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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:

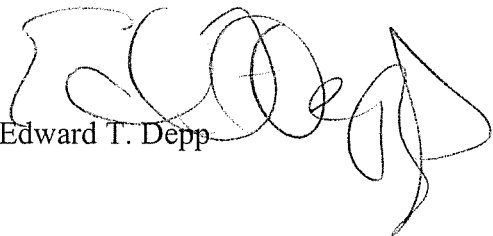
Enclosed for filing in the above-referenced case, please find one original and eleven (11) copies of Communications Venture Corporation d/b/a INdigital Telecom's reply to BellSouth Telecommunications, Inc., d/b/a AT&T Kentucky's initial brief on the threshold issue of whether the issues presented by INdigital Telecom's petition regarding competitive 911/E911 service are appropriate for arbitration under Section 252 of the Act or applicable state law.

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

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

Sincerely,

DINSMORE & SHOHL LLP


Edward T. Depp

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

Jeff Derouen, Executive Director
February 26, 2010
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John E. Selent, Esq. (w/encl.)
Holly C. Wallace, Esq. (w/encl.)

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bcc: Mark Grady (w/encl.)
Brent Cummings (w/encl.)

**COMMONWEALTH OF KENTUCKY
BEFORE THE 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
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**INDIGITAL TELECOM'S REPLY TO
AT&T KENTUCKY'S INITIAL BRIEF ON THE THRESHOLD ISSUE**

Communications Venture Corporation, d/b/a INdigital Telecom ("INdigital Telecom"), by counsel, submits its reply to BellSouth Telecommunications, Inc., d/b/a AT&T Kentucky's ("AT&T Kentucky's") initial brief on the threshold issue (the "AT&T Kentucky Brief" or "Brief") presented by INdigital Telecom's petition (the "Petition"). In support of its reply, INdigital Telecom states as follows.

INTRODUCTION

Only an historical monopolist like AT&T Kentucky could take the statutory framework "intended to pave the way for enhanced competition in all telecommunications markets" and turn it on its head so that it operates, instead, as a barrier to entry into local 911 markets.¹ The irony of AT&T Kentucky's position is that it relies almost exclusively upon two Federal Communications Commission ("FCC") orders – the *Advanced Services Order* and the *Directory Listing Order* – that each resulted in the expansion of the "telephone exchange service" category to include new,

¹ *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, ¶ 4 (1996) ("*Local Competition Order*"), *aff'd* by *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999).

competitive forms of telecommunications service.² To read AT&T Kentucky's Brief, one would never know this.

Instead, AT&T Kentucky's Brief flatly misrepresents INdigital Telecom's competitive 911/E911 service, mischaracterizes the FCC's analysis and application of Section 153(47) of the Act, and relies upon a minority view among state commissions that have addressed the issue – a view that, in any event, is readily distinguishable upon the facts presented here. While the Parties apparently do agree on one thing – that Section 153(47) provides at least one way in which the Commission might exercise its authority over the issues presented by INdigital Telecom's Petition – AT&T Kentucky's Brief is utterly silent regarding the Commission's additional authority under Section 252(b) of the Act to arbitrate "any open issues" presented by INdigital Telecom's Petition,³ and the Commission's concurrent authority under state and federal law to regulate issues pertaining to intrastate telecommunications service,⁴ especially as those issues relate to the preservation of the public safety and welfare.⁵ Quite simply, the Commission has more than one source of authority for addressing the issues raised by INdigital Telecom's provision of competitive 911/E911 service.

REPLY

I. AT&T Kentucky Flatly Misrepresents INdigital Telecom's Competitive 911/E911 Service and Its Ability to Provide Call Origination.

AT&T Kentucky's Brief pretends to speak with authority and certainty about INdigital Telecom's competitive 911/E911 service and capabilities even though not a single piece of evidence has been taken in this proceeding in that regard. Instead, AT&T Kentucky flatly misrepresents INdigital Telecom's competitive 911/E911 service by making the blanket assumption that INdigital

² See generally *Deployment of Wireline Services Offering Advanced telecommunications Capability*, 15 FCC Rcd 385 (1999) ("*Advanced Services Order*") and *Provision of Directory Listing Information under the Telecommunications Act of 1934, As Amended*, 16 FCC Rcd 2736 (2001) ("*Directory Listing Order*").

³ 47 U.S.C. § 252(b)(1); see also *Coserv Ltd. Liability Corp. v. Southwestern Bell Telephone Co.*, 350 F.3d 482 (5th Cir. 2003).

