ______________________

Title: ______________________

Date: ______________________

BellSouth Telecommunications, Inc.

By: ______________________

Name: Jerry Hendrix

Title: Senior Director

Date: ______________________

A3. BASIC LOCAL EXCHANGE SERVICE

A3.31 Lifeline

A3.31.1 Description of Service

A. The Lifeline program is designed to increase the availability of telecommunications services to low income subscribers by providing a credit to monthly recurring local service to qualifying residential subscribers. Basic terms and conditions are in compliance with the FCC's Order on Universal Service in FCC 97-157, which adopts the Federal-State Joint Board's recommendation in CC Docket 96-45, which complies with the Telecommunications Act of 1996. Specific terms and conditions are as prescribed by the Tennessee Regulatory Authority and are as set forth in this tariff.

B. Lifeline is supported by the federal universal service support mechanism.

C. Federal baseline support of $5.25 is available for each Lifeline service and is passed through to the subscriber. An additional $3.50 credit is provided by the Company. Supplemental federal support of $1.75, matching one half of the Company contribution, will also be passed along to the Lifeline subscriber. The total Lifeline credit available to an eligible customer in Tennessee is $10.50. The amount of credit will not exceed the charge for local service.

A3.31.2 Regulations

A. General

1. Customers eligible under the Lifeline program are also eligible for connection assistance under the Link-Up program.
2. One low income credit is available per household and is applicable to the primary residential connection only. The named subscriber must be a current recipient of any of the low income assistance programs identified in I. following.
3. A Lifeline customer may subscribe to the current capped message rate Lifeline plan (USOC LM8) or any local service offering available to other residence customers. ***Since the Lifeline credit is applicable to the primary residential connection only, it may not be applied to a multiple line package local service offering.*** (C)
4. Toll blocking, if elected, will be provided at no charge to the Lifeline subscriber.
5. The deposit requirement is not applicable to a Lifeline customer who subscribes to toll blocking. If a Lifeline customer removes toll blocking prior to establishing an acceptable credit history, a deposit may be required. When applicable, advance payments will not exceed the connection and local service charges for one month.
6. The PICC will not be billed to Lifeline customers who subscribe to toll blocking and do not presubscribe to a long distance carrier.
7. A Lifeline subscriber's local service will not be disconnected for non-payment of regulated toll charges. Local service may be denied for non-payment of local calls in accordance with Section A2. Access to toll service may be denied for non-payment of regulated tolls. A Lifeline subscriber's request for reconnection of local service will not be denied if the service was previously denied for non-payment of toll charges.
8. Resale of Lifeline is subject to the conditions set forth in the Second And Final Order Of Arbitration Awards dated January 23, 1997 (Docket Nos. 96-01152 and 96-01271).

B. Eligibility

1. To be eligible for a Lifeline credit, a customer must be a current recipient of any one of the following low income assistance programs.
   a. Temporary Assistance to Needy Families (TANF), previously known as AFDC
   b. Supplemental Security Income (SSI)
   c. Food Stamps
   d. Medicaid, as provided under TennCare
2. Additionally, a customer with total gross annual income that does not exceed 125% of the federal poverty income guidelines may apply directly to the Tennessee Regulatory Authority (TRA) for Lifeline eligibility certification.
3. All applications for service are subject to verification with the TRA or state agency responsible for administration of the qualifying program.

Note 1: Lifeline replaces the Interstate Subscriber Line Charge Waiver and Matching Program.