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April 27, 2007

VIA FEDERAL EXPRESS

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

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APR 30 2007

PUBLIC SERVICE
COMMISSION

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

Dear Ms. O'Donnell:

Enclosed for filing in the above-referenced matter are the original and ten (10) copies of AT&T Kentucky's Response to Dialog's Motion for Rehearing and Motion to Strike.

Sincerely,


Mary K. Keyer

cc: Parties of Record

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COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

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APR 30 2007

PUBLIC SERVICE
COMMISSION

In the Matter of:

DIALOG TELECOMMUNICATIONS, INC.)
)
v.)
)
BELLSOUTH TELECOMMUNICATIONS, INC.)

CASE NO. 2005-00095

**RESPONSE TO DIALOG'S MOTION FOR REHEARING AND
MOTION TO STRIKE**

BellSouth Telecommunications, Inc., d/b/a AT&T Kentucky ("AT&T Kentucky"),¹ respectfully submits this response to the Motion for Reconsideration or, in the Alternative, to Reopen and Modify Order to Conform to Applicable Law ("Recon Motion") filed by Dialog Telecommunications, Inc. ("Dialog") on or about April 11, 2007. For the reasons set forth herein, the Kentucky Public Service Commission ("Commission") should deny Dialog's Recon Motion. In the alternative, because Dialog has appealed the Commission Order which is the subject of Dialog's Recon Motion, the Commission should deny the Recon Motion as moot,² or simply refrain from ruling on the Recon Motion, which will result in the denial of the Recon Motion in accordance with KRS § 278.400.³

Additionally, AT&T Kentucky respectfully requests for the Commission to issue an Order striking the affidavit of Steven L. Lenarz, which was attached to Dialog's

¹ Because of the merger between BellSouth and AT&T, BellSouth Telecommunications, Inc., is now doing business in the Commonwealth of Kentucky as AT&T Kentucky and will be referred to herein as "AT&T Kentucky" rather than "BellSouth."

² On April 16, 2007, Dialog appealed the Commission's Order granting AT&T Kentucky's Motion for Rehearing. See Franklin Circuit Court, Civil Action No. 07-CI-635.

³ KRS § 278.400 provides in relevant part that "The Commission shall either grant or deny the application for rehearing within twenty (20) days after it is filed, and failure of the commission to act upon the application within that period shall be deemed a denial of the application."

Recon Motion. As explained herein, the affidavit is irrelevant, untimely, and improper. Moreover, because the affidavit was submitted after the Commission rendered its rulings in this case – rulings that are now on appeal – the Commission should strike the affidavit to ensure an appropriate and accurate appellate record.

BACKGROUND

In its Recon Motion, Dialog seeks reconsideration of the Commission's order dated March 23, 2007 ("*Recon Order*"). In the *Recon Order*, the Commission corrected an error of fact contained in the Commission's original order dated February 8, 2007 ("*Original Order*"). In the *Original Order*, the Commission incorrectly noted that Dialog had paid sales tax on unbundled network elements ("UNEs") purchased from AT&T Kentucky.⁴ This mistake of fact was understandable, given Dialog's misrepresentation that it had paid the disputed tax amount.⁵ In the *Recon Order*, the Commission simply corrected this mistake of fact.⁶ As such, the record now correctly reflects the uncontested fact that Dialog has wrongfully withheld payment of over \$530,000 in an attempt to effectively avoid payment of taxes which it contends it should not be obligated to pay.

Based on the language of the parties' interconnection agreement regarding payment of taxes, and the uncontested fact that Dialog had withheld payment of the tax

⁴ *Original Order* at 3.

⁵ In May 2006, Dialog filed a letter with the Commission wherein Dialog affirmatively asserted that:

[W]hile waiting for the Commission to decide the narrow question of law raised in Count II of Dialog's complaint [the tax on UNEs issue], Dialog in good faith continued to honor BellSouth's erroneous invoices for "sales tax" on network elements. In addition, *as it always has*, Dialog has continued to pay Kentucky sales taxes on its sales of communications services to its thousands of Kentucky customers. In other words, Dialog has been doubly burdened with "tax" obligations while awaiting action on the complaint.

