

BEFORE THE
TENNESSEE REGULATORY AUTHORITY

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**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

**NEWPHONE'S REPLY TO AT&T'S RESPONSE TO
MOTION TO DISMISS AND/OR STAY**

Image Access, Inc. d/b/a NewPhone ("NewPhone") hereby requests, pursuant to TRA Rule 1220-1-2-.06, leave to file the following Reply to the Response ("Response") filed by BellSouth Telecommunications, Inc. d/b/a AT&T Southeast d/b/a AT&T Tennessee ("AT&T") to NewPhone's Motion to Dismiss and/or Stay. This Reply corrects misleading statements in AT&T's filing concerning the description of proceedings initiated by NewPhone at the FCC and also responds to a new issue: AT&T's demand for an escrow account if the TRA grants a stay.

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"),¹ 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.² The FCC Resale Docket is currently pending before the FCC.

¹ 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.*

² 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.

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 NewPhone, seeking an order from the Tennessee Regulatory Authority (the “Authority”), *inter alia*, that (a) NewPhone breached its Interconnection Agreement with AT&T by wrongfully withholding amounts associated with the resale of certain AT&T retail promotions.³ AT&T also filed a Motion for Consolidation (“Motion for Consolidation”) with the Authority, seeking the consolidation of this docket and certain other dockets involving similar complaints against certain other resellers operating in Tennessee.

Along with its Answer, NewPhone filed a Motion to Dismiss and/or Stay and Response in Opposition 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 NewPhone’s Motion to Dismiss, the Authority should grant NewPhone’s Motion to Dismiss 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 NewPhone 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...”⁴ A review of the AT&T Complaint, however, reveals that the crux of AT&T’s Complaint is the interpretation of the relevant resale obligations of the federal Telecommunications Act of 1996 (the “Act”) and the FCC regulations promulgated thereunder.

³ See Complaint.

⁴ See Response p. 7.

AT&T's arguments with regard to (i) the applicability and calculation of the Authority's resale discount with respect to retail promotions and (ii) which promotions are subject to resale obligations – the two issues forming the basis of AT&T's Complaint⁵ - 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.⁶ Clearly, then, the issues raised by AT&T in its Complaint before the Authority involve interpretation of the federal Act and the FCC resale regulations. As stated in NewPhone'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) NewPhone erroneously asserts that AT&T cannot apply the resale discount approved by the Authority to the cashback component of various promotional offers that AT&T makes available for resale; and (2) NewPhone erroneously asserts that AT&T's customer referral marketing promotions (such as the "word-of-mouth" promotion) are subject to resale.⁷

In comparison, the FCC Resale Docket explicitly involves both of AT&T's asserted reasons for NewPhone'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

⁵ See Complaint p. 2.

⁶ *Id.* at pp. 5-8.

⁷ *Id.* at p. 2.

retail rate of the telecommunications service that is the subject of the ILEC's retail promotion.⁸

The issues raised by AT&T in its Complaint against NewPhone herein fall squarely within the issues pending before the FCC in the FCC Resale Docket. In this proceeding, AT&T has 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 and calculation methodology 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.”⁹ It should be noted, however, that instead of seeking expedited resolution of the issues pending before the FCC 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. Not only does this create the likelihood of multiple inconsistent rulings among the nine different Commissions with respect to identical issues, it also wastes significant time and resources of the various State Commissions and the parties to these proceedings. AT&T, NewPhone, 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 the nature of this proceeding is interpretation of the Act and the FCC regulations, in its Response, AT&T argues against dismissal of its claims based on the jurisdiction granted to State Commissions to “interpret and enforce the interconnection

⁸ See NewPhone's Motion to Dismiss, Exhibit A.

⁹ See Response p. 5.

agreements they approve”¹⁰ through Section 252 of the Act. However, AT&T ignores the fact that the parties’ Interconnection Agreement explicitly provides that either party may bring a dispute before the State Commission *or the FCC*. AT&T has not disputed the FCC’s jurisdiction or authority to resolve the dispute in any filings made in the FCC Resale Docket. Section 8.1 of the General Terms and Conditions of the parties’ Interconnection Agreement states, in pertinent part,

Except for procedures that outline the resolution of billing disputes which are set forth in Section 2 of Attachment 7¹¹ or as otherwise set forth in this Agreement, each Party agrees to notify the other Party in writing of a dispute concerning this Agreement. If the Parties are unable to resolve the issues relating to the dispute in the normal course of business then *either Party shall file a complaint with the Commission or FCC* to resolve such issues....¹²

NewPhone fully complied with the dispute resolution process of the parties’ Interconnection Agreement by properly disputing incorrect amounts and credits. As mentioned, the FCC Resale Docket is currently pending before the FCC, and no final order has been issued addressing the issues before the FCC in that proceeding. AT&T’s filing of its Complaint herein, along with similar complaints against NewPhone before seven other State Commissions, while NewPhone’s FCC Petition involving substantially identical issues is pending before the FCC, is in direct violation of the dispute resolution procedures set forth in Section 8 of the Interconnection Agreement.

