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July 26, 2011

filed electronically in docket office on 07/26/11

VIA HAND DELIVERY

Hon. Eddie Roberson, Chairman
Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, TN 37238

Re: *Examination of Issues Surrounding BellSouth Telecommunications, Inc. dba AT&T Tennessee's Notice of June 28, 2011 Concerning BLC Management, LLC dba Angles Communication Solutions, dPi Teleconnect, LLC, Ganoco, Inc. dba American Dial Tone, Image Access, Inc. dba NewPhone and OneTone Telecom, Inc.*
Docket No. 11-00109

Dear Chairman Roberson:

Enclosed for filing in the referenced docket are the original and four copies of AT&T Tennessee's *Reply Brief.*

A copy has been provided to counsel of record.

Very truly yours,

Guy M. Hicks

768675

BEFORE THE TENNESSEE REGULATORY AUTHORITY
NASHVILLE, TENNESSEE

In Re: *Examination of Issues Surrounding BellSouth Telecommunications, Inc. dba AT&T Tennessee's Notice of June 28, 2011 Concerning BLC Management, LLC dba Angles Communication Solutions, dPi Teleconnect, LLC, Ganoco, Inc. dba American Dial Tone, Image Access, Inc. dba NewPhone and OneTone Telecom, Inc.*

Docket No. 11-00109

REPLY BRIEF OF AT&T TENNESSEE

In accordance with the procedural schedule established by the Hearing Officer, BellSouth Telecommunications, LLC d/b/a AT&T Tennessee ("AT&T Tennessee")[1] respectfully submits its Reply Brief. AT&T Tennessee believes the arguments in the Brief it submitted on July 20, 2011 fully address and refute the arguments presented in the *Initial Brief* the Resellers submitted on the same date. AT&T Tennessee, therefore, will not repeat those arguments here. Instead, this Reply Brief addresses the arguments made by Resellers in their *Initial Brief*.

I. INTRODUCTION

As explained below, the interconnection agreements ("ICAs") the Resellers signed – and the Authority approved – are contracts that are binding on the Resellers and AT&T Tennessee. AT&T Tennessee and the Resellers agree that, pursuant to those contracts, the substantive contract law of Georgia governs the question of whether the Resellers' "disputes" that are the subject of this docket were lodged in good faith. Further, the Resellers themselves concede that under Georgia law, a contract may be so patently clear and explicit on a given point that

[1] Effective July 1, 2011, BellSouth Telecommunications, Inc. was converted to BellSouth Telecommunications, LLC by operation of Georgia law (the law of the state in which the former BellSouth Telecommunications, Inc. was incorporated).

any construction different from its obvious and exclusive meaning would constitute a gross mistake or error that simply cannot support a claim of good faith. That is exactly the case here.

The contracts the Resellers signed and the Authority approved make clear that AT&T Tennessee is not required to provide the Resellers the $3.50 state Lifeline credit. Significantly, the Resellers do not – and cannot – argue that their contracts say otherwise. Moreover, this clear, unequivocal, and controlling contractual language is entirely consistent with the Authority's Order, affirmed by the Tennessee Court of Appeals, finding that AT&T Tennessee is not required to provide resellers the $3.50 state Lifeline credit. Significantly, the Resellers do not – and cannot – argue that the Authority's Order, or the Tennessee Court of Appeals' Opinion affirming that Order, say otherwise.

Instead, the Resellers note that their contracts allow them to withhold amounts that are subject to billing "disputes." By any objective standard, these perfectly reasonable "dispute" provisions act as a shield that allows the Resellers to withhold payment while they discuss with the AT&T Tennessee (and hopefully resolve) legitimate questions and potential billing mistakes that can arise in good faith in the normal course of any business relationship. The Resellers, however, attempt to contort these contractual "dispute" provisions into a sword that allows them to circumvent the plain language of their contracts while they ask the Authority to re-write their contracts in a manner that is more to their liking. The Authority must reject this tortured interpretation that the Resellers proffer because: it would impermissibly render meaningless the contractual provisions that make clear that AT&T Tennessee is not required to provide the Resellers the $3.50 state Lifeline credit; and neither the Authority nor the courts

can re-write the clear and unambiguous contracts merely because the Resellers wish they had negotiated a different bargain in the first place.[2]

And make no mistake, that is exactly what the Resellers are asking the Authority to do. They are not claiming that AT&T Tennessee has billed them amounts that are not allowed by the plain language of their contracts or that AT&T Tennessee has otherwise done anything that the plain language of their contracts does not allow AT&T Tennessee to do. Instead, the Resellers are asking the Authority to require AT&T Tennessee to provide the $3.50 state lifeline credit amount to the Resellers despite the fact that the contracts the Resellers signed and the Authority approved require exactly the opposite result. The Resellers, therefore, are asking the Authority to re-write their contracts for them, and the Authority cannot lawfully do that.

II. THE RESELLERS' CONTRACTS MAKE CLEAR THAT AT&T TENNESSEE IS NOT REQUIRED TO PROVIDE THE $3.50 STATE LIFELINE CREDIT TO THE RESELLERS.

An ICA is "the Congressionally-prescribed vehicle for implementing the substantive rights and obligations set forth in the [1996] Act,"[3] and once a carrier enters into an ICA in accordance with section 252 of the 1996 Act, "it is then regulated directly by the [ICA]."[4] Accordingly, once an ICA is approved, as the ones at issue in this docket have been, the parties are "governed by the [ICA]" and "the general duties of [the 1996 Act] no longer apply".[5] The

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[2] When their contracts were being negotiated, the Resellers had the right under federal law to ask the Authority to require different language in their contracts. The Resellers, however, did not request the Authority to do so. Instead, the Resellers signed negotiated contracts that were submitted to and approved by the Authority pursuant to 47 U.S.C. §252(e).

[3] *Michigan Bell Tel. Co. v. Strand*, 305 F.3d 580, 582 (6th Cir. 2003), *rehearing denied by Michigan Bell Tel. Co. v. Strand*, 2003 U.S.app. LEXIS 4283 (6th Cir. Mar. 10, 2003), *Appeal after remand at Michigan Bell Tel Co. v. Strand*, 2004 U.S. App. LEXIS 22949 (6th Cir. Mich. 2004).

[4] *Law Offices of Curtis V. Trinko LLP v. Bell Atl. Corp.*, 305 F.3d 89, 104 (2d Cir. 2002), *rev'd in part on other grounds sub nom; Verizon Commc'ns, Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004); *Complaint dismissed at Law Offices of Curtis V. Trinko, LLP v. Verizon Communications, Inc.*, 2006 U.S. Dist. LEXIS 71101 (S.D.N.Y. Sept. 27, 2006).

[5] *Mich. Bell Tel. Co. v. MClmetro Access Trans. Servs., Inc.*, 323 F.3d 348, 359 (6th Cir. 2003).

Authority-approved ICAs that govern this matter make clear that AT&T Tennessee is not required to provide a $3.50 state Lifeline credit to the Resellers.

As explained in detail at pages 6-7 of AT&T Tennessee's *Initial Brief*, each Reseller has ***contractually agreed*** to resell services subject to the terms and conditions of AT&T Tennessee's Tariffs:

> [R]esold services can only be used in the same manner as specified in [AT&T Tennessee's] Tariffs. ***Resold services are subject to the same terms and conditions as are specified for such services when furnished to an individual End User of [AT&T Tennessee] in the appropriate section of [AT&T Tennessee's] Tariffs.*** (Emphasis added).

AT&T Tennessee's Tariff, in turn, expressly provides that:

> The non-discounted ***federal*** Lifeline credit amount will be passed along to resellers ordering local service at the prescribed resale discount from this Tariff, for their eligible end users. ***The additional credit to the end user will be the responsibility of the reseller.*** Eligible Telecommunications Carriers, as defined by the FCC, are required to establish their own Lifeline programs. (emphasis added).

Each Reseller, therefore, has contractually agreed that the Reseller, and not AT&T Tennessee, must provide the state $3.50 Lifeline credit for the Resellers' end-user customers. Moreover, as explained in detail at pages 7-9 of AT&T Tennessee's *Initial Brief*, this unambiguous and controlling contractual language is entirely consistent with Tennessee's substantive telecommunications law as set forth in the Authority's Order and the Tennessee Court of Appeals' Opinion affirming that Order.[6]

[6] As explained at page 6 of AT&T Tennessee's *Initial Brief*, the Authority-approved ICAs make clear that Tennessee's "substantive telecommunications law" governs the ICAs.

III. THE RESELLERS "DISPUTES" – WHICH ARE CONTRARY TO BOTH THE EXPRESS LANGUAGE OF THEIR CONTRACTS AND GOVERNING LAW – ARE NOT LODGED IN GOOD FAITH.

AT&T Tennessee and the Resellers agree that: Georgia contract law governs the payment terms of the contracts at issue in this docket;[7] each of the Authority-approved contracts requires the Resellers to act in good faith in exercising their rights and performing their duties under the contracts;[8] and under controlling Georgia contract law, a contract may be so patently clear and explicit on a given point that any construction different from its obvious and exclusive meaning would constitute a gross mistake or error that simply cannot support a claim of good faith.[9] That is exactly the case in this docket.

As explained above, the controlling contracts make clear that AT&T Tennessee is not required to provide the $3.50 state Lifeline credit to the Resellers. The Resellers do not – and cannot – contend that they say otherwise or that this unambiguous and controlling contractual language is inconsistent with the governing substantive telecommunications law of Tennessee. Instead, the Resellers argue that the contracts also allow them to lodge billing "disputes" and to withhold payment of amounts they dispute, even if their "disputes" are clearly contrary to the plain language of the contract. And they do not stop there – incredibly, they argue that in the unlikely event that the Authority revisits and reverses more than a decade of Authority precedent as affirmed by the Court of Appeals, such a stark reversal of course could be applied retroactively.[10] As explained below, they are simply wrong.

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[7] See Resellers' *Initial Brief* at 2.
[8] *See Id.*, citing § 27 of the General Terms and Conditions of the ICAs.
[9] *See Id.* at 4 (citing to *Planning Technologies, Inc. v. Korman*).
[10] *See Id.* at 10-11.

Georgia law is clear that "[w]here the language of a contract is plain and unambiguous, no construction is required or permissible and the terms of the contract must be given an interpretation of ordinary significance."[11] And even when it is necessary to interpret a contract to resolve some ambiguity in its language (which simply is not the case here), Georgia law makes clear that:

> The contract is to be considered as a whole, and ***each provision is to be given effect and interpreted so as to harmonize with the others***. The construction of the contract should give a reasonable, lawful and effective meaning ***to all manifestations of intention by the parties*** rather than an interpretation which leaves a part of such manifestations unreasonable or of no effect. ***And any construction that renders portions of the contract language meaningless should be avoided.***[12]

The controlling contracts say that AT&T Tennessee is not required to provide the $3.50 state Lifeline credit to the Resellers. The Resellers' position, if accepted, would impermissibly render this language – which is as unambiguous as it is consistent with Tennessee substantive telecommunications law – meaningless. The Authority, therefore, cannot lawfully allow the Resellers to "dispute" that they are required to comply with the plain language of their ICAs.

Additionally, the Resellers clearly are asking the Authority to retroactively re-write their contracts to say that AT&T Tennessee is required to provide the Resellers the $3.50 state Lifeline credit[13] (which is exactly the opposite of what the contracts actually require). Under controlling Georgia law, however, "[n]either the trial court nor this [appellate] Court is at liberty

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[11] *Fernandes v. Manugistis Atlanta, Inc.*, 582 S.E.2d 499, 502 (Ga. Ct. App. 2003), *Cert. denied Fernandes v. Manugistics Atlanta, Inc.*, 2003 GA. LEXIS 879 (Ga. Oct. 6, 2003).

[12] *Thomas v. B&I Lending, LLC*, 581 S.E.2d 631, 634 (Ga. Ct. App. 2003)(emphasis added). This is consistent with Tennessee law. *See Collateral Plus, LLC v. Max Well Medical, Inc.*, Slip Copy, 2011 Tenn. App. LEXIS 150 at *16 (Tenn. Ct. App. March 29, 2011)("All provisions of a contract should be construed as in harmony with each other, if such construction can be reasonably made, so as to avoid repugnancy between the several provisions of a single contract.").

[13] *See* Resellers' *Initial Brief* at 11.

to rewrite or revise a contract under the guise of construing it."[14] Again, "disputes" that are based on intentional breaches of contractual obligations and that are in defiance of controlling law simply are not made in "good faith." The Authority, therefore, cannot accept the Resellers' position that the "disputes" provisions of their contracts allow the Resellers to refuse to abide by the unambiguous language of those same contracts.

Accordingly, as a matter of law, AT&T Tennessee is entitled to terminate service to the Resellers when they breach their respective ICAs by refusing to pay because they simply do not like the lawful decision of the Authority.

IV. AT&T TENNESSEE HAS NOT WAIVED ANY CONTRACTUAL RIGHTS.

The Resellers assert that '[u]ntil last year, AT&T did not challenge the Resellers' right to raise this issue as a billing dispute under the parties' interconnection agreements."[15] To the extent that the Resellers may be suggesting that AT&T has somehow waived its right to require Resellers to self-fund the state Lifeline credit, and to terminate the Resellers' contracts if they refuse to do so, the Resellers are wrong. Section 17 of the General Terms of Conditions of the Authority-approved ICA between AT&T Tennessee and Angles provides:

> **Waivers.** ***A failure or delay of either Party to enforce any of the provisions hereof***, to exercise any option which is herein provided, or to require performance of any of the provisions hereof ***shall in no way be construed to be a waiver*** of such provisions or options, ***and each Party***, notwithstanding such failure, ***shall have the right thereafter to insist***

[14] *Fernandes v. Manugistis Atlanta, Inc.*, 582 S.E.2d 499, 503 (Ga. Ct. App. 2003), *Cert. denied Fernandes v. Manugistics Atlanta, Inc.*, 2003 GA. LEXIS 879 (Ga. Oct. 6, 2003). *Accord Berry v. Travelers Ins. Co.*, 14 S.E.2d 196, 201 (Ga. Ct. App. 1941) ("If it be said that the provision is a harsh one, the answer is that the rights of the parties are to be determined under the contract as made, and it is not within the power of this court to rewrite it."). This is consistent with Tennessee law. *See Collateral Plus, LLC v. Max Well Medical, Inc.*, Slip Copy, Tenn. App. LEXIS 150 at *16 (Tenn. Ct. App. March 29, 2011) ("The court enforces the parties' contract as it is written; it does not make a new contract for the parties.").

