

**BEFORE THE TENNESSEE REGULATORY AUTHORITY**

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

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**BUDGET PHONE’S MOTION FOR LEAVE TO FILE A REPLY TO  
AT&T’S MOTION TO DISMISS AND/OR STAY**

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Budget Prepay, Inc. d/b/a Budget Phone (“Budget Phone”), by and through its undersigned counsel, respectfully submits this Motion for Leave to File the attached Reply to the Response filed on April 9, 2010 by BellSouth Telecommunications, Inc. d/b/a AT&T Southeast d/b/a AT&T Tennessee (“AT&T”).

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 Motion to Dismiss and/or Stay and Reply to Responses to Motion for Consolidate on April 9, 2010.

In AT&T’s Response to Budget Phone’s Motion to Dismiss and/or Stay and Reply to Responses to Motion for Consolidate, AT&T makes several arguments for there should be no

dismissal or delay of this docket and requests the Authority to require Budget phone to deposit in escrow the amounts at issue. In order to address the assertions in AT&T's Response, Budget Phone needs to file a Reply. The arguments and precedents cited by AT&T need to be addressed in order for the Tennessee Regulatory Authority to properly consider this matter.

TRA Rule 12200-1-2-.06(3) states: "No reply to a response shall be filed except upon leave given upon the order of the Authority or hearing officer." Therefore, in compliance with such Rule, Budget Phone hereby requests leave to file a Reply to AT&T's Response.

For the reason states herein, Budget Phone requests leave to file the attached Reply to AT&T's Response to Budget Phone's Motion to Dismiss and/or Stay and Reply to Responses to Motion for Consolidate.

Respectfully submitted,




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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 Motion for Leave to File a Reply to AT&T's Motion to Dismiss and/or Stay via United States First Class Mail, postage paid and properly addressed, overnight delivery, or electronic transmission to the following:

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By:   
H. LaDon Baltimore

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<b>BUDGET PREPAY, INC. DBA BUDGET PHONE</b>	)	
<b>FKA BUDGET PHONE, INC.</b>	)	

**BUDGET PHONE’S REPLY TO  
AT&T TENNESSEE’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 Tennessee (“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 of inconsistent rulings among the different state commissions and this Authority, save significant time and resources of the various state commissions and this Authority, 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 is in direct contravention of the applicable provisions of the parties' Interconnection Agreement. The Interconnection Agreement allows the billed party (here, Budget Phone) to withhold payment of disputed amounts pending a resolution of a billing dispute. Moreover, AT&T has not offered a scintilla of proof to support its alleged claims, or the amounts 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 8, 2010, AT&T filed a Complaint and Petition for Relief ("Complaint") in the above-referenced docket against Budget Phone, seeking an order from the Tennessee Regulatory Authority (the "Authority"), *inter alia*, that 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

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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 AT&T Complaint.

Motion for Consolidation (“Motion for Consolidation”) with the Commission, seeking the consolidation of this docket and certain other dockets involving similar complaints against certain other resellers operating in Tennessee.

Along with its Answer, Budget Phone filed a Motion to Dismiss and/or Stay and Response to Motion for Consolidation (“Motion to Dismiss”), asking the Authority 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 Budget Phone’s Motion to Dismiss, the Authority should grant the relief requested by Budget Phone 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 a violation by Budget Phone of its Interconnection Agreement with AT&T. In its Response, 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...”<sup>4</sup> A review of the AT&T 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>5</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

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<sup>4</sup> See Response p. 7.

<sup>5</sup> See Complaint pp. 2-3.

any provision of the parties' Interconnection Agreement with regard to these two issues.<sup>6</sup> Clearly, then, the issues regarding resale of promotional credits before the Authority involve interpretation of the federal Act and the FCC resale regulations. As stated in Budget Phone's Motion to Dismiss 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 concede 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, that the alleged amounts owed to AT&T are a result of one or both of the following reasons:

(1) Budget Phone erroneously asserts that AT&T cannot apply the resale discount approved by this Authority to the cashback component of various promotional offers that AT&T makes available for resale; and (2) Budget Phone erroneously asserts that AT&T's customer referral marketing promotions (such as the "word-of-mouth" promotion are subject to resale.<sup>7</sup>

In comparison, the FCC Resale Docket explicitly involves both of AT&T's asserted reasons for Budget Phone's withholding of billed amounts. In the FCC's Public Notice in the FCC Resale Docket, 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.<sup>8</sup>

The issues raised by AT&T in its Complaint against Budget Phone herein fall squarely within the issues before the FCC in the FCC Resale Docket. In this proceeding, AT&T has

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<sup>6</sup> *Id.* at pp. 5-8.

<sup>7</sup> *Id.* at pp. 2-3.

