COMMONWEALTH OF KENTUCKY

BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

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

ORDER TO SATISFY OR ANSWER

BellSouth Telecommunications, Inc. ("BellSouth") is hereby notified that it has been named as defendant in a formal complaint filed on March 2, 2005, a copy of which is attached hereto.

Pursuant to 807 KAR 5:001, Section 12, BellSouth is HEREBY ORDERED to satisfy the matters complained of or file a written answer to the complaint within 10 days from the date of service of this Order.

Should documents of any kind be filed with the Commission in the course of this proceeding, the documents shall also be served on all parties of record.

Done at Frankfort, Kentucky, this 7th day of March, 2005.

ATTEST:

Executive Director

By the Commission

RD

RECEIVED

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PUBLIC SERVICE COMMISSION

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	)	
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BELLSOUTH TELECOMMUNICATIONS, INC.	)	
	)	

COMPLAINT

Dialog Telecommunications, Inc., by its undersigned counsel and pursuant to KRS 278.260, and 807 KAR 5:001, Section 12, hereby files this Complaint against BellSouth Telecommunications, Inc. concerning BellSouth's improper billing for Unbundled Network Elements ("UNE") provided under the parties' Interconnection Agreement.

PARTIES

1. Complainant, Dialog Telecommunications, Inc. ("DIALOG") is a North Carolina corporation, with its principal place of business at 756 Tyvola Road, Suite 100, Charlotte, NC 28217. Dialog is a "local exchange carrier" within the meaning of Section 153(26) of the Federal Communications Act ("Act") and is a utility within the meaning of KRS 278.010(3)(e). As a non-incumbent, DIALOG is referred to as a competitive local exchange carrier or "CLEC."
2. Respondent, BellSouth Telecommunications, Inc. (hereinafter "BellSouth" or "BST") is a Georgia corporation, with its principal place of business in Atlanta, Georgia. BellSouth is a utility and provides local exchange telecommunications services in

Kentucky. BellSouth is an incumbent local exchange carrier ("ILEC"), as that term is defined in the Act.

SUMMARY OF COMPLAINT

3. DIALOG's complaint against BellSouth raises two primary issues, each related to incorrect resolution of billing errors by BellSouth. First, due to measurement issues in the BellSouth network, BellSouth consistently erred in billing DIALOG for certain tandem switching rate elements provided under the terms of the parties' interconnection agreement. After BellSouth discovered and admitted the billing problem, which inflated its bill to DIALOG, DIALOG opened various billing disputes related to the improper charges. These disputes total approximately $150,000.00 in Kentucky. Only recently did BellSouth claim to have "resolved" these disputes – in BellSouth's favor – and insist that Dialog pay the disputed amounts immediately. The second billing issue arises from BellSouth's practice of charging sales tax on UNEs. This practice has the practical effect of increasing BellSouth's TELRIC rates for UNEs by six percent. Since BellSouth is not bearing a similar expense[1], BellSouth receives a competitive benefit by saddling DIALOG (and presumably, other CLECs) with this expense. Since UNEs are merely a component part of a message pathway a CLEC provides for its customers to transmit messages, they are not a taxable "communications service." BellSouth should not be paying this "tax" at all, let alone trying to recover the expense from DIALOG. Regardless,

[1] This dispute has nothing to do with whether retail communications services provided by Dialog, or for that matter, BellSouth, are subject to sales tax. Dialog's voice services to its end users are clearly taxable, just as BellSouth's voice services to its own end users are.

BellSouth is contractually obligated to assist DIALOG in putting an end to this practice.[2]

4. Without regard to the dispute resolution process, on February 22, 2005 BellSouth disconnected DIALOG from the BellSouth systems (the "LENS" system) that DIALOG requires to service its customers, despite the existence of the valid, good faith disputes described above, in violation of the Parties' IA. DIALOG protested. BellSouth then claimed it would restore access to LENS only if DIALOG agreed to wire $373,977.20 to BellSouth by March 1, 2005. BellSouth restored access late on February 22 only to interrupt it again without further notice on March 1. DIALOG asserts that it was under no obligation to pay the amount demanded by BellSouth, and further states that with the exception of amounts properly disputed as permitted by its agreement, DIALOG is current in its payments to BellSouth. Nevertheless, Bellsouth continues to block DIALOG's access to LENS.

