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July 14, 2010

**VIA HAND DELIVERY**

Jeff Derouen, Executive Director  
Kentucky Public Service Commission  
211 Sower Blvd  
P.O. Box 615  
Frankfort, KY 40602-0615

RECEIVED  
JUL 14 2010  
PUBLIC SERVICE  
COMMISSION

Re: *In the Matter of Communications Venture Corporation, d/b/a INdigital  
Telecom for Arbitration of Certain Terms and Conditions of Proposed  
Interconnection Agreement with BellSouth Telecommunications, Inc., d/b/a  
AT&T Kentucky – Case No. 2009-00438*

Dear Mr. Derouen:

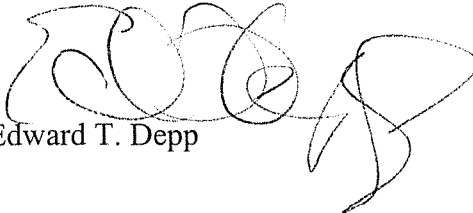
In accordance with the Public Service Commission of the Commonwealth of Kentucky's (the "Commission") January 25, 2010 Order setting forth a Proposed Procedural Schedule in the above-referenced case, please find enclosed for filing one (1) original and eleven (11) copies of the Rebuttal Testimony of Brent Cummings on behalf of Communications Venture Corporation, d/b/a INdigital Telecom. A signed verification page for the testimony will be filed at a later date.

Please file-stamp one copy and return it to our delivery person.

Thank you, and if you have any questions please call me.

Sincerely,

DINSMORE & SHOHL LLP



Edward T. Depp

ETD/sdt  
Enclosures  
cc: All parties of record (w/encl.)

Jeff Derouen, Executive Director

April 22, 2010

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John E. Selent, Esq. (w/encl.)

Holly C. Wallace, Esq. (w/encl.)

COMMONWEALTH OF KENTUCKY  
BEFORE THE PUBLIC SERVICE COMMISSION **RECEIVED**

In the Matter of:

JUL 14 2010

**PUBLIC SERVICE  
COMMISSION**

Petition of Communications Venture )  
Corporation, d/b/a INdigital telecom for )  
Arbitration of Certain Terms and Conditions )  
of Proposed Interconnection Agreement )  
with BellSouth Telecommunications, Inc., )  
d/b/a AT&T Kentucky, Pursuant to the )  
Communications Act of 1934, as Amended )  
by the Telecommunications Act of 1996 )

Case No. 2009-00438

**PREFILED REBUTTAL TESTIMONY OF BRENT CUMMINGS**

**ON BEHALF OF**

**COMMUNICATIONS VENTURE CORPORATION D/B/A INDIGITAL TELECOM**

**JULY 14, 2010**

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**PREFILED REBUTTAL TESTIMONY OF BRENT CUMMINGS**

1 **Q. PLEASE STATE YOUR NAME, TITLE, EMPLOYER, AND ADDRESS.**

2 A. My name is Brent Cummings. I am the Chief Operations Officer ("COO") for  
3 Communications Venture Corporation, d/b/a INdigital telecom ("INdigital"). My business address  
4 is 5312 West Washington Center Road, Fort Wayne, Indiana 46818.

5 **Q. HAVE YOU PROVIDED TESTIMONY IN THIS PROCEEDING PREVIOUSLY?**

6 A. Yes. I submitted prefiled direct testimony in this proceeding on June 15, 2010.

7 **Q. WHAT IS THE PURPOSE OF YOUR TESTIMONY?**

8 A. The purpose of my rebuttal testimony is to respond to the direct testimony filed on behalf of  
9 BellSouth Telecommunications, Inc., d/b/a AT&T Kentucky ("AT&T Kentucky") by Deborah  
10 Fuentes Niziolek, J. Scott McPhee, and Mark Neinast. I will address each issue these witnesses have  
11 raised as well as identify any issue that AT&T Kentucky has conceded.

12 **Q. HOW WILL YOU ORGANIZE YOUR REBUTTAL TESTIMONY?**

13 A. My rebuttal testimony will be organized by attachment and issue in an effort to somewhat  
14 mirror AT&T Kentucky's direct testimony. Due to the overarching significance of the 911-related  
15 issues, I will begin my rebuttal testimony there by discussing the Attachment 5 - 911/E911 portion  
16 of the ICA in Part I of my rebuttal testimony. The remainder of my testimony will then address the  
17 other issues in the following order:

18 Part II, General Terms and Conditions ("GTCs");

19 Part III, Attachment 03 – Structure Access ("SA");

20 Part IV, Attachment 08 – Bona Fide Requests ("BFRs");

21 Part V, Attachment 12 – Collocation;

22 Part VI, Attachment 13 – 251(c)(3) UNEs; and

1 Part VII, Attachment 15 – Coordinated Hot Cuts ("CHC").

1 I. 911/E911 ISSUES

2 *GENERIC ATTACHMENT 05 – 911/E911 (CLEC) GENERALLY:*

3 **Q. DO YOU UNDERSTAND MR. MCPHEE'S AND MR. NEINAST'S TESTIMONY TO**  
4 **BE THAT AT&T KENTUCKY CONCEDES ITS GENERIC ATTACHMENT 05 – 911/E911**  
5 **(CLEC) IS INADEQUATE TO ADDRESS THE PARTIES' SITUATION AND IS NO**  
6 **LONGER AT ISSUE?**

7 A. Yes. As I discussed in my prefiled direct testimony, AT&T Kentucky had previously  
8 admitted that its Generic 911/E911 Attachment did not allow for a scenario in which INdigital would  
9 be the 911/E911 service provider for public safety answering points ("PSAPs"). However, it  
10 remained unclear whether AT&T Kentucky would continue to argue for its inclusion in the ICA.  
11 Now, though AT&T Kentucky has raised the specter of appealing the Commission's decision at  
12 some point in the future, until that time comes – if it comes – it would appear that AT&T Kentucky  
13 has conceded that the Generic Attachment 05 – 911/E911 (CLEC) is off the table. Both Mr. McPhee  
14 and Mr. Neinast concede in their direct testimony that the Generic Attachment is inadequate for the  
15 interconnection relationship between the parties and only addressed those issues disputed in the  
16 Alternate 911/E911 Attachment. (*See* McPhee Direct Testimony at 26:21-27:3; Neinast Direct  
17 Testimony at 3:13-4:8). As a result, my rebuttal testimony will likewise focus only on the disputed  
18 issues in the Alternate Attachment 05 – 911/E911 and addressed by AT&T Kentucky in its direct  
19 testimony.

1 **ALTERNATE ATTACHMENT 05 -- 911/E911 ISSUE 1:**

2 ***INdigital: Should this attachment be designated "(Service Provider)?"***

3

4 ***AT&T Kentucky: Does INdigital have the right to interconnect with AT&T under Section***  
5 ***251(c) of the Act for INdigital's provision of competitive 911/E911 services to PSAPs? If***  
6 ***so, what is the appropriate language that should be included in the interconnection***  
7 ***agreement?***

8

9 **Q. DOES AT&T KENTUCKY WITNESS MR. MCPHEE ADEQUATELY ADDRESS**  
10 **ISSUE 1 OF THE ALTERNATE 911/E911 ATTACHMENT AT PP. 26-27 OF HIS DIRECT**  
11 **TESTIMONY?**

12 A. Not exactly. Issue 1 of the Alternate 911/E911 attachment operates on two separate, but  
13 related, levels. First, it raises the very general issue of whether the service that INdigital provides  
14 qualifies as "telephone exchange service" under the Act. Second, it raises the more specific question  
15 as to whether AT&T Kentucky's last-minute addition of the parenthetical phrase "(Service  
16 Provider)" to the title of the attachment is appropriate. While AT&T Kentucky's testimony  
17 addresses (and concedes) the general dispute over whether the service that INdigital intends to  
18 provide to PSAPs is "telephone exchange service" – a dispute that the Commission has already  
19 resolved in INdigital's favor – AT&T Kentucky fails to address the more specific issue raised by  
20 INdigital in Issue 1: namely, whether it is appropriate to add the qualifier "(Service Provider)" to the  
21 title of the Alternate Attachment.

22 As a practical matter, the addition of "(Service Provider)" is of little significance in light of  
23 the Commission's ruling on the threshold issue. That ruling rendered AT&T Kentucky's addition of  
24 "(Service Provider)" without effect and gratuitous. The addition serves no purpose other than to  
25 make a distinction that the Commission has found not to exist in this case. As such, it continues to

- 1 be INdigital's position that AT&T Kentucky's last-minute addition to the title of Alternate
- 2 Attachment 05 – 911/E911 should be stricken.



1 **ALTERNATE ATTACHMENT 05 – 911/E911 ISSUE 2 (Section 1.2):**

2 ***INdigital:*** *Should this attachment account for the possibility that there may be more than*  
3 *one E911 service provider in a territory?*

4  
5 ***AT&T Kentucky:*** *Should only the 911/E911 System Network providers be identified as*  
6 *part of this agreement?*

7  
8 **Q. HAS AT&T KENTUCKY APPROPRIATELY CHARACTERIZED THE DISPUTE**  
9 **OVER ISSUE 2 OF THE ALTERNATE 911/E911 ATTACHMENT?**

10 A. No. AT&T Kentucky would have the Commission believe that Issue 2 is about clarity or  
11 ambiguity when, in fact, the issue is one of recognizing whether more than one 911/E911 service  
12 provider may operate in the same service territory.

13 Mr. McPhee's own testimony betrays this fact. Mr. McPhee states that "[t]his ICA and  
14 Alternate Attachment 911 only apply to the territory where AT&T Kentucky is an incumbent local  
15 exchange carrier and then only where AT&T Kentucky provides 911/E911 Service." (*Id.* at 27:23-  
16 25). Mr. McPhee characterizes AT&T Kentucky as the "only" provider of 911/E911 service under  
17 the ICA.

18 **Q. IS AT&T KENTUCKY'S PROPOSED LANGUAGE IN SECTION 1.2 CLEAR AND**  
19 **UNAMBIGUOUS AS IT SUGGESTS?**

20 A. Not at all. From INdigital's perspective, AT&T Kentucky's version of Section 1.2 appears to  
21 limit the number of 911/E911 providers in any particular service territory to one. Such a limitation  
22 on competition would run directly counter to the purpose of the ICA. Moreover, given AT&T  
23 Kentucky's position of historical monopoly over 911/E911 service in its service territory, AT&T  
24 Kentucky's interpretation of its proposed language in Section 1.2 is all the more hard to believe.

25

1 **Q. DOES THE ALTERNATE 911/E911 ATTACHMENT DEFINE AT&T KENTUCKY'S**  
2 **PROPOSED PHRASE "E911 NETWORK PROVIDER?"**

3 A. No, it does not. AT&T Kentucky's proposed use of "network provider" as opposed to  
4 "service provider" introduces unnecessary ambiguity into Section 1.2. As an initial matter, it is  
5 altogether unclear what the difference is between an E911 "Service Provider" and an E911 "Network  
6 Provider." In fact, the preferred phrase throughout the Attachment is "Service Provider." Sections 3,  
7 4, 5, and 6 all use the phrase "service provider" to describe the party providing the 911/E911 service.

8 As a result, AT&T Kentucky's proposed language is less than clear and introduces  
9 unnecessary ambiguity into the ICA. INdigital's proposed language by comparison, and consistent  
10 with the rest of the ICA, makes clear that more than one 911/E911 service provider may operate in  
11 the same service territory.

12 But, upon further review of section 1.2 of the attachment, I will go a step further. It would  
13 appear to me that AT&T Kentucky is attempting to draw an implicit distinction between a "Service  
14 Provider" and a "Network Provider." They are blocking INdigital from providing 911 services  
15 where we are not also the network provider. Then they go a step further and even try to stipulate  
16 what services we may or may not provide to the customer. AT&T Kentucky is overreaching the  
17 scope and purpose of the agreement which is interconnection, not regulation of a competitor's  
18 business practices. Additionally, NENA is advocating that 911 PSAPs should be able to purchase  
19 different aspects of the "Next Generation 911 System" from multiple vendors or service providers.  
20 In this light, AT&T Kentucky's proposal betrays the same historical monopolist mindset as its  
21 original "the E911 service provider" language. (Emphasis added.) Accordingly the Commission  
22 should adopt INdigital's proposed language.

