

COMMONWEALTH OF KENTUCKY  
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

DIALOG TELECOMMUNICATIONS, INC.	)	
	)	CASE NO.
COMPLAINANT	)	2005-00095
	)	
V.	)	
	)	
BELLSOUTH TELECOMMUNICATIONS, INC.	)	
	)	
DEFENDANT	)	

O R D E R

By Order of the Franklin Circuit Court, this matter was remanded back to the jurisdiction of the Commission, effective May 23, 2007. Prior to filing the related Circuit Court complaint, on April 12, 2007, Dialog Telecommunications, Inc. (“Dialog”) submitted to the Commission a Motion for Reconsideration or, in the Alternative, to Reopen and Modify Order to Conform to Applicable Law (“Motion to Reopen”). Specifically, with the Motion to Reopen, Dialog is requesting that the Commission re-evaluate its March 23, 2007 Order (“March 23 Order”), wherein AT&T Kentucky<sup>1</sup> was ordered to seek a sales tax refund with the Kentucky Department of Revenue immediately after Dialog remitted payment of the tax to AT&T Kentucky. The Commission issued the March 23 Order granting AT&T Kentucky’s motion for reconsideration of the Commission’s February 8, 2007 Order (“February 8 Order”).

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<sup>1</sup> BellSouth Telecommunications, Inc. d/b/a AT&T Kentucky (“AT&T Kentucky”). AT&T and BellSouth were merged in December 2006.

AT&T Kentucky submitted its response to the Motion to Reopen on April 30, 2007, and Dialog filed a reply on May 1, 2007. After the Circuit Court granted the Commission's motion for remand, on May 30, 2007, the Commission issued an immediate procedural Order granting both parties additional time under which they could file supplemental briefs pertaining to Dialog's Motion to Reopen.

In the February 8 Order, the Commission clarified the distinction 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). The Commission found that unbundled network elements ("UNEs") are not services, in accordance with the definition outlined in 47 U.S.C. § 153(29).<sup>2</sup> The purpose of the February 8 Order was to address Dialog's allegation of improper collection of sales tax on UNEs.

In seeking reconsideration of the February 8 Order, AT&T Kentucky argued that the record needed to be corrected to reflect that Dialog had withheld payment of the disputed UNE sales tax.<sup>3</sup> Dialog did not dispute this allegation, and the Commission notes that prior to AT&T Kentucky's motion for reconsideration, neither party had disputed Dialog's payment status.<sup>4</sup>

As to the March 23 Order, Dialog contends that the Commission overstepped its regulatory boundaries by making an unlawful and incorrect statement about the rights and obligations of Dialog and AT&T Kentucky under Kentucky tax law. Specifically, Dialog alleges that the Commission unlawfully ordered it to pay outstanding UNE sales

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<sup>2</sup> February 8 Order at 6.

<sup>3</sup> March 23 Order at 2.

<sup>4</sup> March 23 Order at 1, 2.

taxes to AT&T Kentucky before AT&T Kentucky applies for a refund with the Kentucky Department of Revenue. Dialog contends that the Commission failed to recognize that Kentucky tax law would permit AT&T Kentucky to challenge a tax without paying it beforehand, pursuant to KRS 131.110.<sup>5</sup> In support of this argument, Dialog provides the affidavit of Steven L. Lenarz, a licensed attorney and certified public accountant.<sup>6</sup> In response, AT&T Kentucky states that the Commission committed no error and, based on the language of the parties' interconnection agreement, Dialog has a contractual obligation to pay the tax in question.

This Order will address only the issue on remand which concerns the Commission's alleged inaccurate interpretation of sales tax law in the March 23 Order. This issue is now fully briefed by the parties and is ready for a final decision by the Commission.

#### MOTION TO STRIKE

In addition to the Motion to Reopen, a motion to strike the affidavit of Mr. Lenarz is also before the Commission.<sup>7</sup> Mr. Lenarz describes the procedures for retailers to seek sales tax refunds, the requirements for payments before seeking refunds, and the issuance of liens due to unpaid sales taxes. While the affidavit is informative, the Commission does not have the regulatory authorization to issue orders that would

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<sup>5</sup> Dialog's Supplemental Comments at 4, filed June 15, 2007.

<sup>6</sup> Motion to Reopen, filed April 12, 2007. Dialog subsequently filed a revised affidavit by Mr. Lenarz as an exhibit to Dialog's Supplemental Comments on June 15, 2007.

<sup>7</sup> AT&T Kentucky's response to Dialog's motion for rehearing and motion to strike, filed April 30, 2007.

define a utility's right to certain tax relief or obligation. The Commission's authority is limited to interpreting the terms of the interconnection agreement entered into by the parties. The Commission has given Mr. Lenarz's affidavit a fair review. However, it will only be given the necessary weight the Commission believes it is owed. For these reasons, AT&T Kentucky's motion to strike is denied.

