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Sent: Friday, April 30, 2010 3:54 PM
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Subject: RE: Electronic Filing - Docket No. 100022-TP
Attachments: 20100430152958800.pdf

Attached is an electronic filing for the docket referenced below. If you have any questions, please contact either Matt Feil or Nicki Garcia at the numbers below. Thank you.

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Docket No. and Name: Docket No. 100022-TP - In Re: Complaint of BellSouth Telecommunications, Inc., d/b/a AT&T Florida Against Image Access, Inc. d/b/a NewPhone

Filed on behalf of: NewPhone

Total Number of Pages: 8 (including cover letter)

Description of Documents: NewPhone's Response in Opposition to AT&T 's Motion to Dismiss or Sever Certain Counterclaims

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DOCUMENT NUMBER - DATE
 03589 APR 30 2010
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April 30, 2010

VIA ELECTRONIC FILING

Ms. Ann Cole
Commission Clerk
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399

**Re: Docket 100022-TP – Complaint of BellSouth Telecommunications, Inc., d/b/a AT&T
Florida Against Image Access, Inc. d/b/a NewPhone**

Dear Ms. Cole:

Attached for filing in the referenced Docket, please find Image Access, Inc. d/b/a NewPhone's Response in Opposition to AT&T's Motion to Dismiss or Sever Certain Counterclaims.

Your assistance in this matter is greatly appreciated. Should you have any questions, please do not hesitate to contact me.

Sincerely,

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{TL222442;1} Attachments

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03589 APR 30 2010

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STATE OF FLORIDA
PUBLIC SERVICE COMMISSION

In Re: Complaint of BellSouth Telecom-)
munications, Inc., d/b/a AT&T Florida)
Against Image Access, Inc. d/b/a)
NewPhone)
_____)

Docket No. 100022-TP

NEWPHONE'S RESPONSE IN OPPOSITION TO AT&T'S
MOTION TO DISMISS OR SEVER CERTAIN COUNTERCLAIMS

Image Access, Inc. d/b/a NewPhone ("NewPhone") hereby submits its Opposition to the Motion to Dismiss or Sever Certain Counterclaims ("Motion to Dismiss or Sever") filed by BellSouth Telecommunications, Inc. d/b/a AT&T Southeast d/b/a AT&T Florida ("AT&T") with the Florida Public Service Commission ("Commission"). For the reasons set forth below, NewPhone respectfully requests that the Commission deny AT&T's Motion to Dismiss or Sever.¹

I. FACTS AND PROCEDURAL HISTORY

AT&T filed a Complaint and Petition for Relief with the Commission on January 8, 2010 ("Complaint"), alleging that NewPhone wrongfully withheld certain amounts owed to and billed by AT&T in connection with the resale of its cash-back and customer referral marketing promotions. NewPhone filed its Defenses, Answer and Counterclaim on February 25, 2010 ("Counterclaim"), asserting that AT&T wrongfully billed and withheld credits due to NewPhone

¹ Per Order No. PSC-10-0260-PCO-TP, issued April 26, 2010, this responsive pleading is timely filed.

and wrongfully placed restrictions on resale of AT&T's services. AT&T filed a Response to NewPhone's Counterclaim along with the Motion to Dismiss or Sever on April 9, 2010.²

II. LAW AND ARGUMENT

A. NewPhone's Counterclaims Are Proper In That They Contain Both Compulsory and Permissive Claims.

In its Motion to Dismiss or Sever, AT&T seeks dismissal or severance of portions of NewPhone's Counterclaim to the extent "that these counterclaims purport to address issues other than those described in Section IV of AT&T's Complaint."³ AT&T's attempt to limit NewPhone's Counterclaim to the issues or claims set forth in AT&T's original Complaint is contrary to law and Commission practice. Rule 1.170 of the Florida Rules of Civil Procedure⁴ provides, in pertinent part:

(a) Compulsory Counterclaims. A pleading **shall** state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, provided it arises out of **the transaction or occurrence that is the subject matter of the opposing party's claim** and does not require for its adjudication the presence of third parties over whom the court cannot acquire jurisdiction. But the pleader need not state a claim if (1) at the time the action was commenced the claim was the subject of another pending action, or (2) the opposing party brought suit upon that party's claim by attachment or other process by which the court did not acquire jurisdiction to render a personal judgment on the claim and the pleader is not stating a counterclaim under this rule.

(b) Permissive Counterclaim. A pleading **may** state as a counterclaim any claim against an opposing party not arising out of the transaction or occurrence that is the subject matter of the opposing party's claim.

(Emphasis added.) AT&T alleges that NewPhone has wrongfully withheld amounts owed to AT&T based on AT&T's calculation of the cash-back credit and "word-of-mouth" promotions

² AT&T also filed a Response to Motions to Dismiss and/or Stay and Reply to Responses to Motion to Consolidate in this proceeding on that same date.

³ See Motion to Dismiss or Sever p. 8.

⁴ The Commission often invokes the Rules of Civil Procedure for guidance, although it is not bound by those rules.

due to NewPhone as a reseller. NewPhone asserts, in part, that AT&T has wrongfully imposed restrictions on its resold services and wrongfully withheld credits due based on AT&T's miscalculation of the cash-back promotional credit due under its resale obligations. This portion of NewPhone's claims arises out of the same transaction or occurrence that is the subject of AT&T's principal demand. Therefore, these claims are compulsory counterclaims pursuant to Rule 1.170, Fla. R. Civ. Pro.

