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April 9, 2010

The Honorable Jocelyn Boyd
Interim Chief Clerk of the Commission
Public Service Commission of South Carolina
Post Office Drawer 11649
Columbia, South Carolina 29211

Re: BellSouth Telecommunications, Incorporated d/b/a AT&T Southeast d/b/a AT&T South Carolina v. Image Access, Incorporated d/b/a New Phone
Docket No. 2010-19-C

Dear Ms. Boyd:

AT&T South Carolina respectfully submits the following documents for filing in the above-referenced Docket:

1. AT&T South Carolina's Response to Motions to Dismiss and/or Stay and Reply to Responses to Motion to Consolidate.[1]

2. AT&T South Carolina's Motion to Dismiss or Sever Certain Counterclaims.

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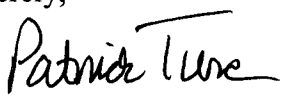
[1] This Response addresses both dPi's "Motion to Dismiss and/or Stay and Response to Motion for Consolidation" and NewPhones' "Motion to Dismiss and/or Stay and Response to Motion for Consolidation," in which Image Access, Incorporated has joined. *See* Responses of Affordable Phone Services, Inc., d/b/a High Tech Communications, Dialtone and More, Inc., Tennessee Telephone Service, LLC d/b/a Freedom Communications, USA, LLC, and Onetone Telecom Inc. to AT&T's Motion for Consolidation, filed in Docket Nos. 2010-14-C, 2010-15-C, 2010-16-C, and 2010-17-C on or about February 25, 2010.

3. AT&T South Carolina's Response to Image Access, Incorporated's Answer/Counterclaims.

By copy of this letter, I am serving all parties of record with a copy of these pleadings as indicated on the attached Certificate of Service.

Sincerely,



Patrick W. Turner

PWT/nml
Enclosure
cc: All Parties of Record
799773

BEFORE THE
PUBLIC SERVICE COMMISSION
OF SOUTH CAROLINA

In Re: BellSouth Telecommunications, Incorporated d/b/a AT&T Southeast d/b/a AT&T South Carolina v. Affordable Phone Services, Incorporated d/b/a High Tech Communications
Docket No. 2010-14-C

BellSouth Telecommunications, Incorporated d/b/a AT&T Southeast d/b/a AT&T South Carolina v. Dialtone & More Incorporated
Docket No. 2010-15-C

BellSouth Telecommunications, Incorporated d/b/a AT&T Southeast d/b/a AT&T South Carolina v. Tennessee Telephone Service, LLC d/b/a Freedom Communications USA, LLC
Docket No. 2010-16-C

BellSouth Telecommunications, Incorporated d/b/a AT&T Southeast d/b/a AT&T South Carolina v. OneTone Telecom, Incorporated
Docket No. 2010-17-C

BellSouth Telecommunications, Incorporated d/b/a AT&T Southeast d/b/a AT&T South Carolina v. dPi Teleconnect, LLC
Docket No. 2010-18-C

BellSouth Telecommunications, Incorporated d/b/a AT&T Southeast d/b/a AT&T South Carolina v. Image Access, Incorporated d/b/a New Phone
Docket No. 2010-19-C

AT&T SOUTH CAROLINA'S MOTION TO DISMISS OR SEVER CERTAIN COUNTERCLAIMS

BellSouth Telecommunications Inc. d/b/a AT&T Southeast d/b/a AT&T South Carolina ("AT&T South Carolina") respectfully moves the Public Service Commission of South Carolina ("the Commission") to dismiss the counterclaims identified in this Motion without prejudice or, in the alternative, to sever them for consideration in their own dockets, separate and apart from the claims presented in AT&T South Carolina's Complaints.

I.
INTRODUCTION

AT&T South Carolina's Complaints in these Dockets are straightforward – they seek to have the respondent resellers ("the resellers") pay bills AT&T South Carolina has previously rendered to them for telecommunications services AT&T South Carolina has already provided to them pursuant to their respective interconnection agreements, but which the resellers have not paid. In each case, the resellers have either failed to dispute the billed amounts, or have submitted disputes that AT&T South Carolina has denied because they are invalid.

