

ORIGINAL

STATE OF INDIANA

INDIANA UTILITY REGULATORY COMMISSION

IN THE MATTER OF THE )  
 COMMISSION INVESTIGATION )  
 OF E.COM TECHNOLOGIES, ) CAUSE NO. 43677  
 LLC, D/B/A FIRSTMILE AND )  
 ITS COMPLIANCE WITH THE ) ORDER ON RECONSIDERATION  
 ORDERS AND RULES OF THIS )  
 COMMISSION, AND THE LAWS ) APPROVED: FEB 09 2011  
 AND REGULATIONS OF THE )  
 STATE OF INDIANA )

**BY THE COMMISSION:**

**Larry S. Landis, Commissioner**  
**David E. Veleta, Administrative Law Judge**

On May 13, 2009, the Indiana Utility Regulatory Commission (“Commission”) initiated this investigation of E.Com Technologies, d/b/a FirstMile (“E.Com”) and its compliance with the orders and rules of the Commission as well as the laws and regulations of the State of Indiana. The Commission’s investigation was initiated in response to complaints received through its Consumer Affairs Division (“CAD”).

An Evidentiary Hearing was held on Monday, December 7, 2009 at 9:30 a.m. in Judicial Courtroom 224, 101 West Washington Street, Indianapolis, Indiana. On October 20, 2010, the Commission issued an Order in this Cause in which it made various findings resulting in a determination that E.Com was in violation of previous orders of the Commission, and therefore, its authority to provide telecommunications services in the State of Indiana should be curtailed to the areas it currently serves (“October 20, 2010 Order”). In doing so, the Commission considered and rejected a course of action which it had previously warned Petitioners could be a consequence of failure to comply with Commission orders, i.e., outright revocation of its Certificate of Territorial Authority (“CTA”),<sup>1</sup> and further accorded to E.Com the opportunity to come back to the Commission at a later date to request an expansion of its authority to serve new areas.

On November 9, 2010, E.Com filed a Petition for Reconsideration and/or Rehearing, and a brief in support thereof, requesting that the Commission reconsider its Order and instead of curtailing E.Com’s service territory to the areas it currently serves, requiring E.Com to seek approval to serve a development or neighborhood, whether owned by an affiliate or non-affiliate, where there is not at least one other terrestrial competitor. On November 9, 2010, E.Com also filed its *Request to Reopen Record to Accept Late-Filed Exhibit*. The Indiana Office of Utility Consumer Counselor (“OUCC”) did not file a response to E.Com’s Petition for Reconsideration and/or Rehearing, or E.Com’s *Request to Reopen Record to Accept Late-Filed Exhibit*.

**1. Commission Jurisdiction.** The bases for our jurisdiction over the parties and subject matter of this proceeding are set forth in our October 20, 2010 Order, which bases are hereby

<sup>1</sup> See Re Petition of E.Com for a Certificate of Territorial Authority, Cause No. 41462 (IURC 5/25/00), p. 9.

incorporated into this Order on Reconsideration. The Commission has jurisdiction over the parties to, and the subject matter of, this proceeding.

**2. Background.** E.Com initially filed a petition for facilities-based and resold local exchange telecommunications services with the Commission on June 11, 1999, having already begun to offer its services without prior Commission authority to do so. In its petition, E.Com sought a CTA to provide telecommunications services statewide, although its initial proposed service area was the Centennial development. After an evidentiary hearing in that cause, the Commission entered its Interim Order on December 15, 1999 (“Interim Order”), in which it issued E.Com a CTA to resell local exchange telecommunications services, but denied its petition for facilities-based local exchange authority.<sup>2</sup> The Commission did not authorize E.Com to provide telecommunications services statewide on a facilities basis, but instead limited E.Com to the Centennial development, if certain conditions were met.

The denial of facilities-based local exchange authority stemmed from the Commission’s concern that E.Com would be the monopoly provider in the Centennial development, but because it was not an Incumbent Local Exchange Carrier (“ILEC”) as defined by the Telecommunications Act of 1996 (“TA 96”), it would not be required to allow competitors access to its facilities in Centennial. The Commission in the Interim Order further expressed its concern that E.Com would not have to comply with Section 251(c) (e.g., requiring ILECs to provide services to other telecommunications carriers at wholesale rates, unbundle their network elements) while owning all of the facilities in Centennial. Thus, the Commission feared that as “first mover,” E.Com could both effectively and literally keep potential competitors out of the development.

E.Com filed a Petition for Rehearing, Reconsideration and Modification of Interim Order, arguing that it should be regulated as a competitive local exchange carrier (“CLEC”) and that forcing it to accept being regulated as an ILEC was both unnecessary and not in the public interest. In its Petition, E.Com proposed certain alternative measures to the Interim Order to alleviate the Commission’s concerns about monopoly control of the communications market in Centennial and other communities developed by E.Com’s affiliates.

In its Order on Reconsideration issued on May 25, 2000, in Cause No. 41462 (“Order on Reconsideration”), the Commission accepted the representations and commitments offered by E.Com in its Petition for Rehearing and granted it a CTA to offer and furnish facilities-based, switched and dedicated, local exchange telecommunications services in Indiana pursuant to the conditions contained in the Order.

