

**Cheryl R. Winn**  
**Attorney At Law**

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July 1, 2005

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

RECEIVED

JUL 01 2005

PUBLIC SERVICE  
COMMISSION

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

Dear Ms. O'Donnell:

In response to a request for examples of requests for refunds of sale tax during the Informal Conference held in this matter on June 21, 2005, BellSouth reviewed its records and located only one such example of a formal refund request. BellSouth attaches a copy of the Sales and Use Tax Refund Application that it filed on behalf of one of its customers and which resulted in the Revenue Cabinet's denial by letter dated March 25, 2003, including a copy of the customer's resale certificate, which was attached to the application. The basis of the refund claim is set forth on Line 6 of the Application. Also attached is a copy of an agreement styled Information Disclosure Agreement for Refund Claims, under which BellSouth essentially agreed to allow the Revenue Cabinet and its customer to deal with each other directly regarding the refund claim. Because the customer has been dealing directly with the Revenue Cabinet, BellSouth does not have any additional knowledge of what arguments have been asserted by the customer in support of the refund claim.

Regarding Dialog's assertion that the Department of Revenue has never actually considered the arguments that it is advancing in support of its position in this matter, we would like to call your attention to a letter dated October 31, 2003, from Mr. Richard Dobson of the Revenue Cabinet's Division of Tax Policy to Mr. Edward Depp, Dialog's former legal counsel. A copy of this letter is enclosed. It appears to us that, in this letter, the Revenue Cabinet squarely addressed, and rejected, all of Dialog's arguments as to why its purchases of UNEs are not subject to tax.

BellSouth reiterates that it stands ready and willing to file a refund claim on Dialog's behalf should Dialog submit its written arguments and supporting authorities to BellSouth.

Ms. Beth O'Donnell  
July 1, 2005  
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The original and ten (10) copies of this filing are enclosed.

Sincerely,

  
Cheryl R. Winn

Enclosures

cc: Parties of Record

591415

**SALES AND USE TAX  
REFUND APPLICATION**



|                             |   |  |
|-----------------------------|---|--|
| <b>Name of Business</b>     | <u>BellSouth Corporation Telecommunications, Inc.</u><br><small>Enter Exact Name as it Appears on Your Permit (please print or type)</small>  | <u>(404) 249-3892</u><br><small>Telephone Number (include area code)</small> |
| <b>Location of Business</b> | <u>1155 Peachtree St., Suite 16H Atlanta</u><br><small>Number and Street City or Town</small>   | <u>Fulton GA 30309</u><br><small>County State ZIP Code</small>               |
| <b>Mailing Address</b>      | <u>Same as above</u><br><small>P.O. Box or Number and Street City or Town County State ZIP Code</small>   |  |
|                             | <p>(1) Sales and use tax account number under which tax was paid to the Kentucky State Treasurer<br/><u>162112 0899 4</u></p> <p>(2) Period(s) in which tax was reported and paid <u>See Attached Schedule.</u><br/><i>Attach detailed schedule if more than one period involved.</i></p> <p>(3) Amount of tax refund requested <u>\$ [REDACTED]</u></p> <p>(4) Was compensation claimed when tax was remitted to the state? <input checked="" type="checkbox"/> Yes <input type="checkbox"/> No</p> <p>(5) Was sales or use tax added to the sales price (bracket system) and collected from the purchaser(s) as a separate charge? <input checked="" type="checkbox"/> Yes <input type="checkbox"/> No. If yes, will the tax be refunded to the purchaser(s)? <input type="checkbox"/> Yes <input type="checkbox"/> No</p> <p>(6) Explain in detail the reason(s) for refund. Attach schedule and copies of pertinent invoices, resale certificates and/or exemption certificates if applicable. Attach separate sheet if necessary.<br/><u>This refund represents sales for resale - resale certificate is attached. Alternatively, sales tax is prohibited by federal statute.</u></p> <p>(7) Banking Information (if electronic fund transfer requested)</p> <p>Name of Bank _____</p> <p>Depositor Account Number (DAN) _____</p> <p>Routing Transit Number (RTN) _____ Account Type: <input type="checkbox"/> Checking <input type="checkbox"/> Savings <input type="checkbox"/> Other</p> |  |
| <b>Instructions</b>         | <p>(1) This application must be completed in order for consideration to be given to the refund request. Substitutions will not be accepted, nor will they preserve your rights to a refund.</p> <p>(2) Only the person making payment of the tax directly to the Kentucky State Treasurer may file the application for refund. Compensation, if claimed, will be deducted from any refund.</p> <p>(3) Claims for refunds or credits must be filed within four years from the date the tax was paid to the State Treasurer. After the statute of limitations has expired, no claims for refunds or credits will be considered.</p> <p>(4) No taxpayer will be issued a refund or credit for sales or use tax where the tax has been collected from a purchaser as provided by KRS 139.210 and 139.340, unless the amount of tax collected from the purchaser is refunded to him by the taxpayer who paid the tax to the State Treasurer.</p> <p>(5) Mail completed application to the Kentucky Revenue Cabinet, Sales and Use Tax Section, P.O. Box 1274, Frankfort, Kentucky 40602-1274.</p>  |  |

