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ORIGINAL

October 8, 2009

Via Hand Delivery

Arizona Corporation Commission
Docket Control
1200 W. Washington Street
Phoenix, AZ 85007-2927

**Re: Docket Nos. T-20517A-07-0135 and T-04045A-07-0135,
Joint Application of STi Prepaid, LLC and Dialaround Enterprises Inc. -
Response to Staff's Procedural Order Filing**

Dear Sir or Madam:

STi Prepaid, LLC ("STi Prepaid") and Dialaround Enterprises Inc. ("Dialaround"), by their attorneys, respectfully submit an original and sixteen (16) copies of their Response to Staff's Procedural Order.

Please contact the undersigned if you have any questions.

Respectfully submitted

Chérie R. Kiser

Counsel for STi Prepaid, LLC and
Dialaround Enterprises Inc.

Arizona Corporation Commission

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Enclosures



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BEFORE THE ARIZONA CORPORATION COMMISSION

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GARY PIERCE
PAUL NEWMAN
SANDRA D. KENNEDY
BOB STUMP

IN THE MATTER OF THE APPLICATION
OF STI PREPAID, LLC AND DIALAROUND
ENTERPRISES, INC. FOR APPROVAL OF A
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

DOCKET NO. T-04045A-07-0135

**APPLICANTS' RESPONSE TO
STAFF'S PROCEDURAL ORDER
FILING**

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BEFORE THE ARIZONA CORPORATION COMMISSION

IN THE MATTER OF THE APPLICATION
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Applicants, STi Prepaid, LLC ("STi Prepaid") and Dialaround Enterprises, Inc. ("DEI"), by and through undersigned counsel, hereby submit this Response per the instructions of Administrative Law Judge Sarah Harpring's Procedural Orders and pursuant to STi Prepaid's March 2, 2007 application for a Certificate of Convenience and Necessity ("CC&N") from the Arizona Corporation Commission ("Commission").

INTRODUCTION AND SUMMARY

On August 6, 2009, the Commission's Hearing Division issued a Procedural Order ("First Procedural Order") instructing the Utilities Division Staff ("Staff") to analyze the information provided by Applicants in their June 4, 2009 Late-Filed Exhibit 1 ("LFE-1") and June 17, 2009 Post-Hearing Exhibit 1 ("PHE-1") by August 27, 2009. The First Procedural Order also instructed Applicants to submit a response to Staff's filing by August 10, 2009. Per Staff's August 26, 2009 Request for an Extension of Time to Comply with Procedural Order and Request to Vacate Procedural Conference, the Hearing Division issued a second Procedural Order on August 26, 2009, which extended Staff's filing deadline to September 24, 2009, and Applicants' filing deadline to October 8, 2009. On September 11, 2009, Staff filed its Response to Procedural Order ("Staff's First Response"), which opined that "the testing of the cards" listed in LFE-1 "is not essential to the resolution of the issues at hand," and concluded that "Staff has

no reason to dispute the veracity of STi's findings."¹ The Hearing Division concurred with Staff in a September 14, 2009 Procedural Order ("Third Procedural Order") that "eliminat[ed] the requirements for Staff to test prepaid calling cards provided by the Applicants and to include in its filing the results of its tests," but otherwise maintained the filing deadlines announced in the Second Procedural Order.²

Staff accordingly filed an Addendum to its First Response on September 24, 2009 ("Staff's Second Response") that presented its assessment of LFE-1 and PHE-1. Of the 51 companies actively selling or reserving the right to offer prepaid calling cards, Staff determined that "39 have a CC&N and are authorized to provide prepaid calling card services in Arizona"³ In addition, Staff found that "[t]wenty one (21) companies, or slightly more than 41 percent of the 51 companies reviewed, are currently providing prepaid calling card services in Arizona."⁴ After "review[ing] the Decisions in which the Commission granted a CC&N to each of the 39 companies that are authorized to provide prepaid calling card services in Arizona," Staff determined that "[n]one of the 39 companies were granted a CC&N with conditions comparable to or similar to the conditions established in Exhibit A [of Staff's initial report to the Commission]."⁵

¹ Docket Nos. T-20517A-07-0135 and T-04045A-07-0135, *In The Matter of The Application of STi Prepaid, LLC and Dialaround Enterprises Inc. For Approval Of A Transfer Of Assets And Certificate Of Convenience and Necessity For To Provide Intrastate Telecommunications Services And Approval of Termination Of Service By Dialaround Enterprises, Inc.*, Staff's Response to Procedural Order, at 2 (Sept. 11, 2009).

