

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

VERSUS

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

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PUBLIC SERVICE  
COMMISSION

**BUDGET PHONE'S REPLY TO  
AT&T KENTUCKY'S RESPONSE TO MOTION TO DISMISS AND/OR STAY**

Budget Prepay, Inc. d/b/a Budget Phone ("Budget Phone") files this Reply to the Response filed by BellSouth Telecommunications, Inc. d/b/a AT&T Southeast d/b/a AT&T Kentucky ("AT&T") to Budget Phone's Motion to Dismiss and/or Stay.

First, contrary to AT&T's assertions, the issue it presents in its Complaint, namely, the calculation of the credit that AT&T must provide to Budget Phone relating to a cashback promotion or rebate given by AT&T to its retail customers, is specifically before the Federal Communications Commission ("FCC") in WC Docket No. 06-129, *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* (the "FCC Resale Docket"). Allowing the FCC to rule on the issues presented will eliminate the potential for inconsistent rulings among the different state commissions, save significant time and resources of the various state commissions, and provide an efficient and cost-effective resolution of the issues presented.

Second, AT&T's request — that (should a stay be granted) Budget Phone be required to deposit into escrow the full amount AT&T claims it is owed — has no basis in law and is in direct contravention of the applicable provisions of the parties' Interconnection Agreement,

which allow the billed party (here, Budget Phone) to withhold payment of disputed amounts pending resolution of a billing dispute. Moreover, AT&T has not offered a scintilla of proof to support its claims, or the amounts allegedly due. In fact, AT&T's Complaint generalizes an amount alleged to be "past-due and unpaid," which may or may not be related to the claims it asserts. AT&T's request should be denied.

## I. PROCEDURAL BACKGROUND

On June 13, 2006, NewPhone filed a Petition for Declaratory Ruling with the Federal Communications Commission ("FCC") at FCC WC Docket No. 06-129 (the "FCC Resale Docket"),<sup>1</sup> asking the FCC to remove uncertainty surrounding the resale of incumbent local exchange carrier ("ILEC") services subject to cash-back promotions, gift cards, coupons, checks, or other similar giveaways. BellSouth Corporation and AT&T Inc. both filed timely comments opposing the FCC Petition.<sup>2</sup> The FCC Resale Docket is currently pending before the FCC.

Despite the pending FCC Resale Docket, on January 21, 2010, AT&T submitted a Formal Complaint ("Complaint") initiating the above-referenced docket against Budget Phone, seeking an order from the Kentucky Public Service Commission (the "Commission") finding that, *inter alia*, Budget Phone breached its Interconnection Agreement with AT&T by wrongfully withholding amounts associated with the resale of certain AT&T retail promotions.<sup>3</sup> AT&T also filed a Motion for Consolidation with the Commission, seeking the consolidation of this docket and certain other dockets involving similarly-worded complaints against other resellers operating in Kentucky.

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<sup>1</sup> FCC WC Docket No. 06-129, *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.*

<sup>2</sup> AT&T Inc. was the result of a merger of SBC Communications, Inc. and AT&T Corp. The opposition of AT&T Inc. in the FCC Resale Docket included the company's ILEC subsidiaries.

<sup>3</sup> See Complaint p.9.

Along with its Answer, Budget Phone filed a Motion to Dismiss and/or Stay and Response to Motion for Consolidation (“Budget Phone Motion”), asking the Commission to dismiss AT&T’s claims, or in the alternative to hold the proceedings in abeyance, pending the outcome of the FCC Resale Docket, and to deny AT&T’s Motion for Consolidation.

For the reasons set forth below and in the Budget Phone Motion, the Commission should grant the relief requested in order to avoid the possibility of multiple proceedings and inconsistent results in numerous forums.

## **II. REPLY ARGUMENT**

### **A. Nature of AT&T’s Claims**

AT&T couches its Complaint as of a violation by Budget Phone of its Interconnection Agreement with AT&T. In its Response (p. 8), AT&T states that the “first common issue presented in AT&T’s complaints, for instance, is a pricing issue under the parties’ interconnection agreements....” A review of the Complaint, however, reveals that its crux is the interpretation of the relevant resale obligations of the federal Telecommunications Act of 1996 (the “Act”) and the FCC regulations promulgated thereunder.

