STATE OF SOUTH CAROLINA

(Caption of Case)

BellSouth Telecommunications, Inc. d/b/a AT&T Southeast d/b/a AT&T South Carolina, Complainant/ Petitioner v. DialTone & More, Inc., Defendant/ Respondent

BEFORE THE
PUBLIC SERVICE COMMISSION
OF SOUTH CAROLINA

COVER SHEET

DOCKET NUMBER: 2010 - 15 - C

(Please type or print)
Submitted by: John J. Pringle, Jr.

Address: Ellis, Lawhorne & Sims, PA
PO Box 2285
Columbia SC 29202

SC Bar Number: 11208
Telephone: 803-343-1270
Fax: 803-799-8479
Other:

Email: jpringle@ellislawhorne.com

NOTE: The cover sheet and information contained herein neither replaces nor supplements the filing and service of pleadings or other papers as required by law. This form is required for use by the Public Service Commission of South Carolina for the purpose of docketing and must be filled out completely.

DOCKETING INFORMATION (Check all that apply)

☐ **Emergency Relief demanded in petition**

☐ **Request for item to be placed on Commission's Agenda expeditiously**

☐ **Other:**

INDUSTRY (Check one)	NATURE OF ACTION (Check all that apply)		
☐ Electric	☐ Affidavit	☐ Letter	☐ Request
☐ Electric/Gas	☐ Agreement	☐ Memorandum	☐ Request for Certification
☐ Electric/Telecommunications	☒ Answer	☐ Motion	☐ Request for Investigation
☐ Electric/Water	☐ Appellate Review	☐ Objection	☐ Resale Agreement
☐ Electric/Water/Telecom.	☐ Application	☐ Petition	☐ Resale Amendment
☐ Electric/Water/Sewer	☐ Brief	☐ Petition for Reconsideration	☐ Reservation Letter
☐ Gas	☐ Certificate	☐ Petition for Rulemaking	☐ Response
☐ Railroad	☐ Comments	☐ Petition for Rule to Show Cause	☐ Response to Discovery
☐ Sewer	☐ Complaint	☐ Petition to Intervene	☐ Return to Petition
☒ Telecommunications	☐ Consent Order	☐ Petition to Intervene Out of Time	☐ Stipulation
☐ Transportation	☐ Discovery	☐ Prefiled Testimony	☐ Subpoena
☐ Water	☐ Exhibit	☐ Promotion	☐ Tariff
☐ Water/Sewer	☐ Expedited Consideration	☐ Proposed Order	☐ Other:
☐ Administrative Matter	☐ Interconnection Agreement	☐ Protest	
☐ Other:	☐ Interconnection Amendment	☐ Publisher's Affidavit	
	☐ Late-Filed Exhibit	☐ Report	

Print Form Reset Form

ELLIS : LAWHORNE

John J. Pringle, Jr.
Direct dial: 803/343-1270
jpringle@ellislawhorne.com

February 25, 2010

FILED ELECTRONICALLY
The Honorable Jocelyn G. Boyd
Clerk
South Carolina Public Service Commission
PO Drawer 11649
Columbia SC 29211

RE: BellSouth Telecommunications, Inc. d/b/a AT&T Southeast d/b/a AT&T South Carolina, Complainant/Petitioner v. DialTone & More, Inc., Defendant/Respondent
Docket No. 2010-15-C, Our File No. 1066-11712

Dear Jocelyn:

Enclosed is the **Answer and Counterclaims** filed on behalf of DialTone & More, Inc. in the above-referenced docket.

If you have any questions or need additional information, please do not hesitate to contact me.

With kind regards, I am

Yours truly,

John J. Pringle, Jr.

JJP/cr
Enclosure
cc: C. Lessie Hammonds, Esquire (via electronic mail service)
Patrick W. Turner (via electronic mail service)
Henry M. Walker, Esquire (via electronic mail service)
Christopher Malish (via electronic mail service)
Gordon D. Polozola, Esquire (via electronic mail service)
Paul F. Guarisco, Esquire (via electronic mail service)
Mr. Jim R. Dry (via electronic mail service)

BEFORE THE
SOUTH CAROLINA PUBLIC SERVICE COMMISSION

BellSouth Telecommunications, Inc.	)	
d/b/a AT&T Southeast d/b/a	)	
AT&T South Carolina,	)	
Complainant/Petitioner v.	)	Docket No. 2010-15-C
Dialtone & More, Inc.,	)	
Defendant/Respondent	)	

ANSWER AND COUNTER-CLAIMS OF DIALTONE & MORE, INC.

