BEFORE THE TENNESSEE REGULATORY AUTHORITY

NASHVILLE, TENNESSEE
December 16, 2011

IN RE:	)	
	)	
EXAMINATION OF ISSUES SURROUNDING BELLSOUTH TELECOMMUNICATIONS, LLC 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**

FINAL ORDER

This matter came before Director Kenneth C. Hill, Director Sara Kyle, and Director Mary W. Freeman, the voting panel of the Tennessee Regulatory Authority (the "Authority") 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 Chief of the Authority's Consumer Services Division received a letter from BellSouth Telecommunications, LLC d/b/a AT&T Southeast d/b/a AT&T Tennessee ("AT&T") notifying the Authority that AT&T intended to suspend and disconnect resold local 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. (collectively, the "Resellers"), unless the Resellers paid, in the aggregate, nearly $1,700,000 of AT&T billings that the Resellers had withheld based on billing

disputes they had submitted to AT&T regarding the $3.50 state Lifeline credit.[1] The Authority's General Counsel requested that the parties file responses explaining why the actions referenced in the letter were not governed by an Authority Order in Docket No. 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. AT&T stated that Docket No. 10-00008 encompassed only three discrete issues, and the order holding the docket in abeyance only applied to those three issues.[3] AT&T stated that the Lifeline credit issue was a separate issue, and thus AT&T was free to pursue any right or relief available, including termination of service for non-payment.[4] The Resellers' reply did not explicitly address the Order in Docket No. 10-00008 or dispute AT&T's position that it could pursue the Lifeline issue.[5] Angles requested that the parties be allowed to come before the Directors at the next conference to address AT&T's threatened actions.[6]

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.[7]

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[1] *See In re: BellSouth Telecommunications, Inc. d/b/a AT&T Southeast d/b/a AT&T Tennessee Complaint and Petition for Relief v. BLC Management, LLC d/b/a Angles Communication Solutions*, Docket No. 10-00008, *Letter from Paul Stinson to Lisa Cooper*, attached to *AT&T's Response To Letter From Richard Collier* (July 1, 2011).
[2] *See Letter from Richard Collier to Guy Hicks and Henry Walker Requesting Information* (June 28, 2011), *citing Order Holding Dockets in Abeyance, Convening a Consolidated Docket and Appointing a Hearing Officer*, Docket No. 10-00008 (July 8, 2010).
[3] *See Letter from Guy M. Hicks to Richard Collier*, Docket No. 10-00008, p. 2 (July 1, 2011).
[4] *Id.*
[5] *See Letter from Henry Walker to Chairman Mary W. Freeman*, Docket No. 10-00008 (July 11, 2011)
[6] *See Letter from Henry Walker to Richard Collier*, Docket No. 10-00008, p. 1 (July 6, 2011).
[7] *Transcript of Authority Conference*, p. 112 (July 11, 2011).

Status Conference and Procedural Schedule

In an effort to expedite proceedings in this docket, following notice, the Hearing Officer held a Status Conference at 10:00 a.m. on July 13, 2011.[8] During the Status Conference, without objection, the Hearing Officer established the following procedural schedule:

> Initial Briefs to be filed on Wednesday, July 20, 2011.
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> 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.[9]

Effective Date(s) of Termination of Service to Resellers

In addition, the Hearing Officer addressed the issues of the suspension and termination of service to the Resellers by AT&T. In its June 28, 2011 letter, AT&T had notified the Authority and the Resellers that it would suspend service effective July 14, 2011 and terminate service on July 28, 2011. Because this docket would not be resolved until August 1, 2011, the Hearing Officer asked AT&T to postpone the scheduled date of termination until thirty days after the Authority's deliberations in the docket.[10] AT&T stated that it would consider lifting the suspension of service pending a decision on the merits if the Resellers agreed to put sixty percent of the disputed amount in escrow.[11] The Resellers offered to cease filing disputes on this issue until the matter was resolved by the Authority, but they argued that the parties' interconnection agreements did not require that disputed charges be placed in escrow and objected to that request.[12]

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[8] 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 therefore not subject to service termination. AT&T confirmed this in a follow-up letter. *See Letter from Guy M. Hicks to Director Kenneth C. Hill* (July 14, 2011).

[9] *Notice of Briefing Schedule and Oral Argument* (July 14, 2011).