[15] *See Initial Brief of Resellers* at 2.

> ***upon the performance of any and all of the provisions of this Agreement.*** (Emphasis added.)

The ICAs between AT&T Tennessee and each of the other Resellers contain substantively identical provisions, and these "no waiver" provisions could not be more clear. It is not surprising, therefore, that when other Resellers raised "waiver" or "AT&T waited too long" arguments last summer in an attempt to avoid paying undisputed past-due amounts, the Florida, Alabama, and North Carolina Commissions each relied upon these contractual "no waiver" provisions in summarily rejecting those arguments and allowing AT&T to terminate service to those Resellers that did not pay their past-due amounts.[16]

V. IN ATTACKING THE AUTHORITY'S EXISTING LIFELINE ORDERS, THE RESELLERS MERELY RE-HASH ARGUMENTS THAT WERE PRESENTED – AND REJECTED – IN A PRIOR AUTHORITY PROCEEDING.

The Resellers devote a substantial portion of their *Initial Brief* attacking the Authority's existing Order and, by necessity, the Court of Appeals' Opinion affirming that Order.[17] As explained below, however, each of the Resellers' arguments was carefully considered – and rejected – by the Authority in the proceedings that led to the Order the Resellers now attack.

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[16] *See* Florida Public Service Commission *Order Granting LifeConnex Telecom, LLC's Request for Emergency Relief with Conditions*, Docket No. 100021-TP, at 7 (July 16, 2010) ("We find this 'boilerplate' contract term is unambiguous, and clearly allows AT&T the right to fail to enforce provisions in the ICA on a flexible basis, without then being required to waive enforcement of those provisions in the future."); Alabama Public Service Commission *Order Granting in Part and Denying in Part LifeConnex Telecom LLC's Petition and Motion for Emergency Relief*, Docket No. 31450, at 7 (August 20, 2010) ("The staff concluded ... that Lifeconnex' arguments ... are fatally undermined by the provisions of [the Non-Waivers section] of the Parties' ICA.... The staff found that the language ... is unambiguous and clearly allows AT&T the right to withhold enforcement of provisions in the ICA on a discretionary basis without then being required to completely waive enforcement of those provisions in the future."); North Carolina Utilities Commission *Order Ruling on Dockets*, Dockets No. P-55, Sub 1817; P-55, Sub 1818; and P-55, Sub 1819, at 12 (September 22, 2010) ("...it is not a defense for LifeConnex, as it insists, that AT&T was to blame for not demanding its money sooner, when, in light of the time value of money, LifeConnex has actually benefited from not paying it.") These orders may be found at the following links:
Florida: http://www.psc.state.fl.us/dockets/orders/singleDisplay.aspx?orderNumber=PSC-10-0457-PCO-TP;
Alabama:https://www.pscpublicaccess.alabama.gov/pscpublicaccess/ViewFile.aspx?Id=51e51434-e413-488f-a530-899bda724cbf;
North Carolina: http://ncuc.commerce.state.nc.us/cgi-bin/webview/senddoc.pgm?dispfmt=&itype=Q&authorization=&parm2=MAAAAA56201B&parm3=000133091.

[17] *See* Resellers' *Initial Brief* at 6-11.

The Authority, therefore, should reject the Resellers attempts to resurrect these erroneous arguments.

The Resellers argue that the Authority's predecessor, the Tennessee Public Service Commission, "designed rates so that the $3.50 subsidy [state Lifeline credit] was 'built in' to each carrier's rate structure", and "the PSC allowed carriers to increase rates to other customers" to "cover the $3.50 loss."[18] From this faulty premise, the Resellers argue that Tennessee funded the state Lifeline credit through an implicit subsidy in BellSouth's rate structure.[19] The reseller in the *Discount Communications* proceedings (which was represented by the same counsel that represents the Resellers in these proceedings) raised this same argument,[20] and BellSouth squarely refuted it.[21] Following a full blown evidentiary hearing, cross-examination of witnesses, and the submission of post-hearing briefs by the parties, the Authority entered its Order concluding that the reseller "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."[22] The Court of Appeals affirmed this Order, and the Authority should not allow the Resellers to resurrect the same erroneous argument again in hopes of achieving a different result.

The Resellers further argue that they "could not readily recover" from non-Lifeline customers the revenue necessary to self-fund the $3.50 state Lifeline credit as required by their

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[18] *See Initial Brief of Resellers* at 7.
[19] *See Id.*
[20] *See* Attachment A to this Reply Brief at 4.
[21] *See* Appellate Brief of BellSouth (Attachment B to this Reply Brief) at 17-25.
[22] *See* Authority's Order in *Discount Communications* (Attachment C to this Reply Brief) at 13.

contracts and applicable law.[23] Again, this same argument was presented by the reseller and the Consumer Advocate Division in the *Discount Communications* proceedings.[24] The Authority and Court of Appeals obviously rejected this argument, and the Resellers should not be afforded another bite at that same apple.

Finally, the Resellers claim that the Authority's existing Order does not comply with federal law.[25] Again, the reseller in the *Discount Communications* proceedings raised this same argument,[26] and both the Authority and the Court of Appeals rejected the argument. Specifically, the Authority found that "BellSouth correctly applied its Lifeline tariff according to federal law,"[27] and the Court of Appeals concluded that

> ***...the FCC interpreted the federal law as allowing the states to determine how the state portion of the Lifeline subsidy will be generated.*** We defer to the expertise of the FCC in interpreting its governing statutes. *CF Industries v. Tennessee Pub. Serv. Comm'n,* 599 S.W.2d. 536 (Tenn. 1980). ***Therefore, the TRA is free to continue its policy of placing the burden of the state subsidy on the carriers that sell the services to the Lifeline customers.***[28] (Emphasis added.)

The Resellers cite no FCC authority contrary to the FCC orders relied upon by the Court of Appeals in 2002, because there is none. Moreover, even assuming for the sake of argument only, that the Authority's Order is later found to be inconsistent with federal law, the Resellers conveniently ignore the fact that they are obligated ***by contract*** to self-fund the $3.50 state Lifeline credit and, as noted above, the Authority cannot re-write those contracts to say otherwise.

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[23] *See Initial Brief of Resellers* at 9.

[24] *See* BellSouth's Appellate Brief (Attachment B to this Reply Brief) at 15-16; Discount Communications' Appellate Reply Brief (Attachment A to this Reply Brief) at 8.

[25] See *Initial Brief of Resellers* at 10.

[26] *See* Appellate Brief of Discount Communications, Inc. (Attachment A to this Reply Brief) at 5-8.

[27] *See* Order In Docket No. 00-00230 (Attachment C to this Reply Brief) at 12.

[28] *See* Court of Appeals' Opinion (Attachment D to this Reply Brief) at 5.

IX. CONCLUSION

The Resellers have intentionally and knowingly breached their contractual obligations (including their obligation to deal in good faith) by filing "disputes" – and withholding payment – on the grounds that AT&T Tennessee must provide them the $3.50 state Lifeline credit even though their contracts, consistent with controlling law, clearly say otherwise. AT&T Tennessee, therefore, is entitled to terminate service to the Resellers consistent with its commitment to the hearing officer not to do so prior to August 18, 2011, in order to facilitate efforts to provide the Reseller's end users notice of the impending termination.

Respectfully submitted,

BELLSOUTH TELECOMMUNICATIONS, LLC
dba AT&T Tennessee

By:_____

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CERTIFICATE OF SERVICE

I hereby certify that on July 26, 2011, a copy of the foregoing document was served on the following, via hand delivery, facsimile, overnight, electronic mail or US Mail, addressed as follows:

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[ ] Overnight
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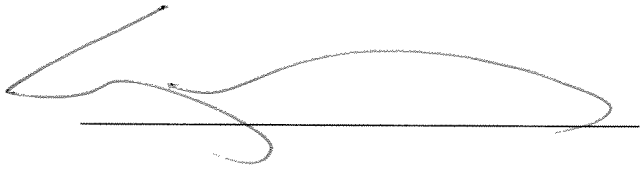

Attachment A

IN THE COURT OF APPEALS
FOR THE MIDDLE SECTION OF TENNESSEE
AT NASHVILLE

IN RE: DISCOUNT COMMUNICATIONS, INC. Petitioner,	)	
v.	)	No. M2000-02924-COA-R12-CV
BELLSOUTH TELECOMMUNICATIONS, INC. Respondent.	)	

BRIEF OF DISCOUNT COMMUNICATIONS, INC.

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Oral Argument Requested

May 29, 2001

IN THE COURT OF APPEALS
FOR THE MIDDLE SECTION OF TENNESSEE
AT NASHVILLE

IN RE: DISCOUNT COMMUNICATIONS, INC. Petitioner,	)	
v.	)	No. M2000-02924-COA-R12-CV
BELLSOUTH TELECOMMUNICATIONS, INC. Respondent.	)	

SUMMARY

This is a direct appeal, pursuant to Tenn. R. App. 12, of a final decision of the Tennessee Regulatory Authority ("TRA" or the "Authority"). In an Order issued September 28, 2000, *In Re: Complaint of Discount Communications, Inc. Against BellSouth Telecommunications, Inc.*, Docket 00-00230 (the "Order"), the Authority announced for the first time, the existence of an "interim policy" concerning the funding of "Lifeline" telephone service in Tennessee. Lifeline is basic local telephone service offered at a reduced rate to eligible, low-income customers. *See* T.C.A. § 65-5-208. Lifeline rates are subsidized with both federal and state funds. Order, at 11.

Discount Communications, Inc. ("Discount") is a reseller of local telephone service. Discount purchases local, residential lines from BellSouth at a discounted, wholesale rate determined by the TRA and then resells that service to its own customers. Many of Discount's customers are eligible for Lifeline service. *Id.* This dispute arose because, when Discount signs up a customer who is entitled to receive Lifeline service, the TRA requires BellSouth to pass through the federal portion of the Lifeline subsidy ($7.00) while permitting the company to keep

the state portion of the subsidy ($3.50). As a result of the TRA's ruling, BellSouth is able to charge its own customers a retail price of only $6.15 a month for Lifeline service while forcing Discount to pay a wholesale price of $7.55 for the same, Lifeline service. *See* Exhibit 10.

This price squeeze plainly violates the federal Telecommunications Act and the rules and orders of the Federal Communications Commission. As explained further below, the FCC has explicitly stated that resellers such as Discount may "obtain Lifeline service at wholesale rates that include Lifeline support amounts [*i.e.*, both the federal and state subsidies] and can pass these discounts through to qualifying low-income consumers." FCC 97-157 "Universal Service Order," paragraph 370, quoted in the Order, footnote 23.

Despite this language, the TRA Order declared that its decision was based on, and determined by, a heretofore unknown "policy" regarding the funding of Lifeline service. According to this policy, incumbent local exchange carriers like BellSouth are not required to pass through to resellers the state's share of the Lifeline subsidy. Resellers must instead "fully fund the state portion of the Lifeline assistance program from the reseller's internal sources." Order, at 11. The TRA declared this method of funding Lifeline to be "the policy of this state" which, the TRA announced in the Order, had been "signaled" in a 1996 arbitration proceeding involving BellSouth, AT&T, and MCI. *Id.* Upon reconsideration, the TRA reiterated its explanation that Discount was not entitled to the state subsidy because of the "state's interim policy of requiring resellers like Discount to fund the state Lifeline credits for their own subscribers." *Order Denying Petition for Reconsideration and Petition to Reconsider*, Docket 00-00230, issued February 6, 2001 ("Reconsideration Order") at 4.

Prior to the issuance of the Order, there had never been any rule, order, or any other TRA document establishing a policy for the funding of Lifeline service. The broad statements of agency policy found in the Order and the Reconsideration Order have a significant impact on the

regulation of resellers of local telephone service and, necessarily, on the customers of those carriers. Such a "policy" even if lawful, cannot be adopted in an arbitration proceeding or in a contested case proceeding. *Tennessee Cable T.V. v. Public Service Commission*, 844 S.W. 2d 151, 163 (Tenn. App., 1992). Under state law, a "rule" includes "each agency statement of general applicability that implements or prescribed law or policy . . . " T.C.A. § 4-5-102(10). To adopt a new, statewide policy on the funding of Lifeline service, the TRA must follow proper rulemaking procedures. The policy cannot simply be unveiled for the first time in a complaint proceeding and declared to be the basis for the agency's decision.

STATEMENT OF FACTS

Discount is a reseller of BellSouth's local exchange telephone service and provides basic residential service on a pre-paid basis. The customer, in other words, pre-pays for service at the beginning of each month. Like other pre-paid carriers, Discount primarily serves customers who, because of credit problems, cannot obtain local telephone service from BellSouth. Discount also provides "Lifeline" service to qualified customers and, in fact, affirmatively seeks out customers in low income areas who do not have telephone service and are likely eligible for the Lifeline program. Tr. II, 199-200.

The Lifeline program offers qualified subscribers local telephone service at a discount of up to $10.50 per month. Administered by the FCC, the program is funded, in part, by interstate carriers and, in part, by participating states. In Tennessee, for example, Lifeline customers are eligible for the full $10.50 discount. Of that amount, $7.00 is provided by federal government and $3.50 --- the state's share --- is provided by intrastate carriers. See Exhibit 10.

The issue in this appeal is whether or not BellSouth is required to offer Lifeline service for resale at a discounted rate which includes both the federal and state subsidies that BellSouth

offers to its own Lifeline customers or whether BellSouth can simply pocket the $3.50 state credit.

To explain the Lifeline program and how the state credit is generated, Discount sponsored the expert testimony of Mr. Archie Hickerson, staff director of the Consumer Advocate's office in the Office of the Attorney General. For eighteen years prior to joining the Consumer Advocate's Office, Mr. Hickerson had served as deputy director of the utility rate division of the Tennessee Public Service Commission. Based on his direct, personal knowledge, he testified about the establishment of Tennessee's Lifeline program in 1991 and how that program was financed then and now. 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 build into BellSouth's annual revenue requirement in the Company's subsequent (and last) 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 was in effect in November, 1997, when BellSouth made a "revenue neutral" tariff filing to change the Lifeline program from a reduced price, measured service to a flat-rated service with a $3.50 state 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 though we all agreed that Bell is currently collecting that subsidy through its rates." *Id.*, at 173. [1]

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[1] There is no evidence in the record to contradict Mr. Hickerson's testimony on this issue. In fact, BellSouth witness, Ms. Bonnie 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 anything about BellSouth's last rates case in Tennessee. *Id.*, at 552-553. She did, however,

(footnote continued on following page ...)

