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November 17, 2004

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PUBLIC SERVICE
COMMISSION

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

RE: 2004-00369 – FCC Rule Governing the Effective Date of Rules

Dear Ms. O'Donnell:

Dialog responded to oppose BellSouth's motion to dismiss and BellSouth has filed a lengthy reply to Dialog. The purpose of this letter is to address a single issue raised in BellSouth's reply, related to when FCC rule changes become effective.

BellSouth claims the Kentucky Commission has "ruled" that FCC Orders are effective upon release. And indeed, it appears that in two recent orders in Case No. 2004-00235 the Commission found legal effect in the *release* date, as opposed to the *effective* date, of an FCC Order. As discussed below, that Commission finding was wrong as a matter of *federal* law. Since the Commission permitted the adoption of the agreement anyway, the Commission's legal error did not prejudice the CLEC adopting the agreement. However, there is no reason that the Commission should reach the same erroneous conclusion here.

FCC Rule 1.4 details "the method for computing the amount of time within which persons or entities must act in response to deadlines established by the Commission." The rule governs the computation of time in all FCC proceedings, including rulemakings required by the Administrative Procedure Act to be published in the Federal Register. CC Docket 01-388, in which the FCC eliminated the "pick and choose" rule, 47 CFR § 51.809, was just such a proceeding. The revised version of Rule 809 was thus not effective on July 13, 2004, the release date of the Order. Rather, it was effective upon publication in the Federal Register. *See* 47 CFR § 1.4(b)(1).

Similarly, the FCC's Interim Rules Order, issued in the same docket, did not become effective until September 13, 2004, when it was published in the Federal Register. As BellSouth

has conceded, Dialog had provided its notice of adoption to BellSouth eleven days earlier, on September 2, 2004. BellSouth's November 15 Response to Dialog mischaracterizes Dialog's notice as a "request" to adopt, Response at 4-5, as if it was a request BellSouth had the power to deny. This is obviously wrong. As the Commission is aware, adoption of an interconnection agreement is Dialog's *federal statutory right*. 47 USC § 251(i).

Sincerely,

A handwritten signature in black ink, appearing to read 'D. Brent', with a long horizontal line extending to the right.

Douglas F. Brent
Counsel to Dialog Communications

Enc.

cc: Parties of record

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1 of 5 DOCUMENTS

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*** THIS SECTION IS CURRENT THROUGH THE NOVEMBER 12, 2004 ISSUE OF ***
*** THE FEDERAL REGISTER ***

TITLE 47 -- TELECOMMUNICATION
CHAPTER I -- FEDERAL COMMUNICATIONS COMMISSION
SUBCHAPTER A -- GENERAL
PART 1 -- PRACTICE AND PROCEDURE
SUBPART A -- GENERAL RULES OF PRACTICE AND PROCEDURE
GENERAL

47 CFR 1.4

§ 1.4 Computation of time.

(a) Purpose. The purpose of this rule section is to detail the method for computing the amount of time within which persons or entities must act in response to deadlines established by the Commission. It also applies to computation of time for seeking both reconsideration and judicial review of Commission decisions.

(b) General Rule -- Computation of Beginning Date When Action is Initiated by Commission or Staff. Unless otherwise provided, the first day to be counted when a period of time begins with an action taken by the Commission, an Administrative Law Judge or by members of the Commission or its staff pursuant to delegated authority is the day after the day on which public notice of that action is given. See § 1.4(b) (1)-(5) of this section. Unless otherwise provided, all Rules measuring time from the date of the issuance of a Commission document entitled "Public Notice" shall be calculated in accordance with this section. See § 1.4(b)(4) of this section for a description of the "Public Notice" document. Unless otherwise provided in § 1.4 (g) and (h) of this section, it is immaterial whether the first day is a "holiday." For purposes of this section, the term "public notice" means the date of any of the following events: See § 1.4(e)(1) of this section for definition of "holiday."

