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October 19, 2012

Ms. Ann Cole  
Commission Clerk  
Office of the Commission Clerk  
Florida Public Service Commission  
2540 Shumard Oak Boulevard  
Tallahassee, FL 32399-0850

RECEIVED FPSC  
12 OCT 19 PM 4:06  
COMMISSION  
CLERK

**Re: Docket No. 120231-TP  
Complaint of Budget Prepay, Inc. against BellSouth  
Telecommunications, Inc. d/b/a AT&T Florida**

Dear Ms. Cole:

Enclosed is an original and seven copies of BellSouth Telecommunications, LLC d/b/a AT&T Florida's Notice of Commencement of Collection Action, which we ask that you file in the captioned docket.

Copies have been served to the Parties shown on the attached Certificate of Service list.

Sincerely,

Tracy W. Hatch

cc: Parties of Record  
Gregory R. Follensbee  
Suzanne L. Montgomery  
Patrick W. Turner

1046045

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**CERTIFICATE OF SERVICE**  
**Docket No. 120231-TP**

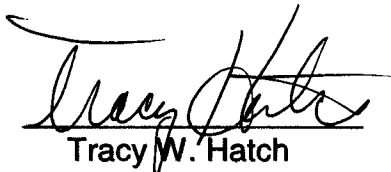
I HEREBY CERTIFY that a true and correct copy of the foregoing was served via  
Electronic Mail and First Class U. S. Mail this 19th day of October, 2012 to the  
following:

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Attys. for Budget Prepay



Tracy W. Hatch

**BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION**

Complaint of Budget Prepay, Inc. against BellSouth ) Docket No. 120231-TP  
Telecommunications, LLC d/b/a AT&T Florida )  
\_\_\_\_\_ ) Filed: October 19, 2012

**AT&T FLORIDA'S NOTICE OF  
COMMENCEMENT OF COLLECTION ACTION**

Budget Prepay, Inc. ("Budget") is breaching its interconnection agreement ("ICA") with AT&T Florida by withholding nearly three quarters of a million dollars it owes AT&T Florida for local services Budget has ordered under the ICA. As permitted by the ICA, AT&T Florida has notified Budget that it will suspend Budget's order processing, and ultimately disconnect Budget's services, if Budget does not cure this breach within the time frames specified in the ICA.<sup>1</sup> Out of respect for the pendency of this proceeding, the notice also informs Budget that if it files a motion with the Commission seeking relief from this suspension or disconnection of service, AT&T Florida will delay suspension and disconnection until close of business on November 27, 2012. The purpose of this extension is to provide the Commission with an opportunity to address this issue at its November 27, 2012 Agenda Conference, in the event Budget chooses to file a motion. AT&T Florida recognizes that the November 27, 2012 Agenda Conference is the first available conference at which the Commission could take up such a motion.<sup>2</sup>

Anticipating that Budget will file such a motion, AT&T Florida is providing the following analysis of the contractual basis for AT&T Florida's action. AT&T Florida is also providing notice to the Commission that, in the event Budget is unwilling to comply with its

<sup>1</sup> A copy of AT&T Florida's Notice of Suspension and Discontinuance is attached as Exhibit 1 (the "Notice").

<sup>2</sup> If Budget declines to make such a motion or files it too late to be included on the Commission's November 27 agenda, or if the Commission declines to consider such a request, AT&T Florida will suspend order and disconnect service after the close of business on November 27, 2012.

ICA, then as an alternative to service disruption that could adversely impact Budget's Florida customers, AT&T Florida would be willing to maintain service upon Budget's compliance with a Commission ruling that Budget either (a) post a bond sufficient to ensure recovery of the withheld amounts or (b) pay those withheld amounts into an escrow account pending the Commission's resolution of Budget's Complaint in this proceeding. As discussed herein, such a directive would be consistent with Commission decisions in other proceedings.<sup>3</sup>

### I. FACTUAL BACKGROUND

Budget's Complaint asks the Commission to decide whether Budget is entitled to monetary credits for certain gift card rewards that AT&T Long Distance<sup>4</sup> (not AT&T Florida – the two are separate affiliates) offers its new retail long distance customers who purchase certain of its long distance services. Although AT&T Florida is confident that Budget is not entitled to such credits, AT&T Florida's Notice does not address that issue. Instead, it addresses Budget's breach of the ICA by withholding more than \$700,000 in payments Budget owes AT&T Florida for *local* services Budget has ordered under the ICA merely because Budget claims to be entitled to rewards under *long distance* service offerings that are not subject to the ICA and that are not offered by AT&T Florida. As explained below, the ICA makes clear that Budget cannot withhold payment to AT&T Florida under these circumstances any more than a consumer can withhold mortgage payments from a bank because he claims the bank's affiliate owes him rewards under a credit card promotion. Budget is in breach of the ICA by withholding payment due to AT&T Florida.