In addition to filing various Motions addressing AT&T's South Carolina's Complaints,[1] the resellers have asserted a variety of purported "counterclaims." Three counterclaims, common to all of the resellers except NewPhone and dPi, ask the Commission to issue sweeping declaratory rulings regarding resale promotional pricing practices that have nothing to do with the issues presented in AT&T South Carolina's Complaints (how much money the resellers owe AT&T South Carolina for bills previously rendered under the parties' existing interconnection agreements).[2] As explained below, the three common counterclaims should be dismissed because the resellers have not alleged (and cannot allege) that they have disputed any billing addressed in AT&T's Complaints on the grounds alleged in the three common counterclaims; as a result, there is no "live" dispute between the resellers and AT&T South Carolina with respect to the issues purportedly presented in the three common counterclaims. It is not surprising, therefore, that the three common counterclaims look

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[1] AT&T South Carolina addresses these Motions in a separate Response that is being filed contemporaneously with this Motion.

[2] These counterclaims are addressed in detail below.

nothing like the detailed factual allegations and claims for relief that one would expect to see in a true counterclaim. Instead, they look like statements of policy issues a party might ask the Commission to address in an arbitration proceeding under Section 251 or 252 of the federal Telecommunications Act of 1996 (the "1996 Act") or in a generic docket. Clearly, they do not belong in proceedings like these, that addresses specific complaints for past due amounts under existing interconnection agreements.

In the alternative, if the Commission does not dismiss the common counterclaims outright, it should at a minimum sever them for consideration in separate dockets, because the issues raised in the counterclaims have nothing to do with the matters at issue in AT&T South Carolina's Complaints, and it thus appears that the counterclaims have been asserted for only one purpose: to improperly delay resolution of AT&T South Carolina's collection claims.

II.
THE COMMISSION SHOULD DISMISS THE THREE COMMON COUNTERCLAIMS

AT&T South Carolina seeks dismissal of the three common counterclaims asserted by all of the resellers except Budget Phone, NewPhone, and dPi.[3] This Motion

[3] NewPhone and dPi do not assert the "common" counterclaims. NewPhone, however, asserts a sweeping claim that AT&T South Carolina has violated the resale provisions of the 1996 Act, certain FCC regulations thereunder, and the parties' interconnection agreement(s) by "failing to provide NewPhone with the appropriate resale promotion credit and/or refund," by imposing "unreasonable and discriminatory restrictions on resale," and by failing to obtain Commission approval before implementing these so-called restrictions. *See* NewPhone Answer/Counterclaim at p.8, ¶2. As discussed below, AT&T South Carolina does not seek dismissal of this counterclaim to the extent it challenges the cashback or marketing referral issues identified in Section IV of AT&T's complaints. However, to the extent it seeks to address any broader issues, this counterclaim, too, should be dismissed. dPi's counterclaim appears to be limited to the cashback promotion at issue in AT&T South

refers to those common counterclaims as the "line connection charge waiver" counterclaim, the "bundled offering" counterclaim, and the "new methodology" counterclaim. In this section, AT&T South Carolina describes each of these three counterclaims and then explains why each should be dismissed without prejudice.

A. The "Line Connection Charge Waiver" Counterclaims.

Some of AT&T South Carolina's retail promotional offerings waive the line connection charge for qualifying end users. When a reseller buys the telecommunications services associated with those offerings, AT&T South Carolina initially bills the reseller the retail charge for the line connection less the applicable wholesale discount. For example, assuming a retail line connection charge of $40 and applying the wholesale discount of 14.8% established by this Commission, AT&T South Carolina initially bills the reseller $34.08.

If the reseller timely submits a request for a promotional credit and otherwise satisfies the qualifications of a specific retail promotional offering, AT&T South Carolina then credits the reseller's bill in the same amount it initially billed the reseller for the line connection charge. In the example above, AT&T South Carolina would credit the reseller's bill in the amount of $34.08. As a result, the reseller, like the qualifying retail customer, would pay $0 for the line connection.

