

**COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION**

IN THE MATTER OF:

CASE NO.: 2010-00025

**BELLSOUTH TELECOMMUNICATIONS, INC.
D/B/A AT&T SOUTHEAST D/B/A AT&T
KENTUCKY**

RECEIVED

VERSUS

FEB 25 2010

BUDGET PREPAY, INC. D/B/A BUDGET PHONE

**PUBLIC SERVICE
COMMISSION**

**DEFENSES AND ANSWER, AND
COUNTER-CLAIM OF BUDGET PHONE**

In accordance with the Order entered herein January 29, 2010, and within the extended time requested, Budget Prepay, Inc. d/b/a Budget Phone ("Budget Phone") files the following defenses and answer to the Formal Complaint filed by BellSouth Telecommunications, Inc. d/b/a AT&T Southeast d/b/a AT&T Kentucky ("AT&T"), and further asserts the following Counter-Claim.

DEFENSES

On the basis of current information and belief, Budget Phone hereby states new matters constituting defenses to AT&T's Complaint, including those matters constituting an avoidance or affirmative defense:

1. The Complaint fails to state a cause of action, in whole or in part, against Budget Phone.
2. The Kentucky Public Service Commission ("KPSC") should decline to hear this Complaint because this matter involves an interpretation of the Telecommunications Act of 1996 ("the Act") and Federal Communications Commission ("FCC") regulations promulgated thereunder relating to AT&T's resale obligations and the prohibition against imposing unreasonable or discriminatory conditions or limitations on resale, which issues are currently pending before

the FCC, the most appropriate body to interpret its own regulations.¹ Therefore, the KPSC should hold this matter in abeyance until such time as the FCC renders a decision.

3. The KPSC should further decline to hear this Complaint because the issue that is the subject of the Complaint, AT&T's resale obligations under the Act and FCC regulations, is currently pending in the United States District Court for the Western District of North Carolina²; the Fourth Circuit previously issued a ruling finding that the Act and FCC regulations require AT&T to make available to Competitive Local Exchange Carrier ("CLEC") resellers the promotional discounts offered to AT&T's retail customers.³ Because the interpretation of that previous decision will be central to a resolution of the issue set forth in the Complaint, the KPSC should hold this matter in abeyance until such time as the federal court renders a decision.

4. In addition, the KPSC should decline to hear this Complaint because the United States Court of Appeals for the Fifth Circuit is currently considering an appeal by AT&T from a preliminary injunction issued by the United States District Court for the Northern District of Texas.⁴ That case involves whether AT&T's new methodology for calculating the resale promotion credits due to CLEC resellers is a restriction on resale requiring advance state commission approval. AT&T filed a Motion for Abeyance in Louisiana Public Service Commission Docket No. U-31202, *In re: BellSouth Telecommunications, Inc. d/b/a AT&T Louisiana, Petition for Review Concerning Resale Promotion Methodology Adjustment*, considering the new methodology, representing that the outcome of the appeal may provide guidance to the parties in that docket, and could be dispositive of some or all of the issues associated with that docket, and that admin-

¹ *In the Matter of Petition of Image Access, Inc. d/b/a NewPhone for Declaratory Ruling Regarding Incumbent Local Exchange Carrier Promotions Available for Resale Under the Communications Act of 1934, as Amended, and Sections 51.601 et seq. of the Commission's Rules*, WC Docket No. 06-129.

² *CGM, LLC v. BellSouth Telecommunications, Inc.*, Case No. 3:09-cv-00377 (W.D.N.C.)

³ *BellSouth Telecommunications, Inc. v. Sanford*, 494 F.3d 439 (4th Cir. 2007).

⁴ *Budget PrePay, Inc. v. AT&T Inc. f/k/a SBC Communications, Inc.*, Case No. 3:09-cv-1494-P (N.D. Tex. Nov. 30, 2009).

istrative and judicial economy are well served and resources appropriately conserved by holding that docket in abeyance. The LPSC granted AT&T's Motion by Order dated February 18, 2010, holding those proceedings in abeyance pending a final decision in *Budget PrePay v. AT&T Inc. f/k/a SBC Communications, Inc.*, 5th Cir. No. 09-11188 c/w 09-110999. Likewise, the KPSC should decline to hear this Complaint because similar issues are involved in this matter, to wit: whether AT&T has refused to provide CLEC resellers the proper promotional discounts and whether such refusal constitutes a restriction on resale requiring advance state commission approval.

5. AT&T has violated 47 U.S.C. § 251(c)(4), 47 C.F.R. 51.605 and 47 C.F.R. 51.613(b) by failing to provide Budget Phone with the appropriate resale promotion credit, and by failing to obtain KPSC approval before placing restrictions on resale.

