

ORIGINAL

STATE OF INDIANA

INDIANA UTILITY REGULATORY COMMISSION

IN THE MATTER OF THE)
COMMISSION INVESTIGATION OF)
E.COM TECHNOLOGIES, LLC, D/B/A)
FIRSTMILE AND ITS COMPLIANCE)
WITH THE ORDERS AND RULES OF)
THIS COMMISSION, AND THE LAWS)
AND REGULATIONS OF THE STATE)
OF INDIANA)

CAUSE NO. 43677

APPROVED: OCT 20 2010

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”). The Commission’s May 13, 2009 Order named AT&T Indiana (“AT&T”) and Verizon as Respondents to this matter.

Pursuant to notice as provided by law, and as provided for in 170 I.A.C. § 1-1.1-15, a prehearing conference was held in Judicial Courtroom 224 of the National City Center, 101 W. Washington St., Indianapolis, Indiana at 10:00 a.m. on May 28, 2009. Proofs of publication of the notice of the prehearing conference were incorporated into the record of this Cause and placed in the official files of the Commission. Respondents E.Com, AT&T, Verizon, and the Indiana Office of Utility Consumer Counselor (“OUCC”) appeared and participated at the prehearing conference. No members of the general public appeared. At the prehearing conference, an informal discussion was held regarding procedural matters in this Cause. On May 29, 2009 the Presiding Officers issued a docket entry directing questions to E.Com, AT&T and Verizon.

On June 9, 2009, the Presiding Officers issued a second docket entry taking administrative notice, pursuant to 170 I.A.C. § 1-1.1-21, of certain materials within the Commission’s possession relative to this Cause. The materials consisted of consumer complaints and related correspondence received by the CAD prior to the initiation of this Cause.

On July 9, 2009, Verizon filed its responses to the May 29, 2009 docket entry. On July 10, 2009, E.Com and AT&T filed their responses to the May 29, 2009 docket entry. On July 28, 2009, the Presiding Officers issued a docket entry to E.Com, ordering it to answer additional questions. E.Com filed its answers to this docket entry on August 7, 2009.

On August 13, 2009, the Presiding Officers issued a second docket entry taking administrative notice of certain materials submitted to the Commission on the same date. The materials, submitted by Ms. Tammie Gabriel, contained signatures of residents of the Centennial subdivision in Westfield, Indiana regarding E.Com's provision of services; correspondence from Ms. Gabriel; accompanying exhibits; and e-mail correspondence. On August 17, 2009, E.Com filed a motion for an extension of time, a request for continuance of the evidentiary hearing originally scheduled for August 20, 2009 and a request for an attorneys' conference in order to respond to the materials submitted by Ms. Gabriel and to allow adequate opportunity to prepare for the hearing in light of Ms. Gabriel's filing. On August 19, 2009, the Presiding Officers issued a docket entry granting E.Com's requests and ordering E.Com to file any responses to the August 13, 2009 Gabriel filing on or before August 31, 2009. On August 31, 2009, E.Com filed a motion to strike and/or dismiss Ms. Gabriel's filing and exhibits. On September 10, 2009, the OUCC filed its response in opposition to E.Com's motion to strike and/or dismiss petition. On October 1, 2009, the Presiding Officers issued a docket entry denying E.Com's motion to strike.

The Commission held a properly noticed public field hearing on October 20, 2009, at the Centennial Bible Church, Centennial subdivision, Westfield, Indiana. The OUCC submitted written public comments obtained at and before the October 20, 2009 field hearing. At the field hearing, in addition to those offering written testimony, 16 witnesses appeared in person and provided oral testimony.

The focus of the witnesses was clearly divided; some residents expecting state of the art technology and a broad array of services sharply criticized E.Com's failure to deliver certain services which were promised in the early years of Centennial's development and E.Com's deployment.