Letter of Douglas F. Brent to Beth O'Donnell, Executive Director of the Kentucky Public Service Commission, dated May 5, 2006, at 2 (emphasis in original).

⁶ *Recon Order* at 2 (noting that "Dialog did not dispute the allegation that it had withheld payment of the tax.")

in question, the Commission correctly concluded that “Dialog must pay AT&T Kentucky the tax in question.”⁷ Of course, Dialog wishes to continue side-stepping its contractual obligation to pay AT&T Kentucky over \$530,000, and therefore has filed a procedurally improper motion that asks this Commission to inappropriately rewrite the parties’ interconnection agreement in a manner favorable to Dialog.

DIALOG’S MOTION FAILS TO MEET THE REQUIREMENTS OF KRS § 278.400

Incredibly, in its Recon Motion, Dialog does not even bother to cite Kentucky’s reconsideration statute – KRS § 278.400. This may be by design, because the relevant language of KRS § 278.400 requires the Commission to disregard the substance of Dialog’s Recon Motion. Specifically, KRS § 278.400 states in relevant part that “[u]pon the rehearing any party may offer additional evidence that could not with reasonable diligence have been offered on the former hearing.” Dialog makes two basic arguments in its Recon Motion: (1) that the Commission misinterpreted the plain language of the parties’ interconnection agreement (contract language that requires Dialog to pay the tax in question); and (2) that under Kentucky tax law, AT&T Kentucky may pursue a tax refund of amounts that Dialog has refused to pay. The first argument lacks merit. The second argument is irrelevant. Both arguments are untimely.

The parties’ contract, quoted by the Commission in its *Recon Order*, requires Dialog to pay the tax in question.⁸ In addition to being unpersuasive, Dialog’s contract arguments are untimely – the time for Dialog to attempt to convince the Commission “that the contract doesn’t really mean what it says” was in opposing AT&T Kentucky’s

⁷ *Recon Order* at 3.

⁸ In addition to the contract language cited by the Commission, other contract language, including the language set forth in Section 11.4.3 of the General Terms and Conditions portion of the parties’ interconnection agreement requires Dialog to pay the amount it has withheld.

Recon Motion. Dialog failed to do so.⁹ In its Recon Motion, AT&T Kentucky argued (and demonstrated) that the parties' contract required payment of the tax in question by Dialog. Dialog's arguments to the contrary should have been contained in its response to AT&T Kentucky's motion.

Dialog's tax refund procedure/analysis argument is untimely and irrelevant. In its *Original Order*, the Commission held that Dialog should participate in any tax refund effort undertaken by AT&T Kentucky, *as required by the parties' interconnection agreement*.¹⁰ Of course, the tax portion of the parties' interconnection agreement¹¹ requires Dialog to pay the tax in question. Dialog did not seek reconsideration of the Commission's *Original Order*. Accordingly, Dialog's efforts to avoid its contractual obligations by submitting an affidavit concerning Kentucky tax law is nothing more than a convoluted and veiled attempt to move for reconsideration of the *Original Order*. As such, the Kentucky tax law argument is untimely. Moreover, it cannot be credibly argued that the affidavit "could not with reasonable diligence have been [previously] offered." KRS § 278.400.

In any event, the affidavit is irrelevant. In its *Recon Order*, the Commission simply held that Dialog had a **contractual obligation** to pay the tax in question. In doing so, the Commission did not rely on, nor attempt to interpret, Kentucky tax law. As such, Dialog's tax law arguments are completely irrelevant.¹²

⁹ See Response of Dialog to BellSouth's Motion for Rehearing dated March 16, 2007.