I, the undersigned, declare under the penalties of perjury that I have examined this application (including any attached schedules, statements or exemption certificates) and to the best of my knowledge and belief, the statements contained herein are true, complete and correct, and that I am duly authorized to sign this application. It is understood that the books and records supporting this refund application must be maintained for a period of four years from the date the refund is issued and are subject to audit at the discretion of the Revenue Cabinet. I, the undersigned, consent and agree that any excess amount refunded pursuant to this application shall be recovered within four years from the date the refund is issued. The undersigned certifies that no tax liability of any kind is due or owing the Commonwealth of Kentucky by this applicant.

Signed Susan Smith Creel  
 Name Susan Smith Creel  
(Print or Type)

Title Asst. Vice President-Taxes  
 Date 2/28/03

Important—Certificate not valid unless completed.

RESALE CERTIFICATE

Check applicable box.

Blanket   
Single Purchase

I hereby certify that \_\_\_\_\_, Kentucky  
Name of Business Address

holds a valid Sales and Use Tax Permit, Account No. \_\_\_\_\_, issued pursuant to the sales and use tax law and is engaged in the business of selling, leasing or renting, industrial processing or manufacturing the following:

Telephone Services

I further certify that the tangible personal property described herein which I shall purchase from:

BellSouth Corporation Telecommunications, Inc., 1155 Peachtree St., Atlanta, GA  
Name of Seller Address 30309

will be resold in the regular course of business, or leased or rented, as provided by Regulation 103 KAR 28:051, or used, as provided in KRS 139.470(11), in the manufacture or industrial processing of tangible personal property which will be resold. In the event any property purchased under this certificate is used for any purpose other than retention, demonstration or display while holding it for sale, lease or rental in the regular course of business, it is understood that I am required by law to report and pay the tax measured by the purchase price of such property. Description of property to be purchased:

Telephone Services

Under penalties of perjury, I swear or affirm that the information on this certificate is true and correct as to every material matter.

\_\_\_\_\_  
Authorized Signature (Owner, Partner or Corporate Officer)

\_\_\_\_\_  
Title

2-27-2003

Date

CAUTION TO SELLER: Contractors or other persons registered under a consumer number in the 900,000 series may not issue a resale certificate for any purchase. Sellers accepting certificates from such persons will be held liable for the sales or use tax.