ARGUMENT

I. The TRA's Order violated the federal Telecommunications Act and the rules and orders of the Federal Communications Commission by allowing BellSouth to charge Discount a wholesale rate for Lifeline telephone service that is higher than the rates BellSouth charges its own end users for the same service.

BellSouth charges $6.15 per month to BellSouth's Lifeline subscribers, but charges Discount a wholesale rates of $7.55 for the same service. *See* Exhibit 10.[2] The reason for this disparity is that BellSouth gives its own end users a "state credit" of $3.50 per month. BellSouth does not, however, include that "state credit" in the wholesale price charged to resellers such as Discount.

Under controlling federal law, BellSouth is overcharging Discount by refusing to include the $3.50 state credit in BellSouth's wholesale rate.

A. The federal Telecommunications Act requires BellSouth "to offer for resale at wholesale rates any telecommunications service that the carrier provides at retail to subscribers." 47.U.S.C. § 251 (c)(4)(A). The Act also prohibits BellSouth from imposing "unreasonable or discriminatory conditions or limitations" related to the resale of service. 47 U.S.C. § 251(c)(4)(B).

The Act goes further. For purposes of implementing Section 251(c)(4), the Act requires that "a state commission shall determine wholesale rates on the basis of retail rates charged to

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(... footnote continued from previous page)
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 rates 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 still build into BellSouth's rates, it would be appropriate to pass that subsidy through to resellers. *Id.*, at 566-568, 572-573.

[2] These amounts do not include various add-ons such as taxes, franchise fees, and charges for number portability.

subscribers for the telecommunications service requested, excluding the portion thereof attributable to . . . . costs that will be avoided by the local exchange carrier." 47 U.S.C. §252(d)(3), emphasis added. In other words, the Tennessee Regulatory Authority "shall" fix BellSouth's wholesale rate for Lifeline service "on the basis of the retail rates" charged by BellSouth to its own Lifeline subscribers, less avoided costs.

B. The FCC's rules implementing the resale provisions of the Act reiterate these statutory requirements. "The wholesale rate . . . shall equal the incumbent LEC's existing retail rate for the telecommunications service, less avoided retail costs." 47 C.F.R.§ 51.607(a). To eliminate any unreasonable or discriminatory conditions which might be attached to a carrier's wholesale service, the FCC rules also state that "A LEC must provide services . . . . for resale that are equal in quality [and] subject to the same conditions . . . as the LEC provides these services to others, including end users." 47 C.F.R. §51.603, emphasis added. Thus, BellSouth must offer wholesale service to Discount that is "subject to the same conditions" as the service BellSouth offers to its own end users.

C. Along with these rules, the FCC has also issued Orders explaining that the resale rules apply to all LEC services, including "below-cost and residential" services and, specifically, Lifeline services.

In the "Local Competition Order," Docket 96-325, issued in August, 1996, the FCC noted that many LECs opposed "requiring, or even allowing resale of below-cost services." Paragraph 954. But, the agency held, "simply because a service may be priced at below-cost levels does not justify denying customers of such a service the benefits of resale competition." Paragraph 956. The FCC explained that the resale pricing standard contained in the federal Act "gives the end users the benefit of an implicit subsidy in the case of below- cost service, whether the end user is served by the incumbent or by a reseller. *Id.*, emphasis added. Finally, the

agency noted, the LEC should be financially indifferent to offering a below-cost service at retail or wholesale rates since any loss of revenue resulting from the resale of below-cost service would be offset by a proportionate savings of avoided costs. *Id.*

In the "Universal Service Order" (Docket 97-157, issued in May, 1997), the FCC explained specifically how the agency's rules and decisions on resale applied to Lifeline service. The agency again noted that the "Local Competition Order" required that all retail services must be available for resale at the LEC's "retail rate," *i.e.* the rate offered to end users, less avoided costs. Therefore, the agency concluded, resellers "could obtain Lifeline service at wholesale rates that include the Lifeline support amounts and can pass these discounts through to qualifying low-income customers." Paragraph 370, emphasis added. Once again, the FCC made it very clear that BellSouth's wholesale rate must "include the Lifeline support amounts," such as the $3.50 state credit, so that the end user will receive the benefit of the state credit whether he receives service from BellSouth or from Discount.

Federal law thus plainly requires that BellSouth include the $3.50 state credit in its wholesale rates for Lifeline service. Furthermore, the Act requires the TRA, in reviewing and approving a resale agreement, to insure that BellSouth's wholesale rates are consistent with these federal requirements. 47 U.S.C. §252(d)(3) and § 252(c)(2)(B).

The TRA offers two reasons why, notwithstanding federal law, BellSouth is not required to pass through to resellers the state portion of the Lifeline subsidy.

First, the agency relies upon BellSouth's intrastate tariff which states that resellers are not entitled to that credit. But when a state tariff conflicts with the federal Telecommunications Act or the FCC's rules, federal law prevails. *See AT&T Corp. v. Iowa Utilities Board*, 1199 S.Ct. 721, 927-733 (1999). There is no serious argument that BellSouth can evade its federal, resale obligations by filing an inconsistent, intrastate tariff or that the TRA can enforce a state

tariff that conflicts with — and is preempted by — federal law. *See also, Public Utilities Commission of California v. United States*, 78 S. Ct. 446 (1958) in which the Court held that federal regulations promulgated by the Dept. of Defense preempted inconsistent state tariffs regulating motor carriers.

Second, the TRA states that its decision is mandated the agency's recently discovered "policy" regarding the financing of the Lifeline program. This argument is discussed below.

II. The TRA Order is invalid because it purports to adopt a new state "policy" in a contested case rather than in a rulemaking proceeding.

The TRA must have recognized that its decision to allow BellSouth to charge a wholesale rate that is greater than BellSouth's retail price is, on its face, inconsistent with federal law. The Order makes no attempt to explain, for example, how that decision can be reconciled with the FCC's rules on the pricing of wholesale telephone service.

Instead, the TRA attempts to support its decision by reaching back to a 1996 arbitration proceeding, which was conducted pursuant to the federal Telecommunications Act, involving AT&T, BellSouth and MCI. No other parties participated in that arbitration proceeding nor, in fact, would any parties have been allowed to intervene in an arbitration proceeding under the TRA's rules.

In that proceeding, the Authority addressed literally hundreds of issues, including the provision of Lifeline telephone service. These decisions were then incorporated into interconnection agreements among the three parties to the arbitration. In that arbitration, the Authority declared that, to the extent AT&T and MCI offer Lifeline service, the carriers must offer the service at a reduced rate "which is no less than the minimum discount that BellSouth now provides." [*ie.*, the state credit amount]. *First Order of Arbitration Awards*, docket nos. 96-01152 and 96-01271, paragraph 9.c.

There is nothing in the record of the current appeal to indicate the basis of the Authority's ruling in the 1996 arbitration proceeding or whether the issue was even contested. In any event, the ruling applied only to the three parties and only for the duration of the interconnection agreements.

Four years later, however, the Authority declared that this one sentence in the arbitration decision "signaled the Authority's intent that resellers are subject to the general Lifeline policy requiring each carrier to establish its own Lifeline assistance program." Order, at 11. Miraculously, a ruling in an arbitration proceeding suddenly transformed into a "general Lifeline policy." Of course, no one at the time could have known of any such "policy" since that word never appears and the decision applied only to the partjes to the arbitration. Nevertheless, the Authority in the year 2000 declared that it was their "intent" in 1996 to adopt this policy and this unspoken intent was somehow "signaled," by means ascertainable to no one else, to a majority of the Directors presiding in the *Discount* case. "Thus," the agency declared in the *Discount* Order, "it is the policy of this state that individual resellers fully fund the state portion of the Lifeline assistance program from the reseller's internal sources. Order, at 11. Presumably in recognition of the fact that the new "policy of this state" might jeopardize service to Lifeline customers, the Authority hastened to add that "this policy is an interim one" and that, as soon as the TRA establishes an intrastate Universal Service Fund (see T.C.A. § 65-5-207), the state credit portion of the Lifeline subsidy will, in fact, be passed on to resellers like Discount. *Id.* In the meantime, the Authority declared that Discount had "offered no compelling arguments, in this instance, that would necessitate the Authority's premature departure from its carefully considered interim policy." *Id.*, at 13.

It is hard to imagine how a "policy" which no party had raised at the hearing and which had never been announced by the agency until it suddenly appeared in the *Discount* Order could

be described as "carefully considered." A policy which was not previously expressed in any official and explicit agency determination, adjudication or rule; which applies to all resellers of local telephone service in Tennessee; which reflects a decision on administrative regulatory policy, and which, according to the Authority, predetermines the outcome of Discount's complaint, must be arrived at through an open, public discussion in a rulemaking and not translated by "signals" from a four-year-old arbitration proceeding.

The TRA is required to follow, when applicable, the rulemaking procedures set forth in the Uniform Administrative Procedures Act. *Tennessee Cable TV v. Public Service Commission*, *supra*, 844 S.W. 2d at 161. Those statutes require the Authority to follow rulemaking procedures whenever the agency issues a "statement of general applicability that implements or prescribes law or policy." *Id.*

The choice between rulemaking and adjudication is, initially, a matter of the agency's discretion." *Tennessee Cable*, *supra*, at 162. Such cases typically involve trying to determine whether an agency's rulings in a particular case should be characterized as more similar to rulemaking or to an adjudication. (*See*, for example, the criteria discussed and adopted in *Tennessee Cable*, *supra,* at 162-163.)

Here, however, the agency itself has characterized its decision as an announcement of "general Lifeline policy," "the policy of this state," the Authority's interim policy," and "its carefully considered interim policy." *Order*, at 11, 13. In the Reconsideration Order, the TRA repeated its finding that "the state's interim policy," adopted in the 1996 arbitration decision, "is consistent with federal and state law" and that the "parties Resale Agreement" [signed in 1998] and BellSouth's Lifeline tariff properly implement this "interim policy." Reconsideration Order, at 4. There can be no doubt that the TRA believes its decision to be an important matter of policy not simply an adjudication of a complaint case.

Since the agency itself has declared that its decision regarding the pass-through of the state credit is based on the agency's "policy," the TRA cannot avoid the consequences of its own language. Such a policy must be adopted through a proper rulemaking and cannot be secretly "signaled" in an arbitration or spontaneously generated from a two-party complaint case.

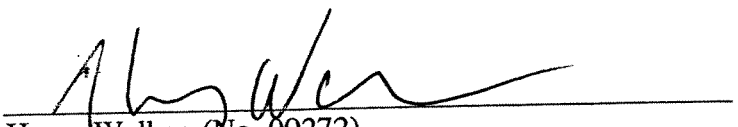
CONCLUSION

The TRA's Order purporting to allow BellSouth to charge a wholesale rate that is higher than its retail price for the same service is inconsistent with, and preempted by, federal law.

To the extent that ruling, even if valid, is based on the TRA's "policy" regarding Lifeline assistance, that policy must be vacated because it was not adopted in accordance with state rulemaking procedures.

Respectfully submitted,

BOULT, CUMMINGS, CONNERS & BERRY, PLC

By: 

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been forwarded via U.S. Mail, postage prepaid, to the following on this the 29th day of May, 2001.

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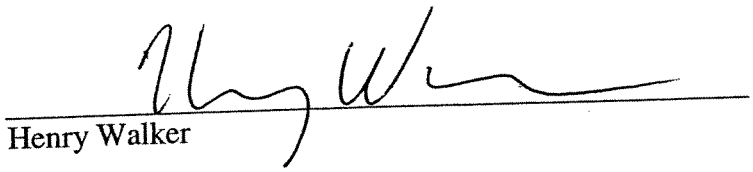

Henry Walker

Attachment B

IN THE COURT OF APPEALS OF TENNESSEE
MIDDLE SECTION AT NASHVILLE, TENNESSEE

BELLSOUTH TELECOMMUNICATIONS, INC.,	)	
Appellant,	)	NO. M2000-02924-COA-R12-CV
	)	On Petition for Review
vs.	)	
	)	TRA Docket No. 00-00230
DISCOUNT COMMUNICATIONS, INC., and THE TENNESSEE REGULATORY, AUTHORITY,	)	ORAL ARGUMENT REQUESTED
Appellees.	)	

BRIEF OF BELLSOUTH TELECOMMUNICATIONS, INC.
ON LIFELINE RULING

Guy M. Hicks, #000232
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TABLE OF AUTHORITIES

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[1] In compliance with Rule 27(e) of the Tennessee Rules of Appellate Procedure, copies of these statutes are reproduced in the Addendum at the end of this brief.

[2] Copies of these Rules are reproduced in the Addendum at the end of this brief.

Page

Tennessee Regulatory Authority Orders[3]

[3] Copies of these Orders are reproduced in the Addendum at the end of this brief.

STATEMENT OF ISSUE FOR REVIEW

In light of the FCC's findings that "[m]any methods [of funding the state Lifeline credit amount] exist, including competitively neutral surcharges on all carriers or the use of general revenues, that would not place the burden on any single group of carriers" and that "[w]e do not currently prescribe the methods states must use to generate intrastate Lifeline support," did the TRA abuse its discretion in ruling that Discount must fund the $3.50 state Lifeline credit amount to its own end users?

STATEMENT OF THE CASE

Discount Communications, Inc. ("Discount") is a telecommunications service provider. Rather than selling its own services, Discount purchases services from BellSouth at wholesale rates and resells the services to Discount's end user customers as allowed by the federal Telecommunications Act of 1996 ("the Act"). Discount purchases such services from BellSouth pursuant to a contract between BellSouth and Discount.

When Discount resells BellSouth's services in this manner, it is Discount (and not BellSouth) that markets the services to its end users, bills its end users for the services, and collects payments for the services from its end users. The Act, therefore, requires BellSouth to charge Discount a wholesale rate for any service that Discount resells to its end users. Unless the parties agree to different wholesale rates, the Act requires the Tennessee Regulatory Authority ("TRA") to determine BellSouth's wholesale rates on the basis of the retail rates BellSouth charges its own end users for the same service less the portion of those retail rates that is attributable to any marketing, billing, collection, and other costs that will be avoided by BellSouth.

