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February 25, 2010

**VIA HAND DELIVERY**

Hon. Sara Kyle, Chairman  
c/o Sharla Dillon, Docket Manager  
Tennessee Regulatory Authority  
460 James Robertson Parkway  
Nashville, Tennessee 37238

filed electronically in docket office on 02/25/10

Re: BellSouth Telecommunications, Inc, d/b/a AT&T Southeast d/b/a AT&T  
Tennessee vs. Image Access, Inc. d/b/a NewPhone  
Docket No. 10-00006

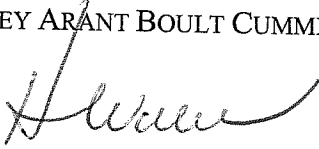
Dear Chairman Kyle:

Please find enclosed the original and four (4) copies of the Defenses, Answer and Counter- Claim of Image Access, Inc. d/b/a NewPhone to AT&T's Motion for Consolidation.

Very truly yours,

BRADLEY ARANT BOULT CUMMINGS LLP

By:

  
Henry Walker,  
Counsel for Image Access, Inc.  
d/b/a NewPhone

HW/dnr

**BEFORE THE  
TENNESSEE REGULATORY AUTHORITY**

**BELLSOUTH TELECOMMUNICATIONS, INC.  
D/B/A AT&T SOUTHEAST D/B/A AT&T  
TENNESSEE**

**DOCKET NO. 10-00006**

**VS.**

**IMAGE ACCESS, INC. D/B/A NEWPHONE**

**DEFENSES, ANSWER AND COUNTER-CLAIM  
OF IMAGE ACCESS, INC. d/b/a NEWPHONE**

Image Access, Inc. d/b/a NewPhone ("NewPhone"), hereby files the following answer to the Complaint and Petition for Relief ("Complaint") filed by BellSouth Telecommunications, Inc. d/b/a AT&T Southeast d/b/a AT&T Tennessee ("AT&T"), and further asserts the following Counter-Claim.

**DEFENSES**

1.

The Complaint fails to state a cause of action, in whole or in part, against NewPhone.

2.

The Tennessee Regulatory Authority (the "TRA") should decline to hear this Complaint because this matter involves an interpretation of the Telecommunications Act of 1996 (the "Act") and Federal Communication Commission ("FCC") regulations promulgated thereunder relating to AT&T's resale obligations and the prohibition against imposing unreasonable or discriminatory conditions or limitations on resale, which issues are presently pending before the FCC, the most appropriate body to interpret its own regulations.<sup>1</sup> Therefore, the TRA should hold this matter in abeyance until such time as the FCC renders a decision.

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<sup>1</sup> See *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*

3.

The TRA should further decline to hear this Complaint because the issue that is the subject of the Complaint, AT&T's resale obligations under the Act and FCC regulations, is presently pending in the United States District Court for the Western District of North Carolina,<sup>2</sup> which previously was involved in a line of decisions that resulted in a Fourth Circuit ruling finding that the Act and FCC regulations require AT&T to make available to competitive local exchange carrier ("CLEC") resellers the promotional discounts offered to AT&T's retail customers. Because the interpretation of the court's decision may be central to a resolution of the issue set forth in the Complaint, the TRA should hold this matter in abeyance until such time as the federal court renders a decision.

4.

In addition, the TRA should decline to hear this Complaint because the United States Court of Appeals for the Fifth Circuit is currently considering an appeal by AT&T Inc., ultimate parent company of AT&T, from a preliminary injunction issued by the United States District Court for the Northern District of Texas.<sup>3</sup> That case involves whether AT&T's newly proposed methodology for calculating the resale promotion credits due to CLEC resellers constitutes a restriction on resale requiring advanced state commission approval. AT&T has filed a Motion for Abeyance in Louisiana Public Service Commission ("LPSC") Docket No. U-31202,<sup>4</sup> considering the new methodology, representing that the outcome of the Fifth Circuit appeal may provide guidance to the parties in that docket, and could be dispositive of some or all of the issues associated with that docket, and that administrative and judicial economy are well served

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*Sections 51.601 et seq. of the Commission's Rules*, Petition for Declaratory Ruling of Image Access, Inc. d/b/a NewPhone, FCC WC Docket No. 06-129 (filed June 13, 2006).