6. AT&T's claims are barred and/or preempted, in whole or in part, by federal laws and regulations, including (without limitation) 47 U.S.C. § 251(c)(4), 47 C.F.R. 51.605 and 47 C.F.R. 51.613(b).

7. AT&T's claims are barred, in whole or in part, by the doctrine of unclean hands and/or estoppel.

8. The FCC has primary jurisdiction over all or part of AT&T's claims.

9. AT&T's claims are barred, in whole or in part, by its failure to mitigate any damages allegedly sustained.

10. AT&T's claims are barred by the applicable statute of limitations.

11. AT&T's right to recover, if any, is offset in whole or in part, for the reasons stated in Budget Phone's counter-claim.

ANSWER

Subject to and without waiving the above exceptions and defenses, Budget Phone further responds in answer to AT&T's Complaint by denying each and every allegation contained therein, except those allegations which may be hereinafter specifically admitted. Contrary to KPSC regulation (807 KAR 5:001, §12(1)(c)), the Complaint does not state "fully, clearly, and with reasonable certainty" either facts or provide specific references to allegedly applicable laws, KPSC orders, or agreement provisions; instead, the Complaint contains argumentative assertions, hypotheticals, and tendentious characterizations of laws, written agreements, and regulatory decisions — to which no response is required. Budget Phone answers the specific material allegations contained in the numbered paragraphs of AT&T's Complaint as follows:

1. Budget Phone denies the allegations contained in Paragraph 1 of the Complaint for lack of information sufficient to justify a belief therein.
2. Budget Phone accepts the designation of AT&T's representative in Paragraph 2 of the Complaint.
3. Budget Phone admits the allegations contained in Paragraph 3 of the Complaint.
4. Budget Phone admits that it entered into an Interconnection Agreement with AT&T on October 16, 2008, effective November 15, 2008. Budget Phone further answers that the provisions of the Parties' November 2008 Interconnection Agreement speak for themselves. Budget Phone denies any remaining allegations in Paragraph 4.
5. Budget Phone denies the allegations contained in the first sentence of Paragraph 5 of the Complaint. Budget Phone is without knowledge or information sufficient to form a belief as to the truth of the allegations in the second sentence concerning AT&T's determinations and beliefs and therefore denies such allegations.

6. Budget Phone denies the allegations contained in Paragraph 6 of the Complaint for lack of information sufficient to justify a belief therein.

7. Budget Phone denies the allegations contained in Paragraph 7 of the Complaint for lack of information sufficient to justify a belief therein.

8. Budget Phone denies the allegations contained in Paragraph 8 of the Complaint.

9. Budget Phone denies the allegations contained in Paragraph 9 of the Complaint.

10. Budget Phone denies the allegations contained in Paragraph 10 of the Complaint as written and, further answers that AT&T has violated 47 U.S.C. § 251(c)(4), 47 C.F.R. 51.605 and 47 C.F.R. 51.613(b) and breached the Parties' Interconnection Agreements by (a) failing to provide Budget Phone with the appropriate resale promotion credit, (b) imposing unreasonable and discriminatory restrictions on resale, and (c) failing to obtain necessary and prior approval from the KPSC, pursuant to 47 C.F.R. 51.613(b), prior to imposing a restriction on resale.

11. Budget Phone denies the allegations contained in Paragraph 11 of the Complaint. Budget Phone further answers that AT&T's resale restriction denies Budget Phone the proper promotional discount and may result in a wholesale price to Budget Phone that exceeds the retail price for AT&T's customers.⁵

12. Budget Phone denies the allegations contained in Paragraph 12 of the Complaint and further answers that the provisions of the Act and KPSC orders speak for themselves.

13. Budget Phone denies the allegations contained in Paragraph 13 of the Complaint and further answers that it has not sought any credits from AT&T in connection with its cus-

⁵ When the retail price of the AT&T service is \$20, and the cash back promotion provided by AT&T to the retail customer is \$50, the customer's effective retail rate is -\$30. Under AT&T's formula, it would apply the wholesale discount of 16.79% to the \$20 rate and the \$50 promotion to arrive at a wholesale rate of -\$24.96. Thus, the whole-sale rate would exceed the effective retail rate by \$5.04.

customer referral marketing promotions such as the “word-of-mouth” promotion such that AT&T has no cause of action against Budget Phone.

14. Budget Phone denies the allegations contained in Paragraph 14 of the Complaint and further answers that the provisions of the Act speak for themselves, and that Budget Phone has not sought any credits from AT&T in connection with its customer referral marketing promotions such as the “word-of-mouth” promotion such that AT&T has no cause of action against Budget Phone.