1 *ALTERNATE ATTACHMENT 05 – 911/E911 ISSUE 3 (Sections 4.1.1.1 and 6.1.1.1):*

2 *INdigital / AT&T Kentucky: How should the "primary" provider of selective routing be*  
3 *determined?*  
4

5 **Q. HAVE YOU REVIEWED MR. NEINAST'S TESTIMONY REGARDING**  
6 **ALTERNATE 911/E911 ATTACHMENT ISSUE 3 ON PP. 4-9 OF HIS DIRECT**  
7 **TESTIMONY?**

8 A. Yes.

9 **Q. HOW WOULD YOU RESPOND TO MR. NEINAST'S DISCUSSION OF HOW**  
10 **AT&T KENTUCKY PROPOSES TO DETERMINE THE PRIMARY AND SECONDARY**  
11 **ROUTERS?**

12 A. The choice that AT&T Kentucky's proposed language presents to INdigital – determining the  
13 primary selective router by mutual agreement between the parties, or, if the parties cannot agree, by  
14 which party has the majority of access lines – is a false choice. Once you understand that AT&T  
15 Kentucky's default position for how the primary selective router is determined is based on the  
16 number of lines served, then you understand that all AT&T Kentucky has to do is refuse to come to a  
17 mutual agreement with INdigital in order to ensure that AT&T Kentucky's selective routers will  
18 always be primary. Basing how a primary selective router is determined on the number of lines  
19 served will always make AT&T Kentucky's selective routers the default. This gives AT&T  
20 Kentucky absolutely no incentive to come to a mutual agreement to the contrary. AT&T Kentucky's  
21 proposed language simply does not provide INdigital with a reasonable choice.

22 **Q. ON PP. 5:15-6:8 OF HIS DIRECT TESTIMONY, MR. NEINAST DISCUSSES HOW**  
23 **PRIMARY / SECONDARY SELECTIVE ROUTERS ARE TYPICALLY DETERMINED IN**  
24 **A SPLIT WIRE CENTER. DOES THE LANGUAGE PROPOSED BY AT&T KENTUCKY**  
25 **ACCOMPLISH WHAT MR. NEINAST DESCRIBES?**

1 A. No, it does not. Mr. Neinast states that "the determination of which carriers selective router  
2 is primary and which is secondary has typically been based on which router serves the PSAP that  
3 serves the clear majority of access lines in the wire center." (Neinast Direct Testimony at 5:22-6:2).  
4 That is, according to Mr. Neinast, the PSAP is the determining factor for deciding who has the most  
5 access lines, and thus, who will provide the primary selective routing function. Compare this,  
6 however, to AT&T Kentucky's actual proposed language in Sections 4.1.1.1 and 6.1.1.1 and there is  
7 a huge discrepancy:

8 4.1.1.1 Where ***an*** a CLEC End Office serves End Users both within and outside of  
9 the AT&T Kentucky network serving area, CLEC shall work cooperatively with  
10 AT&T Kentucky and the affected E91 1 Customer(s) (i) to establish call routing  
11 and/or call handoff arrangements, (ii) to establish which E91 1 Service provider will  
12 serve as the "primary" Selective Routing provider for direct trunking from the split  
13 wire center, determined by ***the E911 Customer's stated preference or, if no***  
14 ***preference is expressed, mutual agreement by the 911 systems service providers,***  
15 **or a clear majority of end users**, based on the Number of **Network** Access Lines  
16 (NALs) served by the Designated Primary Wireline Service Provider; and (iii) to  
17 establish which 91 1/E911 Service provider will serve as the "secondary" Selective  
18 Routing provider receiving a call hand-off from the  
19 primary Selective Routing provider.  
20

21 6.1.1.1 Where an End Office serves End Users both within and outside of the CLEC  
22 network serving area, **AT&T Kentucky** shall work cooperatively with CLEC and  
23 the affected E911 Customer(s) (i) to establish call routing and/or call handoff  
24 arrangements, (ii) to establish which E911 Service provider will serve as the  
25 "primary" Selective Routing provider for direct trunking from the split wire center,  
26 determined by ***the E911 Customer's stated preference or, if no preference is***  
27 ***expressed, as mutually agreed to by the 91 1 systems service providers, or a clear***  
28 **majority of end users**, based on the Number of Access Lines (NALs) served by the  
29 Designated Primary Wireline Service Provider; and (iii) to establish which 91 1/E911  
30 Service provider will serve as the "secondary" Selective Routing provider receiving a  
31 call hand-off from the primary Selective Routing provider.  
32

33 According to the actual language of these two sections, it is not the PSAP, but rather the  
34 "Designated Primary Wireline Service Provider" that is the determining factor for majority access  
35 lines. The "Designated Primary Wireline Service Provider," however, is not defined in the Alternate  
36 911/E911 Attachment. If anything, a "Designated Primary Wireline Service Provider" appears to be

1 the same as a "Designated 911/E911 Service Provider" used elsewhere in the agreement, and would  
2 therefore signify AT&T Kentucky or INdigital – not a PSAP.

3 The bottom line is that Mr. Neinast's testimony does not match the actual language of the  
4 ICA. It is not the PSAP with the majority of lines that would determine which party serves the  
5 primary selective routing function, but rather the 911/E911 Service Provider. As I mentioned above,  
6 this is unacceptable to INdigital because it will always lead to AT&T Kentucky as the default  
7 primary selective router.

8 **Q. IF AT&T KENTUCKY'S PROPOSED LANGUAGE MATCHED WHAT MR.**  
9 **NEINAST'S TESTIMONY DESCRIBES, WOULD INDIGITAL BE AMENABLE TO THAT**  
10 **SOLUTION?**

11 A. Quite possibly. If AT&T Kentucky were to agree to change the phrase in Sections 4.1.1.1  
12 and 6.1.1.1 that currently reads "based on the Number of Access Lines (NALs) served by the  
13 Designated Primary Wireline Service Provider" to "based on the Number of Access Lines (NALs)  
14 in the wire center served by the PSAP," then this may present a much more reasonable proposal from  
15 INdigital's perspective.

1 **ALTERNATE ATTACHMENT 05 – 911/E911 ISSUE 4 (Section 6.1.1):**

2 ***INdigital:*** *Should 911 calls from AT&T Kentucky End Offices be processed by AT&T*  
3 *Kentucky's selective router prior to delivery to INdigital for ultimate delivery to the*  
4 *911/E911 customer?*

5  
6 ***AT&T Kentucky:*** *Does the word "route" in Section 6.1.1 appropriately determine the*  
7 *method of transporting calls between the parties of this agreement?*

8  
9 **Q. HAVE YOU REVIEWED MR. NEINAST'S DIRECT TESTIMONY REGARDING**  
10 **ALTERNATE 911/E911 ATTACHMENT ISSUE 4 AT PP. 9-11?**

11 A. Yes.

12 **Q. DO YOU AGREE WITH MR. NEINAST AT P. 9 OF HIS DIRECT TESTIMONY**  
13 **THAT IT IS NOT CLEAR WHY INDIGITAL PROPOSES USING "TRANSPORT" AS TO**  
14 **"ROUTE" IN SECTION 6.1.1?**

15 A. No. The reason Mr. Neinast fails to understand what the dispute is in Issue 4 is because he  
16 addresses the issue in isolation from Issue 3. INdigital's overriding concern here is which party will  
17 perform the primary selective router function. Again, our concern is that AT&T Kentucky's  
18 proposed use of the word "route" means that AT&T Kentucky is setting itself up as the *de facto*  
19 primary selective router in all cases.

20 In addition, the provision at issue describes a network action that occurs prior to the selective  
21 routing function. In the event that the primary selective router is INdigital's, AT&T Kentucky would  
22 not "route" the call, but rather would simply "transport" it from the end office to that selective router.  
23 INdigital's language avoids that confusion and makes clear that AT&T Kentucky is not allowed to  
24 charge for that function. Otherwise, it would be an enormous competitive disadvantage for INdigital  
25 if it had to pay AT&T for carrying calls from its end offices to an INdigital selective router.

1           Thus, INdigital's proposed language leaves open the possibility that either party may function  
2 as the primary selective router, and avoids the ambiguity of whether AT&T Kentucky is allowed to  
3 charge INdigital for this function.

4 **Q.     REGARDING THE INCLUSION OF THE PHRASE "FROM [AT&T KENTUCKY'S]  
5 END OFFICES," DOES INDIGITAL AGREE TO ACCEPT AT&T KENTUCKY'S  
6 PROPOSED LANGUAGE?**

7 A.     Yes. On further review of Section 6.1.1 of the Alternate 911/E911 Attachment, INdigital is  
8 willing to accept AT&T Kentucky's proposed phrase "its End Offices" so that the last sentence of the  
9 disputed provision reads:

10           In the event AT&T Kentucky's End Office has End Users served by more than one  
11 E911 Selective Router network, AT&T Kentucky will ***transport*** route 911 calls from  
12 its End Offices to the appropriate E911 Selective Router location consistent with the  
13 terms of section 6.1.1.1, below.  
14

15 **Q.     MR. NEINAST CLAIMS ON P. 11:6-7 OF HIS DIRECT TESTIMONY THAT AT&T  
16 KENTUCKY WILL NOT CHARGE INDIGITAL FOR PERFORMING THE PRIMARY  
17 SELECTIVE ROUTING FUNCTION. DO YOU AGREE?**

18 A.     I would like nothing other than to agree with Mr. Neinast on this point. The problem is that,  
19 once again, AT&T Kentucky's proposed language in Section 6.1.1 does not say what its witness  
20 claims it says. The reality is that AT&T Kentucky intends, for example, to charge INdigital for  
21 copies made by AT&T employees in response to bona fide requests. Why would INdigital just  
22 assume that, in the case of selective routing, AT&T Kentucky intends to not charge anything?  
23 Nothing in the Alternate 911/E911 Attachment clarifies that the primary selective routing function  
24 will be performed at no cost to INdigital or its customers. If AT&T Kentucky were to propose  
25 language for Section 6.1.1 that clarifies its position that the selective routing function will be

- 1 performed at no charge, then I believe INdigital would be willing to accept the rest of AT&T
- 2 Kentucky's proposed language on this issue.
- 3



1 *ALTERNATE ATTACHMENT 05 – 911/E911 ISSUE 5 (Section 7.3.2):*

2 **Q. ACCORDING TO THE DIRECT TESTIMONY OF AT&T KENTUCKY WITNESS**  
3 **MR. NEINAST, IS ISSUE 5 RESOLVED?**

4 A. Yes. In his direct testimony, Mr. Neinast states that "[b]ased upon further review, AT&T  
5 Kentucky can accept INdigital's proposed language" for Issue 5 of the Alternate Attachment 05 –  
6 911/E911 to the ICA. Section 7.3.2 of this attachment should read:

7 Where CLEC has been designated the 911 Service Provider for a 911 Customer  
8 contiguous to an AT&T-Kentucky 911 Customer, and where each Party's respective  
9 911 Customer has requested the ability for PSAP-to-PSAP call transfer (and when  
10 AT&T Kentucky's 911/E911 Customer has entered into an agreement with AT&T-  
11 Kentucky for the additional features of Tandem to Tandem transfer between two  
12 E911 service providers) the Parties shall work cooperatively to establish methods and  
13 procedures to support PSAP to PSAP call transfer with ALI for 911 calls.

14  
15 Accordingly, Issue 5 is resolved.

