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April 9, 2010

Hon. Sara Kyle, Chairman
Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, TN 37238

filed electronically in docket office on 04/09/10

Re: *BellSouth Telecommunications, Inc. dba AT&T Southeast dba AT&T Tennessee vs. Budget Prepay, Inc. dba Budget Phone fka Budget Phone, Inc.*
Docket No. 10-00004

BellSouth Telecommunications, Inc. dba AT&T Southeast dba AT&T Tennessee vs. Tennessee Telephone Service, LLC dba Freedom Communications, LLC, dba Freedom Communications USA, LLC
Docket No. 10-00005

BellSouth Telecommunications, Inc. dba AT&T Southeast dba AT&T Tennessee vs. Image Access, Inc. dba New Phone
Docket No. 10-00006

BellSouth Telecommunications, Inc. dba AT&T Southeast dba AT&T Tennessee vs. dPi Teleconnect, LLC
Docket No. 10-00007

BellSouth Telecommunications, Inc. dba AT&T Southeast dba AT&T Tennessee vs. BLC Management, LLC dba Angles Communication Solutions
Docket No. 10-00008

Dear Chairman Kyle:

Enclosed for filing in the referenced dockets are the original and nine copies of AT&T's *Motion to Dismiss or Sever Certain Counterclaims.*

Copies have been provided to counsel of record.

Very truly yours,

Guy M. Hicks

800113

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BEFORE THE TENNESSEE REGULATORY AUTHORITY
Nashville, Tennessee

In Re: *BellSouth Telecommunications, Inc. dba AT&T Southeast dba AT&T Tennessee vs. Budget Prepay, Inc. dba Budget Phone fka Budget Phone, Inc.*
Docket No. 10-00004

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Docket No. 10-00007

BellSouth Telecommunications, Inc. dba AT&T Southeast dba AT&T Tennessee vs. BLC Management, LLC dba Angles Communication Solutions
Docket No. 10-00008

AT&T TENNESSEE'S MOTION TO DISMISS OR SEVER CERTAIN COUNTERCLAIMS

BellSouth Telecommunications Inc. d/b/a AT&T Southeast d/b/a AT&T Tennessee ("AT&T Tennessee") respectfully moves the Tennessee Regulatory Authority ("the Authority") to dismiss the counterclaims identified in this Motion without prejudice or, in the alternative, to sever them for consideration in their own dockets, separate and apart from the claims presented in AT&T Tennessee's Complaints.

I. INTRODUCTION

AT&T Tennessee's Complaints in these Dockets are straightforward – they seek to have the respondent resellers ("the resellers") pay bills AT&T Tennessee has previously rendered to them for telecommunications services AT&T Tennessee has already provided to them pursuant to their respective interconnection agreements, but which the resellers have not paid. In each case, the resellers have either failed to dispute the billed amounts, or have submitted disputes that AT&T Tennessee has denied because they are invalid.

In addition to filing various Motions addressing AT&T's Complaints,[1] the resellers have asserted a variety of purported "counterclaims." Some of these counterclaims allege that AT&T Tennessee billed a reseller specified amounts in the past, that the reseller has disputed those amounts on specified grounds in the past, and that AT&T Tennessee improperly denied those disputes. While AT&T Tennessee reserves the right to vigorously defend itself against such counterclaims, AT&T Tennessee is not asking the Authority to dismiss or sever those counterclaims.

However, three counterclaims, brought by Angles and Freedom,[2] ask the Authority to issue sweeping declaratory rulings regarding resale promotional pricing practices that have nothing to do with the issues presented in AT&T Tennessee's Complaints: how much money the resellers owe AT&T Tennessee for bills previously rendered under the parties' existing interconnection agreements. As explained below, the three common counterclaims should be dismissed because the resellers have not alleged (and cannot allege) that they have disputed

[1] AT&T Tennessee addresses these Motions in a separate Response that is being filed contemporaneously with this Motion.

