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PUBLIC SERVICE
COMMISSION

Ms. Beth O'Donnell
Executive Director
Public Service Commission
211 Sower Boulevard
P.O. Box 615
Frankfort, KY 40602

Re: Dialog Telecommunications, Inc., Complainant v. BellSouth
Telecommunications, Inc., Defendant
KPSC 2005-00095

Dear Ms. O'Donnell:

Enclosed for filing in the above-referenced matter are the original and ten (10) copies of AT&T Kentucky's Response to Dialog's Second Motion for Reconsideration.

Sincerely,

Mary K. Keyer
General Counsel - KY

cc: Parties of Record

696752

March 23 Order compelling Dialog to pay the disputed UNE sales tax prior to having AT&T Kentucky seek a refund was correct as a matter of contractual interpretation.” *Order on Remand* at 6.

In its motion for reconsideration, Dialog makes three arguments – all of which lack merit. First, Dialog makes the nonsensical assertion that the Commission’s *Order on Remand* “did not authorize BellSouth [AT&T Kentucky] to disconnect Dialog for refusal to pay the disputed amount.” Motion for Reconsideration at 2. Again, the Commission has twice found that Dialog has a contractual obligation to pay the amount (which exceeds \$538,000) that Dialog has refused to pay. Accordingly, there is no dispute. In accordance with the plain language of the Parties’ interconnection agreement, the Commission has resolved the dispute in AT&T Kentucky’s favor. Not surprisingly, following the issuance of the Commission’s *Order on Remand*, AT&T Kentucky requested payment of the previously unpaid tax. In direct defiance of the Commission’s *Order on Remand*, Dialog refused to pay AT&T Kentucky. As a result of Dialog’s blatant refusal to pay the amounts the Commission has found it must pay, AT&T Kentucky served Dialog with the suspension/termination notice that is attached to Dialog’s motion for reconsideration.²

² In addition to refusing to pay an amount that it has been ordered to pay by the Commission, Dialog has made no effort to ascertain what payment arrangements could be made to pay off the amount Dialog owes in taxes. This is further evidence that Dialog has no interest in any tax refund; rather Dialog is simply fixated on defying the Commission’s *Order on Remand* and avoiding its contractual obligation to pay the sales tax that it has refused to pay.

Notwithstanding the time lines set forth in the suspension/termination letter, AT&T Kentucky will not take any action regarding the unpaid tax amount while the Commission considers Dialog’s second motion for reconsideration. To the extent there are other undisputed, past due amounts owed by Dialog, AT&T Kentucky will continue to collect such amounts and take action for a failure to pay such amounts in accordance with the parties’ interconnection agreement and any applicable Commission rules and regulations.

To state the obvious, because Dialog has refused to pay an amount that the Commission has twice determined that Dialog has an undisputed contractual obligation to pay, and because such undisputed amount is past due, AT&T Kentucky has the contractual right to suspend access to ordering systems and disconnect service. Dialog's unsupported belief that it should not be obligated to pay Kentucky sales tax on UNEs simply provides no basis for Dialog to skirt its contractual obligations and disregard a Final Order of the Commission.³

As a supposedly second basis for its reconsideration motion, Dialog states that it "strongly disagrees" with the Commission's reading of the Parties' contract. Motion for Reconsideration at 2. Strong disagreement with a Commission Final Order is simply an insufficient basis for granting a motion for reconsideration. If Dialog does not like the Commission's *Order on Remand*, then Dialog has the right to seek appellate review of such Order.

Third, Dialog repeats its argument that "even if the Commission's reading of the contract were accurate, it would not trump Kentucky law." Motion for Reconsideration at 2. Apparently Dialog is of the mistaken belief that Kentucky case law somehow absolves Dialog from its contractual obligations. The cases cited by Dialog in its scramble to avoid its contractual obligation to pay the sales tax in question are irrelevant. The first case, *Grayson Rural Electric Corp. v. City of Vanceburg*, 4 S.W.3d 526 (Ky. 1999), has nothing to do with a contract dispute or contract interpretation. In the next case cited by Dialog, *City of Covington v. Sanitation Dist. No. 1*, 301 S.W.2d 885, 888 (Ky. 1957), the Court rejected arguments that challenged the constitutionality of a Kentucky water statute. Neither case stands for the proposition that Kentucky law

³ It bears repeating that over four years ago, Dialog's "no sales tax on UNEs" position was squarely rejected by the Department of Revenue's Division of Tax Policy. See October 31, 2003 letter from the Department of Revenue to Dialog's former counsel, Edward Depp.

forbids a sophisticated business from contractually agreeing to pay a tax prior to contesting such tax.

Additionally, Dialog's reliance on 807 KAR 5:006, Section 11 is misplaced. There is no dispute – the Commission has now found on two separate occasions that Dialog has a contractual obligation to pay the taxes it has refused to pay. Thus, there is no dispute regarding Dialog's payment obligations, and therefore 807 KAR 5.006, Section 11 is irrelevant. Once Dialog has paid the tax, then AT&T Kentucky remains willing to pursue a refund in accordance with the Parties' interconnection agreement and the Commission's previous order.

Further, Dialog's request for "emergency treatment" should be denied. For years, Dialog has known that AT&T Kentucky expects to be paid the sales tax that Dialog has steadfastly refused to pay. The amount Dialog has refused to pay (over \$538,000) is a sum certain that has remained unchanged since April 2006. There is no surprise or emergency here – the Commission's *Order on Remand* reaffirmed a Commission Order issued in March 2007. It is Dialog that has chosen to ignore its contractual obligations and disregard the Commission's mandate to pay the tax in question. Thus, it is Dialog that has chosen to jeopardize its customers' service by refusing to pay an amount it is contractually obligated to pay.


Finally, Dialog cites no authority or support for making a second, repetitive motion for reconsideration. Kentucky's reconsideration statute, KRS 278.400, requires the Commission to disregard the substance of Dialog's *second* Motion for Reconsideration. Specifically, KRS § 278.400 states in relevant part that "[u]pon the rehearing any party may offer additional evidence that *could not with reasonable diligence have been offered on the former hearing.*" (Emphasis added). Dialog has

provided no new additional evidence that could not have been offered before the Commission's original order and before the Commission's order on reconsideration. In fact, Dialog makes in its second Motion for Reconsideration the identical argument it made in its first motion for reconsideration - that the Commission misinterpreted the plain language of the Parties' interconnection agreement (contract language that requires Dialog to pay the tax in question). Dialog's arguments have now been considered and reconsidered by this Commission and should not be reconsidered yet again.

CONCLUSION

The Commission has twice ruled that Dialog has a contractual obligation to pay the sales tax that it has refused to pay AT&T Kentucky. Dialog has offered no rationale or reasonable reason as to why the Commission should reconsider its prior rulings in this matter, which were based on the plain language of the parties' interconnection agreement. Accordingly, Dialog's motion for reconsideration should be denied.

Respectfully submitted,


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CERTIFICATE OF SERVICE – KPSC 2005-00095

It is hereby certified that a true and correct copy of the foregoing was served on the following individuals by mailing a copy thereof, this 19th day of November, 2007.

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