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BEFORE THE ARIZONA CORPORATION COMMISSION

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AZ CORP COMMISSION  
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IN THE MATTER OF THE APPLICATION OF STi PREPAID, LLC AND DIALAROUND ENTERPRISES, INC. FOR APPROVAL OF TRANSFER OF ASSETS AND CERTIFICATE OF CONVENIENCE AND NECESSITY TO PROVIDE INTRASTATE TELECOMMUNICATIONS SERVICES AND APPROVAL OF TERMINATION OF SERVICE BY DIALAROUND ENTERPRISES, INC.

DOCKET NO. T-20517A-07-0135  
T-04045A-07-0135

STAFF'S RESPONSE TO EXCEPTIONS TO THE STAFF REPORT

I. BACKGROUND.

On March 2, 2007, STi Prepaid, LLC ("STi") and Dialround Enterprises, Inc. ("DEI") (together "Applicants") filed an application before the Arizona Corporation Commission ("ACC" or "Commission") requesting authority to transfer DEI's assets and Certificate of Convenience and Necessity ("CC&N") to provide resold interexchange services from DEI to STi and to cancel DEI's CC&N for those services.

On April 3, 2007, Staff issued a Letter of Sufficiency and on January 9, 2009, Staff filed with Commission Docket Control its Staff Report in this matter. The Staff Report recommends approval of STi's application, subject to n extensive list of conditions.

On May 4, 2009, STi filed its exceptions to the Staff Report. Although in substance STi does not appear to dispute Staff's recommendation for approval of its application, STi does not believe the Commission has the authority to impose several of the recommendations Staff has included for the protection of Arizona consumers. And although these issues will properly be the subject of extensive post-hearing briefing, Staff believes it may assist the Hearing Division to briefly address STi's general assertions prior to the hearing in this matter.

STi's exceptions center on two central arguments:

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- 1           1.     First, STi argues that the Commission’s approval of this application, subject to Staff’s
- 2                     recommended conditions, would amount to an “unlawful rulemaking”; and
- 3           2.     If the Commission approved the application, subject to Staff’s recommended
- 4                     conditions, and if those conditions only apply to STi, then the Commission is engaging
- 5                     in discrimination in violation of federal statute.

6           Staff believes that these arguments are inconsistent. Essentially, STi argues that the

7 Commission’s adoption of Staff recommendations, if applied generally, would constitute a general

8 rulemaking, while applying the recommendations to STi specifically, would amount to

9 discrimination. By combining these arguments, STi asserts that the Commission is without authority

10 altogether, a position with which Staff disagrees.

## 11     **II.     LAW AND ARGUMENT.**

### 12           **A.     Rulemaking.**

13           Staff does not dispute STi’s general references to the Arizona Administrative Code, including

14 the specific references to Rulemaking. However, Staff believes the references are inaccurately

15 applied.

16           In general, Staff supports the concept that ratemaking is better done by implementation of

17 rules and procedures applied on a generic basis. However, not all matters must or even can be

18 addressed in such a manner. This has been recognized by the Arizona Supreme Court in *Arizona*

19 *Corporation Commission v. Palm Springs Utility Company*, 24 Ariz. App. 124, 536 P.2d 245. The

20 Court clearly acknowledged that when appropriate, rules of general application are desirable. But the

21 Court also very specifically left to the Commission the discretion to act on a case-by-case basis when

22 the circumstances dictated such an approach. This matter presents just such a situation.

23 In very few cases do companies come before the Commission requesting the services that STi is

24 requesting, with the intention that those services will be implemented in the way that STi has

25 indicated it will do so. The fundamental question STi poses is whether or not prepaid phone cards

26 fall under the jurisdiction of Commission. Staff believes that question to be too narrow. In Staff’s

27 view, the cards themselves are not the reason that Commission oversight is valid, it their use as the

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1 mechanism by which STi's services will be accessed which makes Commission oversight  
2 appropriate.

3         Neither party disputes that the Commission is charged to act in the interest of the public.  
4 Neither party disputes that the public has had occasion to take issue with the way in which prepaid  
5 phone cards have been marketed and sold across the country. And neither party disputes that the way  
6 STi's services in Arizona will be accessed will be through the issuance of prepaid calling cards.  
7 Therefore, Staff believes the Commission has authority to protect the public in the instant matter by  
8 ensuring that safeguards are in place which have been have been shown to be appropriate to  
9 implement in other jurisdictions.

