

**IN THE TENNESSEE REGULATORY AUTHORITY
NASHVILLE, TENNESSEE**

IN RE:

**PETITION TO ELIMINATE STATE
LIFELINE CREDIT**

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DOCKET NO. 12-00035

BRIEF OF THE CONSUMER ADVOCATE

Pursuant to the procedural schedule in this docket, the Consumer Advocate and Protection Division of the Office of the Attorney General ("Consumer Advocate"), respectfully submits to the Tennessee Regulatory Authority ("Authority", "TRA") the following arguments in favor of preserving the goals and benefits of the state Lifeline credit. On May 1, 2012, BellSouth Telecommunications LLC d/b/a AT&T Tennessee, the CenturyLink Companies, Frontier Communications Co. of Tennessee/Volunteer and Frontier Communications of America, TDS Telecom, Tennessee Telephone Association, Level 3 Communications, LLC and tw telecom of tennessee, llc (collectively, the "Industry") petitioned to eliminate the state Lifeline credit.

Briefly, the state Lifeline credit of \$3.50 at issue in this docket is for qualifying low-income households for traditional wire-line service. In addition to the state Lifeline credit of \$3.50 monthly, eligible households also receive a credit of \$9.25 from the federal Lifeline program. Eligible low-income wireless customers may receive the federal Lifeline credit, but not the state Lifeline credit. The state Lifeline program in Tennessee began in 1991 when all incumbent telephone companies were rate of return regulated. In most instances the subsidy was built into rates or funded through excess earnings.

Funding for the state program was and remains funded entirely by incumbent and competitive local exchange carriers. At this time, the Consumer Advocate opposes any radical change in the state Lifeline credit. The state Lifeline credit is a valuable part of the Tennessee's universal service public policy. Moreover, recent actions of the Federal Communications Commission ("FCC") reflect reforms to eliminate waste and fraud and not an effort to intrude upon the funding practices established by state commissions. Nevertheless, should the TRA determine a change in policy is necessary, there are many policy options the Authority may consider rather than simply ending a long standing and beneficial public policy.

I. THE FCC HAS NOT CALLED FOR THE END OF STATE LIFELINE FUNDING

The FCC's Lifeline and Linkup Modernization Order ("Lifeline Reform Order") does not call for state commissions to re-evaluate the funding mechanisms developed. The FCC has consistently deferred to the states as to the method of funding the state Lifeline contributions.¹ The TRA has applied the funding requirements of the state Lifeline credit to both incumbents and resellers equitably. The Tennessee Court of Appeals has found the TRA's policy is consistent with state and federal law. *Discount Communications, Inc. v. BellSouth Communications, Inc.* 2002 WL 1255674*3-4 (Tenn.Ct.App.2002) (copy attached).

Rather than require state commissions to re-evaluate how they fund state Lifeline credits, the FCC focused on reforms to eliminate waste and fraud.² The Consumer Advocate is supportive of the FCC's efforts and reforms to prevent fraud and waste in the administration of the Federal Lifeline program. The FCC's Lifeline Reform Order has little relevance to the position of the Industry in this matter. However, in making such reforms and adjustments, the FCC has terminated the Link-up program for all state jurisdictions except of those households in

¹ Docket 11-00109, Final Order, fn 71 (December 16, 2011).

² FCC Lifeline Reform Order, p. 9 (February 6, 2012)

Tribal areas and reduced the overall federal Lifeline credit from \$10.00 to \$9.25. The end of the Link-up program and the \$35 subsidy to establish phone service is significant. Specifically for those households in economic duress and moving from location to location, the charges for simply establishing basic dial tone service can represent a steep obstacle.

Public policy is not created in a vacuum. Thus, in weighing the Industry's petition to end the state Lifeline credit, the Authority should consider the other benefits low-income Tennessee households have already lost under the FCC's reforms. Furthermore, there is the impact of deregulation on low-income households in the form of rate increases. Since the implementation of the "Market Regulation Act of 2009" for electing incumbent telephone providers, rates for many telephone services, including basic rates, have actually risen in the face of market competition.³

II. THE BASIS FOR LIFELINE

While introducing reforms to open up the telecommunications industry to competition, the Tennessee legislature has consistently maintained the TRA's jurisdiction and goals for universal service. Tenn. Code Ann. §§ 65-5-107; 65-5-109(n)(x). It is the policy of this state that universal service must be maintained even as market competition is fostered in the telecommunications industry. Tenn. Code Ann. § 65-4-123. Such legislative enactments cannot be ignored.