⁴ See, for example, KRS 278.030, KRS 278.040, KRS 278.260, KRS 278.530, and KRS 278.546.

⁵ See 47 U.S.C. 253(b) and 47 U.S.C. 261(c).

Telecom's service is "just like"⁶ that of another competitive 911/E911 service provider - Intrado Communications Inc ("Intrado").⁷ Not only is there no factual basis for such a comparison, but the service provided by another carrier is entirely irrelevant to these proceedings. The services or capabilities of Intrado, however comparable, are not at issue here and provide no basis for the Commission's decision.

In making the comparison, AT&T Kentucky declares, with no factual basis, that INdigital Telecom's competitive 911/E911 service is incapable of providing its subscribers with the ability to originate calls.⁸ Setting aside the irrelevance and inaccuracy of the alleged comparison, INdigital Telecom's 911/E911 service does, in fact, fully satisfy the requirements of "telephone exchange service" under either part (A) or part (B) of Section 153(47) as INdigital Telecom painstakingly explained in its initial brief.⁹ INdigital Telecom's 911/E911 service would provide its public service answering point ("PSAP") subscribers with the capability to "originate" calls¹⁰ and to

⁶ AT&T Kentucky Brief at 8, 9, 11, 15.

⁷ AT&T Kentucky fails to note that a majority of other state commissions have found that Intrado does in fact provide "telephone exchange service" and is, therefore, entitled to arbitration and interconnection under the Act. *See* 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).

⁸ AT&T Kentucky Brief at 3 ("INdigital's PSAP customers, however, cannot originate any calls using INdigital's E-911 Service, much less originate calls to all subscribers in a geographical area") (emphasis in original); *see also* *Id.* at 7-8, 10, 14-15.

⁹ INdigital Telecom Brief at 15-27.

¹⁰ *See Directory Listing Order* at ¶ 89 (describing origination as "allow[ing] 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").

"intercommunicate"¹¹ with all subscribers in a geographic area as required by Section 153(47). Any assertion by AT&T Kentucky to the contrary is simply false.

INdigital Telecom's competitive 911/E911 service will permit its PSAP subscribers to originate calls on numerous levels. At the most general level, INdigital Telecom's 911/E911 service is capable of providing its PSAP subscribers with the ability to originate calls within the local exchange or exchanges in order to contact anyone the PSAP may choose. For practical reasons, however, a PSAP subscriber may choose to restrict the amount and type of outbound calls in order to reserve the emergency bandwidth for inbound emergency calls, but such a restriction would be a self-imposed choice made by the PSAP subscriber and not a restriction imposed by INdigital Telecom's competitive 911/E911 service.

In the specific context of providing emergency-related services, INdigital Telecom's service will allow PSAP subscribers to call any other PSAP, even outside of the scope of "transferring" a call between PSAP's. For example, one PSAP may need to contact another PSAP in the state to check for a warrant on a suspect. It can originate a call to accomplish this task. Likewise, PSAPs can also originate calls to language translation services in the event they have a caller who does not speak English. Not only are these types of call origination allowed, they are encouraged.

Moreover, a walk through the actual mechanics of performing what AT&T Kentucky derisively describes as "just a transfer"¹² further clarifies that what actually occurs when a call is transferred are two separate and distinct originated calls – one originated by the 911 end user, and the other originated by the PSAP served by INdigital Telecom. Specifically, when a 911 end user originates a call to an INdigital Telecom-served PSAP that needs to be connected to a separate

¹¹ See *Advanced Services Order* at ¶ 23 ("a service satisfies the 'intercommunication' requirement of [Section 153(47)(A) and (B)] as long as it provides customers with the capability of intercommunicating with other subscribers").

¹² AT&T Kentucky Brief at 8.

PSAP, the INdigital Telecom-served PSAP must originate a separate call and dial the number of the second PSAP in order to transfer a call. The two separately-originated calls are then tied together to allow the first caller to exchange information with the final called party. The action does not include the use of a "hookflash" as AT&T Kentucky erroneously asserts. Instead, the first PSAP originates the call to the second PSAP and then connects the two separate calls together to accomplish the "transfer." The "transfer" can occur within the network or can occur across networks served by different carriers.