¹⁰ *Original Order* at 6 (requiring Dialog to "assist BellSouth in this [tax refund] endeavor . . . as required by their interconnection agreement.)

¹¹ Section 11 of the General Terms and Conditions portion of the parties' interconnection agreement contains three (3) pages that are exclusively devoted to taxes.

¹² In addition to being irrelevant, Dialog's tax law argument cannot be reconciled with its repeated assertion that "DIALOG is not asking the Commission to adjudicate this sales tax claim." See e.g. Count II of Dialog's Complaint and Amended Complaint. If true, then why has Dialog submitted for the Commission's review an affidavit from a tax attorney regarding the attorney's view of Kentucky tax refund law and procedure?

THE STATUTE AND CASES CITED BY DIALOG ARE NOT APPLICABLE

In support of its Recon Motion, Dialog cites three Commission Orders for the general proposition that “the Commission has previously reopened cases when necessary for the purpose of modifying its orders[.]” Dialog Recon Motion at pp. 3-4. The cases cited by Dialog have no application whatsoever to the facts and procedural posture of this case. Rather, each case involved a straightforward (and apparently uncontested) request to modify a minor aspect of a Commission Order which had granted the moving party a Certificate of Public Convenience and Necessity to construct certain telecommunications facilities.¹³ Moreover, each of those orders contained language that provided for the parties to notify the Commission if they do not use the towers addressed in the orders in the manner set out in their applications and the orders. To state the obvious, the *Recon Order* has nothing to do with the issuance of a certificate of public convenience. Further, Dialog made no attempt to explain how these irrelevant cases somehow apply to this matter.

¹³ In the matter of: APPLICATION OF KENTUCKY CSGA, INC. FOR ISSUANCE OF A CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY TO CONSTRUCT AN ADDITIONAL CELL SITE IN LEXINGTON, KENTUCKY FOR THE PROVISION OF DOMESTIC PUBLIC CELLULAR RADIO TELECOMMUNICATIONS SERVICE TO THE PUBLIC IN FAYETTE COUNTY, KENTUCKY AND THE LEXINGTON MSA, Case No. 97-253, Order issued September 30, 1998 (granting motion which requested that an Order “granting a Certificate of Public Convenience and Necessity to construct and operate a monopole antenna tower not to exceed 130 feet with attached antennas, be modified to permit Kentucky CSGA to increase the height of the tower to 133 feet.”); In the Matter of: APPLICATION OF HORIZON CELLULAR TELEPHONE COMPANY OF CENTRAL KENTUCKY, L.P., A DELAWARE LIMITED PARTNERSHIP, FOR ISSUANCE OF A CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY TO CONSTRUCT AN ADDITIONAL CELL FACILITY IN THE KENTUCKY RURAL SERVICE AREA NO. 6 WHICH INCLUDES CASEY, LINCOLN, ROCKCASTLE, PULASKI, AND LAUREL COUNTIES IN KENTUCKY (THE LIBERTY CELL SITE), Case No. 96-008, Order issued August 28, 1996 (granting motion to allow the construction of a cellular tower not to exceed 405 feet, rather than the 360 foot height limitation set forth in the Commission’s original Order); In the Matter of: THE APPLICATION OF CROWN COMMUNICATION INC., NEXTEL WEST CORP., AND POWERTEL/KENTUCKY, INC. FOR ISSUANCE OF CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY TO CONSTRUCT A WIRELESS COMMUNICATIONS FACILITY AT 8000 BLOCK WOLF PEN BRANCH ROAD IN THE TRUNKED SMR LICENSE AREA AND BASIC TRADING AREA IN THE COMMONWEALTH OF KENTUCKY IN THE COUNTY OF JEFFERSON SITE NAME: BROWNSBORO FARM, Case No. 98-173, Order issued May 27, 1999 (granting motion permitting Crown Communication, Inc. to amend engineering drawings filed prior to the Commission’s issuance of a certificate of public convenience and necessity).

