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January 20, 2010

VIA OVERNIGHT MAIL

Mr. Jeff Derouen
Executive Director
Kentucky Public Service Commission
211 Sower Boulevard
P.O. Box 615
Frankfort, KY 40602

2010-00025

RECEIVED

JAN 21 2010

PUBLIC SERVICE
COMMISSION

Re: BellSouth Telecommunications, Inc., d/b/a AT&T Southeast d/b/a AT&T
Kentucky, Complainant v. Budget Prepay, Inc. d/b/a Budget Phone,
Defendant

Dear Mr. Derouen:

Enclosed for filing in the above-reference case are the original and five (5) copies of AT&T Kentucky's Formal Complaint along with a CD containing the applicable Interconnection Agreement.

Should you have any questions, please let me know.

Sincerely,


Mary K. Keyer

Enclosures

cc: Registered Agent for Budget Prepay, Inc. d/b/a Budget Phone

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I. BACKGROUND AND SUMMARY OF COMPLAINT

Budget Phone owes AT&T Kentucky a past-due and unpaid balance for telecommunications services that AT&T Kentucky provided to Budget Phone for resale under the terms and conditions of the Parties' Interconnection Agreement entered into in 2008. As of November 9, 2009, this past-due and unpaid balance totals, in the aggregate, more than \$100,000 in the Commonwealth of Kentucky.³ To the extent that Budget Phone has disputed AT&T Kentucky's bills, AT&T Kentucky has denied those disputes as required by its Interconnection Agreement with Budget Phone. Budget Phone, however, has declined to pay AT&T Kentucky the amounts associated with these denied disputes. A substantial amount of this past-due and unpaid balance is the result of Budget Phone' withholding payments to AT&T Kentucky for one or both of the following reasons:⁴ (1) Budget Phone erroneously asserts that AT&T Kentucky cannot apply the resale discount approved by this Commission to the cashback component of various promotional offers that AT&T Kentucky makes available for resale;⁵ and (2) Budget Phone erroneously asserts that AT&T Kentucky's

Kentucky will file that motion in each of these dockets after the Commission assigns them docket numbers.

³ As of November 9, 2009, Budget Phone' unpaid and past-due balance is over \$1.9 million across the nine AT&T Southeast states.

⁴ A more detailed description of Budget Phone' assertions, and a brief explanation of why they are erroneous, are set forth in Section IV of this Complaint.

⁵ For one-time "cashback" promotions, AT&T Kentucky contends that resellers should receive less than the face amount of the promotion minus the wholesale discount because such valuation does not reflect the true economic value of the promotion on retail rates. Among other things, it does not consider the redemption rate, the in-service life of the subject customer, or the net present value of a one-time upfront payment associated with the promotion. Recently, AT&T implemented a new methodology aimed at providing the true economic value of the promotion to resellers. Several resellers are challenging the methodology in other proceedings, but that issue is not before the Commission in this docket because AT&T Kentucky is not seeking any amounts billed under this new methodology in this docket.

customer referral marketing promotions (such as the “word-of-mouth” promotion) are subject to resale.

The Interconnection Agreement between AT&T Kentucky and Budget Phone provides that disputes like these are to be resolved in the first instance by this Commission. AT&T Kentucky, therefore, respectfully requests that the Commission resolve the outstanding disputes, determine the amount that Budget Phone owes AT&T Kentucky under the Parties’ Interconnection Agreement, and require Budget Phone to pay that amount to AT&T Kentucky.

II. PARTIES

1. AT&T Kentucky, a Georgia corporation, is an incumbent local exchange carrier providing telecommunications services in 78 counties in the Commonwealth of Kentucky. AT&T Kentucky’s address in Kentucky is 601 W. Chestnut Street, Louisville, Kentucky, 40203.

2. The full name and address of the authorized representative for AT&T Kentucky in this proceeding is:

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3. Budget Phone is organized under the laws of the State of Louisiana and is a competitive local exchange carrier (“CLEC”) authorized to provide resold local exchange telecommunications services within the Commonwealth of Kentucky.