[10] *Transcript of Proceedings*, pp. 11-12 (July 13, 2011).

[11] *Id.* at 13.

[12] *Id.* at 13-15.

When the Resellers did not offer the security requested by AT&T, the Hearing Officer declined to direct AT&T to lift the suspension and consulted with Authority Staff to determine what time frame the Authority requires in order to properly notify customers as required by Authority Rules.[13] Staff stated that if the Authority ruled in favor of AT&T on August 1, 2011, Staff would need approximately ten to fourteen days to ensure that customers were properly notified.[14] After a recess, AT&T agreed to the Hearing Officer's request that AT&T postpone the prospective termination date from July 28, 2011 to August 18, 2011.[15]

Briefing Schedule and Statement of 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]."[16] 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.[17]

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[13] *Id.* at 43-54. Authority Rule 1220-4-2-.40 (Tenn. Comp. R. & Regs. 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 Authority no less than thirty 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 days before disconnection occurs. Finally, Rule 1220-4-2-.40(c) requires the Authority to notify a reseller's customers of termination of service no less than seven days before disconnection occurs, in the event that the reseller fails to notify its customers. AT&T's letter of June 28, 2011 provided the required thirty days' notice. However, given the procedural schedule, unless AT&T agreed to move the proposed date of termination of service, the Authority would have had to provide 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.

[14] *Id.* at 50-54.

[15] *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 Letter from Guy M. Hicks to Director Kenneth C. Hill* ((July 14, 2011).

[16] *Notice of Briefing Schedule and Oral Argument* (July 14, 2011).

[17] *Id.*

Intervention by Consumer Advocate and Protection Division

Subsequent to the Status Conference, on July 25, 2011, the Consumer Advocate and Protection Division of the Office of the Attorney General ("CAPD") filed a Petition to Intervene. The CAPD stated that its purpose in intervening was to ensure that "the customers of the Resellers . . . are given adequate 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."[18] No objections were filed, and the Petition was granted.

BACKGROUND

The Resellers provide the full amount of mandated Lifeline credits to their end users who qualify for the Lifeline program.[19] The total maximum credit of $13.50 includes a federal portion in the amount of $10.00 that is "flowed through" to the Resellers by AT&T, which receives compensating federal universal service funds for this portion. The remaining $3.50 of the total credit is not subsidized by federal universal service funds but is nevertheless required by federal law; the manner in which this portion is funded is left to the states. The Authority established in Docket No. 00-00230 that each provider of local telephone service in Tennessee must separately fund the state portion of the Lifeline credit.[20] Accordingly, AT&T is not required to and does not "flow through" any amount reflecting the state portion of the Lifeline credit to the Resellers.

The Resellers' respective interconnection agreements with AT&T allow them to withhold payments to AT&T based on good faith billing disputes until such disputes are resolved.

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[18] *Petition to Intervene*, p. 2 (July 25, 2011).

[19] 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's publicly-available General Exchange Guidebook, at A3.31.1.A.

[20] *See Complaint of Discount Communications, Inc. against BellSouth Telecommunications, Inc.*, Docket No. 00-00230, *Order*, pp. 11-12 (Sept. 28, 2000), *aff'd sub nom. Discount Communications, Inc. v. BellSouth Telecommunications, Inc.*, 2002 WL 1255674 (Tenn. Ct. App. June 7, 2002).

Relying on these provisions, the Resellers have disputed and withheld payments to AT&T based on their position that AT&T is required to provide to them a $3.50 state Lifeline credit.

POSITIONS OF THE PARTIES

A. AT&T

AT&T argued that an interconnection agreement is "the Congressionally-prescribed vehicle for implementing the substantive rights and obligations set forth in the [1996 Federal Telecommunications] Act,"[21] 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."[22] Accordingly, AT&T stated, once an interconnection agreement is approved, the parties are "governed by the interconnection agreement" and "the general duties of [the 1996 Act] no longer apply."[23] AT&T further contended that the Authority-approved interconnection agreements relevant to this matter make clear that AT&T is not required to provide a state Lifeline credit to the Resellers.[24]

AT&T asserted that each Reseller has contractually agreed to resell services subject to the terms and conditions of AT&T's tariffs. For example, the interconnection agreement between AT&T and Angles states:

> [R]esold services can only be used in the same manner as specified in [AT&T'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] in the appropriate section of [AT&T's] Tariffs.[25]

AT&T's tariff expressly provides, in relevant part:

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[21] *Brief of AT&T Tennessee*, p. 12, n. 28, quoting *Michigan Bell Tel. Co. v. Strand*, 305 F.3d 580, 582 (6th Cir. 2003).
[22] *Id.*, quoting *Law Offices of Curtis V. Trinko LLP v. Bell Atlantic Corp.*, 305 F.3d 89, 104 (2d Cir. 2002).
[23] *Id.*, quoting *Mich. Bell Tel. Co. v. MCImetro Access Trans. Servs., Inc.*, 323 F.3d 348, 359 (6th Cir. 2003).
[24] *Id.* at 7-8.
[25] *Interconnection Agreement Between AT&T Tennessee and Angles,* Section 4.2 (quoted in *Brief of AT&T Tennessee*, p. 7).

> 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.[26]

Citing these provisions, AT&T contended that each Reseller has contractually agreed that the Reseller, and not AT&T, must provide the state Lifeline credit for the Resellers' end-users.[27] AT&T asserted that the language in the interconnection agreements and its tarriff is unambiguous, controlling, and entirely consistent with Tennessee's substantive telecommunications law[28] as set forth in the Authority's Order in Docket No. 00-00230[29] and the Tennessee Court of Appeals' Opinion affirming that Order.[30] AT&T stated that allowing the Resellers to dispute that they are required by their contracts to comply with the plain language of AT&T's tariff would render the language of the contracts meaningless.[31]

AT&T pointed out that each of the agreements requires the Resellers to act in good faith in exercising their rights and performing their duties under the contracts.[32] AT&T further stated that 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.[33] 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

[26] *See* Tariff/Guidebook, § A3.31.2.A.9 (quoted in *Brief of AT&T Tennessee*, p. 7).
[27] *Brief of AT&T Tennessee*, p. 7.
[28] The interconnection agreements are governed by Tennessee's "substantive telecommunications law." *Id.* at 6.
[29] *In Re: Complaint of Discount Communications, Inc. Against BellSouth Telecommunications Inc.*, Docket No. 00-00230, *Order* (Sept. 28, 2000).
[30] *Discount Communications*, 2002 WL 1255674.
[31] *Reply Brief of AT&T Tennessee*, pp. 5-6.
[32] *See Reply Brief of AT&T Tennessee*, p. 5.
[33] *Id.*

given an interpretation of ordinary significance."[34] And even when it is necessary to interpret a contract to resolve some ambiguity in its language, 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.[35]

Additionally, AT&T argued that the Resellers clearly were asking the Authority to re-write their agreements to say that AT&T is required to provide the Resellers the state Lifeline credit.[36] AT&T cited a Georgia decision stating 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."[37] According to AT&T, disputes that are based on intentional breaches of contractual obligations and are in defiance of controlling law simply are not made in good faith.[38]

On this basis, AT&T 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 for no other reason than that they do not like the lawful decision of the Authority.[39] AT&T contended that each of the arguments the Resellers make in attacking the Authority's existing

[34] *Id.* at 6, n. 11, citing *Fernandes v. Manugistics Atlanta, Inc.*, 582 S.E.2d 499, 502 (Ga. Ct. App. 2003).
[35] *Id,* at 6, n. 12, citing *Thomas v. B&I Lending, LLC*, 581 S.E.2d 631, 634 (Ga. Ct. App. 2003). AT&T further stated that this is consistent with Tennessee law. *Id.*, citing *Collateral Plus, LLC v. Max Well Medical, Inc.*, Slip Copy, 2011 Tenn. App. LEXIS 150 at *16 (Tenn. Ct. App. March 29, 2011).
[36] *Id.* at 2.
[37] *Id.* at 6-7, n. 14, quoting *Fernandes v. Manugistics Atlanta, Inc.*, 582 S.E.2d 499, 503 (Ga. Ct. App. 2003); and citing *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."). AT&T adds that this is consistent with Tennessee law. *Id.*, citing *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.").
[38] *Id.* at 7.
[39] *Id.*

Order and, by necessity, the Court of Appeals' Opinion affirming it, was carefully considered and rejected by the Authority in the proceedings that led to the Order the Resellers now attack.[40]