10         Staff likens the instant situation to the provision of customer-owned pay telephone ("COPT")  
11 services. The holder of a COPT CC&N typically has no permanent subscribers to any service, and  
12 typically offers no services of his own, but instead provides paid access to the services being  
13 provided by others. The COPT CC&N holder provides that access at prescribed tariff rates. Those  
14 rates are indicated on a placard attached to the front of the phone from which the services will be  
15 provided. The customer is informed of the applicable rates and charges through this placard. In fact,  
16 the customer typically has no other way to know the provider's tariffed rates.

17         In the instant case, since STi's services can be accessed from any phone, including cellular  
18 service, there is no effective way to post placards to provide consumers notice of rates. The Arizona  
19 consumer will only learn of the services and rates being offered by STi through the advertisements  
20 posted in various businesses. Customers will buy STi's prepaid cards based upon the representations  
21 made in those advertisements. If the information in the advertisements is inaccurate, the customer  
22 may receive lesser service than expected. Before the Commission allows a company to begin  
23 offering telecommunications services in Arizona, the Commission must ensure the services will be  
24 honestly delivered. These questions of fairness have been raised in jurisdictions across the country.  
25 The Commission would be remiss in not acknowledging those questions and instituting safeguards  
26 for the benefit of the public.

27         STi argues that since its application presents a fairly unique situation, the Commission can not  
28 act, since such action would require a formal rulemaking procedure before Staff recommendations

1 could be adopted. This is simply not the case. The Commission can choose to handle this situation  
2 on a large-scale basis at such time as it believes the volume of telecommunications applications  
3 wishing to provide calling card services is sufficient to warrant such a cumbersome step. In the mean  
4 time, however, the Commission is free to act on the facts and circumstances presented in the instant  
5 matter.

6 **B. Discrimination.**

7 STi has also argued that if the Commission chooses to act on the basis of the facts present in  
8 the instant matter and apply Staff's recommendations to STi's CC&N, the act would constitute  
9 discrimination in that STi would be the only provider in Arizona subject to such restrictions. This  
10 argument is merely a converse of the argument made above.

11 The fact is that STi has presented an application which presents a fairly unique set of  
12 circumstances. It is not clear whether the Commission will at some point instigate a rulemaking  
13 procedure to deal with the issue of prepaid phone services at such time as such a proceeding has  
14 become necessary through the volume of similar applications. For the current time, however, such an  
15 action is premature.

16 The Commission may not have applied the recommendations in the Staff Report to other  
17 companies, but this is not an indication that STi will be subject to greater regulation than other  
18 similarly-situated telecommunications providers. There simply are no other similarly-situated  
19 telecommunications providers at this time. But the argument that therefore, the Commission may not  
20 impose consumer safeguards until it conducts a formal rulemaking is unsupportable.

21 At such time as other similar applications come before the Commission, if the Commission  
22 chooses to grant other applications without such safeguards, then STi may have an argument that it is  
23 being subjected to greater regulation than other telecommunications providers. But that circumstance  
24 has not arisen yet, so the argument is premature.

25 Likewise, if the Commission begins at some future point to impose the instant  
26 recommendations on all similar applicants, then STi and other affected companies may have an  
27 argument that the Commission should formally indicate what have become its de-facto policies. And  
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1 that argument may have some merit at that time. But that time is not now. As previously stated,  
2 there simply are no other similar applications before the Commission at this time.

3 **III. CONCLUSION.**

4 For the reasons stated above, Staff believes that the Commission has the authority to impose  
5 any or all of the recommendations Staff has provided in the Staff Report.

6 RESPECTFULLY SUBMITTED this 18<sup>th</sup> day of May, 2009.

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8   
9 Kevin O. Torrey SBN#022300  
10 Attorney, Legal Division  
11 Arizona Corporation Commission  
12 1200 West Washington Street  
13 Phoenix, Arizona 85007  
14 (602) 542-3402

12 Original and thirteen (13) copies  
13 of the foregoing were filed this  
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14 Docket Control  
15 Arizona Corporation Commission  
16 1200 West Washington Street  
17 Phoenix, Arizona 85007

17 Copy of the foregoing mailed this  
18 18<sup>th</sup> day of May, 2009 to:

18 Todd Feltus  
19 KERSCMAR & FELTUS PLLC  
20 6263 North Scottsdale Road, Suite 320  
21 Scottsdale, Arizona 85250

21 Cherie R. Kiser  
22 CAHILL GORDON & REINDEL LLP  
23 1990 K Street, NW, Suite 950  
24 Washinton, DC 20006

23 Matthew L. Conalty  
24 CAHILL GORDON & REINDEL LLP  
25 80 Pine Street  
26 New York, New York 10005

26 Jenni Partridge  
27 STi Prepaid, LLC  
28 30-50 Whitestone Expressway  
Flushing, New York 11354

