

BEFORE THE TENNESSEE REGULATORY AUTHORITY

IN RE:)	
)	
BELLSOUTH TELECOMMUNICATIONS, INC.)	
D/B/A AT&T SOUTHEAST D/B/A AT&T)	
TENNESSEE)	
)	DOCKET NO. 10-00004
v.)	
)	
BUDGET PREPAY, INC. DBA BUDGET PHONE)	
FKA BUDGET PHONE, INC.)	

BUDGET PHONE RESPONSE IN OPPOSITION TO
AT&T TENNESSEE MOTION TO DISMISS OR SEVER CERTAIN
COUNTERCLAIMS

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

I. FACTS AND PROCEDURAL HISTORY

AT&T filed a Complaint and Petition for Relief with the Authority on January 8, 2010, alleging that Budget Phone withheld certain amounts due to AT&T for services provided pursuant the interconnection agreements between the parties. Budget Phone filed its Defenses, Answer, and Counter-claim on February 20, 2010, claiming that AT&T breached the interconnection agreements by wrongfully overcharging Budget Phone and wrongfully withholding credits due to Budget Phone. AT&T filed a Response to Budget Phone's counterclaim and also filed the Motion at issue on April 9, 2010.

Budget Phone's counterclaims include AT&T wrongfully billing Budget Phone specified amounts in the past, that Budget Phone has disputed those amounts on specified grounds in the past, and that AT&T Tennessee improperly denied those disputes. In its Motion, AT&T specifically states that it is not asking the Authority to dismiss or sever Budget Phone's counterclaims regarding these overcharges.¹

Budget Phone also made a counterclaim for AT&T's wrongful withholding of credits due to Budget Phone, relating to AT&T's calculation of the cashback credit. As to this counterclaim, it appears as though AT&T is not asking the Commission to dismiss or sever the claim to the extent it challenges the cashback or marketing referral issues identified in Section IV of AT&T's Complaint.² Budget Phone's claim for wrongful withholding of credits due is based upon AT&T's failure to provide appropriate resale promotion credits, which falls precisely in line with the cashback and marketing referral issues identified in Section IV of AT&T's Complaint.

Therefore, the Authority should deny AT&T's Motion.

II. LAW AND ARGUMENT

Tennessee Rule of Civil Procedure 13, entitled "Counterclaim and Cross-Claim," provides in pertinent part:

13.01 Pleadings 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 of the opposing party's claim....

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

Pursuant to Rule 13.01 Budget Phone must assert all causes of action against AT&T arising out of the transaction or occurrence that is the subject matter of AT&T's principal action.

¹ See AT&T Tennessee's Motion to Dismiss or Sever Certain Counterclaims, page 2.

² *Id.*, page 2, note 2.

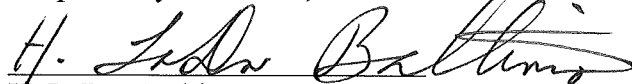
Further, Rule 13.02 permits Budget Phone to assert any causes of action it may have against AT&T. AT&T alleges that Budget Phone breached the parties' interconnection agreements by withholding amounts due to AT&T, relating to AT&T's calculation of the cashback credit due to Budget Phone as a reseller. Budget Phone claims that AT&T breached the parties' interconnection agreements by wrongfully imposing restrictions on its resold services and wrongfully withholding credits due based on AT&T's miscalculation of the cashback credit due under its resale obligations. Therefore, Budget Phone's claims are compulsory and are appropriately brought pursuant to Rule 13.01.

Budget Phone further asserted counterclaims for AT&T's repeated and continued practice of knowingly overcharging Budget Phone a SOMEK rate in excess of that required under the Interconnection Agreement and withholding refunds, and knowingly denying and withholding credits due to Budget Phone. Budget Phone may bring these claims under Rule 13.02

III. CONCLUSION

Budget Phone respectfully requests that the Authority deny AT&T's Motion to Dismiss or Sever Certain Counterclaims. The relief sought by AT&T in its Motion is contrary to Tennessee Rules of Civil Procedure 13.01 and 13.02. Budget Phone is fully entitled to bring the counterclaims asserted in this matter.

Respectfully submitted,



H. LaDon Baltimore

Farrar & Bates, LLP

211 Seventh Ave. N., Suite 500

Nashville, TN 37219-1823

Telephone: 615-254-3060

Fax: 615-254-9835

don.baltimore@farrar-bates.com

Gordon D. Polozola

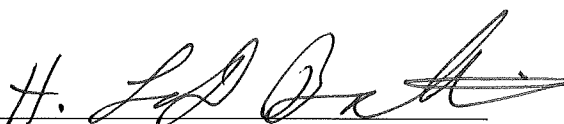
KEAN, MILLER, HAWTHORNE,
D'ARMOND, McCOWAN & JARMAN, L.L.P.
P. O. Box 3513
Baton Rouge, LA 70821
Telephone: (225) 382-3440
Fax: (225) 215-4040
gordon.polozola@keanmiller.com

*Attorneys for Budget Prepay, Inc. d/b/a Budget
Phone*

CERTIFICATE OF SERVICE

I hereby certify that I have this 30th day of April, 2010 served a true and exact copy of the within and foregoing **Budget Phone's Response in Opposition to AT&T's Motion to Dismiss or Sever Certain Counterclaims** via United States First Class Mail, postage paid and properly addressed, overnight delivery, or electronic transmission to the following:

Guy Hicks, Esq.
Joelle J. Phillips
BellSouth Telecommunications, Inc.
333 Commerce Street, Suite 2101
Nashville, TN 37201
gh1402@att.com
jp3881@att.com

By: 
H. LaDon Baltimore