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February 26, 2010

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PUBLIC SERVICE  
COMMISSION

**VIA HAND DELIVERY**

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

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*

Dear Mr. Derouen:

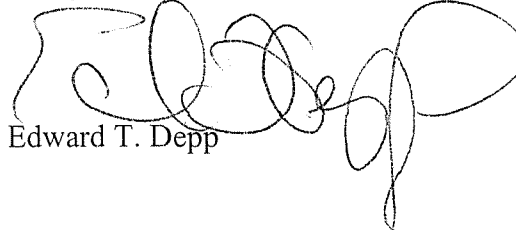
Enclosed for filing in the above-referenced case, please find one original and eleven (11) copies of Communications Venture Corporation d/b/a INdigital Telecom's initial brief on the threshold issue of whether the issues presented by its petition regarding competitive 911/E911 service are appropriate for arbitration under Section 252 of the Act or applicable state law.

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

Jeff Derouen, Executive Director  
February 26, 2010  
Page 2

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

RECEIVED

COMMONWEALTH OF KENTUCKY  
BEFORE THE PUBLIC SERVICE COMMISSION

FEB 26 2010

PUBLIC SERVICE  
COMMISSION

In the Matter of:

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

**INDIGITAL TELECOM'S  
INITIAL BRIEF ON THE THRESHOLD ISSUE OF WHETHER  
THE ISSUES PRESENTED BY INDIGITAL TELECOM'S PETITION REGARDING  
COMPETITIVE 911/E911 SERVICE ARE APPROPRIATE FOR ARBITRATION  
UNDER SECTION 252 OF THE ACT OR APPLICABLE STATE LAW**

## TABLE OF CONTENTS

	<u>Page</u>
<b>INTRODUCTION</b> .....	1
<b>I.</b> Procedural Posture .....	1
<b>II.</b> The Threshold Issue.....	2
A.    Authority Under Sections 251 and 252 of the Act.....	4
B.    Concurrent State Law Authority.....	5
<b>III.</b> Sections 251 and 252 of the Act Provide the Necessary Framework for Interconnection to the PSTN for CLECs Like INdigital Telecom .....	6
<b>IV.</b> The Introduction of Competitive 911/E911 Service to the Kentucky Market Will Further the Expressed Goals of Congress .....	10
<b>STATEMENT OF FACTS</b> .....	11
<b>ARGUMENT AND ANALYSIS</b> .....	14
<b>I.</b> INdigital Telecom Is Entitled to Arbitration and Interconnection Under the Act Because It Provides "Telephone Exchange Service" .....	15
A.    Section 251 (c) Entitles "Telephone Exchange Service" Providers to Interconnection .....	15
B.    INdigital Telecom Is Entitled to a Presumption That It Provides "Telephone Exchange Service".....	15
C.    INdigital Telecom's Competitive 911/E911 Service Is "Telephone Exchange Service" .....	16
1.    The FCC Has Interpreted Section 153(47) of the Act Expansively.....	17
2.    INdigital Telecom's Competitive 911/E911 Service Meets the Criteria for "Telephone Exchange Service" Under Part A and Part B of Section 153(47).....	19
a.    Analysis of Section 153(47)(A).....	19
b.    Analysis of Section 153(47)(B).....	24
D.    Section 252 (b) Entitles INdigital Telecom to Arbitration of "Any Open Issues," Including Issues Outside of Section 251(c)...	27
<b>II.</b> The Commission Has Concurrent Authority Under State Law to Determine the Appropriate Terms and Conditions for INdigital Telecom's 911/E911 Service.....	31
A.    KRS 278.040, KRS 278.030, KRS 278.260, and KRS 278.530 Authorize the Commission to Decide Issues Related to the Provision of Telecommunications Service in Kentucky, Including 911/E911 Service.....	31

**B.** The Act Does Not Pre-empt the Commission's Regulatory Authority Over the Issues Presented by INdigital Telecom's Provision of Competitive 911/E911 Service.....33

**CONCLUSION** .....35

**COMMONWEALTH OF KENTUCKY  
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Communications Act of 1934, as Amended )  
by the Telecommunications Act of 1996 )

Case No. 2009-00438

**INDIGITAL TELECOM'S  
INITIAL BRIEF ON THE THRESHOLD ISSUE**

Communications Venture Corporation, d/b/a INdigital Telecom ("INdigital Telecom"), by counsel, submits its initial brief on the threshold issue presented by its petition (the "Petition") before the Public Service Commission of the Commonwealth of Kentucky (the "Commission") pursuant to Section 252(b)<sup>1</sup> of the Communications Act of 1934, as amended by the Telecommunications Act of 1996 (the "Act"), KRS Chapter 278, and the regulations promulgated thereunder, to arbitrate certain terms and conditions of a proposed interconnection agreement (the "ICA") between INdigital Telecom and BellSouth Telecommunications, Inc., d/b/a AT&T Kentucky ("AT&T Kentucky") (collectively the "Parties"). In support of its brief, INdigital states as follows.

**INTRODUCTION**

**I. Procedural Posture**

This brief addresses a threshold issue to INdigital Telecom's Petition for arbitration. The issue regards the appropriateness of including issues related to INdigital Telecom's provision of competitive 911/E911 services in the current arbitration proceedings. The Parties and the Commission have agreed that addressing this issue at the outset will help to define the scope of

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<sup>1</sup> 47 U.S.C. § 252(b).

subsequent testimony and the final hearing. The Parties are to submit simultaneous initial briefs on the matter. Simultaneous reply briefs will follow. This is INdigital Telecom's initial brief on the threshold issue.

## **II. The Threshold Issue.**

The threshold question in this proceeding is whether the issues presented by INdigital Telecom's Petition regarding competitive 911/E911 service are appropriate for arbitration under Section 252 of the Act or applicable state law. While this appears to be an issue of first impression in Kentucky, several other state commissions have addressed the same threshold question with the majority concluding that the issues presented are appropriate for arbitration.<sup>2</sup> Specifically, these state commissions have found that the type of competitive 911/E911 service that INdigital Telecom provides is "telephone exchange service" as defined by the Act – thus, entitling competitive 911/E911 service providers to Section 251(c) interconnection and Section 252(b) arbitration under the Act. At least one other state commission recently found that it had concurrent jurisdiction under state law to address the issues presented by INdigital Telecom's request for interconnection in that state.<sup>3</sup> In addition, a number of other state commissions have at least implicitly agreed that the

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<sup>2</sup> See, for example, Ohio Case No. 07-1280-TP-ARB, *In the Matter of the Petition of Intrado Communications Inc. for Arbitration Pursuant to Section 252(b) of the Communications Act of 1934, as Amended, to Establish an Interconnection Agreement with the Ohio Bell Telephone Company d/b/a AT&T Ohio*, Arbitration Award (Ohio Public Utilities Commission, March 4, 2009) *aff'd on rehearing* (June 17, 2009); North Carolina Docket No. P-1887, Sub 2, *In the Matter of Petition of Intrado Communications Inc. for Arbitration Pursuant to Section 252(b) of the Communications Act of 1934, as Amended, with BellSouth Telecommunications, Inc. d/b/a AT&T North Carolina*, Arbitration Order (North Carolina Utilities Commission, April 24, 2009); California Decision No. 01-09-048 in Application 00-12-025, *In the Matter of the Petition of SCC Communications Corp. for Arbitration Pursuant to Section 252(b) of the Telecommunications Act of 1996 to Establish an Interconnection Agreement with SBC Communications Inc.*, Opinion Affirming Final Arbitrator's Report and Approving Interconnection Agreement, (California Public Utilities Commission, Sept. 20, 2001).

<sup>3</sup> Indiana Utility Reg. Comm. Cause No. 43499, *In the Matter of the Joint Complaint of Communications Venture Corporation d/b/a INdigital Telecom; the Indiana Wireless Enhanced 9-1-1 Advisory Board; Benton County, Indiana, as the Benton County PSAP Operator; and Carroll County, Indiana, as the Carroll County PSAP Operator, Against Indiana Bell Telephone Company, Inc., d/b/a AT&T Indiana, Concerning Connection of Wireless Enhanced 9-1-1 Circuits and Related Services to Facilities Located at Public Safety Answering Points and AT&T's Refusal to Permit Such Connections for Provision of Wireless Enhanced 9-1-1 Service, and Request for the Indiana Regulatory Commission to Order Necessary Connections and Determine Reasonable Terms, Conditions and Compensation*, Final Order (I.U.R.C., Feb. 10, 2010); *see also* Indiana Cause No. 43277, *In the Matter of the Complaint of*

issues are appropriate for arbitration under Section 252 of the Act as these state commissions have, in fact, arbitrated ICAs that included interconnection provisions for competitive 911/E911 service.<sup>4</sup>

Taking these other state commission decisions into consideration, at least two things are clear. First, competitive 911/E911 service like that provided by INdigital Telecom is already being implemented in a number of other states. Many of these states share Kentucky's border (Ohio, Indiana, and West Virginia) and have either already determined that competitive 911/E911 service providers are entitled to arbitration under the Act and / or state law, or they have assumed as much. In any event, the citizens of these states are already benefiting from access to high-quality, technologically advanced 911 services made possible by the competition envisioned by the Act.

Second, regardless of the underlying rationale, the basic legal / regulatory answer to the threshold question is clear. The issues presented by INdigital Telecom's Petition are not only appropriate for arbitration, but the Act and applicable state law entitles INdigital Telecom to have these issues arbitrated.

