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July 22, 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***

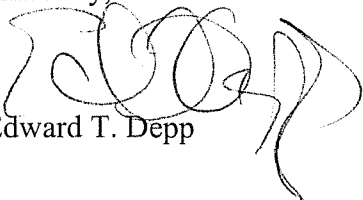
Dear Mr. Derouen:

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 Response to BellSouth Communications, Inc., d/b/a AT&T Kentucky's ("AT&T Kentucky") Motion to Strike Portions of INdigital's Rebuttal Testimony or, in the Alternative, for Leave to File Surrebuttal Testimony .

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

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

Sincerely,



Edward T. Depp

ETD/lb
Enclosure
cc: All parties of record (w/encl.)

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PUBLIC SERVICE
COMMISSION

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

**INDIGITAL TELECOM'S
RESPONSE TO AT&T KENTUCKY'S MOTION TO STRIKE**

Communications Venture Corporation, d/b/a INdigital telecom ("INdigital"), by counsel, hereby responds to BellSouth Communications, Inc., d/b/a AT&T Kentucky's ("AT&T Kentucky") motion to strike portions of INdigital's rebuttal testimony or, in the alternative, for leave to file surrebuttal testimony on designated issues (the "Motion"). For the reasons explained more fully below, AT&T Kentucky's Motion should be denied. In support of its response, INdigital states as follows.

The thrust of AT&T Kentucky's Motion is two-fold. First, AT&T Kentucky complains that it has not had an opportunity to know INdigital's position on the issues. Second, AT&T claims that INdigital's rebuttal testimony should be limited to the scope of INdigital's own direct testimony. The end result is that AT&T Kentucky seeks to have the Public Service Commission of the Commonwealth of Kentucky (the "Commission") strike a full twenty-nine pages of INdigital's rebuttal testimony. AT&T Kentucky's Motion should be denied.

I. AT&T Kentucky's Motion to Strike is Legally Insufficient.

As a threshold matter, AT&T Kentucky's Motion is flawed because it fails to meet the requirements of a motion to strike. A motion to strike is only appropriate where a party includes in a filing an "insufficient defense or any sham, redundant, immaterial, impertinent or scandalous matter." CR 12.06. Kentucky courts have interpreted this rule as one mostly involving materiality – if the evidence is "material" then it "d[oes] not run afoul of CR 12.06" and should not be stricken. *Goldsmith v. Bennett-Goldsmith*, 227 S.W.3d 459, 461 (Ky. App. 2007). Not only is INdigital's rebuttal testimony material to this proceeding, but it is in direct response to the statements made by AT&T Kentucky's witnesses in their direct testimony.

II. AT&T Kentucky Has Known and Had the Opportunity to Testify About INdigital's Position on the Issues.

AT&T Kentucky would have the Commission believe that it was surprised by INdigital's rebuttal of its witnesses' direct testimony. More specifically, AT&T Kentucky argues that "[i]n its rebuttal testimony . . . INdigital seeks, for the first time, to explain its position on several arbitration issues." (AT&T Kentucky Motion at 2.) AT&T Kentucky's claim is beyond credulity. It ignores the fact that the parties have been negotiating the terms of this agreement for months upon months. Attorneys, negotiators, and subject matter experts ("SMEs") have put countless numbers of hours, at great expense, into hammering out the approximately 500 pages of the agreement. Throughout the course of these negotiations and again in direct testimony, INdigital has thoroughly and repeatedly explained to AT&T Kentucky its positions on the disputed issues. Consequently, AT&T Kentucky lacks credibility when it now complains that it has not had an opportunity to know or respond to INdigital's position on the issues. This is especially true now that the parties have *jointly* filed the

Joint Decision Point Lists ("DPLs")¹, undertaken two rounds of discovery, and filed direct testimony. In fact, the positions of both parties have been so well-defined that AT&T Kentucky could have responded to INdigital's position on the issues even in its direct testimony, although it elected not to do so.

The truth of the matter is that AT&T Kentucky fundamentally mischaracterizes the purpose of testimony. The purpose of testimony is not for the benefit of the other party in the proceeding, but rather for the benefit of the Commission. Each side must present enough facts through its testimony to provide the Commission with a sufficient factual basis to decide the matter in that party's favor in light of the applicable law cited in the parties' briefs. There is no procedural or legal requirement that the parties to an arbitration proceeding organize their respective testimony on an issue-by-issue basis, as AT&T Kentucky chose to do in its direct testimony. INdigital chose to focus particular attention on those issues that are of the most significance to its business while addressing its other concerns on a more general basis, by describing the overarching factual considerations that will underlie its eventual legal arguments. INdigital is not prohibited from taking a different approach in rebutting AT&T Kentucky's testimony in the issue-by-issue manner employed by AT&T Kentucky if it believes that format will be most effective for rebuttal purposes.

The position that AT&T Kentucky takes in its Motion effectively turns the filing of testimony into a round of pre-hearing "briefing" by the parties. That is not the purpose of filing testimony. Both parties will have an opportunity to take the facts divulged through pre-filed testimony (both direct and rebuttal) and the formal hearing, and then apply those facts to the relevant law in their respective post-hearing briefs. As of now, however, AT&T Kentucky has had two

¹ The joint DPLs filed by the parties serve as the backdrop to this entire arbitration proceeding and they alone provide ample evidence regarding the parties' respective knowledge of the other parties' positions. Each and every issue in dispute between the parties, along with both party's respective position on each one of those issues, is set forth in the DPLs. Thus, AT&T Kentucky's claim that it was unaware of, did not know, or could not respond to INdigital's position on the issues is flatly false. There is simply no element of surprise here.

opportunities to address INdigital's known and stated positions on the issues in direct and rebuttal testimony. If AT&T Kentucky believes it has more to say, INdigital is not the party to blame.² Therefore, the Commission should deny the Motion.