This is identical to what occurs in a directory assistance ("DA") service call when the DA operator completes a call for a subscriber.¹³ Indeed, AT&T Kentucky cites with approval to the very portion of the *Directory Listing Order* that finds that this type of DA service is "telephone exchange service." AT&T Kentucky, citing the *Directory Listing Order*, confirms the FCC's determination "that the call-completion service offered by many competing DA [directory assistance] providers constitutes intercommunications because it permits a *community of interconnected customers to make calls to one another* in the manner prescribed by the statute."¹⁴ AT&T Kentucky omits, however, the FCC's further determination that "while [DA call completion service is] not the traditional provision of telephone exchange service through the provision of dial tone by a local exchange carrier, [it] nonetheless permits 'intercommunication' within the meaning of [Section 153(47)(A)]."¹⁵ In as much as DA service call completion constitutes "telephone exchange service," INdigital Telecom's competitive 911/E911 service is certainly no less.

¹³ See *Directory Listing Order* at ¶ 18 (describing the DA service provider call completion as either "(i) completing the call through their own switching and transmission equipment or (ii) by acting as a reseller and sending the call to another carrier (such as the LEC) for delivery through the local exchange network").

¹⁴ AT&T Kentucky Brief at 4 (citing *Directory Listing Order* at ¶ 17) (emphasis supplied by AT&T Kentucky).

¹⁵ *Directory Listing Order* at ¶ 18.

Finally, AT&T Kentucky's citation to the proposed language of Alternate Attachment 5 (911/E911) as evidence that "INdigital's PSAP customers cannot initiate or make calls"¹⁶ is nothing more than a "gotcha" tactic. The proposed language of Alternate Attachment 5 (911/E911) has no bearing whatsoever on the technical capabilities of INdigital Telecom's competitive 911/E911. If the proposed language is evidence of anything, it would evidence an divergence in usage, not an admission (as an AT&T Kentucky claims). Where the proposed language refers to INdigital Telecom's "transfer" and "dispatch" capabilities, INdigital Telecom understands that these functions in fact require call origination – regardless of whatever AT&T Kentucky may have believed and failed to clarify. If AT&T Kentucky wants to dispute the meaning and function of these terms, then INdigital Telecom will gladly supplement its Petition, as it reserved its right to do,¹⁷ in order to include them as part of the unresolved issues to be arbitrated.

While the proposed language in Alternate Attachment 5 (911/E911) by no means provides evidence of the technical capabilities of INdigital Telecom's competitive 911/E911 service, AT&T Kentucky's description of the proposed language as "language that the parties have agreed to" does operate as an admission on AT&T Kentucky's part that the Parties have, in fact, engaged in negotiations over Alternate Attachments 5 and 5A for purposes of Section 252(b) arbitrations.¹⁸

Thus, contrary to AT&T Kentucky's baseless assertions, comparisons, and blanket assumptions, INdigital Telecom's competitive 911/E911 service unquestionably provides for call origination as required by Section 153(47) of the Act by "allow[ing] 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."¹⁹ In any event, as both the Ohio and North Carolina state

¹⁶ AT&T Kentucky Brief at 7.

¹⁷ See INdigital Telecom's Petition at 5 ¶ 12.

¹⁸ See AT&T Kentucky Brief at 7.

¹⁹ *Directory Listing Order* at ¶ 21.

commissions found, "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."²⁰

II. AT&T Kentucky Misrepresents the FCC's Analysis and Application of Section 153(47) of the Act.

INDigital Telecom's initial brief provided a painstaking analysis of every single element of "telephone exchange service" as defined in Section 153(47)(A) and (B), applying each element of both parts of the definition to its competitive 911/E911 service. In stark contrast, AT&T Kentucky's Brief slices and dices the FCC's analyses of "telephone exchange service" in both the *Advanced Services Order* and the *Directory Listing Order* in such a way as to defy logic. It not only ignores the FCC's most basic analytical guidance for applying Section 153(47)(A) and (B), but it also teases out a conclusion that is directly at odds with the orders upon which it relies and counter to the very purpose of the Act.²¹

A. AT&T Kentucky Ignores the FCC's Most Basic Analytical Guidance.

AT&T Kentucky argues unsurprisingly for a very narrow and restrictive application of Section 153(47) – one that would preserve its monopoly over the local 911 telephone exchange service market. Yet, such an application runs counter to the FCC's guidance and the overall purpose

²⁰ 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 at 16 (Ohio Public Utilities Commission, March 4, 2009) *aff'd on rehearing* (June 17, 2009) ("*Ohio Arbitration Award*") (emphasis added); 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 at 13 (North Carolina Utilities Commission, April 24, 2009) ("*North Carolina Arbitration Order*").