1 **ALTERNATE ATTACHMENT 05 – 911/E911 ISSUE 6:**

2 **INdigital: Should 911/E911 rates be benchmarked at AT&T Kentucky's tariffed rate?**

3

4 **AT&T Kentucky: Should the ICA include rates for CLEC services?**

5

6 **Q. HAVE YOU REVIEWED MR. MCPHEE'S DIRECT TESTIMONY ON PP. 28-30**  
7 **REGARDING AT&T KENTUCKY'S PROPOSAL FOR BENCHMARKING RATES IN**  
8 **SECTION 10.1 OF THE ALTERNATE 911/E911 ATTACHMENT?**

9 A. Yes.

10 **Q. HOW WOULD YOU RESPOND?**

11 A. After reviewing Mr. McPhee's testimony, it occurred to me that there is possibly a  
12 fundamental misunderstanding between the parties on the question of benchmarking rates for certain  
13 911/E911 services. INdigital has understood AT&T Kentucky's position to be that the rates that  
14 INdigital charges its PSAP customers for 911/E911 service must be benchmarked with the rates  
15 AT&T Kentucky charges its customers. Now obviously, INdigital cannot agree to such a provision.  
16 Not only would it be counter to the principles of competition, but, as I stated in my direct testimony,  
17 INdigital's cost structure is undoubtedly higher than that of AT&T Kentucky's and benchmarking the  
18 rates INdigital charges its customers to those of AT&T Kentucky would be unfair and have a  
19 disastrous effect on INdigital's business.

20 On the other hand, Mr. McPhee was not directly involved in the many ICA negotiation  
21 teleconferences between AT&T Kentucky and INdigital. Having reviewed Mr. McPhee's testimony,  
22 it appears that AT&T Kentucky may be proposing that INdigital benchmark the rates the parties  
23 charge one another – as opposed to customers – for certain services. If this is the proposal that  
24 AT&T Kentucky is making in Section 10.1 of the Alternate 911/E911 Attachment, then INdigital  
25 may be more amenable to such a "reciprocal compensation" structure between the parties. In the

- 1 event this is the correct assumption, we are certainly willing to consider language that would clarify
- 2 AT&T Kentucky's position.

1 *ALTERNATE ATTACHMENT 05 – 911/E911 ISSUE 7 (Sections 11.5 and 11.6):*

2 *INdigital / AT&T Kentucky: Should the parties have mutual indemnity obligations with*  
3 *respect to claims arising from access to or use of each party's respective 911/E911*  
4 *systems?*

5  
6 **Q. AT&T KENTUCKY WITNESS MR. MCPHEE CLAIMS THAT THE**  
7 **INDEMNIFICATION ISSUES IN SECTIONS 11.6 AND 11.7 OF THE ALTERNATE**  
8 **911/E911 ATTACHMENT ARE OF A LEGAL NATURE AND, BECAUSE OF THIS, WILL**  
9 **WAIT TO ADDRESS THEM IN ITS POST-HEARING BRIEF. HOW WOULD YOU LIKE**  
10 **TO RESPOND?**

11 A. I will simply refer the Commission to my prior statement at p. 9 of my direct testimony.  
12 Otherwise, INdigital will address whatever legal issues may apply to the indemnification provisions  
13 in Sections 11.6 and 11.7 of the Alternate 911/E911 Attachment in its post-hearing brief.

14 In short, if AT&T Kentucky expects INdigital to indemnify it with respect to claims arising  
15 from access to or use of INdigital's provision of 911 services, then it is only fair for INdigital to  
16 expect the same indemnification (by AT&T Kentucky against claims arising from access to or the  
17 use of AT&T Kentucky's provision of 911 services) in return.

18

1                                    **II.     GENERAL TERM AND CONDITIONS ISSUES**

2     ***GTCs ISSUE 1 (Section 2.168):***

3                    **INdigital / AT&T Kentucky: Should disputed charges constitute Unpaid Charges?**

4     **Q.     HAVE YOU HAD AN OPPORTUNITY TO REVIEW MR. MCPHEE'S DIRECT**  
5     **TESTIMONY ON PP. 4-8 REGARDING ISSUE 1 IN THE GTCs?**

6     A.     Yes.

7     **Q.     AT P. 5:10-12 OF HIS DIRECT TESTIMONY, MR. MCPHEE CLAIMS THAT**  
8     **INDIGITAL HAS NOT EXPLAINED WHY IT DOES NOT BELIEVE THAT "DISPUTED**  
9     **CHARGES" SHOULD BE INCLUDED WITHIN THE TERM "UNPAID CHARGES." IS**  
10    **THAT TRUE?**

11    A.     Not at all. INdigital has explained to AT&T Kentucky numerous times during the  
12    negotiations that INdigital's concern about the inclusion of Disputed Charges in the definition of  
13    Unpaid Charges is due to the treatment of Unpaid Charges in Section 12 of the GTCs. Section 12  
14    gives AT&T Kentucky the right to disconnect service for Unpaid Charges. Thus, INdigital's  
15    proposal that Disputed Charges be explicitly carved out of the Unpaid Charges definition simply  
16    clarifies that, in the event certain charges are disputed, AT&T Kentucky does not have the right to  
17    discontinue service. AT&T Kentucky's position, on the contrary, leaves the treatment of Disputed  
18    Charges unnecessarily ambiguous because, as Mr. McPhee states in his direct testimony, AT&T  
19    Kentucky considers a "Disputed Amount" [to be] by definition a charge that has not been paid – that  
20    is, an unpaid charge." (McPhee Direct Testimony at 5:2-3).

21    **Q.     IS IT TRUE THAT INDIGITAL IS ATTEMPTING TO "EXCLUDE DISPUTED**  
22    **CHARGES FROM THE SCOPE OF UNPAID CHARGES" IN AN EFFORT "TO AVOID**

1 **ANY RESPONSIBILITY FO LATE PAYMENT CHARGES ON DISPUTED AMOUNTS"**  
2 **AS MR. MCPHEE CLAIMS IN HIS TESTIMONY AT P. 6:8-12?**

3 A. By no means. In fact, Mr. McPhee points out the baselessness of his own accusation in the  
4 very next sentence: "INdigital has agreed, however, to language in Section 11.0 of the GTCs that  
5 makes Disputed Amounts subject to late payment charges." (McPhee Direct Testimony at p. 6:12-  
6 14). And in the accompanying footnote on p. 6 of Mr. McPhee's direct testimony, he states as  
7 clearly as I can here that "[b]oth [parties] agree that Disputed Amounts are subject to Late Payment  
8 Charges." (*Id.* at 6 n.3). Any suggestion by Mr. McPhee that INdigital is attempting to avoid late  
9 payment charges on disputed amounts is simply without substance, as Mr. McPhee's own testimony  
10 shows.

11 **Q. MR. MCPHEE ALSO CLAIMS ON P. 7:2-3 THAT IF INDIGITAL'S LANGUAGE**  
12 **WERE ADOPTED IT WOULD "CREATE AN INCENTIVE FOR INDIGITAL TO**  
13 **DISPUTE CHARGES IN ORDER TO DELAY PAYMENT WITH NO FINANCIAL RISK**  
14 **FROM DOING SO." IS THIS TRUE?**

15 A. Absolutely not. Again, INdigital has already agreed to language in Section 11.10 of the  
16 GTCs that would subject "Disputed Amounts" that are resolved in favor of the billing party to late  
17 payment charges. This is ample incentive for INdigital to dispute only those charges it genuinely  
18 believes it should dispute. If INdigital loses the dispute, it will owe AT&T Kentucky late charges in  
19 addition to the disputed amount. Thus, Mr. McPhee's assertion to the contrary is simply without  
20 substance.

21 Moreover, Mr. McPhee's insistence that "to exclude Disputed Amounts from the definition of  
22 'Unpaid Charges' would create an inherent and unnecessary conflict between Section 11.10 and  
23 Section 11.2 of the GTCs" makes no sense at all. (McPhee Direct Testimony at 6:14-7:1).

1 Excluding Disputed Amounts from the definition of "Unpaid Charges" makes clear that disputed  
2 amounts will not subject INdigital to discontinuance of service under Section 12, while at the same  
3 time Section 11.10 makes clear that Disputed Amounts remain subject to the same late payment  
4 provisions as Unpaid Charges set forth in Section 11.2. There is no conflict, only clarity.

5 The ultimate irony in Mr. McPhee's claim, however, is that the real incentive created by  
6 AT&T Kentucky's proposed dispute resolution provisions will be for AT&T Kentucky to  
7 manufacture disputes in an effort to force INdigital to escrow the disputed amounts pursuant to  
8 Section 11.8 and 11.9. This will drive up INdigital's costs, and it imposes an unfair burden on it, as  
9 the new entrant to the competitive 911 market. There are no safeguards to prevent this scenario from  
10 occurring. I will address this issue in greater detail below when I address GTC Issue 5, regarding the  
11 escrow account provisions.

12 **Q. DO YOU HAVE ANY SUGGESTIONS REGARDING HOW THE PARTIES MAY**  
13 **RESOLVE THIS ISSUE?**

14 A. Possibly. In order to assuage AT&T Kentucky's baseless fear that INdigital is attempting to  
15 avoid late payments on disputed amounts by carving them out of the Unpaid Charges definition,  
16 INdigital proposes the following language for the late payment provision in Section 11.2: "A Late  
17 Payment Charge will be assessed for all Past Due payments and Disputed Amounts that are  
18 resolved in favor of the Billing Party as provided below, as applicable."

1 **GTCs ISSUE 2 (Section 3.7.2):**

2 **INdigital: Should the ICA be non-severable?**

3  
4 **AT&T Kentucky: Should the severability provision be reflected in such a manner that the**  
5 **distinct provisions of this agreement are treated in their totality?**

6  
7 **Q. HAS ISSUE 2 OF THE GTCs BEEN RESOLVED?**

8 A. It is not entirely clear. As Mr. McPhee states in his direct testimony, the Parties are mostly in  
9 agreement regarding Section 3.7.2. However, INdigital believes that the additional sentence  
10 proposed by AT&T Kentucky risks an interpretation that, if any one provision of the ICA is found to  
11 be invalid, illegal or otherwise unenforceable, it could invalidate the entire ICA. Specifically,  
12 AT&T Kentucky has proposed the following: "Consistent with the foregoing in this subsection, the  
13 Parties negotiated the terms and conditions of this Agreement for Interconnection Services as a total  
14 arrangement and it is intended that any adoption of this Agreement contain all of the terms and  
15 conditions." Mr. McPhee claims that AT&T Kentucky's proposed language "merely makes clear  
16 that any provision subject to revision under Section 3.7.2 does *not* alter the original intent of the  
17 Parties to treat the ICA and all of its Attachments as one complete agreement and that any CLEC  
18 that seeks to adopt this ICA under a Most Favored Nations ('MFN') provision of the Act must take  
19 the ICA – including any amended provisions within it – in its entirety." (McPhee Direct Testimony  
20 at 9:24-10:2).

21 INdigital has no problem with this intent, but it remains unconvinced that AT&T Kentucky's  
22 proposed language achieves this limited goal. As a result, INdigital would suggest that the disputed  
23 sentence should read: "Consistent with the foregoing in this subsection, the Parties negotiated the  
24 terms and conditions of this Agreement for Interconnection Services **to be treated as one complete**  
25 **Agreement. In the event any provision of this Agreement is subject to revision under this Section,**  
26 **such revision shall not alter the original intent of the Parties** that any adoption of this Agreement



- 1 contain all of its terms and conditions, *including those terms and conditions that have been*
- 2 *revised.*"

1 *GTCs ISSUE 3 (Section 8.2.1):*

2 *INdigital / AT&T Kentucky: Should the ICA contain an "evergreen" clause?*

3

4 **Q. HAVE YOU REVIEWED MR. MCPHEE'S DIRECT TESTIMONY AT PP. 10-15**  
5 **REGARDING THE SO-CALLED "EVERGREEN CLAUSE" IN SECTION 8.2.1 OF THE**  
6 **GTCs?**

7 A. Yes.

8 **Q. HOW WOULD YOU RESPOND?**

9 A. Generally speaking, I agree with Mr. McPhee that it is common for parties to an ICA to  
10 continue to operate under an expired ICA for an indefinite period of time while they attempt to either  
11 negotiate a successor ICA or to extend the expiration date of the then-current ICA. Additionally,  
12 Mr. McPhee is correct that the parties have agreed to language in Section 8.4.4 of the GTCs that  
13 would allow the parties to continue operating under the expired ICA while a successor ICA is being  
14 negotiated. The real danger, however, is the scenario identified by Mr. McPhee where the ICA  
15 expires and the Parties have not entered into a new agreement or are not in whatever undefined  
16 meaning AT&T Kentucky ascribes to "active negotiations." As a result, INdigital's concern is that  
17 without an evergreen clause, the language proposed by AT&T Kentucky in Section 8.4.5 of the  
18 GTCs is intended to catch INdigital off guard so that it is not in "active negotiations" with AT&T  
19 Kentucky as required by Section 8.4.4 and is thereby relegated to AT&T Kentucky's vastly one-  
20 sided and unacceptable "Generic" ICA.