Voice service remains a prerequisite for full participation in our economy and society.⁴ The FCC has concluded Lifeline "has been instrumental in increasing the availability of quality voice service to low-income consumers" and noted that many low-income households would be

³ Docket 10-00108.

⁴ FCC Lifeline Reform Order, p. 10 (February 6, 2012)

unable to afford service without a Lifeline subsidy.⁵ The current economic challenges for many Tennessee households are daunting. The Tennessee Department of Labor estimates the unemployment rate in Tennessee is 8.4%, slightly more than the national unemployment rate of 8.3%.⁶ However, the rate of unemployment in Tennessee varies across the state. Of the 99 counties in the state, 54 are estimated to have unemployment rates of 10% or greater.⁷

Approximately 93,000 Tennessee households are recipients of the state Lifeline credit for traditional landline service.⁸ This is a significant number of households. It is all the more significant in comparison to the growth in the number of Lifeline subscribers in the last fifteen years. From 1997 to 2001 participation in Lifeline for Tennessee households grew from 18,819 households to 45,695.⁹ Between 2007 and 2009, the growth in Lifeline participation grew from 64,039 Tennessee households to 92,572.¹⁰ 2010 and 2011 saw exponential growth in Lifeline participation from 297,449 to 406,608 Tennessee households.¹¹

The Consumer Advocate acknowledges the bulk of current Tennessee Lifeline subscribers are wireless service customers and thus ineligible for the state Lifeline credit. However, approximately 93,000 Tennessee households currently receive the benefit of the state Lifeline credit. The sheer size of this figure is far from insignificant and represents more Lifeline households (wire-line and wireless combined) than there were in 2009, just a short time again.

⁵ *Id.*, p. 9.

⁶ Tennessee Department of Labor and Workforce Development, <http://www.tn.gov/labor-wfd/news/UIRATE.htm>

⁷ *Id.*

⁸ TRA Annual Report for 2010-2011, p. 12.

⁹ TRA Annual Report for 2001-2002, p. 19.

¹⁰ TRA Annual Report for 2010-2011, p. 16.

¹¹ *Id.*, p. 16.

III. STATE CREDIT LIFELINE POLICY OPTIONS

This matter is not a zero-sum game. It is not simply a choice of whether to end or continue Tennessee's Lifeline program. There are a number of policy options the Authority may consider. The Authority has discretion in this matter to determine first whether a change in the state Lifeline policy is necessary and second, the extent to which the policy needs modification. It is undisputed the Authority has such discretion for regulated incumbent and market regulated telephone companies. In enacting the "Market Regulation Act of 2009," which retired most regulatory controls for those incumbent telephone companies electing to become unregulated, the legislature specifically authorized the TRA to retain jurisdiction over Lifeline for market regulated telephone companies. Tenn. Code Ann. § 65-5-109(n)(vii). Thus, the legislature has left this policy issue squarely in the hands of the Authority.

A. The Establishment of a Tennessee Universal Service Program

The Authority can work to establish a state universal service program as a funding mechanism for a state Lifeline credit for landline telephone service subscribers. The Authority is authorized by statute to do so. Tenn. Code Ann. §§ 65-5-107; 65-5-109(n)(x). The Tennessee legislature was explicit in the goals for a state universal service fund:

Universal service, consisting of residential basic local exchange telephone service at affordable rates and carrier-of-last-resort obligations must be maintained after the local telecommunications markets are opened to competition. In order to ensure the availability of affordable residential basic local exchange telephone service, the authority shall formulate policies, promulgate rules and issue orders which require all telecommunications service providers to contribute to the support of universal service.

Tenn.Code Ann. § 65-5-107(a). This enactment is not completely discretionary. It directs the Authority to ensure the availability of affordable residential basic service after local telecommunication markets are opened to competition. By taking the initiative, the Authority can

craft a state universal service program specifically tailored to address the concerns of the Industry while continuing a valuable public policy. The TRA acknowledged in 1998 the decision to require the telephone service providers to fund the state Lifeline credit was an interim policy.¹² At one time the agency invested considerable effort in attempting to formulate a state universal service program; however, the interim policy set years ago remains in place.¹³ In enacting several market regulation reforms, the Tennessee legislature has chosen to continue to support the concept of universal service and charged the Authority to ensure affordable basic service rates.