Another group of residents found the technological capabilities satisfactory, if less robust than represented in literature and in public statements of E.Com and Centennial officials. This group tended to focus more on responsiveness of E.Com to inquiries requiring service calls, on which E.Com was generally described as helpful and responsive.

On October 29, 2009, E.Com moved for an extension of time for all parties to file rebuttal testimony in response to the evidence presented at the October 20, 2009 field hearing. On November 2, 2009, the Presiding Officers issued a docket entry granting E.Com's motion and ordered the parties to respond by November 30, 2009.

On November 3, 2009, the OUCC submitted additional written comments received from the public. On November 23, 2009, the Presiding Officers issued their third docket entry directing E.Com to answer certain questions. On November 30, 2009, E.Com filed its prefiled direct testimony of Kevin Kernel.

On December 1, 2009, E.Com moved for confidential treatment of certain financial

information responsive to the Presiding Officers' November 23, 2009 docket entry. Also on that date, E.Com filed its response to the November 23, 2009 docket entry excluding the financial information for which it requested confidential treatment. The Presiding Officers granted E.Com's motion for confidential treatment, on a preliminary basis, on December 2, 2009. On December 4, 2009, E.Com submitted its Supplemental Response to the Presiding Officers' November 23, 2009 docket entry, to which it attached the confidential financial information requested by the Presiding Officers.

Pursuant to notice and as provided for in 170 I.A.C. § 1-1.1-15, an evidentiary hearing was held on Monday, December 7, 2009 at 9:30 a.m. in Judicial Courtroom 224 of the National City Center at 101 West Washington Street, Indiana, at which Respondent, E.Com, appeared in person and by counsel; AT&T appeared by counsel; Verizon appeared by counsel; and the OUCC appeared on behalf of the public. No members of the general public appeared or sought to testify.

During the hearing, all evidence was admitted into the record. Respondent E.Com's witness, Kevin Kernel, testified regarding his Prefiled Direct Testimony filed November 1, 2009, which was entered into the record without objection. E.Com also presented the testimony of Mr. Craig Kunkle. In addition, E.Com entered into the record its July 10, 2009, its August 7, 2009, and its December 3, 2009 Responses to the Presiding Officers' May 29, 2009, July 28, 2009, and November 23, 2009 docket entry questions (Respondent's Exhibits 1-4). The Public offered into evidence its Additional Written Public Comments Received after the Public Field Hearing (Public's Ex. 1). Respondents AT&T and Verizon did not introduce any evidence into the record.

On December 16, 2009, the Presiding Officers issued a fourth docket entry to E.Com. On January 19, 2010, E.Com filed its response to the December 16, 2009 docket entry and also filed a motion for confidential treatment of certain information contained in its response. On January 20, 2010, the Presiding Officers granted, on a preliminary basis, confidential treatment of E.Com's information, which was submitted to the Commission on January 22, 2010.

Based upon applicable law and evidence presented herein, the Commission now finds as follows:

1. Notice and Jurisdiction. Notice of the hearing held in this cause was duly given and published more than ten (10) days prior to such hearing as required by law. E.Com is a local exchange carrier ("LEC") with Certificates of Territorial Authority ("CTA") to furnish resold and facilities-based, switched and dedicated local exchange, and resale of wide area telephone service ("WATS") and/or interexchange intrastate telecommunications services in Indiana. E.Com also has a Certificate of Franchise Authority to provide Video Services, issued under cause No. 43175 VSP 01 (December 20, 2006). E.Com is a "public utility" and a "telephone company" as those terms are defined in the Public Service Commission Act, as amended. Indiana Code § 8-1-2-1, *et seq.*

The Commission has the authority to initiate a formal investigation into matters related to any public utility. Pursuant to Indiana Code § 8-1-2-59, E.Com was notified that the Commission found that sufficient grounds existed to warrant a formal investigation into E.Com's compliance with Commission orders, the Indiana Administrative Code and the laws of the State of Indiana.

