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April 10, 2007 APR 12 2007

PUBLIC SERVICE
COMMISSION

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

RE: *Dialog Telecommunications, Inc. v. BellSouth Telecommunications Inc.*
Case No. 2005-00095

Dear Ms. O'Donnell:

Enclosed please find an original and ten copies of Dialog Telecommunications, Inc.'s Motion For Reconsideration Or, In The Alternative, To Reopen And Modify Order To Conform To Applicable Law.

Please indicate receipt of this filing by your office by placing a file stamp on the extra copy and returning to me via the enclosed, self-addressed, stamped envelope.

Very truly yours,

STOLL KEENON OGDEN PLLC

Douglas F. Brent

Enc.

**COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION**

In the Matter of:

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

**MOTION FOR RECONSIDERATION OR, IN THE ALTERNATIVE, TO
REOPEN AND MODIFY ORDER TO CONFORM TO APPLICABLE LAW**

Dialog Telecommunications, Inc. (“Dialog”), for its Motion for Reconsideration or, In the Alternative, to Reopen and Modify Order to Conform to Applicable Law, states as follows:

INTRODUCTION AND BACKGROUND

On February 8, 2007, the Commission entered its Order in this case (the “Final Order”) granting summary judgment to Dialog on the narrow jurisdictional issue presented – whether, as a matter of law, resale of service is the tantamount to the sale of UNEs – and finding as follows:

Dialog specifically requests that the Commission articulate the difference between network elements provided pursuant to 47 U.S.C. § 251(c)(3) and resale provided pursuant to 47 U.S.C. § 251(c)(4). Such an interpretation is squarely within this Commission’s jurisdiction.

[Final Order, at 5].

The object of Dialog’s Complaint was, of course, to put an end to BellSouth’s (now AT&T Kentucky’s) obdurate insistence on collecting a tax on network elements as

though they constituted the sale of service under the applicable tax statutes.¹ Dialog also needed – given the incredible difficulty in finding a forum to vindicate its rights – that Commission conclusion so that, pursuant to applicable utility law and the parties’ Interconnection Agreement, Dialog’s good faith in disputing the alleged “tax” would prevent BellSouth from cutting off its access to UNEs while the dispute is pending.²

However, Dialog did not ask the Commission to adjudicate tax issues, carefully steering clear of those matters within the jurisdiction of the Department of Revenue. Indeed, the Commission specifically noted in its Order that “Dialog is not asking the Commission to adjudicate this sales tax claim.” [Final Order, at 2]. Nor did Dialog in its Complaint ask the Commission to require BellSouth to seek a refund of taxes.³ The Commission did, however, order BellSouth to “seek a tax refund, as described herein, which may benefit Dialog *and the Kentucky operations of all CLECs.*” [Final Order at 6 (emphasis added)].

Subsequently, however, the Commission issued an Order holding that Dialog should pay all alleged “taxes” billed to it, based upon its finding that “AT&T Kentucky [formerly BellSouth] *cannot legitimately seek a refund* for amounts it has not received.” [Order dated March 23, 2007 (“Rehearing Order”)(emphasis added)]. The Commission’s Rehearing Order not only contradicts its previous (and correct) conclusion that an end to

¹ Since 2002, Dialog has disputed the applicability of a service tax to UNEs. The odyssey it has undertaken to attempt to end this unlawful tax has led from the ILEC, which stonewalled, to the court, which essentially refused to rule, to the Department of Revenue, which has denied standing, to a two-year proceeding before this Commission. During these *five years* during which Dialog has sought relief based on this clear question of law, the ILEC providing UNEs to Dialog has continued its course of harassing, and reducing the cash flow of, its competitors by continuing to charge the alleged “tax.” It has refused to seek a Department of Revenue ruling, well aware that no one else can request such a ruling, in the meantime issuing periodic cut-off threats to Dialog. The spirit of Joseph Heller’s immortal *Catch-22* is alive and very, very well.

² Amended Complaint at 11, Prayers for Relief nos. 1 and 4.

³ *Id.* at n. 2 (“Dialog is not asking the Commission to adjudicate a tax claim.”) *See also* letter of Douglas F. Brent, dated July 18, 2005, at 3, n. 2 (“[A]ny refund application BellSouth *chooses to file* would be on behalf of BellSouth, not Dialog or any other BellSouth customer.”) (emphasis added).

