

Cheryl R. Winn
Attorney At Law

December 2, 2005

Ms. Beth O'Donnell
Executive Director
Kentucky Public Service Commission
211 Sower Boulevard
P.O. Box 615
Frankfort, KY 40602


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COMMISSION

Re: Dialog Telecommunications, Inc., Complainant v. BellSouth
Telecommunications, Inc., Defendant
KPSC 2005-00095

Dear Ms. O'Donnell:

Enclosed for filing in the above-captioned case is the original and ten (10) copies of BellSouth Telecommunications, Inc.'s Motion to Dismiss Dialog's Complaint.

Very truly yours,


Cheryl R. Winn

Enclosures

cc: Parties of Record

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COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

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

**BELLSOUTH TELECOMMUNICATIONS, INC.'S
MOTION TO DISMISS DIALOG'S COMPLAINT**

BellSouth Telecommunications, Inc. ("BellSouth"), by counsel, hereby moves the Commission to dismiss Dialog's Complaint.

INTRODUCTION

In its Complaint, Dialog claims BellSouth has breached the parties' interconnection agreement ("ICA") in the following manner: (1) BellSouth allegedly billed improperly the unbundled tandem switching rate element; and (2) BellSouth allegedly collected sales tax improperly on UNEs from Dialog and remitted the UNEs sales tax to the Department of Revenue of the Commonwealth of Kentucky ("Department of Revenue").¹ As explained more fully below, BellSouth has accurately billed Dialog for services and unbundled network elements ("UNEs") provided pursuant to the parties' ICA, including assessing appropriate late payment charges ("LPCs"). Moreover, the Complaint should be dismissed in its entirety because BellSouth has offered to provide all of the relief to which Dialog possibly could be entitled.²

¹Dialog asserted a third claim for improperly billed LPCs. (Complaint, ¶ 24). The LPC claim wholly arises out of the billing associated with the first two claims. Because the first two claims lack merit, all associated LPCs were properly billed and Dialog's LPC claim must likewise fail.

² In the interest of full disclosure and cooperation, even though BellSouth has no obligation to do so and the Commission has not even issued a procedural order for data requests, without waiving its objections, BellSouth responded to Dialog's Data Requests.

Finally, this Commission is not the appropriate venue for Dialog's sales tax claim, the Kentucky Department of Revenue is the appropriate venue.

DISCUSSION

I. Because Dialog has refused to amend its Interconnection Agreement with respect to tandem switching, BellSouth has properly followed its ICA with Dialog in its billing of tandem switching charges.

In 2003, BellSouth discovered that Unbundled Tandem Switching charges were being applied to all interoffice calls that originate from a UNE-P CLEC customer and terminate to a customer of BellSouth, an Independent Telephone Company ("ICO"), or a facilities-based CLEC. Thereafter, BellSouth studied the use of the tandem switch for such call types and derived a percentage of tandem use that, when multiplied by the Unbundled Tandem Switching rate, results in a Melded Tandem Switching rate representing the applicable charge for tandem switching for those types of calls. As a result, BellSouth notified all CLECs of the Tandem Switching billing issue, and offered a proposed ICA amendment to all CLECs, including Dialog, to rectify the situation. *See* Exhibit 1 to Dialog Complaint. To date, approximately 83% of the UNE-P CLECs operating in Kentucky have executed the appropriate amendment and, thus, are being billed the Melded Tandem Switching rate element.

To date, however, and despite being given opportunity to do so, Dialog has failed to sign an appropriate amendment to its ICA to add the appropriate switching rate element. BellSouth is contractually obligated to charge Dialog the rates contained in its ICA with BellSouth. Accordingly, because Dialog has not signed the Melded Tandem Switching Rate agreement ("MTSR"), BellSouth has not, and cannot, unilaterally change the amounts it bills for tandem

switching.³ Because BellSouth has billed Dialog pursuant to the terms of its ICA, the Commission should dismiss Dialog's claim concerning the tandem switching rate element.

II. Dialog's claim involving sales tax that Kentucky law requires BellSouth to charge Dialog for its purchase of UNEs is not properly before this Commission and should be dismissed.