Dialtone & More, Inc. ("Dialtone & More" or "Respondent") responds to the Complaint filed by BellSouth Telecommunications, Inc., d/b/a AT&T Southeast d/b/a AT&T South Carolina ("AT&T") concerning a billing dispute between the parties.

NARRATIVE SUMMARY

Dialtone & More is a local exchange telephone company providing service to approximately 39,000 subscribers in South Carolina, all of whom are low income, residential customers. Dialtone & More resells the services of AT&T. As a reseller, Dialtone & More is entitled under federal law to receive from AT&T the same "cash back" credits and promotional discounts that AT&T gives to its own retail customers. Those credits and discount are usually sufficient to offset, in large part, Dialtone & More's monthly bills from AT&T.[1]

---

[1] AT&T's Complaint implies that since Dialtone & More pays little or nothing to AT&T each month for the purchase of wholesale services, the Respondent must be behind on its bills. That implication is incorrect. Dialtone & More is currently up-to-date on its bills and regularly pays AT&T all amount owed, less the promotional discounts and rebates owed by AT&T to Dialtone & More.

Like a grocery shopper with a pocket full of coupons, Dialtone & More primarily purchases AT&T services which qualify for rebates and discounts. The rebates are often larger than the wholesale price of the service. Just as a shopper with coupons may purchase a cart full of goods for only a few dollars, the Respondent may purchase wholesale services at very little net cost. This litigation is not about whether Dialtone & More pays its bills, but about the property amount of those bills and whether AT&T is giving Dialtone & More the full amount of the discounts and rebates to which a reseller is entitled under federal law.

(footnote continued on following page ...)

AT&T is not entitled to any relief sought in its Complaint. To the contrary, AT&T owes Dialtone & More a substantial amount of money in unpaid -- or underpaid -- rebates and discounts which AT&T offers its own retail customers but refuses to pay its wholesale customers in violation of federal law and the parties' interconnection agreement.

Under the Federal Telecommunications Act and the rules and orders of the Federal Communications Commission, AT&T is required to offer its services for resale (1) "subject to the same conditions" that AT&T offers its own end users and at (2) "the rate for the telecommunications service less avoided retail costs." 47 CFR §51.603(b) and 47 CFR §51.607. 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.

For example, when AT&T offers new customers a rebate of "$50 cash back" for subscribing to residential telephone, AT&T must make the same offer available to resellers. In other words, the reseller will still pay AT&T the normal wholesale rate, that is, the tariffed price less the wholesale discount as determined by the state regulators. The reseller is also, however, entitled to purchase this service "under the same conditions" as an AT&T retail customer, that is, with a rebate of "$50 cash back."

(... footnote continued from previous page)

There have also been, and continue to be, disagreements between the parties over the time it takes AT&T to calculate the rebates and discounts and credit them to the reseller's account. AT&T has, at various times, been months behind while many resellers, including Dialtone & More, typically deduct the amounts owed by AT&T when paying their monthly bills. Although AT&T has worked on reducing these delays, operational problems remain a continuing source of disputes between the parties. These disputes are not before the Commission at this time.

In this example, 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 rate less the wholesale discount – whether or not AT&T offers new customers a rebate. On the other hand, Dialtone & More 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, Dialtone & More is no better or worse off than Dialtone & More 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.

That is the way the resale obligation is supposed to work. Assuming that the avoided retail costs are calculated correctly, the resale rules preserves competitive neutrality. Neither AT&T nor the reseller gains a competitive advantage whether a service is sold at retail or wholesale and neither gains an advantage whether AT&T is selling at the tariffed rate or offering a cash rebate.

But AT&T does not follow the rules. When AT&T offers its retail customers a $50 rebate, AT&T will not offer the same rebate to a reseller. Instead, AT&T subtracts the wholesale discount from the rebate before giving it to the reseller. If, for example, the wholesale discount is 20%, AT&T will pay the reseller only $40 instead of $50, gaining a $10 windfall – and a competitive advantage – each time a line is sold at wholesale rather than retail.