AT&T Kentucky's collection of this "tax" would benefit all CLECs (some of whom no doubt *have* paid all alleged "taxes" to date, and whose rights under law should not be limited by Dialog's payment or lack thereof); it is based upon fundamental errors of *tax* law – an area outside the Commission's jurisdiction, and one into which Dialog's Complaint never required it to enter. As is explained further below, and in the attached Affidavit of Steven Lenarz (the "Lenarz Affidavit"), an attorney and Certified Public Accountant who was a Kentucky Revenue Cabinet Commissioner for eight years and whose practice is focused exclusively on Kentucky tax matters, even the Commission's interpretation of the parties' interconnection agreement, at Section 11.4.4, in which it found an obligation to pay these unlawful "taxes" is based upon fundamental errors of *tax* law.

Should the Commission conclude that this case is final, it may still reopen the proceeding in order to deal with legal errors. "KRS 278.390 clearly provides that the ... commission retains authority to modify its orders until they are suspended or vacated by a court of competent jurisdiction." *Mike Little Gas Co. v. Public Service Comm'n*, 574 S.W.2d 926, 927 (Ky. 1978). *See also Commonwealth v. South Central Bell Telephone Co.*, 545 S.W.2d 927, 931 (Ky. 1976) ("It is as obvious as the acropolis of Athens that an order of the commission continues in force *until* revoked or modified by the commission or unless suspended or vacated in whole or in part by the Franklin Circuit Court.") (emphasis added). In accordance with this authority, the Commission has previously

reopened cases when necessary for the purpose of modifying its orders,⁴ and should do so to remedy the errors in its Rehearing Order in this case.

Dialog notes that its time to seek judicial review of the Rehearing Order may be found to have begun to run prior to the filing of this Motion; accordingly, it respectfully requests an expedited ruling hereon.

ARGUMENT

I. AT&T KENTUCKY MOST CERTAINLY CAN, UNDER APPLICABLE TAX LAW, CONTEST THE TAXATION OF NETWORK ELEMENTS AS SERVICE WITHOUT PAYING THE “TAX,” AND THERE WILL BE NO LIEN ON ITS ASSETS DURING THE PENDENCY OF SUCH CONTEST.

At pages 2 and 3 of its Rehearing Order, the Commission held that, “based on this provision of the interconnection agreement [Section 11.4.4], in order for AT&T Kentucky to pursue an application for a refund of the sales tax which Dialog believes has been improperly collected, Dialog must pay to AT&T Kentucky the tax in question.” At page 3 of the Rehearing Order, the Commission asserted that “Dialog has failed to pay

⁴ See, e.g., PSC Case No. 98-173, *In the Matter of: The Application of Crown Communication, Inc., Nextel West Corp., and Powertel/Kentucky, Inc. for Issuance of a 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* (Order Reopening and Modifying dated May 27, 1999); PSC Case No. 96-008, *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)*, (Order Reopening and Modifying dated August 28, 1996); PSC Case No. 97-253, *Application of Kentucky CGSA, 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* (Order Reopening and Modifying dated September 30, 1998)

AT&T Kentucky the sales tax on UNEs, as required under the interconnection agreement.” This is clear error.

Section 11.4.4, quoted in the Commission’s Rehearing Order, at 2, provides as follows:

In the event that all or any portion of an amount sought to be collected must be paid ***in order to contest the imposition of any such tax*** or fee, ***or to avoid the existence of a lien on the assets of the providing Party during the pendency of such contest***, the purchasing Party shall be responsible for such payment and shall be entitled to the benefit of any refund or recovery.

(Emphasis added.)

Thus, there are two conditions that would trigger a payment obligation on the part of Dialog. Neither exists. The alleged tax ***need not be paid “in order to contest the imposition”*** of the tax. Nor is it necessary to pay the alleged tax in advance of a “contest” of the tax to ***“avoid the existence of a lien on the assets of the providing Party during the pendency of such contest.”*** As the Lenarz Affidavit explains, at ¶¶ 6 and 7, AT&T Kentucky is the “taxpayer” and can, pursuant to KRS 131.110, contest the tax without first paying it. The Lenarz Affidavit also explains, at ¶ 8, that no lien can be placed on the assets of AT&T Kentucky until the tax is “due,” and that, while the contest is pending, no tax is yet “due.”