End users of BellSouth and, through resale, end users of Discount who meet certain need-based financial criteria can request state and federal credits to their telephone bill under BellSouth's Lifeline tariff. When an eligible BellSouth end user requests these credits under the Lifeline tariff, that end user orders any local services BellSouth offers and is billed the full tariffed rate for the services ordered.

BellSouth then applies a $7.00 federal Lifeline credit as well as a $3.50 state Lifeline credit to the Lifeline customer's bill. The Lifeline customer, therefore, pays the full tariffed rate for the services he or she orders less the $10.50 in combined state and federal Lifeline credits.[4] BellSouth is reimbursed for the $7.00 federal Lifeline credit from a federal fund, but there is no fund from which BellSouth or any other carrier can be reimbursed for the $3.50 state Lifeline credit.

Pursuant to its agreement with Bellsouth, Discount offers its eligible end users Lifeline on a resale basis. When Discount purchases BellSouth service for resale to its eligible end users who have requested Lifeline credits, BellSouth charges Discount the tariffed rate for those services less the 16% wholesale discount. BellSouth then applies the $7.00 federal Lifeline credit amount to this bill. Discount, therefore, pays BellSouth the wholesale rate for the services it resells to its Lifeline end users less the $7.00 federal Lifeline credit. BellSouth is reimbursed for the $7.00 federal Lifeline credit from a federal fund. Pursuant to the terms of the contract between BellSouth and Discount and pursuant to the terms of BellSouth's tariff, BellSouth does not apply the $3.50 state Lifeline credit to this bill. Instead, Discount provides the $3.50 state Lifeline credit to its own end user's bill. The issue in this appeal is whether BellSouth is required to provide the $3.50 state Lifeline credit to Discount, or whether Discount is required to fund the $3.50 state Lifeline credit to its own end user customers.

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[4] This is the language of the tariff as of the date of the hearing before the TRA. This tariff has since been amended to reflect higher federal Lifeline credit

On April 11-13, 2000, the TRA held an evidentiary hearing on this and other issues Discount presented in the docket below. BellSouth, Discount, and the Consumer Advocate Division[5] ("CAD") participated in the hearing, and all three parties submitted post-hearing briefs. On September 28, 2000, the TRA entered its Order in the docket below.[6] This Order provides, in part, that "BellSouth shall not be required to pass through the $3.50 state Lifeline credit to Discount because BellSouth's existing Lifeline tariff correctly implements Tennessee's interim policy and is valid and enforceable under existing federal and state law." Order at p. 14.

On November 27, 2000, Discount filed its Petition for Review with this Court. On the same date, BellSouth timely filed a Petition for Review with regard to other aspects of the Order. On December 19, 2000, the Consumer Advocate Division filed a Notice of Appearance.

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amounts.

[5] The TRA granted the Consumer Advocate Division's Petition to Intervene in the docket below.

[6] A copy of the TRA's Final Order in that docket is reproduced in the Addendum at the end of this brief. BellSouth and Discount each filed a Petition for Reconsideration of certain aspects of the Order, and the TRA denied both petitions.

STATEMENT OF FACTS

The following is a recitation of the facts regarding: the resale requirements of the federal Telecommunications Act of 1996 ("the Act"); the approved contract between BellSouth and Discount; BellSouth's Lifeline tariff; and the manner in which BellSouth applies the Lifeline credit amounts to its bills to its end users and to its bills to Discount.

A. The federal Telecommunications Act of 1996 requires BellSouth to resell its services to telecommunications carriers like Discount at wholesale rates established by the TRA.

The federal Telecommunications Act of 1996 requires incumbent local exchange carriers like BellSouth "to offer for resale at wholesale rates any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers." *See* 47 U.S.C. §251(c)(4). Unless the parties agree to different rates for these resold services, *see* 47 U.S.C. §252(a)(1), the TRA "shall determine wholesale rates on the basis of retail rates charged to subscribers for the telecommunications service requested, excluding the portion thereof attributable to any marketing, billing, collection, and other costs that will be avoided by the local exchange carrier." 47 U.S.C. § 252(d)(3). In accordance with this directive, the TRA determined the wholesale rates for BellSouth's resold services in its Final Order in Docket No. 96-01331 ("the avoidable cost docket").

B. The Resale Agreement between BellSouth and Discount provides that "[r]esold services can only be used in the same manner as specified in [BellSouth's] Tariff."

Discount signed a contract for the resale of BellSouth's services in Tennessee on March 12, 1998. (R. Vol. VII at 907-29). On January 21, 1999, Discount and BellSouth jointly petitioned the TRA for approval of their contract, (R. Vol. VII at 907-29), and the TRA approved the contract on February 16, 1999. This contract defines "resale" as "an activity wherein a certificated OLEC, such as Discount Communications, subscribes to the telecommunications services of [BellSouth] and then reoffers those telecommunications services to the public (with or without "adding value")." Agreement §II.G. Discount "may resell the tariffed local exchange and toll telecommunications services of BellSouth contained in the General Subscribers Service Tariff and Private Line Service Tariff subject to the terms, and conditions specifically set forth herein." *Id.*, §III.A (emphasis added). The Agreement further provides that

> Resold services can only be used in the same manner as specified in [BellSouth's] Tariff. Resold services are subject to the same terms and conditions as are specified for such services when furnished to an individual end user of [BellSouth] in the appropriate section of [BellSouth's] Tariffs. Specific Tariff features, e.g. a usage allowance per month, shall not be aggregated across multiple resold services. Resold services cannot be used to aggregate traffic from more than one end user customer except as specified in Section A23. of [BellSouth's] Tariff referring to Shared Tenant Service.

Id., §IV.B (emphasis added).

C. BellSouth's Tariff provides that the state Lifeline credit amount "will be the responsibility of the reseller."

BellSouth's Lifeline tariff provides that

> 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, which includes the access line, Touch-Tone, the Subscriber Line Charge and local usage.

§A3.31.1.C (emphasis added).[7] The tariff then expressly addresses resale situations accordingly:

> The non-discounted federal Lifeline credit amount will be passed along to resellers ordering local service at the prescribed resale discount from this Tariff, for their eligible end users. The additional credit to the end user will be the responsibility of the reseller. Eligible Telecommunications Carriers, as defined by the FCC, are required to establish their own Lifeline programs.

BellSouth Tariff §A3.31.2.A.8. (R. Vol. X, Collective Exhibit 1 at fourth unnumbered page).

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[7] This is the language of the tariff as of the date of the hearing before the TRA. This tariff has since been amended to reflect higher federal Lifeline credit amounts.

D. When Discount resells BellSouth's services to its end users who qualify for the Lifeline credit amounts, BellSouth sells the underlying service to Discount at the wholesale rates set forth in the Resale Agreement; provides Discount with the federal Lifeline credit (which BellSouth recovers from a federal fund); and requires Discount to fund the state Lifeline credit amount to its end user (just like BellSouth funds the state Lifeline credit amount to its end users).

An eligible BellSouth end user customer who requests the credits provided by BellSouth's Lifeline tariff can subscribe to any of the local services that BellSouth offers. (R. Vol. XII at 507). If such a customer in Memphis subscribed to a standard residential line (a 1FR) with Touchtone, for example, BellSouth would bill that customer the tariffed rate of $12.15 for the line, the tariffed rate of $1.00 for the Touchtone, and a $3.50 federal subscriber line charge.[8] (*Id.*). BellSouth would then apply the federal Lifeline credit of $7.00 and the state Lifeline credit of $3.50 to the end user's bill, and the end user would pay a net amount of $6.15 for the service. (*Id.*). BellSouth recovers the $7.00 federal credit amount from a federal fund, (*see* R. Vol. XII at 515-17), but there is no fund from which BellSouth -- or any other carrier can recover the $3.50 state credit amount. (R. Vol. XII at 517).

When Discount resells the same standard residential line (a 1FR) with Touchtone to one of its Lifeline end users in Memphis, Discount buys the service from BellSouth at the 16% wholesale discount rate. (R. Vol. XII at 507-08).

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[8] These are the rates and charges that were in effect at the time of the hearing in the docket below.

BellSouth, therefore, would bill Discount $10.21 for the line (the $12.15 tariffed rate less the 16% wholesale discount), $0.84 for the Touchtone (the $1.00 tariffed rate less the 16% wholesale discount), and a $3.50 federal subscriber line charge.[9] (*Id.*) BellSouth would then apply the $7.00 federal Lifeline credit amount, and Discount would pay a net amount of $7.55 for the service. (*Id.*) BellSouth recovers the $7.00 federal credit amount from a federal fund, (*see* R. Vol. XII at 515-17), and just as BellSouth provides a $3.50 state Lifeline credit to its own end users, Discount would provide a $3.50 state Lifeline credit to its end user.

[9] During the hearings before the TRA, Discount did not dispute that it is required to pay the federal subscriber line charge and that the wholesale discount does not apply to this federal charge.

STANDARD OF REVIEW

As explained below, the FCC has recognized that "[m]any methods [of funding the $3.50 state Lifeline credit amount] exist, including competitively neutral surcharges on all carriers or the use of general revenues, that would not place the burden on any single group of carriers." *In the Matter of Federal-State Joint Board on Universal Service,* CC Docket No. 96-45, *Report and Order,* 12 FCC Rcd 8776, 8967-8968, ¶ 361 (1997) (emphasis added) ("FCC Universal Service Order"). The FCC has further stated that "[w]e see no reason at this time to intrude in the first instance on the states' decision about how to generate intrastate support for Lifeline. We do not currently prescribe the methods states must use to generate intrastate Lifeline support, nor does this order contain any such prescriptions." *Id.* (emphasis added).

In light of this latitude provided to the TRA, the Court must affirm the TRA's decision that Discount must fund the $3.50 state Lifeline credit amount to its own end users unless that decision is "arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion" or unless it is "unsupported by evidence which is both substantial and material in light of the entire record." *See* T.C.A. §4-5-322(h).

ARGUMENT

The contract between Discount and BellSouth (which has been approved by the TRA) provides that "[r]esold services can only be used in the same manner as specified in [BellSouth's] Tariff." First Agreement at §IV.B (emphasis added). As the Court of Appeals has noted,

> [t]he published tariffs of a common carrier are binding upon the carrier and its customers and have the effect of law. The provisions of the tariffs should govern the parties.

GBM Communications, Inc. v. United Inter-Mountain Tel. Co., 723 S.W.2d 109, 112 (Tenn. Ct. App. 1986)(emphasis added). During the hearings before the TRA, Discount acknowledged that BellSouth's published tariff requires Discount to provide the $3.50 state Lifeline credit amount to its own end users who qualify for and request Lifeline support. (*See* R. Vol. X at 95) ("I do not dispute that the tariff says what it says. I do not dispute that BellSouth has complied with the tariff."); (R. Vol. X at 159) (Discount witness Mr. Hickerson agreed that the tariff requires Discount to fund the $3.50 state Lifeline credit amount.). Neither Discount, the CAD, nor any other person or entity challenged the tariff when it was implemented. Accordingly, the tariff is binding upon Discount, and the TRA properly ruled that the tariff requires Discount to fund the $3.50 state Lifeline credit amount for its eligible end users.

Discount attempts to avoid the plain language of this binding tariff by arguing that the tariff is inconsistent with FCC orders. If Discount believed the tariff was inconsistent with FCC orders, however, it should have challenged the

tariff when BellSouth filed it. Having failed to do so, it cannot now argue that the tariff is void.[10] Even if it were appropriate for Discount to challenge BellSouth's tariff after it has gone into effect, however, the TRA properly rejected Discount's arguments that the tariff is inconsistent with FCC Orders for the reasons explained below.

A. The TRA's Order requiring Discount to fund the $3.50 state Lifeline credit to its eligible end users is consistent with the FCC's resale rules and orders.

As Discount correctly notes, the FCC's rules provide that the "wholesale rate . . . shall equal [BellSouth's] existing retail rate for the telecommunications service, less avoided retail costs." *See* Discount's May 29, 2001 Brief at 6. As noted by Discount, the FCC also has explained that the resale pricing provision of the federal

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[10] To give but one example of the chaos that would result if a party could seek retroactive modification of a published tariff, consider the position espoused by Discount in this very docket. When Discount resells service to an end user who is eligible for Lifeline, BellSouth calculates the wholesale discount in the manner set forth in the TRA's Order in the 1996 arbitration dockets involving BellSouth, AT&T, and MCI. This order is discussed in more detail below. Discount witness Mr. Hickerson, however, claims that this method of calculating the wholesale discount is inconsistent with the FCC's Universal Service Order (which, according to Mr. Hickerson, requires the federal and state credits to be applied to the tariffed service rate before the wholesale discount is applied). BellSouth's witness Ms. O'Bannon, however, demonstrated that the methodology espoused by Mr. Hickerson results in a higher resale rate for Lifeline than the methodology ordered by the TRA in the arbitration order, (R. Vol. XII at 538; Ex. 14), and Mr. Hickerson himself concedes that this is true. (R. Vol. X at 156). Mr. Hickerson also concedes that if BellSouth is required to retroactively provide a $3.50 state Lifeline credit amount to Discount, then absent "some impact that I'm not aware of," Discount should be required to retroactively pay the higher resale rate for Lifeline. (R. Vol. X at 165-66). Implementing such an approach, however, would be unmanageable in this one docket, let alone in all other dockets to which similar reasoning could apply.

Act" gives the end users the benefit of an implicit subsidy in the case of below-cost service, whether the end user is served by [BellSouth] or by a reseller." *Id.* (emphasis added). That is exactly what happens when Discount resells BellSouth's services to Discount's end users who qualify for and request Lifeline support -- Discount's end users receive the benefit of any implicit subsidy in the case of the below-cost residential service those end users receive.

As explained above, BellSouth begins with the below-cost, tariffed rates for the residential service Discount orders from BellSouth for resale to its end user (the $12.15 rate in Memphis, for example). This rate includes any and all subsidies that are implicit in the tariffed rates BellSouth charges its end users for the same service. BellSouth then applies the 16% wholesale discount established by the TRA to this below-cost tariffed rate and charges Discount $10.21 ($12.15 less the 16% wholesale discount) for this service.