(1) For all documents in notice and comment and non-notice and comment rulemaking proceedings required by the Administrative Procedure Act, 5 U.S.C. 552, 553, to be published in the FEDERAL REGISTER, including summaries thereof, the date of publication in the FEDERAL REGISTER.

NOTE TO PARAGRAPH (b)(1): Licensing and other adjudicatory decisions with respect to specific parties that may be associated with or contained in rulemaking documents are governed by the provisions of § 1.4(b)(2).

Example 1: A document in a Commission rule making proceeding is published in the FEDERAL REGISTER on Wednesday, May 6, 1987. Public notice commences on Wednesday, May 6, 1987. The first day to be counted in computing the beginning date of a period of time for action in response to the document is Thursday, May 7, 1987, the "day after the day" of public notice.

Example 2: Section 1.429(e) provides that when a petition for reconsideration is timely filed in proper form, public notice of its filing is published in the FEDERAL REGISTER. Section 1.429(f) provides that oppositions to a petition for reconsideration shall be filed within 15 days after public notice of the petition's filing in the FEDERAL REGISTER. Public notice of the filing of a petition for reconsideration is published in the FEDERAL REGISTER on Wednesday, June 10, 1987. For purposes of computing the filing period for an opposition, the first day to be counted is Thursday, June 11, 1987, which is the day after the date of public notice. Therefore, oppositions to the reconsideration petition must be filed by Thursday, June 25, 1987, 15 days later.

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(2) For non-rulemaking documents released by the Commission or staff, including the Commission's section 271 determinations, *47 U.S.C. 271*, the release date.

Example 3: The Chief, Mass Media Bureau, adopts an order on Thursday, April 2, 1987. The text of that order is not released to the public until Friday, April 3, 1987. Public notice of this decision is given on Friday, April 3, 1987. Saturday, April 4, 1987, is the first day to be counted in computing filing periods.

(3) For rule makings of particular applicability, if the rule making document is to be published in the FEDERAL REGISTER and the Commission so states in its decision, the date of public notice will commence on the day of the FEDERAL REGISTER publication date. If the decision fails to specify FEDERAL REGISTER publication, the date of public notice will commence on the release date, even if the document is subsequently published in the FEDERAL REGISTER. See Declaratory Ruling, *51 FR 23059* (June 25, 1986).

Example 4: An order establishing an investigation of a tariff, and designating issues to be resolved in the investigation, is released on Wednesday, April 1, 1987, and is published in the FEDERAL REGISTER on Friday, April 10, 1987. If the decision itself specifies FEDERAL REGISTER publication, the date of public notice is Friday, April 10, 1987. If this decision does not specify FEDERAL REGISTER publication, public notice occurs on Wednesday, April 1, 1987, and the first day to be counted in computing filing periods is Thursday, April 2, 1987.

(4) If the full text of an action document is not to be released by the Commission, but a descriptive document entitled "Public Notice" describing the action is released, the date on which the descriptive "Public Notice" is released.

Example 5: At a public meeting the Commission considers an uncontested application to transfer control of a broadcast station. The Commission grants the application and does not plan to issue a full text of its decision on the uncontested matter. Five days after the meeting, a descriptive "Public Notice" announcing the action is publicly released. The date of public notice commences on the day of the release date.

Example 6: A Public Notice of petitions for rule making filed with the Commission is released on Wednesday, September 2, 1987; public notice of these petitions is given on September 2, 1987. The first day to be counted in computing filing times is Thursday, September 3, 1987.

(5) If a document is neither published in the FEDERAL REGISTER nor released, and if a descriptive document entitled "Public Notice" is not released, the date appearing on the document sent (e.g., mailed, telegraphed, etc.) to persons affected by the action.

Example 7: A Bureau grants a license to an applicant, or issues a waiver for non-conforming operation to an existing licensee, and no "Public Notice" announcing the action is released. The date of public notice commences on the day appearing on the license mailed to the applicant or appearing on the face of the letter granting the waiver mailed to the licensee.