²¹ Both the *Advanced Services Order* and the *Directory Listing Order* resulted in the extension of "telephone exchange service" status to new competitive local service offerings. To read AT&T Kentucky's Brief, one would think that these two FCC orders were, instead, a primer on restricting competition with AT&T Kentucky's historical monopoly.

of the Act, which is to promote "enhanced competition in all local telecommunications markets."²² First, AT&T Kentucky's Brief ignores the expansive interpretation and application that the FCC has given the "telephone exchange service" definition under Section 153(47). The FCC has included non-traditional telecommunications service, including "the provision of alternate loops for telecommunications services, separate from the [PSTN]."²³ Second, it also ignores the FCC's instruction that, as a certificated CLEC in the Commonwealth of Kentucky, INdigital Telecom is entitled to the presumption that it provides "telephone exchange service."²⁴ Third, AT&T Kentucky erroneously conflates the requirements of parts (A) and (B) of Section 153(47), resulting in a failure to recognize that the inclusion of part (B) signaled Congress's intent to broaden the category of telephone exchange service to include non-traditional telecommunications services.²⁵

In addition, AT&T Kentucky's Brief splices together, devoid of context, choice phrases and sentence fragments from FCC orders – orders that resulted in the expansion of the application of "telephone exchange service" no less – in order to preserve its continued monopoly over the local 911 market. Ultimately, AT&T Kentucky takes what was intended to be a barrier only against long distance and private line service providers and attempts to turn it into a barrier against competition in the local 911 market. If directory assistance, facsimile service, and xDSL qualify as "telephone

²² *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, ¶ 4 (1996) ("Local Competition Order"), *aff'd by AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999).

²³ *Federal-State Joint Board on Universal Service*, 13 FCC Rcd 11501, ¶ 54 (1998) (emphasis added); *see also Advanced Services Order* at ¶ 21 ("[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").

²⁴ *Directory Listing Order* at ¶ 14 ("[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").

²⁵ *Advanced Service Order* at ¶ 17 ("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 communicating information within a local area")(emphasis added).

exchange service," which the FCC has determined that they do, then there can be no doubt that competitive 911/E911 service also qualifies.

B. AT&T Kentucky's Restrictive Analysis of Intercommunication, Exchange Area, and Comparable Service Is Incorrect.

Without re-visiting every aspect of the requirements of Section 153(47), INdigital Telecom would like to address a few of the errors made in AT&T Kentucky's "telephone exchange service" analysis.

Intercommunication. AT&T Kentucky's analysis of the intercommunication requirement is incorrect. First, AT&T Kentucky would have the Commission believe that intercommunication requires that a subscriber must be able to make calls to virtually all other subscribers in an exchange area. This runs directly counter to the FCC's determination 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."²⁶ As explained in INdigital Telecom's initial brief, "the FCC [has not] defined the scope of intercommunication that a provider must offer to meet the definition of telephone exchange service."²⁷ As a result, Section 153(47)(A) "does not set limits on the size of the community or the number of interconnected customers."²⁸ "The statute . . . does not quantify intercommunication. It only requires the existence of intercommunication."²⁹

In fact, it is instructive that, even though it found that Intrado's 911 service did not qualify as "telephone exchange service," the Illinois state commission refused to follow AT&T Illinois' reasoning on this very point. Specifically, the Illinois state commission refused to adopt AT&T Kentucky's argument that intercommunication requires that virtually all telephone subscribers in an

²⁶ *Advanced Services Order* at ¶ 23.

²⁷ *Ohio Entry on Rehearing* at 7 (emphasis added).

²⁸ *Ohio Entry on Rehearing* at 7.

²⁹ *Ohio Arbitration Award* at 15 (emphasis added).

exchange area be interconnected. In rejecting this analysis, the Illinois state commission recognized that this is "an effectively impossible standard for any carrier today."³⁰

Ultimately, INdigital Telecom's competitive 911/E911 Service will allow the community of PSAP subscribers to become a "community of interconnected customers." Moreover, they will be interconnected not only amongst themselves but also with all other local exchange service customers in the area, regardless of the identity of the underlying service provider. The INdigital Telecom-served PSAPs will be free to make calls around the state or down the street as their needs demand.