NOTE: Any person who makes improper use of this certificate is subject to such penalties as provided by law including the criminal provisions of KRS 139.990(1).  
Revenue Cabinet  
Frankfort, Kentucky 40620

51A105 (9-90)

COMMONWEALTH OF KENTUCKY  
REVENUE CABINET  
FRANKFORT  
. 40602

INFORMATION DISCLOSURE AGREEMENT  
FOR REFUND CLAIMS

This disclosure agreement is made and entered into by and between BellSouth Corporation ("the Vendor"), of Atlanta GA Telecommunications, Inc. (city) (state) [REDACTED] ("the Purchaser"), of [REDACTED] Kentucky (city) (state) and the Revenue Cabinet, Commonwealth of Kentucky ("the Cabinet").

WHEREAS, the Vendor is a retailer engaged in business in the Commonwealth of Kentucky selling tangible personal property and remitting Kentucky sales and use tax under Account No 162112 0899 4, and the Purchaser is an entity engaged in business in Kentucky holding Sales and Use Tax Account No. [REDACTED] (if applicable);

WHEREAS, the Purchaser has purchased and paid for tangible personal property (including sales tax on the purchase price) from the Vendor;

WHEREAS, the Vendor is filing a claim for refund under its Sales and Use Tax Account Number with the Cabinet for the periods [REDACTED] and the amount \$ [REDACTED], claiming that tangible personal property purchased by the Purchaser was exempt from sales and use taxation under KRS chapter 139; and

WHEREAS, Kentucky sales tax law (particularly KRS 131.190) prohibits the Cabinet from divulging any tax information regarding the Vendor's account except to the Vendor or a properly authorized agent;

THEREFORE, to comply with Kentucky law and to allow for the review of the validity of the refund filed by the Vendor, the parties enter into this Refund Disclosure Agreement:

1. The Cabinet agrees to: (a) review the claim for refund filed by the Vendor and, if valid, remit payment to the Vendor under the terms of KRS 139.770; and (b) communicate the status and final disposition of the claim for refund to the Purchaser, including any adjustments such as vendor compensation, offsets for any outstanding tax liabilities of the vendor, etc.

2. The Vendor agrees to: (a) provide the Cabinet with records or documents necessary for the Cabinet's review of the Vendor's claim, (b) receive and disburse any refund or credit back to the Purchaser from which it was originally collected; and (c) designate the Purchaser to receive or provide information regarding the refund period covered by this agreement.

3. The Purchaser agrees: (a) that it is the party that paid the sales and use tax in question to the Vendor filing the claim for refund referenced in this agreement; (b) to provide the Cabinet with records or documents necessary for the Cabinet's review of the claim for refund.

4. The terms of this agreement relate only to information sharing and do not transfer responsibilities of the vendor which remitted the tax to the state treasury to submit refund claims or protest refund adjustments.

5. The terms of this Refund Disclosure Agreement shall be confidential and shall be divulged only as is necessary to enforce this Agreement.

6. This Refund Disclosure Agreement shall be enforceable only in Franklin Circuit Court, Frankfort, Kentucky.

In witness whereof, the parties have executed this Refund Disclosure Agreement on the dates set forth below by their signatures.

BellSouth Telecommunications, Inc.

by Susan Smith Criel Vendor

Title Asst. Vice President-Taxes

This 28 day of Feb., 2003

Subscribed and sworn to before me this the 28th day of Feb., 2003



NOTARY PUBLIC E. ELLIOTT THOMPSON  
STATE AT LARGE Notary Public, Gwinnett County, GA  
My Commission Expires: My Commission Expires May 3, 2003



Purchaser

by 

Title 

This 17th day of Feb., 2003

Subscribed and sworn to before me this the 17th day of Feb., 2003



NOTARY PUBLIC  
STATE AT LARGE  
My Commission Expires: 4-21-2004

KENTUCKY REVENUE CABINET

by: \_\_\_\_\_  
Date: \_\_\_\_\_ Title \_\_\_\_\_

This Document Is Invalid If The Text, As Originally Provided By The Kentucky Revenue Cabinet, Is Altered In Any Manner.