III. The Scope of INdigital's Rebuttal Testimony Was Determined and Limited Only by the Scope of AT&T Kentucky's Direct Testimony.

AT&T Kentucky would also have the Commission believe that INdigital's rebuttal testimony should be limited to reiterating only those issues it discussed in INdigital's own direct testimony. AT&T Kentucky has no basis for this claim. The fact is that the scope of INdigital's rebuttal testimony is determined (and limited) only by the scope of AT&T Kentucky's direct testimony. Because AT&T Kentucky elected to use an issue-by-issue approach to presenting its direct testimony, INdigital rebutted – and had the right to rebut – this testimony in the same manner. Under any measure, INdigital's rebuttal testimony was an appropriate response to AT&T Kentucky's direct testimony. *See, for example, In the matter of Donnie E. and Delores A. Lowery v. Jessamine-South Elkhorn Water District*, Case No. 2005-00544, 2006 Ky. PUC LEXIS 761 (Ky. PUC 2006) (purpose of rebuttal testimony is to "permit[] . . . Complainants an opportunity to offer proof rebutting the evidence in the record"); *Brawner v. Commonwealth*, 344 S.W.2d 833, 836 (Ky. 1961) (the purpose of rebuttal testimony "is primarily to rebut and disprove the . . . theor[ies] advanced by the [opposing party]"); and *Black's Law Dictionary* 1019, 1295 (Bryan A. Garner ed., 7th ed., West 1999) (defining "rebut" as "[t]o refute, oppose, or counteract (something) by . . . argument").

AT&T Kentucky has erroneously confused direct and rebuttal testimony with direct and cross-examination of a witness in a jury trial. In that context, an attorney may be limited on cross-examination, "in the interest of justice," to the scope of a witness's own testimony on direct

² Quite frankly, every party in every contested proceeding would typically like the opportunity to respond to assertions of contested fact. However, cross-examination, briefing, and the Commission staff's independent expertise regarding matters before it renders the "need" for surreply testimony (or the more draconian remedy of striking relevant, material testimony) utterly superfluous.

examination. *See* KRE 611(b). Rebuttal testimony, however, is fundamentally different from cross-examination.

The purpose of rebuttal testimony, as explained above, is for each party to directly rebut the testimony presented by the other party. INdigital's rebuttal testimony did just that and nothing more. In doing so, INdigital did not raise any new issues, nor did it, as discussed above in Part II of this response, "seek[], for the first time, to explain its position on several arbitration issues" as AT&T Kentucky claims. (AT&T Kentucky Motion at 2.) Each and every response in INdigital's rebuttal testimony was directed solely at some portion of AT&T Kentucky's direct testimony.

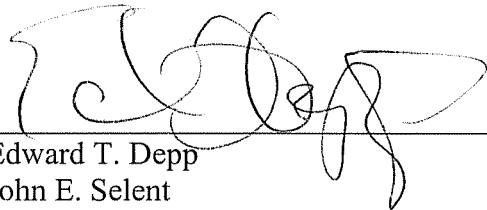
AT&T Kentucky also complains that INdigital has suggested new interconnection agreement language in its rebuttal testimony. (AT&T Kentucky Motion at 3.) Where INdigital suggested new language or a potential compromise in its rebuttal testimony, however, it did so directly in response to the stated concerns of AT&T Kentucky in its direct testimony. INdigital fails to see how addressing the other party's concerns is problematic for AT&T Kentucky or the Commission. The entire purpose of this proceeding is for the parties to come to an agreement. If, after considering AT&T Kentucky's testimony, INdigital can suggest new language that it believes might address AT&T Kentucky's concerns as well as its own, it would seem to be progress in a positive direction toward the end goal of agreement. AT&T Kentucky's request to strike portions of Mr. Cummings's rebuttal testimony is tantamount to telling INdigital to pull its attempts at reaching agreement off the table. Such a request is not only illogical and directly contrary to the purpose of the proceeding; but more to the point, it is self-defeating. Consequently, AT&T Kentucky's Motion should be denied.

IV. Conclusion.

For all of the reasons stated above, AT&T Kentucky's Motion should be denied. Nothing in INdigital's rebuttal testimony prejudices AT&T Kentucky. AT&T Kentucky has been well aware of

INdigital's position on the issues even prior to the filing of the petition for arbitration in this matter. INdigital has not raised any new issues, but rather has attempted to address each issue discussed by AT&T Kentucky in its direct testimony. If anything, INdigital's rebuttal testimony strikes a balance between holding its initial position on the issues as identified in the DPLs and suggesting reasonable alternative language where appropriate to address concerns identified in AT&T Kentucky's direct testimony. AT&T Kentucky's Motion is nothing more than an attempt to maneuver its way around the Commission's procedural order and file "surrebuttal testimony." The Commission's procedural order (to which the parties jointly agreed) did not provide for this, and AT&T Kentucky's Motion should be denied accordingly.³

Respectfully submitted,



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³ If, however, the Commission were to grant AT&T Kentucky's request for surrebuttal testimony it should provide for both parties to do so. Moreover, if the Commission grants AT&T Kentucky's motion to strike portions of INdigital's testimony, INdigital reserves the right to make a similar motion with respect to significant portions of AT&T Kentucky's testimony.

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 22nd day of July, 2010, to the following individuals:

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