2. E.Com's Characteristics. E.Com is an Indiana Limited Liability Company authorized to provide facilities-based, switched and dedicated local exchange telecommunications services, including Caller ID services, and resold local and interexchange telecommunications services in Indiana. It is also authorized to provide video services in Boone, Hamilton and Marion Counties in Indiana. Additionally, E.Com provides high speed internet access and security monitoring services. E.Com primarily offers its services in residential communities owned and/or developed by both affiliated and non-affiliated companies in the Indianapolis metropolitan area.

3. Background. E.Com initially filed a petition for facilities-based and resold local exchange telecommunications services with the Commission on June 11, 1999. 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.

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 E.Com could keep potential competitors out of the development.

In the Interim Order, the Commission gave E.Com the option of agreeing to voluntarily operate in accordance with Section 251(c) in order to be granted facilities-based local exchange authority. Alternatively, the Commission stated that it would file a petition with the Federal Communications Commission ("FCC") to declare E.Com an ILEC pursuant to Section 251(h) of TA 96 and thereby compel E.Com to comply with the market opening provisions of Section 251(c). 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.

The Commission also conducted a prior investigation in Cause No. 42197 initiated on March 20, 2002, of E.Com and its compliance with the orders and rules of the Commission and Indiana laws and regulations. In that investigation, the Commission found that E.Com had filed monthly quality service reports from and after September 2002, and provided such other information as the Commission staff and the OUCC may have required. Concluding that E.Com was in compliance with all requests for information, the Commission issued its order on April 14, 2004, dismissing the investigation in Cause No. 42197.

4. Evidence Presented. In response to the Commission’s current investigation, E.Com presented evidence consisting of the Prefiled Direct Testimony of Kevin Kernel, General Manager of E.Com and the testimony of Craig Kunkle, Vice President of E.Com Technologies, LLC d/b/a FirstMile, at the evidentiary hearing held on December 7, 2009, along with E.Com’s Responses to Commission docket entries.

Mr. Kernel testified as E.Com’s General Manager, in response to the Commission’s investigation and the customer concerns presented at the field hearing and in written comments to the Commission. Mr. Kernel, who is responsible for E.Com’s overall operation, provided his educational and employment history. He described E.Com’s services, which consist of telephone, cable television, and internet access services to residential and business customers. E.Com also offers long distance telecommunications and security monitoring on a resale basis.

Mr. Kernel explained how E.Com was formed in 1999 and its current ownership structure, with Paul E. Estridge as majority owner. E.Com is affiliated with other Estridge companies, including the Estridge Development Corporation (“Estridge”), the developer of Centennial and other area subdivisions. Mr. Kernel noted that E.Com is authorized to provide telecommunications services in Indiana by the Commission’s Order on Reconsideration in Cause No. 41462, issued May 25, 2000.

Mr. Kernel described the CTA conditions which required E.Com to comply with certain additional requirements not typically imposed on other providers. These additional requirements include: that E.Com negotiate in good faith with other carriers that desire to provide service to customers in the original Centennial development for access to E.Com’s network and for interconnection with E.Com at any technically feasible point; that E.com only enter into a contract with an affiliate for access to conduit and easements on the same rates, terms and conditions as are made available to other providers in the Centennial development; that E.Com file a document with the Commission outlining any transactions between it and its affiliates for any area, including Centennial, where E.Com may provide service in the future; that E.Com be responsible for providing information that informs potential homebuyers in Centennial that E.Com is the sole provider of telecommunications service in the development; and that E.Com

file service quality reports monthly (later changed to annually) with the Commission.

Mr. Kernel, while representing that E.Com is generally in compliance with its CTA terms and conditions, acknowledged two instances in which E.Com was not with respect to the terms of its CTA. Mr. Kernel pointed to E.Com's Response to the Commission's May 29, 2009 docket entry, stating that a disclosure statement was provided to prospective home purchasers in the Centennial development until early 2005, as required by the CTA order. Mr. Kernel later in his testimony clarified that this change was made by Estridge without E.Com's knowledge or input. Mr. Kernel testified that the written disclosure was no longer provided to prospective home purchasers for a couple of reasons.

