



Joelle Phillips
General Attorney - TN

AT&T Tennessee
333 Commerce Street
Suite 2101
Nashville, TN 37201-1800

T: 615.214.6311
F: 615-214-7406
jp3881@att.com

August 10, 2011

VIA HAND DELIVERY

filed electronically in docket office on 08/10/11

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

Re: *Examination of Issues Surrounding BellSouth Telecommunications, LLC 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 signature and filing in the referenced docket are the original and four copies of a proposed *Final Order*.

A copy has been provided to counsel of record.

Very truly yours,

Joelle Phillips



NASHVILLE, TENNESSEE

IN RE:)
)
)
EXAMINATION OF ISSUES SURROUNDING)
BELLSOUTH TELECOMMUNICATIONS, LLC)
D/B/A AT&T TENNESSEE'S NOTICE OF JUNE 28,) DOCKET NO.
2011 CONCERNING BLC MANAGEMENT, LLC) 11-00109
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.)

FINAL ORDER

This matter came before Director Kenneth C. Hill, Director Sara Kyle and Director Mary W. Freeman of the Tennessee Regulatory Authority (“Authority” or “TRA”), the voting panel assigned to this docket, for oral argument and deliberations during a regularly-scheduled Authority Conference on August 1, 2011.

TRAVEL OF THE CASE

On June 28, 2011, the Authority received a letter from BellSouth Telecommunications, LLC d/b/a AT&T Southeast d/b/a AT&T Tennessee (“AT&T”) notifying the TRA that it intended to suspend and disconnect local resold service in Tennessee to 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. (the “Resellers”), unless they paid, in the aggregate, nearly \$1,700,000 of AT&T billings that they have withheld

based on “disputes” they have lodged regarding the \$3.50 state Lifeline credit.¹ TRA General Counsel requested the parties to file responses explaining why AT&T’s actions referenced in the letter were not governed by current Authority Order in Docket Number 10-00008, and therefore, not in compliance with Authority procedural orders.² AT&T and BLC Management, LLC d/b/a Angles Communication Solutions (“Angles”) submitted filings on this issue.³ In its letter, Angles requested that the parties be able to come before the directors at the next conference to address the actions of AT&T.

At a regularly scheduled Authority Conference on July 11, 2011, the parties appeared before Chairman Eddie Roberson, Director Kenneth C. Hill, Director Sara Kyle and Director Mary W. Freeman. After hearing from all parties, the directors voted to open a docket and appoint Director Hill to serve as Hearing Officer for the purpose of preparing this matter for hearing, including handling preliminary matters and establishing a procedural schedule.

Status Conference

In an effort to expedite the proceedings in this docket, a Status Conference was held on July 13, 2011, at 10:00 a.m.⁴

Procedural Schedule

Without objection, the procedural schedule was set as follows:

¹See *In re: BellSouth Telecommunications, Inc. d/b/a AT&T Southeast d/b/a AT&T Tennessee Complaint and Petition for Relief vs. BLC Management, LLC d/b/a Angles Communication Solutions*, Docket No. 10-00008, *AT&T's Response To Letter From Richard Collier*, (July 1, 2011).

² See Docket No. 10-00008, *Letter From Richard Collier To Guy Hicks And Henry Walker Requesting Information* (June 28, 2011), *referencing Order Holding Dockets In Abeyance, Convening A Consolidated Docket And Appointing A Hearing Officer*, Docket No. 10-00008 (July 8, 2010).

³ AT&T stated that Docket No. 10-00008 encompasses only three discrete issues, and the order holding the docket in abeyance only applies to those three issues. The Lifeline credit issue is a separate issue, and thus AT&T stated that it was free to pursue any right or relief available, including termination of service for non-payment. Angles’ reply did not explicitly address the 10-00008 Order. The Resellers did not make any statement contradicting AT&T’s position.

⁴ At the Status Conference, both AT&T and the Resellers acknowledged that Image Access, Inc. d/b/a NewPhone had paid AT&T all amounts it had withheld based on its state Lifeline credits “disputes” and was

Initial Briefs to be filed on Wednesday, July 20, 2011.

