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May 1, 2007

Ms. Elizabeth O'Donnell
Executive Director
Public Service Commission
P.O. Box 615
Frankfort, KY 40602

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

Dear Ms. O'Donnell:

Enclosed please find an original and ten copies of Dialog Telecommunications, Inc.'s Reply to BellSouth Telecommunications, Inc. Response and Motion to Strike.

Please indicate receipt of this filing by your office by placing a file stamp on the extra copy and returning to me via our runner.

Very truly yours,

STOLL KEENON OGDEN PLLC

Douglas F. Brent

DFB:jms
Enc.

cc: Mary Keyer, BellSouth
Cheryl Winn, BellSouth

COMMONWEALTH OF KENTUCKY

BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

DIALOG TELECOMMUNICATIONS, INC.	)	
	)	
v.	)	**CASE NO.**
	)	**2005-00095**
BELLSOUTH TELECOMMUNICATIONS, INC.	)	

REPLY OF DIALOG TELECOMMUNICATIONS, INC.
TO BELLSOUTH RESPONSE AND MOTION TO STRIKE

Dialog Telecommunications, Inc. ("Dialog"), for its Reply to BellSouth Response to Dialog's Motion for Rehearing and Motion to Strike ("BellSouth Response"), states as follows:

INTRODUCTION

Dialog and BellSouth agree on one point: as of the date Dialog filed its Complaint seeking judicial review of the Commission's March 23, 2007 Order on Rehearing in this case (the "Rehearing Order"), the question presented by this case – whether the financial burden imposed by the parties' dispute as to whether unbundled network elements ("UNEs") are services and should be taxed as such should be imposed upon Dialog, a party wholly *unable* to obtain final resolution of the issue, or upon BellSouth, which *refuses* to resolve the issue -- is before the Court. However, subsequent to the filing of that Complaint, on April 30, 2007, BellSouth saw fit to file with the Commission its Response. To the extent that the Commission may assert jurisdiction despite ongoing judicial proceedings, and to the extent that the Commission

continues to accept documents filed in this case subsequent to the filing of the Complaint with Franklin Circuit Court, it is necessary for Dialog to respond to the more egregious mischaracterizations of fact and law that appear in BellSouth's latest filing.

ARGUMENT

I. BELLSOUTH IS WRONG WHEN IT CHARACTERIZES DIALOG'S MOTION AS A REQUEST FOR THE COMMISSION TO INTERPRET TAX LAW.

BellSouth turns Dialog's argument on its head when it insists in its Response that Dialog has asked the Commission to go beyond its expertise and make rulings based upon tax law. In fact, Dialog in its Motion pointed out that the Commission had, in fact, interpreted tax law in its Order on Rehearing; that such interpretation was erroneous; and that the Commission should delete those erroneous interpretations and reinstate its Final Order in its entirety. Dialog did, of necessity, point out the errors of tax law that appear in the Order on Rehearing and indicated that if the Commission did in fact intend to conclude this case with conclusions based on tax law, it should correct those conclusions. The basis of Dialog's Motion was, however, that it had not asked the Commission for decisions that depend upon interpretation of tax law, and that it had been satisfied with the Commission's Final Order in this case which interpreted the difference between unbundled network elements and services for resale under law, an issue that is within the Commission's jurisdiction. The Commission's conclusion established that Dialog's billing dispute is in good faith and that BellSouth cannot under law threaten to cut off Dialog's access to needed systems during the pendency of that dispute. This – and only this – was the relief sought by Dialog in this case.

To reiterate: It has *never* been Dialog that has sought conclusions of tax law from the Commission. It has sought only conclusions of utility law. That is why, when the Commission stepped over that line in the Order on Rehearing, Dialog filed its Motion.

Ironically, that is also why Dialog had never made to the Commission the tax law arguments contained in its Motion and in the attached Lenarz Affidavit. Dialog had had no intention of making those arguments in this forum. However, when the Commission issued its ruling, an explanation of tax law became necessary for the first time. Now, in another scenario straight out of Kafka, BellSouth argues that those tax law arguments cannot be heard because they should have been offered *previously* – even while it insists that tax law matters could *never* be heard in this case. Meanwhile, the final, finishing touch on its circular argument is that, although the Commission has no jurisdiction to rule on tax law, the Commission's Order on Rehearing, which is based on conclusions of tax law, must stand.

II. BELLSOUTH MISCHARACTERIZES REPRESENTATIONS CONCERNING TAX PAYMENTS MADE BY DIALOG TO THIS COMMISSION.

In May 2006, when Dialog's complaint had been pending before the Commission for more than a year, Dialog explained to the Commission that while waiting for the Commission to decide the narrow question of law related to whether UNEs are a service, Dialog had continued to honor BellSouth's erroneous invoices. BellSouth has repeatedly characterized this explanation as a misrepresentation. It was not. It was a statement of fact that was accurate. Continually prodded by BellSouth's threats to cut off its access, and in the hope that the Commission would rule in its favor on the UNE/service issue (which it ultimately did), Dialog *did* pay the wrongfully billed "taxes." The bills for

these "taxes" were, in fact, fully paid through February 2006.[1] However, as the proceedings at the Commission lengthened, and as the wrongfully billed amounts continued to affect Dialog's cash flow adversely (as BellSouth intended), Dialog ceased payment.

