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PUBLIC SERVICE
COMMISSION

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May 6, 2020

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Kent A. Chandler
Executive Director
Public Service Commission of Kentucky
211 Sower Boulevard
P.O. Box 615
Frankfort, KY 40602-0615

RE: Case No. 2019-00047

Dear Mr. Chandler:

The accompanying reply is being transmitted by e-mail in accordance with the Commission's March 16, 2020 order in Case No. 2020-00085. Please file it in Case No. 2019-00047.

Please do not hesitate to contact me if you have any questions.

Very truly yours,


Mark R. Overstreet

MRO

cc: paul@louisvillelaw.com
caroline.pieroni@dinsmore.com
kenyon.meyer@dinsmore.com

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

| | | |
|---------------------------------------|---|------------|
| ASSOCIATES IN DERMATOLOGY, PLLC |) | |
| |) | |
| COMPLAINANT |) | |
| |) | |
| V. |) | CASE NO. |
| |) | 2019-00047 |
| BELLSOUTH TELECOMMUNICATIONS, LLC dba |) | |
| AT&T KENTUCKY |) | |
| |) | |
| DEFENDANT |) | |

Reply Memorandum Of BellSouth Telecommunications, LLC d/b/a AT&T Kentucky
In Support Of Its Supplemental Motion To Dismiss

BellSouth Telecommunications, LLC d/b/a AT&T Kentucky states for its reply to the May 1, 2020 Response of Associates in Dermatology, PLLC (“AID”):

AID cites the 1981 Kentucky Court of Appeals’ decision in *Board of Education v. William Dohrman, Inc.*¹ for the proposition that “neither the arbitration provision or an action in arbitration is a factor in whether the Commission has jurisdiction over this matter.”² AID misreads *William Dohrman, Inc.* and ignores subsequent statutory and judicial developments.

First, the question of the effect of a properly invoked arbitration provision was not before the Court of Appeals in *William Dohrman, Inc.* To the contrary, the utility filed an application for a rate adjustment with the Commission. The School Board appeared before the Commission and opposed

¹ 620 S.W.2d 328 (Ky. App. 1981).

² Associates in Dermatology, PLLC’s Response, *In the Matter of: Associates In Dermatology, PLLC v. BellSouth Telecommunications, Inc. d/b/a AT&T Kentucky*, Case No. 2019-00047 at ¶ 6 (Ky. P.S.C. Filed May 1, 2020) (“AID Response”).

the increase on the merits.³ The matter was adjudicated by the Commission and new rates established. The School Board then sought rehearing, and raised the arbitration provision for the first time. The Commission denied the motion for rehearing for undisclosed reasons.⁴

The School Board elected not to appeal the Commission's decision and instead attacked the decision collaterally by filing a declaratory judgment action in the Jefferson Circuit Court. The Jefferson Circuit Court dismissed that portion of the School Board's complaint seeking a declaratory judgment regarding the arbitration provision.⁵

The brief excerpt from the *William Dohrman, Inc.* court's opinion cited by AID is inapposite. Unlike the School Board, AT&T Kentucky objected to the Commission's jurisdiction in its initial filing, and argued in its jurisdictional brief that the contracts required the dispute to be arbitrated. AT&T Kentucky, unlike the School Board, has not litigated the merits of AID's claims before Commission, and the Commission has not rendered a final decision on the merits. Moreover, AID, unlike the utility in *William Dohrman, Inc.*, filed its complaint for arbitration while the jurisdictional issue is pending before the Commission.⁶ Further, although AID now argues that some of its claims are not subject to the arbitration agreements,⁷ it does not identify those claims with any specificity. Instead, it seeks on the one hand to force the Commission to parse its claims, while requiring AT&T Kentucky to litigate simultaneously the same claims before the Commission and the American Arbitration Association. *William Dohrman, Inc.* does not contemplate, much less require, such an unfair and wasteful result.

³ 620 S.W.2d at 328.

⁴ *Id.*

⁵ *Id.* at 329.

⁶ See AAA Initiation Letter from John Germani, American Arbitration Association to Caroline L. Pieroni and Mark R. Overstreet (April 27, 2020) (EXHIBIT 1).

⁷ AID Response at ¶ 2.

