

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

**In the Matter of the Complaint of
Southeast, Inc.,**

Case No. 16-2288-TP-CSS

Complainant

**RESPONDENT'S
AMENDED ANSWER**

v.

Mitel Cloud Services, Inc.,

Respondent

**Relative to Alleged Unreasonable and
Unlawful Billing of Service**

**AMENDED ANSWER, AFFIRMATIVE DEFENSES, AND COUNTERCLAIM
OF RESPONDENT MITEL CLOUD SERVICES, INC.**

Respondent Mitel Cloud Services, Inc. ("Mitel") hereby answers the Complaint of Complainant Southeast, Inc. ("Southeast") as set forth in the Amended Answer below. Mitel respectfully requests that this Amended Answer replace and supersede in its entirety its original Answer, filed March 3, 2017. Mitel denies all allegations not specifically admitted below. Mitel further sets forth its Affirmative Defenses and its Counterclaim.

AMENDED ANSWER TO THE COMPLAINT

1. Mitel lacks knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph 1 of the Complaint and therefore denies them.
2. Mitel admits the allegations as stated in the first sentence of paragraph 2 of the Complaint. Mitel does not contest jurisdiction of the Public Utilities Commission of Ohio for the purposes of this action.
3. Mitel admits only that it entered a series of contracts with Southeast for various telephone services and that Mitel was formerly known as Mitel NetSolutions, Inc. All other allegations in paragraph 3 of the Complaint are denied.
4. Mitel admits the long-distance service contract between Mitel and Southeast had an

1 initial term of sixty (60) months and auto renewed for an additional 60-month term.
2 By way of further answer, this paragraph is vague. Assuming any other contracts
3 referenced in paragraph 4 of the Complaint are contracts between Mitel and Southeast,
4 Mitel refers to each agreement for its terms. All other allegations of paragraph 4 of the
5 Complaint are denied.

6 5. Admit.

7 6. Admit to the extent that Mitel informed Southeast that its account would be placed on
8 month-to-month status, effective on the enumerated dates as provided in Mitel's
9 July 1, 2014 letter—collectively ranging from July 24, 2014 through April 15, 2019.

10 7. Admit to the extent that Southeast requested that Mitel cancel the circuits identified in
11 the June 7, 2016 letter and requested credit for "Pic-C" charges. However, Mitel denies
12 all accounts were out of contract. Mitel further denies all other allegations and
13 conclusions of paragraph 7 of the Complaint.

14 8. Admit. By way of further answer, the June 22, 2016 letter from Mitel advised Southeast
15 that Mitel received Southeast's June 7, 2016 letter of cancellation and the circuits
16 specified for cancellation were still under contract. Mitel further provided a breakdown
17 of the contracted services and the contract termination dates. In addition, Mitel's letter
18 advised Southeast of equipment that would need to be returned to avoid unnecessary
19 billing and provided shipping instructions, a reminder of the potential impact the
20 requested cancellation might have of its minimum monthly commitments, and advised
21 Southeast of the need for its new carrier to coordinate any porting of numbers with
22 Mitel.

23 9. Admit to the extent Mitel is no longer providing telecommunication services to
24 Southeast. Mitel lacks knowledge or information sufficient to form a belief as to the
25 truth of the allegations set forth in the remainder of paragraph 9 of the Complaint and
26 therefore denies them.

1 10. Admit.

2 11. Admit to the extent the allegations of paragraph 11 are related to the September 20, 2016
3 letter from Mitel and to the extent Mitel communicated via the same that Southeast
4 “may” lose its telephone number in the event of disconnection, should full payment of
5 the identified, past due balance not be received by 10:00 a.m., PST, on September 30,
6 2016. All other allegations in paragraph 11 are denied.

7 12. Mitel admits that it did not block services to Southeast. Mitel lacks knowledge or
8 information sufficient to form a belief as to the truth of the allegations set forth in the
9 remainder of paragraph 12 of the Complaint and therefore denies them.

10 13. Admit.

11 14. Admit.

12 **COUNT I**

13 15. Mitel incorporates its responses to paragraphs 1-14 of the Complaint as if fully
14 incorporated herein.

15 16. Denied.

16 17. Mitel admits some of the contracts between Mitel and Southeast were renewed per the
17 terms of the existing agreements, prior to June 2014. By way of further answer, and
18 upon information and belief, affirmative action by Southeast was not required for
19 auto-renewal of the contracts in the State of Ohio. All other allegations of paragraph 17
20 of the Complaint are denied.

21 18. Paragraph 18 of the Complaint states a legal conclusion to which no response is
22 required.

23 **COUNT II**

24 19. Mitel incorporates its responses to paragraphs 1-18 of the Complaint as if fully
25 incorporated herein.