² Docket Nos. T-20517A-07-0135 and T-04045A-07-0135, *In The Matter of The Application of STi Prepaid, LLC and Dialaround Enterprises Inc. For Approval Of A Transfer Of Assets And Certificate Of Convenience and Necessity For To Provide Intrastate Telecommunications Services And Approval of Termination Of Service By Dialaround Enterprises, Inc.*, Procedural Order, at 3 (Sept. 14, 2009).

³ Memorandum from Steven M. Olea, Director, Utilities Division, to Docket Control, re: *Addendum - In The Matter of The Application of STi Prepaid, LLC and Dialaround Enterprises Inc. For Approval Of A Transfer Of Assets And Certificate Of Convenience and Necessity For To Provide Intrastate Telecommunications Services And Approval of Termination Of Service By Dialaround Enterprises, Inc.* (Docket Nos. T-20517A-07-0135 and T-04045A-07-0135), at 2 (Sept. 24, 2009).

⁴ *Id.*

⁵ *Id.* at 3. The conditions originally proposed by Staff in Exhibit A of its initial report to the Commission tracked the those imposed on STi Prepaid by the Florida Attorney General pursuant to an Assurance of Voluntary Compliance it entered into with the State of Florida. See Dockets Nos. T-20517A-07-0135 AND T-04045A-07-0135 - Memorandum from Ernest G. Johnson, Director, Utilities Division, to Docket Control, re: *In The Matter of*

Staff's detailed analysis and determinations regarding LFE-1 and PHE-1 fully support STi Prepaid's request that it be granted a CC&N to provide telecommunications service in the State of Arizona free and clear of any conditions or limitations. STi Prepaid is one among many telecommunications service providers offering long-distance service through prepaid methods of billing and collection to Arizona consumers, all of which have begun operation without the kinds of conditions or limitations at issue in this matter. To continue to insist upon treating STi Prepaid in an disparate fashion would constitute discriminatory treatment in violation of extant administrative law and in direct contravention of Staff's own conclusions in this matter.

I. STAFF'S CONCLUSIONS VALIDATE APPLICANTS' CONTENTION THAT THIS IS NOT A CASE OF FIRST IMPRESSION

Since Staff announced its recommendations and conditions concerning Applicants in the January 2009 Staff Report, one of the central issues in this proceeding has been whether Applicants "presented an application which presents a fairly unique set of circumstances" for the Commission's consideration.⁶ It has been Applicants' contention, based on detailed examination of the Arizona intrastate interexchange telecommunications marketplace, and STi Prepaid's experience as a nationwide provider of prepaid calling card products, that the notion that "[t]here simply are no other similarly-situated telecommunications providers at this time" is erroneous.⁷ To this end, Applicants presented affirmative evidence following the May 18, 2009 Evidentiary Hearing ("Hearing") demonstrating that, in light of the many prepaid calling card companies offering intrastate interexchange service in Arizona,⁸ this matter is not a "case of first

The Application of STi Prepaid, LLC and Dialaround Enterprises Inc. For Approval Of A Transfer Of Assets And Certificate Of Convenience and Necessity For To Provide Intrastate Telecommunications Services And Approval of Termination Of Service By Dialaround (Docket Nos. T-20517A-07-0135 And T-040405A-07-135, at 16, Exhibit A (Jan. 9, 2009) ("Staff's Initial Report"); May 18, 2009 Reporter's Transcript of Proceedings ("Tr.") 161-63.

⁶ Docket Nos. T-20517A-07-0135 and T-04045A-07-0135, *In The Matter of The Application of STi Prepaid, LLC and Dialaround Enterprises Inc. For Approval Of A Transfer Of Assets And Certificate Of Convenience and Necessity For To Provide Intrastate Telecommunications Services And Approval of Termination Of Service By Dialaround Enterprises, Inc.*, Staff's Response to Exceptions to the Staff Report, at 4 (May 18, 2009).