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<sup>3</sup> See *In re: Complaint and petition for relief against LifeConnex Telecom, LLC f/k/a Swiftel, LLC by BellSouth Telecomms., Inc. d/b/a AT&T Florida*, Docket No. 100021-TP, Order No. PSC-10-0457-PCO-TP, at 8-9 (July 16, 2010).

<sup>4</sup> BellSouth Long Distance, Inc. d/b/a AT&T Long Distance Service ("AT&T Long Distance").

AT&T Florida, therefore, has sent the Notice pursuant to its right under Section 1.7.2 of Attachment 7 of the ICA,<sup>5</sup> demanding that Budget cure its nonpayment breach or have its order processing suspended, and ultimately its services disconnected. Such action does not require a Commission determination of the merits of Budget's Complaint. And, in the unlikely event the Commission rules in Budget's favor on the merits, nothing suggests that AT&T Florida would be unable to pay any amounts the Commission determines it owes Budget. In sharp contrast, resellers in Florida and in other states recently have been unable to pay amounts owed to the AT&T ILEC as a result of state commission decisions rejecting various positions taken by the resellers.

## **II. LEGAL BASIS FOR AT&T FLORIDA'S NOTICE**

### **A. Budget is in Breach of the ICA by Withholding Payment**

Budget has submitted promotional credit requests to AT&T Florida based on its erroneous argument that AT&T Florida must resell the AT&T Long Distance promotional offerings. AT&T Florida has properly denied these promotional credit requests in accordance with the ICA, and Budget responded by wrongfully resorting to self-help by withholding in excess of \$700,000 from its payments to AT&T Florida for the local exchange services Budget ordered and AT&T Florida provided pursuant to the ICA.

Budget is in breach of the payment obligations in its ICA as a result of its withholding of payments due to AT&T Florida. Budget's claim that this self-help is authorized by the "billing

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<sup>5</sup> Budget adopted the interconnection agreement between AT&T Florida and Level 3 Communications, LLC, which was approved by the Commission in Docket No. 040680-TP. The Commission approved the ICA between AT&T Florida and Budget pursuant to 47 U.S.C. § 252(e) on February 2, 2009 through Docket No. 080657-TP. A copy of the adoption agreement between AT&T Florida and Budget is available at <http://www.psc.state.fl.us/library/FILINGS/06/00154-06/00154-06.PDF>, and a copy of the Level 3 interconnection agreement that Budget adopted is available at <http://www.psc.state.fl.us/library/FILINGS/04/07202-04/07202-04.PDF>.

dispute” provisions of the ICA is meritless and does not excuse the breach. The ICA requires Budget to pay its bills as follows:

Payment Responsibility. Except as provided in section 2 herein, Payment of all charges will be the responsibility of [Budget]. [Budget] shall make payment to [AT&T Florida] of all services billed. . . .

Payment Due. Payment for services provided is due on or before the next bill date in immediately available funds. Payment is considered to have been made when received by [AT&T Florida].

ICA, Attach. 7, §§ 1.2.2, 1.3. Budget is thus required to pay AT&T Florida for “all services billed” “on or before the next bill date.”

The only exception for timely payment of all billed charges by Budget is “as provided in section 2,” which is entitled “Billing Disputes.” *Id.* § 1.2.2. Section 2.2 allows Budget to “withhold disputed amounts until the dispute is resolved.” *Id.* § 2.2. The ICA, however, narrowly defines a “billing dispute” as “a reported dispute *of a specific amount of money actually billed by either party.*” *Id.* (emphasis added). AT&T Florida has not billed Budget one penny for any of the long distance offerings that are the subject of Budget’s complaint.<sup>6</sup>

Budget’s claims for monetary rewards under long distance service offerings that are not subject to the ICA (and that are offered by an entity that is not a party to the ICA) are not “billing disputes” that allow Budget to withhold payments it owes AT&T Florida pursuant to the ICA. Instead, they are meritless claims for damages supposedly arising from the fact that AT&T Long Distance’s promotions were not made available to Budget for resale. The ICA unambiguously provides that “[c]laims by the billed party for damages of any kind will not be considered a *billing dispute* for purposes of this Section.” *Id.* § 2.2 (emphasis added). This language in the ICA is enforceable as written, and Budget is bound by it. *See Medical Ctr. Health Plan v. Brick,*

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<sup>6</sup> In its Complaint, Budget does not allege that AT&T Florida has billed it for any long distance service, nor does Budget allege that it has ordered any long distance services for resale from AT&T Florida or, for that matter, from AT&T Long Distance.