5. BellSouth's disconnection of DIALOG from access to LENS has harmed DIALOG and its customers. Moreover, such an interruption in access is inconsistent with the agreement between the parties. Attachment 7, §1.7.2, of the BellSouth – DIALOG interconnection agreement states, in pertinent part:

> "BellSouth reserves the right to suspend or terminate service for nonpayment. If payment of amounts <u>not subject to a billing dispute</u>, as described in Section 2, is not received by the bill date in the month after the original bill date, BellSouth will provide written notice to Dialog that additional applications for service may be refused, that any pending orders for service may not be completed, and/or that access to ordering systems

[2] As explained *infra*, DIALOG is not asking the Commission to adjudicate a tax claim. Rather, DIALOG is asking the Commission to require BellSouth to honor its IA by (i) filing a refund claim for any taxes BellSouth paid in error with respect to UNEs provided to DIALOG, and (ii) treating the past and future amounts withheld by DIALOG as subject to a billing dispute until a refund is obtained, then crediting the refund to DIALOG's account.

> may be suspended if payment is not received by the fifteenth day following the date of the notice. . ." (emphasis supplied)

6. BellSouth claims that DIALOG currently owes it more than $527,000.00 for services provided to DIALOG in Kentucky. The vast majority of this disputed amount relates to the sales tax dispute described above. This is an active billing dispute, brought in good faith by DIALOG, and BellSouth should not have suspended service or made additional payment demands over amounts attributable to this issue.

EXHAUSTION OF DISPUTE RESOLUTION

7. DIALOG has been unable to resolve these disputes after numerous and repeated good faith efforts to do so. DIALOG even obtained a court order intended to motivate BellSouth to cooperate in resolving the tax dispute. Despite a request from DIALOG based on that order, BellSouth has refused as recently as two weeks ago to provide any assistance. BellSouth's refusal is detailed in Count II of the Complaint. Instead of cooperating with DIALOG, BellSouth has unilaterally determined that the tax matter is "closed." Thus, the Parties have exhausted the informal dispute resolution process as set forth in their IA. DIALOG has no other choice but to request that the Commission resolve these disputes between the parties.

8. With respect to the billing dispute for tandem charges, the Commission clearly has jurisdiction to resolve the issue completely. With respect to the sales tax issue, the Commission has the authority to order BellSouth to pursue the remedies contemplated by § 11.5 of the IA. Moreover, the Commission may determine that DIALOG's claim is a good faith billing dispute and order that BellSouth not apply coercive collections tactics, including interrupting access to systems or requesting a security deposit, based on the outstanding disputed items.

JURISDICTION

9. The Commission has jurisdiction to interpret and enforce the terms of the Parties' Agreement, and to resolve all disputes raised herein, pursuant to 47 U.S.C. § 252 (e), 47 C.F.R. § 51.809, as well as the relevant sections of the KRS, and the terms of the IA executed between the Parties. §10 of the BellSouth – DIALOG interconnection agreement provides:

> "Except as otherwise stated in this Agreement, if any dispute arises as to the interpretation of any provision of this Agreement or as to the proper implementation of this Agreement, the aggrieved Party shall petition the Commission for resolution of the dispute. However, each Party reserves any rights it may have to seek judicial review of any ruling made by the Commission concerning this Agreement."

STATEMENT OF FACTS

10. DIALOG and BellSouth executed an Interconnection Agreement ("IA" or "Agreement"), together with various attachments incorporated therein on November 23, 2001. The Agreement was filed with the Commission, and is identified by the Commission with tracking number 00452-AM.

11. The Agreement provides the terms and conditions pursuant to which BellSouth provides interconnection services to DIALOG. Included in those services is the provision of unbundled network elements ("UNEs"), according to various schedules which list the monthly recurring and nonrecurring charges associated therewith.

12. On February 7, 2005, BellSouth demanded that DIALOG must pay all outstanding invoices, or face the disconnection of its customers. For the state of Kentucky, that amount was $529,969.19. BellSouth failed to deliver the notice as required by § 20.1 of the ICA.

COUNT I

Improper Calculation of Tandem Switching Charges

13. By BellSouth's own admission DIALOG has been improperly billed for Tandem Switching elements (ports and usage) for interoffice local calls and intraLATA toll calls where BST is the Local Primary Interexchange Carrier and such calls originate with Dialog and terminate to BST, an Independent Company or a Facility-Based CLEC. On May 5, 2004 BST notified Dialog that it was billing these tandem switching elements on all calls of these types while admitting that BST was unable to determine if these elements were actually used on any call. (*See* Exhibit 1) DIALOG began disputing billing for this rate element. However, despite having acknowledged the billing issue, BellSouth failed to respond to any of the monthly billing disputes until January 31, 2005 when it denied the disputes filed in September and October 2004 without clear explanation. DIALOG escalated the disputes within BST as directed. The disputes were denied again on February 23, 2005, once again without clear explanation. The disputes filed for May and August 2004 were denied on February 21, 2005 and the dispute filed for November 2004 was denied on February 22, 2005. BST summarily rejected each of DIALOG's disputes on this issue while refusing to explain BST's conclusion in light of the May 5, 2004 admissions. The amount in dispute for this issue at the time of the filing of this complaint is $163,891.66.