What happens next has nothing to do with implicit subsidies. Instead, what happens next is that BellSouth applies an *explicit credit* (as opposed to an implicit subsidy) of $7.00[11] to that discounted rate, and BellSouth receives an *explicit* reimbursement of an equal amount from an *explicit* federal fund. BellSouth, therefore, is made whole when it receives this dollar-for-dollar reimbursement of the

[11] This is the federal Lifeline credit amount.

$7.00 federal Lifeline credit amount from the federal fund, and thus BellSouth is "financially indifferent" to providing that credit to Discount. *See* Discount's May 29, 2001 Brief at 7.

In sharp contrast, if BellSouth also were to apply an *explicit credit* (as opposed to an implicit subsidy) of $3.50[12] to that discounted rate, BellSouth would not receive any reimbursement for that credit because there is no fund from which BellSouth could seek that reimbursement. BellSouth, therefore, is not "financially indifferent" to providing the state Lifeline credit amount to Discount. The TRA, therefore, acted appropriately when it ruled that just as BellSouth is required to fund the $3.50 state Lifeline credit it provides to its end users who are eligible for and request the Lifeline credits, Discount is required to fund the $3.50 state Lifeline credit it provides to its end users who are eligible for and request the Lifeline credits.

B. The FCC's Universal Service Order expressly allows the states to require resellers offering Lifeline credits to fund the $3.50 state Lifeline credit amount to their own end users.

Discount and the CAD suggest that the TRA is prohibited from requiring a reseller like Discount to fund the $3.50 state Lifeline credit amount to its own end users. This suggestion, however, is flatly refuted by the FCC's Universal Service Order, which acknowledges that "many states currently generate their matching funds[13] [for the $3.50 state Lifeline credit amount] through the state rate-regulation

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12 This is the state Lifeline credit amount.

13 As an inducement for the states to provide Lifeline credits, the FCC provides

process." FCC Universal Service Order at ¶ 361. Far from prescribing a specific method of generating matching funds at the state level, the FCC's Universal Service Order notes that "[m]any methods exist, including competitively neutral surcharges on all carriers or the use of general revenues, that would not place the burden on any single group of carriers." *Id.* (emphasis added). The Order then plainly and unambiguously states "[w]e see no reason at this time to intrude in the first instance on the states' decision about how to generate intrastate support for Lifeline. We do not currently prescribe the methods states must use to generate intrastate Lifeline support, nor does this order contain any such prescriptions." *Id.* at ¶ 361 (emphasis added).

The FCC's Universal Service Order, therefore, expressly acknowledges the TRA's authority to develop a method of generating the $3.50 state credit amount. The same Order also acknowledges the TRA's authority to require "all carriers" to fund the state Lifeline credit amount, and it acknowledges the TRA's authority to generate this credit amount in a manner "that would not place the burden on any single group of carriers." Clearly, the TRA's decision that BellSouth is not required to pass through the $3.50 state Lifeline credit to Discount is entirely consistent with the plain language of this FCC Order.

In its brief before the Court, the CAD argues that "a reseller to credit-challenged customers cannot be expected to generate enough profit to fund a

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a higher federal Lifeline credit amount when a state provides Lifeline credits than it does when a state does not provide Lifeline credits. FCC Universal Service Order at

$3.50 credit." *See* CAD's May 29, 2001 Brief at 18. The evidence of record, however, clearly refutes this argument. When providing Lifeline services to its end users, BellSouth takes residential services, applies a $7.00 federal credit for which it is reimbursed through the National Exchange Carrier Association ("NECA"), applies an additional $3.50 state credit for which it is not reimbursed from any source, and provides a service that is already priced below cost at an even lower rate -- $6.15 in the Memphis 1FR with Touchtone example discussed above.

Discount, on the other hand, charges nearly twice that amount -- $12.15 per month -- to its Lifeline end users. (R. Vol. XI at 304). That is Discount's price for basic service. (R. Vol. XI at 262). Touchtone and other features cost extra. (*Id.*). Additionally, during the hearing before the TRA, Discount acknowledged that its Lifeline rate of $12.15 per month for the most rudimentary of local service represents a forty percent markup on the service. (R. Vol. XI at 304). This is, of course, in addition to the markups implicit in the $29.95 it charges Link-Up customers for connection, (R. Vol. XI at 303), the $59.00 it charges its regular residential customers for connection, (R. Vol. XI at 301), the $22.95 per month it charges its regular residential customers for local service, (R. Vol. XI at 301), and the $65 per month it charges its business customers for local service. (R. Vol. XI at 300). Given these rates, Discount clearly is more than capable of funding a $3.50 state Lifeline credit amount to its eligible end users.

¶¶ 352-53.

C. The evidence of record clearly does not support the factual allegation that there is an implicit subsidy in BellSouth's current rate structure that compensates BellSouth for the cost of providing Lifeline service to every eligible customer in BellSouth's territory.

Discount has presented (and the CAD has adopted) an argument regarding an alleged "implicit subsidy" for Lifeline in BellSouth's rates that is rather convoluted at best. First, Discount claims that "there is an 'implicit subsidy' in BellSouth's current rate structure which compensates the carrier for the cost of providing Lifeline to every eligible customer in BellSouth's territory." Discount's Petition for Reconsideration at 8 (emphasis added). Discount then contends that requiring resellers to fund the $3.50 state Lifeline credit amount to their own end users allows BellSouth to collect the alleged "implicit subsidy" twice. *See, e.g.*, Petition at 8. This purported "double recovery," in turn, forms the basis for Discount's allegation that the manner in which the $3.50 state Lifeline credit amount is generated in Tennessee is not competitively neutral. As explained below, however, the TRA correctly determined that the evidence of record does not support this convoluted theory propounded by Discount and adopted by the CAD.

First, no evidence of record supports the assertion that any such subsidy exists. Second, even if such a subsidy did exist, the undisputed evidence of record clearly shows that the purported "subsidy" simply would not compensate BellSouth for the cost of providing the state Lifeline credit amount to its own end users, much less to Discount's end users as well. Finally, even if such a subsidy existed, the Tennessee Telecommunications Reform Act of 1995 requires that any

modifications to current sources of universal service support be addressed in a single *generic* contested case proceeding.

1. The evidence of record shows that there is no "implicit subsidy" in BellSouth's current rates.

The Lifeline program in Tennessee was established by the Public Service Commission pursuant to its December 20, 1991 Order in Docket No. 91-08797. (Tr. Ex. 15).[14] Under the FCC's Universal Service Order that existed at that time, the FCC would approve a federal credit of $3.50 per month to be applied to a Lifeline subscriber's account, but only if the state provided a matching credit of $3.50. (R. Vol. X at 129; R. Vol. XII at 511; Ex. 15 at 1). In Tennessee, the Public Service Commission generated this matching credit of $3.50 by requiring Lifeline customers to "subscribe to the measured rate service with a calling allowance of 65 calls and to incur a charge of $.10 per call in excess of that allowance up to the amount of the flat residential service rate."[15] (R. Vol. X at

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[14] The Public Service Commission Order ("Ex. 15") was admitted as Exhibit 15 during the April 11-13, 2000 hearing, (Tr. Vol. XII at 634-35), and was clearly part of the record of the proceedings below. Exhibit 15 was inadvertently omitted from the record on appeal. BellSouth understands that, while the TRA does not intend to supplement the record to include Exhibit 15, the TRA recognizes that it was part of the record below and has no objection to BellSouth's reference to the Exhibit. A copy of Exhibit 15 is included in BellSouth's Addendum.

[15] This generated a $3.50 credit because the message rate service in effect at the time of the order allowed a customer "to make 30 calls per month for a set rate with each call thereafter at an additional charge. Lifeline participants will be permitted to utilize this same set rate with a call allowance of 65 calls with each additional call being charged at $.10 a call . . . . This service provision will give eligible Lifeline participants a potential benefit of $3.50 per month which should entitle them to the FCC waiver of the interstate SLC ($3.50)." (Tr. Ex. 15 at 3-4). (R. Vol. XII at 129; R. Vol. XII at 511).

129; R. Vol. XII at 511-512; Ex. 15 at 6, ¶6). As Discount's witness Mr. Hickerson conceded, the Public Service Commission's order implementing the Lifeline program does not attempt to calculate the actual negative revenue impact this would have on BellSouth, (R. Vol. X at 89; R. Vol. X at 137-38), and it does not provide for any rate increases to offset this negative revenue impact. (Ex. 15) (R. Vol. XII at 512). Instead, the PSC's order provides that BellSouth "shall recover any revenue deficiency created by this Lifeline service plan from its deferred revenues in accordance with the Regulatory Reform Plan." (Ex. 15 at 6, ¶7) (R. Vol. X at 130; R. Vol. XII at 512).

As Discount's witness Mr. Hickerson noted during the hearing, the Public Service Commission subsequently conducted an investigation into BellSouth's earnings, and on August 20, 1993, the Public Service Commission entered an order in that earnings investigation docket. This order did not mention Lifeline, nor did it allow BellSouth to increase any rates to fund the $3.50 state Lifeline credit amount. Instead, this order required BellSouth to implement rate reductions (R. Vol. XI at 131-32), and it ordered BellSouth to "maintain the deferred revenue account established by the Commission for the period January 1, 1993 through December 31, 1995." Clearly, even after the 1993 earnings investigation, the only means by which BellSouth was allowed to recover revenue deficiencies resulting from the Lifeline program was by drawing a corresponding amount from the deferred revenue account in accordance with the Regulatory Reform Plan. As

explained below, however, that deferred revenue account no longer exists, and when it went out of existence, it had a *deficit* of $7.7 million.

BellSouth opted to operate under the Regulatory Reform Plan "as an alternative to traditional ratemaking procedures." *See* T.R.A. Rule 1220-4-2-.55(1). The term of the Plan was fixed based upon the length of the forecast test period used by the Commission. Under the Commission's rules, for any carrier electing alternative reform regulation, the Commission was required to project the carrier's earnings over a forecast test period of two to four years, "which will be the period of the regulatory reform plan." Rule 1220-4-2-.55(1)(a) (emphasis added). In BellSouth's case, after filing a petition for conditional election of alternative regulation in January 1993, the Commission projected BellSouth's earnings over a three year forecast test period, commencing in 1993 and ending in 1995. *See* August 20, 1993 Order in *In re: Earnings Investigation of South Central Bell Telephone Company,* 1993-1995, Docket No. 92-13527. Thus, consistent with the Commission's rules, BellSouth's regulatory reform plan was only in effect during the period from 1993 through the end of 1995. The plan did not extend beyond that date and certainly is not in place today. Indeed, BellSouth elected not to continue to operate under a regulatory reform plan by virtue of its applying for price regulation on June 20, 1995.

Moreover, the PSC required BellSouth to maintain the deferred revenue account only "for the period January 1, 1993 through December 31, 1995." *See* August 20, 1993 Order, *In re: Earnings Investigation of South Central Bell*

Telephone Company, 1993-1995, Docket No. 92-13527, at page 16. The funds placed in BellSouth's deferred revenue account have long since been dispersed. *See, e.g.,* August 1, 1994 Order, *In re: Earnings Investigation of South Central Bell Telephone Company,* 1993-1995, Docket No. 92-13527. Indeed, in its Order approving BellSouth's price regulation application, the Commission noted that there was "a $7.7 million deficit in the deferred revenue account to pay for rate reductions ordered in 1993." Order, *In re: Application of BellSouth Telecommunications, Inc. d/b/a South Central Bell Telephone Company For a Price Regulation Plan,* Docket No. 95-02614, at 3 (Jan. 23, 1996).

Thus, even to the extent that a purported subsidy for the $3.50 state Lifeline credit amount existed as of June 6, 1995, that subsidy had a negative balance. It could not possibly have provided funds to offset the state Lifeline credit amount. Finally, this purported subsidy ceased to exist altogether at the end of 1995.

2. Even if an "implicit subsidy" ever had existed (which it did not), it clearly did not compensate BellSouth for the cost of providing Lifeline to the 25,782 Lifeline accounts BellSouth had as of March 2000 -- let alone the cost of providing the service to Discount's Lifeline end users.

During the hearings before the TRA, Discount's witness Mr. Hickerson claimed that requiring Discount to fund the $3.50 state credit amount for its own end users is not "competitively neutral." Mr. Hickerson, however, conceded that his claim is based entirely on his position that a subsidy for the state Lifeline credit amount for every Lifeline customer in BellSouth's territory is somehow built into BellSouth's rates. (R. Vol. X at 169). Even if the evidence in the record suggested

that such a subsidy ever did exist (which it does not), the undisputed evidence presented to the TRA shows that the purported "subsidy" simply would not have compensated BellSouth for the cost of providing the state Lifeline credit amount to its own end users, much less to Discount's end users as well.

The record contains absolutely nothing to suggest how many Lifeline customers were anticipated when the former Tennessee Public Service Commission ("PSC") entered its 1991 Order establishing BellSouth's Lifeline program. Accordingly, the record contains absolutely nothing to suggest the actual value of the "implicit subsidy" Discount erroneously claims is in BellSouth's rates. In fact, Discount's counsel and Mr. Hickerson both acknowledge that the PSC's order implementing the Lifeline program does not even attempt to calculate the actual negative revenue impact the program would have on BellSouth. (R. Vol. X at 89; R. Vol. X at 137-38). Discount and the CAD, therefore, presented absolutely no evidence to support their claim that a subsidy for the state Lifeline credit amount for every Lifeline customer in BellSouth's territory is somehow built into BellSouth's rates.

Similarly, the record contains absolutely nothing to suggest how many Lifeline customers were anticipated when the PSC completed its 1993 investigation into BellSouth's earnings. The record does reflect that BellSouth had no Lifeline customers as of the beginning of that 1993 earnings investigation, and it had only 15,641 Lifeline customers as of the date the PSC ordered BellSouth to reduce its rates at the conclusion of the 1993 earnings investigation. (R. Vol. VI at 787-788).

Moreover, as of June 6, 1995, BellSouth had only 12,903 Lifeline customers. (R. Vol. VI at 787-788). These figures are undisputed.