In any event, two broad statutory enactments, and a landmark Kentucky Supreme Court decision, have superseded the applicability, if any, of *William Dohrman, Inc.* to this dispute. First, the Commission’s jurisdiction with respect to telecommunications and broadband services has been substantially narrowed. The General Assembly in 2006 enacted KRS 278.541 to KRS 278.544 to deregulate the provision of nonbasic service, such as AT&T Kentucky provided AID, in the Commonwealth, and to narrowly limit Commission jurisdiction with respect to such service.⁸ Further, the General Assembly in 2015 amended KRS 278.54611, which already substantially deregulated the provision of broadband services in the Commonwealth, to delete the language regarding the Commission’s jurisdiction with respect to consumer complaints regarding broadband services: “(3) The commission *may* ~~shall retain jurisdiction~~ assist in the resolution of consumer complaints.”⁹

Equally important are the judicial and additional legislative developments subsequent to the decision in *William Dohrman, Inc.* At the time *William Dohrman, Inc.* was decided arbitration agreements were “revocable and unenforceable” at Kentucky common law.¹⁰ Thus, “an agreement between the parties to a contract to arbitrate future disputes arising under that contract was invalid and unenforceable, being antithetical to the jurisdiction of the courts and therefore contrary to public policy.”¹¹

⁸ See Brief of BellSouth Telecommunications LLC d/b/a AT&T Kentucky, *In the Matter of: Associates In Dermatology, PLLC v. BellSouth Telecommunications, Inc. d/b/a AT&T Kentucky*, Case No. 2019-00047 at ¶ 6 (Ky. P.S.C. Filed February 13, 2020).

⁹ 2015 KY. ACTS ch. 2 § 2 (2015).

¹⁰ Thomas J. Stipanowich, *Kentucky Law Survey: Arbitration*, 74 Ky. L. J. 319, 320 (1985) available at <https://uknowledge.uky.edu/cgi/viewcontent.cgi?article=2002&context=klj> (last visited May 5, 2020).

¹¹ *Id.* at 322.

The Kentucky Supreme Court in *Kodak Mining Co. v. Carrs Fork Corp.*¹² renounced this common law rule three years after the court of appeals decision in *William Dohrman, Inc.* Although the case was decided under the Federal Arbitration Act,¹³ the Kentucky Supreme Court continued by explaining “Kentucky has no public policy that would prevent the enforcement of a private arbitration agreement in contract cases ... we reassert that the common law rule against arbitration is no longer viable and what is commonly referred to as Kentucky’s ‘ouster of jurisdiction’ doctrine is no longer applicable....”¹⁴

The same year *Kodak Mining* was decided, the Kentucky General Assembly enacted, with modifications not pertinent to this dispute, the Uniform Arbitration Act.¹⁵ That statutory change made binding the “public policy preference favoring arbitration.”¹⁶ Thus, once the existence of the arbitration provision is presented, as is evident on the face of the contracts filed with the Commission in discovery, “the burden shifts to the party seeking to avoid arbitration. The party seeking to avoid arbitration has a heavy burden.”¹⁷ Moreover, “doubts about the scope of issues subject to arbitration should be resolved in favor of arbitration.”¹⁸ This includes AID’s creative contention that its bare allegation that it did not order some of the services at issue removes the dispute from the requirement

¹² 669 S.W2d 917 (1984).

¹³ *Id.* at 920.

¹⁴ *Id.* at 921. Because AID’s claims are outside the Commission’s jurisdiction there is no conflict between KRS 417.050 and KRS 278.040. But even if there were such a conflict, the requirement that the dispute be arbitrated no more usurps the Commission’s statutory jurisdiction than the same conflict would usurp the Court of Justice’s constitutionally-based jurisdiction. See *Kodak Mining*, 669 S.W.2d at 921. Moreover, any conflict between the two provisions should be resolved in favor of the more specific provisions of KRS 417.050. See *Bevin v. Beshear*, 526 S.W.3d 89, 91 n.6 (Ky. 2017) (“Kentucky follows the rule of statutory construction that the more specific statute controls over the more general statute.”) Likewise, KRS 417.050, as the more recent enacted statute, is to be given effect over KRS 278.040, which was last amended in 1982, in the event of a conflict. *Id.*

¹⁵ 1984 Acts ch. 278 (enacting a version of the Uniform Arbitration Act codified at KRS 417.045-240).

¹⁶ *Schnuerle v. Insight Communs., Co. L.P.*, 376 S.W.3d 561, 574, 575 (Ky. 2012) (also recognizing “clear constitutional and statutory authorities favoring arbitration.”)

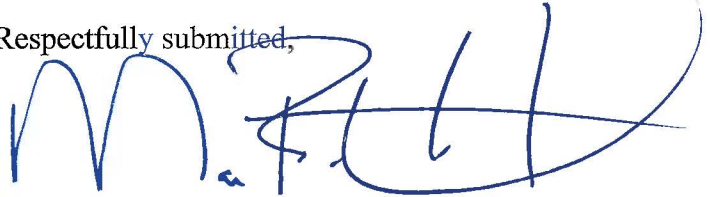
¹⁷ *Id.* at 575.

