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PUBLIC SERVICE
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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

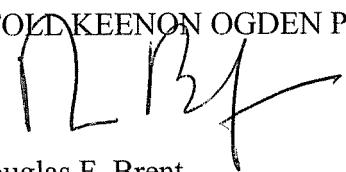
Dear Ms. O'Donnell:

Enclosed please find an original and ten copies of Dialog Telecommunications, Inc.'s Response to Supplemental Brief of AT&T Kentucky d/b/a BellSouth Telecommunications.

Please indicate receipt of this filing by your office by placing a file stamp on the extra copy and returning to me via our runner.

Very truly yours,

STOLL KEENON OGDEN PLLC


Douglas F. Brent

DFB:jms
Enc.

cc: Mary Keyer, BellSouth
Cheryl Winn, BellSouth

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PUBLIC SERVICE
COMMISSION

COMMONWEALTH OF KENTUCKY

BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

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

RESPONSE TO SUPPLEMENTAL BRIEF

Dialog Telecommunications, Inc. (“Dialog”), for its Response to Supplemental Brief of AT&T Kentucky d/b/a BellSouth Telecommunications (“BellSouth”), states as follows:

In its Order granting Dialog’s Motion for Summary Judgment in this case, the Commission entered a lawful and proper determination in accordance with years of its precedents that have uniformly held that unbundled network elements (“UNEs”) are not, and never have been, tantamount to “service.” The Final Order therefore ensured that while there is a good faith dispute between the parties as to BellSouth’s assessment of a tax on UNEs as if they were “service,” BellSouth is prevented from interrupting Dialog’s access to LENSs or to network elements while that dispute is pending. As a consequence, the Final Order removed BellSouth’s perverse incentive to preserve its unlawful “taxation” scheme without bringing the matter before the Kentucky Revenue Department knowing that Dialog would be unable to pursue the question itself before the Department. Dialog had, in fact, attempted to do so before coming to the Commission and had been rebuffed for lack of standing, as the record in this case demonstrates.

The Commission's Order on Rehearing, as a practical matter, reversed its Summary Judgment Order by placing on Dialog all responsibility for paying the tax prior to any determination as to whether the tax is lawful. Dialog's disagreement with the basis of that Order need not be repeated here.

However, BellSouth in its Supplemental Brief has come forward with yet additional theories to continue its taxation scheme, to which Dialog is compelled to respond.

BellSouth now argues that, because Section 11.4.3 of the Interconnection Agreement says it has the "responsibility" for determining the tax to be paid, Dialog must pay whatever it says is a tax. This contention is error in at least three ways.

First, it is obvious that general principles of law would prohibit any agreement from conferring upon one private party the unfettered right to force the other to pay any unlawful charge it cares to characterize as a "tax." Even if BellSouth's interpretation of the contract were correct (and it is not), no contract trumps the law; instead, the law is incorporated into contracts and governs the parties' relationships. *See, e.g., Grayson Rural Electric Corp. v. City of Vanceburg*, 4 S.W.3d 526, 531 (Ky. 1999). A tax is not lawful simply because BellSouth says it is.

Second, the Interconnection Agreement imposes upon BellSouth the "responsibility" to determine the tax, not the "authority." Thus, rather than conferring discretion upon BellSouth, this section actually places a *burden* on BellSouth to ensure that the tax is lawful. The Commission's lawful determination that UNEs are not services casts serious doubt upon BellSouth's practices and thus triggers BellSouth's

“responsibility.” Certainly the Commission’s interpretation of law should not encourage BellSouth in its determination to evade that responsibility.

Third, even if Section 11.4.3 did confer upon BellSouth some discretionary authority to impose taxation, and even if the law permitted such authority to be exercised by a private party, Section 11.4.3 would still have to be read in conjunction with the entire contract, which contains provisions requiring consultation and cooperation regarding any disagreement as to taxes. In addition, as all contracts do, this contract imposes obligations of good faith and fair dealing. *Ranier v Mount Sterling Nat. Bank*, 812 S.W.2d 154, 157 (Ky. 1991).

The obligation of good faith and fair dealing requires BellSouth to cooperate with, rather than stonewall, Dialog. BellSouth should seek a proper resolution of this matter before the Department of Revenue. It has not done so. It did not do so even when Dialog paid the alleged “tax.” And, yes, for some time, Dialog did in fact pay this “tax,” although BellSouth persists in claiming that Dialog’s statements to this effect are misrepresentations. BellSouth’s contention that it is only a lack of such payments that cause its current refusal to take action rings hollow. So too does its argument that the Commission should make Dialog pay all back “taxes” owed before BellSouth seeks the resolution of the issue that only it can obtain.

Finally, BellSouth’s argument that the Commission’s Final Order would encourage CLECs to challenge taxes because such a challenge would be without cost is extraordinarily ironic in this context. Dialog has expended tremendous amounts of money to take the case to the Department of Revenue; to take the case to Franklin Circuit Court; and to take the case to the Commission.

The Commission should reject BellSouth's arguments and vacate its Order on Rehearing. BellSouth should not reap any further benefits from its refusal to seek a proper resolution of this matter before the Department of Revenue, and should not be permitted to impose upon Dialog the responsibility for an issue that affects every competing local exchange carrier that obtains access to UNEs from BellSouth.

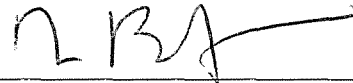
CONCLUSION

For the foregoing reasons as well as those previously offered, Dialog respectfully renews its request that the Commission vacate its Rehearing Order.

Respectfully Submitted,

DIALOG TELECOMMUNICATIONS, INC.

By:



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CERTIFICATE OF SERVICE

It is hereby certified that this 12th day of July, 2007 I have served the within Response on the following by deposit in the U. S. Mail, first class.



Counsel for Dialog Telecommunications

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