<sup>2</sup> See *CGM, LLC v. BellSouth Telecommunications, Inc., AT&T Billing Southeast, LLC f/k/a AT&T Billing Southeast, Inc. and AT&T Corp.*, Case 3:09-CV-00377 (W.D.N.C. filed Aug. 28, 2009).

<sup>3</sup> See *Budget Prepay, Inc. v. AT&T Inc. f/k/a SBC Communications, Inc.*, No. 09-11188 c/w 09-11099 (5<sup>th</sup> Cir.).

<sup>4</sup> LPSC Docket No. U-31202, *In re: BellSouth Telecommunications, Inc. d/b/a AT&T Louisiana, Petition for Review Concerning Resale Promotion Methodology Adjustment*.

and resources appropriately conserved by holding that docket in abeyance. The LPSC granted AT&T's Motion by Order dated February 18, 2010.<sup>5</sup> Likewise, the TRA should decline to hear this Complaint because similar issues are involved in this matter, to wit: the issue of whether AT&T has refused to provide CLEC resellers the proper promotional discounts and whether such refusal constitutes a restriction on resale requiring advanced state commission approval.

5.

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) by failing to provide NewPhone with the appropriate resale promotion credit, and by failing to obtain TRA approval before placing restrictions on resale.

6.

AT&T's claims are barred and/or preempted, in whole or in part, by federal laws and regulations, including (without limitation) 47 U.S.C. § 251(c)(4), 47 C.F.R. 51.605 and 47 C.F.R. 51.613(b).

7.

AT&T's claims are barred, in whole or in part, by the doctrines of unclean hands, laches, forbearance, waiver, and/or estoppel.

8.

The FCC has primary jurisdiction over all or part of AT&T's claims.

9.

AT&T's claims are barred, in whole or in part, by its failure to mitigate any damages allegedly sustained.

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<sup>5</sup> See, LPSC Docket No. U-31202, Order dated February 18, 2010.

10.

AT&T's claims are barred, in whole or in part, by the applicable statute of limitations.

11.

AT&T has (or had) a contractual obligation to pursue, escalate, and preserve its claim to the disputed amounts it seeks in its Complaint in accordance with the applicable provisions of the parties' 2002 and 2006 Interconnection Agreements. Upon information and belief, AT&T failed to do so. Accordingly, AT&T should be barred from pursuing claims that it failed to contractually preserve.

12.

AT&T's right to recover, if any, is offset in whole or in part, for the reasons stated in NewPhone's counter-claim.

13.

NewPhone asserts the right to attorneys' fees after successful defense of this matter to the extent allowed under the terms of its Interconnection Agreements with AT&T and/or applicable law.

NewPhone reserves the right to amend this answer to add other affirmative defenses which are determined to be applicable upon discovery in this case.

### **ANSWER**

Subject to and without waiving the above defenses, NewPhone further responds in answer to AT&T's Complaint by denying each and every allegation contained therein, except those allegations which may be hereinafter specifically admitted. NewPhone answers the specific material allegations contained in the numbered paragraphs of AT&T's Complaint as follows:

1. NewPhone denies the allegations contained in Paragraph 1 of the Complaint for lack of information sufficient to justify a belief therein.

2. NewPhone accepts the designation of AT&T's representative in Paragraph 2 of the Complaint.

3. NewPhone admits the allegations contained in Paragraph 3 of the Complaint.

4. In response to Paragraph 4 of the Complaint, NewPhone admits that it entered into an Interconnection Agreement with AT&T in 2002 (the "2002 Interconnection Agreement"). NewPhone answers that as of the effective date of the Interconnection Agreement between NewPhone and AT&T dated April 19, 2006, as amended and extended on March 31, 2009 (the "2006 Interconnection Agreement"), the 2006 Interconnection Agreement superseded the 2002

Interconnection Agreement. NewPhone further answers that the provisions of the 2002 and 2006 Interconnection Agreements speak for themselves. NewPhone denies any remaining allegations in Paragraph 4.