26 20. To the extent paragraph 20 of the Complaint contains factual allegations, including

1 Mitel's understanding of the \$12,500 minimum monthly commitment, the allegations
2 are denied. To the extent paragraph 20 of the Complaint states a legal conclusion, no
3 response is required. All other allegations of paragraph 20 of the Complaint are denied.

4 21. Mitel admits that if Southeast achieved the \$12,500 minimum monthly commitment
5 when long-distance usage charges and all other contracted services were included, no
6 underutilization fees would be invoiced. Mitel further admits that if Southeast failed to
7 achieve the \$12,500 minimum monthly commitment including all long-distance usage
8 charges (if any) and all other contracted services, Southeast would be billed for
9 underutilization fees. All factual statements and other allegations in paragraph 21 of the
10 Complaint are denied.

11 22. Denied.

12 **COUNT III**

13 23. Mitel incorporates its responses to paragraphs 1-22 of the Complaint as if fully
14 incorporated herein.

15 24. Denied. By way of further answer, the contract for the new 20MBPS circuit contains
16 specific instructions from Southeast to leave the 3MBPS circuit in place as a backup and
17 secondary connection. Mitel has no record of an instruction to replace or cancel the
18 3MBPS circuit.

19 25. To the extent paragraph 25 of the Complaint contains legal conclusions, no response is
20 required. To the extent paragraph 25 of the Complaint contains factual allegations, said
21 factual allegations are denied. All other allegations in paragraph 25 of the Complaint
22 are denied.

23 **COUNT IV**

24 26. Mitel incorporates its responses to paragraph 1-25 of the Complaint as if fully set forth
25 herein.

26 27. Denied.

1 28. Denied. By way of further answer, PICC charges were assessed against any equal access
2 (ANI) service number that is in an “active” status on the account. Mitel left the ANIs in
3 active status because Mitel did not receive an electronic notice that the ANIs had been
4 disconnected, nor did Southeast provide Mitel a request to cancel the service numbers.

5 **COUNT V**

6 29. Mitel incorporates its responses to paragraph 1-28 of the Complaint as if fully set forth
7 herein.

8 30. Mitel admits it provided a dedicated data circuit to Southeast’s location in Woodsfield,
9 Ohio.

10 31. Denied. By way of further answer, the agreement for Southeast’s Woodsfield, Ohio
11 location auto-renewed in February of 2014 for a new 60-month term.

12 32. Mitel admits the basis for early termination fees for Southeast’s Woodsfield, Ohio
13 location is a contract termination date of February 2019. All other allegations of
14 paragraph 32 of the Complaint are denied.

15 **COUNT VI**

16 33. Mitel incorporates its responses to paragraph 1-32 of the Complaint as if fully set forth
17 herein.

18 34. Mitel admits that it provided a dedicated data circuit to Southeast’s Brooks Building
19 location in Columbus, Ohio.

20 35. Mitel denies all allegations in paragraph 35 of the Complaint. By way of further answer,
21 the agreement for Southeast’s Brooks Building location auto-renewed in February of
22 2014 for a new 60-month term, and Mitel has no record that Southeast notified Mitel of
23 the Brooks Building closure or request to cancel the circuit before it auto-renewed.

24 36. Mitel admits the basis for early termination fees for Southeast’s Brooks Building location
25 is a contract termination date of February 2019. All other allegations of paragraph 36 of
26 the Complaint are denied.

1 **COUNT VII**

2 37. Mitel incorporates its responses to paragraph 1-36 of the Complaint as if fully set forth
3 herein.

4 38. Mitel admits it provided a dedicated data circuit to Southeast's Rebecca's Place location
5 in Columbus, Ohio.

6 39. Mitel denies all allegations in paragraph 39 of the Complaint. By way of further answer,
7 the agreement for Southeast's Rebecca's Place location auto-renewed in February of
8 2014 for a new 60-month term ending in February of 2019. Mitel's records show
9 Southeast notified Mitel of the Rebecca's Place closure, but such records also show
10 Southeast informed Mitel that the circuit would not be moved and that Southeast would
11 continue making payments until otherwise notified. Southeast provided no further
12 instruction to Mitel regarding auto-renewal or cancellation of the circuit before it auto-
13 renewed.

14 40. Mitel admits the basis for early termination fees for Southeast's Rebecca's Place location
15 is a contract termination date of February 2019. All other allegations of paragraph 40 of
16 the Complaint are denied.

17 **COUNT VIII**

18 41. Mitel incorporates its responses to paragraph 1-40 of the Complaint as if fully set forth
19 herein.

20 42. Mitel lacks knowledge or information sufficient to form a belief as to the truth of the
21 allegations set forth in paragraph 42 of the Complaint and therefore denies them.