[2] These counterclaims are addressed in detail below.

any billing addressed in AT&T's Complaints on the grounds alleged in the three common counterclaims; as a result, there is no "live" dispute between the resellers and AT&T Tennessee with respect to the issues purportedly presented in the three common counterclaims. It is not surprising, therefore, that the three common counterclaims look nothing like the detailed factual allegations and claims for relief that one would expect to see in a true counterclaim. Instead, they look like statements of policy issues that a party might ask the Authority to address in an arbitration under Section 251 or 252 of the federal Telecommunications Act of 1996 (the "1996 Act") or in a generic docket. Clearly, they do not belong in proceedings like these, that addresses specific complaints for past due amounts under existing interconnection agreements.

In the alternative, if the Authority does not dismiss the common counterclaims outright, it should at a minimum sever them for consideration in separate dockets, because the issues raised in the counterclaims have nothing to do with the matters at issue in AT&T Tennessee's complaints, and it thus appears that the counterclaims have been asserted for only one purpose: to improperly delay resolution of AT&T Tennessee's collection claims.

II. THE AUTHORITY SHOULD DISMISS THE THREE COMMON COUNTERCLAIMS

AT&T Tennessee seeks dismissal of the three common counterclaims asserted by Angles and Freedom.[3] This Motion refers to those common counterclaims as the "line connection

[3] Budget Phone, NewPhone and dPi do not assert the "common" counterclaims. Budget and NewPhone, however, assert a sweeping claim that AT&T Tennessee has violated the resale provisions of the 1996 Act, certain FCC regulations thereunder, and the parties' ICA, by "failing to provide [Budget/NewPhone] with the appropriate resale promotion credit and/or refund," by imposing "unreasonable and discriminatory restrictions on resale," and by failing to obtain Authority approval before implementing these so-called restrictions. *See id.* at p. 8, ¶ 8. As discussed below, AT&T Tennessee does not seek dismissal of this counterclaim to the extent it challenges the cashback or marketing referral issues identified in Section IV of AT&T's complaints. However, to the extent it asks the Authority to decide issues relating to the common counterclaims, this counterclaim, too, should be dismissed.

charge waiver" counterclaim, the "bundled offering" counterclaim, and the "new methodology" counterclaim. In this section, AT&T Tennessee describes each of these three counterclaims and then explains why each should be dismissed without prejudice.

A. The "Line Connection Charge Waiver" Counterclaims.

Some of AT&T Tennessee's retail promotional offerings waive the line connection charge for qualifying end users. When a reseller buys the telecommunications services associated with those offerings, AT&T Tennessee initially bills the reseller the retail charge for the line connection less the applicable wholesale discount. For example, assuming a retail line connection charge of $40 and applying the wholesale discount of 16% established by the Authority, AT&T Tennessee initially bills the reseller $33.60.

If the reseller timely submits a request for a promotional credit and otherwise satisfies the qualifications of a specific retail promotional offering, AT&T Tennessee then credits the reseller's bill in the same amount it initially billed the reseller for the line connection charge. In the example above, AT&T Tennessee would credit the reseller's bill in the amount of $33.60. As a result, the reseller, like the qualifying retail customer, would pay $0 for the line connection.

Several of the resellers, however, have filed counterclaims suggesting that they are entitled to more.[4] To use the example above, they contend that, instead of crediting the reseller's bill in the amount of $33.60 (so the qualifying reseller, like the qualifying retail customer, pays nothing for the line connection), AT&T Tennessee should credit the reseller's

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dPi's counterclaim appears to be limited to the cashback promotion at issue in AT&T's complaint; if that is correct, AT&T Tennessee does not seek dismissal or severance of dPi's counterclaim.

[4] *See* Angles Answer at p. 9, ¶19; Freedom Answer at p. 10, ¶22.

bill in the amount of $40 (so AT&T Tennessee winds up *paying* the reseller $6.40 for a service the reseller has ordered from AT&T Tennessee).

Setting aside the obvious absurdity of the resellers' position, to AT&T Tennessee's knowledge, no reseller has disputed any amount AT&T Tennessee seeks in its Complaints on the grounds set forth in the "line connection charge waiver" counterclaim, and no reseller alleges that it has done so.