¹⁸ *Grimes v. GHSW Enters., LLC*, 556 S.W.3d 576, 581 (Ky. 2018).

that it be arbitrated.¹⁹ Accepting such a ploy would render arbitration provisions meaningless,²⁰ and undercut the strong constitutional,²¹ judicial, and legislative mandates that disputes such as this be arbitrated.

Wherefore, BellSouth Telecommunications, LLC d/b/a AT&T Kentucky respectfully requests that its supplemental motion to dismiss be granted.

Respectfully submitted,



Dated: May 6, 2020

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Counsel for BellSouth Telecommunications, LLC

¹⁹ AID Response at ¶ 2.

²⁰ See *Louisville Peterbilit v. Cox*, 132 S.W.3d 850, 855-856 (Ky. 2004) (claim of fraud in the inducement of underlying agreement required to be arbitrated because to hold otherwise “would “render the arbitration statutes meaningless.”)

²¹ *Schnuerle*, 376 S.W.3d at 574 (“[I]n Kentucky, unlike most jurisdictions, arbitration enjoys the imprimatur of our state Constitution.” (citing KY. CONST. § 250).

Certificate of Service

I certify that a true copy of the foregoing was served by first class mail, postage prepaid, and by e-mail transmission on the following this 6th day of May 2020:

Paul Schurman
Avery & Schurman, PLC
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Kenyon R. Meyer
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A handwritten signature in blue ink, consisting of a large 'M' followed by 'R. Overstreet' in a cursive style. The signature is written above a horizontal line.

Mark R. Overstreet

EXHIBIT 1



AMERICAN
ARBITRATION
ASSOCIATION®

INTERNATIONAL CENTRE
FOR DISPUTE RESOLUTION®

Southeast Case Management Center
John Bishop
Vice President
2200 Century Parkway, Suite 300
Atlanta, GA 30345
Telephone: (404)325-0101
Fax: (877)395-1388

April 27, 2020

Caroline L. Pieroni, Esq.
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Mark R. Overstreet, Esq.
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Case Number: 01-20-0004-9999

Associates in Dermatology, PLLC
-vs-
BellSouth Telecommunications, LLC dba
AT&T KY

Dear Parties:

Thank you for choosing the American Arbitration Association (the AAA) to assist you in resolving your dispute. The AAA is committed to providing you with the highest level of service in order to facilitate the resolution of your dispute. This letter--along with the attached Arbitration Information Sheet, AAA-ICDR® Best Practices Guide for Maintaining Cybersecurity and Privacy, and AAA-ICDR Cybersecurity Checklist--provide basic information about the AAA's arbitration process.

I will be your primary contact for this matter and am here to serve as your resource during the administration of your case. There may be times when you are contacted, on my behalf, by a member of my staff. Please do not hesitate to contact me directly with any questions, issues, or concerns.

This will acknowledge receipt on April 21, 2020 of a Demand for Arbitration providing for administration of a controversy arising out of a contract between the above-captioned parties, containing a clause providing for administration by the AAA. We understand that a copy was sent to Respondent. A copy of our Commercial Arbitration Rules may be obtained from our website at www.adr.org

Claimant has requested that the hearing be held in Jefferson County, Kentucky. Please review the Rules and the Arbitration Information Sheet regarding the locale of hearings. In accordance with the Rules, Respondent may file an answering statement with the AAA within 14 calendar days from the date of this letter. If no answering statement is filed within the stated time, the respondent will be deemed to deny the claim. Failure to file an answering statement shall not delay the arbitration from proceeding forward.

Inasmuch as the claim exceeds \$75,000, the parties shall mediate their dispute pursuant to AAA's Commercial Mediation Procedures, or as otherwise agreed upon by the parties, in accordance with Rule R-9 (Mediation). Absent agreement of the parties, the mediation shall take place concurrently with the arbitration and shall not serve to delay the arbitration proceedings. The parties may mediate their dispute at any time while the arbitration is pending. Any party may unilaterally opt-out of this rule upon notification to the AAA and the other parties to the arbitration. If either party wishes to opt out of mediation please advise the AAA by May 11, 2020.