22 43. Denied. By way of further answer, Mitel has no record of a tax exemption certificate on
23 file for Southeast.

24 **COUNT IX**

25 44. Mitel incorporates its responses to paragraph 1-43 of the Complaint as if fully set forth
26 herein.

1 45. Mitel denies the factual allegations in paragraph 45 of the Complaint. By way of further
2 answer, Southeast has provided that all circuits had been switched from Mitel service at
3 the time Mitel issued its September 2016 letter removing any risk in fact of a potential
4 loss of telephone numbers. Further, Mitel's September 2016 letter to Southeast was
5 advisory in nature and included among other things, language indicating merely that if
6 Southeast had active numbers with Mitel at time of cancellation, there was no guarantee
7 such number could be retrieved once disconnect was initiated. Mitel refers to the
8 September 6, 2016 letter itself for the advisory statements. All other allegations in
9 paragraph 45 of the Complaint are denied.

10 46. Paragraph 46 of the Complaint states a legal conclusion to which no response is required.

11 **AFFIRMATIVE DEFENSES**

12 For its Affirmative Defenses, Mitel states the following:

- 13 1. Mitel hereby asserts that the Complaint fails to state reasonable grounds or otherwise state
14 a cause against Mitel for which relief can be granted.
- 15 2. Mitel further asserts that this Commission should fully and finally dismiss with prejudice
16 Complainant's claims as barred and estopped by the face of the mutually agreed to
17 service agreements that govern Mitel's provision of service, each of which provide that,
18 "[i]f notice of a dispute as to a charge is not received, in writing, by [Mitel] within thirty
19 (30) days after a billing statement is rendered, such billing statement shall have been
20 deemed correct and binding upon the customer." Said provision is included in all
21 applicable service agreements at issue in this instant proceeding, including contracts for
22 dedicated data and long distance services. Since issuing invoices in August, October, and
23 November of 2016, Mitel has received no written dispute of any charge included therein
24 from Southeast, Southeast has presented no evidence of such notice to Mitel, and per the
25 terms of all service agreements, all invoiced charges should be deemed correct and
26 binding upon Southeast. Therefore, all claims regarding said invoiced charges, including

1 early termination fees, should be dismissed with prejudice as Southeast failed to timely
2 exercise its contractual rights to dispute invoiced charges and early termination fees.

- 3 3. Mitel further asserts that this Commission should fully and finally dismiss with prejudice
4 Complainant's claims and order that Complainant take nothing from Mitel based on the
5 equitable doctrine of laches. Ohio law recognizes the equitable defense of laches, which
6 has been defined as "an omission to assert a right for an unreasonable and unexplained
7 length of time, under circumstances prejudicial to the adverse party." *Connin v. Bailey*,
8 15 Ohio St.3d 34, 35, 472 N.E.2d 328 (1984) quoting *Smith v. Smith*, 107 Ohio App. 440,
9 443, 146 N.E.2d 454 (1957), *affirmed*, 168 Ohio St. 447, 156 N.E.2d 113 (1959).
10 To successfully invoke the doctrine of laches the party invoking it must establish by a
11 preponderance of the evidence the following four elements: (1) an unreasonable delay or
12 lapse of time in asserting a claim of right; (2) an absence of an excuse for such a delay;
13 (3) the knowledge, actual or constructive, of the injury or wrong; and (4) a prejudice to
14 the other party. *State ex rel. Meyers v. Columbus*, 71 Ohio St.3d 603, 605, 646 N.E.2d
15 173 (1995).
- 16 4. Southeast lodges claims stemming from the initiation of month-to-month auto-renewal of
17 existing contracts, beginning in February 2014, as well as the early termination of
18 long-distance service and a number of circuits installed with Mitel, with an effective
19 termination date of July 22, 2016. However, Southeast filed the instant petition on
20 January 13, 2017, contesting in part the practice of auto-renewal as well as specific
21 invoiced charges issued in August of 2016, October of 2016, and again in November of
22 2016. A nearly three (3) year delay in lodging such a claim of right, without a
23 demonstrated excuse, constitutes an unreasonable lapse of time.
- 24 5. Southeast has failed to present a viable excuse.
- 25 6. Southeast further failed to instruct Mitel not to auto-renew existing circuits or otherwise
26 ensure the termination of existing contractual obligations and failed to pay all required

1 early termination fees. Southeast omitted such action with knowledge that Mitel
2 continued to provide telecommunication services since February 2014.
3 Said telecommunications services and applicable termination fees, left unpaid, present
4 Mitel with a considerable financial burden and actual injury.