AT&T’s arguments with regard to (i) the applicability and calculation of the resale discount and (ii) which promotions are subject to resale obligations — the two issues forming the basis of AT&T’s Complaint<sup>4</sup> — focus entirely on what AT&T asserts to be relevant provisions contained in Sections 251 and 252 of the Act; nowhere does AT&T argue the interpretation of any provision of the parties’ Interconnection Agreement with regard to these two issues.<sup>5</sup> Clearly, then, the issues regarding resale of promotional credits before the Commission involve interpretation of the federal Act and the FCC resale regulations. As stated in the Budget Phone

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<sup>4</sup> See Complaint pp. 2-3.

<sup>5</sup> See *id.* pp. 5-8.

Motion and as reasserted herein, the FCC is in the best position and is the most appropriate agency to interpret the Act and its own regulations.

**B. Pending FCC Resale Docket**

AT&T refuses to acknowledge that the issues presented in its Complaint are the same as the issues before the FCC in the FCC Resale Docket. AT&T states, in its Complaint (pp. 2-3), that the amounts allegedly owed to AT&T are a result of one or both of the following reasons:

- (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; and
- (2) Budget Phone erroneously asserts that AT&T Kentucky's customer referral marketing promotions (such as the "word-of-mouth" promotion are subject to resale).

The FCC Resale Docket explicitly involves both of these reasons asserted by AT&T for Budget Phone's withholding of billed amounts. In the FCC's Public Notice in the FCC Resale Docket,<sup>6</sup> the FCC requests comments from interested parties on whether:

an ILEC's refusal to make cash-back, non-cash-back, and bundled promotional discounts available for resale at wholesale rates is an unreasonable restriction on resale... [and whether] ILECs are required either to offer to telecommunications carriers the value of the giveaway or discount, in addition to making available for resale at the wholesale discount the telecommunications service that is the subject of the ILEC's retail promotion, or to apply the wholesale discount to the effective retail rate of the telecommunications service that is the subject of the ILEC's retail promotion.

The issues raised by AT&T in its Complaint against Budget Phone herein thus fall squarely within the issues before the FCC in the FCC Resale Docket, and the Commission should dismiss or stay this proceeding pending an order of the FCC in the FCC Resale Docket.

In its Response (p. 5), AT&T argues that its Complaint should not be dismissed based on the pending FCC Resale Docket because "the FCC still has taken no action in its Resale Docket." It should be noted, however, that instead of seeking expedited resolution of the issues

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<sup>6</sup> See Budget Phone Motion, Exhibit A.

pending in the FCC Resale Docket to achieve a central resolution of the issues, AT&T has chosen to file complaints in over 30 proceedings before nine different state commissions. Not only does this create the likelihood of multiple inconsistent rulings among the commissions, but it also wastes significant time and resources of the various state commissions and the parties to these proceedings. AT&T, Budget Phone and the other resellers, and the state commissions involved in these proceedings would be better served by pursuing an efficient and cost-effective resolution from the FCC in the FCC Resale Docket.

Further, notwithstanding the fact that its Complaint explicitly calls for interpretation of the Act,<sup>7</sup> in its Response (p. 7), AT&T suggests that dismissal is inappropriate because state commissions may “interpret and enforce the interconnection agreements they approve” through Section 252 of the Act. However, even if the questions presented were dependent upon particulars of the interconnection agreements, that would not impede a centralized resolution by the FCC. AT&T omits mention of the fact that the Resale Docket dispute was brought to the FCC by NewPhone pursuant to its interconnection agreement with AT&T, and AT&T did not dispute the FCC’s jurisdiction or authority to resolve the dispute in any filings made in the FCC Resale Docket.

### **C. The *CGM* Case**

In its Response (p. 9), AT&T argues that this proceeding should not be dismissed or delayed based on *CGM, LLC v. BellSouth Telecommunications, Inc.*, W.D.N.C. Case No. 3:09-cv-00377, currently pending before a federal court in North Carolina,<sup>8</sup> because any decision from that court “would not be binding on this Commission.” However, this reason given by AT&T

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<sup>7</sup> See Complaint pp. 6-8.

<sup>8</sup> On March 16, 2010, the Magistrate Judge in that proceeding issued a Memorandum and Recommendation that the case be dismissed on jurisdictional grounds. Objections to that Recommendation have been filed by both sides in the case.

against dismissal based on the *CGM* case actually lends support to dismissal (or stay) of this proceeding based on the FCC Resale Docket. An order by the FCC addressing the very issues before this Commission and construing and applying the Act to them would be binding on AT&T and so resolve this case and similar complaints against Budget Phone and other resellers filed before the Commission and in other states.

