

THE COMPETITION TRIBUNAL

IN THE MATTER of the *Competition Act*, R.S.C. 1985, c. C-34, as amended;

AND IN THE MATTER of an inquiry commenced pursuant to section 10 of the *Competition Act* into certain deceptive marketing practices of Phonetime Inc. & its Affiliates, hereinafter Phonetime;

AND IN THE MATTER of the filing and registration of a Consent Agreement pursuant to section 74.12 of the *Competition Act*.

BETWEEN:

THE COMMISSIONER OF COMPETITION

Competition Tribunal Tribunal de la concurrence	
FILED / PRODUIT November 5, 2009 CT-2009-017	
Chantal Fortin for / pour REGISTRAR / REGISTRAIRE	
OTTAWA, ONT.	# 001

Applicant

- and -

PHONETIME INC.

Respondent

CONSENT AGREEMENT

WHEREAS the Commissioner of Competition (the "Commissioner") is head of the Competition Bureau and is responsible for the administration and the enforcement of the *Competition Act* (the "Act") including paragraph 74.01(1)(a) of the Act;

AND WHEREAS Phonetime Inc. ("Phonetime") is a publicly-traded company that operates on a national basis supplying long distance telecommunications services including the sale, marketing and distribution of pre-paid telephone calling card products;

AND WHEREAS Wayne Silver is the President and Rodney Franklin is the Treasurer of Phonetime, and as such, have direct responsibility for the operations and marketing decisions of Phonetime, including representations to the public regarding the rate per minute and available call minutes on point-of-sale promotional posters and the website www.phonetime.com that the Commissioner believes to be false and misleading;

AND WHEREAS on January 16, 2006, the Commissioner commenced an inquiry (the "Inquiry") pursuant to section 10 of the Act into certain alleged deceptive marketing practices by

Phonetime and its affiliates. These alleged practices involved Phonetime making false and misleading representations to the public regarding the rate per minute and available call minutes on point of sale promotional posters and the website www.phonetime.com, that would not be supplied given the additional charges and fees identified in the fine print disclosure, for the promotion of prepaid telephone calling card products;

AND WHEREAS the Commissioner has concluded that, from February 2000 and continuing until at least January 2007, Phonetime engaged in reviewable conduct by promoting its prepaid telephone calling card products to the public by making representations that are false or misleading contrary to paragraph 74.01(1)(a) of the Act;

AND WHEREAS the Commissioner and Phonetime (collectively, the "Parties") are satisfied that this matter can be resolved with the registration of this Consent Agreement;

AND WHEREAS Phonetime is committed to compliance with the Act generally, and the deceptive marketing provisions (Part VII.1) specifically;

AND WHEREAS the Parties agree that, upon the signing of this Consent Agreement, the Parties shall file the Consent Agreement with the Competition Tribunal for immediate registration;

AND WHEREAS the Parties understand that, upon registration, this Consent Agreement shall be enforceable as if it were an Order rendered by the Competition Tribunal pursuant to section 74.12 of the Act;

NOW THEREFORE in order to resolve the Commissioner's Inquiry into certain alleged deceptive marketing practices of Phonetime, the Parties agree as follows:

I. Interpretation

1. For the purposes of the Agreement, the following definitions shall apply:
 - a. "**Affiliate**" shall have the meaning ascribed to it in the Act;
 - b. "**Agreement**" means this Consent Agreement entered into by Phonetime and the Commissioner of Competition;
 - c. "**Commissioner**" means the Commissioner of Competition, appointed pursuant to section 7 of the Act, and her authorized representatives;
 - d. "**Phonetime**" means Phonetime Inc., a company incorporated under the laws of Ontario and British Columbia, carrying on business under Phonetime or any other subsidiary corporation of Phonetime Inc. within the meaning of subsection 2(3) of the Act;

