BEFORE THE TENNESSEE REGULATORY AUTHORITY

NASHVILLE, TENNESSEE

IN RE:	)	
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EXAMINATION OF ISSUES SURROUNDING BELLSOUTH TELECOMMUNICATIONS, INC. D/B/A AT&T TENNESSEE'S NOTICE OF JUNE 28, 2011 CONCERNING BLC MANAGEMENT, LLC D/B/A ANGLES COMMUNICATION SOLUTIONS, DPI TELECONNECT, LLC, GANOCO, INC., D/B/A AMERICAN DIAL TONE, IMAGE ACCESS, INC. D/B/A NEWPHONE, AND ONETONE TELECOM, INC.	)	**DOCKET NO. 11-00109**

REPLY BRIEF

I. May a Reseller ask the TRA to revisit its eleven-year-old "interim policy" on the $3.50 Lifeline subsidy on the grounds that the policy is not consistent with federal law?

If the answer to the question is "Yes"—as it must be—then the Resellers are entitled to raise the $3.50 Lifeline issue as a "billing dispute" under the parties' interconnection agreement.

AT&T, however, seems to believe that the answer to the question is "No." Without saying so directly, AT&T implies that even if the TRA decides that the agency's current policy is inconsistent with the federal law, the TRA cannot change the policy and resolve these disputes in favor of the Resellers because the policy is incorporated in AT&T's tariffs which are referenced in the parties' interconnection contracts. That is the heart of AT&T's position in this case.

The fact that the current TRA policy is incorporated in AT&T's state tariffs is immaterial. State tariffs cannot override federal law; otherwise, AT&T could "prevail" on any debate over the meaning of a federal rule by incorporating AT&T's interpretation of the law into a state tariff. When a state tariff conflicts with the federal statutory law or the rules of a federal agency, federal

law prevails. *See, Public Utilities Commission of California v. United States*, 78 S.Ct. 446 (1958) (holding that federal agency regulations preempt state tariffs). [1] If, for example, requiring a reseller to pay the $3.50 Lifeline subsidy is inconsistent with Section 254(f) of the Federal Telecom Act, AT&T cannot escape the requirements of the statute because of language in a tariff. Here, the Resellers contend that the FCC's rules and orders implementing Section 254(f) require that, in the absence of a neutral funding mechanism, AT&T must pass on to the Resellers the $3.50 subsidy. If the Authority agrees, it can simply direct that AT&T's tariff be changed. [2]

This argument that a state tariff can trump federal law was also raised by AT&T (then, BellSouth) when the Lifeline issue was litigated eleven years ago. *See* Docket No. 00-00230, Brief of BellSouth filed April 5, 2000 at pp. 15-16, Brief of BellSouth filed May 12, 2000 at pp. 12-18. The tariff required then, as now, that a reseller must pay the $3.50 state subsidy. Both

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[1] This issue was briefed by the Attorney General's office in the "Discount" case. See Docekt 00-00230, brief of Consumer Advocate filed May 12, 2000, at 7-8.

[2] The TRA has the same jurisdiction to amend a contract that the Authority has to amend a tariff. In *New River Lumber Co. v. Tennessee Railway Co.*, 145 Tenn. 266, (1921), the Tennessee Supreme Court made clear that a contract rate is no different from a tariffed rate, that both are subject to the agency 's supervision and control, and that a contract, once approved, may be thereafter changed by the agency as circumstances warrant. *Id.* at 288.

Similarly, the United States Supreme Court has ruled repeatedly that states may exercise control over regulated industries without violating the Contracts Clause of the Constitution, even when such state action impairs private contracts. In the context of a heavily regulated industry, the Court has clearly established that state impairment of contracts, when in the exercise of the public interest, does not violate the Contracts Clause:

> It is the settled law of this court that the interdiction of statutes impairing the obligation of contracts does not prevent the state from exercising such powers as are vested in it for the promotion of the common weal, or are necessary for the general good of the public, though contracts previously entered into between individuals may thereby be affected. This power, which, in its various ramifications, is known as the police power, is an exercise of the sovereign right of the government to protect the lives, health, morals, comfort, and general welfare of the people, and is paramount to any rights under contracts between individuals.

Home Building & Loan Ass'n. v. Blaisdell, 290 U.S. 398, 437, 78 L. Ed. 413 (1934), quoting *Manigault v. Springs*, 199 U.S. 473, 480, 26 S. Ct. 127, 130. *See also*, *Midland Realty Co. v. Kansas City Power & Light Co.*, 300 U.S. 109, 113 (1937). These Supreme Court cases are consistent with the *New River Lumber* decision.

the TRA and the Court of Appeals treated the Lifeline subsidy dispute as a question of agency policy, not a legal issue. Neither the TRA nor the Court addressed BellSouth's claim that the company's tariff predetermined the agency's decision. By implication, both the agency and the Court concluded that BellSouth's tariff argument did not resolve the issue or even merit discussion. There is no serious argument that AT&T can evade its universal service obligation by filing an intrastate tariff.

II. May the TRA change its interim policy and resolve these billing disputes in favor of the Resellers?

AT&T's also contends that because the Lifeline subsidy issue in Tennessee was addressed eleven years ago, the TRA's decision is the "law" in Tennessee and "remains effective ... unless and until ... the Authority takes action to change the law on a prospective basis." AT&T Brief, at p. 9.