21 **Q. IS AT&T KENTUCKY'S CONCERN OVER CHANGES IN THE**  
22 **TELECOMMUNICATIONS REGULATORY LANDSCAPE LEGITIMATE?**

23 A. It is certainly true that the rules and regulations for our industry can and do change,  
24 occasionally. However, AT&T Kentucky's concerns are adequately addressed by the change of law

1 provisions found in Section 3 of the GTCs. These provisions make AT&T Kentucky's concerns  
2 moot.

3 **Q. WHAT DOES INDIGITAL PROPOSE IN RESPONSE TO AT&T KENTUCKY'S**  
4 **CONCERNS REGARDING INDIGITAL'S PROPOSED EVERGREEN CLAUSE?**

5 A. INdigital is willing to make the following change to its proposed language in Section 8.2.1:  
6 "Following the expiration of the Initial Term, the Agreement shall automatically renew for  
7 successive one (1) year terms (each, a 'Renewal Term') unless CLEC or AT&T Kentucky provides  
8 no less than thirty (30) days prior written Notice of its intent to terminate the Agreement at the end  
9 of the Initial Term or any Renewal Term or its intent to negotiate a successor Agreement to replace  
10 this Agreement." This language should provide both Parties with ample room for determining if the  
11 ICA should be terminated, renegotiated, or simply allowed to renew under the evergreen clause. At  
12 the same time, it affords INdigital the security that this agreement (which has been negotiated and,  
13 now, arbitrated with great time and expense) will continue until the replacement agreement is ready  
14 for implementation.

1 **GTCs ISSUE 4 (Sections 10.2.1-10.2.2):**

2 **INdigital / AT&T Kentucky: Should INdigital be required to provide a deposit in the event**  
3 **AT&T Kentucky determines there has been a general impairment of INdigital's financial**  
4 **stability? If so, which deposit language should be used in Section 10.2.2?**

5  
6 **Q. REGARDING THE DEPOSIT PROVISIONS AT ISSUE IN ISSUE 4 OF THE GTCs,**  
7 **MR. MCPHEE STATES ON P. 16:3-4 THAT "AT&T KENTUCKY HAS PROPOSED ICA**  
8 **LANGUAGE THAT WOULD REQUIRE INDIGITAL TO PROVIDE A DEPOSIT IF**  
9 **INDIGITAL EITHER HAS NOT ESTABLISHED A GOOD PAYMENT RECORD OR HAS**  
10 **A HISTORY OF LATE PAYMENTS." IS THIS AN ACCURATE REPRESENTATION OF**  
11 **AT&T KENTUCKY'S PROPOSED LANGUAGE?**

12 **A.** No, this is simply not what AT&T Kentucky has proposed. A look at AT&T Kentucky's  
13 actual language shows that it has nothing to do with a "good payment record" or a "history" of late  
14 payments. AT&T Kentucky's proposed language states that

15 10.2 Assurance of payment may be requested by **AT&T Kentucky:**

16  
17 10.2.1 **Intentionally deleted: If based on AT&T Kentucky's analysis of the AT&T**  
18 **Kentucky Credit Profile and other relevant information regarding CLECs**  
19 **credit and financial condition, there is an impairment of the credit, financial**  
20 **health, or credit worthiness of CLEC. Such impairment will be determined**  
21 **from information available form Third Party financial sources; or**

22  
23 10.2.2 **If CLEC fails to timely pay at least two (2) a bill(s) rendered to CLEC by**  
24 **AT&T Kentucky (except such portion of a bill that is subject to a good faith, bona**  
25 **fide dispute and as to which the CLEC has complied with all requirements set forth**  
26 **in Section 12.4 below;**

27  
28 AT&T Kentucky proposes in Section 10.2.1 that it can demand assurance of payment from  
29 INdigital "based on AT&T Kentucky's analysis of the AT&T Kentucky Credit Profile and other  
30 relevant information." Nowhere does it mention that assurance of payment is triggered by a CLECs  
31 lack of a "good payment record," nor does it explain what constitutes a "good payment record."  
32 Instead, a demand for payment assurance is based upon some undefined "analysis" performed by

1 AT&T Kentucky, using some undefined and unidentified "Credit Profile," and a reference to some  
2 nebulous "other relevant information." There is absolutely no way that INdigital can agree to give  
3 AT&T Kentucky such unfettered decision-making power in determining if it can demand assurance  
4 of payment. AT&T Kentucky's proposal is simply not reasonable.

5         Additionally, Section 10.2.2 has absolutely nothing to say about "a history of late payment"  
6 as described by Mr. McPhee. Instead, AT&T Kentucky would allow itself the right to demand  
7 assurance of payment for only one "late payment." As an initial matter, one late payment does not a  
8 history of late payments make. As I explained in my direct testimony, there are numerous reasons  
9 why a single payment from INdigital to AT&T Kentucky might be untimely, and not all of the  
10 reasons would necessarily be INdigital's fault. AT&T Kentucky is just as prone to the potential for  
11 administrative error as any other company, and in this instance, may even have an ulterior motive for  
12 such error – especially if it can make life more difficult for a competitor by requiring assurance of  
13 payment as a result of such an error.

14         In any event, Mr. McPhee's description of AT&T Kentucky's proposed language is rather less  
15 than accurate.

16 **Q. DOES MR. MCPHEE'S DIRECT TESTIMONY ADEQUATELY ADDRESS**  
17 **INDIGITAL'S CONCERNS REGARDING THIS ISSUE?**

18 A. Not at all. As I discussed in my direct testimony, AT&T Kentucky's proposed language in  
19 Section 10.2 is altogether unclear as to how AT&T Kentucky performs its "Credit Profile" analysis  
20 and what objective standards, if any, it uses. It is also unclear when AT&T Kentucky can perform  
21 such an analysis. On its face, Section 10.2.1 appears to allow AT&T Kentucky to perform a "Credit  
22 Profile" analysis whenever and as often as it likes. AT&T Kentucky's apparent unbridled discretion

1 and potential to employ a subjective analysis that may be results-driven is all too convenient and not  
2 reasonably limited by external criteria.

3 In his direct testimony, Mr. McPhee has failed to explain how AT&T Kentucky would make  
4 a determination of credit impairment and when it would be able to do so. Though Mr. McPhee  
5 provides an "example" of what criteria it uses to make a determination of credit worthiness, he fails  
6 to explain how these criteria are applied in an objective manner. Ultimately, AT&T Kentucky's  
7 approach to the credit worthiness issue is just one more example of its paternalistic approach to  
8 competition in general.

9 **Q. DID INDIGITAL REQUEST DURING DISCOVERY THE DATA THAT AT&T**  
10 **KENTUCKY HAS NOW CHOSEN TO DISCLOSE?**

11 A. Yes. INdigital asked AT&T Kentucky to describe and provide the standards by which it  
12 performs the credit worthiness analysis, and AT&T Kentucky failed to provide the criteria it uses.  
13 (*See* AT&T Kentucky Response to Initial Data Request No. 8.) Instead, AT&T Kentucky chose to  
14 disclose its criteria via its prefiled direct testimony.<sup>1</sup> While this is a step in the right direction,  
15 AT&T Kentucky's direct testimony still fails to explain how the criteria it uses is applied objectively.  
16 Though it mentions Moody's and Standard & Poor's as reference points for a credit worthiness  
17 determination, AT&T Kentucky's testimony is absent specific information as to how it would use  
18 these ratings systems. For instance, does anything below a "AAA" rating trigger the need for  
19 payment assurance and, if so, why not write these specific criteria into Section 10.2.1? Until the  
20 agreement includes this level of detail, AT&T Kentucky's proposal for requiring assurances of  
21 payment is ambiguous, unreasonable, and leaves INdigital entirely exposed to AT&T Kentucky's

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<sup>1</sup> Following the direct testimony and a request from INdigital counsel, AT&T Kentucky finally provided the same basic information under a protective agreement. AT&T Kentucky claims that this information is confidential and in need of protection, notwithstanding the fact that AT&T Kentucky has now disclosed this information in its publicly-filed testimony.

- 1 whim. Otherwise, AT&T Kentucky's language should be intentionally deleted as proposed by
- 2 INdigital.

1 *GTCs ISSUE 5 (Sections 11.8, 11.9-11.9.2.5.3, 11.10, 11.12-11.12.4, 12.4-12.4.4, 12.6-12.6.2,*  
2 *13.4.4, and 40.1):*

3 ***INdigital:*** *Should INdigital be required to escrow amounts subject to dispute?*

4  
5 ***AT&T Kentucky:*** *Is it reasonable to require CLEC to pay disputed charges into an escrow*  
6 *account while the disputed amounts are being resolved through the dispute process?*

7  
8 **Q. HAVE YOU REVIEWED MR. MCPHEE'S DIRECT TESTIMONY AT PP.19-23**  
9 **REGARDING THE ESCROW PROVISIONS IN ISSUE 5 OF THE GTCs?**

10 A. Yes.

11 **Q. HOW WOULD YOU LIKE TO RESPOND?**

12 A. AT&T Kentucky completely misses the point. AT&T Kentucky goes into great detail as to  
13 how the escrow provisions would work and why it feels they are important. But I think we already  
14 understand how an escrow account works, and how such a provision would be beneficial to AT&T  
15 Kentucky. What AT&T Kentucky fails to address, however, is how its proposed language requiring  
16 that disputed amounts be placed into an escrow account can be used as a tool to drive up the  
17 administrative costs of its competitors. As I discussed in my direct testimony, there are absolutely  
18 no safeguards in place to ensure that AT&T Kentucky does not manufacture disputes just as a means  
19 for forcing CLECs like INdigital to pay money into an escrow account – money that INdigital  
20 would, then, have no access to until the "dispute" is resolved. And as Mr. McPhee himself  
21 recognizes, "the dispute resolution process common to most ICAs can take a significant amount of  
22 time, sometimes as long as a full year or longer where litigation is involved." (McPhee Direct  
23 Testimony at 23:4-6).

24 In addition, there is nothing to prevent AT&T Kentucky from creating a billing dispute (in  
25 the form of inaccurate bills) for the sole purpose of forcing new entrants like INdigital out of the  
26 market. Due to the deleterious effects that requiring escrow payments could have on INdigital and



1 the unmitigated possibility for their abuse by AT&T Kentucky, INdigital continues to believe that  
2 these provisions should be stricken from the ICA. AT&T Kentucky's position on this issue is as  
3 though it is the responsible parent and all CLECs are irresponsible children who cannot be trusted to  
4 properly manage their business.

5 **Q. IS THERE ANYTHING ELSE YOU WOULD LIKE TO ADD?**

6 A. Yes. I would also like to point out that INdigital's ICA with AT&T Kentucky's affiliate in  
7 Indiana does not contain an escrow requirement. Thus, even from the standpoint of consistency,  
8 AT&T Kentucky's escrow proposal is unreasonable.