(c) General Rule -- Computation of Beginning Date When Action is Initiated by Act, Event or Default. Commission procedures frequently require the computation of a period of time where the period begins with the occurrence of an act, event or default and terminates a specific number of days thereafter. Unless otherwise provided, the first day to be counted when a period of time begins with the occurrence of an act, event or default is the day after the day on which the act, event or default occurs.

Example 8: Commission Rule § 21.39(d) requires the filing of an application requesting consent to involuntary assignment or control of the permit or license within thirty days after the occurrence of the death or legal disability of the licensee or permittee. If a licensee passes away on Sunday, March 1, 1987, the first day to be counted pursuant to § 1.4(c) is the day after the act or event. Therefore, Monday, March 2, 1987, is the first day of the thirty day period specified in § 21.39(d).

(d) General Rule -- Computation of Terminal Date. Unless otherwise provided, when computing a period of time the last day of such period of time is included in the computation, and any action required must be taken on or before that day.

Example 9: Paragraph 1.4(b)(1) of this section provides that "public notice" in a notice and comment rule making proceeding begins on the day of FEDERAL REGISTER publication. Paragraph 1.4(b) of this section provides that the first day to be counted in computing a terminal date is the "day after the day" on which public notice occurs. Therefore, if the commission allows or requires an action to be taken 20 days after public notice in the FEDERAL REGISTER, the first day to be counted is the day after the date of the FEDERAL REGISTER publication. Accordingly, if the

FEDERAL REGISTER document is published on Thursday, July 23, 1987, public notice is given on Thursday, July 23, and the first day to be counted in computing a 20 day period is Friday, July 24, 1987. The 20th day or terminal date upon which action must be taken is Wednesday, August 12, 1987.

(e) Definitions for purposes of this section:

(1) The term holiday means Saturday, Sunday, officially recognized federal legal holidays and any other day on which the Commission's offices are closed and not reopened prior to 5:30 p.m. For example, a regularly scheduled Commission business day may become a holiday if its offices are closed prior to 5:30 p.m. due to adverse weather, emergency or other closing.

NOTE: As of August 1987, officially recognized federal legal holidays are New Year's Day, January 1; Martin Luther King's Birthday, third Monday in January; Washington's Birthday, third Monday in February; Memorial Day, last Monday in May; Independence Day, July 4; Labor Day, first Monday in September; Columbus Day, second Monday in October; Veterans Day, November 11; Thanksgiving Day, fourth Thursday in November; Christmas Day, December 25. If a legal holiday falls on Saturday or Sunday, the holiday is taken, respectively, on the preceding Friday or the following Monday. In addition, January 20, (Inauguration Day) following a Presidential election year is a legal holiday in the metropolitan Washington, DC area. If Inauguration Day falls on Sunday, the next succeeding day is a legal holiday. See *5 U.S.C. 6103*; Executive Order No. 11582, *36 FR 2957* (Feb. 11, 1971). The determination of a holiday will apply only to the specific Commission location(s) designated as on holiday on that particular day.

(2) The term business day means all days, including days when the Commission opens later than the time specified in Rule § 0.403, which are not holidays as defined above.

(3) The term filing period means the number of days allowed or prescribed by statute, rule, order, notice or other Commission action for filing any document with the Commission. It does not include any additional days allowed for filing any document pursuant to paragraphs (g), (h) and (j) of this section.

(4) The term filing date means the date upon which a document must be filed after all computations of time authorized by this section have been made.

(f) Except as provided in § 0.401(b) of this chapter, all petitions, pleadings, tariffs or other documents not required to be accompanied by a fee and which are hand-delivered must be tendered for filing in complete form, as directed by the Rules, with the Office of the Secretary before 7:00 p.m., at 445 12th St., SW., TW-A325, Washington, DC. The Secretary will determine whether a tendered document meets the pre-7:00 p.m. deadline. Documents filed electronically pursuant to § 1.49(f) must be received by the Commission's electronic filing system before midnight. Applications, attachments and pleadings filed electronically in the Universal Licensing System (ULS) pursuant to § 1.939(b) must be received before midnight on the filing date. Media Bureau applications and reports filed electronically pursuant to § 73.3500 of this Chapter must be received by the electronic filing system before midnight on the filing date.