No one disputes that the TRA's "interim policy" established in the *Discount* case is "the law" in Tennessee until such time as the Authority orders otherwise. That is not the issue. The issue in this case is whether the Resellers have the right under their interconnection agreements to ask the TRA to revisit that policy and change it.

The TRA "is free to reverse course if public policy demands it." *United Cities v. Tennessee Public Service Commission*, 709 S.W. 2d 256 (Tenn. 1990). There is no question that the agency is free to change its mind, especially where, as here, the agency's policy was never intended to be permanent. As previously discussed in the Reseller's main brief, the TRA's decision in the *Discount* case was made in anticipation of the adoption of a state universal service fund from which all carriers would draw the $3.50 subsidy amount. The two Directors who adopted the "interim policy" presumably understood that requiring a reseller to pay $3.50 from its own funds for each Lifeline customer was not competitively neutral nor would it

encourage carriers to offer Lifeline service. Had the Directors believed at the time that no universal service fund would be created, it seems likely that they would have agreed with Chairman Kyle and ordered BellSouth to pass through the $3.50 state subsidy to resellers through a reduced wholesale price, as described by the FCC in paragraph 370 of the Universal Service Order. *See* TRA Docket 00-00230, Order at footnote 23.

AT&T argues that even if the TRA changed its Lifeline policy, the agency may only do so on a prospective basis. As discussed in the Resellers' initial brief, a change in the TRA's policy would apply only to pending billing disputes that have been preserved, pursuant to the terms of the parties' interconnection agreements, pending a decision by the agency. The decision would not apply to Lifeline charges which were not disputed. Under the parties' contract, a charge must be disputed at the time it is made or it is waived. This case only affects pending disputes that have been properly documented and preserved for resolution by the agency.

III. If the Resellers' interconnection agreements allow them to raise the Lifeline subsidy issue as a billing dispute without requiring a bond or payment into an escrow account, may the TRA require the Resellers to post a bond or pay money into an escrow account in order to obtain a ruling from the TRA?

Over the objections of the Resellers, the Hearing Officer agreed to allow AT&T to "suspend" service to a Reseller unless the Reseller could post a bond of 60% of the amount of the Lifeline subsidy issue claimed by AT&T. [3]

The TRA has no power to impose such a requirement and, even if it did, a bond is not appropriate unless a "judgment" has been entered ordering the Resellers to pay a certain amount. At this time, not only is there no "judgment," there is not even a case pending to obtain a judgment on the merits of the Lifeline issue.

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[3] There are no facts in the record, not even an affidavit, to support the amounts claimed by AT&T or the amount of the bond requirement.

Under Tennessee law, the purpose of a bond is to "protect the appellee" from the risks of delay in enforcement of a judgment. *Holmes v. U.S. Fidelity*, 844 S.W.2d 632, 635 (Tenn. Ct. App. 1992). The particular requirements of a bond are determined by the statutes or court rules (*see* T.R.C.P. 62) which authorize the court to require a bond. *Id.*, at 634.

There is no statute or TRA rule which authorizes the Authority to require a carrier to post a bond as a condition for seeking relief from the agency. The TRA does, however, have the power to interpret and enforce interconnection agreements. Some of those agreements require that a carrier disputing a bill must first deposit the disputed charge into an escrow account pending a resolution of the dispute. In this case, however, the interconnection agreements do not require the disputing carrier to pay the bill or place the money in an escrow account. By requiring the Resellers to post a bond in order to continue serving their customers, the Hearing Officer, in effect, rewrote the parties' contracts to make the contracts more favorable to AT&T.

In other cases where the TRA has asked a party to post a bond related to a billing dispute, the TRA did so in situations where AT&T already had the apparent right to terminate service *i.e.*, where the parties' contract required a reseller to pay disputed charges and allowed AT&T to terminate service for non-payment. In those cases, the TRA enjoined AT&T from proceeding with the threatened termination upon the condition that the other party agree to post a bond for the disputed amount.

Here, the parties' interconnection agreements allow the Resellers to withhold payment of disputed charges. AT&T is nevertheless claiming that it is entitled to payment because these Lifeline disputes were not raised in good faith. Thus, the first issue before the agency is whether the Resellers have brought these Lifeline disputes in good faith. If so, AT&T cannot require payment of the Lifeline charges and has no basis to threaten termination. In other words, the TRA must initially address the threshold issue of "good faith" before AT&T can demand

payment. If the Resellers have the right to raise this issue as a billing dispute, there is no basis for requiring the Resellers to post a bond in order to obtain a ruling from the TRA.

The Resellers have offered to bring this billing dispute before the Authority for resolution on the merits as soon as practical. In the meantime, the Resellers have offered to discontinue filing disputes on the Lifeline subsidy issue so that the amount of money in dispute will not increase and the *status quo* will remain unchanged. That is the appropriate way to handle this dispute and the only way to handle it that is consistent with due process and the parties' interconnection agreements.

Respectfully submitted,

BRADLEY ARANT BOULT CUMMINGS LLP

By: _____

Henry Walker (B.P.R. No. 000272)
Bradley Arant Boult Cummings, LLP
1600 Division Street, Suite 700
Nashville, TN 37203
Phone: 615-252-2363
Email: hwalker@babc.com

CERTIFICATE OF SERVICE

I hereby certify that on the 26th day of July, 2011, a copy of the foregoing document was served on the parties of record, via hand-delivery, overnight delivery or U.S. Mail, postage prepaid, addressed as follows:

Guy Hicks, Esq.
AT&T
333 Commerce Street, #2101
Nashville, TN 37201-3300

HENRY WALKER