5. In response to Paragraph 5 of the Complaint, NewPhone admits that it entered into the 2006 Interconnection Agreement with AT&T. NewPhone answers that the provisions of the 2006 Interconnection Agreement speak for themselves. NewPhone denies any remaining allegations in Paragraph 5.

6. NewPhone denies the allegations contained in the first sentence of Paragraph 6 of the Complaint. NewPhone is without knowledge or information sufficient to form a belief as to the truth of the allegations in the second sentence of Paragraph 6 concerning AT&T's determinations and beliefs and therefore denies such allegations.

7. NewPhone denies the allegations contained in Paragraph 7 of the Complaint for lack of information sufficient to justify a belief therein.

8. NewPhone denies the allegations contained in Paragraph 8 of the Complaint for lack of information sufficient to justify a belief therein.

9. NewPhone denies the allegations contained in Paragraph 9 of the Complaint.

10. NewPhone denies the allegations contained in Paragraph 10 of the Complaint for lack of information sufficient to justify a belief therein.

11. NewPhone denies the allegations contained in Paragraph 11 of the Complaint as written and further answers that 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' 2002 Interconnection Agreement and/or 2006 Interconnection Agreement by (a) failing to provide NewPhone 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 TRA, pursuant to 47 C.F.R. 51.613(b), prior to imposing a restriction on resale.

12. NewPhone denies the allegations contained in Paragraph 12 of the Complaint. NewPhone further answers that AT&T's resale restriction denies NewPhone the proper promotional discount and may result in a wholesale price to NewPhone that exceeds the retail price for AT&T's customers.<sup>6</sup>

13. NewPhone denies the allegations contained in Paragraph 13 of the Complaint, and further answers that the provisions of the Act and TRA orders speak for themselves.

14. NewPhone denies the allegations contained in Paragraph 14 of the Complaint, and further answers that NewPhone has not sought any credits from AT&T in connection with AT&T's customer referral marketing promotions such as the "word-of-mouth" promotion such that AT&T has no cause of action against NewPhone.

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<sup>6</sup> When the retail price of the AT&T service is \$20, and the cash-back promotion provided by AT&T to the retail customer is \$50, the customer's effective retail rate is -\$30. Under AT&T's formula, it would apply the wholesale discount of 16% to the \$20 rate and the \$50 promotion to arrive at a wholesale rate of -\$25.20. Thus, the wholesale rate would exceed the effective retail rate by \$4.80. Clearly, the TRA did not intend for wholesale rates to be greater than retail rates when establishing the resale discount.

15. NewPhone denies the allegations contained in Paragraph 15 of the Complaint, and further answers that the provisions of the Act speak for themselves and that NewPhone has not sought any credits from AT&T in connection with AT&T's customer referral marketing promotions such as the "word-of-mouth" promotion such that AT&T has no cause of action against NewPhone.

16. NewPhone denies the allegations contained in Paragraph 16 of the Complaint, and further answers that the provisions of the Act speak for themselves, and that it has not sought any credits from AT&T in connection with AT&T's customer referral marketing promotions such as the "word-of-mouth" promotion such that AT&T has no cause of action against NewPhone.

17. NewPhone denies the allegations contained in Paragraph 17 of the Complaint as written, and further answers that the provisions of the Act and decisions of the federal courts speak for themselves. NewPhone further answers that the Complaint should be held in abeyance on the grounds of primary jurisdiction pending a decision by the FCC in WC Docket No. 06-129.

Responding to the "REQUEST FOR RELIEF" portion of the Complaint, NewPhone denies that AT&T is entitled to the relief requested. NewPhone denies all allegations made in any unnumbered paragraphs of the Complaint.