1 *GTCs ISSUE 6 (Sections 14.1 and 14.8):*

2 *INdigital / AT&T Kentucky: What is an appropriate error threshold for the right to*  
3 *conduct follow-up audits?*

4  
5 **Q. ON PP. 24-26 MR. MCPHEE DISCUSSES AT&T KENTUCKY'S PROPOSED**  
6 **LANGUAGE FOR SECTIONS 14.1 AND 14.8 OF THE GTCs. CAN YOU EXPLAIN TO**  
7 **THE COMMISSION WHY AT&T KENTUCKY'S POSITION IS UNREASONABLE AND**  
8 **WHY INDIGITAL'S IS RATHER GENEROUS?**

9 A. Certainly. Counsel tells me that, in the past, it has been the Commission's practice to require  
10 the party wishing to perform the audit to pay for it, on the theory that one company should not bear  
11 the burden of another when ensuring compliance with an agreement. Likewise, here it is not  
12 INdigital that seeks to ensure compliance under the audit provisions. Thus, the fact that INdigital  
13 has agreed to even a 20% variance as a threshold for it to reimburse AT&T Kentucky's audit  
14 expenses is more than generous. Yet, AT&T Kentucky complains that this is not enough. AT&T  
15 Kentucky's 5% threshold for triggering a re-audit would impose unreasonable time and financial  
16 costs on a new entrant, like INdigital, to the competitive market. Due to the legal nature of this  
17 issue, I understand counsel will address this in greater detail in the post-hearing brief.

18 For these reasons alone, the Commission should reject AT&T Kentucky's auditing provisions  
19 as unreasonable and accept INdigital's language.

1 **GTCs ISSUE 7 (Section 16.7):**

2 **INdigital: Should the limitation of liability related to 911 service be mutual?**

3

4 **AT&T Kentucky: What is the appropriate language to be included in Section 16.7 of the**  
5 ***interconnection agreement?***

6

7 **Q. AT&T KENTUCKY WITNESS MR. MCPHEE CLAIMS THAT THE LIMITATION**  
8 **OF LIABILITY ISSUES IN SECTION 16.7 OF THE GTCs ARE OF A LEGAL NATURE**  
9 **AND, BECAUSE OF THIS, IT WILL WAIT TO ADDRESS THIS ISSUE IN ITS POST-**  
10 **HEARING BRIEF. HOW WOULD YOU LIKE TO RESPOND?**

11 **A. INdigital will, likewise, address whatever legal issues may apply to the limitation of liability**  
12 **provisions in Section 16.7 of the GTCs in its post-hearing brief.**

1 **III. ATTACHMENT 03 – STRUCTURE ACCESS**

2 *STRUCTURE ACCESS ISSUE 1 (Section 6.2.1.1):*

3 ***INdigital:** In addition to paying for the production and mailing of records relating to*  
4 *structure access, should INdigital pay for the cost of employee time spent gathering and*  
5 *copying records?*

6  
7 ***AT&T Kentucky:** Should AT&T Kentucky absorb costs associated with research, review*  
8 *and copying of records?*

9  
10 **Q. AT&T KENTUCKY ARGUES IN ITS DIRECT TESTIMONY THAT ITS**  
11 **PROPOSED LANGUAGE "REMOVES ANY AMBIGUITY OR UNCERTAINTY" IN**  
12 **SECTION 16.2 OF THE STRUCTURE ACCESS ATTACHMENT. DO YOU AGREE?**

13 A. No. From INdigital's perspective, AT&T Kentucky's proposed language leaves INdigital  
14 exposed to an AT&T Kentucky's employee costs – no matter how unreasonable they may be. There  
15 is no certainty in that – except for the certainty that AT&T Kentucky will have absolutely no  
16 incentive to make sure that its employees' costs are reasonable. There are simply no safeguards  
17 against AT&T Kentucky running up the costs of its employee's time. For this reason, INdigital  
18 proposed simply to insert a reasonableness standard for this provision.

19 Moreover, even if INdigital's proposed reasonableness standard were to increase the  
20 likelihood of disputes (as unlikely as that may be) between the parties, as Ms. Niziolek suggests, that  
21 check and balance will help ensure that AT&T Kentucky has an incentive to keep its employee's  
22 costs down. Besides, that is why the parties have agreed to include a dispute resolution process in  
23 the ICA. In any event, I find AT&T Kentucky's concern that INdigital's proposed language might  
24 lead to disputes between the parties somewhat disingenuous. AT&T Kentucky makes no hesitation  
25 to point INdigital to the Dispute Resolution process for any of AT&T Kentucky's proposals that  
26 might just as easily lead to dispute. (*See, for instance*, Niziolek Direct Testimony at 8:6-8; 31:26-  
27 28).

1 **Q. DOES ANYTHING IN SECTION 2.11 OF THE STRUCTURE ACCESS**  
2 **ATTACHMENT, WHERE THE TERM "COST" IS DEFINED, PRECLUDE THE USE OF A**  
3 **REASONABLE STANDARD IN SECTION 6.2.1.1 AS AT&T KENTUCKY ARGUES?**

4 A. No. Contrary to Ms. Niziolek's assertion that, because "INdigital has already agreed" to  
5 Section 2.11 of the Structure Access Attachment, it is somehow precluded from proposing a  
6 reasonableness standard. (Niziolek Direct Testimony at p. 5:12). In Section 6.2.1.1, the definition  
7 of "Cost" simply identifies the different components that make up the charges to a CLEC. There is  
8 nothing about the definition of "Cost" that would be incompatible with a requirement that those costs  
9 be reasonable prior to passing them along to INdigital.

1 **STRUCTURE ACCESS ISSUE 2 (Section 16.1):**

2 ***INdigital / AT&T Kentucky: Should INdigital pay for AT&T Kentucky to monitor the***  
3 ***entrance and exit of Facilities?***  
4

5 **Q. HAVE YOU REVIEWED THE DIRECT TESTIMONY OF MS. FUENTES**  
6 **NIZIOLEK AT PP. 6-8 REGARDING ISSUE 2 OF THE STRUCTURE ACCESS**  
7 **ATTACHMENT?**

8 A. Yes.

9 **Q. HOW WOULD YOU RESPOND?**

10 A. As an initial matter, I take issue with Ms. Niziolek's restatement of Section 16.1. Ms.  
11 Niziolek claims that there is no charge for monitoring facilities under Section 16.1 unless some "out  
12 of the ordinary" activity by INdigital causes AT&T Kentucky to dispatch personnel to the facilities.  
13 Specifically, Ms. Niziolek, at p. 7:10-18 states that

14 AT&T Kentucky remotely monitors entrances and exits to AT&T Kentucky  
15 manholes. There is no charge for this remote monitoring. If, however, AT&T  
16 Kentucky identifies any unusual activity during this remote monitoring (for example,  
17 alarm notifications, an unprecedented number of cover openings/closings, etc.) and  
18 this unusual activity cannot be corrected or reviewed remotely, then AT&T Kentucky  
19 may need to dispatch someone to the site in order to address the issue. If, and only if,  
20 AT&T Kentucky determines that the dispatch was necessary because of some action  
21 by INdigital, then INdigital should pay the costs of the dispatch, because in that  
22 situation INdigital is the cost-causer.

23  
24 (*Id.* (emphasis added)). This, however, is simply not what Section 16.1 says.

25 For comparison, AT&T Kentucky's proposed language for Section 16.1 actually states as  
26 follows:

27 AT&T Kentucky may monitor, at CLEC's expense, the entrance and exit of CLEC's  
28 Facilities into AT&T Kentucky's Manholes and the placement of CLEC's Facilities  
29 in AT&T Kentucky's Manholes.  
30

31 There is no conceivable way to tease out the meaning that Ms. Niziolek gives AT&T Kentucky's  
32 proposed language. Ms. Niziolek states that there is no charge for the monitoring, but AT&T

1 Kentucky's proposed language clearly states that AT&T Kentucky "may monitor, at CLEC's  
2 expense, the entrance and exit of CLEC's facilities." Ms. Niziolek claims that charges will only  
3 apply in certain qualified situations that are out of the ordinary, but there is no qualifying language in  
4 AT&T Kentucky's actual proposed language.

5 **Q. IF AT&T KENTUCKY INTENDS SECTION 16.1 TO HAVE THE MEANING THAT**  
6 **MS. FUENTES NIZIOLEK CLAIMS THAT IT DOES, WHAT WOULD YOU**  
7 **RECOMMEND?**

8 A. I would recommend that AT&T Kentucky change its proposed language so that it makes  
9 explicit what Ms. Niziolek implies that it says.

10 AT&T Kentucky may remotely monitor, at AT&T Kentucky's expense, the normal  
11 day-to-day entrance and exit of CLEC's Facilities into AT&T Kentucky's Manholes  
12 and the placement of CLEC's Facilities in AT&T Kentucky's Manholes. If, however,  
13 AT&T Kentucky identifies any unusual activity during its remote monitoring  
14 operations and this unusual activity cannot be corrected or reviewed remotely, then  
15 AT&T Kentucky may dispatch personnel to investigate the CLEC's  
16 Facilities activity in order to address the issue. If, upon completion of that  
17 investigation, AT&T Kentucky determines that the dispatch was necessary because  
18 of some due to a breach of this Agreement caused by CLEC, then CLEC  
19 should shall pay the costs associated with of the dispatch.  
20

21 **Q. IF AT&T KENTUCKY WERE TO ACCEPT THE ABOVE PROPOSED**  
22 **LANGUAGE, WOULD INDIGITAL BE AMENABLE TO RESOLVING THIS ISSUE?**

23 A. Yes.

1 **STRUCTURE ACCESS ISSUE 3 (Sections 16.2.1 and 16.3.3):**

2 **INdigital / AT&T Kentucky: Should INdigital pay for the cost of post-construction**  
3 **inspections?**

4  
5 **Q. HAVE YOU REVIEWED THE DIRECT TESTIMONY OF MS. FUENTES**  
6 **NIZIOLEK AT PP. 9-10 REGARDING ISSUE 3 OF THE STRUCTURE ACCESS**  
7 **ATTACHMENT?**

8 A. Yes.

9 **Q. HOW WOULD YOU RESPOND?**

10 A. Recognizing that AT&T Kentucky has accepted INdigital's proposed term "may" as opposed  
11 to "will," INdigital can reduce the remaining dispute over Sections 16.2.1 and 16.3.3 down to one  
12 issue. Namely, the determination of who pays the cost of the inspection should be based solely upon  
13 whether the inspection actually reveals that INdigital did, in fact, do something wrong. If the  
14 investigation fails to do this, then AT&T Kentucky should pay for it. If, on the other hand, the  
15 investigation confirms AT&T Kentucky's concerns, INdigital should pay for the costs of the  
16 inspection.

17 To that end, INdigital would propose the following language for Section 16.2.1 of attachment  
18 3:

19 AT&T KENTUCKY may conduct a post-construction inspection of the Attaching  
20 Party's attachment of Facilities to AT&T Kentucky's Structures for the purpose of  
21 determining the conformance of the attachments to the occupancy permit. **If the post-**  
22 **construction inspection reveals a defect in conformity of the attachments to the**  
23 **occupancy permit, then CLEC will be responsible for the costs of the inspection.**  
24 **If, however, the post-construction inspection fails to reveal a defect in conformity**  
25 **of the attachments to the occupancy permit, then AT&T Kentucky will be**  
26 **responsible for the costs of the inspection.** AT&T Kentucky will provide the  
27 Attaching Party advance written Notice of proposed date and time of the post-  
28 construction inspection. The Attaching Party may accompany AT&T Kentucky on  
29 the post-construction inspection.

30  
31 This proposal is much more equitable between the parties, and it would be acceptable to INdigital.



1 **STRUCTURE ACCESS ISSUE 4 (Section 16.3.5):**

2 ***INdigital/AT&T Kentucky: Should the time attributable to make-ready work be included***  
3 ***in INdigital's time to bring facilities into compliance?***  
4

5 **Q. HAVE YOU REVIEWED THE DIRECT TESTIMONY OF MS. FUENTES**  
6 **NIZIOLEK AT PP. 11-12 REGARDING ISSUE 4 OF THE STRUCTURE ACCESS**  
7 **ATTACHMENT?**

8 A. Yes.

9 **Q. HOW WOULD YOU RESPOND?**

10 A. Ms. Niziolek fails to appreciate or acknowledge AT&T Kentucky's involvement (or should I  
11 say culpability) in the initial Make-Ready Work process when she states that "[a]ny make-ready  
12 work should have been identified and completed prior to the original facility inspection." (Niziolek  
13 Direct Testimony at 12:2-3). The Make-Ready Work process is set forth in Section 7.0 of  
14 Attachment 3 and requires that all make-ready work be performed either by AT&T Kentucky or an  
15 outside contractor certified by AT&T Kentucky. (Section 7.1.1 and 7.3.1). In either case, once the  
16 make-ready work is completed, AT&T Kentucky issues a license to the CLEC giving it the "go  
17 ahead" to begin attachment or occupancy. (Section 7.4).

