

**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**

**APR 30 2010**

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

**PUBLIC SERVICE  
COMMISSION**

**BUDGET PHONE RESPONSE IN OPPOSITION TO  
AT&T KENTUCKY'S MOTION TO DISMISS OR SEVER COUNTERCLAIM**

Budget Prepay, Inc. d/b/a Budget Phone ("Budget Phone") hereby submits its Response in Opposition to the Motion to Dismiss or Sever Counterclaim ("Motion") filed by BellSouth Telecommunications, Inc. d/b/a AT&T Southeast d/b/a AT&T Kentucky ("AT&T") with the Kentucky Public Service Commission ("Commission") in the above-referenced docket on April 9, 2010. For the reasons set forth below, Budget Phone respectfully urges that the Commission deny AT&T's Motion.

**I.           FACTS AND PROCEDURAL HISTORY**

AT&T filed a Formal Complaint with the Commission on January 21, 2010, claiming that Budget Phone had withheld amounts allegedly due to AT&T for services provided pursuant to interconnection agreements between the parties. Budget Phone filed its Defenses and Answer, and Counter-Claim on February 25, 2010, in which it counterclaimed that AT&T violated federal statutes and regulations and breached the interconnection agreements by wrongfully overcharging Budget Phone and wrongfully withholding credits due to Budget Phone. AT&T filed a reply to Budget Phone's counterclaim as part of its Response to Budget Phone's Defenses and Answer, and Counter-Claim, as well as the Motion at issue, on April 9, 2010.

Budget Phone's counterclaim relates to AT&T's failure to provide it with appropriate, lawful resale promotion credits and (consequently) AT&T's overcharging Budget Phone. AT&T expressly states in its Motion (p.2) that it is not asking the Commission "to dismiss or sever the counterclaim to the extent it relates to amounts Budget Phone has disputed or withheld on the basis of the cash-back or marketing referral issues identified in Section IV of AT&T Kentucky's Complaint." Budget Phone's counterclaim for wrongful withholding of credits is indeed based on AT&T's failure to provide appropriate resale promotion credits, which falls precisely in line with the cashback and marketing referral issues alleged in AT&T's Complaint.

## **II. ARGUMENT**

AT&T seeks dismissal or severance "to the extent that Budget Phone's counterclaim purports to address issues other than those described in Section IV of AT&T's Complaint..." Motion p.2. As noted above, the counterclaim does fit within the cashback and marketing referral issues alleged in AT&T's Complaint. AT&T claims that Budget Phone breached the parties' interconnection agreements by withholding amounts allegedly due to AT&T, relating to AT&T's calculation of the cashback credit to Budget Phone as a reseller. The counterclaim is in effect the flip side of the Complaint.<sup>1</sup>

Had AT&T brought its Complaint under the more-restrictive rules applicable to civil actions, Budget Phone would be compelled to bring the counterclaim or risk being forever barred:

A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and

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<sup>1</sup> AT&T has claimed for underpayment allegedly resulting from Budget Phone's claiming credits for AT&T's Word-of-Mouth Promotion. Because Budget Phone has not claimed credits associated with that promotion, it has not filed a counterclaim related to that matter. AT&T has alleged a more than \$100,000 past-due and unpaid balance in Kentucky of which "[a] substantial amount ... is the result of Budget Phone'[s] withholding payments" on disputes relating to the cash-back and referral marketing promotion issues. Complaint pp.2-3; see footnote 2 below.

does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction.

CR 13.01. Even if Budget Phone brought counterclaims “that have nothing to do with the matters at issue in AT&T Kentucky’s Complaint” (Motion p.3), they should be permitted:

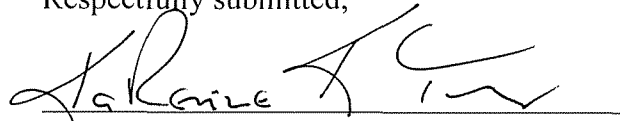
A pleading, other than a reply, may state as a counterclaim any claim against an opposing party not arising out of the transaction or occurrence that is the subject matter of the opposing party's claim.

CR 13.02 (emphasis added). Including all claims between parties in one proceeding comports with “the general policy of the law that a multiplicity of suits should be avoided,” *England v. Coffey*, 350 S.W.2d 163, 164 (Ky. 1961) (applying CR 13.01), and prevents the sort of manipulation attempted here by AT&T to control exactly what the Commission (or other adjudicator) may consider in achieving a just and fair resolution. Therefore, all of Budget Phone’s claims relating to the cashback or marketing referral issues raised in the Complaint should be considered at the same time and in the same proceeding as the AT&T claims.<sup>2</sup>

### III. CONCLUSION

For the reasons set forth herein, Budget Phone respectfully urges that the Commission deny AT&T’s Motion to Dismiss or Sever Counterclaim. The relief sought by AT&T in its Motion is unsupported by law or administrative regulation. Budget Phone is entitled to bring a counterclaim that is fully within the ambit of AT&T’s Complaint.

Respectfully submitted,



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<sup>2</sup> In the event AT&T attempts to broaden its claims beyond the cash-back and referral marketing claims, Budget Phone reserves the right to assert any other related counterclaims

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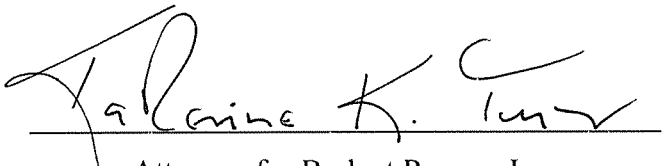
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ATTORNEYS FOR BUDGET PREPAY, INC.  
D/B/A BUDGET PHONE

CERTIFICATE of FILING and SERVICE

I hereby certify that on this the 30th day of April 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:

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