B. The "Bundled Offering" Counterclaims.

The same resellers who filed the "line connection charge waiver" counterclaim have also filed a "bundled offering" counterclaim that alleges, in its entirety:

> AT&T offers discounted telephone service bundled with other, non-regulated services such as cable television and internet services. AT&T, however, refuses to offer its telephone service for resale at a comparable discounted rate. Respondent asks the Authority to declare that AT&T cannot impose this condition on resale unless and until AT&T "proves to the state commission that the restriction is reasonable and nondiscriminatory." 47 C.F.R. §51.613(b).[5]

To AT&T Tennessee's knowledge, no reseller has disputed any amount AT&T Tennessee seeks in its Complaints on the grounds set forth in the "bundled offering" counterclaim, and no reseller alleges that it has done so.

C. The "New Methodology" Counterclaims.

The same resellers who assert the "line connection charge" and "bundled offering" counterclaims also assert a "new methodology" counterclaim that alleges, in its entirety:

> AT&T has recently informed Respondent that AT&T intends to reduce from approximately $40 to $3.65 the amount paid to resellers under AT&T's "$50 cash back" rebate offer. Respondent asks the Authority to declare that AT&T cannot impose this condition on resale unless and until AT&T "proves to the state

[5] *See* Angles Answer at p. 9-10, ¶20; Freedom Answer at p. 10, ¶23.

commission that the restriction is reasonable and nondiscriminatory." 47 C.F.R. §51.613(b).[6]

The first sentence of this counterclaim refers to Accessible Letter No. CLECSE09-100, issued by AT&T Tennessee on July 1, 2009, a copy of which is attached to this Motion as Exhibit A. That Accessible Letter, along with Accessible Letter No. CLECSE09-112, issued July 1, 2009 (attached as Exhibit B), announced that AT&T Tennessee planned to change, effective September 1, 2009, the manner in which it calculated the credits available to CLECs that purchase certain retail cash-back promotional offers that are available for resale.

To AT&T Tennessee's knowledge, no reseller has disputed any amount AT&T Tennessee seeks in its Complaints on the grounds set forth in the "new methodology" counterclaim, and no reseller alleges that it has done so. This is hardly surprising, because AT&T Tennessee emphasizes on the first page of each of its Complaints that "***AT&T Tennessee is not seeking any amounts billed under this new methodology in this Docket.***" Moreover, AT&T Tennessee is not currently applying the new methodology to any CLEC, including any of the resellers, and AT&T Tennessee commits that it will not bill any reseller, including without limitation the Defendants in these proceeding, in the future for any amounts calculated under this new methodology without providing the requisite notice in the form of an Accessible Letter.

D. The Authority should dismiss each of the three common counterclaims.

As noted above, AT&T Tennessee is unaware of any reseller having disputed any amount AT&T Tennessee seeks in its Complaints on the grounds set forth in any of the three common counterclaims, and no reseller alleges that it has done so. Accordingly, each reseller that asserted the common counterclaims has failed to allege any cause of action for which relief

[6] *See* Angles Answer at p. 11, ¶24; Freedom Answer at p. 10, ¶21.

can be granted with regard to amounts AT&T Tennessee has billed them.[7] Moreover, "declaratory judgment proceedings will not lie for an anticipated controversy."[8]

To be sure, the issues the resellers improperly seek to inject into this proceeding by way of the "line connection charge waiver" counterclaim, the "bundled offering" counterclaim, and the "new methodology" counterclaim could be presented for resolution in an appropriate proceeding (for instance, a generic docket to consider policy issues that apply industry-wide, or an arbitration under Section 252 of the 1996 Act). But ***these*** Dockets are not the appropriate forum to address those broad policy issues, especially since, as explained in AT&T Tennessee's Responses to the various Motions to Dismiss and/or Stay (filed herewith), any delay in resolving AT&T Tennessee's Complaints will only harm AT&T Tennessee and benefit the resellers. AT&T Tennessee therefore respectfully requests that the Authority dismiss the three common counterclaims without prejudice to the resellers' right to raise the issues in an appropriate proceeding.

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[7] See, *e.g., Freeman Management corp. v. Shurgard Storage Centers, LLC,* 461 F.Supp.2d 629 (M.D. Tenn. 2006 (a "justiciable controversy is one that is definite and concrete, touching the legal relations of the parties in adverse legal interest") (citations and punctuation omitted).

