

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

DIALOG TELECOMMUNICATIONS, INC.)	
)	CASE NO.
COMPLAINANT)	2005-00095
)	
V.)	
)	
BELLSOUTH TELECOMMUNICATIONS, INC.)	
)	
DEFENDANT)	

O R D E R

On March 2, 2005, Dialog Telecommunications, Inc. (“Dialog”) filed a complaint against BellSouth Telecommunications, Inc. (“BellSouth”) alleging three different causes. The first count of the complaint alleged improper calculation of tandem switching charges (“Count I”); the second count alleged improper collection of sales tax on unbundled network elements (“UNEs”) (“Count II”); and the third count alleged invalid late charges (“Count III”). The parties have negotiated a settlement on Count I and, as it applies to Count I, on Count III of the complaint. This Order addresses only Count II.¹

¹ On January 11, 2007, Dialog filed a letter notifying the Commission that it had reached an agreement with BellSouth regarding Count I, and accordingly Dialog was withdrawing Count I of its complaint. On January 17, 2007, BellSouth filed a letter indicating that it agreed that Count III of the complaint should be dismissed in part. Because the remaining issue of Count III will necessarily be determined by the outcome of Count II, the Commission will focus this Order only on Count II.

Dialog is a competitive local exchange carrier (“CLEC”) that purchases UNEs from BellSouth. Dialog then uses these UNEs to create telecommunications services to sell to its customers. When Dialog purchases UNEs from BellSouth, BellSouth charges Dialog sales tax which it remits to the Department of Revenue in the Kentucky Finance and Administration Cabinet. BellSouth does so at the direction of the Department of Revenue. Dialog believes that both BellSouth and the Department of Revenue are in error in classifying UNEs as taxable items pursuant to Kentucky state law.

Dialog has asserted that BellSouth is in error in collecting sales tax on UNEs. Dialog maintains that UNEs are not “communications services” within the meaning of KRS 139.100. Thus, UNEs should not be subject to retail tax. Dialog is not asking the Commission to adjudicate this sales tax claim but, rather, to find that Dialog has acted in good faith in refusing to pay tax that was not due. Dialog also asks the Commission to find that BellSouth has a contractual duty to obtain an administrative determination from the Department of Revenue that UNEs are not taxable. Finally, Dialog asserts that BellSouth should not collect these charges or penalize Dialog for not paying them while they are being disputed.

Dialog has sought relief through administrative and judicial procedures apart from the Commission but has been unable to obtain a substantive ruling. The Department of Revenue has rejected ruling on the matter because it maintains that only BellSouth has standing to challenge the application of the tax. Likewise, the Kentucky Board of Tax Appeals will not hear the case because there is no final order for it to review.

Dialog has also sought judgment from the Franklin Circuit Court naming the Department of Revenue as a defendant. The Department of Revenue filed a motion to

dismiss, claiming that Dialog had failed to exhaust its administrative remedies even though it had claimed that Dialog was not entitled to seek such remedies. The judge recognized the procedural dilemma and issued an order holding the case in abeyance and requiring Dialog to make a formal request to BellSouth to file a refund claim. However, BellSouth refused to do so because Dialog had withheld payment of the disputed taxes from BellSouth. Dialog has now paid, pending resolution of this dispute.

In support of its claim that BellSouth has a contractual obligation to resolve this issue before the Department of Revenue, Dialog relies on Section 11.5 of its interconnection agreement. It states: "In any contest of a tax or fee by one party, the other party shall cooperate fully by providing records, testimony and such additional information or assistance as may reasonably be necessary to pursue the contest."

On March 17, 2005, BellSouth filed its response to Dialog's complaint. BellSouth asserts that it is complying with Kentucky law in collecting and remitting to the Department of Revenue sales taxes on UNEs purchased by Dialog. Since Dialog has now paid the disputed sales tax, BellSouth says it has offered to file a sales tax refund on Dialog's behalf.

On December 5, 2005, BellSouth filed a motion to dismiss Dialog's complaint, asserting that Dialog's claim involving sales tax issues is not properly before the Commission. Since 103 KAR 28:140 requires BellSouth to collect and remit sales tax on UNEs purchased by Dialog and other carriers for resale, BellSouth asserts it is appropriately assessing the tax. The jurisdiction of the application of this regulation belongs to the Department of Revenue, not to the Commission.²

² KRS 139.770.