(g) Unless otherwise provided (e.g., § § 1.773 and 76.1502(e)(1) of this chapter), if the filing period is less than 7 days, intermediate holidays shall not be counted in determining the filing date.

Example 10: A reply is required to be filed within 5 days after the filing of an opposition in a license application proceeding. The opposition is filed on Wednesday, June 10, 1987. The first day to be counted in computing the 5 day period is Thursday, June 11, 1987. Saturday and Sunday are not counted because they are holidays. The document must be filed with the Commission on or before the following Wednesday, June 17, 1987.

(h) If a document is required to be served upon other parties by statute or Commission regulation and the document is in fact served by mail (see § 1.47(f)), and the filing period for a response is 10 days or less, an additional 3 days (excluding holidays) will be allowed to all parties in the proceeding for filing a response. This paragraph (h) shall not apply to documents filed pursuant to § 1.89, § 1.120(d), § 1.315(b) or § 1.316. For purposes of this paragraph (h) service by facsimile or by electronic means shall be deemed equivalent to hand delivery.

Example 11: A reply to an opposition for a petition for reconsideration must be filed within 7 days after the opposition is filed. 47 CFR 1.106(h). The rules require that the opposition be served on the person seeking reconsideration. 47 CFR 1.106(g). If the opposition is served on the party seeking reconsideration by mail and the opposition is filed with the Commission on Monday, November 9, 1987, the first day to be counted is Tuesday, November 10, 1987 (the day after the day on which the event occurred, § 1.4(c)), and the seventh day is Monday,

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November 16. An additional 3 days (excluding holidays) is then added at the end of the 7 day period, and the reply must be filed no later than Thursday, November 19, 1987.

Example 12: Assume that oppositions to a petition in a particular proceeding are due 10 days after the petition is filed and must be served on the parties to the proceeding. If the petition is filed on October 28, 1993, the last day of the filing period for oppositions is Sunday, November 7. If service is made by mail, the opposition is due three days after November 7, or Wednesday, November 10.

(i) If both paragraphs (g) and (h) of this section are applicable, make the paragraph (g) computation before the paragraph (h) computation.

Example 13: Section 1.45(b) requires the filing of replies to oppositions within five days after the time for filing oppositions has expired. If an opposition has been filed on the last day of the filing period (Friday, July 10, 1987), and was served on the replying party by mail, § 1.4(i) of this section specifies that the paragraph (g) computation should be made before the paragraph (h) computation. Therefore, since the specified filing period is less than seven days, paragraph (g) is applied first. The first day of the filing period is Monday, July 13, 1987, and Friday, July 17, 1987 is the fifth day (the intervening weekend was not counted). Paragraph (h) is then applied to add three days for mailing (excluding holidays). That period begins on Monday, July 20, 1987. Therefore, Wednesday, July 22, 1987, is the date by which replies must be filed, since the intervening weekend is again not counted.

(j) Unless otherwise provided (e.g. § 76.1502(e) of this chapter) if, after making all the computations provided for in this section, the filing date falls on a holiday, the document shall be filed on the next business day. See paragraph (e)(1) of this section.

Example 14: The filing date falls on Friday, December 25, 1987. The document is required to be filed on the next business day, which is Monday, December 28, 1987.

(k) Where specific provisions of part 1 conflict with this section, those specific provisions of part 1 are controlling. See, e.g., § 1.45(d), 1.773(a)(3) and 1.773(b)(2). Additionally, where § 76.1502(e) of this chapter conflicts with this section, those specific provisions of § 76.1502 are controlling. See e.g. 47 CFR 76.1502(e).