From a statutory perspective, Dialog cites KRS § 278.390 in support of its Recon Motion. The relevant language of this statute provides that “[t]he commission may compel obedience to its lawful orders by mandamus, injunction, or other proper proceedings” To the extent KRS § 278.390 is applicable, the statute gives the Commission the power to require Dialog to obey its *Recon Order* and therefore pay AT&T Kentucky the amounts Dialog has a contractual obligation to pay. In sum, the Commission should correctly conclude that the Commission Orders and statute cited by Dialog provide no legitimate basis for granting its Recon Motion.

MOTION TO STRIKE

AT&T Kentucky moves for the Commission to strike the affidavit of Steven L. Lenarz, which was submitted as part of the Recon Motion. As previously stated, the Lenarz affidavit is irrelevant because it does not address the core ruling made by the Commission in its *Recon Order* – that is, Dialog has a contractual obligation to pay the amounts it has withheld from AT&T Kentucky. Indeed, the affidavit does not even mention the parties’ interconnection agreement.

Further, the affidavit is procedurally improper because it is an untimely attack on the Commission’s *Original Order*. Again, in its *Original Order*, the Commission ruled that Dialog must participate in any tax refund effort undertaken by AT&T Kentucky, as *required by the parties’ interconnection agreement*.¹⁴ Again, the interconnection agreement requires Dialog to pay the tax in question. Dialog did not seek reconsideration of the Commission’s *Original Order*. Rather, after the Commission issued its *Recon Order*, Dialog submitted an affidavit that stands for the misguided (and incorrect) proposition that Kentucky tax law absolves Dialog from its contractual

¹⁴ *Original Order* at 6 (requiring Dialog to “assist BellSouth in this [tax refund] endeavor . . . as required by their interconnection agreement.”)

obligation to pay the amounts it has wrongfully withheld. The time for making such arguments has long since passed.

Moreover, the affidavit contains improper legal conclusions regarding Kentucky sales tax law. Among other things, the affidavit purports to offer definitive legal opinions regarding: (i) the imposition of sales tax under Kentucky law; (ii) how to challenge the imposition of a sales tax under Kentucky law; and (iii) when a lien arises for unpaid taxes under Kentucky law. In addition to being improper, these legal conclusions are irrelevant because the Commission ordered the parties to seek a tax refund *in accordance with the parties' interconnection agreement*.¹⁵ Finally, the affidavit was submitted after the Commission issued its *Original Order* and *Recon Order*. Dialog has now appealed the *Recon Order*. To ensure a proper record on appeal, the Commission should strike the affidavit for the reasons stated herein.¹⁶

CONCLUSION

For the reasons stated herein, the Commission should deny Dialog's Recon Motion. *Upon Dialog's payment of the tax in question -- AT&T Kentucky remains ready, willing, and able to pursue a refund of such amount as set forth in the Original Order and Recon Order and in accordance with the parties' interconnection agreement.* In the alternative, because Dialog has appealed the *Recon Order*, the Commission can deny Dialog's Recon Motion as moot, or refrain from ruling on the Recon Motion, which will result in the Recon Motion being deemed denied in accordance with KRS § 278.400.

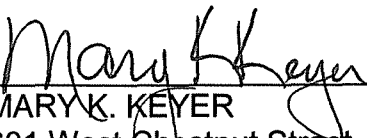
Additionally, for the reasons stated herein, the Commission should grant AT&T Kentucky's motion to strike the affidavit of Steven L. Lenarz, which was attached to

¹⁵ *Original Order* at 6; *Recon Order* at 3.

¹⁶ KRS § 278.440.

Dialog's Recon Motion. Striking the affidavit will ensure a proper record on appeal in accordance with KRS §§ 278.420 and 278.440 and other applicable law.

Respectfully submitted,



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CERTIFICATE OF SERVICE – KPSC 2005-00095

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 27th day of April, 2007.

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