⁷ *Id.*

⁸ See Tr. 147-48, 167. While Staff initially stated that it "[wa]s not aware of other companies that have asked for CC&Ns to provide service in conjunction with their phone card activity," it later noted that "prepaid

impression.”⁹ LFE-1, filed on June 4, 2009, presented Applicants’ analysis of 14 prepaid calling cards available for purchase in Arizona, all of which “permit intrastate long distance calling even though two of the cards indicate that intrastate Arizona calls are not permitted.”¹⁰ PHE-1, attached as an exhibit to Applicants’ Post-Hearing Brief, identified 126 companies that provided for some form of card-based calling in their tariffs, 39 of which were of the prepaid variety.¹¹

Following Staff’s submission of its First and Second Responses, Applicants and Staff now find themselves in complete agreement as to the routine nature of STi Prepaid’s application for an intrastate interexchange CC&N. As Staff explained in its First Response, prepaid calling cards marketed as providing international or interstate long-distance service routinely offer the capability of intrastate calling:

For example, a company in New York could market and sell its cards in New York for international or interstate long distance calls. If the call is made from New York to California, clearly that would constitute [an] interstate call. However, there is no way to prevent that same customer from thereafter traveling to California and then calling the same party using the same card, which might then constitute a local call.¹²

Accordingly, Staff concluded that it “has no reason to dispute the veracity of STi’s findings.”¹³

calling card services are listed in some of the carriers’ tariffs on file at the Commission.” STi Prepaid thus proceeded to clearly document the frequency and form of prepaid calling in Arizona, providing clarification for all parties to this proceeding. Tr. 15-16, 148.

⁹ Tr. 15.

¹⁰ Letter from Cherie R. Kiser to Arizona Corporation Commission Docket Control, Docket Nos. T-20517A-07-0135 and T-04045A-07-0135, Joint Application of STi Prepaid, LLC and Dialaround Enterprises Inc. - Late-Filed Hearing Exhibit No. 1, at 1 (June 4, 2009) (enclosing LFE-1); *see also* Tr. 154, 174-75 (summarizing required response from Applicants per findings that several Arizona companies offer intrastate interexchange service via prepaid billing and collection method).

¹¹ This exhibit proceeded directly from Staff’s suggestion analytical model - given Staff’s “aware[ness] that prepaid calling card services are listed in some of the carriers’ tariffs on file at the Commission,” Staff opined that “[a] review of each carrier’s tariff will identify the carriers that offer to provide prepaid calling card services to their customers.” Tr. 148. Applicants also provided Post-Hearing Exhibit 2 (“PHE-2”) as an exhibit to the Post-Hearing Brief. This exhibit, while not at issue in the Procedural Orders, culled the relevant tariff pages from Arizona prepaid calling card provider Entrix Telecom, Inc. PHE-2 illustrated Entrix’s rechargeable prepaid calling card service offered for “placing calls within the State” available “at a variety of retail outlets or through other distribution channels. . . . in face values of \$5.00, \$10.00, and \$20.00” which bears a strong resemblance to STi Prepaid’s own proposed intrastate interexchange service.

¹² Staff’s First Response at 2.

¹³ *Id.*

Applicants and Staff are also in agreement as to the many telecommunications service providers, both authorized and unauthorized by the Commission, offering prepaid services in the state of Arizona. Staff's Second Response presented a tabular overview of the 14 companies cited in LFE-1 and the 39 companies cited in PHE-1. Of the 14 companies named in LFE-1, 13 currently provide telecommunications service via the prepaid calling method of billing and collection in Arizona, though 12 lack "an R-LD [resold long distance] or FB-LD [facilities-based long distance] CC&N."¹⁴ Out of 51 total companies examined - two were duplicated between the two exhibits - "39 have a CC&N and are authorized to provide prepaid calling card services in Arizona."¹⁵

Staff's conclusions demonstrate the Commission's marked acquaintance with telecommunications providers offering prepaid calling service in Arizona, and its considerable experience in granting CC&Ns to those providers that have sought them. Additional evidence presented in Applicants' Post-Hearing Brief, outside the scope of Staff's First and Second Responses, bolsters this conclusion. Applicants identified several cases demonstrating the Commission's direct experience with CC&Ns for companies offering prepaid calling card services including: applications by two interexchange carriers to expand their CC&Ns to provide intrastate services including prepaid calling card service;¹⁶ an application of a switchless reseller to provide competitive resold interexchange telecommunications service (which was ultimately exercised in the sale of prepaid calling cards services);¹⁷ an application by a prepaid calling card

¹⁴ Staff's Second Response at 2.