On January 20, 2006, Dialog filed a response to BellSouth's motion to dismiss and filed a cross-motion for summary judgment. Dialog asserts that the Commission may affirm that a network element is not a communications service and that such determination is a matter of telecommunications law within the jurisdiction of the Commission. Dialog claims that BellSouth's unwillingness to draw legal distinctions between network elements and services in this matter is at odds with its determinations in other cases. From this Dialog concludes that BellSouth is merely serving its own interests by continuing to assess this tax.³

On March 2, 2006, BellSouth filed its response to Dialog's cross-motion for summary judgment. BellSouth asserts that Dialog has refused its offer to file a tax refund request on Dialog's behalf. Thus, according to BellSouth, Dialog has demonstrated that it has no interest in resolving this sales tax issue. Also, BellSouth asserts that the Commission should reject Dialog's request for the Commission to address a sales tax issue, as that is within the jurisdiction of another agency.

On May 8, 2006, Dialog filed a reply to BellSouth's response. Dialog calls BellSouth's statements that it is not interested in resolving this tax issue "nonsense." Dialog asks that the Commission affirm that access to network elements under § 251(c)(3) is not the same as resale under § 251(c)(4). Such a reaffirmation would, in Dialog's viewpoint, provide the foundation for BellSouth to file a refund claim with the Department of Revenue.

³ Dialog's Motion for Summary Judgment at 10.

FINDINGS AND ORDERS

Dialog has asked the Commission to determine the interpretation of the Telecommunications Act of 1996 (“Telecom Act”) as it applies to the provision of telecommunications in Kentucky. Dialog specifically requests that the Commission articulate the difference between network elements provided pursuant to 47 U.S.C. § 251(c)(3) and resale provided pursuant to 47 U.S.C. § 251(c)(4). Such an interpretation is squarely within this Commission’s jurisdiction. According to Michigan Bell Telephone Company v. Strand, 305 F.3d 580, 582 (6th Cir. 2002), state commissions have the authority to foster competition in local telephone markets. The purpose of the statutes which we are interpreting today is to promote competition in local telephone markets. Michigan Bell Telephone Company v. MCIMetro Access Transmission Services, Inc., 323 F.3d 348 (6th Cir. 2003). Dialog alleges that BellSouth’s collection of the sales tax places Dialog at a competitive disadvantage vis-à-vis Dialog. BellSouth, whose provision of telecommunications to Kentuckians is assessed the sales tax in question only once, has a competitive advantage over Dialog, whose provision of telecommunications to Kentuckians is assessed the sales tax twice.

Section 251(c)(3) of the Telecom Act requires BellSouth, as an incumbent local exchange carrier, to provide to Dialog, as a requesting telecommunications carrier, “access to network elements on an unbundled basis at any technically feasible point.” The purpose of this unbundled access to network elements is to enable the requesting carrier “to combine such elements in order to provide such telecommunications service.”

When BellSouth provides unbundled access to network elements, it is leasing parts and pieces of its network to Dialog. This lease of parts and pieces of the network enables Dialog to create services to provide to retail customers.

Section 251(c)(4), on the other hand, obligates BellSouth “to offer for resale at wholesale rates any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers.” Pursuant to this section of the Telecom Act, BellSouth provides the sale of a service at wholesale for resale by another carrier.

Dialog’s complaint regards the sales tax collected on its purchase of UNEs pursuant to 47 U.S.C. § 251(c)(3). A network element is not a service. 47 U.S.C. § 253(29) defines “network element” as “a facility or equipment used in the provision of a telecommunications service. Such term also includes features, functions, and capabilities that are provided by means of such facility or equipment.” The facility or equipment with its features, functions, and capabilities is sold by BellSouth to Dialog not as a service but, rather, as a means to enable Dialog to combine parts and pieces of the network to provide a service to its own users.

BellSouth stated in its answer to the complaint that Dialog has now paid the disputed sales tax to BellSouth. Moreover, BellSouth is willing to file a refund request with the Department of Revenue on behalf of Dialog.

The Commission finds that BellSouth should file the refund request for the application of sales tax on UNEs. Dialog should assist BellSouth in this endeavor by providing the arguments and evidence it wishes BellSouth to present to the Department of Revenue, as required by their interconnection agreement.

IT IS THEREFORE ORDERED that:

1. BellSouth's motion to dismiss Dialog's complaint is denied.
2. Dialog's cross-motion for summary judgment is granted to the extent that the Commission has clarified the distinction between network elements provided pursuant to § 251(c)(3) and resale provided pursuant to § 251(c)(4).
3. BellSouth shall seek a tax refund, as described herein, which may benefit Dialog and the Kentucky operations of all CLECs.
4. This matter is hereby removed from the Commission's docket.

Done at Frankfort, Kentucky, this 8th day of February, 2007.

By the Commission

ATTEST:

A handwritten signature in black ink, consisting of several overlapping loops and a long horizontal stroke at the end, positioned above the text 'Executive Director'.

Executive Director