COUNT II

Collection of Sales Tax on UNEs

14. Since 2002, DIALOG has asserted that BellSouth is in error to collect sales tax on UNEs. DIALOG's claim is well grounded in Kentucky law. Put simply, UNEs are not "communications services" within the meaning of KRS 139.100. Thus, they cannot be subject to a "retail sale" and BellSouth is not a "retailer" when it provides UNEs to DIALOG. DIALOG is not asking the Commission to adjudicate this sales tax claim. Rather, DIALOG asks the Commission to find that DIALOG has acted in good faith in refusing to pay "tax" that was not due, that BellSouth has a contractual obligation to obtain an administrative or judicial determination that UNEs are not taxable, and that BST should not attempt to collect these charges or penalize DIALOG for not paying them while they continue to be disputed. The total amount attributable for these charges has become significant in amount only because BellSouth has failed to provide the good faith effort required by the agreement with DIALOG and has failed to address the issues in a timely manner.

15. DIALOG'S objective good faith related to this issue is extensively documented. Before bringing the instant complaint DIALOG attempted to resolve this matter through every possible communication channel. First, beginning in 2002 Dialog protested on numerous occasions to BellSouth. BellSouth denied each claim. Naturally, it was in BellSouth's competitive interest to do so and thereby increase Dialog's cost of competing against BellSouth.

16. Once DIALOG determined that BellSouth was not going to change position, DIALOG sought relief through administrative and judicial procedures, including by

seeking a ruling from the Revenue Cabinet, the Kentucky Board of Tax Appeals, and through a Circuit Court complaint brought in Franklin County against the Revenue Cabinet. However, the Revenue Cabinet has fought to prevent any decision on the merits in each of the three forums where DIALOG sought a ruling.

17. When DIALOG sought a determination directly from the agency, the Cabinet refused to issue a final ruling to DIALOG, claiming that BellSouth is the taxpayer with respect to UNEs it provides to DIALOG, and thus *only BellSouth has standing* to challenge application of the tax. This position made it impossible for DIALOG to maintain an appeal to the Kentucky Board of Tax Appeals, as the Revenue Cabinet claimed there had been no final order subject to review. DIALOG voluntarily dismissed a petition it had filed with the Board.

18. DIALOG then sought a declaratory judgment in Franklin Circuit Court, naming the Revenue Cabinet as a defendant, though not BellSouth. The Revenue Cabinet filed a motion to dismiss, arguing, ironically, that DIALOG had failed to exhaust its administrative remedies. Of course, the Revenue Cabinet had earlier claimed that DIALOG was not *entitled to seek* such administrative remedies.

19. Judge Crittenden, apparently recognizing the procedural dilemma facing DIALOG, issued an order in February 2004 holding the case in abeyance and requiring DIALOG to make a formal written demand to BellSouth to file a refund claim. The Court's order is attached as Exhibit 2 to this Complaint.

20. DIALOG complied with the Court's order, asking BellSouth more than a year ago to seek a refund of the taxes (which would result in a credit to DIALOG's account with BellSouth). After more than a year of inaction, on February 17, 2005, BellSouth

formalized its refusal to act, by sending Dialog the letter attached as Exhibit 3. In the letter BellSouth, while acknowledging "receipt of numerous emails from [DIALOG] requesting that such a refund be filed," took the startling position that BellSouth has no obligation to file a refund claim because DIALOG "has not paid the disputed Kentucky sales taxes for which a refund would be sought." That justification is nonsensical, and it is wrong, for two reasons.

21. First, with respect to taxes collected on UNEs it provides to DIALOG, BellSouth is the taxpayer, not DIALOG. *See* KRS 139.200. According to the Revenue Cabinet, only BellSouth has standing to ask for a refund of taxes it paid. If BellSouth has paid the taxes, it is entitled to pursue a refund, regardless of whether DIALOG has withheld payment. If BellSouth receives a refund, the amount attributable to UNEs furnished to DIALOG should be credited to DIALOG's account. The cash would of course remain with BellSouth.