III. BUDGET PHONE' BREACH OF ITS INTERCONNECTION AGREEMENT

4. In 2008, AT&T Kentucky and Budget Phone entered into a negotiated interconnection agreement ("Interconnection Agreement") in which AT&T Kentucky agreed, among other things, to offer various telecommunications services for resale to Budget Phone at specified wholesale rates and subject to specified terms and conditions. A copy of the Interconnection Agreement is on a CD attached hereto as **Exhibit A**.⁶

5. As of November 9, 2009, Budget Phone owes a past due and unpaid balance to AT&T Kentucky in the amount of \$100,931.39 (the "Past Due Balance"). The Past Due Balance represents the amounts AT&T Kentucky billed Budget Phone for telecommunications services provided to Budget Phone in Kentucky pursuant to the Parties' Interconnection Agreement less: payments made by Budget Phone, and credits provided by AT&T Kentucky to Budget Phone in connection with valid disputes and approved promotional credit requests submitted by Budget Phone as of November 9, 2009.

6. The Past Due Balance does not include any amounts related to disputes or promotional credit requests submitted by Budget Phone, but not yet reviewed by AT&T Kentucky.

7. To the extent that the Past Due Balance includes any charges on AT&T Kentucky's invoices that Budget Phone has disputed, AT&T Kentucky has denied those disputes as required by the Interconnection Agreement with Budget Phone.

⁶ AT&T Kentucky will make copies of this CD available to the Parties upon request.

8. Budget Phone has breached the Interconnection Agreement by refusing to pay amounts that are due and owing to AT&T Kentucky under that agreement.

IV. BUDGET PHONE'S ERRONEOUS REASONS FOR NONPAYMENT

9. As noted above, a substantial amount of Budget Phone's unpaid balance is the result of Budget Phone's withholding payments to AT&T Kentucky for one or both of the following reasons.

A. Application of the resale discount to the "cashback" component of promotional offerings.

10. Budget Phone asserts that AT&T Kentucky cannot apply the resale discount approved by this Commission to the cashback component of various promotional offerings that AT&T Kentucky makes available for resale. Assume, for example, AT&T Kentucky's retail promotional offering provides a coupon that can be redeemed for a \$50 check to a retail residential customer who purchases Telecommunications Service A under certain conditions. When Budget Phone resells that promotional offering to qualifying end users and submits to AT&T Kentucky an appropriate promotional credit request, AT&T Kentucky provides Budget Phone a bill credit of \$41.60 (\$50 less the 16.79% resale discount established by this Commission). Budget Phone, however, erroneously contends that it is entitled to a bill credit for the full \$50 "face value" of the cashback amount.

11. There is no basis in logic or law for Budget Phone's assertions. If AT&T Kentucky were to reduce the retail price of a telecommunications service

by \$50 in a given month (say from \$200 to \$150), Budget Phone would not receive the full \$50 “face value” of the reduction when it purchased that service for resale. Instead, Budget Phone would receive a \$41.60 reduction – the \$50 face value of the reduction less the 16.79% avoided cost discount established by the Commission.⁷ Budget Phone clearly should not receive a greater wholesale reduction merely because the retail reduction takes the form of a “cashback” offer rather than a price reduction.

12. The federal Act expressly contemplates that when an incumbent LEC resells services under § 251(c)(4), “a State commission shall determine wholesale rates on the basis of retail rates charged to subscribers for the telecommunications service requested, excluding the portion thereof attributable to any marketing, billing, collection, and other costs that will be avoided by the local exchange carrier.” 47 U.S.C. § 252(c)(3). Using this “costs avoided” standard, this Commission determined a state-wide percentage discount from the retail rate that is used to determine the wholesale rate at which the incumbent LEC, AT&T Kentucky, is to sell its services to CLECs for resale. Far from being inappropriate, subtracting the wholesale discount from the face value of the promotion is exactly what is contemplated by the federal Act.

⁷ When the retail price of the service was \$200, Budget Phone paid AT&T Kentucky \$166.42 (\$200 less the 16.79% resale discount) when it purchased the service for resale. When the retail price of the service is reduced to \$150, Budget Phone pays AT&T Kentucky \$124.82 (\$150 less the 16.79% resale discount) when it purchases the service for resale. In other words, a \$50 reduction in the retail price of the service results in a \$41.60 reduction in the price Budget Phone pays for the service (from \$166.42 to \$124.82), which is the \$50 “face value” of the reduction less the 16.79% resale discount.