Therefore, even setting aside the fact that INdigital Telecom's competitive 911/E911 service is, as explained above, capable of allowing for such unfettered intercommunication, AT&T Kentucky's analysis is still flawed at its core. There is no doubt that 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."³¹

Within a Telephone Exchange. AT&T Kentucky's analysis of the requirement in Section 153(47)(A) that "telephone exchange service" must be provided within a telephone exchange or within a connected system of telephone exchanges within the same exchange area is also without merit. Not only does it read call origination and intercommunication requirements into this portion of the "telephone exchange service" definition, but, as INdigital Telecom explained in its initial brief, it also ignores the recognition afforded to extended area service ("EAS") plans and wireless

³⁰ Illinois Commerce Commission Case No. 08-0545 *Intrado, Inc. Petition for Arbitration Pursuant to Section 252(b) of the Communications Act of 1934 as Amended, to Establish an Interconnection Agreement with Illinois Bell Telephone Company*, Arbitration Decision at 14 (Mar. 17, 2009) ("*Illinois State Arbitration Decision*").

³¹ *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").

service providers' geographic service areas – both of which qualify as "telephone exchange service."^{32, 33}

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."³⁴ The district court specifically waived the LATA restrictions with respect to 911 services 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 during a period when BOCs like AT&T Kentucky were prohibited from providing long distance services or other services that fell outside the scope of telephone exchange service.^{35, 36}

Again, even the Illinois state commission – despite finding that Intrado's 911 service did not qualify as "telephone exchange service" – rejects AT&T Kentucky's analysis on this point. It found that "[t]here is no question that Intrado's 911 service will facilitate 911 calls that originate and terminate within the same exchange area."³⁷ It also found that, had it concluded that Intrado's 911

³² See *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") (FCC 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)).

³³ *Petitions for Limited Modification of LATA Boundaries to Provide Expanded Local Calling Service (ELCS) at Various Locations*, 12 FCC Rcd 10646, ¶ 7 (1997).

³⁴ *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").

³⁵ *United States v. Western Elec. Co.*, Civil Action No. 82-0192, slip op. at 5 n.8 (D.D.C. Feb. 6, 1984).

³⁶ In addition, AT&T Kentucky's refusal to provide INdigital Telecom with interconnection arrangements for 911/E911 services is in violation of the competitive checklist under Section 271 of the Act, thereby exposing itself to potential penalties or interLATA service restrictions under that statute. See 47 U.S.C. § 271(c)(2)(B) and 47 U.S.C. § 271(d)(6).

³⁷ Illinois Order at 16.

service satisfied the other elements of the "telephone exchange service" definition, it "would likely hold that the associated rate constitutes an exchange service charge."³⁸

Put simply, AT&T Kentucky's analysis of the exchange area and exchange service charge requirements can find no quarter – not even in the analysis of one of only two state commissions that otherwise found in its favor (and the Florida state commission did not address this issue).

Comparable Service. Likewise, AT&T Kentucky's approach to the "comparable service" requirement in Section 153(47)(B)'s alternative definition of "telephone exchange service" is flatly wrong. While AT&T Kentucky recognizes that "telephone exchange service" under Section 153(47)(B) must "retain [] key characteristics and qualities" of "telephone exchange service" as defined under Section 153(47)(A), it fails to identify what these key characteristics and qualities are (despite the fact that the FCC has made them clear).

Instead, by setting up "typical local exchange service to typical residential or business end-users"³⁹ as the standard for "comparable service," AT&T Kentucky's analysis eviscerates Congress's intent to broaden the inclusion of services that would fall within the alternative "telephone exchange service" category under Section 153(47)(B). Basically, AT&T Kentucky would require that INdigital Telecom's competitive 911/E911 service be tantamount to a market substitute for traditional telephone exchange service. The FCC, however, has consistently rejected the contention that Section 153(47)(B) "is limited to services that are 'market substitutes' for two-way switched voice service."⁴⁰

³⁸ Illinois Order at 17.

³⁹ AT&T Kentucky Brief at 14.

⁴⁰ *Advanced Services Order* at ¶ 31 (the Commission goes on to say that it "never suggested that the telephone exchange service definition is limited to voice services or that substitutability is a necessary criterion for determining whether a particular telecommunications service falls within the scope of [Section 153(47)(B)]").