C. The CGM Case

In its Response, AT&T argues that this proceeding should not be dismissed or delayed

¹⁰ See Response p. 7.

¹¹ Section 2 of Attachment 7 to the parties’ Interconnection Agreement sets forth the method of asserting billing disputes. NewPhone has properly disputed each AT&T invoice containing incorrect amounts and promotional credits. If the parties are unable to come to a resolution through the billing dispute and escalation procedures, Section 2.1.3 of Attachment 7 provides that “either Party may initiate the dispute resolution process.” Accordingly, NewPhone’s FCC Petition is consistent with the dispute resolution provisions of Attachment 7 and Section 8 of the Interconnection Agreement.

¹² Interconnection Agreement between BellSouth Telecommunications, Inc. and Image Access, Inc. d/b/a NewPhone, dated April 19, 2006, as amended and extended of March 31, 2009, General Terms and Conditions, Section 8.1 (emphasis added).

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.” NewPhone is aware that the Magistrate Judge in that proceeding has recommended dismissal of that case (although the recommendation is not based on the merits of the claims asserted). However, the reason given by AT&T against dismissal herein 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 issues before the Authority would be binding on the Authority and the various other State Commissions where AT&T has filed similar complaints against other resellers. Such a ruling by the FCC would provide binding precedential value and obviate the need for these numerous separate proceedings.

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

AT&T also asks that the Authority require NewPhone to deposit into escrow the full amount which AT&T claims in its Complaint should the Authority decide to delay these proceedings.¹³ NewPhone 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, NewPhone) to withhold payment of disputed amounts pending a resolution of a billing dispute.¹⁴ Requiring NewPhone 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 cites to none) which allows 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

¹³ See Response p. 11.

¹⁴ See Interconnection Agreement, Attachment 7 Section 2.2.

will not be able to pay any amounts they ultimately will be found to owe.”¹⁵ NewPhone 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 allegedly due. Requiring NewPhone to deposit the amount claimed by AT&T would financially harm NewPhone, considering NewPhone ultimately should not be required to pay any portion of the amounts properly withheld by NewPhone that are the subject of AT&T’s Complaint. Accordingly, should the Authority decide to dismiss or stay this proceeding, it must do so without any requirement to escrow the amounts in dispute.

E. AT&T’s Motion for Consolidation

For the reasons set forth herein and in NewPhone’s Motion to Dismiss, the Authority should dismiss or stay these proceedings pending the outcome of the FCC Resale Docket. However, should the Authority decide that this proceeding should not be dismissed or stayed and that this proceeding should move forward, NewPhone 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.

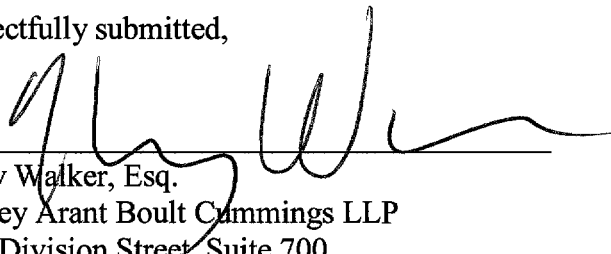
NewPhone has denied that it has withheld billed amounts or claimed credits based on the “word-of-mouth” promotion. NewPhone maintains this position. Despite NewPhone’s denial with respect to the “word-of-mouth” promotion, NewPhone expressly reserves the right to assert its positions and arguments concerning the treatment of customer referral marketing promotions (including the “word-of-mouth” promotion) in the event that issue is consolidated with other proceedings. Further, should the Authority decide that this proceeding should not be dismissed or stayed, NewPhone remains opposed the escrow arrangement proposed by AT&T in its Response for the reasons stated above.

¹⁵ *Id.*

In conclusion, NewPhone respectfully requests that the Authority dismiss the Complaint filed by AT&T for the reasons stated herein and in NewPhone'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, NewPhone 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 30th day of April, 2010.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing has this date been served via U.S. Mail, postage prepaid, or electronic mail to all parties listed on the Official Service List.

This 30th day of April, 2010.