Reply Briefs to be filed on Tuesday, July 26, 2011.

Oral argument before the panel to occur during the Authority Conference on Monday, August 1, 2011.

Effective Date(s) of Termination of Service to Resellers

The Hearing Officer also addressed the issue of pending termination of service by AT&T to the Resellers. In its letter of June 28, 2011, AT&T notified the TRA and the Resellers that it intended to disconnect service on July 28, 2011. Because this docket would not be resolved until August 1, 2011, the Hearing Officer requested AT&T to postpone the scheduled date of termination. The Hearing Officer proposed that the date of termination be moved until thirty (30) days following the Authority's deliberations in the docket.⁵ AT&T stated that it would consider voluntarily delaying termination if the Resellers agreed to put a substantial amount of the disputed amount into an escrow account, as a gesture of good faith.⁶ The Resellers stated that they had no issue with putting into escrow any disputed amount relating to the Lifeline credit issue that might accrue from July 13, 2011 until the matter was resolved by the Authority.⁷ However, they strongly objected to putting any more than the forward-looking monies into escrow.⁸

When the Resellers did not offer any security that was acceptable to AT&T, the Hearing Officer consulted with TRA Staff to determine what time frame the TRA requires in order to properly notify customers as required by TRA Rules.⁹ Staff stated that if the Authority ruled in

therefore not subject to service termination. AT&T confirmed this in a follow-up letter. *See AT&T's Confirmation That They Have Agreed To Extend The Service Termination Until August 18, 2011* (July 14, 2011).

⁵ Status Conference Transcript, at 11-12 (July 13, 2011).

⁶ *Id.* at 13.

⁷ *Id.* at 15.

⁸ *Id.* at 13-54.

⁹ *Id.* at 43-54. TRA Rule 1220-4-2-.40 pertains to the obligations of resellers and underlying carriers upon the termination of service. Rule 1220-4-2-.40(3)(a) requires the underlying carrier to notify the reseller and the TRA

favor of AT&T on August 1, 2011, Staff would need approximately ten to fourteen days to ensure that customers were properly notified.¹⁰ After a recess, AT&T agreed to the Hearing Officer's request that AT&T postpone the prospective termination date of July 28, 2011, until August 18, 2011.¹¹

Issues Before the Authority

On July 14, 2011, the Hearing Officer issued a *Notice of Briefing Schedule and Oral Argument* memorializing the briefing schedule, scheduling oral arguments, and setting forth the following issue:

Whether the Resellers have acted in good faith in withholding Lifeline credits from payments to AT&T.

In discussing this issue, the parties were directed to address:

1. Whether the Interconnection Agreements of the parties allow the Resellers to withhold Lifeline credits while a dispute over payment of those credits is being adjudicated; and
2. Whether AT&T is allowed to terminate service to Resellers for failure to make payment of Lifeline credits if it is determined that those credits have been withheld in bad faith.

Intervention by Consumer Advocate and Protection Division

Subsequent to the Status Conference, on July 25, 2011, the Consumer Advocate and Protection Division ("CAPD") filed a *Petition to Intervene*. In the *Petition*, the CAPD stated that its purpose in intervening was to ensure that "the customers of the Resellers...are given adequate

no less than thirty (30) days before service is to be terminated. Rule 1220-4-2-.40(3)(b) requires the reseller to notify its customers of termination no less than fourteen (14) days before disconnect occurs. Finally, Rule 1220-4-2-.40(c) requires the TRA to notify the reseller's customers of termination of service no less than seven (7) days before disconnect occurs, in the event that the reseller fails to notify its customers. AT&T's letter of June 28, 2011 provided the thirty days' notice that it was required to give. However, given the procedural schedule, unless AT&T agreed to move the proposed date of termination of service, the TRA would have to have provided notice to the Resellers' customers of termination before the Authority could make a determination on the issue of whether AT&T was allowed to terminate service.