B. The Resellers

The Resellers contended that there is no disagreement that the parties' interconnection agreements allow them to dispute any charge from AT&T and to withhold payment of that charge pending a resolution of the dispute by the Authority.[41] The Resellers asserted that under Georgia law, which they agree governs the contracts, all contracts require either explicitly or implicitly that the parties perform "in good faith."[42] The Resellers cited a Georgia decision that defines "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."[43]

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.[44] Nevertheless, the Resellers argued that at the time of that decision the Authority said the issue was one of "policy," not law, and that the Authority's policy was intended only to be an "interim" one.[45] On this basis, the Resellers claimed that they are entitled to file a billing dispute asking the Authority to revisit its interim policy and reach a different result.[46]

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[40] *Id.* at 8-10.
[41] *Initial Brief of Resellers*, p. 1 (July 20, 2011). The Resellers cite the dPi interconnection agreement, which states at 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." *Id.* at 1, n. 2.
[42] *Id.* at 3.
[43] *Id.* at 5, quoting *Lawyers Title Ins. Corp. v. Griffin,* 691 S.E.2d 633, 637 (Ga. Ct. App. 2010).
[44] *Id.* at 6.
[45] *Id.* The Authority's Final Order in Docket No. 00-00230 stated that in deciding that "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 resources," the Director's "further recognized, however, that this policy is an interim one." *Final Order*, Docket No. 00-00230, p. 11 (Sept. 28, 2000). The Authority referred to its own *Interim Order on Phase I of Universal Service*, Docket No. 97-00888, p. 43 (May 20, 1998), in which the Authority stated that "the interstate portion of Lifeline and Link-up shall be funded from the intrastate USF."
[46] *Initial Brief of Resellers,* p. 6 (July 20, 2011).

The Resellers stated that the Authority had intended that its interim policy would remain in place only until the Authority established an intrastate Universal Service Fund, which would be used to fund "the state subsidy portion of Lifeline service."[47] In the Resellers' view, when this interim policy was adopted the Authority had already decided to create a state universal service fund and anticipated that the money in the fund would be used to supply the state share "once the fund becomes established and operational."[48]

The Resellers argued that, on appeal, the Tennessee Court of Appeals affirmed the Authority's decision because, according to the Court, the issue was a question of policy which the Federal Communications Commission ("FCC") had left to the discretion of the state commissions.[49] The Resellers contended that the Court deferred to the FCC's finding that states could chose among "many" acceptable methods for subsidizing the Lifeline program and therefore held that the Authority 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."[50]

The Resellers acknowledged that in the ensuing eleven years the "intrastate Universal Service Fund" they state was anticipated by former Authority Directors as a mechanism for funding the state's share of the Lifeline program had not been created.[51] As a result, the Resellers argued, the Authority's interim policy has the effect of requiring some carriers to bear a disproportionate share of the cost of the Lifeline program, an effect which undermines the availability of Lifeline service.[52]

The Resellers asserted that the FCC recognized that many states, like Tennessee, had been funding the state's share of the Lifeline subsidy through the ratemaking process, ordering

[47] *Id.* at 9, quoting *Final Order*, Docket No. 00-00230, p. 11 (Sept. 28, 2000).
[48] *Id.*, quoting *Final Order*, Docket No. 00-00230, p. 11 (Sept. 28, 2000).
[49] *Id.* at 6.
[50] *Id.* at 9-10.
[51] *Id.* at 10.
[52] *Id.* at 9-10.

incumbent LECs to charge Lifeline customers a discounted rate and allowing them to recover the revenue by charging other subscribers more.[53] The Resellers also stated that in the words of the FCC, "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."[54] The Resellers added, 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 1996 Federal Telecommunications Act.[55]

In sum, according to the Resellers, the state commissions were presented with the following options: 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.[56] Whatever method the state chose also had to promote the availability of Lifeline services.[57] The Resellers stated that the Authority 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."[58]

The Resellers believe that the Authority's interim policy does not comply with federal law and that the Authority must choose one of the options suggested by the FCC.[59] In the absence of a "neutral surcharge" on all carriers or a program to fund the Lifeline subsidy with tax