18 With Section 7.0 of Attachment 3 in mind, it is entirely unreasonable for AT&T Kentucky to  
19 force INdigital to bear the responsibility for inadequate make-ready work when a future inspection  
20 reveals such a defect. Moreover, AT&T Kentucky (not INdigital) controls the timeframe within  
21 which make-ready work will actually be completed. Thus, INdigital's proposed language seeking to  
22 exclude additional make-ready work from the 30-day compliance window in Section 16.3.5, is  
23 entirely reasonable and should be accepted by the Commission.

24 **Q. IS THERE ANYTHING ELSE YOU WOULD LIKE TO ADD?**

1 A. Yes. As it stands at the moment, the parties may have tentatively reached agreement on the  
2 language for this provision. As a result, the parties will hopefully solidify this agreement once they  
3 file the final joint issues matrix with the Commission.

1 ***STRUCTURE ACCESS ISSUE 5 (Section 19.7.1):***

2 **Q. HAS ISSUE 5 IN THE STRUCTURE ACCESS ATTACHMENT BEEN RESOLVED?**

3 A. Yes. According to the direct testimony of Ms. Niziolek, AT&T Kentucky accepts INdigital's  
4 proposed language in Section 19.7.1. (Niziolek Direct Testimony at p.12, lines 18-24).

1 **STRUCTURE ACCESS ISSUE 6 (Sections 22.1.3-22.1.4, and 22.1.6):**

2 ***INdigital / AT&T Kentucky: Should the indemnification provisions of the GT&C govern***  
3 ***the structure access, and if not, should the indemnification provisions relating to damage***  
4 ***to Facilities be mutual in nature?***

5  
6 **Q. AT&T KENTUCKY WITNESS MS. FUENTES NIZIOLEK CLAIMS THAT THE**  
7 **INDEMNIFICATION PROVISIONS IN SECTIONS 22.1.3 - 22.1.4 AND 22.1.6 OF THE**  
8 **STRUCTURE ACCESS ATTACHMENT ARE OF A LEGAL NATURE AND, BECAUSE OF**  
9 **THIS, WILL WAIT TO ADDRESS THEM IN ITS POST-HEARING BRIEF. HOW WOULD**  
10 **YOU LIKE TO RESPOND?**

11 **A.** I will simply refer the Commission to my prior statement at pp. 15-16 in my direct testimony.  
12 Otherwise, INdigital will address whatever legal issues may apply to the indemnification provisions  
13 in Sections 22.1.3-22.1.4, and 22.1.6 of the Structure Access Attachment in its post-hearing brief.

1 **IV. ATTACHMENT 08 – BONA FIDE REQUESTS**

2 **Q. PRIOR TO ADDRESSING THE SPECIFIC DISPUTED ISSUES IN THE BFR**  
3 **ATTACHMENT, AT&T KENTUCKY SETS FORTH SOME "PRELIMINARY**  
4 **OBSERVATIONS" REGARDING THE BFR ISSUES. IN PARTICULAR, AT&T**  
5 **KENTUCKY CLAIMS THAT "INDIGITAL'S POSITION STATEMENT ON THE DPL IS**  
6 **IDENTICAL FOR EVERY BFR ISSUE." (FUENTES NIZIOLEK DIRECT TESTIMONY**  
7 **AT 15:14-15). HOW WOULD YOU RESPOND TO THIS STATEMENT?**

8 **A.** AT&T Kentucky completely misframes the BFR issues and fundamentally mischaracterizes  
9 INdigital's position when it states that INdigital makes a singular response to all of the BFR issues in  
10 dispute. I would remind AT&T Kentucky and the Commission that, from a procedural standpoint,  
11 INdigital filed the initial issues matrix for the BFR Attachment. When it did so, INdigital identified  
12 only one overarching issue and, in turn, one position statement regarding that issue. (*See* DPL Att. 8  
13 to INdigital's Petition for Arbitration). It was AT&T Kentucky who subsequently broke out the  
14 different sections into separate issues. But for INdigital (and as it repeatedly informed AT&T  
15 Kentucky's ICA negotiation team during negotiations prior to the filing of this arbitration petition),  
16 the BFR Attachment continues to present only one overarching issue. Namely, whether AT&T  
17 Kentucky should be compensated separately for performing a function that it is statutorily required  
18 to perform.

19 **Q. AT&T KENTUCKY ALSO SUGGESTS THAT INDIGITAL SEEKS TO USE AT&T**  
20 **KENTUCKY AS A "FREE RESEARCH AND DEVELOPMENT ARM." (FUENTES**  
21 **NIZIOLEK DIRECT TESTIMONY AT 14:1-2). DO YOU AGREE WITH THIS**  
22 **CHARACTERIZATION?**

1 A. No. AT&T Kentucky is by no means being asked to function as a research and development  
2 arm for INdigital. Instead, INdigital sees this issue as more of a legal requirement of AT&T  
3 Kentucky. As such, INdigital will address it more fully in its post-hearing brief. Suffice it to say for  
4 the time being, however, that INdigital takes the position that AT&T Kentucky is statutorily  
5 obligated to respond to bona fide requests, and it has every right to recoup its costs related to these  
6 requests in its rate structure for any services or elements provided in response to a bona fide – or,  
7 literally, a "good faith" – request for the service or element. In the event that INdigital cancels a  
8 request, INdigital has agreed in Section 3.8 of this Attachment to pay AT&T Kentucky its reasonable  
9 development costs incurred in connection with the cancelled request. In either case, INdigital's  
10 proposed language ensures that AT&T Kentucky will recoup its costs for responding to INdigital's  
11 bona fide requests.

12

1 **BONA FIDE REQUESTS ISSUE 1 (Sections 2.2, 2.3, and 3.1.2):**

2 ***INdigital: Should AT&T Kentucky receive fees for evaluating, cancelling, and***  
3 ***implementing bona fide requests for interconnection services?***

4  
5 ***AT&T Kentucky: Should the language address compensation to AT&T Kentucky for costs***  
6 ***incurred as a result of CLEC's BFR request?***

7  
8 **Q. AT&T KENTUCKY CLAIMS THAT "THESE [BFR] CHARGES EXIST TO**  
9 **ENSURE THAT . . . AT&T KENTUCKY WILL BE PAID FOR THE WORK IT DOES."**  
10 **(FUENTES NIZIOLEK DIRECT TESTIMONY AT 16:25-28). IS THIS A LEGITIMATE**  
11 **CONCERN?**

12 **A.** No. To use a tired, yet appropriate, phrase, this is nothing but a red herring. There is no real  
13 threat that AT&T Kentucky will be unable to recoup appropriate compensation for its work in  
14 responding to a BFR under INdigital's proposed deletion of these provisions. AT&T Kentucky will  
15 be compensated either in the rate structure for the element requested or for its reasonable costs under  
16 Section 3.8 in the unlikely event INdigital cancels a BFR.

17 Therefore, it is not INdigital's contention, as AT&T Kentucky alleges, "that it should not  
18 have to pay AT&T Kentucky for *any* work that AT&T Kentucky does in order to analyze and  
19 evaluate INdigital's BFRs." (Niziolek Direct Testimony at 18:19-21; emphasis in original). These  
20 costs should instead be recouped by AT&T Kentucky by – as counsel informs me – building them  
21 into its rate structure for the element requested.

1 **BONA FIDE REQUESTS ISSUE 2 (Section 3.3):**

2 ***INdigital: Should AT&T Kentucky receive fees for evaluating, cancelling, and***  
3 ***implementing bona fide requests for interconnection services?***

4  
5 ***AT&T Kentucky: Should the costs incurred by AT&T Kentucky for a Complex Evaluation***  
6 ***be addressed through the dispute resolution process?***

7  
8 **Q. HAVE YOU REVIEWED THE DIRECT TESTIMONY OF MS. FUENTES**  
9 **NIZIOLEK AT PP. 19-20 REGARDING ISSUE 2 OF THE BONA FIDE REQUESTS**  
10 **ATTACHMENT?**

11 A. Yes.

12 **Q. HOW WOULD YOU RESPOND?**

13 A. It would appear that, according to Ms. Niziolek's direct testimony, AT&T Kentucky solely  
14 objects to using the Dispute Resolution Process for determining whether INdigital's request qualifies  
15 as a complex request. Ms. Niziolek claims that the dispute resolution process "is for disputes  
16 involving elements or wholesale products that already exist" and that using the dispute resolution  
17 process for "addressing a Complex Request Evaluation Fee is simply inappropriate." (Niziolek  
18 Direct Testimony at p. 20:3-5, 22-23). Yet, nowhere does the ICA so limit the dispute resolution  
19 process, and nothing about the language in the Dispute Resolution sections would appear to support,  
20 much less compel, her conclusion. Once again, where INdigital proposes that the parties utilize the  
21 dispute resolution process, AT&T Kentucky scoffs, even though AT&T Kentucky refers to the  
22 dispute resolution process in other sections of the ICA in constant refrain. The Dispute Resolution  
23 provisions are drafted generically in order to encompass a variety of potential disputes, and so the  
24 parties should resort to those provisions when a dispute arises.



1 **Q. MS. FUENTES NIZIOLEK ALSO ASSERTS THAT "AT&T KENTUCKY COULD**  
2 **BEAR SIGNIFICANT FINANCIAL RISK WHEN RESPONDING TO A CLEC'S BFR" IF**  
3 **ITS PROPOSED LANGUAGE IS NOT INCLUDED. DO YOU AGREE?**

4 A. No. I have difficulty understanding how proposing that the parties refer to the dispute  
5 resolution process for resolving complex request disputes can lead to AT&T Kentucky's significant  
6 financial risk. If anything, it will allow the parties equal footing to discuss the request. In any event,  
7 as I have stated above and in my direct testimony, AT&T Kentucky will have every opportunity to  
8 recoup its costs through appropriate rate structures or, in the event INdigital cancels its request,  
9 through the cancellation provision in Section 3.8 of this Attachment.

1 **BONA FIDE REQUESTS ISSUE 3 (Section 3.4):**

2 ***INdigital:*** *Should AT&T Kentucky receive fees for evaluating, cancelling, and*  
3 *implementing bona fide requests for interconnection services?*

4  
5 ***AT&T Kentucky:*** *Should AT&T Kentucky be held to a 30-day response time even if*  
6 *extraordinary situations occur preventing AT&T Kentucky from completing its*  
7 *evaluation?*

8  
9 **Q. UPON REVIEW OF MS. FUENTES NIZIOLEK'S TESTIMONY REGARDING**  
10 **ISSUE 3 OF THE BONA FIDE REQUESTS ATTACHMENT, HOW DOES INDIGITAL**  
11 **RESPOND TO AT&T KENTUCKY'S CONCERNS REGARDING HAVING AN**  
12 **ADDITIONAL, REASONABLE AMOUNT OF TIME TO EVALUATE A COMPLEX**  
13 **REQUEST?**

14 A. After further consideration of AT&T Kentucky's position on Section 3.4, INdigital could  
15 agree that, for BFRs that are more complex in nature, AT&T Kentucky should be allowed a  
16 reasonable amount of additional time as required to respond to INdigital's request. In an effort to  
17 accommodate AT&T Kentucky's concern, the following language in Section 3.4 of the BFR  
18 Attachment would be agreeable to INdigital:

19 Notwithstanding any other provision of this attachment, AT&T Kentucky shall,  
20 within thirty (30) Business Days of its receipt of CLEC's fully complete and valid  
21 BFR, AT&T Kentucky shall respond to CLEC by confirming whether AT&T  
22 Kentucky will or will not offer the new or modified Section 251 or 251(c)(3) element  
23 and, if it will offer the new or modified Section 251 or 251(c)(3) element, provide a  
24 preliminary analysis of such element(s). **If, however, the CLEC's request is**  
25 **determined to be a complex request as described in Section 3.3 above, then AT&T**  
26 **Kentucky shall have a reasonable amount of additional time not to exceed ninety**  
27 **(90) days in order to respond to CLEC's request.**

1 **BONA FIDE REQUESTS ISSUE 4 (Section 3.5):**

2 ***INdigital:*** ***Should AT&T Kentucky receive fees for evaluating, cancelling, and***  
3 ***implementing bona fide requests for interconnection services?***

4  
5 ***AT&T Kentucky:*** ***Should AT&T Kentucky be compensated for CLEC's failure to timely***  
6 ***cancel a request when AT&T Kentucky has already expended resources for the***  
7 ***preliminary analysis?***

8  
9 **Q. HAVE YOU REVIEWED THE DIRECT TESTIMONY OF MS. FUENTES**  
10 **NIZIOLEK AT PP. 22-23 REGARDING ISSUE 2 OF THE BONA FIDE REQUESTS**  
11 **ATTACHMENT AND WHETHER A THIRTY (30) DAY CANCELLATION PERIOD IS**  
12 **REASONABLE?**

13 A. Yes.

14 **Q. IS INDIGITAL WILLING TO ACCEPT AT&T KENTUCKY'S PROPOSAL?**

15 A. INdigital is willing to accept the thirty (30) business day cancellation period proposed by  
16 AT&T Kentucky. INdigital, however, continues to dispute that portion of Section 3.5 that would  
17 require INdigital to pay AT&T Kentucky a BFR Deposit or a Complex Evaluation Fee. As I have  
18 stated many times before, these costs should be adequately addressed through AT&T Kentucky's rate  
19 structure for the particular element requested, or, in the event of cancellation, through the  
20 cancellation provisions in Section 3.8.