Kentucky law requires BellSouth to collect and remit sales tax on UNEs purchased by Dialog and other carriers for resale. 103 KAR 28:140. Although Dialog takes issue with the correctness of BellSouth collecting and remitting the tax to the Commonwealth, the Kentucky Public Service Commission is not the appropriate venue for resolving the tax issue. The sales tax issue rests squarely within the jurisdiction of the Kentucky Department of Revenue. KRS 139.770. Dialog has presented arguments to the Department of Revenue and those arguments have been considered and squarely rejected. See attached October 31, 2003, letter from Richard Dobson to Dialog's former counsel, Edward Depp. Despite Dialog's protestation, the final determination of the applicability of sales tax to UNEs rests with the Department of Revenue. All arguments notwithstanding, BellSouth is legally required to collect and remit this tax. Accordingly, because the jurisdiction over this tax issue rests solely with the Kentucky Department of Revenue, BellSouth requests this Commission dismiss the count of Dialog's complaint that seeks a determination over which the Kentucky Public Service Commission has no jurisdiction.

Finally, Dialog's original Complaint filed with this Commission sought to require BellSouth to file a refund request. At the informal conference held in this matter on June 21, 2005, BellSouth agreed to Dialog's request that BellSouth file a refund request with the Department of Revenue. Subsequent to the informal conference, Dialog amended its complaint

³ The amendment for a MTSR agreement is still available for Dialog to execute and BellSouth will bill Dialog at the melded tandem switching rate if and when Dialog executes an appropriate amendment to its ICA.

and deleted its request for BellSouth to file the refund request.⁴ Despite Dialog's ever-changing position on the sales tax issue, BellSouth has offered to file a refund request on Dialog's behalf and, to date, Dialog has declined BellSouth's offer.⁵ Dialog is not entitled to the relief it seeks from this Commission on its tax issue; indeed, this Commission is not the appropriate authority to decide the tax issue. Accordingly, the Commission should dismiss Dialog's sales tax claim.

CONCLUSION

BellSouth respectfully requests the Commission dismiss Dialog's Complaint because BellSouth has already offered Dialog all of the relief to which it possibly could be entitled in this proceeding. Specifically, with respect to the tandem billing issue, BellSouth has billed Dialog the rates as required by its ICA. BellSouth has offered Dialog an appropriate amendment to its ICA with respect to melded tandem switching rate element, but Dialog has refused to amend its agreement.

With respect to the sales tax issue, the Kentucky Department of Revenue, not this Commission, is the appropriate body with jurisdiction over the application of sales tax to UNEs. Moreover, BellSouth has offered to file a refund claim on Dialog's behalf, but again, Dialog has refused BellSouth's offered assistance.

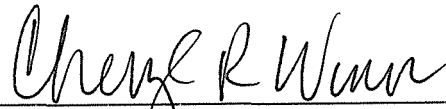
Finally, the merits of Dialog's late payment charge claim necessarily rises and falls with resolution of the underlying claims on the tandem switching and sales tax issues. Because Dialog's claims with respect to the tandem switching and sales tax issues lack merit, the Commission should likewise dismiss its late payment charge claim.

Accordingly, for the foregoing reasons, BellSouth respectfully moves this Commission to dismiss Dialog's Complaint for naught.

⁴ The Commission has not acted on Dialog's attempt to amend its Complaint.

⁵ BellSouth still stands ready and willing to file a refund request, which posits Dialog's arguments, with the Department of Revenue.

Respectfully submitted,



Dorothy J. Chambers
Cheryl R. Winn
601 W. Chestnut Street, Room 407
Louisville, KY 40203
(502) 582-1475

Robert A. Culpepper
675 W. Peachtree St., NE, Suite 4300
Atlanta, GA 30375
(404) 335-0841

COUNSEL FOR BELLSOUTH
TELECOMMUNICATIONS, INC.

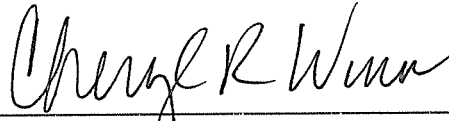
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CERTIFICATE OF SERVICE

It is hereby certified that a true and correct copy of the foregoing was served on the following individuals by mailing a copy thereof, this 2nd day of December, 2005.

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

Honorable Douglas F. Brent
Attorney at Law
Stoll, Keenon & Park, LLP
2650 AEGON Center
400 West Market Street
Louisville, KY 40202
brent@skp.com



Cheryl R. Winn