Thus, pursuant to well-established tax law, neither of the conditions precedent to Dialog’s obligation to pay the disputed tax exists. The Commission’s finding to the contrary is clear and palpable error.

II. AT&T KENTUCKY MOST CERTAINLY CAN, UNDER APPLICABLE TAX LAW, SEEK A REFUND OF ALL AMOUNTS IT HAS REMITTED TO THE REVENUE CABINET, WHETHER OR NOT DIALOG HAS FIRST REMITTED ANY AMOUNT TO AT&T KENTUCKY.

The PSC held, in its Rehearing Order at 3, that “AT&T Kentucky cannot legitimately seek a refund for amounts it has not received.” This conclusion is error.

As the Lenarz Affidavit, at ¶ 6, explains, the retailer, AT&T Kentucky, certainly is permitted to seek a refund for taxes it has paid, regardless of whether it collected those taxes from the purchaser. It bears repeating that, as the retailer, AT&T Kentucky is the “taxpayer” for purposes of reporting to the Department of Revenue. The Department of Revenue has absolutely no relationship with Dialog under these circumstances. It is concerned neither with Dialog’s payments to AT&T Kentucky nor with Dialog’s objections to paying the tax. The Department of Revenue has refused to hear any of Dialog’s objections. That, combined with BellSouth’s refusal to assist Dialog despite Judge Crittenden’s February 2004 order,⁵ is why Dialog is before this Commission in the first place.

It is AT&T Kentucky that has a relationship with the Department of Revenue with respect to the communications “service” tax it has charged to CLECs who purchased UNEs from it. Dialog is without actual knowledge of whether AT&T Kentucky has remitted all of this “tax” to the Department of Revenue, but states categorically that, if it

⁵ Complaint, Exhibit 2.

has, it may seek a refund of those taxes.⁶ If it has not, it can contest the imposition of those taxes whether or not they have been paid, without any worries that a lien will be placed on its assets. *See Lenarz Affidavit.*

The PSC did not need to reach this issue in any event. It is outside the Commission's jurisdiction to rule on the procedure that AT&T Kentucky would follow to obtain a refund from the Department of Revenue. Moreover, Dialog does not demand, and has not demanded, that AT&T Kentucky (or BellSouth before it) file a refund claim with the Revenue Cabinet.⁷ Dialog's interest is in ending AT&T Kentucky's unlawful billing practices to it, and the accompanying, ever-present threat that AT&T Kentucky will cease to provide network elements to Dialog during its efforts to vindicate its rights in this matter.

Dialog does, however, note that the Commission in its Final Order recognized the industry-wide significance of BellSouth's billing practice challenged by Dialog, and ordered BellSouth to seek a tax refund that could benefit every CLEC providing service in Kentucky. It is difficult to understand why, in its Rehearing Order, the Commission withdrew an industry-wide benefit based upon the payment history of a single CLEC.

It is equally difficult to understand why the Commission would cast doubt on Dialog's right under Commission precedent to continue to obtain UNEs from AT&T Kentucky during its good faith dispute of these unpaid, alleged "taxes," or why the Commission would further enable AT&T Kentucky to profit from its six-year pattern and

⁶ In its Answer to Dialog's original complaint, BellSouth stated it "has remitted to the Commonwealth of Kentucky the sales tax that Dialog had previously refused to pay." Answer, n. 3. BellSouth's Answer made clear that when Dialog paid the disputed amounts prior to filing its complaint, BellSouth allocated the payment to Dialog's account. Dialog has already painstakingly explained to the Commission that a refund to BellSouth would not necessarily result in a cash payment to Dialog. *See Amended Complaint*, ¶ 21.

⁷ Letters of Douglas F. Brent to Elizabeth O'Donnell dated July 18, 2005, at 3, n. 2 and May 5, 2006, at 3.

practice of undermining its competitors by charging a disputed “tax” and refusing to take action that *only it can take* to cease collection of this charge. Dialog should not be punished for AT&T Kentucky’s recalcitrance, and AT&T Kentucky should not be rewarded for it. Moreover, neither rewards nor punishments prescribed by this Commission should be based on interpretations of tax law.