Accordingly, regardless of the date as of which the value of the alleged "implicit subsidy" is calculated, that alleged "implicit subsidy" would fund the provision of a $3.50 state Lifeline credit to no more than 15,641 Lifeline customers. As of March 2000, however, BellSouth had 25,782 of its own Lifeline end-user customers. Clearly, even if it had ever existed, the alleged "implicit subsidy" in BellSouth's rates would have been depleted long before BellSouth provided the $3.50 state Lifeline credit amount to each one of its own Lifeline end users. Moreover, the deferred revenue account -- the source of this alleged subsidy -- no longer exists.

Discount's own witness acknowledges that Discount's attacks on the TRA's decision on the Lifeline issue in this docket are based on its factual allegation that BellSouth is recovering an alleged "implicit subsidy" twice. Nothing in the record, however, supports Discount's factual allegation that BellSouth is recovering this alleged "implicit subsidy" once, much less twice. The TRA, therefore, properly rejected the attacks on BellSouth's tariff that were based on this erroneous "implicit subsidy" argument.

3. The "subsidy" argument presented by Discount and the CAD ignores the fact that the Telecommunications Reform Act of 1995 requires that any modifications to current sources of universal service support be addressed in a single generic contested case proceeding.

The "subsidy" argument also ignores the plain language of the Telecommunications Reform Act of 1995. In the docket below, Discount asked the TRA to modify the manner in which the state Lifeline credits -- which are simply one method of providing universal service support -- are generated in Tennessee. The Telecommunications Reform Act of 1995, however, prohibits Discount from seeking that type of relief in an ordinary contested case docket. Instead, to the extent that Discount wishes to seek such relief, it must do so in the context of the ongoing Universal Service Proceedings before the TRA.

The Telecommunications Reform Act of 1995 directs the TRA to "formulate policies, promulgate rules and issue orders which require all telecommunications service providers to contribute to the support of universal service." T.C.A. §65-5-207(a) (emphasis added). Under this statute, the TRA is to "determine the need and timetable for modifying current universal service support mechanisms and implementing alternative universal service support mechanisms," *id,* §65-5-207(b), and it is required to "create an alternative universal service support mechanism that replaces current sources of universal service support" if it determines that the alternative mechanism will "prevent the unwarranted subsidization of any telecommunications service provider's rates by consumers or by another telecommunications service provider." *Id.*, §65-5-207(c)(emphasis added). Finally,

and most significantly, the TRA is directed to make these decisions in a "generic contested case proceeding," *id.*, §65-5-207(b), not in a docket involving a billing dispute between two service providers. If the TRA is to consider these subsidy arguments at all, therefore, it is required by statute to consider them only in the context of the Universal Service Fund docket.

D. The TRA's ruling in the docket below was not inconsistent with the *Tennessee Cable Television Associate* decision.

In its May 29, 2001 Brief, Discount argues that the TRA's Order is invalid because it "purports to adopt a new state 'policy' in a contested case rather than in a rulemaking proceeding." *See* Brief at 8. This argument, however, is a red herring. As noted above, no party has argued that BellSouth is not following the terms of its Lifeline tariff. Instead, Discount and the CAD argue that BellSouth's Lifeline tariff is inconsistent with federal law. The issue that was presented to the TRA and the issue upon which the TRA ruled, therefore, was plainly and simply whether BellSouth's Lifeline tariff is or is not valid. In deciding this issue, the TRA reviewed the applicable law and determined that BellSouth's tariff -- which was already in effect when Discount filed its Complaint -- was entirely consistent with that law. *See* Order at 14 (finding that BellSouth's existing Lifeline tariff is "valid and enforceable under existing federal and state law"). The TRA clearly was not required to convene a rulemaking proceeding in order to determine whether an existing tariff complies with federal law.

Even if this were not the case, however, the TRA's decision on the Lifeline issue in the docket below would still be perfectly valid. It is difficult to determine whether Discount is arguing that the TRA erred when it made decisions related to Lifeline during the 1996 arbitration proceedings involving BellSouth, AT&T, and MCI,[16] or whether Discount is arguing that the TRA erred in convening a contested case in order to consider and rule on the Complaint Discount itself filed. Either way, however, Discount is wrong.

A contested case proceeding "is the process by which an agency applies either law or policy, or both, to a particular set of facts." *Tennessee Cable Television Ass'n v. Tennessee Pub. Serv. Comm'n*, 844 S.W.2d 151, 161 (Tenn. Ct. App. 1992). That is what happened during the 1996 arbitration proceedings -- the TRA applied a "relatively new statute" to the Lifeline resale issue at a time when it had "not solidified its position concerning an incipient or evolving policy." *See id.* at 162. The TRA obviously considered the decision it rendered in the 1996 arbitration proceedings when it ruled on Discount's Complaint in the docket below.

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[16] The Order the TRA entered in those proceedings provides that if MCI or AT&T resell Lifeline: (1) BellSouth must charge AT&T or MCI the tariffed rate for the local exchange service chosen by the Lifeline customer less the wholesale discount; and (2) AT&T or MCI must further discount this rate by a "discount which is no less than the minimum discount that BellSouth now provides." *See* Second and Final Order of Arbitration Awards in Docket Nos. 96-01152 and 96-01271 at 15-16. (R. Vol. XII at 513-516). Clearly, the "minimum discount that BellSouth now provides" refers to both the federal Lifeline credit amount and the state Lifeline credit amount. Accordingly, the Arbitration Order provides that if AT&T or MCI resell Lifeline, the $3.50 state Lifeline credit amount is the responsibility of AT&T or MCI. During the hearings below, the TRA took official notice of the AT&T/MCI arbitration dockets without objection. (R. Vol. XI at 471-

This is neither novel nor inappropriate. More significantly, the TRA did not merely "rubber stamp" its ruling in the AT&T/MCI proceedings onto Discount's complaint. Instead, the TRA conducted an extensive three-day evidentiary hearing during which it heard testimony from numerous fact and policy witnesses. The TRA carefully considered the evidence presented during those three days, and it ruled that Discount was not entitled to the relief it sought on the basis of that evidence. To the extent Discount suggests that it was inappropriate for the TRA to do so, Discount is confusing precedent with policy.

To the extent that Discount is arguing that the TRA improperly adopted a broad-reaching policy in the docket below, Discount is estopped from doing so for at least two reasons. First, Discount knew that win or lose, the TRA's decision on the Lifeline issue in this docket would have an impact on any other reseller that may wish to provide its end users with Lifeline credits. If Discount was concerned that the TRA's ruling on that issue would establish a broadly-applicable policy, Discount should have petitioned the TRA to convene a rulemaking proceeding to address the issue. Having elected instead to ask the TRA to address the issue by way of a contested case proceeding, Discount cannot now seek to evade an unfavorable decision by claiming that instead of doing what Discount asked it to do, the TRA should have convened a rulemaking proceeding instead.

Second, Discount claimed during the hearing that it is the only reseller in the State of Tennessee that is providing Lifeline credits to its end users. (R. Vol. X at

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72).

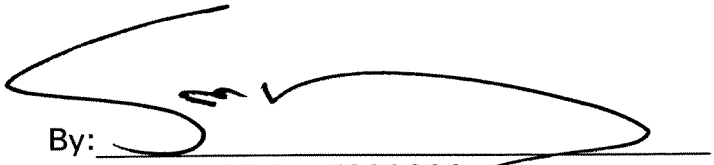
26). Discount cannot, on the one hand, tout itself as the sole reseller of Lifeline in the state and, on the other hand, claim that the TRA's ruling in this docket will somehow "have wide coverage encompassing a large segment of the regulated or general public, rather than an individual or a narrow select group." *See Tennessee Cable Television Ass'n*, 844 S.W.2d at 162.

CONCLUSION

For the reasons set forth above, the Court should affirm the TRA's decision that Discount must fund the $3.50 state Lifeline credit amount for its own end users.

Respectfully submitted,

BELLSOUTH TELECOMMUNICATIONS, INC.



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CERTIFICATE OF SERVICE

I hereby certify that on August 13, 2001, a copy of the foregoing document was served via the method indicated, on

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Attachment C

BEFORE THE TENNESSEE REGULATORY AUTHORITY

NASHVILLE, TENNESSEE

September 28,2000

IN RE:	)	
	)	
COMPLAINT OF DISCOUNT	)	**DOCKET NO. 00-00230**
COMMUNICATIONS, INC.	)	
AGAINST BELLSOUTH	)	
TELECOMMUNICATIONS, INC.	)	

ORDER

This matter comes before the Tennessee Regulatory Authority ("Authority") upon the filing by Discount Communications, Inc. ("Discount") of a formal letter of complaint against BellSouth Telecommunications, Inc. ("BellSouth"). In its letter filed on March 16, 2000, Discount stated that BellSouth had discontinued Discount's access to the LENS system[1] due to a billing dispute. Discount requested a hearing and additionally requested that BellSouth restore access to the LENS system pending a resolution of the dispute.

At a Status Conference immediately following the regularly scheduled Authority Conference held on March 28, 2000, the Directors appointed General Counsel to serve as Pre-Hearing Officer to resolve any pre-hearing disputes, including any failure to comply with the Compromise Agreement entered into by the parties at that Status Conference. At a second Status conference held on April 5, 2000, the Pre-Hearing Officer considered BellSouth's Motion to

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[1] The LENS system allows Discount to place orders for service, verify orders, amend/correct orders, suspend/disconnect non-paying customers, examine local service records, examine customer service records and transfer existing customers.

Compel Disclosure or, in the Alternative, to Find Discount Communications in Violation of the Compromise Agreement, which was filed earlier that day. During the second Status Conference, BellSouth's Motion was denied based upon the agreement of the parties that the law firm of Boult, Cummings, Conners & Berry would act as interim escrow agent for receipt of payments by Discount.

On April 4, 2000, the Consumer Advocate Division of the Office of the Attorney General ("Consumer Advocate") filed a Petition for Information. In its Petition, the Consumer Advocate stated that the requested information was necessary to determine whether intervention by the Consumer Advocate was warranted to represent the interests of Tennessee consumers. On April 11, 2000, the Consumer Advocate filed a Petition to Intervene in this docket. A hearing commenced on this matter on April 11, 2000, and the Consumer Advocate's Petition to Intervene was granted at the beginning of the hearing.

Issues Before the Authority

Discount filed a list of preliminary issues on March 31, 2000 for the Authority's consideration. The issues presented were:

1. Whether BellSouth has properly charged, and may continue to charge, Discount Communications for directory assistance.

2. Whether BellSouth has properly credited Discount Communications for providing service to Lifeline customers and how BellSouth will provide such credits in the future.

3. Whether BellSouth has properly credited Discount Communications for providing service to Link-Up customers and how BellSouth will provide such credits in the future.

4. Whether BellSouth has engaged in a pattern of anti-competitive activity toward Discount Communications, as evidenced by the three matters described above and by other incidents of anti-competitive behavior.

The merits of Issue No. 3 were not considered by the Authority because the parties stated in their prehearing briefs that the Link-Up dispute was presented to the Federal Communications Commission's ("FCC") Staff, and that the issue would not be presented to the Authority until the

FCC had made its ruling.[2] Also, the parties announced at the hearing that the Link-Up issue had been settled with respect to prior amounts in dispute.[3]

With respect to Issue No. 4, Discount alleged that in addition to BellSouth's actions regarding directory assistance, Lifeline and Link-Up, BellSouth had engaged in "other similar, anti-competitive acts," and that evidence regarding these claims would be presented at the hearing.[4] BellSouth moved to strike the anti-competitive activity issue on the ground that Discount is "attempt[ing] to dredge vague and unspecified allegations of 'other incidents of anti-competitive behavior' into an expedited hearing to resolve what very plainly are – and for months have been – billing disputes."[5] At the outset of the hearing, BellSouth's request was held in abeyance.[6] As the hearing proceeded, BellSouth continued to object to the admission of evidence regarding "other acts" of BellSouth that were not directly related to the directory assistance, Lifeline, and Link-Up billing issues.[7] Discount responded that such evidence was necessary to negate the implication that Discount does not pay its bills, and that such evidence addresses the "unspoken" issue of whether Discount had attempted to use the regulatory process to evade paying its bills.[8]

In light of the fact that the parties had elected not to submit pre-filed testimony and since BellSouth could test the trustworthiness of "other acts" evidence on cross-examination, the Chair ruled that the evidence could be admitted and that the Directors could give this evidence due weight and consideration.[9] Discount's counsel acknowledged that issues raised by the "other acts" evidence are not before the Authority in this proceeding, and that Discount is "simply

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[2] Discount Prehearing Brief at 2 and BellSouth Prehearing Reply Brief at 2, FN 1.
[3] Hearing Transcript, Volume II at 185-188.
[4] Discount Prehearing Brief at 10.
[5] BellSouth Response and Motion to Strike at 1, 4-5.
[6] Hearing Transcript, Volume I at 5.
[7] See Hearing Transcript, Volume II at 189, 231, and 244.
[8] Hearing Transcript, Volume II at 232-233.
[9] Hearing Transcript, Volume II at 195 and 232.

asking this agency to rule on the disputed issues of directory assistance and Lifeline."[10] Based on these conclusions, only Issue Nos.1 and 2 were presented to the Authority for consideration.

Positions of the Parties

Issue No. 1

Regarding Issue No. 1, Discount argued that the price of directory assistance is fixed by the resale agreement between Discount and BellSouth. Discount specifically relied upon language in the contract stating that:

> The Wholesale Discount is set as a percentage off tariffed rates. If OLEC [Discount Communications] provides is [sic] own operator services and directory services, the discount shall be 21.56%. These rates are effective as of the Tennessee Regulatory Authority's Order in Tennessee Docket No. 90-01331 [sic] dated January 17, 1997.[11]

Discount's President, Edward Hayes, testified that he interpreted the above quoted language as meaning "that directory assistance is included in the 16 percent that we're already paying for access to directory assistance in the directory usage."[12] Discount maintained that the resale agreement provided them with a choice of wholesale rate discounts. If the 16% discount option was chosen, BellSouth must provide operator services and directory services at no additional cost to Discount. If the 21.56% discount option was chosen, Discount must provide its own operator services and directory services. Discount chose the 16% discount option. Thus Discount accepted the lower discount with the understanding that BellSouth would provide directory assistance service without assessing any additional charges.

Discount also stated that it proposed an option to BellSouth to block access to directory assistance services after six (6) calls, but that BellSouth stated that this option was not feasible.[13]

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[10] Hearing Transcript, Volume II at 287.
[11] Resale Agreement, Exhibit A, Applicable Discounts
[12] Hearing Transcript, Volume II at 250-251.
[13] Hearing Transcript, Volume II at 252.