¹⁵ *Id.*

¹⁶ Docket No. U-2428-94-413, *AT&T Communications of the Mountain States, Inc.*, Opinion and Order (Dec. 20, 1995); Docket No. U-2431-95-337, *MCI Telecommunications Corporation*, Opinion and Order (Dec. 20, 1995).

¹⁷ Docket No. T-03232A-96-0428, *Application of Transcommunications, Incorporated for a Certificate of Convenience and Necessity to Provide Competitive Resold Interexchange Telecommunications Services Except Local Exchange Services*, Order (Mar. 30, 2001). A later application by the same provider to cancel its CC&N indicated "that it provided discretionary prepaid calling cards to long haul truck drivers distributed through trucking companies." Docket No. T-03232A-05-0209, *Application of Transcommunications, Inc., for Approval to Cancel its Certificate of Convenience and Necessity to Provide Resold Long Distance Telecommunications Services in the State Of Arizona*, Order (Feb. 20, 2007).

service provider to provide customer-owned pay telephone service to correctional facility inmates (with service limited to collect calling and facility-issued prepaid calling cards);¹⁸ and the transfer of a resold long distance service provider's CC&N to a newly formed subsidiary, on the condition that the latter honor any existing prepaid calling cards issued by the former.¹⁹ From the annals of Arizona regulatory decisions to Staff's own thorough evaluation of LFE-1 and PHE-1, the Commission's encounters with prepaid calling service are well-documented and well understood by all parties to this proceeding.

II. STAFF'S DETERMINATION OF THE COMMISSION'S EXTENSIVE EXPERIENCE WITH PREPAID CALLING SERVICE FORECLOSES THE USE OF EXTRAORDINARY AUTHORITY IN THIS MATTER

The conditions in Exhibit A of Staff's initial report were predicated upon *Arizona Corporation Commission v. Palm Springs Utility Co., Inc.*,²⁰ a precedent that affords "the Commission the discretion to act on a case-by-case basis when the circumstances dictated such an approach."²¹ Charged by the Hearing Division with "analyz[ing] whether the Commission has imposed the conditions set forth in Exhibit A, or substantially similar conditions, upon each of the companies authorized to provide intrastate prepaid calling card service in Arizona similar to the service for which STi has requested authority in this matter,"²² Staff determined that "[n]one of the 39 companies [in PHE-1] were granted a CC&N with conditions comparable to or similar to the conditions established in Exhibit A" of Staff's initial report.²³ Given this

¹⁸ Docket No. T-04294A-04-0879, *Application of Inmate Calling Solutions, LLC for a Certificate of Convenience and Necessity to Provide Customer-Owned Pay Telephone Service*, Order (Dec. 9, 2005).

¹⁹ Docket Nos. T-03887A-05-0909, T-20436A-05-0909, *Joint Application of Alltel Communications, Inc. and Alltel Holding Corporate Services, Inc. for Approval of the Transfer of the Certificate Of Convenience and Necessity to Provide Resold Long Distance Telecommunications Services and Assets to Alltel Holding Corporate Services, Inc., Approval of Termination of Service and Limited Waiver of the Slamming Rules*, Order (Sept. 21, 2006).

²⁰ 24 Ariz. App. 124 (1975).

²¹ Staff's Response to Exceptions at 2; *see also* Tr. 16 (explaining rationale for Commission "to act on an individual case-by-case basis where the facts and circumstances would seem to indicate that that is appropriate").

²² First Procedural Order at 3.

²³ Staff's Second Response at 3.

conclusion, as well as Staff's observations as to the ubiquity of the form of telecommunications service STi Prepaid seeks to offer in Arizona, the necessary circumstances to warrant discretion are absent in this matter. The "rational basis" for disparate treatment²⁴ is missing - Staff's findings highlight the absence of any meaningful difference between the case of STi Prepaid and those of other similarly situated Arizona telecommunications service providers. The "general principle of administrative law" referenced by *Palm Springs* stands firm - "rules and regulations of general applicability" must trump piecemeal policy generation.²⁵ The Commission's long-standing practice of granting CC&Ns to and permitting operation of prepaid service concerns in Arizona, without condition or limitation, must now extend to STi Prepaid.