- e. **“Phonetime Inc. Personnel”** means all current and future Phonetime senior management and all other Phonetime employees who are materially involved in the formulation and/or implementation of advertising/marketing policies for pre-paid telephone calling card products;
- f. **“Phonetime Inc. Senior Management”** means the current and future: Chairman of the Board of Phonetime, the Chief Executive Officer, the President and Chief Operating Office, the Vice-President, General Counsel and Corporate Secretary, the Vice-President of Marketing and Customer Service, and the Treasurer;
- g. **“Parties”** mean the Commissioner of Competition and Phonetime Inc.;
- h. **“Person”** means any individual, partnership, firm, corporation, association, trust, unincorporated organization, or other entity;
- i. **“Pre-paid Telephone Calling Card Product”** means any pre-paid phone card, in physical, receipt tape or electronic form, which is used by entering a Personal Identification Number (“PIN”), or by any other means by a consumer, to make long distance or local telephone calls, using Phonetime as a telecommunications carrier or any other telecommunications carrier;
- j. **“Related Person”** means any of Phonetime, its affiliates, any present or future persons under the control of Phonetime, Wayne Silver, Rodney Franklin and any affiliates, successors, and assigns;
- k. **“Respondent”** means Phonetime Inc., and its Affiliates; and
- l. **“Tribunal”** means the Competition Tribunal established by the *Competition Tribunal Act*, R.S.C. 1985, c. 19 (2nd Supp.), as amended.

II. Application

2. The provisions of the Agreement shall apply to:

- a. Phonetime, its subsidiaries, its affiliates and successors, assigns and Phonetime Inc. personnel, including all persons who act for, on behalf of, or will act on behalf of or in concert with Phonetime, including agents, representatives and associates of Phonetime; and
- b. The Commissioner.

A. **NO FALSE OR MISLEADING STATEMENTS**

3. Phonetime and Phonetime Inc. Personnel shall comply with the deceptive marketing practices provisions of the Act, which provide:

74.01 (1) A person engages in reviewable conduct who, for the purpose of promoting, directly or indirectly, the supply or use of a product or for the purpose of promoting, directly or indirectly, any business interest, by any means whatever,

(a) makes a representation to the public that is false or misleading in a material respect;

4. Neither Phonetime, Phonetime Inc. Personnel, nor any Related Person shall make, cause to be made, or permit to be made on its behalf, any representation whatsoever, in Canada or available to consumers in Canada by any means, including *via* the Internet, that is false or misleading in a material respect. Without limiting the generality of the foregoing, with respect to a Pre-paid Telephone Calling Card Product, this includes:

- a. the rates per minute available on any Pre-paid Telephone Calling Card Product that is advertised on any point of purchase display, including posters, or on any website;
- b. the number of minutes available on any Pre-paid Telephone Calling Card Product that is advertised on any point of purchase display, including posters, or on any website; and
- c. any charge whatsoever, including maintenance fees, service fees, administrative charges, surcharges, and taxes, to be deducted from any Pre-paid Telephone Calling Card Product that is advertised on any point of purchase display, including posters, or on any website.

B. PROVIDE MINUTES ADVERTISED

5. Phonetime and the Related Persons have taken and shall continue to take all steps to automatically fulfill the rate per minute and available minutes that are prominently advertised for all Phonetime's Pre-paid Telephone Calling Card Products.

C. ADMINISTRATIVE MONETARY PENALTY

6. Phonetime shall pay a corporate administrative monetary penalty in the amount of \$250,000.

D. COSTS

7. Phonetime shall indemnify the Receiver General of Canada for costs and disbursements incurred during the course of its investigation into this matter in the amount of \$50,000.

E. RESTITUTION

8. Phonetime shall provide a credit to consumers (i.e., someone who has purchased a card for his/her own use) of BRAVO! and BRAVO! Atlantic in the amount of 78% of the face value of such Pre-paid Telephone Calling Card Products, purchased prior to this Agreement, upon presentation by the consumer of satisfactory proof of purchase (the expired BRAVO! or BRAVO! Atlantic card or payment record will be suitable proof of purchase). The Respondent shall ensure that a refund service toll-free number is staffed between the hours of 8:00 a.m. and 8:00 p.m. Eastern Standard Time to field calls, in English and French, from prospective refundees. If the toll-free number is busy, callers will be directed to a recorded message advising them of that fact and inviting them to call back at another time. Phonetime shall provide detailed reports every six (6) months to the Commissioner, throughout the operation of the toll-free customer service number including, but not limited to: the number and names of individuals requesting refunds; the amount refunded; and specific details on any requested refunds that were not issued. The toll-free customer service number shall be operational for twelve (12) months from the registration of the Consent Agreement, or until call volumes decrease to less than one a week, whichever is later.