First, E.Com no longer provided specific written disclosure to prospective home purchasers in the Centennial development since he represented that E.Com is not the sole provider of communications services. Second, a kiosk is maintained in the Estridge design studio where home purchasers and builders are made aware that E.Com is the provider of various communications services in the Centennial development.

Mr. Kernel also explained that almost all of the lots owned by Estridge in Centennial have been sold, and future sales transactions regarding those lots will occur between the homeowner and the purchaser. Mr. Kernel opines that the requirement that E.Com or its affiliates make the disclosure to prospective home purchasers should be dropped because there is no relationship between the subsequent purchaser and the developer.

Due to Mr. Kernel's lack of knowledge at the hearing regarding the answers to certain questions from the Commission, E.Com also offered the testimony of Mr. Craig Kunkle.

Mr. Kunkle, in an *in camera* portion of the proceeding, responded to bench questions regarding confidential financial documents provided to the Commission by E.Com in response to the Commission's November 23, 2009 docket entry, under a preliminary finding of confidentiality.

Additionally, Mr. Kunkle testified as to the timing of the placement of E.Com's fiber in the Centennial development with approximately 80% of Centennial still available for other providers to put their fiber in the right of way, as of May of 2000, when the Commission issued its Order on Reconsideration in the CTA proceeding.

Mr. Kunkle testified that E.Com and its affiliates were prepared to continue to allow other providers access to the same easement on the same rates, terms and conditions that are available to E.Com, but other providers did not take advantage of this access.

Mr. Kunkle also described E.Com's willingness to provide information to potential homeowners about E.Com's role in providing technology services, both in the past and prospectively, as well as taking other measures to disclose E.Com's role in the event Estridge is not involved in the transaction. Mr. Kunkle also described the competition available for E.Com

services offered to Centennial residents and stated his belief that E.Com has competition in Centennial.

5. Public's Evidence. On October 20, 2009, the OUCC offered into evidence Public Field Hearing Exhibit 1, which consisted of the comments by Herbert Miller, Joe Dalton, Lynda Pitz, Terry Yonce, and Kim Ake and Ron Rothrock together as representatives of the Homeowners Association. Additionally, the Commission received testimony at the October 20, 2009 field hearing. The oral and written testimony received at the Field Hearing was offered as Public's Field Hearing Exhibit 2. On November 3, 2009, the OUCC also submitted additional written public comments received after the public field hearing which was placed into the record at the formal evidentiary hearing as Public's Exhibit 1.

6. Commission Findings and Conclusions. This investigation was initiated by the Commission in response to complaints from residents of the Centennial development and the Commission's concerns that E.Com was not fully in compliance with prior Commission orders.

To put the Commission's findings in perspective, it is appropriate to briefly review the context of the Commission's earlier orders, commencing with TA 96. The title of that Act reads as follows:

"An Act to 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]."

This expectation at the national level was later to be reflected and amplified with the 2006 passage of House Enrolled Act 1279 by the Indiana General Assembly, in which public policy expectations were clearly identified to include (among others) the following:

"(2) competition has become commonplace in the provision of telecommunications services in Indiana and the United States..." and

"(5) an environment in which Indiana consumers will have available the widest array of state-of-the-art communications services at the most economic and reasonable cost possible will necessitate full and fair facilities based competition in the delivery of telecommunications services throughout Indiana..." and

"(6) the public interest requires that the commission be authorized to formulate and adopt rules and policies as will permit the commission, in the exercise of its expertise, to regulate and control the provision of telecommunications services to the public in an increasingly competitive and technologically changing environment, giving due regard to the interests of consumers and the public, the ability of market forces to

encourage innovation and investment, and to the continued universal availability of basic telecommunications service [emphasis added].”