21 For the sake of clarity, and in light of INdigital's acceptance of the thirty (30) business day  
22 cancellation period, Section 3.5 should now read (with accepted language in normal type and AT&T  
23 Kentucky's language still disputed by INdigital in bold):

24 **Subject to the cancellation provisions in Section 3.8,** CLEC may cancel a BFR at  
25 any time up until thirty (30) Business Days after receiving AT&T Kentucky's  
26 preliminary analysis. **If CLEC cancels the BFR within thirty (30) Business Days**  
27 **after receipt of AT&T Kentucky's preliminary analysis, AT&T Kentucky shall**  
28 **be entitled to retain the BFR Deposit or any Complex Request Evaluation Fee,**  
29 **minus those costs that have not been incurred by AT&T Kentucky as of the date**  
30 **of cancellation.**

1 **BONA FIDE REQUESTS ISSUE 5 (Section 3.6):**

2 ***INdigital:*** *Should AT&T Kentucky receive fees for evaluating, cancelling, and*  
3 *implementing bona fide requests for interconnection services?*

4  
5 ***AT&T Kentucky:*** *Should CLEC be required to provide payment of an estimated*  
6 *Development Rate for a new or modified network element?*

7  
8 **Q. AFTER REVIEWING MS. FUENTES NIZIOLEK'S TESTIMONY ON P. 24**  
9 **REGARDING SECTION 3.6 OF THE BONA FIDE REQUESTS ATTACHMENT, WHAT**  
10 **REMAINS IN DISPUTE?**

11 A. Consistent with my response earlier to AT&T Kentucky's preliminary observations with  
12 respect to the Bona Fide Request issues, the singular overarching issue involved in Section 3.6 is  
13 whether INdigital should be required to pay AT&T Kentucky a separate "Development Rate" when  
14 requesting a modified network element from AT&T Kentucky.

15 **Q. AT&T KENTUCKY CLAIMS THAT A CLEC SHOULD PAY AT&T KENTUCKY**  
16 **FOR THE "ADDITIONAL" DEVELOPMENT COSTS ASSOCIATED WITH A BONA**  
17 **FIDE REQUEST. HOW WOULD YOU RESPOND TO THIS ASSERTION?**

18 A. The simple and short response is: it will pay these costs through rates. While AT&T  
19 Kentucky may characterize these costs as "additional," such a characterization is nothing more than a  
20 distraction. Again, AT&T Kentucky can and should recoup its costs through the rates it charges  
21 CLECs for the network element being requested, just as it does with every single other element of  
22 service it provides under this agreement. INdigital's proposed version of Section 3.6 does not  
23 prevent AT&T Kentucky from doing so, and should be accepted by the Commission.

1 **BONA FIDE REQUESTS ISSUE 6 (Section 3.7):**

2 ***INdigital:*** *Should AT&T Kentucky receive fees for evaluating, cancelling, and*  
3 *implementing bona fide requests for interconnection services?*

4  
5 ***AT&T Kentucky:*** *Should CLEC be obligated to commit to accepting the preliminary*  
6 *analysis and pay an estimated Development Rate prior to AT&T Kentucky's moving*  
7 *forward?*

8  
9 **Q. HAVE YOU REVIEWED THE DIRECT TESTIMONY OF MS. FUENTES**  
10 **NIZIOLEK AT PP. 25-27 REGARDING ISSUE 6 OF THE BONA FIDE REQUESTS**  
11 **ATTACHMENT?**

12 A. Yes.

13 **Q. HOW WOULD YOU RESPOND?**

14 A. I would start off by agreeing with Ms. Niziolek that "BFR Issue 6 is effectively the same  
15 issue as in BFR Issues 1 and 5." (Niziolek Direct Testimony at p. 25:15). The disputed provision  
16 states:

17 3.7 As soon as feasible, but not more than ninety (90) calendar days after **AT&T**  
18 **Kentucky's** receipt of CLEC's **BFR** written acceptance of the preliminary  
19 **analysis and payment of the estimated Development Rate, AT&T Kentucky**  
20 shall provide to CLEC a firm price quote **for the requested element(s)**. The firm  
21 price quote will include **any additional Development Rates**, the nonrecurring rate  
22 and the recurring rate, and a detailed implementation plan. **The firm nonrecurring**  
23 **rate will not include any of the Development Rate or the Complex Request**  
24 **Evaluation Fee, if required, in the calculation of this rate.**

25  
26 For the reasons I have already discussed elsewhere in my testimony, INdigital is opposed to any  
27 language that would require it to compensate AT&T Kentucky separately for a "Development Rate"  
28 or "Complex Evaluation Fee."

29 **Q. MS. FUENTES NIZIOLEK ALSO RAISES THE TIMING ISSUE PRESENTED IN**  
30 **SECTION 3.7. AT&T KENTUCKY PROPOSES A 90 DAY TIME FRAME FOR IT TO**

1 **PROVIDE A CLEC A FIRM PRICE QUOTE FOR THE NETWORK ELEMENTS**  
2 **REQUESTED. IS THIS REASONABLE AND WHY?**

3 A. No, it is not reasonable. If it were only ninety (90) days total from the time INdigital submits  
4 its request to the time of receiving a firm price quote, then it would be more reasonable. But as Ms.  
5 explains in her direct testimony, that is not the only time period involved. Once INdigital submits its  
6 BFR, it will take up to 150 days (five months) before it will get a price quote from AT&T Kentucky:  
7 thirty (30) days for AT&T Kentucky to complete a preliminary analysis, thirty (30) more days for  
8 the CLEC to accept the preliminary analysis, and then the ninety (90) day period proposed by AT&T  
9 Kentucky here. That is nearly half a year. Surely AT&T Kentucky, who elsewhere in its direct  
10 testimony emphasized how quickly the telecommunications industry changes, can understand that  
11 this is too long. As a result, the Commission should reject AT&T Kentucky's proposed language for  
12 the price quote timeline as unreasonable. The result of striking AT&T Kentucky's proposed  
13 language would make the overall effect timeframe ninety (90) days from initial request to price  
14 quote – a much more reasonable period of time.

1 **BONA FIDE REQUESTS ISSUE 7 (Section 3.8):**

2 **INdigital: Should AT&T Kentucky receive fees for evaluating, cancelling, and**  
3 **implementing bona fide requests for interconnection services?**

4

5 **AT&T Kentucky: Should be compensated for necessary work that is required to complete**  
6 **the CLEC's request?**

7

8 **Q. HAVE YOU REVIEWED THE DIRECT TESTIMONY OF MS. FUENTES**  
9 **NIZIOLEK AT PP. 27-29 REGARDING ISSUE 7 OF THE BONA FIDE REQUESTS**  
10 **ATTACHMENT?**

11 A. Yes.

12 **Q. WHAT IS IN DISPUTE IN THIS ISSUE?**

13 A. Once again, the issue is whether AT&T Kentucky should receive "additional Development  
14 Rates" for performing tasks it is statutorily obligated to perform. And, once again, I can agree with  
15 Ms. Niziolek that this issue is part of the same "Development Rate at issue in BFR Issue 1 [and 5  
16 and 6]." (Niziolek Direct Testimony at p. 27:25-26). Also in dispute is INdigital's proposal to pay  
17 only those costs that are "reasonable" if it cancels a request.

18 **Q. REGARDING "ADDITIONAL DEVELOPMENT RATES," WHAT IS INDIGITAL'S**  
19 **POSITION?**

20 A. It remains the same as that for Issues 1, 5 and 6. AT&T Kentucky should not receive  
21 "additional" or separate compensation outside of its rate structure for fulfilling INdigital's bona fide  
22 requests. These costs should be built into AT& T Kentucky's rates.

23 **Q. HOW DO YOU RESPOND TO MS. FUENTES NIZIOLEK'S DIRECT TESTIMONY**  
24 **REGARDING INDIGITAL'S PROPOSAL THAT, UPON CANCELLATION OF A BONA**  
25 **FIDE REQUEST, IT PAY THE "REASONABLE" COSTS INCURRED BY AT&T**  
26 **KENTUCKY?**

1 A. Ms. Niziolek's main complaint regarding INdigital's proposed language is that it "is  
2 subjective and likely to lead to disputes." (Niziolek Direct Testimony at 28:27). Yet as I have  
3 pointed out previously, AT&T Kentucky only appears to complain about the possibility of dispute if  
4 the provision in question is not its proposal. Otherwise, AT&T Kentucky recommends the dispute  
5 resolution process. In any event, limiting AT&T Kentucky's costs to those that are "reasonable" is,  
6 well, reasonable. INdigital should not be burdened with AT&T Kentucky's costs, whether INdigital  
7 cancels a request or otherwise, if those costs are not reasonable ones.

8 In addition, Ms. Niziolek erroneously claims that "[i]f INdigital can authorize AT&T  
9 Kentucky to go forward on a BFR . . . but then cancel the BFR and only compensate AT&T  
10 Kentucky for costs that INdigital decides, in hindsight, were "reasonable," then AT&T Kentucky  
11 could easily be left to bear most or all of the costs of BFR work that it would never have done but for  
12 INdigital's request." (Niziolek Direct Testimony at p. 28:28-29:5). INdigital's proposal does not  
13 allow it unilaterally to "decide, in hindsight," what costs are reasonable. The word "reasonable"  
14 simply operates as a safeguard against AT&T Kentucky's potential (or, even, incentive) to run up  
15 costs for no reason when responding to a BFR. If a dispute arises between the parties regarding what  
16 costs are reasonable, the parties will have access to the dispute resolution provisions of the ICA to  
17 reach an equitable solution.



1 V. ATTACHMENT 12 – COLLOCATION

2 *COLLOCATION ISSUE 1 (Section 4.4):*

3 *INdigital: Should INdigital be liable to AT&T Kentucky for consequential, incidental, or*  
4 *punitive damages related to damage at a co-location facility?*

5  
6 *AT&T Kentucky: Can the CLEC limit the damage liability to AT&T Kentucky and other*  
7 *CLECs resulting from the installation, operation, or maintenance of the CLEC's*  
8 *equipment, including but not limited to from any defect in CLEC's equipment or its*  
9 *installation, operation, or maintenance, or resulting from the actions or inaction, willful,*  
10 *or negligent, of the CLEC's employees, suppliers, or contractors?*

11  
12 **Q. AT&T KENTUCKY WITNESS MS. FUENTES NIZIOLEK CLAIMS THAT THE**  
13 **LIMITATION OF LIABILITY PROVISIONS IN SECTION 4.4 OF THE COLLOCATION**  
14 **ATTACHMENT IS OF A LEGAL NATURE AND, BECAUSE OF THIS, AT&T**  
15 **KENTUCKY WILL WAIT TO ADDRESS THEM IN ITS POST-HEARING BRIEF. HOW**  
16 **WOULD YOU LIKE TO RESPOND?**

17 A. I will simply refer the Commission to my prior statement at pp. 17-18 of my direct testimony.  
18 Otherwise, INdigital will address whatever legal issues may apply to the limitation of liability  
19 provisions in Section 4.4 of the Collocation Attachment in its post-hearing brief.