572 So.2d 548, 551 (Fla. 1st DCA 1990) (“A party is bound by, and a court is powerless to rewrite, the clear and unambiguous terms of a voluntary contract.”) (citation omitted).<sup>7</sup>

Thus, the ICA allows Budget to raise a good faith “billing dispute” only with respect to a charge AT&T Florida has actually billed Budget for a service AT&T Florida has actually provided to Budget pursuant to the ICA. But Budget’s claims based on the AT&T Long Distance promotions are not “billing disputes” because AT&T Florida has never billed Budget anything for long distance services, and AT&T Florida has never provided Budget any long distance services under the ICA (or otherwise). Budget’s withholding of payment for the local exchange services that it has ordered from AT&T Florida and that AT&T Florida has provided under the ICA is in breach of the ICA.

**B. Budget is Contractually Obligated to Cure its Breach by Making Immediate Payment to AT&T Florida; Alternatively, AT&T Florida Would Accept a Bond or Escrow Payment Until the Commission Resolves This Proceeding**

As a result of Budget’s nonpayment breach, AT&T Florida has the contractual right to take collection action, including suspending Budget’s order processing and disconnecting its services if Budget fails to timely cure the breach. Specifically, Section 1.7.2 of Attachment 7 of the ICA states:

[AT&T Florida] reserve the right to suspend or terminate service for nonpayment of undisputed amounts. If payment of amounts not subject to a billing dispute, as described in Section 2, is not received by the bill date in the month after the original bill date, [AT&T Florida] will provide written notice to [Budget] that additional applications for service may be refused, that any pending orders for service may not be completed, and/or that access to ordering systems may be suspended if payment of such amounts, and all other amounts not in dispute that become past due before refusal, incompleteness or suspension, is not received by the fifteenth day following the date of the notice. In addition, [AT&T Florida] will provide written notice to the person designated by [Budget] to receive notices of noncompliance that [AT&T Florida] may discontinue the provision of existing

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<sup>7</sup> This is true even if a provision of the ICA is perceived to be harsh or disadvantageous to one party (which is certainly not the case here). *See Applica Inc. v. Newtech Electronics Indus., Inc.*, 980 So. 2d 1194, 1194 (Fla. 3d DCA 2009).

services to [Budget] if payment of such amounts, and all other amounts not in dispute that become past due before discontinuance, is not received by the thirtieth day following the day of the initial notice. [AT&T Florida] may provide all written notices at the same time.

*Id.*, Attach. 7, § 1.7.2. AT&T Florida therefore is authorized to take the action in its Notice.

This action – appropriate under the plain language of the ICA – is necessary to protect AT&T Florida and its customers. As the Commission is well aware, resellers in Florida and in other states have been unable to pay amounts owed to the AT&T ILEC as a result of state commission decisions rejecting various positions taken by the resellers. Indeed, several commissions – including this Commission – have rejected resellers’ positions on other “billing disputes” that, like Budget’s spurious “billing dispute,” were asserted as purported justifications for unlawfully withholding payment from AT&T ILECs.<sup>8</sup> In many instances, however, the AT&T ILECs have consistently recovered only a tiny fraction of the amounts resellers had wrongfully withheld when the commission ruled against the resellers. To date, at least 16

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<sup>8</sup> See *dPi Teleconnect, LLC v. BellSouth Telecomms., Inc.*, Order PSC-08-0598-FOF-TP, Docket No. 050863 (Fla. P.S.C. Sept. 16, 2008), *aff’d dPi Teleconnect, LLC v. Florida Pub. Serv. Comm’n*, No. 4:08-cv-509/RS-WCS, 2009 WL 2603144 (N.D. Fla. Aug. 21, 2009); *see, also, e.g.*, Order No. 15 Granting AT&T’s Motion for Summary Disposition, *In re: Petition of Nexus Commc’ns, Inc. for Post-Interconnection Dispute Resolution with Southwestern Bell Tel. Co. d/b/a AT&T Tex. under FTA Relating to Recovery of Promotional Credit Due*, Docket No. 39028, 2012 WL 2366729 (Tex. P.U.C. Apr. 5, 2012); Order, *In Re Consolidated Proceedings to Address Certain Issues Common to Dockets U-31256, U-31257, U-31258, U-31259, and U-31260*, Docket No. U-31364 (La. P.S.C. May 25, 2012); Order, *In the Matter of: dPi Teleconnect, LLC v. BellSouth Telecomms., Inc., d/b/a AT&T Ky.*, Case No. 2009-00127, 296 P.U.R.4th 123, 2012 WL 182217 (Ky. P.S.C. Jan. 19, 2012); Order Resolving Credit Calculation Dispute, *In the Matter of BellSouth Telecomms., Inc. d/b/a AT&T North Carolina v. Image Access, Inc.*, Docket Nos. No. P-836, Sub 5 et al., 2011 WL 4448873 (N.C.U.C. Sept. 22, 2011); Order, *In the Matter of dPi Teleconnect, LLC v. BellSouth Telecomms., Inc. d/b/a AT&T Kentucky*, Case No. 2005-00455, 2011 WL 490903 (Ky. P.S.C. Feb. 1, 2011); Recommended Order, *In the Matter of dPi Teleconnect, LLC v. BellSouth Telecomms., Inc., d/b/a AT&T North Carolina*, Docket No. Docket No. P-55, Sub 1744, 2010 WL 1922679 (N.C.U.C. May 7, 2010), *aff’d sub nom. dPi Teleconnect, LLC v. Finley*, 844 F. Supp. 2d 664 (E.D.N.C. 2012); Order Denying Motion to Reconsider, *In re dPi Teleconnect, LLC v. BellSouth Telecomms., Inc.*, Docket No. P-55, Sub 1577, 2008 WL 2880723 (N.C.U.C. July 18, 2008), *aff’d sub nom. dPi Teleconnect LLC v. Sanford*, 2007 WL 2818556 (E.D.N.C. 2007), *aff’d sub nom. dPi Teleconnect LLC v. Owens*, 2011 WL 327071 (4th Cir. 2011).