B. Changing the Eligibility Requirements for the State Lifeline Credit

The Authority could consider the establishment of new baseline Lifeline eligibility requirements for low-income households. The Consumer Advocate does not suggest the TRA should deviate from the income eligibility requirements, but rather limiting eligibility for the state Lifeline credit to those households that utilize the most basic telephone services. For example, the Authority could limit the state Lifeline credit to those households with basic service and very few call features. Currently, a low-income household with a bundled package with a wide variety of services such as wire-line, internet access and other services provided by an incumbent provider is eligible for the state Lifeline credit. A household with bundled services may absorb the loss of a \$3.50 credit much easier than a household that can only afford basic service.

The Authority could also consider other eligibility requirements that would maintain the state Lifeline credit for low-income households with seniors and children. However, the Consumer Advocate acknowledges such changes in eligibility requirements for a state Lifeline

¹² Docket 97-00888, *Interim Order on Phase I of Universal Service*, p. 43 (May 20, 1998); Docket 00-00230, *Order Denying Petition for Reconsideration and Petition to Reconsider*, p. 4 (February 6, 2001).

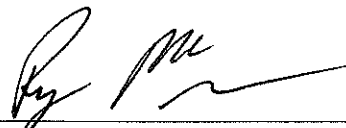
¹³ TRA Docket 97-00888; This docket was administratively closed on April 12, 2012.

credit would be a subjective or academic judgment based on the limited information in the record and could impact the administrative costs of an incumbent provider.

C. "Sunset" The State Lifeline Credit Pending a Thorough Review

The Authority could make no change in the current state Lifeline program, but rather "sunset" the program at a specific date in the future to revisit the issue to examine the need for the state credit, modification of the policy or, if necessary, determine to end the state Lifeline credit altogether. At this time, the Consumer Advocate is unaware of any state that has ended its state Lifeline credit program or state universal service fund. With the recent reforms implemented by the FCC, it may be premature for the Authority to consider simply ending the state Lifeline credit given that 93,000 low-income households are still utilizing the state credit and the extent of the economic challenges such Tennessee families endure. Moreover, the legislature charged the TRA to ensure affordable basic service rates after local markets are opened to competition and that universal service must be maintained. Tenn.Code Ann. §§ 65-5-107(a); 65-4-123. The Court of Appeals has concluded the policy in place complies with state and federal law. Currently there is no legal catalyst for changing the TRA's policy.

RESPECTFULLY SUBMITTED,



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Dated: Oct. 22, 2012.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served via U.S. Mail or electronic mail upon:

This the 22nd day of October, 2012.

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(Cite as: 2002 WL 1255674 (Tenn.Ct.App.))

Only the Westlaw citation is currently available.

SEE COURT OF APPEALS RULES 11 AND 12

Court of Appeals of Tennessee.
DISCOUNT COMMUNICATIONS, INC.

v.

BELLSOUTH TELECOMMUNICATIONS, INC.

No. M2000-02924-COA-R12-CV.

June 7, 2002.

Appeal from the Tennessee Regulatory Authority,
No. 00-00230; Melvin J. Malone, Chairman.
Henry Walker, Nashville, Tennessee, for the appel-
lant, Discount Communications, Inc.

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

Guy M. Hicks and Patrick W. Turner, Nashville,
Tennessee, for the appellant and appellee, Bell-
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Jonathan N. Wike and Gary R. Hotvedt, Nashville,
Tennessee, for the appellee, Tennessee Regulatory
Authority.

OPINION

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.

BEN H. CANTRELL, P.J., M.S.

*1 Discount Communications, Inc. purchases
telephone services from BellSouth Telecommunica-
tions, 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 sub-
sidies. 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 Regu-
latory Authority decided that the agreement re-
quired BellSouth to provide directory assistance at
no charge to Discount's customers and that Bell-
South was not required to forward the \$3.50
monthly charge to Discount. We affirm.

I.

The Federal Communications Act of 1996 re-
quires local exchange carriers like BellSouth Com-
munications, 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 de-
signed to make telephone service more affordable
for low income households. The federal govern-
ment provides a subsidy of \$7.00 a month for eli-
gible consumers and the TRA requires each carrier
in Tennessee to give a \$3.50 credit as a state sub-
sidy. 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 por-
tion of the total subsidy was exacted from the local
carrier.

Not Reported in S.W.3d, 2002 WL 1255674 (Tenn.Ct.App.)
(Cite as: 2002 WL 1255674 (Tenn.Ct.App.))

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:

- *2 (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 assist-

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ance 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.

*3 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,

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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.

*4 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.

Tenn.Ct.App.,2002.
Discount Communications, Inc. v. Bellsouth Telecommunications, Inc.
Not Reported in S.W.3d, 2002 WL 1255674
(Tenn.Ct.App.)

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