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*Communications Venture Corporation d/b/a INdigital Telecom Against Verizon North, Inc. and Contel of the South, Inc. d/b/a Verizon North Systems Concerning the Refusal of Verizon to Allow Connection of INdigital's Wireless Enhanced 911 Telephone System Serving Public Service Safety Answering Points and INdigital's Request for the Indiana Regulatory Commission to Order the Connection Under Reasonable Terms, Conditions and Compensation, Final Order (Indiana Reg. Comm., Nov. 20, 2008)*

<sup>4</sup> West Virginia Case No. 08-0298-T-PC, *Intrado Communications, Inc. and Verizon West Virginia Inc., Petition for Arbitration filed Pursuant to §252(b) of 47 U.S.C. and 150 C.S.R. 6.15.5, Arbitration Award (West Virginia P.S.C., Nov. 14, 2009)*; Indiana Cause No. 43277, *In the Matter of the Complaint of Communications Venture Corporation d/b/a INdigital Telecom Against Verizon North, Inc. and Contel of the South, Inc. d/b/a Verizon North Systems Concerning the Refusal of Verizon to Allow Connection of INdigital's Wireless Enhanced 911 Telephone System Serving Public Service Safety Answering Points and INdigital's Request for the Indiana Regulatory Commission to Order the Connection Under Reasonable Terms, Conditions and Compensation, Final Order (Indiana Reg. Comm., Nov. 20, 2008)*; Ohio 08-198-TP-ARB, *In the Matter of the Petition of Intrado Communications, Inc. for Arbitration of Interconnection Rates, Terms, and Conditions and Related Arrangements with Verizon North Inc., Pursuant to Section 252(b) of the Telecommunications Act of 1996, Arbitration Award (Ohio P.U.C., June 24, 2009)*; Maryland Case No. 9138, *In the Matter of the Petition of Intrado Communications Inc. for Arbitration to Establish an Interconnection Agreement with Verizon Maryland Inc. Pursuant to the Federal Telecommunications Act, Proposed Order (Maryland P.S.C., Nov. 13, 2009)*; Massachusetts D.T.C. 08-9 *Petition for Arbitration of an Interconnection Agreement between Intrado Communications Inc. and Verizon New England Inc. d/b/a Verizon Massachusetts, Arbitration Order (Mass. Dept. of Telecomm. and Cable, May 8, 2009)*.



**A. Authority under Sections 251 and 252 of the Act.**

The competitive 911/E911 service provided by INdigital Telecom is "telephone exchange service" as defined by Section 153(47) of the Act.<sup>5</sup> Because of its status as a "telephone exchange service," the issues presented by INdigital Telecom's Petition fall squarely within the framework of Sections 251 and 252 of the Act, entitling it to both interconnection and arbitration. Specifically, Section 251(c) of the Act requires incumbent carriers like AT&T Kentucky to provide interconnection to requesting carriers like INdigital Telecom,<sup>6</sup> and Section 252(b) of the Act mandates that INdigital Telecom is entitled to arbitration.<sup>7</sup>

Alternatively, even if INdigital Telecom's competitive 911/E911 service did not satisfy the requirements for "telephone exchange service" under Section 153(47) (which it does), and therefore the issues presented fell outside of AT&T Kentucky's Section 251(c) interconnection duties (which they do not), Section 252 of the Act would still entitle INdigital Telecom to arbitration of these issues. Section 252(b) of the Act plainly states that INdigital Telecom is entitled to have "any open

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<sup>5</sup> 47 U.S.C 153(47) defines "telephone exchange service" alternatively as "(A) service within a telephone exchange, or within a connected system of telephone exchanges within the same exchange area operated to furnish to subscribers intercommunicating service of the character ordinarily furnished by a single exchange, and which is covered by the exchange service charge," or "(B) comparable service provided through a system of switches, transmission equipment, or other facilities (or combination thereof) by which a subscriber can originate and terminate a telecommunications service."

<sup>6</sup> 47 U.S.C. 251(c) provides in pertinent part:

(c) Additional obligations of incumbent local exchange carriers. In addition to the duties contained in subsection (b), each incumbent local exchange carrier has the following duties:

(1) Duty to negotiate. The duty to negotiate in good faith in accordance with section 252 the particular terms and conditions of agreements to fulfill the duties described in paragraphs (1) through (5) of subsection (b) and this subsection. The requesting telecommunications carrier also has the duty to negotiate in good faith the terms and conditions of such agreements.

(2) Interconnection. The duty to provide, for the facilities and equipment of any requesting telecommunications carrier, interconnection with the local exchange carrier's network--

(A) for the transmission and routing of telephone exchange service and exchange access.

<sup>7</sup> 47 U.S.C. 252(b) provides that "[d]uring the period from the 135th to the 160th day (inclusive) after the date on which an incumbent local exchange carrier receives a request for negotiation under this section, the carrier or any other party to the negotiation may petition a State commission to arbitrate any open issues."

issues" presented by its Petition arbitrated by the Commission.<sup>8</sup> The Section 252 arbitration process has generally been understood to apply to all Section 251 agreements, and not just those agreements addressing solely 251(c) issues. Neither the initial negotiations between the Parties nor the subsequent arbitration by the Commission is, therefore, limited to Section 251(c) issues.

**B. Concurrent state law authority.**

In addition to the mandate of Sections 251 and 252 of the Act, the Commission has concurrent state law authority to exercise jurisdiction over the parties and determine appropriate terms and conditions for the 911/E911 issues presented by INdigital Telecom's Petition. The Commission is the agency that has been authorized by both state<sup>9</sup> and federal law to regulate the rates and services of telecommunications providers in Kentucky. The provision of 911/E911 service is no exception. Indeed, the Kentucky Legislature has made the specific finding that "[s]tate-of-the-art telecommunications is an essential element to the Commonwealth's initiatives to improve the lives of Kentucky citizens, to create investment, jobs, economic growth, and to support the Kentucky Innovation Act of 2000," and that "[c]onsumer protections . . . for access to emergency services including enhanced 911 must continue."<sup>10</sup>

Thus, although INdigital Telecom believes that the framework provided by Sections 251 and 252 of the Act is the most appropriate one for addressing the issues presented by its Petition, numerous provisions of KRS Chapter 278<sup>11</sup> in conjunction with Sections 253 and 261 of the Act provide additional authority for the Commission to take an active role in regulating the terms and conditions regarding how 911/E911 services will be provided in Kentucky. In any event, due to the significant public safety and welfare components involved in the provision of 911/E911 service,

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<sup>8</sup> 47 U.S.C. 252(b).

<sup>9</sup> See KRS 278.040 (providing that the Commission "shall have exclusive jurisdiction over the regulation of rates and service of utilities" and to "adopt . . . reasonable regulations to implement the provisions of KRS Chapter 278").

<sup>10</sup> KRS 278.546.

<sup>11</sup> See, for example, KRS 278.030, KRS 278.040, KRS 278.260, and KRS 278.530.

there can be no doubt that the Commission should play a critical role in overseeing and reviewing the rollout of competitive 911/E911 services. To that end, both the Act and Kentucky state law support the Commission's involvement in arbitrating the issues presented here.

For these reasons, and as explained more fully below, the Commission not only can, but should, arbitrate the issues relating to INdigital Telecom's provision of competitive 911/E911 service.

### **III. Sections 251 and 252 of the Act Provide the Necessary Framework for Interconnection to the PSTN for CLECs Like INdigital Telecom.**

The practical reality lurking behind the threshold issue in this case is that of competition. INdigital Telecom seeks to provide the Commonwealth with a competitive, state-of-the-art alternative to the legacy 911 systems currently provided by incumbent local exchange carriers ("ILECs") like AT&T Kentucky. It would provide choice to PSAPs where there currently is none. And, it would exponentially improve the reliability and public safety response to wireless 911 users, where today in Kentucky wireless 911 calls are mishandled "thousands of times a year."<sup>12</sup>

Ultimately, Sections 251 and 252 of the Act entitle INdigital Telecom, as a competitive provider of telephone exchange service, to interconnection and interoperability arrangements with ILECs such as AT&T Kentucky.<sup>13</sup> Indeed, it is an absolutely necessary component in order for INdigital Telecom to provide its competitive 911/E911 services to Kentucky end users. INdigital Telecom's entry into the local telecommunications market in Kentucky will promote the reliability and redundancy critical to public safety.

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<sup>12</sup> As recent as Feb. 11, 2010, the legacy 911 system in Kentucky misrouted a 911 call from a cellular phone end user. See, "PRP 911 Call Sent Out of State," <http://www.wave3.com/Global/story.asp?S=11973854> (last visited Feb. 19, 2010) (cellular phone user called 911 from Louisville, KY suburb because teenage children were inside a burning house, but was transferred to a Sellersburg, IN PSAP for help. According to officials, this type of mistake "happens thousands of times a year") (emphasis added).

<sup>13</sup> 47 U.S.C § 251(c).

Sections 251 and 252 of the Act were intended to facilitate "[v]igorous competition," which Congress understood "would be impeded by technical disadvantages and other handicaps that prevent a new entrant from offering services that consumers perceive to be equal in quality to the offerings of incumbent LECs."<sup>14</sup> They establish a "procompetitive, deregulatory national policy framework designed to accelerate rapid private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition."<sup>15</sup> Thus, the process established by Sections 251 and 252 along with the FCC's implementing rules eliminates the barriers to entry, giving competitors like INdigital Telecom "a fair opportunity to compete in the marketplace."<sup>16</sup> Indeed, the opening of the local exchange market to competition was "intended to pave the way for enhanced competition in all telecommunications markets, by allowing all providers to enter all markets."<sup>17</sup>

Like other consumers of telecommunications services who have benefited from the competition encouraged by Sections 251 and 252 of the Act, Kentucky public safety entities and consumers deserve competitive choices as well as state-of-the-art technologies. INdigital Telecom's network delivers these choices and technologies while at the same time fully accommodating both legacy analog services and the IP-based services being offered today, many of which are not supported by existing 911 networks. INdigital Telecom's network can also readily adapt to the technologies of tomorrow. INdigital Telecom's entry into the Kentucky market will "enable the public safety community to focus on future needs rather than requiring more from legacy systems,

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<sup>14</sup> *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, 11 FCC Rcd 15499, ¶ 16 (1996) ("Local Competition Order"), *aff'd by AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999).

<sup>15</sup> *Provision of Directory Listing Information under the Telecommunications Act of 1934, As Amended*, 16 FCC Rcd 2736, ¶ 5 (2001) ("Directory Listing Order").

<sup>16</sup> *Local Competition Order* ¶ 18.