**D. AT&T's Escrow Request is Contrary to the Parties' Interconnection Agreement.**

AT&T also asks that the Commission require Budget Phone to deposit into escrow the full amount which AT&T claims in its Complaint if the Commission decides to stay these proceedings.<sup>9</sup> Budget Phone opposes any escrow requirement. AT&T's request is in direct contravention of the applicable provisions of the parties' Interconnection Agreement, which allow the billed party (here, Budget Phone) to withhold payment of disputed amounts pending a resolution of a billing dispute.<sup>10</sup> Requiring Budget Phone to escrow any amount subject to a billing dispute would be contrary to the parties' Interconnection Agreement as filed with and approved by this Commission. There is no basis in law (and AT&T offers none) which allows AT&T or this Commission to unilaterally amend the parties' approved Interconnection Agreement by engrafting an escrow requirement for amounts in dispute between the parties.

The only reason which AT&T offers in support of its escrow request is that it is "concerned that Budget Phone will not be able to pay any amounts it ultimately will be found to owe AT&T Kentucky."<sup>11</sup> Budget Phone has denied that it owes AT&T any of the disputed amounts. Moreover, AT&T has not offered a scintilla of proof to support its allegations, or the amounts claimed due. Requiring Budget Phone to deposit amounts claimed by AT&T would financially harm Budget Phone without affording any due process. Accordingly, no requirement

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<sup>9</sup> AT&T Response p. 12.

<sup>10</sup> See Interconnection Agreement, Attachment 7, Section 2.

<sup>11</sup> See AT&T Response p. 11.

to escrow the amounts in dispute may be imposed, regardless of whether the Commission dismisses, stays, or proceeds with this case (singly or consolidated with others).

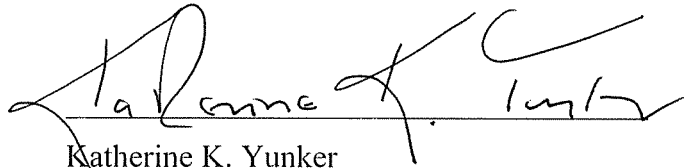
**E. AT&T's Motion for Consolidation**

For the reasons set forth herein and in the Budget Phone Motion, the Commission should dismiss or stay these proceedings pending the outcome of the FCC Resale Docket. However, should the Commission decide that this proceeding should move forward at this time, Budget Phone does not oppose consolidation of this proceeding with the other Commission dockets initiated by AT&T against other resellers (2010-0023, -0026) with respect to issues actually presented in the respective complaints concerning treatment of the cash-back and “word-of-mouth” promotions. Budget Phone has denied that it has withheld billed amounts or claimed credits based on the “word-of-mouth” promotion. Nonetheless, in the event that the issue is included in consolidated proceedings, Budget Phone expressly reserves the right to assert its positions and arguments and otherwise participate in proceedings concerning the treatment of customer referral marketing promotions (including the “word-of-mouth” promotion).

**III. CONCLUSION**

In conclusion, Budget Phone respectfully requests that the Commission dismiss the Complaint filed by AT&T for the reasons stated herein and in the Budget Phone Motion, or in the alternative, stay this proceeding pending a resolution of the FCC Resale Docket. However, should the Commission decide to move forward with these proceedings, Budget Phone does not oppose consolidation of this proceeding with the other Commission dockets initiated by AT&T against other resellers with respect to issues concerning treatment of the cash-back and customer referral marketing promotions, as more fully stated above.

Respectfully submitted this 30th day of April, 2010.



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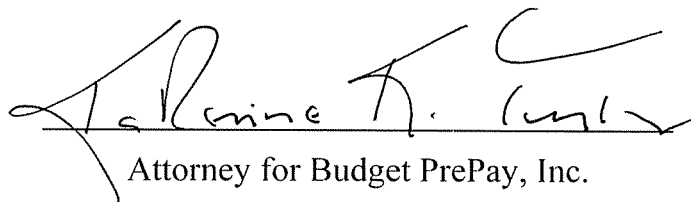
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CERTIFICATE of FILING and SERVICE

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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