[8] *Mills v. Shelby County Election Commission*, 218 S.W.3d 33 (Tn Ct. App. 2006). Each of the three common counterclaims also suggests (without explicitly alleging) that AT&T Tennessee has somehow engaged in a "restriction" on resale and asks the Authority to declare that AT&T Tennessee may not "impose" the restriction without first proving to the Authority that the restriction is reasonable and nondiscriminatory under the 1996 Act. See, *e.g., Answer and Counter-Claims of Tennessee Telephone Service, LLC dba Freedom Communications, LLC, dba Freedom Communications USA, LLC* at p. 10-11 ¶¶ 21-24. The common counterclaims asserted by Freedom and Angles are virtually identical. As the discussion of each of the three counterclaims above makes clear, each of the three common counterclaims involves the *pricing* of telecommunications services AT&T Tennessee *makes available for resale*, and not any attempt by AT&T Tennessee to restrict or limit the resale of telecommunications services. The Authority, however, need not – and should not – address that issue in this Docket because, as explained above, no reseller alleges that it has disputed any amount AT&T Tennessee seeks in its Complaints on the grounds set forth in any common counterclaim and, therefore, the resellers fail to state a claim upon which relief can be granted.

III. THE AUTHORITY SHOULD DISMISS BUDGET PHONE'S, NEWPHONE'S AND DPI'S "RESALE PROMOTION CREDITS" COUNTERCLAIMS TO THE EXTENT THEY ADDRESS ISSUES NOT REFERENCED IN SECTION IV OF THE AT&T COMPLAINTS.

In addition to seeking dismissal of the three common counterclaims, AT&T Tennessee seeks dismissal of the counterclaims described below (asserted by Budget Phone, NewPhone and dPi) to the extent Budget Phone, NewPhone and/or dPi have not disputed any amount AT&T Tennessee seeks in its Complaints on the grounds set forth in those counterclaims.

Budget Phone, NewPhone and dPi do not assert any of the three common counterclaims discussed above. Instead, Budget Phone asserts a broad "resale promotion credits" counterclaim that alleges:

> 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 Agreement 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 APSC, 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.[9]

New Phone and dPi assert a similarly broad counterclaims that include additional allegations specific to cashback offerings.[10] AT&T Tennessee does not ask the Authority to dismiss or sever these counterclaims to the extent that they relate to amounts these resellers have disputed or withheld on the basis of the cashback or marketing referral issues identified in Section IV of AT&T Tennessee's Complaints.

However, neither Budget Phone, NewPhone nor dPi allege that it has disputed and failed to pay any amounts other than those relating to the cashback or marketing referral

[9] *See* Budget Phone Answer at p.8, ¶ 5.

[10] *See* New Phone Answer at pp. 8-10, ¶¶ 2-5. *See* dPi Answer at pp 4-8; ¶27 and following. These paragraphs are erroneously numbered.

promotions that are the subject of AT&T Tennessee's collection claims. Accordingly, to the extent that these counterclaims purport to address issues other than those described in Section IV. of AT&T Tennessee's Complaints, they – like the three common counterclaims – are overly-broad and fail to state a claim upon which relief can be granted and should be dismissed for all the reasons set forth above with respect to the common counterclaims.

IV. IF THE AUTHORITY DOES NOT DISMISS THE COUNTERCLAIMS ADDRESSED ABOVE, IT SHOULD AT A MINIMUM SEVER THEM FROM THIS DOCKET.

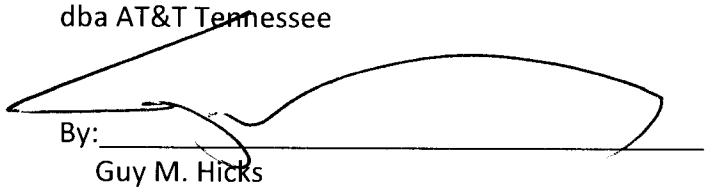
If the Authority permits any of the disputed counterclaims to go forward as pleaded, it should do so for the sole purpose of deciding those issues on a prospective basis (because, as explained above, AT&T Tennessee is unaware of any reseller having disputed any amount AT&T Tennessee seeks in its Complaints on the grounds set forth in the disputed counterclaims, and no reseller alleges that it has done so) and in one or more proceedings separate and apart from these dockets. The three common counterclaims have nothing to do with the issues raised in AT&T's complaints; nor do Budget Phone's, NewPhone's or dPi's resale promotions credits counterclaims, to the extent they go beyond the cashback or marketing referral issues identified in Section IV of AT&T Tennessee's Complaints. It thus appears that these "counterclaims" have been interposed for the sole – and improper – purpose of delay: having already moved to stay this Docket to await rulings in other proceedings, the reseller-counterclaimants are now trying to inject irrelevant issues into this Docket to complicate an otherwise straightforward collections case and delay its resolution. The Authority should not permit this.