¹⁰ *Id.* at 50-54.

notice of the possible impending termination of their telephone service and are given further assistance in securing new phone service, particularly Lifeline service, should it become necessary.”¹² No objections were filed, and the *Petition* was granted.

DESCRIPTION OF THE RESELLERS’ “DISPUTES”

When the Resellers order service from AT&T Tennessee for resale to their end users who qualify for the Lifeline program,¹³ AT&T Tennessee credits or “flows through” the \$10 federal Lifeline credit to the Resellers. AT&T Tennessee does not “flow through” any amount reflecting the state Lifeline credit to the Resellers because there is no state-funded Lifeline credit to “flow through.” The Resellers’ respective interconnection agreements generally allow them to withhold payments to AT&T Tennessee based on bona fide, good faith billing disputes until such disputes are resolved. Relying on these provisions, the Resellers have “disputed” – and refused to pay – amounts based on their position that AT&T is required to provide them the \$3.50 state Lifeline credit.

POSITIONS OF THE PARTIES

A. AT&T Tennessee

AT&T asserted that the Sixth Circuit Court of Appeals has held that an interconnection agreement is “the Congressionally-prescribed vehicle for implementing the substantive rights

¹¹ *Id.* at 56. AT&T also clarified that the Resellers’ ordering capability would be suspended beginning at 11:59 p.m. on July 14, 2011. See *AT&T’s Confirmation That They Have Agreed To Extend The Service Termination Until August 18, 2011* (July 14, 2011).

¹² *Petition to Intervene*, at 2 (July 25, 2011).

¹³ The Lifeline program is designed to increase the availability of telecommunications services to low income subscribers by providing a credit to monthly recurring local service for qualifying residential subscribers. See G.S.S.T. Tariff A3.31.1.A, now found in AT&T Tennessee’s publicly-available General Exchange Guidebook, at A3.31.1.A. The maximum available Lifeline credit in Tennessee for a retail customer currently is \$13.50, and it is composed of \$10.00 in credit that AT&T Tennessee recovers from the federal USF (“federal Lifeline credit”), and \$3.50 in credit that AT&T Tennessee funds itself (“state Lifeline credit”).

and obligations set forth in the [1996] Act,”¹⁴ and once a carrier enters into such a contract in accordance with section 252 of the 1996 Act, “it is then regulated directly by the interconnection agreement.”¹⁵ Accordingly, once an interconnection agreement is approved, as the ones at issue in this docket have been, the parties are “governed by the interconnection agreement” and “the general duties of [the 1996 Act] no longer apply”.¹⁶ Based on the following, AT&T contended that the Authority-approved interconnection agreements that govern this matter make clear that AT&T Tennessee is not required to provide a state Lifeline credit to the Resellers.

AT&T asserted that 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.¹⁷

AT&T Tennessee’s Tariff, in turn, expressly provides in relevant part 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.¹⁸

As a result, AT&T contended, each Reseller has contractually agreed that the Reseller, and not AT&T Tennessee, must provide the state Lifeline credit for the Resellers’ end-user customers. AT&T asserted the contract language is unambiguous, controlling and entirely consistent with

¹⁴ *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).

¹⁵ *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 Comm’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).

¹⁶ *Mich. Bell Tel. Co. v. MCImetro Access Trans. Servs., Inc.*, 323 F.3d 348, 359 (6th Cir. 2003).

¹⁷ See Section 4.2 of the Resale attachment (Attachment 1) to the Authority-approved interconnection agreement between AT&T and Angles, for example.

Tennessee’s substantive telecommunications law as set forth in the Authority’s Order in *In Re Complaint of Discount Communications, Inc. Against BellSouth Telecommunications Inc.*, Docket No. 00-00230 (“*Discount Communications*”) and the Tennessee Court of Appeals’ Opinion¹⁹ affirming that Order.²⁰ AT&T claimed that allowing Resellers to “dispute” that they are required to comply with the plain language of their interconnection agreements would impermissibly render the language of the contracts meaningless.