To help arbitrators during the appointment process, the parties must complete a Checklist for Conflicts form. This form helps to avoid the possibility of a last-minute disclosure and/or disqualification of the arbitrator(s). Parties are requested to provide the full and complete names of all persons, firms, companies or other entities involved in this matter including, but not limited to, subsidiaries, related entities, witnesses, consultants, and attorneys. Arbitrators may need to divulge any relevant information in order to make necessary disclosures, in accordance with the rules. This form is not a preliminary or final witness list, and the AAA will not share your Checklist with the opposing party and the parties are not required to exchange them. The Checklist is due by May 11, 2020 and may be completed online via the AAA's WebFile at www.adr.org. Subsequent updates to the Checklist may be completed at any time.

Payments can be paid online using our new Quick Pay option. A unique Pay Pin can be found on the 'Payment Options' page of your invoice. To pay an invoice or statement, please visit www.adr.org, select 'File or Access Your Case' and then choose 'Quick Pay an Invoice.' We accept Visa, MasterCard, and American Express. To make other payment arrangements, please contact me.

If you have a Webfile account, you should see this case listed when you log in. If you do not see the case number when you login, please contact the undersigned. If you do not have a Webfile account, please email a request for a registration code to: customerservice@adr.org and they will send you an email with the code and instructions for registering for immediate case access.

Please feel free to call if you have any questions. I look forward to assisting you in this matter.

Sincerely,

/s/

John Germani
Manager of ADR Services
Direct Dial: (404)320-5101
Email: Germanij@adr.org
Fax: (877)395-1388

Enclosure

cc: Casey Horton



Arbitration Information Sheet

This document provides information about your upcoming arbitration and the expectations concerning each party's conduct throughout the process. Please save this information sheet so that you may refer to it throughout the arbitration.

Administrative Conference - The AAA may conduct an Administrative Conference with the parties to discuss issues that will assist the AAA in administering the case as efficiently as possible. This is also a good time for the parties to discuss ways to conduct the arbitration to meet their specific needs. Please be prepared to discuss the following:

- Estimates on the expected duration of the case;
- Number of arbitrators/party-appointed arbitrator provision;
- Method of appointment of arbitrators, if applicable;
- Your views on the qualifications of the arbitrators to be proposed;
- The possibility of submitting this dispute to mediation;
- The handling of extension requests;
- Reminder for parties to review the AAA-ICDR® Best Practices Guide for Maintaining Cybersecurity and Privacy;
- Means of communication between the AAA and the parties;
- The possibility of utilizing a documents only process.

Exchange of Correspondence and Documents - It is also important to note that the parties must exchange copies of all correspondence during the course of the arbitration. The two exceptions are the Checklist for Conflicts mentioned above and the party's arbitrator ranking list, which you will receive further information on during the course of the arbitrator appointment process. The parties only need to send copies of documents, such as discovery, to the AAA if the document is to be transmitted to the arbitrator for a determination.

Communications with Arbitrator - It is very important that parties do not engage in any ex-parte communications with the arbitrator. So as to minimize the potential of such communications, this case will be administered by facilitating the exchange of appropriate written documents through the AAA. To ensure the proper handling of all case-related documents, the parties are asked not to submit correspondence directly to the arbitrator. Correspondence should be submitted to your primary contact for transmittal to the arbitrator, copying the other party.

Timeliness of Filings - Please pay particular attention to response dates included on any correspondence sent to you by the AAA. Untimely filings or responses will not be considered by the AAA. Therefore, if you need an extension to any deadline, please contact the other party to reach an agreement. In the event you are unable to agree, the AAA or the arbitrator will determine if an extension will be granted.

International Arbitrations - If either party believes a matter involves an arbitration agreement between parties from different countries or otherwise has an international nexus that may give rise to unique issues, please let the AAA know within fifteen days. The International Centre for Dispute Resolution (ICDR, www.ICDR.org) is a Division of the AAA that administers international arbitrations worldwide, including in the US. The ICDR is available for assistance in any arbitration handled by the AAA, or, alternatively, can administer the case, if both parties agree. The AAA can also apply its Supplementary Procedures for International Arbitration under any of its Rules. The Supplementary Procedures are available on either www.ADR.org or www.ICDR.org.

Locale of the Arbitration - The parties may agree to a locale for the arbitration. This agreement can be made in the parties' agreement or contract, or when the arbitration is submitted to the AAA. The AAA will place the

arbitration within the agreed upon locale.

When the parties' arbitration agreement is silent or ambiguous with respect to locale, and the parties disagree as to locale, the AAA may determine the place of arbitration, subject to the power of the arbitrator after appointment, to make a final determination on the locale.