Dialog's payment status should not have affected the posture of this case. The question presented to the Commission was one of law: Is an unbundled network element a "service," and is Dialog's contention that an unbundled network element is *not* a "service" such that it should not be taxed as a "service" a good faith dispute such that BellSouth is prohibited from cutting off access to those network elements while the dispute is pending?

BellSouth's continued insistence that Dialog has misrepresented itself in any way to this Commission is as wrong as it can be. Dialog's reason for coming to the Commission in the first place was to stop BellSouth from demanding payment of "service" tax on unbundled network elements, and to establish that its dispute of this tax was in good faith. If Dialog had meant to pay the taxes anyway, there would have been no remedy – even a stopgap remedy such as preserving Dialog's financial viability during the dispute – that the Commission could grant.

III. BELLSOUTH'S RESPONSE IS RIDDLED WITH ADDITIONAL MISCHARACTERIZATIONS OF FACT AND LAW.

Additional mischaracterizations of fact and law placed in the record by BellSouth that must be corrected include the following:

[1] Note that despite BellSouth's current claim of willingness to seek resolution of the tax issue at the Department of Revenue if Dialog continues to fling money in its direction, these alleged "taxes" have been paid up to date before, and BellSouth took no action at all.

In its Response, at 2, BellSouth states that the "record now correctly reflects the uncontested fact that Dialog has wrongfully withheld payment of over $530,000..." Whether Dialog has "wrongfully" withheld anything is neither "uncontested" nor "factual." This is the sort of statement that illustrates BellSouth's ongoing conflation of law and fact.

In its Response, at 3, BellSouth purports to quote the Commission's Order on Reconsideration, at 3, stating that "the Commission correctly concluded that 'Dialog must pay AT&T Kentucky the tax in question.'" BellSouth conveniently omits the modifying adverbial clause that precedes this portion of the Commission's sentence and places a condition on it. The entire sentence reads as follows: "The Commission finds that, based on this provision of the interconnection agreement, *in order for AT&T Kentucky to pursue an application for a refund of the sales tax which Dialog believes has been improperly collected,* Dialog must pay to AT&T Kentucky the tax in question." (Emphasis added.) In other words, *unless* Dialog pays the "tax," the sentence frees BellSouth from the previously-ordered requirement that it seek a refund. The sentence does not require Dialog to pay the tax. What a difference the strategic omission of a few words makes.

In its Response, at 3, BellSouth claims that Dialog attempted to "convince the Commission 'that the contract doesn't really mean what it says'..." It is entirely unclear whom BellSouth is quoting here. Presumably BellSouth means to imply that Dialog actually *said* that the "contract doesn't really mean what it says." Of course, Dialog said no such thing. BellSouth's use of quotation marks here appears to be a transparent attempt to mislead.

In its Response, at 4, BellSouth asserts that the Commission "did not rely on, nor attempt to interpret, Kentucky tax law" in its Order on Rehearing. It is possible that this statement is true, but neither Dialog nor BellSouth *knows* what the Commission "attempted" in issuing this Order, or whether any tax law research was undertaken by the Commission in the course of preparing it. Certainly no briefing was requested from the parties. The conclusion, and the basis for it, came as a complete surprise to Dialog.

But the question as to whether the Commission was actually "attempting" to interpret tax law is irrelevant. Tax law is inextricably entwined with the section of the Interconnection Agreement which the Commission concluded was controlling. As Dialog pointed out in its most recent Motion, Section 11.4.4 of the Interconnection Agreement requires payment of a disputed tax *only if* [a] BellSouth cannot contest the tax without first paying it, or [b] if a lien will be placed on BellSouth's assets during the pendency of the contest. These two conditions present questions of Kentucky tax law. Pursuant to Kentucky tax law, neither condition exists here. The Commission erroneously concluded that those conditions *do* exist here – that BellSouth must first be paid in order to contest the tax and/or that a lien could be placed on its assets while it contests the tax.

Tax law errors caused the Commission to misinterpret the agreement. The question with regard to whether the Commission *meant* to interpret Kentucky tax law is simply irrelevant. It did so. And it did so erroneously.

CONCLUSION

Dialog recognizes that a Commission ruling on its Motion is unlikely, given that statutory deadlines required Dialog to seek judicial remedies and that its Complaint is

now pending in Franklin Circuit Court. However, if the Commission does rule, it should reject the arguments made by BellSouth in its Response. The Commission should recognize that, as it initially held, the relief sought by Dialog here is an industry-wide issue that can be resolved only by BellSouth. As a result, it is both inequitable and unlawful to place the financial burden for resolution on Dialog. The Commission should further recognize that its interpretation of the parties' agreement was based on errors in tax law and that, as Dialog's billing dispute with BellSouth is and has been in good faith, BellSouth cannot deny access to critical systems if Dialog does not pay the disputed amount.

Respectfully Submitted,

DIALOG TELECOMMUNICATIONS, INC.

By: /s/ Douglas F. Brent

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CERTIFICATE OF SERVICE

It is hereby certified that this 1st day of May, 2007, I have served the within Reply on the following by electronic mail and by deposit in the U. S. Mail, first class.

/s/ Douglas F. Brent
Counsel for Dialog Telecommunications

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