B. Customer Referral Marketing Promotions.

13. Budget Phone asserts that AT&T Kentucky's customer referral marketing promotions (such as the "word-of-mouth" promotion) are subject to resale. Assume, for example, that AT&T Kentucky gives retail customers who qualify a \$50 bill credit when they refer others who purchase AT&T services. Budget Phone contends that it is entitled to resell this customer referral marketing promotion and that it, therefore, is entitled to a \$50 bill credit when one of Budget Phone's end users refers others who purchase services from Budget Phone.

14. Subject to certain conditions and limitations, AT&T Kentucky is required "to offer for resale at wholesale rates any *telecommunications service* that [it] provides at retail to subscribers who are not telecommunications carriers." 47 U.S.C. § 251(c)(4)(A) (emphasis added). Customer referral marketing promotions, however, are not telecommunications services that are subject to resale obligations. An end user does not receive any benefit under these promotions for purchasing telecommunications services from AT&T Kentucky. Instead, an end user receives benefits under these promotions only if he or she successfully markets AT&T Kentucky's services to others who then purchase services from AT&T Kentucky. Budget Phone obviously is free to give similar benefits to its end users who successfully market its services to others, but it is not entitled to have AT&T Kentucky finance any such marketing programs that Budget Phone may employ.

15. The federal Act makes it clear that CLECs must finance their own marketing programs when it directs state commissions to “determine wholesale rates on the basis of retail rates charged to subscribers for the telecommunications service requested, *excluding the portion thereof attributable to any marketing . . . costs that will be avoided by the local exchange carrier.*” 47 U.S.C. § 252(d)(3). Accordingly, the resale discount rate that this Commission established (and that is incorporated in the Interconnection Agreement) already excludes the costs of customer referral marketing promotions like the “word of mouth” promotion. To go further and also require AT&T Kentucky to give Budget Phone additional promotional credits for these customer referral marketing promotions would impermissibly force AT&T Kentucky to double-count its marketing expenses -- first in the wholesale rate, and again in the promotional credit.

V. JURISDICTION

17. The Commission has jurisdiction to interpret and enforce the terms of the Interconnection Agreement at issue in this docket. The 1996 Act expressly authorizes state commissions to mediate interconnection agreement negotiations,⁸ arbitrate interconnection agreements,⁹ and approve or reject interconnection agreements.¹⁰ In addition, the courts have held that § 252

⁸ 47 U.S.C. § 252(a)(2)

⁹ *Id.* § 252(b)

¹⁰ *Id.* § 252(e)

implicitly authorizes state commissions to interpret and enforce the interconnection agreements they approve.¹¹

VI. REQUEST FOR RELIEF

WHEREFORE, AT&T Kentucky respectfully requests that the Commission:

(1) Serve a copy of this Complaint upon Budget Phone and require Budget Phone to answer the Complaint;

(2) Find that Budget Phone has breached the Interconnection Agreement by wrongfully withholding amounts due and payable to AT&T Kentucky for services provided in accordance with the Parties' Interconnection Agreement;

(3) Find that AT&T Kentucky has been financially harmed as a direct result of Budget Phone's breach;

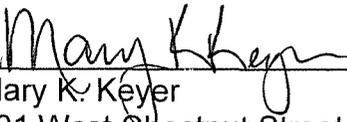
(4) Find that Budget Phone is liable to AT&T Kentucky for all amounts wrongfully withheld by it, including without limitation late payment charges and interest;

(5) Require Budget Phone to pay AT&T Kentucky all amounts wrongfully withheld by it, including without limitation late payment charges and interest; and

¹¹ See, e.g., *Bell Atl. Md., Inc. v. MCI WorldCom, Inc.*, 240 F.3d 279, 304 (4th Cir. 2001) ("The critical question is not whether State commissions have authority to interpret and enforce interconnection agreements – we believe they do"), *vacated on other grounds in Verizon Md., Inc. v. Pub. Serv. Comm'n of Md.*, 535 U.S. 65 (2002). See also *Core Commc'ns v. Verizon Pennsylvania, Inc.*, 493 F.3d 333, 342 n.7 (3rd Cir. 2007) ("[E]very federal appellate court to consider the issue has determined or assumed that state commissions have authority to hear interpretation and enforcement actions regarding approved interconnection agreements").

(6) Grant AT&T Kentucky such additional relief as the Commission may deem just and proper.

Respectfully submitted,



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