Should the Commission wish to demand more rigorous standards of prepaid calling providers in Arizona, it must do so in accordance with established rulemaking procedures.²⁶ According to statute, an agency may not "base a licensing decision in whole or in part on a licensing requirement or condition that is not specifically authorized by statute, rule or state tribal gaming compact."²⁷ When an agency nonetheless permits an enforcement action against third parties without such a legislative basis, it engages in formal rulemaking.²⁸ Consequentially, the agency must comply with the due process protections of the federal and Arizona Constitutions²⁹ and the notice and comment provisions of the federal and Arizona Administrative Procedure Acts.³⁰ Applicants welcome the prospect of stricter regulation on the Arizona prepaid calling card industry, so long as it applies to every carrier, including those currently operating

²⁴ See, e.g., *Kessen v. Stewart*, 195 Ariz. 488, 492 (Ariz. App. Div. 1 1999).

²⁵ 24 Ariz. App. at 128.

²⁶ See Docket Nos. T-20517A-07-0135 and T-04045A-07-0135, *In The Matter of The Application of STi Prepaid, LLC and Dialaround Enterprises Inc. For Approval Of A Transfer Of Assets And Certificate Of Convenience and Necessity For To Provide Intrastate Telecommunications Services And Approval of Termination Of Service By Dialaround Enterprises, Inc.*, Applicants' Exceptions to Staff Report, at 9-12 (May 4, 2009).

²⁷ A.R.S. § 41-1030(B); accord A.R.S. § 41-1001.01(A)(7).

²⁸ *Erringer v. Thompson*, 371 F.3d 625, 630 (9th Cir. 2004).

²⁹ U.S. Const. amend. V, amend. XIV, § 1; Ariz. Const. art. 2, § 4.

³⁰ 5 U.S.C. § 553 *et seq.*; A.R.S. §§ 41-1013 *et seq.*, 41-1021 *et seq.*, 41-1023 *et seq.*

with and without a CC&N.³¹ Should the Commission wish to pursue such a course, it must adhere to the “rudimentary requirements of fair play”³² by affording all interested parties “a meaningful opportunity to be heard,” rather than unilaterally (and undeservedly) attaching special conditions to STi Prepaid’s application for a CC&N.³³

CONCLUSION

Pursuant to A.R.S. § 40-282 and A.A.C. R14-2-1105 *et seq.*, STi Prepaid has demonstrated its technical, financial, and managerial capabilities as a “fit and proper entity” to receive a CC&N for operation in the public interest in Arizona. Staff validated this in its initial report to the Commission, which concluded that STi Prepaid has the “customer service capability,” financial resources, and “technical capability” to offer service in the public interest.³⁴ At the Hearing, Staff explicitly affirmed its confidence in STi Prepaid’s “financial wherewithal,” “technical expertise” and overall fitness to receive a CC&N.³⁵ Now, Staff has determined that the kind of service STi Prepaid seeks to provide to Arizona consumers, and the CC&N that will enable it to do so, is well-known to the Commission as a common offering in the vibrant Arizona telecommunications marketplace. The proposed conditions on STi Prepaid’s application for a

³¹ See, e.g., Tr. 11-12, 21-22, 45-46, 56-57, 80-83, 85-86, 89-95, 97-101.

³² *Western Gillette, Inc. v. Arizona Corp. Commission*, 121 Ariz. 541, 543 (Ariz. Ct. App. 1979).

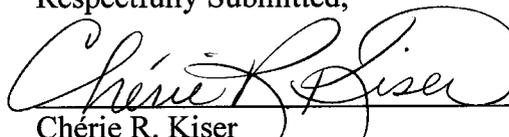
³³ *Boddie v. Connecticut*, 401 U.S. 371, 379 (1971); see also *Forman v. Creighton School Dist. No. 14*, 87 Ariz. 329, 332 (1960).

³⁴ Staff’s Initial Report at 3, 12-13. Staff also found STi Prepaid’s proposed rates to be “just and reasonable” *Id.* at 10.

³⁵ Tr. 130-131, 138-139, 145-146.

CC&N, absent from all other similarly situated prepaid calling service concerns, are unnecessary and unwarranted. Applicants therefore respectfully request that STi Prepaid's application for a CC&N be approved by the Commission unconditionally and without further delay.

Respectfully Submitted,



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Dated: October 8, 2009

CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of October, 2009, a copy of Applicants' Response to Staff's Procedural Order Filing in Docket Nos. T-20517A-07-0135 & T-04045A-07-0135, was served on all parties on the service list via hand delivery.



Todd Feltus

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