F. FORM OF PAYMENT

9. The payments referred to in paragraph 6 and 7 above shall be made forthwith, no later than the point of signing of the Agreement, and shall be in certified funds.

G. PRODUCT REPRESENTATIONS

10. Phonetime and Phonetime Inc. Senior Management shall, immediately following the registration of this Agreement, ensure that appropriate disclosure is made, in any and all promotional and media products, to purchasers of Phonetime Pre-paid Telephone Calling Card Products, to:
- a. ensure that advertising representations accurately reflect true performance, actual rates per minute and actual numbers of minutes available to consumers regarding all Pre-paid Telephone Calling Card Products; and
 - b. ensure that all conditions that must be met to achieve the actual rates per minute and numbers of minutes advertised are prominently and accurately disclosed.

H. CORRECTIVE NOTICE

11. Phonetime shall publish a corrective notice, as set out in Appendix "A" of the Agreement, in accordance with the terms and conditions set out in Appendices "B" and "C" of the Agreement. Phonetime shall provide a detailed report containing the names of the newspapers where the corrective notices were published, the dates the corrective notices were published, and the cost per newspaper to publish the corrective notices. This report shall be provided to the Commissioner within ninety (90) days of signing this agreement.

I. CORPORATE COMPLIANCE PROGRAM

12. Within forty five (45) days of the registration of this Agreement, Phonetime shall establish, and thereafter maintain, a Corporate Compliance Program (the "Compliance Program"), the goal of which will be to promote the compliance of Phonetime Inc. Personnel with the Act generally, and specifically, without limiting the generality of the foregoing, the deceptive marketing practices provisions of the Act (Part VII.1), which include paragraph 74.01(1)(a) and subsection 74.01(6) of the Act. The Compliance Program shall be framed and implemented in a manner consistent with the Commissioner's Information Bulletin, "*Corporate Compliance Program*", published on the Competition Bureau's website at www.competitionbureau.gc.ca.

13. Phonetime Inc. Senior Management shall fully support and enforce the Compliance Program and shall take an active and visible role in its establishment and maintenance.
14. Phonetime Inc. Senior Management shall acknowledge their commitment to the Compliance Program via commitment letters within thirty (30) days from the registration of the Consent Agreement and as provided in Appendix "D".
15. The Compliance Program shall include:
 - a. the designation of a Corporate Compliance Officer within thirty (30) days of the execution of the Agreement;
 - b. the development of a written Corporate Compliance Policy in respect of the representations to be made in connection with the promotion, marketing and distribution of each existing and each new Pre-paid Telephone Calling Card Product (the "Compliance Policy");
 - c. a written Compliance Policy that will include, among other things:
 - (i) a statement by Phonetime Inc. Senior Management emphasizing the company's commitment to the policies and procedures contained therein;
 - (ii) a reference to the purpose of the Act, a general description of the Act, and a description of those provisions of the Act that are most relevant to Phonetime's business, including the enforcement, penalty and remedy provisions;
 - (iii) clear examples to illustrate the specific example practices that are prohibited, so that Phonetime Inc. Personnel, at all levels, can easily understand the potential application of the Act to their own duties;
 - (iv) a practical code of conduct that identifies activities that are illegal or open to question;
 - (v) a statement outlining the consequences of breaching corporate policies;
 - (vi) procedures that detail exactly what an employee should do when concerns arise out of certain situations, or when possible violations of the Act are suspected; and
 - (vii) training sessions to ensure that all persons, to whom this Agreement applies, understand the terms of this Agreement and the Compliance Policy.
 - d. the distribution of the Compliance Policy to Phonetime Inc. Personnel;
 - e. the inclusion of the Compliance Policy in any and all, including but not limiting the generality of the following, marketing, pricing, advertising, distribution policy manuals, and retail distributors' operations manuals;