22. Second, BellSouth's letter does not consider BellSouth's contractual obligation to assist DIALOG in resolving disputes over taxes § 11.5 of the IC, which sets forth duties of cooperation related to tax disputes, states:

> 11.5 Mutual Cooperation. In any contest of a tax or fee by one Party, the other Party shall cooperate fully by providing records, testimony and such additional information or assistance as may reasonably be necessary to pursue the contest. Further, the other Party shall be reimbursed for any reasonable and necessary out-of-pocket copying and travel expenses incurred in assisting in such contest.

23. BellSouth's broad duty to cooperate in tax disputes clearly includes assisting DIALOG in those cases where BellSouth has standing and DIALOG may not. This is

exactly the situation recognized by Judge Crittenden when he ordered DIALOG to make a "demand" to BellSouth to file a refund claim. Since BellSouth has not honored § 11.5 of the IA, it should not be permitted to treat the tax dispute as "resolved" until it has provided the assistance reasonably necessary to pursue the contest of the tax.

COUNT III

Invalid Late Charges

24. Throughout the course of the Parties' interconnection agreement, when BellSouth has over-billed DIALOG for services and charges, these billings were properly disputed. As a result of these over-billings, DIALOG withheld payment of the disputed portions of the erroneous carrier bills as provided for in the IA In spite of this, BellSouth tracks these amounts as unpaid while the disputes are pending and assesses DIALOG late charges on its account. While BST states that these late charges will be credited if a dispute is resolved in Dialog's favor, according to the terms of the IA Dialog must either dispute or pay the late fees each month while BST is considering the original dispute, and furthermore BST's failure to act upon these disputes creates the appearance of significant unpaid balances due within BST. This would not have become unduly burdensome for Dialog if BST had acted upon the disputes in a timely fashion as outlined in the IC (Attachment 1, § 7.6.4, which provides that parties will endeavor to resolve disputes within 60 days) but BST has consistently failed to address disputes within this timeframe, causing both significant late fees and the appearance within BellSouth of significant unpaid balances due. These incorrect balances result in inappropriate review and the constant threat of an imposition of a

security deposit to reduce the apparent risk created by BST's inaction on these issues. DIALOG asks that the Commission direct BST to remove from DIALOG's invoice any disputed items and to not accumulate late fees against disputed items until such time as they are resolved in BellSouth's favor. Dialog currently has outstanding disputes older than 60 days of $489,050.31 including accumulated late charges of $45,630.95.

PRAYER FOR EXPEDITED RELIEF

WHEREFORE, for the foregoing reasons, DIALOG respectfully requests that the Commission:

1) Require that BellSouth immediately cease all credit and collections activity against Dialog, including application of late fees, threats and imposition of service interruptions and threat and imposition of a security deposit, related to properly disputed items that have not been resolved;
2) Find that BST has and continues to improperly bill Dialog for tandem switching, and require that refunds be issued for these charges and all related past due charges, and further require that BST not bill these elements in the future until such time as BST can determine if those elements have been used or another arrangement is negotiated between the parties;
3) Require that BellSouth immediately restore electronic ordering and account management capabilities to DIALOG;
4) Require that BellSouth file a refund request with the Kentucky Revenue Cabinet related to all taxes collected on UNEs provided to DIALOG and assist Dialog in good faith to reach resolution of these disputes;

5) Require that BellSouth refund all amounts that DIALOG has overpaid, plus interest at the rate established in the Parties' Interconnection Agreement;

6) Require that BellSouth immediately apply credits to Dialog's account for all disputed items older than 60 days and for all accumulated late fees based on these disputed items; and

7) Require such other relief as the Commission deems just and reasonable.

Respectfully Submitted:

DIALOG TELECOMMUNICATIONS, INC.

By: Douglas F. Brent

C. Kent Hatfield
Douglas F. Brent
STOLL, KEENON & PARK, LLP
2650 AEGON Center
Louisville, KY 40202
502-568-9100

CERTIFICATE OF SERVICE

It is hereby certified that this 2nd day of March, 2005 I have served the within Amended Complaint on the following by deposit in the U. S. Mail, first class.

Counsel for Dialog Telecommunications

Dorothy Chambers, Esquire
BellSouth Telecommunications
P. O. Box 32410
601 West Chestnut Street, Room 407
Louisville, KY. 40232

EXHIBIT 1

BELLSOUTH

Kenneth F. Chapman
Tax Manager – State & Local Taxes
Suite 16A
1155 Peachtree Street, N.E.
Atlanta, GA 30309-3610
Telephone: (404) 249-3624

February 17, 2005

Mr. Jim Bellina
President
Dialog Telecommunications, Inc.
756 Tyvola Road
Suite 100
Charlotte, NC 28217

Certified Mail Receipt 7002 0860 0006 8062 8465

Re: Commonwealth of Kentucky, Franklin Circuit Court Division I, Case 03-CI-1617

Dear Mr. Bellina:

In the matter of *Dialog Telecommunications, Inc. v. The Commonwealth of Kentucky and The Kentucky Revenue Cabinet*, the court ordered that your company, the Plaintiff, "make a formal written demand to BellSouth to file a refund claim in its behalf". BellSouth acknowledges receipt of numerous emails from your company requesting that such a refund be filed.