**3. Petition for Reconsideration and/or Rehearing.** E.Com, in its current Petition for Reconsideration and/or Rehearing, requests that the Commission reconsider its Order and instead of curtailing E.Com’s service territory to the areas it currently serves (while according to E.Com the opportunity “...to come back to the Commission to request and expansion of this authority...”), require E.Com to seek approval to serve a development or neighborhood, whether owned by an affiliate or non-affiliate, where there is not at least one other terrestrial competitor. E.Com’s brief filed in support of its Petition sets forth the following reasons for reconsideration. First, E.Com argues that the Commission’s Order is predicated on certain findings that are either contrary to the

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<sup>2</sup> See Re Petition of E.Com for a Certificate of Territorial Authority, Cause No. 41462 (IURC 12/15/99)

evidence, contrary to the law, or both. Second, E.Com argues that the Commission has exceeded its authority in unnecessarily restricting E.Com's service territory.

**4. Request to Reopen Record to Accept Late-Filed Exhibit.** E.Com's *Request to Reopen Record to Accept Late-Filed Exhibit* ("Motion") is untimely. 170 IAC 1-1.1-22(a) provides that any party may request to reopen the proceeding for the purpose of taking additional evidence prior to a final order being issued. The Commission issued a final order in this Cause on October 20, 2010. E.Com's Motion was not filed until November 9, 2010 and therefore is denied.

**5. Commission Discussion and Findings.** Petitions for reconsideration and rehearing are governed by the requirements in 170 IAC 1-1.1-22(e)(1). This rule requires a petition seeking rehearing to be verified or supported by affidavit and set forth the following:

- (A) The nature and purpose of the evidence to be introduced at rehearing.
- (B) The reason or reasons such new evidence was not available at the time of the hearing or could not be discovered with diligence.
- (C) A statement of how such evidence purportedly would affect the outcome of the proceeding if received into the record.
- (D) A showing that such evidence will not be merely cumulative.

Many of the arguments presented by E.Com in support of its request for reconsideration are the same as those presented in the underlying proceeding and rejected in our October 20, 2010 Order. E.Com continues to assert that there has been no evidence of anti-competitive behavior. We continue to disagree with E.Com that it has not engaged in anti-competitive behavior. In the Centennial development, E.Com failed to provide competitors with meaningful and timely access to its facilities for purposes of facility-based market entry. There has been no evidence offered in this Cause that AT&T and Verizon were offered access to E.Com's facilities in the Centennial development prior to the trenches being closed.

Instead, E.Com continues to shift the responsibility for notification to local government entities, in violation of the Commission's Order on Reconsideration. Furthermore, while we agree with E.Com that there has been no evidence of any competitor being denied access to the facilities in the Centennial development, the real issue is that E.Com did not provide notice that the trenching was to occur. Therefore, E.Com's competitors never had a reasonable opportunity to access the facilities in the Centennial development. As the Commission cited in its October 20, 2010 Order (at p. 10), as much as 78% of the cost of establishing service in a heretofore unserved area is in placement of cable by a second facility-based entrant to compete, while lacking the customer enrollment advantage enjoyed by the initial entrant.

E.Com also contends that the Commission's October 20, 2010 Order curtailing E.Com's service territory is contrary to law. The Indiana General Assembly enacted HEA 1279 in 2006. E.Com claims that HEA 1279 places limits on the Commission's authority to impose conditions on CTAs. HEA 1279 granted the Commission specific authority to revoke or modify the terms of a CTA. Indiana Code § 8-1-29.5-6(b)(3)(B). HEA 1279 also provided the Commission with the authority to fine CTA holders. Indiana Code § 8-1-29.5-6(b)(4). The Commission is authorized to enforce Indiana law, applicable administrative rules and Commission orders pursuant to Indiana Code § 8-1-2-115. HEA 1279 did not eliminate the Commission's authority to regulate CTA holders, but

instead provided the Commission with specific statutory authority for addressing CTA holders who fail to comply with Commission orders or Indiana law.

On December 15, 1999, the Commission granted E.Com authority to do business in the Centennial development. E.Com had requested statewide authority in its petition, but the Commission denied E.Com's request due to fears that E.Com would become a monopoly provider in the Centennial development. On May 25, 2000, the Commission granted E.Com statewide authority after E.Com agreed to abide by certain conditions which were meant to alleviate the Commission's concerns.

The Commission's investigation in this Cause was initiated in response to complaints received through its CAD. The CAD received approximately twenty complaints from individuals residing in the Centennial development concerning E.Com's role as the sole terrestrial provider in the Centennial development. The Commission held a Field Hearing on October 20, 2009 to provide Centennial residents with an opportunity to voice their concerns over E.Com directly to the Commission. Many of the concerns voiced at the Field Hearing were identical to the concerns the Commission voiced when it denied E.Com statewide authority.

The Commission subsequently received a petition signed by over 60 residents of the Centennial development. The petition was submitted to the Commission on the behalf of residents of the Centennial development who desired to have a choice for telecommunications services. E.Com is still the only facility-based terrestrial provider in the Centennial development because its competitors never had a reasonable opportunity to build out facilities, enter the market and compete for customers in the Centennial development without having to incur a significant cost disadvantage. In this investigation, the Commission took only the necessary and carefully tailored remedies to address once again these continuing concerns of anti-competitive behavior by E.Com. Therefore, based on the foregoing, we find that E.Com's Petition for Reconsideration and/or Rehearing should be denied.

**IT IS THEREFORE ORDERED BY THE INDIANA UTILITY REGULATORY COMMISSION that:**

1. E.Com's Petition for Reconsideration and/or Rehearing is hereby denied.
2. E.Com's Request to Reopen Record to Accept Late-Filed Exhibit is hereby denied.
3. This Order shall be effective on and after the date of its approval.

**ATTERHOLT, BENNETT, MAYS AND ZIEGNER CONCUR; LANDIS ABSENT:**

APPROVED: FEB 09 2011

**I hereby certify that the above is a true and correct copy of the Order as approved.**



**Brenda A. Howe  
Secretary to the Commission**