Here is a simple example, which assumes that the wholesale discount is 20%:

When AT&T sells a residential telephone service for a tariffed rate of $30 per month, the reseller pays a wholesale rate of $24 a month for the line (Retail rate less 20%.) If AT&T pays a $50 rebate in connection with the sale of the line to a new customer, AT&T only gives the reseller a credit of $40 ($50 less the 20% wholesale discount). When the first month's credits and payments are balanced, the reseller has a net credit of $16 (the $40 credit to the reseller less

the $24 payment to AT&T). The retail customer, on the other hand, has a net credit of $20 at the end of the month (the $50 credit less the $30 tariffed price). Using AT&T's approach, the "retail" rate is actually $4 less than the "wholesale" rate- a classic, illegal price squeeze. If, on the other hand, AT&T gave the reseller credit for the full, $50 rebate, the reseller would have a net credit of $26 (the $50 credit to the reseller less the $24 payment to AT&T) and the net wholesale price would, as it should, be six dollars less than the retail price.

This, then, is the first issue raised in AT&T's Complaint: When AT&T offers its retail customers a cash rebate, what is proper amount of the rebate AT&T must offer to resellers? Respondent's contends AT&T must offer the same cash rebate to a reseller. AT&T contends that it is only required to offer the amount of the rebate minus the wholesale discount. In either case, the reseller is still charged for the line itself at the regular tariffed rate, less the wholesale discount. Under Respondent's approach, the competitive balance reflected in the calculation of the avoided cost discount is preserved whether or not AT&T offers a rebate of $100, $50, or any other amount. Under AT&T's approach, AT&T gains a competitive advantage by giving the reseller only a percentage of the rebate. The larger the rebate, the larger the windfall, the larger AT&T's competitive advantage.

The second issue raised in the Complaint is not about calculating the amount of a rebate owed to a reseller but about determining whether a particular AT&T promotion is even subject to the resale requirement.

Since the 2007 decision of the US Court of Appeals for the Fourth Circuit in BellSouth v. Sanford, 197 F.3d 663 (4th Circuit, 2007), BellSouth (now AT&T) has not disputed that when it offers a cash rebate to attract new retail customers, the company must also offer a rebate – at least of some amount – to resellers serving similarly situated wholesale customers. But when the cash is offered, not to the new user but to an existing AT&T customer as a reward for referring

new business to the company, AT&T argues that this "referral" promotion is not subject to resale and that AT&T owes nothing to a reseller serving similarly situated customers.

The Sanford court held that when AT&T offers cash, gift cards, or other items of value to its retail customers in exchange for the purchase of regulated service, AT&T has, in effect, reduced the price of that service and must offer that same price reduction, along with the value of the avoided cost discount, to resellers. In an apparent attempt to evade the Court's holding, AT&T has decided to offer cash, gift cards, or other items of value to its retail customers in exchange for the purchase of regulated service, *not by the existing customer, but by a new customer who is referred to AT&T by the existing customer*. The rebate, in other words, goes to an existing customer, not for purchasing services himself, but as a reward for persuading someone else to purchase AT&T's telephone service. The impact on AT&T is the same, of course, as if AT&T had paid the new customer directly. In exchange for a payment of, for example, $50, AT&T has gained a new subscriber. But the impact on a reseller is quite different, according to AT&T. The company contends that this promotion is not subject to resale and refuses to pay anything when an existing customer of an AT&T reseller refers new business to the reseller. The advantage to AT&T is the same whether the referral brings a new retail customer or a new wholesale customer to AT&T. But in the retail market, AT&T pays a fee for getting a new customer, while in the wholesale market, AT&T gets the same new business but pays nothing at all.

This is the second issue raised in the Complaint. Dialtone & More believes it is entitled to resell AT&T's referral promotion and collect a rebate equal to the value of the payment offered by AT&T to its retail customers for referring new business. AT&T contends that it is not required to offer this promotion to resellers and that it owes Dialtone & More nothing for bringing new, wholesale business to AT&T.

Finally, Dialtone & More brings its own counter-claims against AT&T concerning some of AT&T's other restrictions on the resale of regulated services.

a. AT&T offers to waive the line connection charge for new retail customers and is, therefore, required to offer resellers a waiver of equal value. Instead, AT&T offers resellers only a portion of the value of the waiver of the line connection fee.

b. AT&T offers retail customers a discount on the purchase of regulated telephone service if the customer purchases a bundle of regulated and non-regulated services. AT&T, however, refuses to offer unbundled telephone service for resale at a comparable discount.

c. AT&T has recently announced its intention to eliminate almost entirely the cash rebates paid to resellers. For example, AT&T has stated that competitive carriers in South Carolina who resell a "$50 cash back" promotion are entitled to receive a rebate of only $4.66. Implementation of this proposal has been enjoined by a Federal District Court in Texas. That decision is now under review by the Fifth Circuit. Oral argument is scheduled for March 1, 2010.