AT&T pointed out that the parties agree that: Georgia contract law governs the payment terms of the contracts at issue in this docket;²¹ 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;²² 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.²³

AT&T asserted that 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.”²⁴ And even when it is necessary to interpret a contract to resolve some ambiguity in its language (which AT&T claims 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

¹⁸ See Tariff/Guidebook, § A3.31.2.A.9.

¹⁹ *Discount Communications, Inc. v. BellSouth Telecommunications, Inc.*, 2002 WL 1255674 (Tenn. Ct. App. 2002).

²⁰ As explained at page 6 of AT&T Tennessee’s *Initial Brief*, the Authority-approved interconnection agreements make clear that Tennessee’s “substantive telecommunications law” governs the interconnection agreements.

²¹ See AT&T *Reply Brief* at 5.

²² *Id.*

²³ *Id.*

²⁴ *Fernandes v. Manugistics 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).

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.²⁵

Additionally, AT&T argued that the Resellers clearly were asking the Authority to retroactively re-write their contracts to say that AT&T Tennessee is required to provide the Resellers the state Lifeline credit.²⁶ AT&T cited controlling Georgia law, which states that “[n]either the trial court nor this [appellate] Court is at liberty to rewrite or revise a contract under the guise of construing it.”²⁷ According to AT&T, “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.”

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

AT&T contended that each of the arguments the Resellers use to attempt to attack the Authority’s existing Order and, by necessity, the Court of Appeals’ Opinion affirming that Order, was carefully considered – and rejected – by the Authority in the proceedings that led to the Order the Resellers now attack.²⁸

²⁵ *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.”).

²⁶ See AT&T Reply Brief at 6.

²⁷ *Fernandes v. Manugistics 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.”).

²⁸ See AT&T Reply Brief at 8-10.

B. Resellers

According to the Resellers, AT&T acknowledged that the Resellers are permitted under their interconnection agreement to dispute any charge from AT&T and to withhold payment of that charge²⁹ pending a resolution of the dispute by the Authority. The interconnection agreements between the Resellers and AT&T are governed, where applicable, by Georgia state law,³⁰ and the Resellers claimed the TRA must look to Georgia contract law. The Resellers asserted that under Georgia law, all contracts contain a requirement – either explicit or implicit – that the parties perform "in good faith." That doctrine is well settled and there are many Georgia cases defining "good faith" as that term is used in a Georgia contract. The Resellers argued that other cases have defined "good faith" as "any reasonable ground for contesting the claim," such as where there is a "disputed question of fact or doubtful question of law."³¹ The Resellers contended this is the test the TRA must apply.

The Resellers cited Georgia law stating that "[a] party does not breach its obligation of good faith where it exercises a right which it has under a contract,"³² and that "there can be no breach of an implied covenant of good faith where a party to a contract has done what the provisions of the contract expressly give him the right to do."³³ The Resellers claimed that, because the contract at issue in this case expressly gives a Reseller the right to withhold payment if the Reseller disputes a bill, AT&T cannot unilaterally terminate on the basis of nonpayment where the Resellers have withheld payment due to a billing dispute.

²⁹ For example, the dPi interconnection agreement states (Attachment 7, Section 1.4.1), "Payment Due. Payment for services provided by BellSouth, not including disputed charges, is due on or before the next bill date."

³⁰ Each contract contains the following provision under "General Terms and Conditions": "Where applicable, this Agreement shall be governed by and construed in accordance with federal and state substantive telecommunications law, including rules and regulations of the FCC and appropriate Commission. In all other respects, this Agreement shall be governed by and construed and enforced in accordance with the laws of the State of Georgia without regard to its conflict of laws principles."

³¹ *Lawyers Title Ins. Corp. v. Griffin*, 691 S.E.2d 633, 637 (Ga. Ct. App. 2010.)

³² *Hemmerich v. Southeast Properties Group, L.P.*, 498 S.E.2d 87, 89 (Ga. Ct. App. 1998).