- f. the placement of the Compliance Policy on the Phonetime Intranet network, if applicable;
 - g. the development of and delivery to Phonetime Inc. Personnel of a mandatory Compliance Program/Compliance Policy education session;
 - h. the development and delivery of an annual refresher Compliance Program/Compliance Policy education session for Phonetime Inc. Personnel; and
 - i. the annual acknowledgement, in writing, by Phonetime Inc. Personnel of their awareness and comprehension of the Compliance Program and Compliance Policy as provided in Appendix "E" of the Agreement.
16. The Commissioner or her authorized representative shall, on an annual basis, be entitled to require Phonetime to provide a written report on its annual review of its Compliance Program and Compliance Policy and their implementation. Any such report shall be submitted under oath or affirmation of an officer of Phonetime within thirty (30) days of the request being made.
17. For the purpose of determining or securing compliance with this Agreement, subject to any valid claims to a legally recognized privilege, and upon written request, Phonetime shall permit any duly authorized representative of the Commissioner:
- a. upon a minimum of ten (10) days notice to Phonetime, access during office hours of Phonetime to inspect and copy all books, ledgers, accounts, correspondence, memoranda, and all other records and documents in the possession or under control of Phonetime relating to compliance with this Agreement; and
 - b. upon a minimum of ten (10) days notice to Phonetime and without restraint or interference from Phonetime, to interview directors, officers or employees of Phonetime on matters relating to compliance with this Agreement.
18. The Commissioner or her authorized representative may also request, and Phonetime shall facilitate, access to education sessions conducted by Phonetime.
19. Phonetime shall submit to the Commissioner the Compliance Program and Compliance Policy more fully ascribed in paragraphs 12 to 15 above, within sixty (60) days of execution of the Agreement.

J. FAILURE TO COMPLY

20. A failure to comply with the terms of this Agreement by Phonetime and/or its Corporate Officers/Directors/Employees, its affiliates or any Related Person shall be deemed to be a breach of this Agreement by Phonetime and/or its Corporate Officers/Directors/Employees.

K. COPIES OF THE AGREEMENT

21. Phonetime and any entity for which it (collectively or individually) has *de facto* or *de jure* control, shall provide a copy of the Agreement in its entirety to all current and future Phonetime Inc. Senior Management and Phonetime Inc. Personnel, within thirty (30) days of the execution of the Agreement. Further, within forty-five (45) days of the execution of the Agreement, and in any event upon commencing employment with Phonetime, Phonetime shall secure from each such person identified above a signed and dated statement acknowledging that he or she has read and understood the Agreement and the relevant Deceptive Marketing Practices provisions of the Act, which include paragraph 74.01(1)(a).

L. TERMS OF AGREEMENT

22. Unless otherwise specified, this Agreement shall be binding upon Phonetime, any Related Person, and successors or assigns as defined herein for a period of ten (10) years following the date of registration of this Agreement.

III. Notices

23. Notices pursuant to the Agreement shall be given to the Parties at the following addresses or facsimile numbers:

(a) **Commissioner of Competition**

Melanie L. Aitken
Commissioner of Competition
Competition Bureau
Place du Portage, Phase 1, 50 Victoria Street
Gatineau, Quebec K1A 0C9

Telephone: 819 994-1863

Facsimile: 819 997-5013

With copies to:

Josephine Palumbo
Senior Litigation Counsel
Department of Justice
Competition Bureau, Legal Services
Place du Portage Phase 1
50 Victoria Street
Gatineau, Quebec K1A 0C9