Four of the resellers, however, have filed counterclaims suggesting that they are entitled to more.[4] To use the example above, they contend that, instead of crediting the

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Carolina's complaint. *See* dPi Answer/Counterclaims at pp. 4-7. If that is correct, AT&T South Carolina does not seek dismissal or severance of dPi's counterclaim.

[4] *See* Affordable Answer/Counterclaims at p. 9, ¶21; Dialtone & More Answer/Counterclaims at p. 10, ¶23; Freedom Answer/Counterclaims at p. 10, ¶22; OneTone Answer/Counterclaims at p. 9, ¶21.

reseller's bill in the amount of $34.08 (so the qualifying reseller, like the qualifying retail customer, pays nothing for the line connection), AT&T South Carolina should credit the reseller's bill in the amount of $40 (so AT&T South Carolina winds up *paying* the reseller $5.92 for a service the reseller has ordered from AT&T South Carolina).

Setting aside the obvious absurdity of the resellers' position, to AT&T South Carolina's knowledge, no reseller has disputed any amount AT&T South Carolina seeks in its Complaints on the grounds set forth in the "line connection charge waiver" counterclaim, and no reseller alleges that it has done so.

B. The "Bundled Offering" Counterclaims.

The same resellers who filed the "line connection charge waiver" counterclaim have also filed a "bundled offering" counterclaim that alleges, in its entirety:

> 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 service 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).[5]

To AT&T South Carolina's knowledge, no reseller has disputed any amount AT&T South Carolina seeks in its Complaints on the grounds set forth in the "bundled offering" counterclaim, and no reseller alleges that it has done so.

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[5] *See* Affordable Answer/Counterclaims at p. 10, ¶22; Dialtone & More Answer/Counterclaims at p. 11, ¶24; Freedom Answer/Counterclaims at p. 10, ¶23; OneTone Answer/Counterclaims at p. 10, ¶22.

C. The "New Methodology" Counterclaims.

The same resellers who assert the "line connection charge" and "bundled offering" counterclaims also assert a "new methodology" counterclaim that alleges, in its entirety:

> 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).[6]

The first sentence of this counterclaim refers to Accessible Letter No. CLECSE09-100, issued by AT&T South Carolina on July 1, 2009, a copy of which is attached to this Motion as Exhibit A. That Accessible Letter, along with Accessible Letter No. CLECSE09-111, issued July 1, 2009 (attached as Exhibit B), announced that AT&T South Carolina planned to change, effective September 1, 2009, the manner in which it calculated the credits available to CLECs that purchase certain retail cash-back promotional offers that are available for resale.

To AT&T South Carolina's knowledge, no reseller has disputed any amount AT&T South Carolina seeks in its Complaints on the grounds set forth in the "new methodology" counterclaim, and no reseller alleges that it has done so. This is hardly surprising, because AT&T South Carolina emphasizes on the first page of each of its Complaints that "***AT&T South Carolina is not seeking any amounts billed under this new methodology in this Docket.***" Moreover, AT&T South Carolina is not currently applying the new methodology to any CLEC, including any of the resellers, and AT&T

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[6] *See* Affordable Answer/Counterclaims at p. 10, ¶23; Dialtone & More Answer/Counterclaims at p. 11, ¶25; Freedom Answer/Counterclaims at p. 10, ¶24; OneTone Answer/Counterclaims at p. 10, ¶23.

South Carolina commits that it will not bill any reseller, including without limitation the Defendants in these proceeding, in the future for any amounts calculated under this new methodology without providing the requisite notice in the form of an Accessible Letter.

D. The Commission should dismiss each of the three common counterclaims.

As noted above, AT&T South Carolina is unaware of any reseller having disputed any amount AT&T South Carolina seeks in its Complaints on the grounds set forth in any of the three common counterclaims, and no reseller alleges that it has done so. Accordingly, each reseller that asserted the common counterclaims has failed to allege any cause of action for which relief can be granted with regard to amounts AT&T South Carolina has billed them. *See, e.g., Peoples Fed. Sav. & Loan Ass'n v. Resources Planning Corp.*, 596 S.E.2d 51, 60 (S.C. 2003)("A justiciable controversy is a real and substantial controversy which is ripe and appropriate for judicial determination, as distinguished from a contingent, hypothetical or abstract dispute."); *Pond Place Patrners, Inc. v. Poole,* 567 S.E.2d 881, 889 (S.C. Ct. App. 2002)(under the declaratory judgment act, a "justiciable controversy exists when a concrete issue is present, there is a definite assertion of legal rights and a positive legal duty which is denied by the adverse party.").