According to Discount, BellSouth proffered that it could block access to directory assistance and toll services for a $23.50 charge per customer.[14] Discount asserted that the FCC's Lifeline regulations require that Lifeline subscribers be provided with access to directory assistance and toll services and that Discount was continuing to investigate the possibility of a blocking option that would alleviate the billing dispute without violating Lifeline regulations.[15]

Finally, Discount maintained that the LENS system did not provide a method to process waivers for those consumers who are exempt from directory assistance charges.[16] During the Hearing, Discount claimed that it had never charged any of its customers for directory services,[17] but that it had no effective means to escape BellSouth's billing of directory charges for Discount's customers who qualify for free directory services.

Regarding Issue No. 1, BellSouth claimed that the resale agreement required Discount to pay for directory services. Specifically, BellSouth relied upon the contract provision that states:

> The rates pursuant by [sic] which Discount Communications is to purchase resale services from BellSouth for resale shall be at a discount rate off the retail rate for the telecommunications service. The discount rates shall be as set forth in Exhibit A, attached hereto and incorporated herein by this reference. Such discount shall reflect the costs avoided by BellSouth when sell[ing] a service for wholesale purposes.[18]

BellSouth maintained that the 16% discount rate selected by Discount is a set percentage off the tariffed rates as required by federal law and the Authority's Final Order in the avoidable cost proceeding (Docket No. 96-01331). BellSouth also asserted that at the time the resale agreement was executed in March 1998, directory assistance services were classified by the Authority as a non-basic service based on its approval of United Telephone Southeast's directory assistance

[14] Hearing Transcript, Volume II at 253.
[15] Hearing Transcript, Volume II at 253-255.
[16] Hearing Transcript, Volume II at 266-267.
[17] Hearing Transcript, Volume II at 267.
[18] Resale Agreement, Section I.C.

tariff in Docket No. 96-01423. BellSouth averred that, under the terms of the resale agreement, Discount agreed to pay BellSouth the tariffed rate for the directory assistance services being resold less the applicable 16% wholesale discount.

BellSouth maintained that the parties did not intend to include directory assistance when the resale agreement was executed simply by agreeing to the 16% discount rate. In support of its position, BellSouth pointed out that Discount did not initially challenge the directory assistance charges on those contractual grounds, but only requested the blocking of directory assistance services. BellSouth proffered that in spite of the billing dispute regarding directory assistance, Discount entered into another resale agreement with BellSouth in February 2000 containing substantially similar terms with respect to directory assistance services.

In response to Discount's request to block access to directory assistance once the end user's six (6) call allowance has been made, BellSouth stated that it does not currently provide this blocking option. Additionally, BellSouth maintained that there was an application process for directory assistance exemptions. Discount asserted that it had not received any information about such a process from its BellSouth account team.[19]

Issue No. 2

Lifeline subscribers in Tennessee are eligible for a maximum of $10.50 in assistance, which consists of a $7.00 federal credit funded through National Exchange Carrier Association ('NECA"),[20] and a matching $3.50 state credit funded by the intrastate carrier. Currently, BellSouth passes through the $7.00 federal credit to Discount, but does not pass through the $3.50 state credit. Thus, the amount in Lifeline credit in dispute involves only the $3.50 state credit.

[19] Hearing Transcript, Volume II at 314.
[20] NECA is an organization created by the FCC to administer the FCC's access charge plan.

Discount claimed that the Federal Telecommunications Act,[21] FCC rules,[22] and FCC orders[23] require BellSouth to pass through both the federal and state Lifeline credits. According to Discount, these federal authorities mandate that BellSouth resell its local service for Lifeline customers at the same rate that BellSouth charges its own Lifeline customers, less avoidable costs. Discount takes the position that Lifeline service is a retail telecommunications service offering that is subject to federal resale obligations. Under Discount's theory and methodology, BellSouth must reduce the base rate for local service by both the federal and state credit to obtain the retail rate for Lifeline service, which would then be resold at the 16% wholesale discount.[24]

Discount also asserted that BellSouth's reselling of Lifeline service was not competitively neutral if the state Lifeline credit is not deducted.[25] To demonstrate this point, Discount proffered that BellSouth charges its own end users $6.15 for Lifeline service (access line, touch-tone, and SLC), but it charges $7.55 for Lifeline service that is resold to Discount.[26] Thus, Discount claimed that BellSouth's current practice was unjust since it "retains" the state Lifeline credit. To support its position, Discount argued that the rates that were set in the 1993 BellSouth earnings review included an implicit subsidy for Lifeline support.[27] Discount further maintains that the implicit subsidy is included today's rates because the rates set in 1993 were

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[21] 47 U.S.C. § 251(c)(4) provides: [Each incumbent local exchange carrier has] the duty to offer for resale at wholesale rates any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carrier.

[22] 47 C.F.R. § 51.607 provides: The wholesale rate that an incumbent LEC may charge for a telecommunications service provided for resale to other telecommunications carriers shall equal the incumbent LEC's existing retail rate for the telecommunications service, less avoided retail costs, as described in § 51.609.

[23] FCC 97-157, Universal Service Order, paragraph 370, provides: We further observe that, contrary to the fears of some commenters, a large class of carriers will not be eligible to receive universal service support - those providing service purely by reselling another carrier's services purchased on a wholesale basis pursuant to section 251(c)(4) – will nevertheless be able to offer Lifeline service. The *Local Competition Order* provides that all retail services, including below-cost and residential services, are subject to wholesale rate obligations under section 251(c)(4). Resellers therefore could obtain Lifeline service at wholesale rates that include the Lifeline support amounts and can pass these discounts through to qualifying low-income consumers. We are hopeful that states will take the steps required to ensure that low-income consumers can receive Lifeline service from resellers. (Citations omitted.)

[24] Hearing Transcript, Volume I at 140-143.

[25] Hearing Transcript, Volume I at 144.

[26] See Hearing Exhibit No. 10.

[27] Hearing Transcript, Volume I at 139.

the same rates in effect June 6, 1995, and that under BellSouth's price regulation plan, these rates have continued to remain in effect.[28] Since today's rates include an implicit subsidy to fund the state's Lifeline program, Discount asserted that BellSouth unfairly benefits when it resells Lifeline service because BellSouth does not pass through the state credit amount. Discount maintained that BellSouth collects the $3.50 state credit amount twice – once from Discount, because the state Lifeline credit is not flowed through, and once again through an implicit subsidy built into its current rates. Therefore, Discount concluded that the BellSouth Lifeline tariff is not competitively neutral.

Regarding Issue No. 2, BellSouth claimed that the federal authorities referred to by Discount do not require any specific treatment of the state Lifeline credit when Lifeline services are resold. BellSouth cited Paragraph 361 of the FCC's Universal Service Order (FCC 97-157), which states:

> The Joint Board observed that many states currently generate their matching funds through the state-regulation process. These states allow incumbent LECs to recover the revenue the carriers lose from charging Lifeline customers less by charging other subscribers more. Florida PSC points out that this method of generating Lifeline support from the intrastate jurisdiction would result in some carriers (i.e., ILECs) bearing an unreasonable share of the program's costs. We see no reason at this time to intrude in the first instance on states' decisions about how to generate intrastate support for Lifeline. We do not currently prescribe the methods states must use to generate intrastate Lifeline support, nor does this Order contain any such prescriptions. Many methods exist, including competitively neutral surcharges on all carriers or the use of general revenues, that would not place the burden on any single group of carriers. We note, however, that states must meet the requirements of section 254(e) in providing equitable and non-discriminatory support for state universal service support mechanisms. (Citations omitted.)

[28] Hearing Transcript, Volume I at 139.

BellSouth asserted that the controlling authority on the treatment of state Lifeline credits for resellers is the Authority's First Order of Arbitration Awards in the BellSouth/AT&T and BellSouth/MCI arbitration proceedings, Docket Nos. 96-01152 and 96-01271, respectively. Specifically, BellSouth claimed that paragraph 9.c.[29] of that Order requires resellers to provide a state credit to its Lifeline customers that is at least equal to the state credit that BellSouth provides to its Lifeline customers.[30] BellSouth also claimed that paragraph 9.g.[31] initially required resellers to seek the federal Lifeline credit from NECA. However, BellSouth subsequently changed its Lifeline tariff to provide for the flow through of the federal Lifeline credit to resellers when the Authority informed BellSouth that the procedure set out in paragraph 9.g. was inconsistent with the FCC's Universal Service Order, issued approximately six months after the Authority's arbitration order was entered.[32] According to BellSouth, the current Lifeline tariff, as amended, cured any inconsistency between federal and state requirements for resale of Lifeline service.

Findings of Fact and Conclusions of Law

At a regularly scheduled Authority Conference held on June 6, 2000, the Directors heard oral argument from the parties in this matter. Following oral argument, the Directors deliberated and announced their decisions regarding Issue Nos. 1 and 2.

On Issue No. 1, the Directors determined, based upon the record in this matter, that pursuant to the resale agreement between BellSouth and Discount, that BellSouth was obligated to provide Discount with directory assistance access and usage at no additional charge during the

[29] Paragraph 9.c. provides: 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.
[30] Hearing Transcript, Volume III at 514.
[31] Paragraph 9.g. provides: AT&T and MCI are responsible for recovering the Subscriber Line Charge from the National Exchange Carriers Association's interstate toll settlement pool, just as BellSouth does today.
[32] Hearing Transcript, Volume III at 515-516.

term of the agreement. The Directors concluded that the resale agreement contained two (2) discount rate options – 16% or 21.56% – established by previous Orders of the Authority.[33] Based upon the Authority's Order in Docket Nos. 96-01152 and 96-01271, the costs of directory access and usage are totally avoided in the 21.56% rate.[34] Further, the Directors determined that under the 16% discount rate option, BellSouth was obligated to provide access to and usage of directory assistance service. The prospect of BellSouth providing these services served as an inducement for resellers to choose the lesser discount.

Additionally, the Directors determined that prior charges for directory assistance by BellSouth were improper under the terms of the resale agreement, and that BellSouth should refrain from billing Discount for directory assistance services for the remaining term of the resale agreement. Further, the Directors determined that BellSouth should immediately credit Discount's account for all prior directory assistance charges. The Directors voted unanimously that BellSouth should provide directory assistance access and usage for the remaining term of the parties' resale agreement at no additional costs to Discount.[35]

Regarding Issue No. 2, a majority of the Directors determined that BellSouth's existing Lifeline tariff was valid and enforceable under existing federal and state law and that BellSouth was not required to pass through the state Lifeline credit to Discount. In making this determination, a majority of the Directors considered the compliance of BellSouth's Lifeline tariff with the Authority's orders, FCC orders and the federal Telecommunications Act of 1996.

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[33] The 16% discount rate was established by the Authority's avoidable cost proceeding in Docket No. 96-01331. The 21.56% discount rate was established in arbitration proceedings between BellSouth and AT&T (Docket No. 96-01152) and BellSouth and MCI (Docket No. 96-01271).

[34] Specifically, the language in the Order for these dockets state, "[T]he Arbitrators also decided to set an additional discount rate for BellSouth retail services of twenty-one and fifty-six one hundredths percent (21.56%) when operator services and directory assistance are not bundled." First Order of Arbitration Awards, Docket Nos. 96-01152 and 96-01271 at 33.

[35] Director Greer stated that his decision regarding the directory assistance issue was applicable to this case only and that his decisions regarding such issues would be evaluated on a case by case basis.

In determining whether BellSouth properly credited Discount for service to Lifeline customers under state law, the Directors considered previous orders of the Authority applicable to this docket. Although, pursuant to Tenn. Code Ann. § 65-5-208, Lifeline is categorized as a basic local exchange telephone service of incumbents who apply for price regulation under § 65-5-209, a majority of the Directors concluded that the *First Order of Arbitration Awards* in the BellSouth/AT&T and BellSouth/MCI arbitration proceedings unanimously recognized that Lifeline essentially is an assistance program designed to subsidize the local telephone service of eligible, lower-income consumers.[36] In the *First Order of Arbitration Awards*, the Authority required the resale operations of "AT&T and MCI [to] 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 [i.e., the state credit amount]."[37] The Directors concluded that this earlier unanimous arbitration decision signaled the Authority's intent that resellers are subject to the general Lifeline policy requiring each carrier to establish its own Lifeline assistance program. The majority also recognized then, as it does now, that this conclusion has the effect of requiring the retail rate of Lifeline to be determined on a *pre-subsidy* basis for resale purposes. Thus, it is the policy of this state that each individual reseller fully fund the state portion of the Lifeline assistance program from the reseller's internal sources. The Directors further recognized, however, that this policy is an interim one. In the *Interim Order on Phase I of Universal Service*, the Authority found that the state subsidy portion of Lifeline service shall be funded from the intrastate Universal Service Fund once the fund is established and becomes operational.[38]

Pursuant to the language contained in BellSouth's Lifeline tariff, "The non-discounted federal Lifeline credit amount will be passed along to resellers ordering local service at the

[36] Lifeline subsidies are funded from both state and federal sources.
[37] See Paragraph 9.c of First Order of Arbitration Awards, Docket Nos. 96-01152 and 96-01271.
[38] See page 43 of Interim Order on Phase I of Universal Service, Docket No. 97-00888.

prescribed resale discount from this Tariff, for their eligible end users. The additional credit to the end user [i.e., the state credit] will be the responsibility of the reseller."[39] Based on the language contained in BellSouth's tariff, a majority of the Directors determined that BellSouth's tariff complied with the policy and procedures established in the Authority's *First Order of Arbitration Awards.*

A majority of the Directors also determined that BellSouth correctly applied its Lifeline tariff according to federal law. Under the Universal Service Order, the FCC did not dictate the methods by which states should administer the state portion of the Lifeline credit.[40] Additionally, under Paragraph 370 of the FCC's Universal Service Order, the federal portion of the Lifeline subsidy should be flowed through to resellers of Lifeline service. BellSouth's resale agreement with Discount provides that "federal baseline support of $5.25 is available for each Lifeline service and is passed through to the subscriber. An additional $3.50 state 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 the credit will not exceed the charge for local service."[41] Pursuant to the language of the parties' resale agreement, Discount should provide its customers a discount that is not less than the discount provided by BellSouth, which is $3.50. Additionally, the resale agreement required Discount to provide the state Lifeline credit to its customers.