1 **COLLOCATION ISSUE 2 (Section 10.2):**

2 ***INdigital:*** *Should AT&T Kentucky have sole discretion to determine whether material*  
3 *deviations from the specifications of a mutually agreed co-location Application constitute*  
4 *exceptions subject to correction by a mutually agreed upon date?*  
5

6 ***AT&T Kentucky:*** *Does AT&T Kentucky have the right to review and agree to the*  
7 *exceptions the CLEC has listed during the acceptance walk-through?*  
8

9 **Q. HAVE YOU REVIEWED MS. FUENTES NIZIOLEK'S DIRECT TESTIMONY AT**  
10 **PP. 30-32 REGARDING THE COLLOCATION ATTACHMENT ISSUE 2?**

11 A. Yes.

12 **Q. HOW WOULD YOU RESPOND?**

13 A. Apparently both parties are concerned that the other party is attempting to have unilateral  
14 discretion over what constitutes a material deviation from the collocation Application. In my direct  
15 testimony at p. 18:19-21 when discussing this issue, I stated that "AT&T Kentucky has proposed  
16 language that would allow it to determine in its sole discretion whether a material deviation from  
17 previously agreed to specifications for the collocation space is, in fact, a material deviation." (*Id.*  
18 (emphasis in original).) In her direct testimony, Ms. Niziolek echoes my concern, but on behalf of  
19 AT&T Kentucky, when she states that "it is INdigital that is seeking a unilateral right to determine  
20 exceptions and what constitutes a 'material deviation' from the collocation Application." (Niziolek  
21 Direct Testimony at p. 32:6-8).

22 With this in mind, INdigital proposes the following language for Section 10.2 of the  
23 Collocation Attachment (changes in underline, bold and italics):

24 10.2 After the Physical Collocator's receipt of such notice, the Physical Collocator  
25 shall request within fifteen (15) calendar days an acceptance walk-through of the  
26 Collocation space with **AT&T Kentucky**. The acceptance walk-through will be  
27 scheduled on a mutually agreed upon date. Any material deviations from mutually  
28 agreed Application specifications may be noted by the Physical Collocator as  
29 exceptions, which to qualify as exceptions, must be ***mutually agreed upon*** as  
30 exceptions ***by CLEC and AT&T Kentucky***. The agreed upon exceptions shall be

1 corrected by AT&T Kentucky by a mutually agreed upon date. The correction of  
2 these exceptions shall be at AT&T Kentucky's expense. AT&T Kentucky will then  
3 establish a new Space Ready Date.  
4

5 This language should alleviate both INdigital's and AT&T Kentucky's concerns that the other party  
6 has unilateral discretion over what constitutes a "material deviation" under this provision. And, if a  
7 dispute arises, the parties may rely upon the Dispute Resolution provisions elsewhere in the ICA.

1 VI. ATTACHMENT 13 251(C)(3) UNEs

2 *UNEs ISSUE 1 (Section 1.4):*

3 *INdigital: Should Attachment 13 override intervening law or changes in law?*

4  
5 *AT&T Kentucky: Should the language clearly indicate that the provisions of the*  
6 *underlying agreement are subject to declassification? Whose language should appear in*  
7 *the ICA?*

8  
9 **Q. AT&T KENTUCKY CLAIMS THAT THE CHANGE IN LAW PROVISION IN**  
10 **SECTION 1.4 OF THE ONE ATTACHMENT IS OF A LEGAL NATURE AND, BECAUSE**  
11 **OF THIS, WILL WAIT TO ADDRESS THIS PROVISION IN ITS POST-HEARING BRIEF.**  
12 **HOW WOULD YOU LIKE TO RESPOND?**

13 A. I will simply refer the Commission to my prior statement at p. 19 of my direct testimony.  
14 Otherwise, INdigital will address whatever legal issues may apply to the change in law provisions in  
15 Section 1.4 of the UNE Attachment in its post-hearing brief.

1 *UNEs ISSUE 2 (Section 16.4):*

2 ***INdigital:** Should AT&T be permitted to disconnect circuits when the parties have been*  
3 *unable to reach agreement for substitute service arrangements or elements?*

4  
5 ***AT&T Kentucky:** Should AT&T Kentucky be allowed to disconnect or convert services?*

6  
7 **Q. AT&T KENTUCKY CLAIMS THAT THE DISCONNECTION PROVISION IN**  
8 **SECTION 16.4 OF THE UNE ATTACHMENT IS OF A LEGAL NATURE AND, BECAUSE**  
9 **OF THIS, AT&T KENTUCKY WILL WAIT TO ADDRESS THIS PROVISION IN ITS**  
10 **POST-HEARING BRIEF. HOW WOULD YOU LIKE TO RESPOND?**

11 A. I refer the Commission to my prior statement at p. 19 of my direct testimony. Otherwise,  
12 INdigital will address whatever legal issues may apply to the disconnection provision in Section 16.4  
13 of the UNE Attachment in its post-hearing brief.

14 **Q. IS THERE ANYTHING ELSE YOU WOULD LIKE TO ADD?**

15 A. Yes. Ms. Niziolek, who was not involved in the many ICA negotiation telephone calls  
16 between INdigital and AT&T Kentucky, misstates INdigital's position in her testimony when she  
17 states that "INdigital has not provided counter language" to AT&T Kentucky's proposed language.  
18 (Niziolek Direct Testimony at 34:27). To the contrary, INdigital's "counter language" is Section  
19 16.4 without AT&T Kentucky's proposed language in bold. In other words, INdigital's counter  
20 proposal is the portion of Section 16.4 that is in normal font type with AT&T Kentucky's additional  
21 language removed. It would, thus, read as follows:

22 16.4 Notwithstanding anything to the contrary in the Agreement, including any  
23 amendments to this Agreement, at the end of the applicable transitional period,  
24 unless CLEC has submitted a disconnect/discontinuance LSR or ASR, as applicable,  
25 under Section 14.1 .1 above of this Agreement, and if CLEC and AT&T Kentucky  
26 have failed to reach agreement under Section 14.4.1 above of this Agreement as to a  
27 substitute service arrangement or element, then AT&T Kentucky may convert the  
28 subject element(s), whether alone or in combination with or as part of any other  
29 arrangement to an analogous resale or access service, if available, at rates applicable  
30 to such analogous service or arrangement.

1                   **VII. ATTACHMENT 15 – CHC (COORDINATED HOT CUTS)**

2    ***CHC ISSUE 1 (Section 3.5):***

3                   ***INdigital:*** *Should AT&T be required to work cooperatively with INdigital prior to*  
4                   *suspending CHC/OC service?*

5  
6                   ***AT&T Kentucky:*** *Should language be included to enable AT&T to suspend CHC/OC*  
7                   *activity due to unanticipated heavy work loads/activity periods?*

8  
9    **Q.    MS. FUENTES NIZIOLEK CLAIMS IN HER DIRECT TESTIMONY AT P. 35:17-19**  
10 **THAT INDIGITAL'S PROPOSED LANGUAGE WILL "NOT ALLOW AT&T KENTUCKY**  
11 **THE FREEDOM TO MAKE [] DECISION[S]" TO "DETERMINE THE AVAILABILITY**  
12 **OF CHCs BASED UPON CURRENT AT&T KENTUCKY WORKLOAD." IS THAT TRUE?**

13 A.    Not at all. INdigital's proposed language for Section 3.5 of Attachment 15 simply states that  
14 "AT&T Kentucky shall work cooperatively with CLEC regarding the availability of CHC/OC  
15 service during unanticipated heavy workload/activity periods." Compare this with AT&T  
16 Kentucky's proposed unilateral language: "AT&T Kentucky reserves the right to suspend the  
17 availability of CHC/OC service during unanticipated heavy workload/activity periods." In the  
18 starkest of terms, this issue presents a choice between cooperation and unilateralism. As I stated  
19 previously in my direct testimony, because suspension of CHCs can lead to out-of-service periods,  
20 all INdigital asks from AT&T Kentucky is that it cooperate with INdigital so that INdigital is  
21 prepared during these periods.

22 **Q.    MS. FUENTES NIZIOLEK ALSO STATES ON P. 36 OF HER DIRECT**  
23 **TESTIMONY THAT THIS IS AN ISSUE THAT APPLIES TO ALL CLECs AND, BECAUSE**  
24 **OF THIS, AT&T KENTUCKY MUST MAKE SURE THAT ALL CLECs ARE TREATED**  
25 **EQUALLY. HOW WOULD YOU RESPOND?**

1 A. Due to the nature of INdigital's core business, it should be of little surprise that the way  
2 AT&T Kentucky has traditionally done business with other CLECs is somewhat challenged in this  
3 proceeding. INdigital presents AT&T Kentucky with new CIRCUMSTANCES, but that is part of  
4 competition – it forces dominant companies like AT&T Kentucky who have become entrenched in a  
5 certain way of doing things to innovate. Ms. Niziolek appears to recognize this in her testimony  
6 when she states that "AT&T Kentucky [may] need[] to have the opportunity to rethink the situation"  
7 regarding how it currently approaches CHC service. (Niziolek Direct Testimony at 36:18-20).  
8 While the thrust of her statement is clearly cautionary (AT&T Kentucky may possibly have to  
9 "suspend CHC/OC activities for a given period of time" if it is required to work cooperatively with  
10 CLECs), it is unclear to INdigital how requiring AT&T Kentucky to be cooperative with CLECs so  
11 that they can prepare for potential out-of-service periods is a bad thing for customers. In light of  
12 INdigital's core business – providing emergency telephone service to PSAPs – such a "rethinking" of  
13 the way AT&T Kentucky does business may be the difference between life and death.

14 For these reasons, the Commission should accept INdigital's proposed language in Section  
15 3.5 of Attachment 15.

**VIII. CONCLUSION**

1

2 **Q. WHAT ACTION WOULD YOU HAVE THE COMMISSION TAKE IN THIS**  
3 **MATTER?**

4 A. I would request that the Commission resolve the outstanding disputed provisions identified  
5 by the parties in the joint issues matrices and as discussed within my direct and rebuttal testimony in  
6 INdigital's favor.

7 **Q. DOES THIS CONCLUDE YOUR TESTIMONY?**

8 A. Yes.



**VERIFICATION**

I hereby verify that the foregoing testimony is true and accurate to the best of my  
knowledge and belief.

\_\_\_\_\_  
Brent Cummings

STATE OF INDIANA        )  
  ) SS  
COUNTY OF \_\_\_\_\_ )

SUBSCRIBED, SWORN TO AND ACKNOWLEDGED before me by BRENT  
CUMMINGS, to me known, this \_\_\_\_ day of July, 2010.

My commission expires:\_\_\_\_\_.

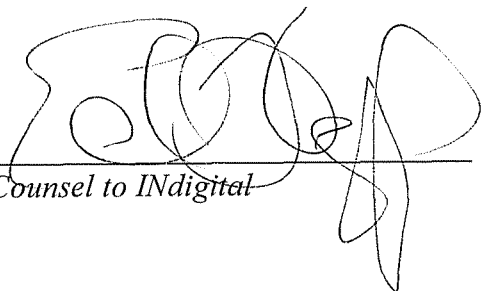
\_\_\_\_\_  
Notary Public

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing was served by U.S. First Class mail and electronic mail on this 14<sup>th</sup> day of July, 2010, to the following individuals:

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\_\_\_\_\_  
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