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PUBLIC SERVICE  
COMMISSION

September 30, 2005

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

**Re: Dialog Telecommunications, Inc. v. BellSouth  
KPSC 2005-00095 – Response to BellSouth's September 2, 2005 Filing**

Dear Ms. O'Donnell:

This is in response to BellSouth's recent filing in this case of another Sales and Use Tax Refund Application that BellSouth claims to have filed "on behalf of one of its customers" in mid-August. Like the similar refund application BellSouth filed in this case in July, this document is irrelevant to Dialog's formal complaint against BellSouth.

As a preliminary matter, Dialog feels compelled to remind the Commission that under Kentucky's sales tax statute the legal incidence of the tax is on BellSouth, not with the purchaser of service, so BellSouth's "filed on behalf of" construct is entirely without basis. When BellSouth files a refund application with the Kentucky Department of Revenue, it does so on its own behalf, not on behalf of the unnamed carrier that BellSouth apparently overcharged for resold services.

In any event, the refund application filed by BellSouth is irrelevant to Dialog's complaint to the Commission. The unnamed customer whose business model BellSouth describes in the "Statement of Reason for Refund Request" ("statement") is a reseller, not a purchaser of network elements. Thus, BellSouth's recent refund request merely reinforces what BellSouth conceded in its July 1 letter to the Commission – contradicting its statements during the informal conference – BellSouth has never advised the Department of Revenue that leases of network elements are legally distinguishable from sales of "communications service."

Ms. Beth O'Donnell  
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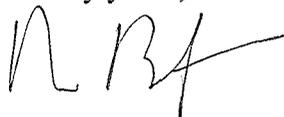
As Dialog explained in detail at the informal conference in June, at issue here is the lease of network elements ("UNEs") under 251(c)(3) rather than a "sale for resale" under Section 251(c)(4). Analysis of resold services under Chapter 139 would have no bearing on whether network elements are taxable under the same tax statute.

The only issue related to these "taxes" in this case is to determine if Dialog has a good faith basis for disputing these BellSouth charges. The final determination of the applicability of sales tax to UNEs will not be made by this Commission, but the Commission is certainly qualified to consider the definitions in the Kentucky tax statutes, the language in the Telecom Act, and the conduct of the parties in this case and to determine if there is a valid outstanding dispute about these charges. On this the record is quite clear.

Dialog does commend BellSouth for explaining to the Department of Revenue how application of sales tax to resold services is anticompetitive insofar as it discriminates against the unnamed customer and other CLECs and in favor of ILECs. *See* Statement at pp. 4-5. Dialog agrees that the effect of any decision to subject CLECs to sales taxes for wholesale purchases of service, or, for that matter, on provision of access to network elements, is to preclude CLECs from competing effectively in the local telephone services market with ILECs. What Dialog doubts is whether BellSouth is truly interested in putting an end to a practice so obviously harmful to its competitors.

If you have questions, please do not hesitate to contact me.

Sincerely yours,

A handwritten signature in black ink, appearing to read 'DB', with a long horizontal stroke extending to the right.

Douglas F. Brent

cc: Service List