[53] *Id.* at 7; *cf. In the Matter of Federal-State Joint Board on Universal Service*, 12 F.C.C.R. 8776 (May 8, 1997) ("*Universal Service Order*"), ¶ 361
[54] *Id.* at 8, quoting *Universal Service Order*, ¶ 157.
[55] *Id.*, quoting *Universal Service Order*, ¶ 361.
[56] *Id.* at 8.
[57] *Id.*
[58] *Id.* at 8-9, quoting *Final Order*, Docket No. 00-00230, p. 11 (Sept. 28, 2000).
[59] *Id.* at 10.

revenue, the Resellers stated, the Authority can comply with federal law only by requiring AT&T to offer Lifeline service for resale at the discounted Lifeline rate.[60]

The Resellers argued that AT&T's state tariffs referred to in the parties' interconnection agreements 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.[61] The Resellers argued that when a state tariff conflicts with the federal statutory law or the rules of a federal agency, federal law prevails.[62] Here, the Resellers contended, the FCC's rules and orders implementing Section 254(f) of the 1996 Act require that in the absence of a neutral funding mechanism AT&T must pass on the subsidy to the Resellers.[63] Thus, the Resellers argued, if the Authority finds that AT&T's tariffs, as referenced in the parties' interconnection contracts, are inconsistent with federal law, the Authority can simply direct that AT&T's tariff language be changed to comply with federal law.[64]

The Resellers did not dispute that the Authority's "interim policy" established in Docket No. 00-00230 is the law in Tennessee until such time as the Authority orders otherwise.[65] The Resellers contended, however, that the issue in this case is whether they have the right under their interconnection agreements to ask the Authority to revisit that policy and change it.[66] The Resellers cited a decision of the Tennessee Court of Appeals holding that the Authority "is free to reverse course if public policy demands it."[67]

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[60] *Id.*
[61] [Resellers'] *Reply Brief*, p. 1 (July 26, 2011).
[62] *Id.* at 1-2.
[63] *Id.* at 2.
[64] *Id.*
[65] *Id.* at 3.
[66] *Id.*
[67] *Id.*, quoting *United Cities v. Tenn. Public Service Comm'n*, 709 S.W.2d 256 (Tenn. 1990).

FINDINGS AND CONCLUSIONS

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

Because AT&T has elected market regulation pursuant to Tenn. Code Ann. § 65-5-109(m), the Authority's jurisdiction to hear this dispute is narrowly defined by Tenn. Code Ann. § 65-5-109(m) – (n). Subsection (m) provides, in relevant part:

> Notwithstanding the limitations on authority jurisdiction over market-regulated companies under state law as set forth in this section, it is the express intent of the general assembly that the Tennessee regulatory authority is authorized as a matter of state law . . . to arbitrate and enforce interconnection agreements.

And subsection (n) provides, in relevant part:

> A certificated provider electing market regulation shall be subject to the jurisdiction of the authority only when:
> . . .
> (7) The authority is exercising jurisdiction respecting the Life Line or Link Up programs consistent with FCC rules, including, but not limited to, 47 CFR 54.403(a)(3) and relevant Tennessee public service commission orders on file with the authority as of January 1, 2009[.]

The interconnection agreements at issue in this matter are governed by Georgia contract law. In addition, by incorporation in AT&T's tariff and pursuant to the Authority's decisions administering the Lifeline program, the agreements require AT&T to flow through to the Resellers that portion of the Lifeline subsidy which is funded by the federal Universal Service Fund. In its decision relevant to the state Lifeline credit, the Authority determined that each provider of local telephone service would be responsible for that portion of the total credit. The Court of Appeals affirmed the Authority's decision, which remains in effect. In the absence of a state universal service fund, and in accordance with the Authority's decision, AT&T does not

flow through any additional amount for the state Lifeline component. Accordingly, the interconnection agreements obligate the Resellers to make payments to AT&T for the state portion of the Lifeline credit.

The interconnection agreements expressly provide for billing disputes. The relevant sections of the agreements also provide by implication that the party bringing a billing dispute may withhold payment of the disputed amounts pending resolution of the dispute. The parties agree that this is the case. As the parties also agree, the agreements contain both expressly and as a matter of Georgia law an obligation to perform in good faith.