#### MOTION TO REOPEN

In issuing the March 23 Order, the Commission had no intent to interpret or apply Kentucky tax law, but sought, primarily, to correct a statement of fact contained within the February 8 Order and interpret the terms of the Dialog-AT&T Kentucky interconnection agreement based on that corrected fact. Any interpretation or application of tax law, if at all, was not intended, and the March 23 Order should not be so construed otherwise.

The portions of the Dialog-AT&T Kentucky interconnection agreement guiding the Commission's decision are Sections 11.4.3 and 11.4.4. The sections are provided as follows:

- 11.4.3 If the purchasing Party disagrees with the providing Party's determination as to the application or basis for any such tax or fee, the Parties shall consult with respect to the imposition and billing of such tax or fee. Notwithstanding the foregoing, the providing Party shall retain ultimate responsibility for determining whether and to what extent any such taxes or fees are applicable, and the purchasing Party shall abide by such determination and pay such taxes or fees to the providing Party. The providing Party shall further retain ultimate responsibility for determining whether and how to contest the imposition of such taxes and fees; provided however, that any such contest undertaken at the request of the purchasing Party shall be at the purchasing Party's expense.<sup>8</sup>

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<sup>8</sup> The "purchasing Party" is Dialog. The "providing Party" is AT&T Kentucky.

11.4.4 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.

Based on a plain reading of the language of both sections, the Commission finds that Dialog is obligated to pay the UNE sales tax to AT&T Kentucky, since AT&T Kentucky has requested such payments. Section 11.4.3 states that AT&T Kentucky will retain the ultimate responsibility for determining whether and how to contest the imposition of taxes. Under this section, if the circumstance arises wherein the purchasing party disputes the applicability or payment of certain taxes, the purchasing party is still required to pay the disputed amount to the providing party. The Commission finds that these are the terms to which Dialog agreed to be held in assenting to the creation of the interconnection agreement. The Commission finds no ambiguity in either Section 11.4.3 or Section 11.4.4 and has looked only to the four corners of the agreement to come to this conclusion.<sup>9</sup> These sections of the agreement are plain and unambiguous, and the Commission has no reason to render a decision that varies from the obvious language of the contract.<sup>10</sup> AT&T Kentucky has previously stated that it has offered to seek a tax refund on Dialog's behalf once the disputed sales tax has been paid.<sup>11</sup> The

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<sup>9</sup> See generally Abney v. Nationwide Mutual Insurance Company, 215 S.W.3d 699 (Ky. 2006).

<sup>10</sup> See generally Cantrell Supply, Inc. v. Liberty Mutual Insurance Co., 94 S.W.3d 381 (Ky. App. 2002) and Green v. McGrath, 662 F. Supp. 337 (E.D. Ky. 1986).

<sup>11</sup> AT&T Kentucky's Reply to Dialog's Response to AT&T Kentucky's Supplemental Brief at 3, filed July 26, 2007; AT&T Kentucky's Supplemental Brief at 6.

Commission strongly encourages AT&T Kentucky to adhere to this pledge. As stated in the March 23 Order, the Commission finds that Dialog has a contractual obligation to pay the UNE sales tax. However, the Department of Revenue has previously found that Dialog is without standing to contest the collection of the tax. Therefore, such an application must be made by AT&T Kentucky.

Having reviewed the arguments of the parties, the Commission finds that the March 23 Order compelling Dialog to pay the disputed UNE sales tax prior to having AT&T Kentucky seek a refund before the Department of Revenue was correct as a matter of contractual interpretation. AT&T Kentucky should file the refund request for the application of sales tax on UNEs, and Dialog should assist AT&T Kentucky in this matter by providing the arguments and evidence it wishes AT&T Kentucky to present to the Department of Revenue, as required by Section 11.4.3 of their interconnection agreement.

In conclusion, the Commission finds the March 23 Order to have been an accurate interpretation of the parties' obligations under their interconnection agreement and, therefore, Dialog's Motion to Reopen is denied.

IT IS HEREBY ORDERED that:

1. AT&T Kentucky's Motion to Strike the affidavit of Steven L. Lenarz is denied.
2. Dialog's Motion to Reopen is denied.
3. This Order is final and appealable.

Done at Frankfort, Kentucky, this 26<sup>th</sup> day of October, 2007.

By the Commission

Commissioner Clark Abstains.

ATTEST:

A handwritten signature in black ink, consisting of several overlapping loops and flourishes, positioned above a horizontal line.

Executive Director