### **COUNTER CLAIM**

And now, acting as Plaintiff in its Counter-Claim, NewPhone represents as follows:

1.

Made Defendant is BellSouth Telecommunications, Inc. d/b/a AT&T Southeast d/b/a AT&T Tennessee ("AT&T").

2.

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' 2002 Interconnection Agreement and/or 2006 Interconnection Agreement



by (a) failing to provide NewPhone with the appropriate resale promotion credit and/or refund, (b) imposing unreasonable and discriminatory restrictions on resale, and (c) failing to obtain necessary and prior approval from the TRA, pursuant to 47 C.F.R. 51.613(b), prior to imposing a restriction on resale. AT&T's actions are unlawfully discriminatory and anticompetitive and caused financial harm to NewPhone. AT&T owes NewPhone for all amounts wrongfully withheld and/or not properly credited or refunded to NewPhone.

3.

AT&T is required to offer its services for resale "subject to the same conditions" that AT&T offers its own end-users and at "the rate for the telecommunications service less avoided retail costs."<sup>7</sup> For example, when AT&T offers retail telephone service in conjunction with a "\$50 cash-back" rebate to new customers, AT&T must make that offer available to resellers such as NewPhone "under the same conditions," that is, with a \$50 cash rebate, and "at the rate for such telecommunications services less the avoided retail costs," that is, at the tariffed retail price less the wholesale discount. In this example, NewPhone would receive a \$50 rebate for each new wholesale line but, would still pay AT&T for the monthly use of the line at the tariffed retail rate less the wholesale discount. Here, the rebate offer does not change the competitive balance between the carriers. On the one hand, AT&T earns exactly the same margin – the tariffed retail rate less the wholesale discount – whether or not AT&T offers new customers a rebate. On the other hand, NewPhone receives exactly the same benefit that it normally receives from the avoided cost discount – the tariffed rate less the wholesale discount – and the same \$50 rebate that AT&T offers new retail customers. Like AT&T, NewPhone is no better or worse off than

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<sup>7</sup> 47 CFR § 51.603(b) and 47 CFR § 51.607. Furthermore, other than in limited circumstances not applicable here, AT&T cannot impose any restrictions on the resale of its services unless AT&T "proves to the state commission that the restriction is reasonable and non-discriminatory." 47 CFR §51.613

NewPhone would be if AT&T was not offering the \$50 rebate. Neither carrier gains a competitive advantage or a financial windfall as a result of the rebate program.

4.

In Paragraph 12 of its Complaint, AT&T uses an example to explain its method for calculating the resale promotional credit due CLEC resellers of AT&T's cash-back promotions. AT&T's method involves applying the TRA's wholesale discount of 16% to the face value of the promotion. The avoided cost discount represents the costs avoided when AT&T provides the service on a wholesale rather than retail basis.<sup>8</sup> Therefore, the avoided cost discount should not be applied to *reduce* the amount of a promotion, such as a \$50 cash back offer. As explained above in paragraph 3, cash back promotions should be treated as a condition of service, which must be applied on a nondiscriminatory basis (i.e., if the retail customer qualifies for it, the reseller qualifies for it). If the avoided cost discount has any application to the cash-back promotion, it should, based on the theory of costs avoided, be applied to reflect the costs AT&T avoids in providing the \$50 cash-back to the reseller rather than to AT&T's retail customer. The same costs (e.g., marketing, overhead, etc.) are avoided in this context. However, because the cash back promotion involves the payment of money by rather than to AT&T, the cost avoided discount should be applied in a manner that *raises* the amount of the promotion when provided to CLECs in the wholesale context. If applied in the manner AT&T suggests to the most common cash-back promotions (i.e., promotions where the tariffed retail rate of the service *is less than* the amount of the associated cash-back promotion), the effect of applying the avoided cost discount would be to increase AT&T's own revenues – and the costs to CLEC resellers – when a promotion is sold on a wholesale rather than retail basis. Clearly, this is not what was intended

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<sup>8</sup>

47 C.F.R. Section 51.607.

by the FCC's rules. This form of regulatory arbitrage is both anticompetitive and unlawfully discriminatory.