The Resellers stated that it was not the purpose of this proceeding to reargue the merits of the Lifeline subsidy issue, which was addressed in 2000. However, the Resellers argued that at the time of the decision, the Authority said the issue was one of policy, not law, and that the agency's policy was intended only to be an interim one, and, based on that argument, the Resellers claimed that it was not "arbitrary or capricious" to ask the TRA to revisit its interim policy and reach a different result.

The Resellers contended the reference to this policy as "an interim one" meant it was intended to remain in place only until the TRA established an "intrastate Universal Service Fund" which would be used to fund "the state subsidy portion of Lifeline service."³⁴ The Resellers contended that the TRA's final Order in the *Discount* case recognized that the agency had already decided to create a state universal service fund and that the money in the fund would be used to supply the state share "once the fund becomes established and operational."³⁵

The Resellers argued that, on appeal, the Tennessee Court of Appeals affirmed the TRA's decision because, according to the Court, the issue was a question of policy which the FCC had left to the discretion of the state commissions.³⁶ The Resellers contended that the Court deferred to the FCC's finding that states could choose among "many" acceptable methods for subsidizing the Lifeline program and therefore held that the TRA was "free to continue its policy of placing the burden of the state subsidy on the carriers that sell the services to the Lifeline customers."³⁷

The Resellers conceded that, in the ensuing eleven years, the "intrastate Universal Service Fund" anticipated by former TRA Directors as a mechanism for funding the state's share

³³ *Cox v. Athens Regional Medical Center, Inc.*, 631 S.E.2d 792, 797 (Ga. Ct. App. 2006).

³⁴ See Reseller's *Initial Brief* at 9.

³⁵ See Reseller's *Initial Brief* at 6, citing to page 43 of the "Interim Order on Phase I of Universal Service," TRA Docket 97-00888.

³⁶ See Reseller's *Initial Brief* at 6.

³⁷ See Reseller's *Initial Brief* at 9-10.

of the Lifeline program was never created.³⁸ As a result, the Resellers claimed, some carriers bear a disproportionate share of the cost of the Lifeline program which, in turn, undermines the availability of Lifeline service.³⁹

The Resellers proffered the following analysis of FCC orders. The FCC recognized that many states, like Tennessee, had been funding the state's share of the Lifeline subsidy through the ratemaking process, ordering incumbent LECs to charge Lifeline customers a discounted rate and allowing them to recover the revenue "by charging other subscribers more."⁴⁰ The Resellers also noted that the FCC said, "Many methods exist, including competitively neutral surcharges on all carriers or the use of general revenues," that states could use to fund the Lifeline program "that would not place the burden on any single group of carriers."⁴¹ The FCC cautioned, however, that any method adopted by a state to fund the Lifeline program must be "equitable" and "non discriminatory" and contribute to the "preservation and advancement of universal service" as required by Section 254(f) of the Federal Telecom Act.⁴²

In sum, according to the Resellers, these were the choices presented to the state commissions: requiring resale of Lifeline service at the reduced, Lifeline rate; imposing a non-discriminatory, competitively neutral surcharge on all carriers; or funding Lifeline through state tax revenues.⁴³ Whatever method the state chose also had to promote the availability of Lifeline services.⁴⁴

³⁸ See Reseller's *Initial Brief* at 10.

³⁹ See Reseller's *Initial Brief* at 10.

⁴⁰ See Reseller's *Initial Brief* at 7.

⁴¹ See Reseller's *Initial Brief* at 8.

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

The Resellers claimed that the TRA chose none of these options, but, instead, adopted an "interim" policy of requiring that "each individual reseller fully fund the state portion of the Lifeline assistance program from the reseller's internal sources."⁴⁵

The Resellers believe that the interim policy of the TRA does not comply with federal law and that the TRA must choose one of the options suggested by the FCC. In the absence of a "neutral surcharge" on all carriers or a program to fund the Lifeline subsidy with tax revenue, the Resellers claim the TRA can comply with federal law only by requiring AT&T to offer Lifeline service for resale at the discounted, Lifeline rate.⁴⁶

The Resellers argued that 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.⁴⁷ They argued that when a state tariff conflicts with the federal statutory law or the rules of a federal agency, federal law prevails.⁴⁸ Here, the Resellers contended 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 the subsidy to the Resellers.⁴⁹ Thus, the Resellers argued, the TRA can simply direct that AT&T's tariff be changed.⁵⁰

The Resellers did not dispute that the TRA's "interim policy" established in the *Discount* case is "the law" in Tennessee until such time as the Authority orders otherwise.⁵¹ The Resellers, however, contended that the issue in this case is whether they have the right under their

⁴⁵ See Reseller's *Initial Brief* at 8-9.