HISTORY: [52 *FR* 49159, Dec. 30, 1987; 53 *FR* 44196, Nov. 2, 1988, as amended at 56 *FR* 40567, 40568, Aug. 15, 1991; 58 *FR* 17529, April 5, 1993; 61 *FR* 11748, 11749, March 22, 1996; 62 *FR* 4169, 4170, Jan. 29, 1997; 62 *FR* 26235, 26238, May 13, 1997; 62 *FR* 38029, July 16, 1997; 63 *FR* 24121, 24124, May 1, 1998; 63 *FR* 68904, 68919, Dec. 14, 1998; 63 *FR* 70040, 70047, Dec. 18, 1998; 64 *FR* 27200, 27201, May 19, 1999; 64 *FR* 60715, 60725, Nov. 8, 1999; 65 *FR* 46108, 46109, July 27, 2000; 67 *FR* 13216, 13223, Mar. 21, 2002]

AUTHORITY: AUTHORITY NOTE APPLICABLE TO ENTIRE PART:
(47 U.S.C. 151, 154(i), 154(j), 155, 225, 303(r), 309 and 325(e).)

NOTES: [EFFECTIVE DATE NOTE: 67 *FR* 13216, 13223, Mar. 21, 2002, substituted "Media Bureau" for "Mass Media Bureau" in paragraph (f), effective Mar. 25, 2002.]

NOTES APPLICABLE TO ENTIRE CHAPTER:

SUPPLEMENTAL PUBLICATIONS:

Annual Reports of the Federal Communications Commission to Congress.

FCC Record of Orders and Decisions.

Communications Act of 1934 (with amendments and index thereto), Recap. Version to May 1989.

Study Guide and Reference Material for Commercial Radio Operator Examinations, May 1987 edition.

[PUBLISHER'S NOTE: For Federal Register citations concerning Chapter I Petitions for Reconsideration, see: 51 *FR* 2501, 6119, 11037, 11039, 44478, (1986); 52 *FR* 23305, 23551 (1987); 53 *FR* 4624, 8903, 13272, 17040, 40894 (1988); 54 *FR* 13689, 18889, 39152, 49995 (1989); 55 *FR* 7494, 13907, 14285, 50181, 52172 (1990); 56 *FR* 48442, 57823 (1991); 57 *FR* 3952, 27367 (1992); 58 *FR* 14239, Mar. 16, 1993; 58 *FR* 14328, Mar. 17, 1993; 58 *FR* 37867, July 14, 1993; 59 *FR* 40365, July 28, 1993; 58 *FR* 45842, Aug. 31, 1993; 58 *FR* 48459, Sept. 16, 1993; 58 *FR* 51251, Oct. 1, 1993; 58 *FR* 63086, Nov. 30, 1993; 59 *FR* 13661, Mar. 23, 1994; 59 *FR* 28014, May 31, 1994; 59 *FR* 37439, July 22, 1994; 59 *FR* 44272, Aug. 26, 1994; 59 *FR* 44340, Aug. 29, 1994; 59 *FR* 55594, Nov. 8, 1994; 59 *FR* 66254,

Dec. 23, 1994; 60 FR 3099, Jan. 13, 1995; 60 FR 3773, Jan. 19, 1995; 60 FR 31257, 31258, June 14, 1995; 60 FR 43981, Aug. 24, 1995; 64 FR 52464, Sept. 29, 1999; 65 FR 5267, Feb. 3, 2000; 67 FR 5955, Feb. 8, 2002.]

[PUBLISHER'S NOTE: For Federal Register citations concerning Chapter I Final Reports, see: 59 FR 35631, July 13, 1994.]

[PUBLISHER'S NOTE: For Federal Register citations concerning Chapter I Periodic Reviews of Regulations, see: 59 FR 3633, Jan. 25, 1994.]