In each case, AT&T has imposed, or tried to impose, a restriction on the resale of its service without first "prov[ing] to the state commission that the restriction is reasonable and non-discriminatory" as AT&T is required to do under the FCC's rules. 47 C.F.R.§51.613(b).

SPECIFIC RESPONSES TO AT&T'S COMPLAINT

The Section of AT&T South Carolina's Complaint entitled "Background and Summary of Petition" and all included footnotes are AT&T South Carolina's version of the situation and

require no response from Respondent. Unless below Respondent specifically admits any of the matters asserted, those matters are denied.

1. Admitted.

2. Admitted.

3. Admitted. The Respondent is a competitive local exchange carrier certified by the Commission to offer intrastate telecommunications services. The Respondent currently serves approximately 39,000 customers in South Carolina, primarily through the resale of AT&T's services. The address of Respondent's corporate headquarters is 1121 Highway 70, Suite 202, Arlington, Tennessee, 38002.

4. Because of the voluminous Exhibits to AT&T's Complaint, Respondent has not been yet able to review each page of those exhibits and is thus without knowledge or information sufficient to form a belief as to the truth or falsity of the allegations of Paragraph 4 of the Complaint and therefore cannot either admit or deny the same. Thus, such allegations stand denied. However, Respondent also states that it has no reason to dispute AT&T's assertion that the Exhibits are accurate copies of the interconnection agreement between AT&T and the Respondent.

5. Because of the voluminous Exhibits to AT&T's Complaint, Respondent has not been yet able to review each page of those exhibits and is thus without knowledge or information sufficient to form a belief as to the truth or falsity of the allegations of Paragraph 5 of the Complaint and therefore cannot either admit or deny the same. Thus, such allegations stand denied. However, Respondent also states that it has no reason to dispute AT&T's assertion that the Exhibits are accurate copies of the interconnection agreement between AT&T and the Respondent.

6. Because of the voluminous Exhibits to AT&T's Complaint, Respondent has not been yet able to review each page of those exhibits and is thus without knowledge or information sufficient to form a belief as to the truth or falsity of the allegations of Paragraph 6 of the Complaint and therefore cannot either admit or deny the same. Thus, such allegations stand denied. However, Respondent also states that it has no reason to dispute AT&T's assertion that the Exhibits are accurate copies of the interconnection agreement between AT&T and the Respondent.

7. Because of the voluminous Exhibits to AT&T's Complaint, Respondent has not been yet able to review each page of those exhibits and is thus without knowledge or information sufficient to form a belief as to the truth or falsity of the allegations of Paragraph 7 of the Complaint and therefore cannot either admit or deny the same. Thus, such allegations stand denied. However, Respondent also states that it has no reason to dispute AT&T's assertion that the Exhibits are accurate copies of the interconnection agreement between AT&T and the Respondent.

8. Because of the voluminous Exhibits to AT&T's Complaint, Respondent has not been yet able to review each page of those exhibits and is thus without knowledge or information sufficient to form a belief as to the truth or falsity of the allegations of Paragraph 8 of the Complaint and therefore cannot either admit or deny the same. Thus, such allegations stand denied. However, Respondent also states that it has no reason to dispute AT&T's assertion that the Exhibits are accurate copies of the interconnection agreement between AT&T and the Respondent.

9. Denied.

10. Respondent is without knowledge or information sufficient to form a belief as to the truth or falsity of the allegations of Paragraph 10 of the Complaint and therefore cannot either admit or deny the same. Thus, such allegations stand denied.

11. Respondent is without knowledge or information sufficient to form a belief as to the truth or falsity of the allegations of Paragraph 11 of the Complaint and therefore cannot either admit or deny the same. Thus, such allegations stand denied.

12. Denied.

13. Respondent denies that AT&T is owed an unpaid balance.

14. Admitted.

15. Denied.

16. The language of the Federal Telecommunications Act speaks for itself. Otherwise, this allegation is denied.

17. Admitted.

18. The language of the Federal Telecommunications Act speaks for itself. Otherwise, this allegation is denied.

19. The language of the Federal Telecommunications Act speaks for itself. Otherwise, this allegation is denied.

20. Admitted.

AFFIRMATIVE DEFENSES

21. Respondent asks that Commission to dismiss this Complaint in deference to the primary jurisdiction of the Federal Communications Commission which currently has before it a Petition requesting a declaratory ruling on the same issues raised in this Complaint. FCC Docket WC-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").