Telephone: (819) 953-3902

Facsimile: (819) 953-9267

(b) **Mr. V. Ross Morrison**

One Toronto Street
P. O. Box 28, Suite 910,
Toronto, Ontario M5C 2V6

Telephone: (416) 368-0600 ext. 202

Facsimile: (416) 368-6068

IV. General

24. The Agreement may be executed in two or more counterparts, each of which shall be an original instrument, but all of which shall constitute one and the same Agreement.
25. The Agreement shall be governed by and interpreted in accordance with the laws of the Province of Ontario and the federal laws of Canada applicable therein.
26. For greater certainty, the Tribunal shall retain jurisdiction for the purpose of any application by the Commissioner or Phonetime to rescind or vary any of the provisions of the Agreement in the event of a change of circumstances or otherwise pursuant to section 74.13 of the Act, or with respect to any issue concerning the Agreement with the exception of matters contained in paragraphs 5 through 11 above.
27. In the event of a dispute as to the interpretation or the application of the Agreement, including any decision by the Commissioner pursuant to the Agreement or breach of the Agreement by Phonetime, either of the parties shall be at liberty to apply to the Tribunal for an Order interpreting any provision of the Agreement. In the event of a dispute in relation to the English and French version of the Agreement, the English version shall govern.
28. In the event that the Tribunal varies, in a material respect, the substantive terms of the Agreement pursuant to section 74.13 of the Act, Phonetime or the Commissioner, with the exception of matters contained in paragraphs 5 through 11 above, shall each have the right to terminate the Agreement by written notice to the other parties hereto given within thirty (30) days of the date on which such order is made. For greater certainty, in such circumstances, the Commissioner shall have the right to commence proceedings against, amongst others, the Respondent hereto.

The undersigned hereby agree to the registration of this Consent Agreement.

Dated at Mississauga, in the Province of Ontario this 14th day of September 2009.

"Wayne Silver"

for: Phonetime Inc.
Mr. Wayne Silver

Dated at Gatineau, in the Province of Quebec this 3rd day of November 2009.

"Andrea Rosen"

Andrea Rosen
Deputy Commissioner of Competition

Appendix "A"**NOTICE RE: PHONETIME INC. PREPAID TELEPHONE CALLING CARDS**

The Competition Bureau (the "Bureau") believes that Phonetime Inc. misrepresented in their advertising the rate per minute, and the number of call minutes available on their pre-paid telephone calling cards. The Bureau has informed Phonetime Inc. that certain of its marketing practices have raised concerns under the deceptive marketing practices provisions of the Competition Act (the "Act"). The Bureau believes that the rate per minute and number of minutes available for Phonetime prepaid telephone calling cards are not achievable.

In recognition of both the Bureau's concerns and the importance of providing accurate information to consumers, Phonetime Inc. and the Bureau have filed a Consent Agreement (the "Agreement") with the Competition Tribunal which addresses the Bureau's concerns.

Pursuant to the Agreement, Phonetime Inc. shall, among other things:

- ensure that all of its current and future promotional advertising material complies with the deceptive marketing practices provisions of the Act;
- develop and maintain a corporate compliance program designed to ensure compliance with the Act;
- pay a corporate administrative monetary penalty in the amount of \$250,000;
- reimburse the Bureau for the costs for its investigation in the amount of \$50,000; and
- provide restitution to purchasers of BRAVO! and BRAVO! Atlantic phone cards through the refund service toll-free number 1-877-404-0046.

The Consent Agreement can be found on the Competition Tribunal's website at [http:// www.ct-tc.gc.ca](http://www.ct-tc.gc.ca). For additional information, consult the Competition Bureau's website at <http://www.competitionbureau.gc.ca>

Appendix "B"

The newspapers in which Phonetime Inc. is to publish the Notice identified in Appendix "A" of the Agreement include the following:

Part A - Daily:

Vancouver Sun
Toronto Star
Le Devoir
The Halifax Chronicle Herald
Italian - Corriere Canadese Tandem
Chinese - World Journal

Part B - Weekly:

The Weekly Voice
West Asian- Horizon Weekly
Pakistan - Sunday Times
Caribbean Camera
Horizon Weekly
Vietnamese - Thoi Bao

Part C - Bi-Weekly:

Indo Caribbean World

Part D - Monthly:

Arab - El-Masri

1. Phonetime Inc. shall commence publishing the Notice within (5) five days of the registration of the Agreement;
2. Phonetime Inc. shall publish the Notice as set out in Appendix "A" of the Agreement in the Wednesday and Saturday editions of each of the daily newspapers named in Part "A" above for a period of (3) three consecutive weeks; Phonetime Inc. shall publish the Notice as set out in Appendix "A" of the Agreement in the weekly edition of each of the

newspapers named in Part "B" above for a period of (3) three consecutive editions; Phonetime Inc. shall publish the Notice as set out in Appendix "A" of the Agreement in the bi-weekly edition of the newspaper named in Part "C" above for a period of (3) three consecutive editions; and Phonetime Inc. shall publish the Notice as set out in Appendix "A" of the Agreement in the monthly edition of the newspaper named in Part "D" above for a period of (3) three consecutive editions. Phonetime Inc. shall obtain publication space in accordance with the following hierarchy of spacial availability, and every effort shall be made to obtain publication space in the following order of priority:

- within the first five (5) pages of the cover section; and
 - within the first four (4) pages of the business section of the newspaper(s).;
3. The Notice shall appear in a space no less than one eighth of a page in size when published in the newspapers named above;
 4. The title of the Notice, as set out in Appendix "A" of the Agreement, shall be capitalized and shall appear in 16-point bold font unembellished print; and
 5. The text of the Notice shall appear in 10-point font unembellished print in the newspapers named above.

Appendix "C"

1. Phonetime Inc. is to publish the Notice, as it appears in Appendix "A" of the Agreement, on the following website: www.phonetime.com;
2. Publication of the Notice on the website shall occur within seven (7) days of the registration of the Agreement;
3. The Notice shall remain on the website for a period of twenty-six (26) weeks;
4. The Notice shall be accessible through a link on the menu-bar of each website homepage entitled "Competition Bureau Notice";
5. The Notice shall have a link to the Competition Bureau Tribunal website at <http://www.ct-tc.gc.ca>. and to the Competition Bureau website at <http://www.competitionbureau.gc.ca>;
6. The Notice shall take up a full screen size of the linked page;
7. The text of the Notice shall appear in no less than 12-point font unembellished print; and
8. The title of the Notice, as set out in Appendix "A" of the Agreement, shall be capitalized and appear in no less than 16-point bold font unembellished print.

Appendix "D"

September XX, 2009

CONFIDENTIAL

Melanie L. Aitken
Commissioner of Competition
Competition Bureau
Place du Portage I
50 Victoria Street
Gatineau (Quebec)

Dear Commissioner:

RE: Commitment to Establishment and Maintenance of Compliance Programs

Further to paragraph 12 of the Consent Agreement between the Commissioner of Competition (the "Commissioner") and Phonetime Inc. registered before the Competition Tribunal on __/__/__, I hereby commit to the successful implementation of Phonetime Inc.'s Corporate Compliance Program and Compliance Policy towards promoting compliance with the *Competition Act*, R.S.C. 1985 c. C-34 (as amended) (the "Act") generally and the deceptive marketing practices provisions (Part VII.I), and sections 74.01 (1), 74.01(1)(a), and 74.01(6) of the Act specifically and will take an active and visible role in their establishment and maintenance.

Sincerely,

cc. Josephine Palumbo, Senior Litigation Counsel

Appendix "E"

I, _____ of the City of _____, am employed by Phonetime Inc. in the capacity of _____. In this capacity, I am materially involved in the formulation and/or implementation of Phonetime's marketing, including but not limiting the generality of the following: pricing, advertising, and distribution policies. I acknowledge that I am subject to and am required to comply with Phonetime's Corporate Compliance Program and Compliance Policy with respect to the *Competition Act*, R.S.C. 1985 c. C-34 (as amended) (the "Act").

This is to advise that:

- (a) I have read and understood Phonetime's Corporate Compliance Policy, the goal of which is to promote compliance with the Act generally, and sections 74.01 (1), 74.01(1)(a), and 74.01(6) specifically; and
- (b) I have read and understood Phonetime's Corporate Compliance Program with respect to the Act.

Date: ____ / ____ / ____

Signature: _____

THE COMPETITION TRIBUNAL

IN THE MATTER of the *Competition Act*, R.S.C.
1985, c. C-34, as amended;

AND IN THE MATTER of an inquiry commenced
pursuant to section 10 of the *Competition Act* into certain
deceptive marketing practices of Phonetime Inc. & its
Affiliates, hereinafter Phonetime;

AND IN THE MATTER of the filing and registration
of a Consent Agreement pursuant to section 74.12 of the
Competition Act.

BETWEEN:

THE COMMISSIONER OF COMPETITION

Applicant

- and -

PHONETIME INC.

Respondent

CONSENT AGREEMENT

Josephine A.L. Palumbo

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Department of Justice

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