In addition, AT&T Kentucky states that "Indigital's [*sic*] E911 service to PSAPs bears no resemblance to [other] services found to be 'telephone exchange service.'"⁴¹ But this is the wrong comparison. Rather than comparing INdigital Telecom's competitive 911/E911 service to other services like "traditional voice telephony," "DA with call completion," or "xDSL-based services" as AT&T Kentucky does,⁴² the appropriate comparison is to the "key characteristics and qualities" identified by the FCC in the "telephone service exchange" definition in part A of Section 153(47).⁴³ As INdigital Telecom explained in its initial brief, these "key characteristics and qualities" include the ability for subscribers to originate calls and to intercommunicate; therefore, INdigital Telecom's 911/E911 services constitute "telephone exchange service" as defined in Section 153(47) of the Act.

III. The Florida and Illinois State Commission Orders Represent a Minority View and Are Factually Distinguishable.

AT&T Kentucky's reliance upon the minority view of only two state commissions also fails.⁴⁴ Both the Illinois and Florida state commissions determined that the competitive 911/E911 service presented in those proceedings (which was not INdigital Telecom's, but rather Intrado's)

⁴¹ AT&T Kentucky Brief at 14.

⁴² AT&T Kentucky Brief at 14-15.

⁴³ AT&T Kentucky would have the Commission reach the uncontested conclusion that apples are different from oranges. INdigital Telecom, rather, asks the Commission simply to determine that an apple is a fruit.

⁴⁴ AT&T Kentucky also cites to a Texas state commission decision in support of its analysis, while noting that "that case is now on rehearing to allow submission of more evidence." AT&T Kentucky Brief at 9 n.9; *see also* Texas PUC Docket No. 36176, *In the Matter of the Petition of Intrado, Inc. for Arbitration Pursuant to Section 252(b) of the Communications Act of 1935, as Amended, to Establish an Interconnection Agreement with Southwestern Bell Telephone Company d/b/a AT&T Texas*, Order on Threshold Issue No. 1 and Granting Motion for Summary Decision (Nov. 23, 2009). However, AT&T Kentucky did not inform the Commission that Intrado, the petitioner in that case, filed a motion for reconsideration of the Texas state commission's order finding that Intrado did not provide telephone exchange service, and that the Texas state commission GRANTED Intrado's motion for reconsideration. In granting the motion, the Texas state commission specifically found that the order "was not based on any evidence. The issuance of such a decision without evidence is improper. Therefore, the Commission . . . remands this case to the arbitrators for the development of an adequate evidentiary ruling on the first threshold issue." Texas PUC Docket No. 36176, *In the Matter of the Petition of Intrado, Inc. for Arbitration Pursuant to Section 252(b) of the Communications Act of 1935, as Amended, to Establish an Interconnection Agreement with Southwestern Bell Telephone Company d/b/a AT&T Texas*, Order on Motion for Reconsideration at 1 (Feb. 4, 2010). This is significant because AT&T Texas in that case attempted to do the very thing that AT&T Kentucky is doing in the present case. AT&T Texas pretended to make authoritative declarations about the nature and capabilities of Intrado's service without any evidence being taken in that regard. As a result, the arbitration decision to which AT&T Kentucky refers in support of its analysis in this case was not based upon any evidence, and should, likewise, be disregarded by this Commission in the present case.

failed to qualify as "telephone exchange service." However, the Illinois and Florida state commissions' determinations are readily distinguishable from the present case because those determinations rested specifically on the determination that the 911 service presented in those proceedings failed to provide for call origination and / or intercommunication. While the merits of these two state commission orders can certainly be questioned in light of their minority status, it is unnecessary to do so here. As already explained in detail above, INdigital Telecom's competitive 911/E911 service does permit call origination and intercommunication.

It is also worth noting briefly that , even though it found that Intrado's 911 service failed to qualify as "telephone exchange service" for want of call origination and intercommunication, the Illinois state commission rejected nearly every other aspect of AT&T Illinois's analysis (which is effectively the same as AT&T Kentucky's here). For instance, the Illinois state commission refused to accept AT&T Illinois's analysis that call origination and intercommunication are the same thing.⁴⁵ As noted above, the Illinois state commission also refused to adopt AT&T Illinois's analysis of intercommunicating.⁴⁶ In addition, the Illinois state commission rejected AT&T Illinois's argument regarding the telephone exchange area requirement,⁴⁷ and would have agreed with Intrado on the "exchange service charge" but could not because it found that it did not provide telephone exchange service.⁴⁸ Perhaps most significantly, the Illinois state commission found that Intrado was nonetheless entitled to arbitration under 252(b).⁴⁹

Thus, AT&T Kentucky's reliance on the minority view espoused by two other state commissions to support its position is not as persuasive as AT&T Kentucky would suggest. Ultimately, because both the Florida and Illinois state commissions based their determinations

⁴⁵ *Illinois State Arbitration Decision* at 6.