<sup>17</sup> *Local Competition Order* ¶ 4.

offer more redundancy and flexibility, and contribute greatly to improving compatibility between public safety systems that operate using different proprietary standards."<sup>18</sup>

In order for INdigital Telecom to provide its competitive 911/E911 services to Kentucky end users, INdigital Telecom must interconnect with ILECs, like AT&T Kentucky, that control a significant majority of the local exchange market, and consequently, the consumers that make 911 calls destined for PSAPs that will be served by INdigital Telecom. The appropriate method for achieving such interconnection is through the framework established by Sections 251 and 252 of the Act, which were designed for the very purpose of promoting competition by facilitating the interconnection of new entrants to the PSTN to ensure the interoperability of co-carrier networks.<sup>19</sup>

Indeed, when Congress amended the Act in 1996 to open local exchange markets to competition,<sup>20</sup> it recognized that an ILEC like AT&T Kentucky would have the incentive to thwart competition. It therefore established the negotiation and arbitration process under Sections 251 and 252 of the Act, which conferred upon competitive carriers, like INdigital Telecom, not only the right to interconnect, but the right to do so on fair and pro-competitive terms.<sup>21</sup>

INdigital Telecom cannot offer its competitive 911/E911 services in Kentucky without interconnecting to the PSTN, and AT&T Kentucky, in this instance, is the gatekeeper to that network. Sections 251 and 252 of the Act were designed to protect competitors from experiencing unreasonable delays in entering a market controlled by incumbents.<sup>22</sup> Unlike typical commercial

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<sup>18</sup> *Recommendations of the Independent Panel Reviewing the Impact of Hurricane Katrina on Communications Networks*, 22 FCC Rcd 10541, ¶¶ 74-75, 80-82 (2007) ("*Katrina Order*").

<sup>19</sup> *Local Competition Order* at ¶ 10.

<sup>20</sup> Telecommunications Act of 1996, Pub. L. 104-104, 110 Stat. 56 (1996) (codified at 47 U.S.C. §§ 151, *et seq.* (1996) (purpose of the Act is "[t]o promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies") (emphasis added).

<sup>21</sup> *See generally* 47 U.S.C. §§ 151, 152.

<sup>22</sup> *See, for example, AT&T Communs. Sys. v. Pacific Bell*, 203 F.3d 1183, 1186 (9th Cir. Cal. 2000) ("the strict timelines contained in the Telecommunications Act indicate Congress' desire to open up local exchange markets to competition without undue delay"); *see also GTE South, Inc. v. Morrison*, 199 F.3d 733, 744 (4th Cir. 1999)

agreements where both parties may have an incentive to reach a mutually beneficial outcome through agreement, AT&T Kentucky has generally demonstrated a monopolistic reluctance to willingly enter into such agreements. Thus, arbitration is necessary to ensure that competitors like INdigital Telecom with unequal bargaining power have their rights protected.<sup>23</sup> Section 252 of the Act in particular is designed to address the very unequal bargaining power manifest in negotiations between ILECs and competitive local exchange carriers ("CLECs") in order to advance Congress's goal of increased competition.<sup>24</sup>

INdigital Telecom's right to interconnection and arbitration is well-established. As the FCC has recognized:

absent interconnection between the incumbent LEC and the entrant, the customer of the entrant would be unable to complete calls to subscribers served by the incumbent LEC's network. Because an incumbent LEC currently serves virtually all subscribers in its local serving area, an incumbent LEC has little economic incentive to assist new entrants in their efforts to secure a greater share of that market. An incumbent LEC also has the ability to act on its incentive to discourage entry and robust competition by not interconnecting its network with the new entrant's network or by insisting on supracompetitive prices or other unreasonable conditions for terminating calls from the entrant's customers to the incumbent LEC's subscribers.<sup>25</sup>

Congress addressed these problems in the Act by requiring ILECs to enter into ICAs with new CLEC entrants to the market on just, reasonable, and nondiscriminatory terms, enabling the competitor's customers to place calls to and receive calls from the ILECs' subscribers.<sup>26</sup> INdigital

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("Congress intended that competition under the Telecommunications Act take root 'as quickly as possible'") (citing H.R. Rep. No. 104-204 at 89 (1995)).

<sup>23</sup> *Local Competition Order* at ¶ 41 (noting the "significant imbalances in bargaining power").

<sup>24</sup> *Local Competition Order* at ¶ 15 (the "statute addresses this problem [of the incumbent's 'superior bargaining power'] by creating an arbitration proceeding in which the new entrant may assert certain rights"); *see also id.* ¶ 134 (noting that because it is the new entrant's objective to obtain services and access to facilities from the incumbent and thus "has little to offer the incumbent in a negotiation," the Act creates an arbitration process to equalize this bargaining power).

<sup>25</sup> *Local Competition Order* ¶ 10.

<sup>26</sup> *Local Competition Order* ¶¶ 10-11, 13.

Telecom's request for interconnection and arbitration is premised upon these very principles. It simply cannot provide its competitive 911/E911 services in Kentucky without interconnection to the PSTN as provided for under Sections 251 and 252 of the Act.

**IV. The Introduction of Competitive 911/E911 Service to the Kentucky Market Will Further the Expressed Goals of Congress.**

It is undeniable that 911/E911 service is critically important to the public switched telephone network (the "PSTN"). 911/E911 service "saves lives and property by helping emergency services personnel respond more quickly and efficiently."<sup>27</sup> INdigital Telecom, a certificated CLEC in Kentucky, is focused on improving 911/E911 services through reliable, technologically advanced, high-quality telephone exchange service that is interconnected with the legacy system of AT&T Kentucky. To that end, INdigital Telecom stands ready to offer Kentucky counties, public safety agencies, and Public Safety Answering Points ("PSAPs") a competitive alternative for their 911/E911 service – a service that has historically been monopolized by AT&T Kentucky.

INdigital Telecom, however, cannot offer its innovative 911/E911 service to Kentucky end users without first establishing mutually beneficial interconnection and interoperability arrangements with AT&T Kentucky because AT&T Kentucky controls access to the PSTN itself. Interconnection with AT&T Kentucky, therefore, is essential. Without interconnection, AT&T Kentucky's end users will not be able to reach or "intercommunicate" with INdigital Telecom's end users, depriving them of the innovative 911/E911 services INdigital Telecom provides. Moreover, interconnection between the parties will serve to meet the goal of ensuring that "Americans have access to a resilient and reliable 911 system irrespective of the technology used to provide the service."<sup>28</sup>

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<sup>27</sup> *Revision of the Commission's Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems*, 11 FCC Rcd 18676, ¶ 5 (1996) ("*Enhanced 911 Compatibility Order*").

<sup>28</sup> *Katrina Order* at ¶ 96.

INdigital Telecom's competitive 911/E911 telephone exchange service directly responds to the goals of Congress and the Federal Communications Commission (the "FCC") by providing "meaningful automatic location identification information that permits first responders to render aid, regardless of the technology or platform employed" by the caller.<sup>29</sup> As the FCC has determined, it is imperative that public safety officials receive "accurate and timely information concerning the current location of an individual who places an emergency call, notwithstanding the platform or technology used by the provider or the means by which the individual places the call."<sup>30</sup>

### **STATEMENT OF FACTS**

INdigital Telecom is a CLEC certificated and authorized by the Commission to provide competitive local exchange service in Kentucky. INdigital Telecom's business model is unique in this state. Its principal service offerings are focused on bringing effective competition to, among other areas, the 911/E911 services market in Kentucky through reliable, technologically advanced, high-quality telephone exchange service that will be interconnected with the legacy AT&T Kentucky system. To the best of INdigital Telecom's knowledge, its entry into the Kentucky market will, for the first time, present many PSAPs and related public safety entities in the Commonwealth with a competitive alternative to the traditional monopoly held by AT&T Kentucky over the routing and switching of 911/E911 calls.

INdigital Telecom is already providing its 911/E911 service in Indiana.<sup>31</sup> In fact, INdigital Telecom was chosen by the Indiana Wireless Enhanced 911 Advisory Board to design, construct,

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<sup>29</sup> *Wireless E911 Location Accuracy Requirements*, 22 FCC Rcd 10609, ¶ 6 (2007).

<sup>30</sup> *Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, 23 FCC Rcd 5255, ¶ 23 (2008) ("TRs 911 Order").

<sup>31</sup> Indiana Utility Reg. Comm. Cause No. 43499, *In the Matter of the Joint Complaint of Communications Venture Corporation d/b/a INdigital Telecom; the Indiana Wireless Enhanced 9-1-1 Advisory Board; Benton County, Indiana, as the Benton County PSAP Operator; and Carroll County, Indiana, as the Carroll County PSAP Operator, Against Indiana Bell Telephone Company, Inc., d/b/a AT&T Indiana, Concerning Connection of Wireless Enhanced 9-1-1 Circuits and Related Services to Facilities Located at Public Safety Answering Points and AT&T's Refusal to Permit Such Connections for Provision of Wireless Enhanced 9-1-1 Service, and Request*



and implement the Indiana Wireless 911 network.<sup>32</sup> This network is an enhanced 911 delivery network that is designed to reliably and efficiently route wireless 911 calls to Indiana PSAP subscribers. INdigital Telecom's competitive 911/E911 network is particularly beneficial for wireless calls and other emerging technologies.

In its effort to enter the Kentucky market, INdigital sought interconnection with AT&T Kentucky, an ILEC under the terms of the Act. Within its operating territory, AT&T Kentucky has, at all relevant times in this proceeding, been a dominant provider of telephone exchange service. INdigital Telecom can only gain access to the PSTN in AT&T Kentucky's operating territory by entering into an appropriate interconnection agreement with AT&T Kentucky.

