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January 24, 2006

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JAN 26 2006

**PUBLIC SERVICE
COMMISSION**

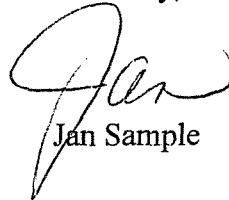
Ms. Charla Masters
Public Service Commission
Docket Branch
P.O. Box 615
Frankfort, KY 40602

***RE: Dialog Telecommunications, Inc. v. BellSouth Telecommunications Inc.
Case No. 2005-00095***

Dear Charla:

Enclosed please find eleven copies of Exhibit 1 to Dialog's Response to BellSouth's Motion to Dismiss and Cross Motion for Summary Judgment as filed with the Commission on Friday, January 20, 2006. The existing Exhibit 1 consists of only two pages with an error page attached and should be discarded and replaced with the enclosed. Please do not hesitate to contact me should you need further information.

Sincerely,



Jan Sample

Enc.

Dialog Telecommunications

KY PSC Case No. 2005-00095

Informal Conference

June 21, 2005

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Three Issues in Pending Complaint

- BellSouth collecting 6% “sales tax” on network elements
- BellSouth billing tandem switching rate on non-tandem routed traffic
- BellSouth applying late charges to amounts properly disputed by Dialog

Kentucky Taxes Providers of “Communications Service”

- Dialog, like BellSouth, is required to pay and does pay Kentucky Sales Tax on its sales to Kentucky purchasers of “Communications service.” KRS 139.200(2)(d)

Kentucky Taxes Providers of “Communications Service”

- ...the provision, transmission, conveyance, or routing, for consideration, of voice, data, video, or any other information signals of the purchaser's choosing to a point or between or among points specified by the purchaser, by or through any electronic, radio, light, fiber optic, or similar medium or method now in existence or later devised. KRS 139.195(4)

Kentucky Taxes Providers of “Communications Service”

- KY sales tax statute compared to 1996 Telecom Act: “...the transmission, between or among points specified by the user, of *information of the user's choosing*, without change in the form or content of the information as sent and received.” 47 USC § 153(43) (emphasis added).

Kentucky Taxes Providers of “Communications Service”

- Kentucky definition and federal definition each recognize basic principles of common carriage – carrier is objective conduit of intelligence created by the customer.
- Kentucky taxes services involving transmission of purchaser’s information

Dialog is a common carrier

- Common carriers (“Telecommunications carriers” under the 1996 Act) transmit information for customers
- Dialog’s customers determine what information to transmit, who to call, what number to dial, when, for how long, and for what purpose

It is not possible to be simultaneously a common carrier and a “purchaser” of “Communications service”

- It is a basic and central principle of common carriage that a carrier may provide tariffed service only as an objective conduit of a customer's communication, without influence or control in determining either the content of the communication or the destination of a customer's calls.

Network Elements are not “Communications Service”

The term "network element" means 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, including subscriber numbers, databases, signaling systems, and information sufficient for billing and collection or used in the transmission, routing, or other provision of a telecommunications service. 47 USC § 153 (29) (emphasis supplied).

Network Elements are not “Communications Service”

The Kentucky Commission has long recognized the distinction between UNEs and services: “Reiterating, the Act provides pricing standards for the sale of unbundled elements that differ from the pricing standards for the sale of “service” to another carrier.” Case No. 96-482, (1997)

Why Network Elements are not taxable

- Under KRS 139.200(2)(d), only “Communications service” is taxed
- Network elements are used to create a Communications Service – they are not a service unto themselves
- BellSouth errs by attempting to collect taxes not due from Dialog

DB1

Slide 11

DB1

Cf. BellSouth comments in CC Dkt 98-147 (7/22/99) at pp. 6-7: (line sharing is not a telecommunications service because it is not the transmission of information," but is merely the "provisioning of a facility" over which CLECs transmit information for their customers.
Douglas Brent, 8/29/2005

Why Network Elements are not taxable

- Applying tax creates tax pyramiding problem

Why Network Elements are not taxable

- Intent to “double tax” will not be implied in Kentucky:

Multiple taxation is generally against public policy and will be upheld only when there is an express legislative grant. Kentucky Power v. Revenue Cabinet, 705 S.W. 2d 904 (1985). Under Kentucky law, when the legislative intent is less than clear, a statute is to be construed so as to avoid double taxation in any form. George v. Scent, 346 S.W. 2d 784 (1961).

Solving the Problem?

- Dialog has made good faith effort to pursue by following the BellSouth procedures for billing dispute resolution and administrative and judicial process
- BellSouth has refused to pursue the issue despite Circuit Court's order

Solving the Problem?

- While the PSC cannot adjudicate the tax claim, it can find that Dialog has raised a bona fide billing dispute and is entitled to withhold payment equal to the amount of “taxes” wrongly collected
- BellSouth must not be permitted to interrupt system access to force payment of disputed amounts. See 807 KAR 5:006, Section 11.

Solving the Problem?

- BellSouth is the taxpayer and should pursue a refund for all “taxes” paid on network elements provided to any carrier