To be sure, the issues the resellers improperly seek to inject into this proceeding by way of the "line connection charge waiver" counterclaim, the "bundled offering" counterclaim, and the "new methodology counterclaim" could be presented for resolution in an appropriate proceeding (for instance, a generic docket to consider policy issues that apply industry-wide, or an arbitration under Section 252 of the 1996 Act). But *these* Dockets are not the appropriate forum to address those broad policy issues, especially since, as explained in AT&T South Carolina's Responses to the various Motions to

Dismiss and/or Stay (filed herewith), any delay in resolving AT&T South Carolina's Complaints will only harm AT&T South Carolina and benefit the resellers. AT&T South Carolina therefore respectfully requests that the Commission dismiss the three common counterclaims without prejudice to the resellers' right to raise the issues in an appropriate proceeding.

III.
THE COMMISSION SHOULD DISMISS NEWPHONE'S "RESALE PROMOTION CREDITS" COUNTERCLAIMS TO THE EXTENT IT ADDRESS ISSUES NOT REFERENCED IN SECTION IV OF THE COMPLAINTS.

In addition to seeking dismissal of the three common counterclaims, AT&T South Carolina seeks dismissal NewPhone's counterclaim described below to the extent NewPhone has not disputed any amount AT&T South Carolina seeks in its Complaints on the grounds set forth in that counterclaim.

NewPhone does not assert any of the three common counterclaims discussed above. Instead, NewPhone asserts a broad "resale promotion credits" counterclaim that alleges:

> 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 Commission, 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.[7]

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[7] *See* New Phone Answer at p.8, ¶ 5.

NewPhone's counterclaim includes additional allegations specific to cashback offerings.[8] AT&T South Carolina does not ask the Commission to dismiss or sever this counterclaims to the extent it relates to amounts NewPhone has disputed or withheld on the basis of the cashback or marketing referral issues identified in Section IV of AT&T South Carolina's Complaints.

However, NewPhone does not allege that it has disputed and failed to pay any amounts other than those relating to the cashback or marketing referral promotions that are the subject of AT&T South Carolina's collection claims. Accordingly, to the extent that its counterclaim purports to address issues other than those described in Section IV. of AT&T South Carolina's Complaints, it – like the three common counterclaims – is overly-broad and fails to state a claim upon which relief can be granted and should be dismissed for all the reasons set forth above with respect to the common counterclaims.

IV. IF THE COMMISSION DOES NOT DISMISS THE COUNTERCLAIMS ADDRESSED ABOVE, IT SHOULD AT A MINIMUM SEVER THEM FROM THIS DOCKET.

If the Commission permits any of the disputed counterclaims to go forward as pleaded, it should do so for the sole purpose of deciding those issues on a prospective basis (because, as explained above, AT&T South Carolina is unaware of any reseller having disputed any amount AT&T South Carolina seeks in its Complaints on the grounds set forth in the disputed counterclaims, and no reseller alleges that it has done) and in one or more proceedings separate and apart from these dockets. The three common counterclaims have nothing to do with the issues raised in AT&T's Complaints; nor does NewPhone's resale promotions credits counterclaim, to the extent it goes

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[8] *See* New Phone Answer at pp. 8-10, ¶¶ 3-5.

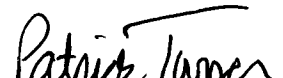
beyond the cashback or marketing referral issues identified in Section IV of AT&T South Carolina's Complaints. It thus appears that these "counterclaims" have been interposed for the sole – and improper – purpose of delay: having already moved to stay this Docket to await rulings in other proceedings, the reseller-counterclaimants are now trying to inject irrelevant issues into this Docket to complicate an otherwise straightforward collections case and delay its resolution. The Commission should not permit this.

CONCLUSION

For the reasons set forth above, the disputed counterclaims should be dismissed without prejudice or severed from these proceedings.