resellers have declared bankruptcy or ceased doing business while owing, in the aggregate, more than \$150,000,000.00 they wrongfully withheld from AT&T ILECs.

Taking this action has become all the more necessary in light of the manner in which this case is proceeding. Notwithstanding that it was Budget who began this case, Budget's own actions are delaying the case from going forward. First, Budget declined to submit its proposed issue list in response to Staff's request, and, instead, on September 21, 2012, asked that the issue identification process be delayed while Budget conducts discovery and responds to AT&T Florida's Counterclaim. Nearly four weeks have elapsed and Budget has not sent out any discovery. Moreover, rather than respond to the merits of AT&T Florida's Counterclaim, Budget filed a Motion to Dismiss. As shown in AT&T Florida's October 15, 2012 Response in Opposition, that Motion to Dismiss is not well taken. AT&T Florida should not bear the risk of loss while this case is slow-rolled through the Commission, especially since the ICA does not even arguably allow Budget to withhold payment under these circumstances.

Alternatively, if Budget refuses to comply with its contractual obligations, in deference to this pending Commission proceeding, it would be acceptable to AT&T Florida if the Commission ordered Budget to post a bond sufficient to ensure recovery of withheld amounts or pay into escrow all amounts it has wrongfully withheld pending the outcome of this proceeding.<sup>9</sup> The Commission has previously required a CLEC to post a bond for the amount due to AT&T Florida during the pendency of the case addressing the CLEC's promotion claims. *See In re: Complaint and petition for relief against LifeConnex Telecom, LLC f/k/a Swiftel, LLC by BellSouth Telecomms., Inc. d/b/a AT&T Florida*, Docket No. 100021-TP, Order No. PSC-10-0457-PCO-TP, at 8-9 (July 16, 2010). In that case, the Commission ordered:

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<sup>9</sup> AT&T Florida is making this proposal for purposes of this case only. It is without waiver of its right to enforce the ICA provisions against Budget in another state.

Given the magnitude of the sum in dispute (approximately \$1.4 Million), we are concerned with ensuring that once this docket is resumed, and we make a final determination of the correct disposition of the amount currently in dispute, sufficient funds will be available for [CLEC] to pay AT&T such sums as we may determine are due and owing to AT&T. Therefore, as a further condition of allowing [CLEC] to continue to receive service from AT&T under the ICA during the pendency of this dispute, we order [CLEC] to post a bond in the amount of \$1.4 Million [within 15 days of the order]. The bond will remain in place throughout the remainder of this proceeding . . .

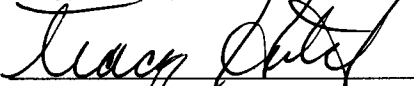
*Id.*

### III. CONCLUSION

Budget is in breach of the ICA by withholding payment due for local services it received from AT&T Florida based on its claim for credits associated with the AT&T Long Distance promotion. Budget has no legitimate basis to withhold such payment and, as a result, AT&T Florida has taken the action specified in its Notice of Suspension and Discontinuance.

Respectfully submitted this 19th day of October, 2012.

AT&T Florida



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c/o Gregory R. Follensbee

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**Exhibit 1 to the Notice of Commencement of Collection Action  
may be deemed to be confidential by Budget Prepay and therefore will  
be filed under a Notice of Intent this same day**