<sup>8</sup> See Budget Phone's Motion to Dismiss, Exhibit A.

asked the Authority to determine whether the customer referral marketing promotions are subject to the federal resale obligations, and to determine the appropriate resale discount applicable to cash-back and customer referral marketing promotions. Therefore, the Authority should dismiss or stay this proceeding pending an order of the FCC in the FCC Resale Docket.

In its Response, AT&T also 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.”<sup>9</sup> It should be noted, however, that instead of seeking expedited resolution of the issues pending in the FCC Resale Docket to achieve a central resolution of the pending issues, AT&T has chosen to file complaints in over thirty proceedings before nine different state Commissions, including this Authority. Not only does this create the likelihood of multiple inconsistent rulings among the nine different Commissions, including this Authority with respect to identical issues, but it also wastes significant time and resources of the various State Commissions, this Authority and the parties to these proceedings. AT&T, Budget Phone, and the other resellers and the State Commissions and this Authority 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 the nature of this proceeding is interpretation of the Act and the FCC regulations, in its Response, AT&T suggests that a dismissal or stay is inappropriate because state commissions (including the Authority) may “interpret and enforce the interconnection agreements they approve”<sup>10</sup> through Section 252 of the Act. However, AT&T ignores the fact that the dispute was brought to the FCC by NewPhone pursuant to its Interconnection Agreement with AT&T. So, AT&T clearly contemplated the FCC resolving disputes between the parties under the Interconnection Agreement. In fact, AT&T did not

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<sup>9</sup> See AT&T’s Response p. 5.

<sup>10</sup> See AT&T’s Response p. 7.



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, AT&T argues that this proceeding should not be dismissed or delayed based on *CGM, LLC v. BellSouth Telecommunications, Inc.*, Case No. 3:09-cv-00377 (W.D. N.C. 2009), currently pending before the Western District of North Carolina, because any decision from that court "would not be binding here." Budget Phone is aware that the Magistrate Judge in that proceeding has recommended dismissal of that case (although not based on the merits of the claims). However, the reason given by AT&T against dismissal based on the *CGM* case lends support to dismissal of this proceeding based on the FCC Resale Docket. An order by the FCC addressing the very issue before the Authority would be binding on AT&T and so resolve this case and similar complaints by AT&T against Budget Phone and other resellers.

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

AT&T also asks that the Authority require Budget Phone to deposit into escrow the full amount which AT&T claims in its Complaint should the Authority decide to delay these proceedings.<sup>11</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>12</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 Authority. There is no basis in law (and AT&T offers none) which allows

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<sup>11</sup> *Id.* at p. 11.

<sup>12</sup> See Interconnection Agreement, Attachment 7, Section 2.2.

AT&T or this Authority to unilaterally amend the parties' approved Interconnection Agreement by unilaterally 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 AT&T is "concerned that the Resellers will not be able to pay any amounts they ultimately will be found to owe."<sup>13</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 alleged claims, or the amounts due. Requiring Budget Phone to deposit the amount claimed by AT&T would financially harm Budget Phone, without any due process. Accordingly, no requirement to escrow the amounts in dispute may be imposed, regardless of whether the Commission dismisses, stays, or proceeds with this case.

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

For the reasons set forth herein and in Budget Phone's Motion to Dismiss, the Authority should dismiss or stay these proceedings pending the outcome of the FCC Resale Docket. However, if the Authority decides that this proceeding should move forward at this time, Budget Phone does not oppose consolidation of this proceeding with the other dockets initiated by AT&T against other resellers with respect to issues presented in the respective complaints concerning treatment of the cash-back and "word-of-mouth" promotions.

Budget Phone has not withheld billed amounts or claimed credits based on the "word-of-mouth" promotion. Nonetheless, in the event that issue is included in consolidated proceedings, Budget Phone expressly reserves the right to assert its positions and arguments concerning the treatment of customer referral marketing promotions (including the "word-of-mouth" promotion).

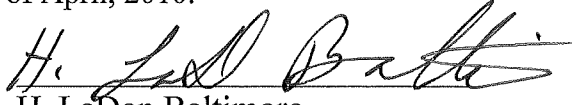
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<sup>13</sup> See A

### III. CONCLUSION

In conclusion, Budget Phone respectfully requests that the Authority dismiss the Complaint filed by AT&T for the reasons stated herein and in Budget Phone's Motion to Dismiss, or in the alternative, stay this proceeding pending a resolution of the FCC Resale Docket. However, should the Authority decide to move forward with these proceedings, Budget Phone does not oppose consolidation of this proceeding with the other dockets initiated by AT&T against other resellers before this Authority with respect to issues concerning treatment of the cash-back and "word-of-mouth" promotions.

Respectfully submitted this 30<sup>th</sup> day of April, 2010.



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**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 Reply to AT&T Tennessee's Response to Motion to Dismiss and/or Stay** via United States First Class Mail, postage paid and properly addressed, overnight delivery, or electronic transmission to the following:

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By: \_\_\_\_\_

  
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