- 5 7. Such delay in attempting to assert a claim of right, with knowledge of ongoing financial
6 hardship expended to ensure the continued provision of telecommunications services to
7 Southeast or breach of contractual obligation to pay all applicable early termination fees
8 where properly disconnecting an account prior to the end of the agreed service period—
9 an actual injury—without excuse, warrants dismissal with prejudice of the Complainant’s
10 allegations.
- 11 8. The Complaint requests relief that is inconsistent with sound public policy.

12 **COUNTERCLAIM**

13 For its Counterclaim against Southeast, Mitel states the following:

- 14 1. Mitel and Southeast entered into a series of service agreements for telephone, dedicated
15 data services, Primary Rate Interface (“PRI”) Service, and switched long-distance toll
16 telephone services, beginning in November of 2008, each for an initial sixty (60) month
17 term of service.
- 18 2. Said service agreements each contained auto-renewal provisions within their terms and
19 conditions mutually assented to at the time of execution. On June 23, 2014, Mitel
20 received an email from Peter Davis, Director of IT, of Southeast, requesting that all then-
21 existing accounts not auto-renew. Mitel acknowledged this request via email dated June
22 24, 2014, further instructing Southeast that—per the terms of all then-existing
23 contracts—Mitel requires auto-renewal letters to be submitted in writing to the address
24 listed on the front of each service agreement. Further, on June 24, 2014, Southeast
25 submitted to Mitel a written instruction to “not auto renew any circuit or contract” and
26 instructed Mitel to place all circuits on “a month-to-month basis” until terminated.

- 1 3. Mitel acknowledged Southeast's June 24, 2014 request via letter dated July 1, 2014,
2 confirming Southeast's account would be placed on a month-to-month status effective on
3 the dates provided therein and reiterating, per the terms of all then-existing service
4 agreements between Mitel and Southeast, that cancellation of any agreement would only
5 be processed thirty (30) days from the date a written request for termination is received.
- 6 4. Specifically, the terms of all applicable service agreements provided that, unless Mitel
7 received "a notice of termination of services by the customer on or before thirty (30) days
8 from the end of the agreed service period, the services provided . . . shall automatically
9 renew at the same Monthly Recurring Commitment level and Term and at the published
10 rates in effect at the time of such renewal."
- 11 5. On June 7, 2016, Southeast submitted to Mitel a written request that Mitel cancel an
12 enumerated list of active accounts under existing contractual commitments.
- 13 6. On June 22, 2016, Mitel informed Southeast via written letter that the requested services
14 Southeast sought to disconnect are "under existing contractual commitments that have
15 not yet been satisfied," and informed Southeast of its obligation to pay \$587,906.30 in
16 early termination charges per the terms and conditions of all governing service
17 agreements.
- 18 7. Since notifying Southeast of this obligation, Mitel has performed all of its obligations
19 under existing service agreements, for which Mitel is entitled to payment.
- 20 8. In addition to and notwithstanding its obligations under the aforementioned, existing
21 service agreements pre-dating July 22, 2016, Southeast provided no instruction to Mitel
22 regarding auto-renewal or cancellation of the circuits identified in its Counts V through
23 VII before said circuits auto-renewed, and Southeast has failed to pay for all continued
24 services provided since as well as all applicable early termination fees associated with
25 accounts that auto-renewed prior to receipt of notice of non-auto-renewal in June of 2014.
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12. Mitel could have generated further revenue equal to or in excess of the charges billed to Southeast for the services and equipment rendered under the terms of its service agreements and Mitel is therefore entitled to recover such additional lost revenue.

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- A. This Commission fully and finally dismiss with prejudice Complainant's claims and order that Complainant take nothing from Mitel;
- B. That this Commission enter judgment and declare that Mitel has not unreasonably or unjustly billed or invoiced Southeast for contracted services including early termination fees, past due balances, new non-recurring charges, new finance charges, new taxes and surcharges, PCCC charges, taxes or any other monetary amounts claimed by Southeast in its Complaint;
- C. That this Commission enter judgment that Mitel has not violated any rule or statute over which this Commission has jurisdiction;
- D. That this Commission enter judgment awarding Mitel its attorneys' fees;

- 1 E. That this Commission enter judgment awarding Mitel all of its costs in this action; and
2 F. This Commission grant Mitel such other and further relief as the Commission shall deem
3 proper and just.

4 Respectfully submitted,

5 /s/ BARBARA BISON JACOBSON

6 _____
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DATED this 14th day of March, 2017.

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Summary: Answer Amended Answer to Complaint Relative to Alleged Unreasonable and Unlawful Billing of Service electronically filed by Lance Steinhart on behalf of Mitel Cloud Services, Inc. electronically filed by Lance Steinhart on behalf of Mitel Cloud Services, Inc. and Bison Jacobson, Barbara