As stated by the Hearing Officer, the issues before the Authority are whether the agreements "allow the resellers to withhold Lifeline credits while a dispute over payment of those credits is being adjudicated" and "[w]hether 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." Whether the Authority's Order in Docket No. 00-00230 is inconsistent with the FCC's Universal Service Order, therefore, is not at issue. Generally, whether a party has acted in good faith is a question of fact.[68] Here, however, there is no dispute that the Resellers' decision to withhold payment was based exclusively on their belief that if the Authority were to revisit the issue in Docket No. 00-00230 it would reach a completely different result. The question whether the Resellers brought their billing disputes in good faith can be determined, therefore, by examining this action in light of the plain terms of the interconnection agreements.[69]

A billing dispute, as commonly understood and as apparently contemplated by the interconnection agreements, is a challenge to the manner in which a bill submitted to the

[68] *Re/Max Executives, Inc. v. Vacalis*, 507 S.W.2d 235, 237 (Ga. Ct. App. 1998).
[69] Summary judgment is appropriate where the plain language of an agreement admits of only one interpretation. *Megel v. Donaldson,* 654 S.W.2d 656, 662 (Ga. Ct. App. 2007).

disputing party was calculated or the basis on which payment was demanded. In some circumstances, a billing dispute might arise which would be characterized as a challenge to the other party's interpretation of the terms of the parties' agreement. Here, however, the Resellers are challenging neither AT&T's administration of the agreements nor its interpretation of them. Instead, the Resellers have based their billing disputes and their decision to withhold payment solely on the theory that the Authority should and, if requested to, will reverse its prior decision on the state Lifeline credit. The Resellers are quite frank in admitting that the interconnection agreements do not require AT&T to flow through the state Lifeline credit, and they do not pretend that they are disputing AT&T's bills on the basis of AT&T's calculation methods or its interpretation of the agreements. Instead, they are seeking action by the Authority that would necessarily begin with the Authority's determination that its own order is ineffective.

The Authority concludes that the good faith requirement contained in the interconnection agreements extends to the provision allowing a party to withhold payment pending resolution of a billing dispute. The Authority agrees with AT&T that the Resellers have not relied on a good faith basis for lodging their disputes and, therefore, are not entitled to withhold payment of the state Lifeline credit.[70] The provision for billing disputes contained in the interconnection agreements does not allow a party to withhold payments on no other basis than conjecture about possible changes in the substantive law incorporated into the agreements.[71]

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[70] Whereas bad faith may not be found where the accused party had "any reasonable ground" for the dispute it raised, bad faith "is shown by evidence that under the terms of the [agreement] under which the demand is made, . . . [the party raising the dispute] had no 'good cause' for resisting and delaying payment." *Lawyers Title*, 691 S.E. at 637. As the terms of the interconnection agreements at issue obligate the Resellers to fund the state Lifeline credit, a fact the Resellers do not dispute, the Reseller's dispute was not lodged in good faith.

[71] The Resellers' suggestion that the Authority's decision in Docket No. 00-00230 is somehow unlawful on its face, see *Initial Brief of Resellers,* p. 10, is not well-taken. The FCC's Universal Service Order acknowledged the approach taken by the Authority and in effect today:

> The Joint Board observed that many states currently generate their matching funds through the state rate-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

Consequently, a party lodging a dispute which does not do so in good faith is not relieved of its continuing obligation to make payments. 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 Authority 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 Authority may allow the Resellers to notify their customers, and the Authority is obligated to send notification letters, the Authority will recover from the Resellers its costs associated with notification.

The parties are instructed to work with Authority 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, in order to avoid duplicative or unnecessary customer notices in the event that service is not disconnected.

IT IS THEREFORE ORDERED THAT:

1. The Authority finds that the Resellers did not act in good faith in disputing charges and withholding payments to AT&T related to the state Lifeline credit.

> from the intrastate jurisdiction could 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.*

Universal Service Order, ¶ 361 (Emphasis added). In affirming the Authority's decision in Docket No. 00-00230, the Court of Appeals quoted with approval the highlighted portion of this passage. *See* 2002 WL 1255674, at *3. The Resellers suggest that the last sentence of Paragraph 361 would independently invalidate the Authority's approach, but the better reading is that the FCC would not have included the last sentence if it already believed that the method it had just described, and which the FCC had just stated that it would leave alone, inherently violated it.

2. The Authority finds that 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 such other time as the Authority may allow the Resellers to notify their customers, the Authority will recover costs associated with such customer notification from the Resellers.

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 W. Freeman, Director