The Parties entered into voluntary negotiations for interconnection of their respective networks. Though the Parties worked cooperatively and exhaustively to resolve all disputed issues, the voluntary negotiations ultimately broke down. The Parties' divergent views with respect to 911/E911 services were at the center of the disputed issues. AT&T Kentucky initially proposed Attachment 5 (911/E911) to the interconnection agreement, but this attachment failed to address situations in which INdigital Telecom would be the 911/E911 service provider. In response, the parties negotiated an alternate Attachment 5 (911/E911) and Alternate Attachment 5A (911 NIM) ("Alternate Attachments 5 and 5A") to replace the original Attachment 5 proposed by AT&T Kentucky. The Parties made good progress negotiating and resolving most issues in the terms of Alternate Attachments 5 and 5A.<sup>33</sup> Most importantly, Alternate Attachments 5 and 5A would provide the necessary terms and conditions to enable end-user customers to receive vital 911/E911

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*for the Indiana Regulatory Commission to Order Necessary Connections and Determine Reasonable Terms, Conditions and Compensation, Final Order at 6 (I.U.R.C., Feb. 10, 2010) ("Indiana Regulatory Order No. 43499").*

<sup>32</sup> *Indiana Regulatory Order No. 43499* at 6.

<sup>33</sup> The parties had reached complete agreement on Alternate Attachment 5A until the afternoon prior to the filing of the Petition, when AT&T Kentucky changed the name of that attachment, as well as that of Alternate Attachment 5, in an apparent effort to reflect its new position that the attachments are not appropriate for a CLEC interconnection agreement.

services regardless of whether INdigital Telecom or AT&T Kentucky is the underlying service provider to PSAPs and related entities.

Prior to INdigital Telecom's Petition for arbitration, AT&T Kentucky informed INdigital Telecom that notwithstanding its negotiation of Alternate Attachments 5 and 5A, it would argue that Alternate Attachments 5 and 5A fall outside the scope of an arbitrable interconnection agreement. In essence, AT&T Kentucky's position is that it should be able to negotiate certain terms and conditions with INdigital Telecom without being considered to have negotiated these terms and conditions for purposes of the Act.

As a result of the imminent closing of the statutory window for filing a formal request for arbitration under the Act, INdigital Telecom filed its Petition for arbitration with the Commission.

AT&T challenges the appropriateness of including terms and conditions for the provision of 911/E911 service in a Section 251(c) ICA and, as a result, their inclusion in a Section 252(b) arbitration. AT&T Kentucky's position is meritless. The very fact that AT&T Kentucky includes as part of its base ICA a section specifically addressing 911/E911 acknowledges the appropriateness of including such terms and conditions in an ICA.<sup>34</sup> Otherwise these services would be excluded entirely and would need to be negotiated separately for each and every ICA between AT&T Kentucky and another carrier. Parties can and do negotiate the terms of 911/E911 service within Section 251/252 ICAs, and the Commission has approved those ICAs.<sup>35</sup>

INdigital Telecom not only believes that the issues are appropriate for arbitration, but also that its competitive 911/E911 service qualifies as "telephone exchange service" under the Act,

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<sup>34</sup> Moreover, as recently as Nov. 4, 2009, AT&T Kentucky entered into a Section 251/252 ICA with All American Telecom, Inc. that included 911/E911 provisions (*see* "MFN Agreement" filed Nov. 4, 2009). It should go without saying that this is industry standard practice (*see, for example*, Interconnection Agreement between Windstream East, Inc. and Armstrong Telecommunications, Inc., filed June, 25, 2007).

<sup>35</sup> *See, for example, Petition of Southeast Telephone, Inc. for Arbitration with BellSouth Under the Telecommunications Act of 1996*, filed on June 26, 2006 (arbitrating, among other things, the E911 addresses for each remote terminal, main distribution frame, and central office).

thereby entitling it to interconnection under the framework provided by Sections 251 and 252 of the Act, and mandating that the issues be arbitrated. In addition, the Commission has additional, concurrent authority under state law to decide appropriate terms and conditions for the provision of competitive 911/E911 services in Kentucky. This appears to be an issue of first impression in Kentucky.

### **ARGUMENT AND ANALYSIS**

The Commission has numerous bases for exercising its authority over the issues presented by INdigital Telecom's competitive 911/E911 service. First and foremost, INdigital Telecom's competitive 911/E911 service is "telephone exchange service" as defined by Section 153(47). As such, it is not only appropriate for inclusion in the terms and condition of the ICA between the parties, but Sections 251 and 252 of the Act mandate that AT&T Kentucky provide interconnection to INdigital Telecom as a requesting CLEC and that the Commission arbitrate "any open issues."<sup>36</sup> In addition, KRS Chapter 278 (along with Sections 253 and 261 of the Act) provides the Commission with additional, concurrent authority to assert its jurisdiction over the issues presented by INdigital Telecom's Petition.

Therefore, the mandate of Sections 251 and 252 of the Act, and the authority provided under KRS Chapter 278 and Section 253(b) of the Act to "protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers"<sup>37</sup> both support and necessitate that the Commission has jurisdiction to address the terms and conditions relating to INdigital Telecom's provision of competitive 911/E911 service.

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<sup>36</sup> 47 U.S.C. § 252(b)(1).

<sup>37</sup> 47 U.S.C. § 253(b).

**I. INdigital Telecom Is Entitled to Arbitration and Interconnection Under the Act Because It Provides "Telephone Exchange Service."**

Under the framework of Sections 251 and 252 of the Act, a competitive telecommunications carrier like INdigital Telecom is entitled to interconnection with an ILEC like AT&T Kentucky – including arbitration of any disputed issues – for the transmission and routing of "telephone exchange service." Therefore, if the competitive 911/E911 service INdigital Telecom provides qualifies as "telephone exchange service" (which, as explained below, it does), then the Act mandates that INdigital Telecom is entitled to have the disputed issues arbitrated for inclusion in a final ICA with AT&T Kentucky.

**A. Section 251(c) entitles "telephone exchange service" providers to interconnection.**

INdigital Telecom is entitled to interconnection and arbitration rights under Sections 251 and 252 of the Act because its competitive 911/E911 service is "telephone exchange service." Section 251 (c)(2)(a) of the Act provides that:

(c) Additional obligations of incumbent local exchange carriers. In addition to the duties contained in subsection (b), each incumbent local exchange carrier has the following duties:

(2) Interconnection. The duty to provide, for the facilities and equipment of any requesting telecommunications carrier, interconnection with the local exchange carrier's network--

(A) for the transmission and routing of telephone exchange service and exchange access.<sup>38</sup>

It is undisputed that INdigital Telecom is a "requesting telecommunications carrier." INdigital Telecom submitted a bona fide request to AT&T Kentucky for interconnection. Because INdigital Telecom's competitive 911/E911 service is a "telephone exchange service," it is entitled to

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<sup>38</sup> 47 U.S.C. § 251(c)(2)(a) (emphasis added).

interconnect with AT&T Kentucky pursuant to 251(c). Because it made a bone fide request for interconnection, it is entitled to arbitration under Section 252.<sup>39, 40</sup>

**B. INdigital Telecom Is Entitled to a Presumption That It Provides "Telephone Exchange Service."**

As an initial matter, INdigital Telecom's status as a CLEC certificated by the Commission to provide competitive local exchange service in Kentucky entitles it to a presumption that it provides "telephone exchange service." The FCC has previously instructed that "[a]ny entity that is certified as a competing LEC by the appropriate state commission is presumptively a competing provider of telephone exchange service. . . . [A]s long as the state certification remains in effect, the incumbent must provide the CLEC with . . . [the] resources to which a CLEC is entitled under section 251."<sup>41</sup> Therefore, the burden of proof rests squarely on AT&T Kentucky to show that INdigital Telecom's competitive 911/E911 service is something less than "telephone exchange service."

As explained below, however, even without this presumption, INdigital Telecom's competitive 911/E911 service satisfies the definition of "telephone exchange service."

**C. INdigital Telecom's competitive 911/E911 service is "telephone exchange service."**

Even setting aside the presumption granted INdigital Telecom by virtue of its status as a certificated CLEC, INdigital Telecom's competitive 911/E911 service satisfies the requirements for

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<sup>39</sup> *Petition of Worldcom, Inc. Pursuant to Section 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia State Corporation Commission Regarding Interconnection Disputes with Verizon Virginia Inc., and for Expedited Arbitration, et al.*, 17 FCC Rcd 27039, n.200 (2002) ("Virginia Arbitration Order") (stating that ILECs are required by Section 251(c)(2) to allow competitors to interconnect while interconnection arrangements between "non-incumbent carriers" are governed by Section 251(a)).

<sup>40</sup> When applying the provisions of Section 251, it is important not to overlook the underlying purpose of the "telephone exchange service" limitation in Section 251(c). It exists to ensure that long distance carriers do not attempt to avail themselves of 251(c) interconnection privileges in an effort to circumvent access charges, not to require an analysis of each local service offered by a competitive CLEC like INdigital Telecom. (See *Local Competition Order* at ¶ 186-191). In essence, Congress balanced the stick of 251(c) – additional obligations necessary to ensure equal bargaining power for the opening of local markets – with the carrot of Section 271 of the Act, giving to ILECs like AT&T Kentucky the right to provide long distance service. (See *Local Competition Order* at ¶ 55).

<sup>41</sup> *Directory Listing Order* ¶ 14.

"telephone exchange service" as defined by the Act. Section 153(47) of the Act defines "telephone exchange services" as:

(A) service within a telephone exchange, or within a connected system of telephone exchanges within the same exchange area operated to furnish to subscribers intercommunicating service of the character ordinarily furnished by a single exchange, and which is covered by the exchange service charge, or (B) comparable service provided through a system of switches, transmission equipment, or other facilities (or combination thereof) by which a subscriber can originate and terminate a telecommunications service.<sup>42</sup>

Prior to applying Section 153(47) to INdigital Telecom's provision of 911/E911 service, however, it is important to note two interpretive guideline.

1. The FCC has interpreted Section 153(47) of the Act expansively.

When construing Section 153(47) of the Act, "it is important to note that the FCC has been expansive in its definition of telephone exchange service."<sup>43</sup> Specifically, the FCC has found that "telephone exchange service [is] not limited to traditional voice telephony, but include[s] non-traditional 'means of communicating information within a local area.'"<sup>44</sup>

As an example, the FCC found in its *Advanced Services Order* that even if "the transmission is a data transmission rather than a voice transmission . . . such transmissions nevertheless constitute telephone exchange service."<sup>45</sup> It went on to instruct that "[i]n this era of converging technologies, limiting the telephone exchange service definition to voice-based communications would undermine a central goal of the 1996 Act – opening local markets to competition to all telecommunications service."<sup>46</sup> The FCC concluded that certain advanced DSL-based services are telephone exchange services "when used to permit communications among subscribers within an exchange or within a

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<sup>42</sup> 47 U.S.C. § 153(47) (emphasis added).