KENTUCKY REVENUE CABINET  
DIVISION OF TAX POLICY  
200 FAIR OAKS LANE  
FRANKFORT, KENTUCKY 40620  
PHONE 502-564-6843  
FAX 502-564-9565

October 31, 2003

Edward T Depp  
Dinsmore & Shohl LLP  
1400 PNC Plaza  
500 West Jefferson Street  
Louisville, KY 40202

Dear Mr. Depp:

Your correspondence addressed to Mr. Kevin West of the Sales and Use Tax Branch has been forwarded to the Division of Tax Policy for review and response. You are requesting information regarding the application of sales tax on purchases made by your client, Dialog Telecommunications, Inc. (Dialog).

Dialog is a competitive local exchange carrier (CLEC) under the Telecommunications Act of 1996 (the Act). According to the provisions of the Act, Dialog is purchasing unbundled network elements (UNE's) from BellSouth at wholesale rates. These elements include 2-wire loop, a switch port, installation and repair services, switch processing, network transport, and voice mail services, etc. Your letter characterizes these elements as "pieces of the entire telecommunications system that are necessary to provide telecommunications services." By virtue of these wholesale purchases, Dialog is able to provide local exchange service to its own retail end-user customers.

The 1996 Telecommunications Act was to encourage greater competition by requiring the incumbent local exchange carriers (ILEC's) to give competitors access to their networks. Section 251(c)(4) of the Act characterizes this access as the resale at wholesale rates of any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers. In Section 5 of your ruling request, Overarching Concerns Regarding KRS 139.200, you also describe the transactions in question as the wholesale purchase of communications services. BellSouth is providing the pieces of communications service that Dialog packages into local exchange service and sells to its own customers.

The argument that Dialog's purchase of telecommunications elements such as the 2-Wire Loop and the switch port are a lease of "facilities" rather than communications service is not persuasive. BellSouth is clearly providing Dialog with a communications service that enables it to provide local telephone service to its own clients. However, for the sake of argument, even if the purchase of access to the phone line or switch port were characterized as a lease of facilities or communications equipment, this lease would be subject to sales tax as a lease of tangible personal property. Dialog's purchase of taxable services or property is no different than the hotel operator who pays sales tax on beds, linens, and other items for use in providing taxable accommodations services. The hotel



AN EQUAL OPPORTUNITY EMPLOYER M/F/D

operator then collects sales tax from customers who pay for the hotel accommodations. The Court of Appeals held in *Kentucky Board of Tax Appeals v. Brown Hotel Co.*, 528 S.W.2d 715 (1975) that a service provider could not purchase tangible personal property exempt from tax based upon the theory that the hotel acquired the property for resale to its customers who are the ultimate users of the property when paying for the accommodations service.

According to the provisions of Kentucky Regulation 103 KAR 28:140, Section 2, "communications service providers that purchase communications services from facilities-based carriers to resell to their own customer base shall not claim the communications services purchased are exempt as being transactions for resale." Furthermore, BellSouth is properly following Section 3 of the Regulation in refusing to accept Dialog's issuance of a resale certificate for the communications services in question. Dialog is the consumer of the communications services purchased in these transactions as stated in Section 1 of the Regulation. The resale exclusion from the definition of retail sale in KRS 139.100 applies only to the sale of tangible personal property for resale.

You have also asserted that the Act prohibits Kentucky from imposing sales tax on your client's wholesale purchase of UNE's. Upon review, it is the Cabinet's position that the Act does not prohibit the statutes in question. There is no evidence that this so-called "collection scheme" is a barrier to the wholesale purchase of UNE's. In fact, the use of the UNE platform is being utilized by CLEC's now more than ever. Furthermore, it is the Cabinet's responsibility to administer the current language of the law as it applies to companies such as Dialog until such time as an appropriate legislative or judicial body determines otherwise.

If you should have any further questions regarding this matter, please do not hesitate to contact my office at (502) 564-6843, ext. 4442.

Sincerely,



Richard Dobson  
Tax Consultant  
Division of Tax Policy

C: Kevin West