The Commission’s actions in its Order on Reconsideration reflected the Commission’s hope and expectation that E.Com might be a harbinger of the emergence of facilities-based competitive entry in a market which had been largely dominated for the better part of a century by incumbent local exchange carriers and characterized by a monopolistic, if often generally benign, structure. As noted above, the Commission accepted the representations and commitments offered by E.Com in its Petition for Rehearing, and set aside its concerns about monopoly control over Centennial and other communities developed by E.Com’s affiliates.

As it turns out, the Commission’s faith was misplaced. Anticompetitive behavior turns out not to be a function of the size of the provider; this proceeding, coming on the heels of earlier Commission action, has demonstrated that small providers as well as large providers are capable of disregarding the interests of consumers and the public and thwarting the ability of market forces to serve the public interest.

The Commission has jurisdiction over communications service providers with respect to various matters including issuance of CTAs and enforcement of its orders and rules, including the terms and conditions of a CTA. The CTA issued to E.Com in Cause No. 41462 (by virtue of its Interim Order and its Order on Reconsideration) emanated from unique circumstances that caused the Commission to attach certain specific requirements to the authority granted to E.Com.

At the time the Commission issued its Order on Reconsideration, as we have noted, the discussion of public policy was strongly focused on the encouragement of competitive entry by non-traditional providers. It was this desire on the part of the Commission that led the Commission to view certain non-compliant actions of E.Com as well as certain potentially anticompetitive behavior with a combination of forgiveness and imposition of modest forward-looking requirements. The most significant of these requirements, and those which are of the greatest concern to the Commission in this investigation, are the following: 1) to properly notify potential home buyers as to E.Com’s position as sole provider of terrestrial communications services; 2) to allow other providers to use E.Com’s facilities to provide services in the Centennial development; 3) to provide the Commission with reports as to the quality of service provided by E.Com; 4) in future developments, to allow other facilities-based communications service providers open access to place their facilities while it was still meaningful (i.e. when the conduits and easements are easily accessible before the installation of streets and sidewalks); and 5) in the future, to file a document with the Commission outlining any transactions between it and its affiliates for any area, including Centennial, where E.Com may provide service. We will address each condition and E.Com’s compliance or failure to comply.

The Commission required as a condition of the CTA granted to E.Com that it be responsible for informing potential home purchasers in Centennial and any future developments, where applicable where E.Com is the sole facilities-based telecommunications carrier. For a period of time, at least until early 2005, according to E.Com’s testimony, a written disclosure

was provided to potential home purchasers in Centennial by E.Com's affiliate, the Estridge Company, stating that E.Com was the sole provider of telecommunications service.

According to E.Com, this process was discontinued when Estridge, without informing E.Com, ceased providing the written disclosure to potential home purchasers in early 2005. According to E.Com's testimony, this change took place when Estridge moved its model home and sales office from Centennial to an office and design studio located in the Clay Terrace Shopping Center in Carmel, Indiana. The Clay Terrace location served as a centralized sales office and design studio for all Estridge developments, including Centennial. Potential home purchasers visit the sales office and design studio both prior to and subsequent to entering into a purchase agreement. Based on the presented evidence, E.Com is out of compliance with this requirement of its CTA. Despite being clearly required to do so, E.Com has not ensured distribution of written information to potential buyers of homes in the original Centennial development and other sole-provider developments informing them of E.Com's status as the development's sole provider of facilities-based communications service.

The Commission's Order on Reconsideration is clear: the notification obligation was and is E.Com's. Representation that this responsibility was "handed off" to an affiliate, whether or not the affiliate is providing the disclosure represented in Mr. Kimble's testimony, does not constitute compliance by E.Com.

With respect to the CTA requirement requiring E.Com to allow other providers to use E.Com's facilities to provide services in the Centennial development, there has been no evidence submitted in this cause that E.Com has failed to comply with the requirement. E.Com is required to negotiate in good faith with other carriers that desire to provide service to customers in the Centennial, or any other development, for access to E.Com's network and for interconnection with E.Com at any technically feasible point. According to E.Com, no other carrier has requested interconnection with E.Com.