V. CONCLUSION

For the reasons set forth above, the disputed counterclaims should be dismissed without prejudice or severed from these proceedings.

Respectfully submitted,

BELLSOUTH TELECOMMUNICATIONS, INC.
dba AT&T Tennessee



By: _____

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Accessible

Date: **July 1, 2009**

Number: **CLECSE09-100**

Effective Date: **September 1, 2009**

Category: **Resale**

Subject: **(ORDERING AND PROVISIONING) Resale of Cash-Back Promotions**

Related Letters: **NA**

Attachment: **NA**

States Impacted: **Alabama, Florida, Georgia, Kentucky, Louisiana, Mississippi, North Carolina, South Carolina, and Tennessee**

Issuing AT&T ILECS: **AT&T Alabama, AT&T Florida, AT&T Georgia, AT&T Kentucky, AT&T Louisiana, AT&T Mississippi, AT&T North Carolina, AT&T South Carolina and AT&T Tennessee (collectively referred to, for purposes of this Accessible Letter, as "AT&T Southeast Region")**

Response Deadline: **NA**

Contact: **Account Manager**

Conference Call/Meeting: **NA**

AT&T Southeast Region is sending this letter to provide notice that it will change the manner in which it calculates the credits available to CLECs that purchase certain retail cash-back promotional offers (including but not limited to promotional offers involving checks, coupons, and other similar items) that are available for resale.

The change will be implemented initially for residential acquisition cash-back promotion offers requested on or after September 1, 2009, in all AT&T ILEC states, regardless of whether the underlying promotion is new or existing.

Details regarding the specific resale credits available for applicable promotions will be communicated via separate Accessible Letters. The formulae AT&T Southeast Region will use to calculate these credits is available in the Resale Product section of the CLEC Handbook on CLEC Online at:

https://clec.att.com/clec/hb/index.cfm

AT&T Southeast Region reserves the right to make any modifications to or to cancel the above information prior to the proposed effective dates. Should any modifications be made to the information, these modifications will be reflected in a subsequent letter. Should the information be canceled, AT&T Southeast Region will send additional notification at the time of cancellation. AT&T Southeast Region will incur no liability to the CLECs if the above mentioned information and/or approach is modified or discontinued for any reason.

at&t

Accessible

Date: **July 1, 2009**

Number: **CLECSE09-112**

Effective Date: **September 1, 2009**

Category: **Resale**

Subject: **(ORDERING AND PROVISIONING) Revision to Win-back Cash Back Promotion - TN**

Related Letters: **CLECSE09-100**

Attachment: **NA**

States Impacted: **Tennessee**

Response Deadline: **NA**

Contact: **Account Manager**

Conference Call/Meeting: **NA**

Effective September 1, 2009, Competitive Acquisition Customers who purchase Complete Choice® Basic or Enhanced will receive a one-time cashback amount of $3.65 using the methodology announced in **CLECSE09-100**, dated July 1, 2009.

AT&T Tennessee reserves the right to modify or cancel the above information. Should any such action be taken, it will be reflected in a subsequent letter to CLECs. AT&T Tennessee will incur no liability for the foregoing.

CERTIFICATE OF SERVICE

I hereby certify that on April 9, 2010, a copy of the foregoing document was served on the following, via the method indicated:

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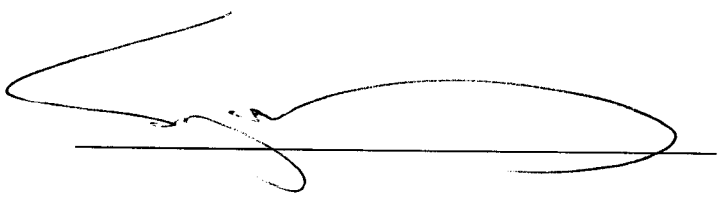

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