15. Budget Phone denies the allegations contained in Paragraph 15 of the Complaint, and further answers that the provisions of the Act and KPSC orders speak for themselves and that Budget Phone has not sought any credits from AT&T in connection with its customer referral marketing promotions such as the “word-of-mouth” promotion such that AT&T has no cause of action against Budget Phone.

16. There is no paragraph 16 in the Complaint.

17. Budget Phone denies the allegations contained in Paragraph 17 of the Complaint as written and answers that the provisions of the Act and decisions of the federal courts speak for themselves. Budget Phone further answers that the Complaint should be held in abeyance on the grounds of primary jurisdiction pending a decision by the FCC in WC Docket No. 06-129.

18. Budget Phone denies all allegations made in any unnumbered paragraphs of the Complaint and denies that AT&T is entitled to the relief requested.

COUNTER-CLAIM

And now, acting as Plaintiff in its Counter-Claim against AT&T, Budget Phone alleges and claims as follows:

1. Budget Phone and AT&T executed an Interconnection Agreement on August 18, 2005, effective September 17, 2005 (“September 2005 Interconnection Agreement”). Budget Phone and AT&T executed an Interconnection Agreement on October 16, 2008, effective November 15, 2008 (“November 2008 Interconnection Agreement”) (collectively, “Interconnection Agreements”).

2. AT&T has violated 47 U.S.C. § 251(c)(4), 47 C.F.R. 51.605 and 47 C.F.R. 51.613(b) and breached the Parties’ Interconnection Agreements by (a) failing to provide Budget Phone with the appropriate resale promotion credit, (b) imposing unreasonable and discriminatory restrictions on resale, and (c) failing to obtain necessary and prior approval from the KPSC, pursuant to 47 C.F.R. 51.613(b), prior to imposing a restriction on resale. AT&T’s actions are anticompetitive and caused financial harm to Budget Phone. AT&T owes Budget Phone for all amounts wrongfully withheld.

WHEREFORE, Defendant Budget Phone requests:

(1) that its answer be deemed good and sufficient and, after due proceedings are had, that the Complaint of AT&T be dismissed with prejudice at its sole cost;

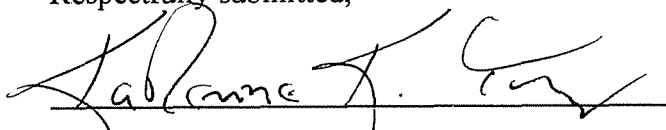
(2) that AT&T’s Complaint be held in abeyance pending decisions by the FCC in WC Docket No. 06-129, the United States District Court for the Western District of North Carolina in Case No. 3:09-cv-00377, and the United States Court of Appeals for the Fifth Circuit, Case Nos. 09-11188 and 09-11099, on the appeal of the decision of the United States District Court for the Northern District of Texas, Case No. 3:09-cv-1494-P; and

(3) that there be judgment in Budget Phone’s favor on its counter-claim, declaring that AT&T has breached its Interconnection Agreements with Budget Phone by wrongfully withholding the proper promotional credits due and payable to Budget Phone, finding and declaring that

Budget Phone has been financially harmed as a result of AT&T's breach, finding and declaring that AT&T is liable to, and required to pay, Budget Phone for all amounts wrongfully withheld by it, including late payment charges and interest, costs and any other appropriate damages; and

(4) for all general and equitable relief deemed appropriate by the Commission.

Respectfully submitted,



Katherine K. Yunker
YUNKER & PARK PLC
P. O. Box 21784
Lexington, KY 40522-1784
Telephone: 859-255-0629
Fax: 859-255-0746

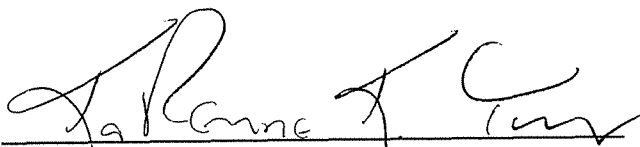
Gordon D. Polozola
KEAN, MILLER, HAWTHORNE, D'ARMOND,
MCCOWAN & JARMAN, L.L.P.
P. O. Box 3513
Baton Rouge, LA 70821
Telephone: (225) 382-3440
Fax: (225) 215-4040

ATTORNEYS FOR BUDGET PREPAY, INC.
d/b/a BUDGET PHONE

CERTIFICATE of FILING and SERVICE

I hereby certify that on this the 25th day of February 2010, the original and ten (10) copies of the foregoing were hand-delivered to the Commission for filing, and a copy was served, by first-class U.S. mail, on:

Mary K. Keyer
AT&T SOUTHEAST
601 W. Chestnut Street, Suite 407
Louisville, KY 40203-2034



Attorney for Budget PrePay, Inc.