With respect to the CTA requirement of monthly quality of service reports, the Commission's records reveal that in Cause No. 42197, the Commission suspended E.Com's requirement to submit monthly service quality reports upon dismissal of that proceeding. Moreover, as a result of the enactment of HEA 1279, during much of the period of time in question, the Commission has required E.Com and other communications service providers to file annual service quality reports. E.Com neglected to file its annual service quality reports for the years 2005, 2006, 2007 and 2008 which it attributed to a "change in management". A change in management does not justify failure to comply with Commission orders. Upon having this failure to comply with a term of its CTA called to its attention through Commission data requests in this proceeding, E.Com did, however, submit its delinquent service quality reports.

E.Com was further required as a condition of its CTA to only provide services in Estridge developments where other providers were allowed access to conduit and easements on the same rates, terms and conditions that were offered to E.Com. It is our understanding from the evidence that there is no space left in the conduit owned by E.Com or its affiliate in the original

Centennial development. We understand, however, that there is still space available within the easements and the rights-of-way, which have been dedicated to the public and are now owned by the City of Westfield.

E.Com presented testimony through its witnesses, along with supporting documents, that the rates, terms and conditions upon which it is granted access to Estridge developments are equally available to other providers. However, in Centennial in particular, no other provider has requested access to the development, which was confirmed by both AT&T and Verizon in their respective responses to Commission docket entries. E.Com represented that it had fulfilled this requirement by contacting local government entities which purportedly maintain lists of providers of various utility and related services for “greenfield” developments, whether or not such notification had occurred in a timely manner. Once again, E.Com has attempted to defend its failure to comply with the Commission’s Order on Reconsideration by passing the buck to other entities which have no standing in this proceeding and no obligation under the Commission’s order. E.Com has not provided sufficient evidence of compliance with this requirement of its CTA. E.Com has created a situation wherein it would be financially unjustifiable for providers to access the conduit and easement in which E.Com currently houses its facilities.

E.Com’s default existence as the sole communications service provider in its affiliate’s developments is not acceptable as a practice. Since the issuance of the Commission’s Order on Reconsideration granting the CTA, E.Com has an affirmative obligation to ensure that other interested providers have been properly notified in order to provide a meaningful opportunity to place facilities in developments by Estridge. E.Com is claiming that access to the conduit and easement is available; however, both are already buried, paved over and/or landscaped. E.Com has created a barrier to entry for other providers, and therefore meaningful access is financially unsustainable as a facility-based provider.

The Commission is administratively aware of data presented to the FCC by staff responsible for development of the National Broadband Plan¹ which indicates that as much as 78% of the estimated total cost of a “greenfield” fiber build is attributable to placement (i.e. a cost which is avoidable by joint trenching). As such, any second facilities-based entrant following on the heels of E.Com’s build out would face an insurmountable competitive disadvantage.

The Commission further required as a condition of its CTA that E.Com file a document with the Commission outlining any transactions between it and its affiliates for any area, including Centennial, where E.Com may provide service in the future. The Commission previously opened an investigation in Cause No. 42197 to determine if E.Com was in compliance with its orders and rules. In that proceeding, E.Com filed a document entitled E.Com Technologies, LLC Submission of Executed Affiliate Agreements in which it represented

¹ Presentation to FCC Open Commission meeting, September 29, 2009, available at <http://reboot.fcc.gov/open-meetings/2009/september>, page 51.

that, pursuant to understandings reached between the parties and the presiding officers during the evidentiary hearing in this cause on August 23, 2002, E.Com submitted certain affiliate agreements including an Access Fee Agreement, Building Marketing Agreement and a Development and Service Agreement.