⁴⁶ See Reseller's *Initial Brief* at 10.

⁴⁷ See Reseller's *Reply Brief* at 1.

⁴⁸ See Reseller's *Reply Brief* at 1-2.

⁴⁹ See Reseller's *Reply Brief* at 2.

⁵⁰ *Id.*

⁵¹ See Reseller's *Reply Brief* at 3.

interconnection agreements to ask the TRA to revisit that policy and change it.⁵² The Resellers contended that the TRA "is free to reverse course if public policy demands it."⁵³

ANALYSIS AND DECISIONS

At a regulatory-scheduled Authority Conference held on August 1, 2011, the Directors heard oral argument from the parties in this matter. Following oral argument, the Directors deliberated and announced their unanimous decision, based on the following analysis.

The parties agree that the state Lifeline credit issue was first examined by the Authority in a contested case proceeding in 2000. The parties further agree that the Authority Order in that proceeding required that individual resellers self-fund the entire state Lifeline credit from the resellers' internal resources, in the same manner that AT&T and other Tennessee LECs fund the state Lifeline credit extended to their customers.⁵⁴ The parties also agree that the Tennessee Court of Appeals upheld the Authority's Order in 2002.⁵⁵

The Resellers, however, point to language in the Authority's Order referring to the Order as "interim" and "a policy decision," and they suggest that in 2000 the Authority did not intend for its Order to be a permanent one and that the policy should be re-visited by the Authority. Revisiting the manner in which the state Lifeline credit is funded, however, is not the issue before the Directors.⁵⁶ Instead, as determined by the Hearing Officer, and without objection from the parties, the issue before the Authority is whether the Resellers have acted in good faith in withholding payment from AT&T based on "disputes" they have lodged regarding the \$3.50 state Lifeline credit. In other words, under the terms of the parties' contracts, are the Resellers

⁵² *Id.*

⁵³ *Id.*

⁵⁴ See Order in *Discount Communications* at 14.

⁵⁵ *Discount Communications, Inc. v. BellSouth Telecommunications, Inc.*, 2002 WL 1255674 (Tenn. Ct. App. 2002).

acting in good faith when they dispute these charges and withhold payment based on those disputes? For reasons which follow, we find the Resellers have not raised legitimate disputes and have not acted in good faith.

While the Resellers may have the right generally to dispute charges, they also have the obligation to exercise their contractual rights in good faith. In this case, the grounds for the Resellers' "disputes" are contrary to the unambiguous language of their controlling contracts that requires the Resellers to self-fund the state Lifeline credit for their end users, just as AT&T self-funds the state Lifeline credit for its end users. This unambiguous contractual language is supported by, and consistent with, an Authority Order (which was affirmed on appeal) finding that AT&T is not required to provide resellers the \$3.50 state Lifeline credit. Withholding of payment based on a party's dissatisfaction with the terms of its contract or dissatisfaction with an Authority order does not constitute good faith or a bona fide billing dispute.

Since the Authority's Order was issued in 2000 and affirmed in 2002, none of the Resellers have even sought to initiate a new proceeding for the Authority to revisit how state Lifeline credits should be funded.⁵⁷ Absent a valid order of the Authority or a court of competent jurisdiction reversing or modifying the Authority's prior findings, the Resellers have no legal basis to operate under the assumption that their contracts or the Authority's Order are no longer valid or enforceable.

Accordingly, the Directors find that the Resellers did not act in good faith in disputing charges and withholding payments to AT&T related to the state Lifeline credit. Additionally, the

⁵⁶ The Resellers acknowledge that "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." See Resellers' Reply Brief at 3.