Furthermore, Rule 1.170 *permits* NewPhone to assert against AT&T any other causes of action, whether such causes of action are related to AT&T's claims or not. The clear language of Rule 1.170 defeats AT&T's Motion to Dismiss or Sever. All claims that NewPhone asserted against AT&T are, at the very least, permissive under Rule 1.170 and are properly asserted in NewPhone's Counterclaim. AT&T cites no relevant authority (and can cite none) to support its position. There is no law, no rule, no order providing that the Counterclaim asserted by NewPhone must be limited in the manner AT&T suggests.

B. AT&T's Basis for Dismissing or Severing Claims Lacks Merit.

In addition to lacking a legal basis, AT&T's argument to limit NewPhone's claims lacks a logical basis. As noted, NewPhone's Counterclaim includes allegations that AT&T has wrongfully billed and withheld credits due to NewPhone in relation to AT&T's calculation of the cash-back promotional credit. In its Motion to Dismiss or Sever, AT&T stated that it "does not ask the Commission to dismiss or sever these counterclaims to the extent that they relate to amounts NewPhone has disputed or withheld on the basis of the cash-back or marketing referral issues identified in Section IV of AT&T's Complaint."⁵ Rather, AT&T asks the Commission to

⁵ See Motion to Dismiss or Sever p. 8.

dismiss or sever any claims other than those which pertain to the cash-back or customer referral marketing promotions.⁶

However, to the extent AT&T wishes to restrict NewPhone's claims to the cash-back and customer referral marketing promotions, AT&T's Complaint must also be so limited. Otherwise, AT&T's argument is circular. AT&T admits, on the one hand, that its Complaint is limited to disputed amounts relating to the cash-back and customer referral marketing promotions by stating that, for example, "NewPhone's resale promotion credits counterclaim, to the extent it goes beyond the cashback or marketing referral issues identified in Section IV of AT&T's Complaint" has "*nothing to do with the issues raised in AT&T's complaint.*"⁷ Nowhere does AT&T allege anything other than the cash-back or customer referral marketing promotions as the basis of its demands against NewPhone in its Complaint.

Yet on the other hand, it is NewPhone's understanding that AT&T may want to reserve the argument that its claims against NewPhone extend beyond the cash-back and customer referral marketing promotions, which NewPhone denies. If AT&T intends to argue in the future that it has asserted claims for more than cash-back and customer referral marketing promotions, then its Motion to Dismiss or Sever is without merit. AT&T cannot argue that NewPhone should

⁶ AT&T argues that NewPhone's allegations are limited to the cash-back and word-of-mouth promotions, but that is contrary to the clear language of the Counterclaim. As background, AT&T's Complaint suggests that AT&T seeks an "unpaid balance" and states that "a substantial amount of [NewPhone's] past-due and unpaid balance" is related to the cash-back and word-of-mouth promotions. *See* Complaint p. 2. This language could be interpreted as meaning that AT&T seeks the full amount withheld, regardless of the bases for such withholding. Accordingly, NewPhone responded as broadly as AT&T by, for example, asserting in its Counterclaim that AT&T failed to provide NewPhone the "appropriate resale promotion credit and/or refund," has imposed "unreasonable and discriminatory restrictions on resale," and "owes NewPhone for all amounts wrongfully withheld and/or not properly credited or refunded to NewPhone." *See* Counterclaim p. 8, 10. Thus, contrary to AT&T's assertions, NewPhone has alleged wrongful conduct by AT&T that goes beyond simply the cash-back and word-of-mouth promotions and includes other promotion refunds and credits and other disputes.

⁷ *See* Motion to Dismiss or Sever p. 9 (emphasis added). In addition, AT&T offers no facts or allegations in its Complaint, Motion to Dismiss or Sever, or other pleadings relating to anything other than the cash-back or customer referral marketing promotion issues.

be precluded from asserting claims not previously raised by AT&T, and at the same time reserve its right to argue additional claims through its Complaint in the future.

As a practical matter, if the Commission finds that AT&T is restricted by the allegations of its Complaint or by its admission that its claims concern amounts billed relating to the cash-back and customer referral marketing promotions only, then NewPhone will consider limiting its Counterclaim to these same promotions.⁸ However, should this Commission find that AT&T has not limited its Complaint to these two issues, then there is no basis in law or logic for so limiting NewPhone's Counterclaim.

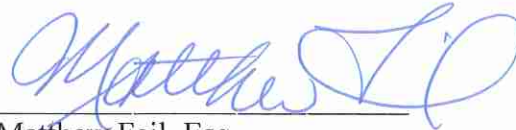
III. CONCLUSION

WHEREFORE, in consideration of the foregoing, NewPhone respectfully requests that the Commission deny AT&T's Motion to Dismiss or Sever Certain Counterclaims. NewPhone is entitled by law and Commission practice to bring the counterclaims asserted in this matter. Furthermore, the relief sought by AT&T is without merit. Nevertheless, if the Commission finds that AT&T's Complaint is limited to disputed amounts under the cash-back and customer referral marketing promotions only, then NewPhone will consider so limiting its Counterclaim, with full reservation of all other permissive claims.

Respectfully submitted this 30th day of April, 2010.

⁸ NewPhone at all times reserves its right to pursue any other claims that it has relating to other promotions and disputes.

NewPhone Response in Opposition
April 30, 2010



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NEWPHONE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served upon the following by email, and/or U.S. Mail this 30th day of April, 2010.

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By: 
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