The investigation in Cause No. 42197 was dismissed on April 14, 2004. In this proceeding, E.Com responded to a Commission docket entry and represented that there had been no further affiliate agreements or understandings that should be reflected in a filing with the Commission pursuant to the CTA order.

In response to Commission docket entries, E.Com did submit with its materials, an access agreement between its affiliate and another communications service provider in a development other than Centennial where the Estridge Company is the developer; and E.Com provides services; to demonstrate that the other provider has been granted access on the same rates, terms and conditions that are available to E.Com. We find that E.Com is in compliance with this requirement of its CTA.

We now turn our attention to the future and consider what current or new requirements of E.Com's CTA should be continued, discontinued or imposed. We first note that all conditions or requirements of E.Com's CTA not discussed herein remain fully in effect.

E.Com's CTA conditions provide protections for consumers necessary to mitigate E.Com's status as the sole facilities-based provider in the Centennial development and as the potential sole provider in other developments. E.Com's CTA conditions do not exist solely to protect the residents in the Centennial development. E.Com's CTA conditions are meant to protect all Indiana residents.

In the Commission's Order on Reconsideration, E.Com was granted statewide authority to offer several specific types of telecommunications services. Subsequently, E.Com was also granted a state-issued franchise to offer video services. For the following reasons it is apparent that E.Com has not been prepared to meet the responsibilities that come with the authority to provide telecommunications services throughout the State of Indiana.

First, E.Com has engaged in anti-competitive behavior, failing to provide competitors with meaningful and timely access to its facilities for purposes of facility-based market entry. E.Com has sought, in effect, to shift responsibility for notification to local government entities.

Second, since early 2005, E.Com has not notified potential home purchasers in Centennial that E.Com is the sole facilities-based telecommunications carrier. E.Com admitted its lack of compliance with this condition, but conveniently blamed it on an affiliate company. Although the cautionary note is equally applicable to any and all of the conditions imposed in the Order on Reconsideration, speaking specifically of the disclosure requirement, the Commission wrote;

“We caution E.Com that failure of the carrier and/or its affiliated developer to comply with this requirement could result in suspension or revocation of E.Com’s CTA to provide local exchange to communications services in the state of Indiana [emphasis added]”²

Third, E.Com failed to file annual quality of service reports from 2005-2008. E.Com blamed this mistake on a change in management.

E.Com has shown through various acts of noncompliance that it is not currently capable of holding a statewide CTA. Therefore, we are curtailing E.Com’s authority to only offer services in those areas it currently serves. E.Com’s CTA for other areas of the state is hereby revoked. E.Com may come back to the Commission to request an expansion of this authority to serve new areas. At the time of such a request, the Commission would be able again to review E.Com’s compliance with the CTA requirements in the areas it currently serves, as well as to determine E.Com’s willingness and ability to comply with CTA requirements in the new areas in which it desires expanded authority to offer service.

E.Com shall file within 30 days of the date of this Order a map indicating in street level detail the areas they currently serve. We reiterate the cautionary note in Cause No. 41642 regarding possible suspension or revocation of E.Com’s CTA. Any further failure to comply will be dealt with accordingly.

Having addressed the primary concerns regarding compliance with the Orders and Rules of the Commission, we turn our attention to the issue of Provider of Last Resort (“POLR”) obligations pursuant to Indiana Code § 8-1-32.4-13.

In Cause No. 41462, the Commission took several unprecedented steps in its treatment of E.Com, because “...we are convinced by Petitioner’s arguments that it is inappropriate to treat E.Com as an ILEC. However, we also believe that this Petitioner’s circumstances set it apart from other CLECs that obtain CTAs to operate in areas where an existing ILEC also operates. ...”³

Regarding the nature of the relationship between E.Com and the residents of Centennial, the Commission discussed E.Com’s monopoly status, thusly: “The Commission found E.Com to be a monopoly provider because it owns all of the bottleneck facilities located in the development and thus possesses the characteristics of a monopolist in the development.”⁴

Finally, the Commission goes on to state that E.Com was accorded differential regulatory treatment because of “[T]he commitment of E.Com and the hope that there will be competition

² Cause No. 41462, Order on Reconsideration at 9, May 25, 2000.