<sup>43</sup> *North Carolina Arbitration Order* at 12.

<sup>44</sup> *Advanced Services Order* at ¶ 17.

<sup>45</sup> *Advanced Services Order* at ¶ 21.

<sup>46</sup> *Advanced Services Order* at ¶ 21 (noting that using the PSTN for facsimile transmission services, though "the transmission is a data transmission rather than a voice transmission, . . . such transmissions nevertheless constitute telephone exchange service").

connected system of exchanges."<sup>47</sup> In addition, the FCC has determined that the service provided by certain directory assistance providers also qualifies as telephone exchange service because "it permits a community of interconnected customers to make calls to one another in the manner prescribed by the statute."<sup>48</sup>

The provision of telephone exchange service is also not limited to services that are provided over the competitive carrier's exchange. In fact, the FCC has admonished that it "has never suggested that the telephone exchange service definition is limited to voice communications provided over the [PSTN]."<sup>49</sup> Rather,

Congress' redefinition of 'telephone exchange service' was intended to include in that term not only the provision of traditional local exchange service (via facilities ownership or resale), but also the provision of alternate loops for telecommunications services, separate from the [PTSN], in a manner 'comparable' to the provision of local loops by a traditional local telephone exchange carrier.<sup>50</sup>

Thus, even the fact that the 911 network is interconnected to, but separate from, the PTSN would not change INdigital Telecom's classification as a "telephone exchange service" provider. Taking the guidance of the FCC and these examples together when applying Section 153(47) to INdigital Telecom's competitive 911/E911 service, it is quite clear "that the language [of Section 153(47)] should be given a liberal interpretation that furthers the purpose of telecommunications competition."<sup>51</sup>

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<sup>47</sup> *Advanced Services Order* at ¶ 20.

<sup>48</sup> *Directory Listing Order* at ¶ 17.

<sup>49</sup> *Advanced Services Order* at ¶ 20.

<sup>50</sup> *Federal-State Joint Board on Universal Service*, 13 FCC Rcd 11501, ¶ 54 (1998) (emphasis added).

<sup>51</sup> *North Carolina Arbitration Order* at 12 (noting that "the FCC has even gone so far as to require local exchange companies 'to provide access to 911 databases and interconnection to 911 facilities to all telecommunications carriers, pursuant to sections 251(a) and (c) and section 271(c)(2)(B)(vii) of the Act.") (citing *E911 Requirements for Internet Protocol (IP)-Enabled Service Providers*, 20 FCC Rcd 10245, ¶ 38, n.128 (2005)).

2. INdigital Telecom's competitive 911/E911 service meets the criteria for "telephone exchange service" under part A and part B of Section 153(47).

It is also important to note that Section 153(47) of the Act "is written in the disjunctive – that is, if either part (A) or part (B) of this definition is satisfied, then such service is a 'telephone exchange service'" under the Act.<sup>52</sup> In this case, whether evaluated under part A or part B of Section 153(47), INdigital Telecom's competitive 911/E911 service is capable of meeting the criteria identified under both.

- a. *Analysis of Section 153(47)(A)*.

Under Section 153(47)(A), a "telephone exchange service" is "service within a telephone exchange, or within a connected system of telephone exchanges within the same exchange area operated to furnish to subscribers intercommunicating service of the character ordinarily furnished by a single exchange, and which is covered by the exchange service charge."<sup>53</sup> Broken into its essential components, then, "telephone exchange service" under 153(47)(A) must (1) furnish to subscribers intercommunicating service, (2) be within a telephone exchange or within a connected system of telephone exchanges within the same exchange areas, and (3) be covered by exchange service charge. INdigital Telecom's competitive 911/E911 service offering meets all three of these elements.

**(1) Intercommunicating Service.** The first prong of Section 153(47)(A) requires that "telephone exchange service" provide subscribers "intercommunicating service." Although "[i]ntercommunication is not separately defined in the Act, nor is it exactly a term of art,"<sup>54</sup> the FCC

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<sup>52</sup> *North Carolina Arbitration Order* at 11; *see also Ohio Arbitration Award* Case No. 07-1280-TP-ARB at 16 (if CLEC's "911 service satisfies the criteria of either A or B it will establish that it provides a telephone exchange service"); *Advanced Services Order* at ¶ 17 ("The 1996 Act provides two alternative definitions for the term "telephone exchange service") (emphasis added).

<sup>53</sup> 47 U.S.C. 153(47)(A).

<sup>54</sup> *North Carolina Arbitration Order* at 11; *accord Ohio Entry on Rehearing* at 7; *see also Advanced Services Order* at ¶ 23 ("The term 'intercommunication' is not defined in the Act or the Commission's rules").



has instructed that intercommunication is "a key component of telephone exchange service"<sup>55</sup> that "refer[s] to the provision of individual two-way voice communication."<sup>56</sup> In its *Advanced Services Order*, the FCC explained that "a service satisfies the 'intercommunication' requirement of [Section 153(47)(A)] as long as it provides customers with the capability of intercommunicating with other subscribers."<sup>57</sup>

"Nor has the FCC defined the scope of intercommunication that a provider must offer to meet the definition of telephone exchange service."<sup>58</sup> As a result, Section 153(47)(A) "does not set limits on the size of the community or the number of interconnected customers."<sup>59</sup> "The statute . . . does not quantify intercommunication. It only requires the existence of intercommunication."<sup>60</sup>

INdigital Telecom's competitive 911/E911 service would fulfill this "key component" by allowing its PSAP subscribers to intercommunicate with 911 callers, other PSAP subscribers for which it provides service, and with PSAP customers of AT&T Kentucky. Moreover, INdigital Telecom's service would allow Kentucky end users to make calls to PSAPs and communicate with other local emergency personnel. In this way, INdigital Telecom's competitive 911/E911 service will allow "a community of interconnected customers to make calls to one another."<sup>61</sup> This interconnected community would consist of 911 callers, PSAPs, and other emergency personnel in the relevant geographic area.

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<sup>55</sup> *Advanced Services Order* at ¶ 30.

<sup>56</sup> *Advanced Services Order* at ¶ 30.

<sup>57</sup> *Advanced Services Order* at ¶ 23, also citing *General Tel. Co. of Cal.*, 13 FCC 2d 448, 460, ¶ 24 (1968) ("Manifestly, the phrase [telephone exchange service] is intended primarily to apply to a telephone or comparable service involving 'intercommunication,' *i.e.*, a two-way communication, not the one way transmission of signals which takes place with respect to CATV channel service").

<sup>58</sup> *Ohio Entry on Rehearing* at 7 (emphasis added).

<sup>59</sup> *Ohio Entry on Rehearing* at 7.

<sup>60</sup> *Ohio Arbitration Award* at 15 (emphasis added).

<sup>61</sup> *Directory Listing Order* at ¶ 17.

Thus, INdigital Telecom's competitive 911/E911 service "satisfies the 'intercommunication' requirement of [Section 153(47)(A) because] . . . it provides customers with the capability of intercommunicating with other subscribers."<sup>62</sup>

**(2) Within a Telephone Exchange.** The second prong of Section 153(47)(A) requires that "telephone exchange service" must be provided within a telephone exchange or within a connected system of telephone exchanges within the same exchange area.<sup>63</sup> However, the telephone exchange component does not require that service be coterminous with the ILEC's exchange boundaries to qualify as "telephone exchange service." Instead, "the concept of an exchange is based on geography and regulation."<sup>64</sup> Moreover, the FCC has found that Section 153(47)(a) "does not have a specific geographic boundary" requirement.<sup>65</sup>

This fact is exemplified by both wireless service providers and extended area service ("EAS") offerings. For example, the FCC has determined that, even though wireless service providers' geographic service areas are different from typical wireline exchange area boundaries, they are still considered to be "within a telephone exchange" or "a connected system of telephone exchanges within the same exchange area" for the purpose of Section 153(47)(A).<sup>66</sup> Likewise, many telephone exchange service providers have developed expanded local calling service offerings, also known as EAS, that allow subscribers in a "community of interest across LATA boundaries" to

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<sup>62</sup> *Advanced Services Order* at ¶ 23, also citing *General Tel. Co. of Cal.*, 13 FCC 2d 448, 460, ¶ 24 (1968) ("Manifestly, the phrase [telephone exchange service] is intended primarily to apply to a telephone or comparable service involving 'intercommunication,' *i.e.*, a two-way communication, not the one way transmission of signals which takes place with respect to CATV channel service").

<sup>63</sup> 47 U.S.C. 153(47)(A).

<sup>64</sup> *Advanced Services Order* at ¶ 22.

<sup>65</sup> *Application of BellSouth Corp., BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc., for Provision of In-Region, InterLATA Services in Louisiana*, 13 FCC Rcd 20599, ¶ 30 (1998) ("*BellSouth Louisiana Order*").

<sup>66</sup> *BellSouth Louisiana Order* at ¶ 30.

reach one another without incurring a toll call.<sup>67</sup> And, at least one state commission has found that the service area covered by competitive 911/E911 services "is akin to a single exchange with EAS to neighboring exchanges."<sup>68</sup>

In addition, both the FCC and the federal district court overseeing the divestiture of the Bell Operating Companies ("BOCs") in the Modified Final Judgment recognized that many 911/E911 "transmissions cross LATA boundaries."<sup>69</sup> The district court specifically waived the LATA restrictions to ensure that the BOCs could "provide, using their own facilities, 911 emergency service across LATA boundaries to any 911 customer whose jurisdiction crosses a LATA boundary," thus allowing the BOCs to provide multiLATA 911 services.<sup>70</sup>

Consequently, the fact that INdigital Telecom's competitive 911/E911 service will be provided via "switches" in order to interconnect PSAPs with other PSAPs, 911 callers, and other local emergency personnel located within the same geographic area satisfies the requirement that it be offered within a telephone exchange. Ultimately, there is no requirement that INdigital Telecom's exchange boundaries be coterminous with that of the ILEC. Instead, "PSAPs must have a service that takes into account the location of fire, police, and other emergency service providers within the county that it serves."<sup>71</sup> INdigital Telecom's service does this.