5.

For these reasons, AT&T owes NewPhone for all amounts wrongfully withheld and/or not properly credited or refunded to NewPhone, in an amount to be determined through discovery.

**WHEREFORE**, having responded to the Complaint, NewPhone respectfully requests:

(1) that its answer be deemed good and sufficient and after due proceedings are had, that the Complaint of AT&T be denied and dismissed with prejudice at its sole cost;

(2) in the alternative, that its answer be deemed good and sufficient and that AT&T's Complaint be held in abeyance pending decisions by the FCC in WC Docket No. 06-129,<sup>9</sup> the United States District Court for the Western District of North Carolina in Case No. 3:09-cv-00377,<sup>10</sup> and the United States Court of Appeals for the Fifth Circuit, Case Nos. 09-11188 and 09-11099, on the appeal of the decision of the United States District Court for the Northern District of Texas, Case No. 3:09-cv-1494-P;<sup>11</sup>

(3) that there be judgment in NewPhone's favor on its Counter-Claim, finding and declaring that AT&T has breached its Interconnection Agreements with NewPhone by wrongfully overcharging NewPhone and wrongfully withholding credits due and payable to NewPhone, finding and declaring that NewPhone has been financially harmed as a result of AT&T's breach, finding and declaring that AT&T is liable to, and required to pay and/or credit, NewPhone for all amounts wrongfully charged and withheld, under-credited or under-refunded

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<sup>9</sup> See *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*, Petition for Declaratory Ruling of Image Access, Inc. d/b/a NewPhone, FCC WC Docket No. 06-129 (filed June 13, 2006).

<sup>10</sup> See *CGM, LLC v. BellSouth Telecommunications, Inc., AT&T Billing Southeast, LLC f/k/a AT&T Billing Southeast, Inc. and AT&T Corp.*, Case 3:09-CV-00377 (W.D.N.C. filed Aug. 28, 2009).

<sup>11</sup> See *Budget Prepay, Inc. v. AT&T Inc. f/k/a SBC Communications, Inc.*, No. 09-11188 c/w 09-11099 (5<sup>th</sup> Cir.).

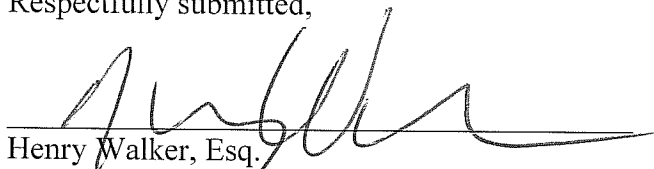
by AT&T, including late payment charges, penalties and interest, cost and any other appropriate amounts;

(4) for all general and equitable relief deemed appropriate by the TRA; and

(5) that the TRA grant such further relief to NewPhone as the TRA deems just and proper.

Respectfully submitted this 25<sup>th</sup> day of February, 2010.

Respectfully submitted,



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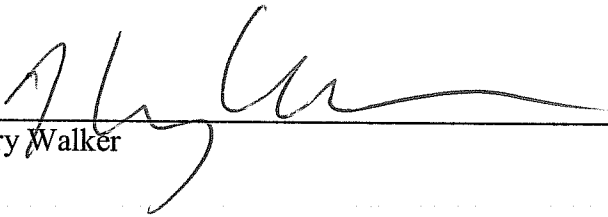
COUNSEL FOR IMAGE ACCESS, INC. d/b/a  
NEWPHONE

## CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been forwarded electronically and via U.S. Mail, first class, postage prepaid, to:

Guy Hicks  
AT&T Tennessee  
333 Commerce Street  
Suite 2101  
Nashville, TN 37201-3300

on this the 25th day of February 2010.

  
\_\_\_\_\_  
Henry Walker