⁵⁷ The Resellers acknowledge that "... there is not even a case pending to obtain a judgment on the merits of the Lifeline issue." See Resellers Reply Brief at 4.

Directors find that Resellers are obligated by contract to pay AT&T the amounts withheld for the state Lifeline credit.

The Directors understand that the Resellers' continued failure to pay may result in AT&T's termination of service to the Resellers on or after August 18, 2011, pursuant to the terms of the Authority-approved interconnection agreements between the parties. In accordance with TRA Rule 1220-4-2-.40(3)(c), if the Resellers do not notify their customers within fourteen (14) days of disconnection of their service or within such other time as the TRA may allow the Resellers to notify their customers, and the TRA is obligated to send notification letters, the Authority will recover its costs associated with notification from the Resellers.

The Directors instructed the parties to work with the TRA Staff, as reasonably necessary, to refine the list of Reseller customers that may need to be notified, because of changes in the customer base that have taken place in the last few weeks.⁵⁸ The Directors wish to avoid duplicative or unnecessary customer notices in the event that service is not disconnected.

IT IS THEREFORE ORDERED THAT:

1. The Resellers did not act in good faith in disputing charges and withholding payments to AT&T Tennessee related to the state Lifeline credit.
2. The Resellers are obligated by the terms of their interconnection agreements to pay AT&T the amounts withheld for the state Lifeline credit.
3. If the Resellers fail to notify their customers within fourteen days of disconnection of service by AT&T, pursuant to Authority Rule 1220-4-2-.40(3)(c), or within

⁵⁸ At the request of the TRA Staff and pursuant to TRA Rule 1220-4-2-.40, AT&T provided customer information to the Staff on July 25, 2011.

such other time as the TRA may allow the Resellers to notify their customers, the Authority will recover costs associated with such customer notification from the Resellers.⁵⁹

4. Any party aggrieved by the decision of the Authority may file a Petition for Reconsideration with the Authority within fifteen (15) days of the entry of this Order.

5. Any party aggrieved by the decision of the Authority may file a Petition for Review with the Tennessee Court of Appeals, Middle Division, within sixty (60) days of the entry of this Order.

Kenneth C. Hill, Director

Sara Kyle, Director

Mary Freeman, Director

⁵⁹ The Authority also requested that the Parties work with the Staff to identify the Reseller customers who need to be notified prior to disconnection in an effort to avoid unnecessary or duplicative notices.

CERTIFICATE OF SERVICE

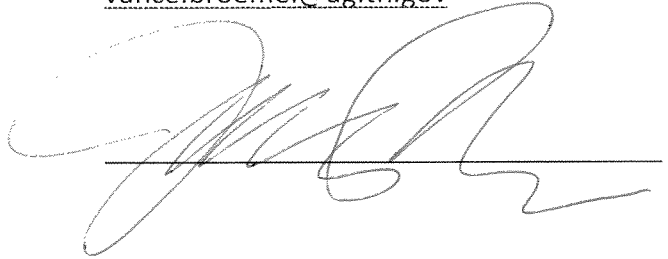
I hereby certify that on August 10, 2011, a copy of the foregoing document was served on the following, via hand delivery, facsimile, overnight, electronic mail or US Mail, addressed as follows:

- ☐ Hand
- ☐ Mail
- ☐ Facsimile
- ☐ Overnight
- ☒ Electronic

Henry Walker, Esquire
Bradley Arant Boult Cummings
P. O. Box 198062
Nashville, TN 37219-8062
hwalker@babbc.com

- ☐ Hand
- ☐ Mail
- ☐ Facsimile
- ☐ Overnight
- ☒ Electronic

Vance Broemel, Esquire
Consumer Advocate Division
425 6th Ave. N, 2nd Floor
Nashville, TN 37243
vance.broemel@ag.tn.gov

A handwritten signature in black ink, appearing to read 'Vance Broemel', is written over a horizontal line.