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[39] BellSouth's Lifeline tariff, GSST A3.31.2.A.8.

[40] FCC 97-157, Paragraph 361, provides in pertinent part: We do not currently prescribe the methods states must use to generate intrastate Lifeline support, nor does this Order contain any such prescriptions. Many methods exist, including competitively neutral surcharges on all carriers or the use of general revenues that would not place the burden on any single group of carriers. We note, however, that states must meet the requirements of Section 254(c) in providing equitable and non-discriminatory support for state universal service support mechanisms. (Citations omitted).

[41] Resale Agreement, Section 1 C. Description of Service.

Based upon the language of the FCC's Universal Service Order and BellSouth's resale agreement, a majority of the Directors concluded that BellSouth's Lifeline tariff was valid and enforceable under current federal and state law and that BellSouth was correctly applying its Lifeline tariff. The majority further concluded 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.

With respect to the Authority's *interim* policy, as discussed above, of requiring resellers to fund the state subsidy portion of Lifeline from internal sources, a majority of the Directors determined that Discount offered no compelling arguments, in this instance, that would necessitate the Authority's premature departure from its carefully considered interim policy. Therefore, a majority of the Directors concluded that BellSouth was not required to flow through the disputed $3.50 state credit to Discount, but instead that Discount should provide the $3.50 state Lifeline portion to its customers.

At the conclusion of the deliberations on these two (2) issues, the Directors expressed concern regarding BellSouth's charges to Discount for E911 service and number portability as well as Discount's charges to Lifeline customers for these services. A majority of the Directors determined that the Consumer Services Division should conduct an investigation of these charges by BellSouth and Discount, and submit a report of the findings to the Authority within sixty (60) days.

IT IS THEREFORE ORDERED THAT:

1. BellSouth Telecommunications, Inc. should provide Discount Communications, Inc. with directory assistance access and usage during the term of the parties' resale agreement at no additional charge;

2. BellSouth shall immediately credit Discount's account for all directory assistance charges assessed prior to the date of the Authority's decision;

3. BellSouth shall not be required to pass through the $3.50 state Lifeline credit to Discount because BellSouth's existing Lifeline tariff correctly implements Tennessee's interim policy and is valid and enforceable under existing federal and state law;

4. The Consumer Services Division shall conduct an investigation of the charges from BellSouth to Discount for E911 service and number portability, and the charges from Discount to Lifeline customers for E911 service and number portability. A report of the findings of this investigation shall be submitted to the Authority within sixty (60) days of this decision;

5. Any party aggrieved by the Authority's decision in this matter may file a Petition for Reconsideration with the Authority within fifteen (15) days from the date of this Order; and

6. Any party aggrieved with the Authority's decision in this matter has the right of judicial review by filing a Petition for Review in the Tennessee Court of Appeals, Middle Section, within sixty (60) days from the date of this Order.

Melvin J. Malone, Chairman

H. Lynn Greer, Jr., Director

***

Sara Kyle, Director

ATTEST:

K. David Waddell, Executive Secretary

*** Director Kyle voted with the majority regarding the directory assistance issue (Issue No. 1), but she did not vote with the majority regarding the Lifeline issue (Issue No. 2). Also, Director Kyle did not vote to initiate an investigation by the Consumer Services Division. Specifically, regarding an investigation of charges for E911 service and number portability, Director Kyle stated, "I just think it's the wrong course to take. I think if we're going to get into this we might as well just cut to the chase and get regulations laid out for Lifeline subsidies..." (June 6, 2000 Authority Conference, Transcript pg. 88.)

Attachment D

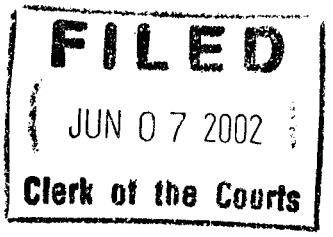
IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
January 7, 2002 Session

DISCOUNT COMMUNICATIONS, INC. v. BELLSOUTH TELECOMMUNICATIONS, INC.

Tennessee Regulatory Authority
No. 00-00230

No. M2000-02924-COA-R12-CV

JUDGMENT



This cause came on to be heard upon the record on appeal from the Tennessee Regulatory Authority, briefs and argument of counsel; upon consideration whereof, this Court is of the opinion that in the judgment of the trial court there is no reversible error.

In accordance with the opinion of the Court filed herein, it is, therefore, ordered and adjudged by this Court that the judgment of the trial court is affirmed. The cause is remanded to the Tennessee Regulatory Commission for the execution of the judgment of that court and for the collection of costs accrued below.

Tax the costs on appeal equally to Discount Communications, Inc. and BellSouth Telecommunications, Inc., for which execution may issue if necessary.

☒ State Specific
Copy to:
☒ Spalding ☐
☐
Scan to: ☐ Smith

Notified of Scan/Faxed:
☐ /☐ Lackey ☐ /☐ Carver
☐ /☐ Twomey ☐ /☐ Edenfield
☒ /☐ Turner ☐ /☐
Other: Phillips

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
January 7, 2002 Session

DISCOUNT COMMUNICATIONS, INC. v. BELLSOUTH TELECOMMUNICATIONS, INC.

Appeal from the Tennessee Regulatory Authority
No. 00-00230 Melvin J. Malone, Chairman

No. M2000-02924-COA-R12-CV

Discount Communications, Inc. purchases telephone services from BellSouth Telecommunications, Inc. and resells the services at an increased rate to Discount's own residential and commercial customers. Some of Discount's customers qualify for a Federal Communication Commission program called Lifeline, which provides telephone services at a reduced rate through federal and state subsidies. BellSouth and Discount got into a dispute about whether their agreement required BellSouth (1) to provide directory assistance to Discount's customers and (2) to pass the $3.50 per month state subsidy through to Discount. The Tennessee Regulatory Authority decided that the agreement required BellSouth to provide directory assistance at no charge to Discount's customers and that BellSouth was not required to forward the $3.50 monthly charge to Discount. We affirm.

Tenn. R. App. P. 12 Appeal as of Right; Judgment of the Tennessee Regulatory Commission Affirmed and Remanded

BEN H. CANTRELL, P.J., M.S., delivered the opinion of the court, in which WILLIAM B. CAIN, J. and JANE W. WHEATCRAFT, SP. J., joined.

Henry Walker, Nashville, Tennessee, for the appellant, Discount Communications, Inc.

Paul G. Summers, Attorney General and Reporter; Michael E. Moore, Solicitor General; and Vance L. Broemel, Assistant Attorney General, for the appellant, State of Tennessee.

Guy M. Hicks and Patrick W. Turner, Nashville, Tennessee, for the appellant and appellee, BellSouth Telecommunications, Inc.

Jonathan N. Wike and Gary R. Hotvedt, Nashville, Tennessee, for the appellee, Tennessee Regulatory Authority.

OPINION

I.

The Federal Communications Act of 1996 requires local exchange carriers like BellSouth Communications, Inc. ("BellSouth") to sell its services at wholesale rates to subscribers, who may resell the services to their own customers. *See* 47 U.S.C. § 251(c)(4). In the absence of an agreement about the wholesale price for services, the Tennessee Regulatory Authority ("TRA") sets the wholesale rate at the regular retail rate less any marketing, billing, collection, and other costs that will be avoided by BellSouth, (the "avoided costs"). *See* 47 U.S.C. § 252(d)(3). In a prior proceeding the TRA set the wholesale rate at 16% off the regular retail rate. In another proceeding, involving resellers that provide their own directory assistance, the TRA set the discount at 21.56%.

Lifeline is a federally certified program designed to make telephone service more affordable for low income households. The federal government provides a subsidy of $7.00 a month for eligible consumers and the TRA requires each carrier in Tennessee to give a $3.50 credit as a state subsidy. It appears that ultimately the TRA intends to fund the state subsidy with a Universal Service Fund accumulated from surcharges on all carriers, but as of the date of the order below, the state portion of the total subsidy was exacted from the local carrier.

In 1998 Discount Communications, Inc. ("Discount") and BellSouth entered into a resale agreement. By March of 2000 the parties had reached an impasse on two important points: (1) Did the rate Discount pay include BellSouth's directory assistance services; and (2) Did the agreement require BellSouth to give Discount the $3.50 state subsidy. Pursuant to a provision in the contract, Discount filed a formal complaint before the TRA to resolve the dispute. The TRA ruled with Discount on the first question and against it on the second.

II.
STANDARD OF REVIEW

When reviewing a decision of the TRA, this court must follow the standard of review set out in Tenn. Code Ann. § 4-5-322(h):

> The [reviewing] court may affirm the decision of the agency or remand for further proceedings. The court may reverse or modify the decision if the rights of the petitioner have been prejudiced because the administrative findings, inferences, conclusions or decisions are:
>
> (1) In violation of constitutional or statutory provisions;
> (2) In excess of the statutory authority of the agency;
> (3) Made upon unlawful procedure;
> (4) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion; or

(5) Unsupported by evidence which is both substantial and material in the light of the entire record.

Our Supreme Court has held that an agency's findings "may not be reversed or modified unless arbitrary or capricious or characterized by an abuse, or clearly unwarranted exercise, of discretion and must stand if supported by substantial and material evidence." *CF Industries v. Tennessee Pub. Serv. Comm'n*, 599 S.W.2d 536, 540 (Tenn. 1980).

The interpretation of a statute, however, and the application of the law to the facts is a question of law to be decided by the court. *Sanifill v. Tennessee Solid Waste Disposal Control Board*, 907 S.W.2d 807 (Tenn. 1995). The interpretation of a written agreement is also a question of law that merits a de novo review on appeal. *Guiliano v. Cleo, Inc.*, 995 S.W.2d 88 (Tenn. 1999).

III. DIRECTORY ASSISTANCE

The Resale Agreement entered into by BellSouth and Discount provided that the services available for purchase by Discount would be charged according to a "Schedule A" attached to the agreement. Schedule A called for a 16% discount off the retail rate. A footnote to the schedule, however, reads as follows:

> The Wholesale Discount is set as a percentage off the tariffed rates. If OLEC (Discount) provides is (sic) own operator services and directory services, the discount shall be 21.56%.

BellSouth argues that another section of the agreement, interpreted with the ongoing proceedings before the TRA in mind, clearly shows that the parties agreed that Discount should pay for directory assistance. The section referred to is section I.C and it provides:

> The rates pursuant by which Discount Communications is to purchase services from BellSouth for resale shall be at a discount rate off of the retail rate for the telecommunications service. The discount rates shall be as set forth in Exhibit A, attached hereto and incorporated herein by this reference. Such discount shall reflect the costs avoided by BellSouth when selling a service for wholesale purposes.

BellSouth's argument is that the agreement plainly states that Discount shall pay for the services it purchases from BellSouth at a certain percentage off the retail rate. Since directory assistance was not part of the basic service under the price regulation statutes, it was an extra that could be purchased at the discounted rate.

The TRA, however, concluded that the agreement contained two discount rate options, one with directory assistance (16%), and one without it (21.56%). Since Discount was paying the basic rate less 16%, it was in fact entitled to directory assistance.

We agree with that interpretation of the contract. The discount percentages set out in the agreement were set in prior proceedings before the TRA. The 16% discount reflected the TRA's calculation of the costs avoided when BellSouth did not have to engage in marketing, billing, or collection because they were selling services at wholesale. In other proceedings involving AT&T and MCI the TRA concluded that BellSouth avoided 21.56% of its costs when directory assistance was unbundled from the basic services. Therefore the TRA's interpretation seems like the only logical one to be deduced from the facts.

BellSouth also argues that under price regulation they were allowed to set such rates as they deemed appropriate. *See* Tenn. Code Ann. § 65-5-208(a). Therefore, they argue that they could increase the rates for directory assistance without seeking any approval from the TRA. What they say is undoubtedly true, but any increase in the charge for directory assistance would simply be added to the cost of the whole bundle of services and the new total would then be discounted by 16%.

IV. LIFELINE

The TRA reviewed the history of the Lifeline program, including its former proceedings involving resellers of telephone services, and concluded that the authority had consistently placed the burden of providing the state portion of the Lifeline subsidy on each individual reseller. The TRA found that that policy complied with state and federal law and was consistent with BellSouth's Lifeline tariff.

Discount argues that the TRA decision violates the clear federal mandate that telecommunications services be offered for resale at "wholesale rates"; i.e., retail rates charged to BellSouth's Lifeline subscribers less the avoided costs. *See* 47 U.S.C. § 251 (c)(4)(A); 47 U.S.C. §252(d)(3). Since BellSouth gives its Lifeline customers the $3.50 credit, they must be required to give the same credit to Discount.

We think, however, that the policy expressed in the federal acts is addressed in the 1997 Federal Communication Commission's ("FCC") Universal Service Order. In that order the FCC required certain companies (including BellSouth) to pass through to its reseller customers the federal portion of the Lifeline subsidy. BellSouth has complied with that directive. With respect to the state portion of the subsidy (if the state chose to participate) the order says:

> We see no reason at this time to intrude in the first instance on states' decisions about how to generate intrastate support for Lifeline. We do not currently prescribe the methods states must use to generate intrastate Lifeline support, nor does this Order contain any such prescriptions. Many methods exist, including competitively neutral surcharges on all carriers or the use of general revenues, that would not place the burden on any single group of carriers. We note, however, that states must meet the requirements of section 254(e) in providing equitable and non-discriminatory support for state universal service support mechanisms.

Universal Service Order § 361. Another paragraph of the order states "we are hopeful that states will take the steps required to ensure that low-income consumers can receive Lifeline service from resellers." *Id.* at § 370. We conclude that the FCC interpreted the federal law as allowing the states to determine how the state portion of the Lifeline subsidy will be generated. We defer to the expertise of the FCC in interpreting its governing statutes. *CF Industries v. Tennessee Pub. Serv. Comm'n*, 599 S.W.2d 536 (Tenn. 1980). Therefore, the TRA is free to continue its policy of placing the burden of the state subsidy on the carriers that sell the services to the Lifeline customers.

We affirm the order of the Tennessee Regulatory Authority and remand this cause for any further proceedings necessary. Tax the costs on appeal equally to Discount Communications, Inc. and BellSouth Telecommunications, Inc.

Ben H. Cantrell

BEN H. CANTRELL, PRESIDING JUDGE, M.S.