**(3) Exchange Service Charge.** The final prong of Section 153(47)(A) requires that in order to qualify as telephone exchange service the service must be covered by an "exchange service charge." Although this term is also not defined by the Act or by the FCC's rules, the FCC stated in

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<sup>67</sup> *Petitions for Limited Modification of LATA Boundaries to Provide Expanded Local Calling Service (ELCS) at Various Locations*, 12 FCC Rcd 10646, ¶ 7 (1997).

<sup>68</sup> *Ohio Arbitration Award* at 16; *see also 911 Requirements for IP-Enabled Service Providers*, 20 FCC Rcd 10245, n.32 (2005) ("unlike normal phone calls, 911 calls are routed based on the calling number (which is linked to a particular geographic area and political jurisdiction), not the called number").

<sup>69</sup> *Bell Operating Companies; Petitions for Forbearance from the Application of Section 272 of the Communications Act of 1934, as Amended, to Certain Activities*, 13 FCC Rcd 2627, ¶20 (1998) ("Forbearance Order").

<sup>70</sup> *United States v. Western Elec. Co.*, Civil Action No. 82-0192, slip op. at 5 n.8 (D.D.C. Feb. 6, 1984).

<sup>71</sup> *Ohio Arbitration Award* at 15.

its *Advanced Services Order* that "any charges a LEC assesses" for the service in question "would be covered by the 'exchange service charge.'"<sup>72</sup> "[T]he phrase implies that an end-user obtains the ability to communicate within the equivalent of an exchange area as a result of entering into a service and payment agreement with a provider of a telephone exchange service."<sup>73</sup> The FCC also noted that the underlying purpose of the "exchange service charge" is to distinguish "whether or not a service is a local . . . service, by virtue of being part of a 'connected system of exchanges,' and not a 'toll' service."<sup>74</sup>

INdigital Telecom's service easily meets this element of the definition because its PSAP customers will obtain the "ability to communicate within the equivalent of an exchange area as a result of entering into a service and payment agreement with" INdigital Telecom.<sup>75</sup> In any event, the jurisdictional nature of 911/E911 service alleviates the underlying concern addressed by the exchange service charge. There will simply be no need to distinguish "whether or not [INdigital Telecom's] service is a local . . . service . . . and not a 'toll' service" as the 911/E911 service provided by INdigital Telecom will always be local in nature.<sup>76</sup>

Therefore, INdigital Telecom's competitive 911/E911 service meets all three elements of the "telephone exchange service" definition provided in Section 153(47)(A). It will furnish to subscribers intercommunicating service that is within a telephone exchange or within a connected system of telephone exchanges within the same exchange areas, and will be covered by an exchange service charge. As discussed directly below, it also qualifies under the alternate definition in Section 153(47)(B).

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<sup>72</sup> *Advanced Services Order* at ¶ 27.

<sup>73</sup> *Advanced Services Order* at ¶ 27.

<sup>74</sup> *Advanced Services Order* at ¶ 27.

<sup>75</sup> *Advanced Services Order* at ¶ 27.

<sup>76</sup> *Advanced Services Order* at ¶ 27.

b. *Analysis of Section 153(47)(B).*

Alternatively, under Section 153(47)(B), a "telephone exchange service" is a "comparable service provided through a system of switches, transmission equipment, or other facilities (or combination thereof) by which a subscriber can originate and terminate a telecommunications service."<sup>77</sup> Discussing alternate Section 153(47)(B), the FCC has concluded "that a service falls within the scope of [Section 153(47)(B)] if it permits intercommunication within the equivalent of a local exchange area and is covered by the exchange service charge."<sup>78</sup> Broken into its essential parts, a "telephone exchange service" under alternative 153(47)(B) must (1) be a comparable service provided through a system of switches, transmission equipment, or other facilities (or combination thereof); (2) allow subscribers to originate and terminate a telecommunications service; and (3) furnish to subscribers intercommunicating service.<sup>79</sup>

The addition of "part (B)" of the "telephone exchange service" definition to the Act has been understood as Congress's intent to broaden the inclusion of the services that would fall within the telephone exchange service category.<sup>80</sup> Logic, then, would dictate that if a service qualifies as "telephone exchange service" under the more restrictive definition in Section 153(47)(A), then it should also meet the criteria of Section 153(47)(B). Thus, INdigital Telecom's competitive 911/E911 service easily meets this alternative definition of "telephone exchange service" as it "permits intercommunication within the equivalent of a local exchange area and is covered by the exchange service charge."<sup>81</sup>

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<sup>77</sup> 47 U.S.C. 153(47)(B).

<sup>78</sup> *Advanced Services Order* at ¶ 29.

<sup>79</sup> 47 U.S.C. § 153(47)(B); *see also Advanced Services Order* ¶ 30 (finding that "intercommunication" is required under Section 153(47)(B) even though the language of the Act does not explicitly state it).

<sup>80</sup> *Advanced Services Order* at ¶ 17.

<sup>81</sup> *Advanced Services Order* at ¶ 29.

Because the "intercommunication" component has already been addressed above in the analysis of 153(47)(A), the analysis of Section 153(47)(B) will be limited to whether INdigital Telecom's competitive 911/E911 service is (1) a comparable service provided through a system of switches, transmission equipment, or other facilities (or combination thereof); and (2) allow subscribers to originate and terminate a telecommunications service.

**(1) Comparable Service.** The first prong of Section 153(47)(B)'s alternative definition for "telephone exchange service" requires that the service be "'comparable' to the services described in [Section 153(47)(A)]" discussed above.<sup>82</sup> In fact, Section 153(47)(B) "was added to ensure that the definition of telephone exchange service was not limited to traditional voice telephony, but included non-traditional means of communication within a local calling area."<sup>83</sup> In its *Advanced Services Order*, the FCC recognized that, although the term "comparable" is not defined in the Act, "as used in [Section 153(47)(B)], [it] means that the services described therein share some of the same characteristics and qualities as the services described in [Section 153(47)(A)]."<sup>84</sup> The FCC went on to note that "neither the statutory text nor the legislative history accompanying [Section 153(47)(B)] provides guidance on which characteristics and qualities must be present in order for a service to fall within the scope of [Section 153(47)(B)]."<sup>85</sup> In any event, the FCC has rejected the idea that Section 153(47)(B) "is limited to services that are 'market substitutes' for two-way switched voice service."

INdigital Telecom's competitive 911/E911 service is at a minimum "comparable" to the services described in Section 153(47)(A). It allows for "the key component" of two-way voice intercommunication among its subscribers. It operates within a geographically relevant area to

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<sup>82</sup> *Advanced Services Order* at ¶ 29.

<sup>83</sup> *Directory Listing Order* at ¶ 21.

<sup>84</sup> *Advanced Services Order* at ¶ 30 (emphasis added).

<sup>85</sup> *Advanced Services Order* at ¶ 29; *Id.* at ¶ 30 (finding later that "intercommunication" is a key characteristic shared between both definitions for telephone exchange service).

connect PSAPs, 911 callers, and local emergency personnel. It will be covered by an exchange service charge. Regardless of which combination of "characteristics and qualities" must be present, Indigital Telecom's service at least shares "some of the same characteristics and qualities as the services described in [Section 153(47)(A)]."<sup>86</sup> In any event, "[i]f, as the FCC stated, a 'comparable' service is a service that shares some of the same characteristics, it stands to reason that the 'comparable' service need not share all of the same characteristics."<sup>87</sup>

**(2) Origination and Termination.** The second prong of Section 153(47)(B)'s alternative definition for "telephone exchange service" requires that a subscriber be able to "originate and terminate a telecommunications service." Neither call origination nor termination is defined by the Act, and there is a near paucity of guidance as to their application to "telephone exchange service." In the context of directory assistance, the FCC determined that allowing "a local caller to connect to another local telephone subscriber . . . enables the caller to originate and terminate a call" as required by Section 153(47)(B).<sup>88</sup> In addition, the FCC found that call completion offered by a directory assistance provider, "while it may not take the form of an ordinary telephone call (*i.e.*, one initiated by LEC provision of dial tone), nonetheless allows a caller at his or her request to connect to another local telephone subscriber thereby permitting a community of interconnected customers to make calls to one another."<sup>89</sup>

Notably, the FCC's description of call origination/termination in the *Directory Listing Order* suggests an overlap between the requirements for call origination/termination and those for intercommunication. And as one state commission addressing the issue of call origination and / or termination in the context of competitive 911/E911 services has found: "as with

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<sup>86</sup> *Advanced Services Order* at ¶ 30 (emphasis added).

<sup>87</sup> *Ohio Entry on Rehearing* at 14.

<sup>88</sup> *Directory Listing Order* at ¶ 20.

<sup>89</sup> *Directory Listing Order* at ¶ 21.

'intercommunicating,' the statute does not quantify 'originate.' . . . [T]hus . . . the capability of a PSAP to call to another PSAP and engage in two-way communications with 911 callers satisfies the call origination and termination requirement."<sup>90</sup>

INdigital Telecom's 911/E911 service will allow its PSAP customers to "originate and terminate" calls. Moreover, INdigital Telecom's PSAP customers will have the capability to reach AT&T Kentucky's PSAP customers as well as other local emergency personnel. It will allow its subscribers to carry on two-way voice communication between PSAPs as well as between PSAPs and 911 callers. Similar to the service discussed in the FCC's *Directory Listing Order*, INdigital Telecom's competitive 911/E911 service will "allow[] a caller at his or her request to connect to another local telephone subscriber thereby permitting a community of interconnected customers to make calls to one another."<sup>91</sup>

Therefore, INdigital Telecom's competitive 911/E911 service is "telephone exchange service" as defined by the Act. With or without the presumption granted to it as a state-certified CLEC, INdigital Telecom's competitive 911/E911 service offering squarely meets the requirements for "telephone exchange service" as defined under Section 153(47) the Act. As a result, INdigital Telecom is entitled to all of the benefits granted to it under Sections 251 and 252 of the Act. AT&T is required to interconnect its legacy 911/E911 network with INdigital Telecom's competitive 911/E911 network, and INdigital Telecom is entitled to have the issues presented by its Petition arbitrated by the Commission for that purpose.

