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May 12, 2020

RECEIVED

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PUBLIC SERVICE
COMMISSION

Via E-mail – PSCED@ky.gov

Hon. Kent Chandler
Executive Director
Public Service Commission
211 Sower Blvd.
P. O. Box 615
Frankfort, KY 40601

***In the Matter of Associates in Dermatology, PLLC v. Bellsouth
Telecommunications, LLC d/b/a AT&T Kentucky, Case No. 2019-00047***

Dear Mr. Chandler:

Attached are the enclosed Motion for Leave to file Surreply and Surreply, in the above-referenced matter, of Associates in Dermatology, PLLC. Pursuant to the Commission's emergency order in Case No. 2020-00085, Associates in Dermatology, PLLC is submitting these documents via e-mail to the Commission and opposing counsel, and will follow up with an original in the mail.

Thank you and if you have any questions, please call me.

Sincerely,

DINSMORE & SHOHL LLP

/s/ [Caroline L. Pieroni](#)

Caroline L. Pieroni

CLP/kwi

Enclosures

cc: Ben Bellamy – ben.bellamy@ky.gov
Mark Overstreet – moverstreet@stites.com

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

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

ASSOCIATES IN DERMATOLOGY, PLLC'S
MOTION FOR LEAVE TO FILE SURREPLY

Associates in Dermatology, PLLC (“AID”) submits this Motion for Leave in support of the attached Surreply to the Reply Memorandum filed by Bellsouth Telecommunications, LLC d/b/a/ AT&T Kentucky (“AT&T”) on May 6, 2020.

Reply memoranda “shall be confined to points raised in the responses to which they are addressed.” 807 KAR 5:001 Sec. 5(3). AT&T’s Reply violates this rule by venturing into novel

points of law. Accordingly, there is good cause for the Commission to grant leave and accept the Surreply attached as Exhibit A.

Respectfully submitted,

DINSMORE & SHOHL LLP

/s/ Caroline L. Pieroni

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Attorneys for Complainants

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the foregoing was served on the following, via e-mail and U.S. Mail on this the 12th day of May, 2020, as indicated below:

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/s/ Caroline L. Pieroni

Attorneys for Complainant AID

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

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

**ASSOCIATES IN DERMATOLOGY, PLLC’S SURREPLY TO AT&T’S
NOTICE OF FILING AND SUPPLEMENTAL MOTION TO DISMISS**

Associates in Dermatology, PLLC (“AID”) submits this Surreply to the Reply Memorandum filed by Bellsouth Telecommunications, LLC d/b/a/ AT&T Kentucky (“AT&T”) in support of its Supplemental Motion to Dismiss. The Reply asserts novel and mistaken points of law which must be addressed.

1. *Dohrman* Is Binding and Determinative.

AT&T’s Reply attacks *Board of Education v. William Dohrman, Inc.*, 620 S.W.2d 328 (Ky. Ct. App. 1981), the best authority to have addressed the issue before the Commission here, on three fronts. All fail.

First, AT&T asserts that if the School Board did not seek arbitration and did not receive it, AT&T after requesting it must receive it. This is a classic inverse error. The conduct of the School Board in *Dohrman* and AT&T here do not influence the Commission’s jurisdiction. The question

presented is strictly a legal issue, separate from the parties' conduct. No concepts of "waiver" or "preservation" are in play.

Second, AT&T asserts that if the School Board collaterally attacked a Commission decision and failed, AT&T after jumping the gun before a decision is rendered must succeed. This argument fails for the same reason above.

Third, AT&T argues that more-recent developments in the law have superseded *Dohrman*. To do so, AT&T stretches an accepted concept too far. It is well-established that arbitration agreements must receive equal footing to other contracts. *See generally* Federal Arbitration Act, 9 U.S.C. § 1 *et seq.*; Uniform Arbitration Act, KRS 417.045 *et seq.*; *Kodak Mining Co. v. Carrs Fork Corp.*, 669 S.W.2d 917 (Ky. 1984). But it is equally well-established that arbitration agreements cannot command any super-contractual authority. *See Hill v. J.J.B. Hilliard, W.L. Lyons, Inc.*, 945 S.W.2d 948, 952 (Ky. Ct. App. 1996) ("We will not expand the arbitration agreement merely for the sake of efficiency.") Kentucky's courts and the Commission alike have repeatedly reaffirmed *Dorhman*'s holding—that contracts, no matter their terms, do not affect the Commission's right and duty to regulate. *See, e.g., Nat'l-Southwire Aluminum Co. v. Big Rivers Elec. Corp.*, 785 S.W.2d 503, 517 (Ky. Ct. App. 1990) (citing *Dohrman*, 620 S.W.2d 328); Case No. 16-00287, Petition of Kentucky Frontier Gas, LLC for a Declaratory Order, 2016 Ky. PUC LEXIS 1107, at *6 (Ky. P.S.C. Dec. 14, 2016) (same).

Dohrman's edict is clear: "the Commission ha[s] the right and duty to regulate rates and services, no matter what a contract provide[s]." 620 S.W.2d at 329. This principle has endured since 1981.

2. For Public Policy Reasons, the Commission Should Reject AT&T's Position.

AT&T also argues that even if the Commission could exercise jurisdiction, it should decline to do so because AT&T and AID have a contract that requires arbitration. This position assumes a disputed fact – whether the contracts at issue govern AT&T's overcharges (and thus whether the arbitration provision is even applicable). But, even if the contracts did govern, AT&T's position, if maintained going forward, would effectively eradicate Commission oversight, because arbitration is a *standard requirement* in all of AT&T's contracts. In other words, refusing jurisdiction over claims that are or could be brought in arbitration takes the power of the regulator and puts it in the hands of the regulated. AT&T can simply choose not to be regulated by putting arbitration provisions in all of its contracts. The Commission exists “for the purpose of hearing the facts and establishing reasonable rules, rates, and services to the public in order to secure conformity of services and rates affecting all classes of customers.” *Bulldog's Enters. v. Duke Energy*, 412 S.W.3d 210, 211 (Ky. Ct. App. 2013) (quoting *Smith v. Southern Bell Tel. & Tel. Co.*, 104 S.W.2d 961, 962 (Ky. 1937)); *see also Ky. PSC v. Commonwealth ex rel. Conway*, 324 S.W.3d 373, 377 (Ky. 2010) (describing the Commission's “broad role”). A private arbitration agreement cannot and should obviate this essential function that the PSC provides to the public.

Respectfully submitted,

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