22. In the alternative, Respondent asks that this Complaint be held in abeyance pending the outcome of two federal lawsuits. One is pending in the United States Court of Appeals for the Fifth Circuit, *Budget PrePay, Inc. v. AT&T Inc. f/k/a SBC Communications, Inc.*, Case Nos. 09-11188 and 09-11099. Oral argument scheduled for March 1, 2010. The other is pending in the United States District Court for the Western District of North Carolina, *CGM, LLC v. BellSouth Telecommunications, Inc.*, Case No. 3:09-cv-00377.

COUNTERCLAIMS

23. For its own retail customers, AT&T offers to waive the line connection charge, a one-time payment of about $40. AT&T, however, refuses to give Respondent the full value of that $40 credit, offering instead only about $32 (the value of the retail credit less the wholesale discount). The reseller is entitled to receive the full value of the line connection waiver.

Here is a simple example, based on the assumption that the wholesale discount is 20%: When a reseller orders a new line, he pays AT&T a wholesale rate of $32 for the line connection fee (the tariffed rate of $40 less the 20% wholesale discount.) If AT&T waives the line connection charges for its retail customer, AT&T will give the reseller a credit of $32 ($40 credit less the wholesale discount). Since the $32 charge to be reseller is offset by the $32 credit, the reseller is charged $0 for the line connection. If, as Respondent claims, AT&T is required to give the reseller the full, $40 value of the waiver, the reseller would end up with a credit of $8 instead of $0 (the $40 credit less the $32 charge). Respondent asks the Commission 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).

24. 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 services for resale at a comparable discounted rate. Respondent asks the Commission 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).

25. AT&T has recently informed Respondent that AT&T intends to reduce from approximately $40 to $4.66 the amount paid to resellers under AT&T's "$50 cash back" rebate offer. Respondent asks the Commission 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).

RELIEF SOUGHT

WHEREFORE, Respondent respectfully requests that the Commission issue an Order

1. Denying the relief sought by AT&T;

2. Dismissing this Complaint in deference to the primary jurisdiction of the FCC or, in the alternative, holding this Complaint in abeyance pending the outcome of two federal lawsuits addressing the same issues raised in this Complaint;

3. Granting Respondent's Counter Claims and such further relief as the Commission deems fair and equitable.

John J. Pringle, Jr., Esquire
Ellis, Lawhorne & Sims, P.A.
1501 Main Street, 5th Floor
P.O. Box 2285
Columbia, South Carolina 29202
Telephone: (803) 343-1270
Facsimile: (803) 799-8479
jpringle@ellislawhorne.com

Henry M. Walker, Esquire
Bradley Arant Boult Cummings, LLP
1600 Division St., Suite 700
Nashville Tennessee 37203
Telephone: (615) 252-2363
Facsimile: (615) 252-6363
hwalker@babc.com

Attorneys for DialTone & More, Inc.

THE PUBLIC SERVICE COMMISSION OF

SOUTH CAROLINA

DOCKET NO. 2010-15-C

IN RE:	)	
	)	
BellSouth Telecommunications, Inc.	)	
d/b/a AT&T Southeast d/b/a AT&T	)	**CERTIFICATE OF SERVICE**
South Carolina, Complainant/Petitioner	)	
v. DialTone & More, Inc.,	)	
Defendant/Respondent	)	

This is to certify that I have caused to be served this day, one (1) copy of the **Answer and Counterclaims of Dialtone & More, Inc.** by placing a copy of same in the care and custody of the United States Postal Service (unless otherwise specified), with proper first-class postage affixed hereto and addressed as follows:

VIA ELECTRONIC MAIL SERVICE
C. Lessie Hammonds, Esquire
Office of Regulatory Staff
Legal Department
PO Box 11263
Columbia SC 29211

VIA ELECTRONIC MAIL SERVICE
Patrick W. Turner, Esquire
BellSouth Telecommunications, Inc.
1600 Williams Street
Suite 5200
Columbia SC 29201

Carol Roof
Paralegal

February 25, 2010
Columbia, South Carolina