**D. Section 252(b) entitles INdigital Telecom to arbitration of "any open issues," including issues outside of Section 251(c).**

Even if INdigital Telecom's competitive 911/E911 service did not satisfy the requirements for "telephone exchange service" under Section 153(47) (which it does), and therefore the issues

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<sup>90</sup> *Ohio Arbitration Award* at 16.

<sup>91</sup> *Directory Listing Order* at ¶ 21.



relating to this service fell outside of AT&T Kentucky's Section 251(c) interconnection duties (which they do not), Section 252 of the Act would still entitle INdigital Telecom to arbitration of these issues. Beginning with Section 252(a) of the Act, it is clear that neither the initial negotiations nor the subsequent arbitrations are limited to Section 251(c) issues.

Section 252(a) of the Act specifies the procedures by which a requesting CLEC like INdigital Telecom can enter into voluntary negotiations for interconnection with an ILEC like AT&T Kentucky. Section 252(a)(1) provides in pertinent part that

[u]pon receiving a request for interconnection, services, or network elements pursuant to section 251, an incumbent local exchange carrier may negotiate and enter into a binding agreement with the requesting telecommunications carrier or carriers without regard to the standards set forth in subsections (b) and (c) of section 251. The agreement shall include a detailed schedule of itemized charges for interconnection and each service or network element included in the agreement.<sup>92</sup>

Under Section 252(a), therefore, "the parties are free to reach any agreement, without regard to the duties set forth in § 251."<sup>93</sup> Here, INdigital Telecom submitted a bona fide request for interconnection to AT&T Kentucky pursuant to section 251. The parties willingly negotiated the terms and conditions of that agreement, including the terms and conditions for the provision of 911/E911 services as is evidenced by the two different versions of Attachment 5. Unfortunately, INdigital Telecom and AT&T Kentucky were unsuccessful in their negotiations (whether under 251(a) or 251(c)), leading to INdigital Telecom's Section 252(b) Petition for the Commission to arbitrate, which specifically included the issues relating to the provision of competitive 911/E911 service.

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<sup>92</sup> 47 U.S.C. 252(a)(1) (emphasis added).

<sup>93</sup> *Coserv Ltd. Liability Corp. v. Southwestern Bell Telephone Co.*, 350 F.3d 482, 485 (5th Cir. 2003) (emphasis in original).

Section 252(b) entitles the parties involved in the negotiations to petition the state commission for arbitration of "any open issues" in the event the Section 252(a) negotiations break down.<sup>94</sup> Section 252(b)(1) specifically provides that

During the period from the 135th to the 160th day (inclusive) after the date on which an incumbent local exchange carrier receives a request for negotiation under this section, the carrier or any other party to the negotiation may petition a State commission to arbitrate any open issues.<sup>95</sup>

Just as Section 252(a) specifically allows the parties to voluntarily negotiate issues that are outside the scope of Section 251(b) and (c),<sup>96</sup> the plain language of Section 252(b)(1) does not limit, as AT&T Kentucky would claim, the issues that are arbitrable by the Commission to those that would fall under Section 251(c). The Commission has authority "to arbitrate any open issues."<sup>97</sup> In fact, several other state commissions have found that the Section 252 arbitration process applies to all Section 251 negotiations with ILECs regardless of the issues involved.<sup>98</sup>

Federal case law also supports this interpretation. For instance, in *Coserv Ltd. Liability Corp. v. Southwestern Bell Telephone Co.*, 350 F.3d 482 (5th Cir. 2003), the Fifth Circuit found that "Congress contemplated that voluntary negotiations might include issues other than those listed in

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<sup>94</sup> 47 U.S.C. 252(b)(1).

<sup>95</sup> 47 U.S.C. 252(b)(1) (emphasis added).

<sup>96</sup> *Coserv*, 350 F.3d at 485.

<sup>97</sup> 47 U.S.C. 252(b)(1); *see also* 47 U.S.C. 252(b)(4) (requires that once a petition for arbitration has been accepted by the state commission, the state commission "shall resolve each issue set forth in the petition and the response") (emphasis added).

<sup>98</sup> *See, e.g.*, Indiana Utility Reg. Comm. Cause No. 43052-INT-01, *Sprint Communications Company L.P.'s Petition for Arbitration Pursuant to Section 252(b) of the Communications Act of 1934, as Amended by the Telecommunications Act of 1996, and the Applicable State Laws for Rates Terms and Conditions of Interconnection with Ligonier Telephone Company, Inc.*, Opinion (I.U.R.C. Sept. 6, 2006) (agreeing that Section 251(a) issues may be included in a Section 252 arbitration proceeding); North Dakota P.U.C. Case No. PU-2065-02-465, *Level 3 Communications LLC Interconnection Arbitration Application*, Order (N.D. P.U.C. May 30, 2003) (finding the arbitration provisions of Section 252 are available for all Section 251 interconnections, including interconnections under Section 251(a)); Washington State U.T.C. Docket No. UT-023043, *Petition for Arbitration of an Interconnection Agreement Between Level 3 Communications, LLC and CenturyTel of Washington, Inc.* Pursuant to 47 U.S.C. Section 252, Seventh Supplemental Order: Affirming Arbitrator's Report and Decision (Wash. U.T.C. Feb 28, 2003) ("[T]he mechanisms for negotiation, mediation, and arbitration provided by Section 252 apply to requests to negotiate made under Section 251(a).").

§251 (b) and (c) and still provided that any issue left open after unsuccessful negotiation would be subject to arbitration by the [state Commission]."<sup>99</sup> The court in *Coserv* also found that the "open issues" must have been part of the voluntarily negotiations between the parties, and the evidence in this case supports that very conclusion.

Upon INdigital Telecom's request for interconnection, the Parties entered into voluntary negotiations. Though the Parties worked diligently to resolve all disputed issues, the voluntary negotiations broke down. In particular, the Parties were unable to agree as to the terms and conditions regarding INdigital Telecom's provision of 911/E911 service. AT&T Kentucky initially proposed Attachment 5 (911/E911) to the interconnection agreement, but this attachment failed to address situations in which INdigital Telecom would be the 911/E911 service provider. In response, the parties negotiated an alternate Attachment 5 (911/E911) and Alternate Attachment 5A (911 NIM) ("Alternate Attachments 5 and 5A") to replace the original Attachment 5 proposed by AT&T Kentucky. The Parties made good progress negotiating and resolving most issues in the terms of Alternate Attachments 5 and 5A.<sup>100</sup> Most importantly, Alternate Attachments 5 and 5A (as proposed by INdigital Telecom) would provide the necessary terms and conditions to enable end-user customers to receive vital 911/E911 services regardless of whether INdigital Telecom or AT&T Kentucky is the underlying service provider to PSAPs and related entities.

AT&T Kentucky later informed INdigital Telecom that notwithstanding its negotiation of Alternate Attachments 5 and 5A, it would argue that Alternate Attachments 5 and 5A fall outside the scope of an arbitrable interconnection agreement. In essence, AT&T Kentucky's position is that it should be able to negotiate certain terms and conditions with INdigital Telecom without being

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<sup>99</sup> *Coserv* at 487 (emphasis in original).

<sup>100</sup> As noted previously, the parties had reached complete agreement on Alternate Attachment 5A until the afternoon prior to this filing, when AT&T Kentucky changed the name of that attachment, as well as that of Alternate Attachment 5, in an apparent effort to reflect its new position that the attachments are not appropriate for a CLEC interconnection agreement.

considered to have negotiated these terms and conditions for purposes of the Act. While AT&T Kentucky argues that it did not intend for its alternative 911/E911 proposals to be part of a voluntary negotiation, it is contrary to the evidence of actual, voluntary negotiation. AT&T Kentucky cannot have it both ways. INdigital Telecom never waived its right to seek arbitration of the 911/E911 issues that are the subject of this brief. Thus, pursuant to Section 252 of the Act, the Commission should arbitrate the issues presented by INdigital Telecom's Petition regardless of whether they fall under Section 251(c).

**II. The Commission Has Concurrent Authority Under State Law to Determine the Appropriate Terms and Conditions for INdigital Telecom's 911/E911 Service.**

In addition to the mandate of Sections 251 and 252 of the Act, the Commission has concurrent authority under state law to exercise its jurisdiction over the parties and determine the appropriate terms and conditions for INdigital Telecom's provision of competitive 911/E911 services. The Commission is the agency that has been authorized by both state and federal law to regulate the provision of telephone service in Kentucky. Although INdigital Telecom continues to believe that the framework provided by Sections 251 and 252 of the Act is the most appropriate means for addressing the issues, KRS Chapter 278 along with Sections 253 and 261 of the Act provide additional authority for the Commission to take an active role in the issues regarding how 911/E911 services will be provided in Kentucky.

**A. KRS 278.040, KRS 278.030, KRS 278.260, and KRS 278.530 authorize the Commission to decide issues related to the provision of telecommunications service in Kentucky, including 911/E911 service.**

The Commission has exclusive jurisdiction to enforce the provisions of KRS Chapter 278 (the "Chapter"), including the regulation of utilities' rates and services, and the adoption of reasonable regulations to implement the provisions of the Chapter. Beginning with KRS 278.040

(1) The Public Service Commission shall regulate utilities and enforce the provisions of [KRS Chapter 278]. . . .

. . .

(2) The jurisdiction of the commission shall extend to all utilities in this state. The commission shall have exclusive jurisdiction over the regulation of rates and service of utilities . . .

. . .