[PUBLISHER'S NOTE: For Federal Register citations concerning Chapter I Policy Statements, see: 51 FR 9794, 20975 (1986); 52 FR 16386 (1987); 53 FR 13270, 15557 (1988); 56 FR 56937 (1991); 61 FR 11163, Mar. 19, 1996; 62 FR 34634, 34648, June 28, 1997; 65 FR 80367, Dec. 21, 2000; 68 FR 25840, May 14, 2003.]

[PUBLISHER'S NOTE: For Federal Register citations concerning Chapter 1 Orders, see: 51 FR 4918 (1986); 53 FR 501 (1988); 55 FR 7898 (1990); 57 FR 3133, 6481, 33275 (1992); 58 FR 14161 (1993); 59 FR 61284 (1994); 60 FR 18778, 35507, 53544, 53877 (1995); 61 FR 2452, Jan. 26, 1996; 61 FR 14672, Apr. 3, 1996; 61 FR 26466, May 28, 1996; 61 FR 30531, June 17, 1996; 61 FR 35964, July 9, 1996; 62 FR 7690, 7720, Feb. 20, 1997; 62 FR 16093, 16099, Apr. 4, 1997; 62 FR 36216, July 7, 1997; 62 FR 56111, Oct. 29, 1997; 63 FR 42275, Aug. 7, 1998; 63 FR 45956, Aug. 28, 1998; 64 FR 54561, Oct. 7, 1999; 64 FR 61527, Nov. 12, 1999; 64 FR 68053, Dec. 6, 1999; 65 FR 50652, Aug. 21, 2000; 65 FR 55923, Sept. 15, 2000; 66 FR 10965, Feb. 21, 2001; 67 FR 3616, 3617, Jan. 25, 2002, as corrected at 67 FR 13291, Mar. 22, 2002]

NOTES APPLICABLE TO ENTIRE PART:

[PUBLISHER'S NOTE: For Federal Register citations concerning Part 1 Reports to Congress, see: 59 FR 53363, Oct. 24, 1994.]

[PUBLISHER'S NOTE: For Federal Register citations concerning Part 1 Comment time extended, see: 60 FR 10038, Feb. 23, 1995.]

[PUBLISHER'S NOTE: For Federal Register citations concerning Part 1 Clarifications, see: 60 FR 39656, Aug. 3, 1995; 61 FR 66931, Dec. 19, 1996; 67 FR 17009, Apr. 9, 2002.]

[PUBLISHER'S NOTE: For Federal Register citations concerning Part 1 Report and Orders, see: 57 FR 3133 (1992); 59 FR 8413, 53363 (1994); 60 FR 64348, Dec. 15, 1995; 61 FR 45903, Aug. 30, 1996; 62 FR 38475, July 18, 1997; 63 FR 2170, Jan. 14, 1998; 63 FR 10153, March 2, 1998; 63 FR 42734, Aug. 11, 1998; 63 FR 63612, Nov. 16, 1998; 64 FR 42854, Aug. 6, 1999; 64 FR 69926, Dec. 15, 1999; 67 FR 63850, Oct. 16, 2002; 67 FR 67567, Nov. 6, 2002; 67 FR 77173, Dec. 17, 2002; 68 FR 58629, Oct. 10, 2003; 69 FR 30234, May 27, 2004; 69 FR 30587, May 28, 2004.]

[PUBLISHER'S NOTE: For Federal Register citations concerning Part 1 Opinion and Order, see: 62 FR 39450, July 23, 1997; 63 FR 24126, May 1, 1998; 65 FR 4891, Feb. 2, 2000; 66 FR 29722, June 1, 2001.]

[PUBLISHER'S NOTE: For Federal Register citations concerning Part 1 temporary procedural requirements, see: 66 FR 62991, Dec. 4, 2001; 67 FR 3441, Jan. 24, 2002; 67 FR 3620, Jan. 25, 2002, as withdrawn at 67 FR 7287, Feb. 19, 2002.]

[PUBLISHER'S NOTE: For Federal Register citations concerning Part 1 interpretations, see 67 FR 49242, July 30, 2002.]

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