³ *Id.* at 7.

⁴ *Id.* at 6.

in the future...”⁵

Ten years later, E.Com has failed to live up to those commitments, still owns all of the bottleneck facilities located in the development, and terrestrial competition has not emerged, precisely because of the economic barriers raised to buildout by a second entrant of facility-based competition in “greenfield” developments such as Centennial.

E.Com argues that it faces competition, pointing to availability of commercial mobile radio service (“CMRS” or mobile wireless) and satellite video (e.g., DirecTV and DISH) as options available to Centennial residents. Satellite video does not deliver either voice or broadband, and is therefore not a meaningful competitor to E.Com, particularly in those cases where the customer desires the so-called “triple play” of voice, internet and video.

As for free-standing voice, according to the most recent study conducted by the Centers for Disease Control,⁶ which has studied use of land lines and substitution by mobile wireless, about one in four households has “cut the cord,” and now maintains only wireless service. This means that a still overwhelming three of every four households maintain both mobile wireless and land line service as a matter of preference...a preference which can only be delivered with the involvement of E.Com’s land line facilities. There is no land line option available from the ILEC, from any facility-based CLEC, or from any Internet Protocol based provider such as a cable system.

Based on the failure of a viable terrestrial facilities-based competitor to emerge in selected developments over the course of the past decade, on May 29, 2009, the Presiding Officers issued a docket entry asking AT&T Indiana whether it wished to relinquish its POLR obligations for the subject developments pursuant to Indiana Code § 8-1-32.4-13. AT&T Indiana responded that it “would be interested in relinquishing its POLR obligations in the existing Centennial development where AT&T Indiana does not have facilities.” If AT&T Indiana wishes to pursue this course of action it should follow the remedy outlined in Indiana Code § 8-1-32.4-13.

7. **Confidential Treatment of Certain Information.** In order to protect certain detailed financial information, on December 1, 2009, E.Com filed a Verified Request for Confidential Treatment of Certain Financial Information in conjunction with its Response to the Commission’s November 23, 2009 docket entry. On December 2, 2009, the Commission

⁵ *Id. at 9.*

⁶ Blumberg SJ, Luke JV. Wireless substitution: Early release of estimates from the National Health Interview Survey, July-December 2008. National Center for Health Statistics. May 2009. Available from: <http://www.cdc.gov/nchs/nhis.htm>.

granted E.Com's Request on a preliminary basis. Also, on January 19, 2010, in order to protect sales information, E.Com filed a Verified Request for Confidential Treatment of Certain Information, in conjunction with its Response to the Commission's December 16, 2009 docket entry. On January 20, 2010, the Commission granted E.Com's Request and made a preliminary finding of confidentiality. Both Requests were verified by E.Com's corporate officer, Craig Kunkle, Vice President of E.Com Technologies, LLC d/b/a FirstMile. As shown through its Verified Requests, E.Com considers certain information responsive to the Commission's docket entries to be confidential and has taken reasonable steps to insure the confidentiality including restricting access to such information to a need to know basis.

The submitted confidential financial, customer and sales information in response to the Commission's docket entries substantiates that it should continue to be treated as confidential trade secrets, as preliminarily ruled in this Cause on December 2, 2009 and January 20, 2010. Accordingly, this information is exempted from public disclosure and will be held as confidential by the Commission.

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

1. E.Com shall comply with all requirements and conditions of its Certificate of Territorial Authority as modified herein.
2. This investigation is dismissed subject to the Commission's findings and conclusions contained in Finding Paragraph 6 of this order.
3. This order shall be effective on and after the date of its approval.

ATTERHOLT, LANDIS AND ZIEGNER CONCUR; MAYS ABSENT:

APPROVED: OCT 20 2010

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



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