In these circumstances, the Claimant will generally request that the hearing be held in a specific locale. If the Respondent fails to file an objection to the locale requested by the Claimant within 14 calendar days after the notice of the request has been sent to the Respondent by the AAA, the AAA will confirm the locale requested by the Claimant is agreeable.

When a locale objection is filed, each party is requested to submit written statements regarding its reasons for preferring a specific locale. In preparing their written statements, the parties are asked by the administrator to address the following issues:

- Location of parties & attorneys;
- Location of witness and documents;
- Location of records;
- If construction, location of site, place or materials and the necessity of an on-site inspection;
- Consideration of relative difficulty in traveling and cost to the parties;
- Place of performance of contract;
- Place of previous court actions;
- Location of most appropriate panel;
- Any other reasonable arguments that might affect the locale determination.

AAA WebFile - We encourage the parties to visit our website to learn more about how to file and manage your cases online. As part of our administrative service, AAA's WebFile allows parties to perform a variety of case related activities, including:

- File additional claims;
- Complete and update the Checklist for Conflicts form;
- View invoices and submit payment;
- Merge forms that auto-populate with case and party information;
- Share and manage documents;
- Strike and rank listed neutrals;
- Review case status or hearing dates and times.

AAA WebFile provides flexibility because it allows you to work online as your schedule permits - day or night. Cases originally filed in the traditional offline manner can also be viewed and managed online. If the case does not show up when you log in, please contact your AAA case manager to request access.

Refund Schedule - The AAA has a refund schedule in the administrative fee section of the Rules. After 60 days of the AAA's receipt of the Demand or the appointment of the arbitrator the filing fees are non-refundable. The AAA will only refund filing fees as outlined in the Rules and does not refund neutral costs incurred when parties settle their dispute or withdraw their claims. Case service Final fees are fully refundable if the parties provide at least 24 hours' notice prior to the hearing.



Billing Information Sheet

Deposits - After the preliminary management hearing, the arbitrator will notify the case manager how much time is anticipated for the arbitration process. The Manager of ADR Services will then notify the parties of this amount. Once billing is entered into our system an invoice is automatically generated and transmitted within 2 weeks. Should you need an immediate copy to expedite payment please contact your case manager. Checks are to be made payable to the American Arbitration Association and submitted to the case manager in the time stated in our letter. These deposits are typically due thirty days prior to the evidentiary hearings, but this may vary depending on the schedule specific to this case.

At the conclusion of the preliminary management hearing, the parties' representatives and the Manager of ADR Services may discuss the AAA's billing and deposit practices with regard to covering the arbitrator's anticipated fees and expenses for the entire proceeding. We ask that the representatives discuss this with their clients prior to the conference so that any questions they may have can be addressed.

Deposits are typically due thirty days prior to the first evidentiary hearing and failure to make deposits by the established due date may result in the arbitrator suspending the proceeding. Therefore, please comply with all established due dates for payment in order to avoid interruption in the progress of the case. All unused deposits shall be promptly refunded.

Parties are also reminded that you may view case financial information, as well as make payments with a credit card online via AAA's WebFile.

Compensation to the arbitrator represents an independent obligation of the parties, and it is understood that the AAA has no liability, direct or indirect, for such payment. Each party shall promptly deposit in advance with the AAA such sums of money as required by the administrator to defray the costs of the arbitrator(s) fees. Compensation incurred will be deducted from deposits on hand, if any.

Abeyance Fee - Should parties agree, it is the policy of the Association to hold cases in abeyance for up to one year. The parties may continue to hold the matter in abeyance beyond that period providing they remit a payment of \$500.00 to the AAA to cover the administrative expense of continued tracking of such cases.

Final Fee - The Final Fee covers all AAA services from the time a hearing is scheduled to when the case is awarded, settled or withdrawn. The Final Fee is billed after an arbitrator has been appointed and a hearing has been scheduled and is payable in advance of the first scheduled hearing. The Final Fee will be incurred for all cases that proceed to their first evidentiary regardless of whether that hearing is held in person, via video conference, or via telephone and is payable by each party filing a claim or counterclaim, pursuant to the applicable fee schedule. If a hearing does not take place, the Final Fee will be fully refunded if the parties provide at least 24 hours' notice prior to the hearing.

Refund Schedule - The AAA has a refund schedule in the administrative fee section of the Rules. After 60 days of the AAA's receipt of the Demand or the appointment of the arbitrator the filing fees are non-refundable. The AAA will only refund filing fees as outlined in the Rules and does not refund arbitrator costs incurred when parties settle their dispute or withdraw their claims. The date of receipt by the AAA of the demand for arbitration will be used to calculate refunds of both claims and counterclaims.