(3) The commission may adopt . . . reasonable regulations to implement the provisions of KRS Chapter 278 . . .<sup>101</sup>

In addition, KRS 278.030(2) provides that "[e]very utility shall furnish adequate, efficient and reasonable service, and may establish reasonable rules governing the conduct of its business and the conditions under which it shall be required to render service."<sup>102</sup>

KRS 278.010 defines service as "any practice or requirement in any way relating to the service of any utility, including . . . in general the quality . . . of any commodity or product used or to be used for or in connection with the business of any utility."<sup>103</sup> And KRS 278.260(1) further provides that the Commission

shall have original jurisdiction over complaints as to rates or service of any utility, and upon a complaint in writing made against any utility by any person. . . that any regulation, measurement, practice or act affecting or relating to the service of the utility or any service in connection therewith is unreasonable, unsafe, insufficient or unjustly discriminatory or that any service is inadequate or cannot be obtained, the [C]ommission shall proceed, with or without notice, to make such investigation as it deems necessary or convenient.. . .<sup>104</sup>

Regarding the issue of interconnection in particular, KRS 278.530 gives the Commission authority to "indicate . . . the terms and conditions and the rates to be charged."<sup>105</sup> And the legislative findings memorialized in KRS 278.546 plainly affirm that "[s]tate-of-the-art telecommunications is an essential element to the Commonwealth's initiatives to improve the lives of

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<sup>101</sup> KRS 278.040.

<sup>102</sup> KRS 278.030(2).

<sup>103</sup> KRS 278.010.

<sup>104</sup> KRS 278.260(1).

<sup>105</sup> KRS 278.530.

Kentucky citizens, to create investment, jobs, economic growth, and to support the Kentucky Innovation Act of 2000," and that "[c]onsumer protections . . . for access to emergency services including enhanced 911 must continue."<sup>106</sup>

Taken together, it is undeniable that the Commission has the authority to address the issues presented to it by INdigital Telecom's Petition. The issues presented relate directly to the rates and service of INdigital Telecom and AT&T Kentucky in the provision of 911/E911 service. It is the responsibility of the Commission to ensure that the terms and conditions of this service are reasonable, safe, sufficient, non-discriminatory, and that the service is adequate and obtainable.<sup>107</sup> Moreover, the conditions by which 911/E911 service is provided in Kentucky present a significant public safety and welfare issue, as well as a potential quality of service issue.<sup>108</sup>

**B. The Act does not pre-empt the Commission's regulatory authority over the issues presented by INdigital Telecom's provision of competitive 911/E911 Service.**

The Commission is not preempted from regulating the issues presented by INdigital Telecom's provision of competitive 911/E911 service. Generally, there is "a presumption against the pre-emption of state . . . regulations" and any preemption analysis must be based upon "the structure and purpose of the [statutory framework] as a whole."<sup>109</sup> This approach to the question of preemption "is consistent with both federalism concerns and the historic primacy of state regulation of matters of health and safety."<sup>110</sup>

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<sup>106</sup> KRS 278.546.

<sup>107</sup> KRS 278.260(1).

<sup>108</sup> As recent as Feb. 11, 2010, the legacy 911 system in Kentucky misrouted a 911 call from a cellular phone end user. See "PRP 911 Call Sent Out of State," <http://www.wave3.com/Global/story.asp?S=11973854> (last visited Feb. 19, 2010) (cellular phone user called 911 from Louisville, KY suburb because teenage children were inside a burning house, but was transferred to a Sellersburg, IN PSAP for help. According to officials, this type of mistake "happens thousands of times a year") (emphasis added).

<sup>109</sup> *Lohr v. Medtronic*, 518 U.S. 470, 485-486 (1996).

<sup>110</sup> *Lohr* at 485 (emphasis added).

The Act expressly preserves states' authority to regulate telecommunications carriers to further certain goals, so long as the regulation is not inconsistent with the Act.<sup>111</sup> Under Section 253(b) of the Act the Commission is expressly authorized "to impose, on a competitively neutral basis, requirements necessary . . . to protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers."<sup>112</sup> With Section 253(b), "Congress . . . recognized the continuing need for state and local governments to regulate telecommunications providers on grounds such as consumer protection and public safety, which are separate from any intent to create or maintain barriers of entry."<sup>113</sup> Indeed, "it suggests that states may regulate broadly with respect to public safety and welfare, service quality, and consumer protection."<sup>114</sup>

In addition, Section 261(c) of the Act also preserves the Commission's ability to impose

requirements on a telecommunications carrier for intrastate services that are necessary to further competition in the provision of telephone exchange service or exchange access, as long as the State's requirements are not inconsistent with this part or the Commission's regulations to implement this part.<sup>115</sup>

Thus, "the Act preserves [the Commission's] authority to regulate if the regulation is competitively neutral, necessary to protect the public safety and welfare, necessary to further competition, and not inconsistent with the Act of the FCC's regulations."<sup>116</sup>

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<sup>111</sup> See *Ind. Bell Tel. Co. v. McCarty*, 362 F.3d 378, 392 (7th Cir. Ind. 2004) ("Although it now federalizes regulation of the telecommunications field in the name of competition, the Act recognizes and specifically preserves state authority to continue to regulate locally, as long as the regulations promote, and do not conflict with, the stated goals and requirements of the Act on its face or as interpreted by the FCC").

<sup>112</sup> 47 U.S.C. 253(b).

<sup>113</sup> *Cablevision of Boston, Inc. v. Public Improvement Comm'n of the City of Boston*, 184 F.3d 88, 98 (1st Cir. 1999).

<sup>114</sup> *Id.* (emphasis added); see also *City of Abilene, Texas v. FCC*, 164 F.3d 49, 53 (D.C. Cir. 1999) (Section 253(b) "set aside a large regulatory territory for State authority").

<sup>115</sup> 47 U.S.C. 261(c).

<sup>116</sup> *Indiana Utility Reg. Comm. Cause No. 43499, In the Matter of the Joint Complaint of Communications Venture Corporation d/b/a INdigital Telecom; the Indiana Wireless Enhanced 9-1-1 Advisory Board; Benton County, Indiana, as the Benton County PSAP Operator; and Carroll County, Indiana, as the Carroll County PSAP Operator, Against Indiana Bell Telephone Company, Inc., d/b/a AT&T Indiana, Concerning Connection of*

It is also worth noting that the FCC itself has also pointed to Sections 251(e) and 157 of the Act as giving authority to state commissions to oversee the deployment of 911 services.<sup>117</sup> The FCC has found that the 911/E911 play a "critical role . . . in achieving the Act's goal of promoting safety of life and property . . . [and that] improved public safety remains an important public health objective of Federal, State, and local governments."<sup>118</sup>

Because INdigital Telecom's request for interconnection with AT&T Kentucky involves the provision of competitive 911/E911 service, the implications of its request invoke significant considerations of public safety. There is no doubt that the Commission should take a critical role in overseeing and reviewing any agreement regarding the provision of 911/E911 services within the Commonwealth. To that end, both the Act and Kentucky law support the Commission's involvement in arbitrating the issues presented here. Therefore, the Commission should exercise its authority pursuant to KRS Chapter 278 to determine the appropriate terms and conditions for the provision of 911/E911 service presented by INdigital Telecom's Petition.

### CONCLUSION

The Commission can and should arbitrate the issues regarding the provision of competitive 911/E911 services presented in INdigital Telecom's Petition. It has both federal and state law bases for exercising this authority.

- (1) As a provider of "telephone exchange service," INdigital Telecom is entitled to have these issues arbitrated under Sections 251 and 252 of the Act. Under Section 251, INdigital Telecom is entitled to interconnection with AT&T because its competitive 911/E911 service

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*Wireless Enhanced 9-1-1 Circuits and Related Services to Facilities Located at Public Safety Answering Points and AT&T's Refusal to Permit Such Connections for Provision of Wireless Enhanced 9-1-1 Service, and Request for the Indiana Regulatory Commission to Order Necessary Connections and Determine Reasonable Terms, Conditions and Compensation*, Final Order at 38 (I.U.R.C., Feb. 10, 2010).

<sup>117</sup> See *VoIP E911 Order* at ¶ 31,33.

<sup>118</sup> *VoIP E911 Order* at ¶ 32.

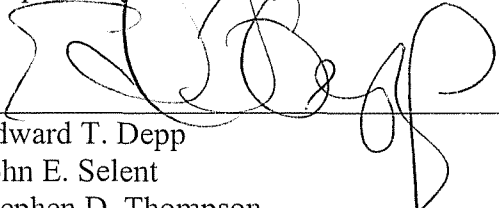


is "telephone exchange service" as defined by Section 153(47). Under Section 252 of the Act, INdigital Telecom is entitled to arbitration because either (i) its bona fide request for interconnection falls within the scope of Section 251(c) or, in the alternative, (ii) the issues regarding INdigital Telecom's competitive 911/E911 service were voluntarily negotiated by the Parties – giving the Commission authority under Section 252(b) to arbitrate "any open issues."

(2) In addition to the mandate of Sections 251 and 252 of the Act, the Commission has additional concurrent state law authority to regulate the rates and service relating to INdigital Telecom's 911/E911 service. Under KRS Chapter 278, the Commission has exclusive jurisdiction to regulate the rates and services of telephone service providers to ensure that they are reasonable, safe, adequate and obtainable. Combined with Sections 253(b) and 261(c) of the Act, the Commission's ability to regulate local telephone service "to protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers" has not been pre-empted by the Act, but rather encouraged.

For these reasons, the Commission should arbitrate the issues relating to competitive 911/E911 service presented by INdigital Telecom's Petition.

Respectfully submitted,



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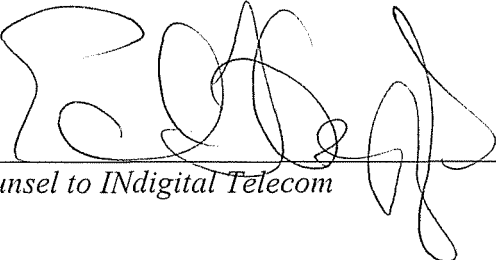
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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing was served by U.S. First Class mail and electronic mail on this 26th day of February, 2010, to the following individuals:

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