Respectfully submitted this 9th day of April, 2010.

BELLSOUTH TELECOMMUNICATIONS, INC.
d/b/a AT&T SOUTHEAST d/b/a AT&T SOUTH CAROLINA



Patrick W. Turner
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EXHIBIT A

at&t

Accessible

Date: **July 1, 2009**

Number: **CLECSE09-100**

Effective Date: **September 1, 2009**

Category: **Resale**

Subject: **(ORDERING AND PROVISIONING) Resale of Cash-Back Promotions**

Related Letters: **NA**

Attachment: **NA**

States Impacted: **Alabama, Florida, Georgia, Kentucky, Louisiana, Mississippi, North Carolina, South Carolina, and Tennessee**

Issuing AT&T ILECS: **AT&T Alabama, AT&T Florida, AT&T Georgia, AT&T Kentucky, AT&T Louisiana, AT&T Mississippi, AT&T North Carolina, AT&T South Carolina and AT&T Tennessee (collectively referred to, for purposes of this Accessible Letter, as "AT&T Southeast Region")**

Response Deadline: **NA**

Contact: **Account Manager**

Conference Call/Meeting: **NA**

AT&T Southeast Region is sending this letter to provide notice that it will change the manner in which it calculates the credits available to CLECs that purchase certain retail cash-back promotional offers (including but not limited to promotional offers involving checks, coupons, and other similar items) that are available for resale.

The change will be implemented initially for residential acquisition cash-back promotion offers requested on or after September 1, 2009, in all AT&T ILEC states, regardless of whether the underlying promotion is new or existing.

Details regarding the specific resale credits available for applicable promotions will be communicated via separate Accessible Letters. The formulae AT&T Southeast Region will use to calculate these credits is available in the Resale Product section of the CLEC Handbook on CLEC Online at:

https://clec.att.com/clec/hb/index.cfm

AT&T Southeast Region reserves the right to make any modifications to or to cancel the above information prior to the proposed effective dates. Should any modifications be made to the information, these modifications will be reflected in a subsequent letter. Should the information be canceled, AT&T Southeast Region will send additional notification at the time of cancellation. AT&T Southeast Region will incur no liability to the CLECs if the above mentioned information and/or approach is modified or discontinued for any reason.

EXHIBIT B

at&t

Accessible

Date: **July 1, 2009**

Number: **CLECSE09-111**

Effective Date: **September 1, 2009**

Category: **Resale**

Subject: **(ORDERING AND PROVISIONING) Revision to Win-back Cash Back Promotion - SC**

Related Letters: **CLECSE09-100**

Attachment: **NA**

States Impacted: **South Carolina**

Response Deadline: **NA**

Contact: **Account Manager**

Conference Call/Meeting: **NA**

Effective September 1, 2009, Competitive Acquisition Customers who purchase Complete Choice® Basic or Enhanced will receive a one-time cashback amount of $4.66 using the methodology announced in **CLECSE09-100**, dated July 1, 2009.

AT&T South Carolina reserves the right to modify or cancel the above information. Should any such action be taken, it will be reflected in a subsequent letter to CLECs. AT&T South Carolina will incur no liability for the foregoing.

STATE OF SOUTH CAROLINA)
) CERTIFICATE OF SERVICE
COUNTY OF RICHLAND)

The undersigned, Nyla M. Laney, hereby certifies that she is employed by the Legal Department for BellSouth Telecommunications, Inc. d/b/a AT&T Southeast d/b/a AT&T South Carolina ("AT&T") and that she has caused AT&T South Carolina's Motion to Dismiss or Sever Certain Counterclaims in Docket Nos. 2010-14-C, 2010-15-C, 2010-16-C, 2010-17-C, 2010-18-C and 2010-19-C to be served upon the following on April 9, 2010:

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Columbia, South Carolina 29202
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(Dialtone & More, Inc.)
(Tennessee Telephone Service, LLC d/b/a Freedom Communications)
(OneTone Telecom, Inc.)
(dPi Teleconnect, L.L.C.)
(Image Access, Inc. d/b/a NewPhone)
(Electronic Mail)

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Nyla M. Laney

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