As I have communicated in prior email messages, it is our position that BellSouth has no obligation to file a refund claim on Dialog's behalf because your company has not paid the disputed Kentucky sales taxes for which a refund would be sought. We have spoken about this matter with a representative of the Kentucky Department of Revenue and we are satisfied that our position is sound.

From a tax perspective we consider the matter closed. I would refer you to BellSouth's customer care organization to continue the discussions about the ongoing status of your account.

Sincerely,

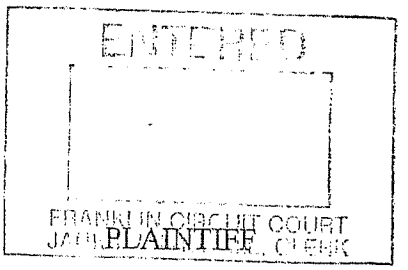
Ken Chapman

Kenneth F. Chapman

Cc: Mr Keith Landry, Senior Tax Counsel-BellSouth Corporation
Ms. Leisa Mangina, Supervisor, BellSouth Accounts Receivable Management

EXHIBIT 2

COMMONWEALTH OF KENTUCKY
FRANKLIN CIRCUIT COURT
DIVISION I
CASE NO. 03-CI-1617



DIALOG TELECOMMUNICATIONS, INC.

PLAINTIFF

v.

ORDER

THE COMMONWEALTH OF KENTUCKY
and THE KENTUCKY REVENUE CABINET

DEFENDANTS

* * * * * * *

The Kentucky Revenue Cabinet filed a Motion to Dismiss (the "Motion"), Plaintiff filed a response and a hearing was held. The Court having considered the arguments of both parties and being sufficiently advised, it hereby ORDERS that the Motion shall be held in abeyance until further order of the Court. The Court further ORDERS that the Plaintiff shall make a formal written demand to Bell South to file a refund claim on its behalf.

ROGER L. CRITTENDEN, JUDGE
FRANKLIN CIRCUIT COURT DIVISION I

Tendered by:

Laura M. Ferguson

Laura M. Ferguson
Revenue Cabinet,
Commonwealth of Kentucky
Division of Legal Services
P.O. Box 423
Frankfort, Kentucky 40602-0423
Phone: (502) 564-3112
Fax: (502): 564-4044

EXHIBIT 3

BELLSOUTH

BellSouth Interconnection Services
675 West Peachtree Street, NE
Room 34S91
Atlanta, Georgia 30375

Lynn Allen Flood
(404) 927-1376
Fax: (404) 529-7839

Sent by EMAIL

May 5, 2004

Mr. Patrick L. Eudy
Chairman
Dialog Telecommunications, Inc.
1927 Pinewood Circle
Charlotte, NC 28211

Dear Pat:

This is to advise that BellSouth has identified an Unbundled Network Element-Platform (UNE-P) billing issue involving the Unbundled Tandem Switching rate element.

In the case of interoffice local calls and intraLATA toll calls where BellSouth is the Local Primary Interexchange Carrier (LPIC), where such calls originate with a UNE-P Competitive Local Exchange Carrier (CLEC) and terminate to BellSouth, an Independent Company (ICO) or Facility-Based CLEC, the use of a tandem switch is not recorded during the call. BellSouth has determined that the Unbundled Tandem Switching Rate has been applied to all calls in this scenario. To resolve this issue, BellSouth has studied the use of the tandem switch for this call type and has derived a percentage of tandem use that, when multiplied by the Unbundled Tandem Switching rate, results in a Melded Tandem Switching rate that represents the applicable charges for tandem switching for these types of calls.

Attached is an amendment to the Interconnection Agreement between BellSouth and Dialog Telecommunications, Inc.. The amendment serves to clarify the application of the Melded Tandem Switching Rate. Please sign two copies of the signature page and return to me at your earliest convenience. To facilitate processing, a fax of the signature page is requested followed by mailing of the two original signed signature pages.

If there are any additional questions, please contact me at 404-927-1376.

Sincerely,

Lynn Allen Flood
Manager, Interconnection Services

Attachment