The Commission should modify its Rehearing Order so that it concerns those matters within the Commission’s jurisdiction that the Complaint brought before it: whether Dialog in good faith disputes the imposition of “service” tax on UNEs and whether, as a result of that good faith dispute, Dialog should be protected from the threat of termination by AT&T Kentucky.

CONCLUSION

In 2002, armed with the knowledge that a UNE is not a sale of service under the Telecommunications Act of 1996, and that it cannot be taxed as if it were, Dialog began its good faith quest to put an end to BellSouth’s erroneous tax billing. Blocked from relief by BellSouth and literally disconnected for daring to challenge the error, Dialog presented its case to this Commission to protect its right to continue to obtain UNEs while the dispute is pending. Ultimately Dialog believes that it will prevail. However, insofar as the Commission’s March 23 Order on Rehearing requires Dialog to pay this unlawful, alleged “tax” for all the years in which BellSouth/AT&T Kentucky unlawfully charged it over Dialog’s protests, it will work a tremendous and unfair hardship on Dialog. It will also remove scarce financial resources from a carrier that continues, despite the recent trend toward re-monopolization of telephone service, to provide competition in the Kentucky marketplace.

The Rehearing Order is based upon errors of tax law, an area outside the Commission's jurisdiction and expertise. Accordingly, Dialog respectfully requests the Commission to modify its Rehearing Order to conform to the law or, at the very least, to modify the Rehearing Order to delete those findings and decisions that are based upon erroneous conclusions of an area of law that is outside the Commission's jurisdiction.

Because the time to seek judicial review of the Rehearing Order may be found to have commenced to run, Dialog respectfully requests that the Commission expedite its ruling on this matter.

Respectfully Submitted,

DIALOG TELECOMMUNICATIONS, INC.

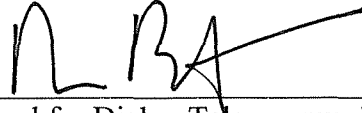
By:



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CERTIFICATE OF SERVICE

It is hereby certified that this 10th day of April, 2007 I have served the foregoing upon the following by deposit in the U. S. Mail, first class.

A handwritten signature in black ink, appearing to be 'N. B. A.', written over a horizontal line.

Counsel for Dialog Telecommunications

Mary Keyer
Cheryl Winn
BellSouth Telecommunications
P. O. Box 32410
601 West Chestnut Street, Room 407
Louisville, KY. 40232

COMMONWEALTH OF KENTUCKY
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BELLSOUTH TELECOMMUNICATIONS, INC.

AFFIDAVIT OF STEVEN L. LENARZ

1. My name is Steven L. Lenarz. I am 51 years old, and I am entirely competent and authorized to make this affidavit.

2. I am a Kentucky lawyer, am duly licensed, and have been in good standing with the Kentucky Bar Association since 1983. No ethics complaints have been filed against me.

3. I also am a Kentucky certified public accountant, and duly licensed, and have been in good standing with the Kentucky Board of Accountancy since 1979. No complaints have been filed against me.

4. My entire career has been spent studying and applying the Kentucky tax law, including for the Kentucky Revenue Cabinet of which I was a Commissioner from 1992 to 2000. From 1977 to 1988, I held various tax-related positions including Senior Tax Manager at Ernst and Whinney, a big eight CPA firm. From 1988 to 1992, I was the Partner in Charge of Tax for a 50 person, three office CPA firm. From 1992 to 2000, I served as Commissioner of the Department of Tax Compliance at the Kentucky Revenue Cabinet. From 2000 to early 2005, I was the designated subject matter expert on Kentucky tax issues for PricewaterhouseCoopers. For the remainder of 2005, I practiced in the State and Federal Tax Practice Group for the Louisville office of the law firm of Stoll Keenon Ogden PLLC. I now practice in the Louisville office of the law firm of Hurt Crosbie & May, PLLC. My practice is limited solely to Kentucky tax matters.

5. I have been asked by Petitioner's counsel to explain the procedure by which a retailer (the "taxpayer") seeks a refund of sales taxes paid; whether sales tax must be paid in advance of a contest of such sales taxes; and when a lien arises with respect to unpaid sales taxes.