⁴⁶ *Illinois State Arbitration Decision* at 14.

⁴⁷ *Illinois State Arbitration Decision* at 15-16.

⁴⁸ *Illinois State Arbitration Decision* at 17.

⁴⁹ *Illinois State Arbitration Decision* at 19-21.

specifically on the inability of Intrado's service to provide for call origination or intercommunication, these decisions are easily distinguished from the service provided by INdigital Telecom.

IV. The Commission Has Additional Authority Under Section 252(b) of the Act and Concurrent Authority Under KRS Chapter 278 to Arbitrate the Issues Presented by INdigital Telecom's Petition.

Because AT&T Kentucky's Brief fails to address the Commission's authority to arbitrate "any open issues" under Section 252(b) of the Act, and its concurrent authority under state law to address the issues, INdigital Telecom briefly reiterates its position⁵⁰ here in order to ensure that these alternative bases for the Commission to exercise its authority do not get "lost in the shuffle." While INdigital Telecom's competitive 911/E911 service qualifies as "telephone exchange service" under Section 153(47) of the Act, thereby entitling it to both arbitration and interconnection pursuant to the standards enunciated, Section 153(47) is not the sole basis of authority for the Commission to address the issues presented.

First, even if the Commission were to determine that 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(b) 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 issues" presented by its Petition arbitrated by the Commission.⁵¹ 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

⁵⁰ See INdigital Telecom Brief at 31-35.

⁵¹ 47 U.S.C. 252(b). See also, *Coserv Ltd. Liability Corp. v. Southwestern Bell Telephone Co.*, 350 F.3d 482, 485 (5th Cir. 2003).

initial negotiations between the Parties nor the subsequent arbitration by the Commission is, therefore, limited to Section 251(c) issues.

Second, 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.⁵² The Commission is the agency that has been authorized by both state⁵³ 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."⁵⁴

Thus, although 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 278,⁵⁵ 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, there can be no doubt that the Commission should play a role in reviewing the interconnection terms and conditions associated

⁵² As INdigital Telecom explained in its initial brief, the Commission is not preempted by the Act from taking this action. To the contrary Section 253(b) and Section 261(c) both reserve the states' authority to regulate issues pertaining to public safety and welfare. *See* INdigital Telecom Brief at 33-35.

⁵³ *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").

⁵⁴ KRS 278.546.

⁵⁵ *See, for example,* KRS 278.030, KRS 278.040, KRS 278.260, and KRS 278.530.

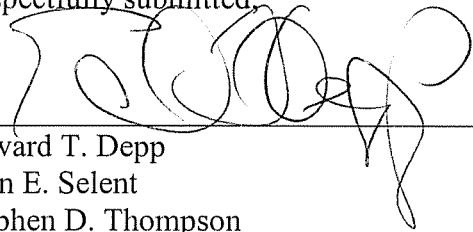
with the provision of competitive 911/E911 services. To that end, both the Act and Kentucky state law support the Commission's jurisdiction to arbitrate the issues presented by INdigital Telecom's Petition.

Thus, as INdigital Telecom explained in its initial brief, a finding that Section 153(47) applies is only one of several bases upon which rests the Commission's authority to address the issues presented by INdigital Telecom's Petition. While competitive 911/E911 service qualifies as "telephone exchange service" under Section 153(47) of the Act, thereby entitling it to both arbitration and interconnection, Section 153(47) is not the sole basis of authority for the Commission to address the issues presented.

CONCLUSION

For the reasons stated above and in INdigital Telecom's initial brief, 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.

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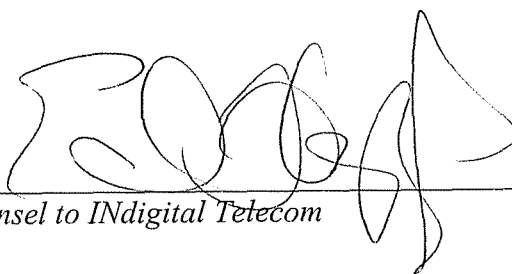
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served by U.S. First Class mail on this 12th day of March, 2010, to the following individuals:

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