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March 7, 2008

VIA ECFS

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: Notice of Ex Parte Presentation - WC Docket No. 08-23, *In the Matter of AT&T ILECs Petition for Declaratory Ruling*

Dear Secretary Dortch:

On March 6, 2008, Susan A. McGurkin, Director of Federal Government & Regulatory Policy at Intrado Communications Inc. ("Intrado Comm"), and the undersigned met with Nicholas Alexander of the Wireline Competition Bureau. The participants discussed Intrado Comm's efforts to obtain Section 251(c) interconnection with incumbent local exchange carriers ("ILECs") in various states and how Intrado Comm's experiences relate to the pending Petition for Declaratory Ruling concerning AT&T merger commitment 7.1 in the above-referenced matter.

Specifically, Intrado Comm explained that it is certified to provide competitive telephone exchange services in thirty-eight (38) states and has sought interconnection agreements with Embarq, Verizon, and AT&T to cover several states. These negotiations have lead to the filing of petitions for arbitration in seven states.[1/] Physical interconnection with the ILECs pursuant to Section 251(c) of the Communications Act of 1934, as amended (the "Act"), is critical to Intrado Comm's provision of service, including the provisioning of its next-generation E911 service to emergency service organizations, such as government authorities or public safety answering points ("PSAPs"). While many competitive local exchange carriers ("CLECs") transmit 911 calls to PSAPs through their interconnection arrangements with ILECs, virtually no competition exists for the ILECs in their provision of transmission and connectivity services to PSAPs.[2/] This telephone exchange communication service[3/] is and has been provided to PSAPs by the

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[1/] The citations for Intrado Comm's state arbitration proceedings with AT&T, Embarq, and Verizon are set forth in Attachment 1.

[2/] *E911 Requirements for IP-Enabled Service Providers*, 20 FCC Rcd 10245, ¶ 14 (2005) ("*E911 Order*").

[3/] *See, e.g.*, BellSouth Telecommunications, Inc. Florida General Subscriber Service Tariff, Section A24, Emergency Reporting Services, First Revised Page 6 (effective Apr. 3, 2001); Verizon South Inc. North Carolina General Customer Services Tariff, Section 24, Emergency Reporting Service, 5th Revised Page 1 (effective Nov. 28, 2005); United Telephone Company of Ohio d/b/a Embarq, P.U.C.O. No. 5 General Exchange Tariff, Section 32, Original Sheet 5 (effective Mar. 5, 2007) (collectively, Attachment 2).

ILECs over "25-year old architecture with legacy components that place significant limitations on the functions that can be performed over the network."[4/]

Intrado Comm has developed and is ready to deploy next-generation E911 technology that is designed to handle the latest technologies whether over wireline, wireless, or voice over Internet protocol, and to deliver all dialed 911 calls from these technologies to Intrado Comm's PSAP customers. Although Intrado Comm is ready to provide the type of next-generation technology being sought by PSAPs and regulators, it cannot without mutually beneficial interconnection arrangements pursuant to Section 251(c) that will enable Intrado Comm to provide its much needed and desired services.[5/]

While there are many issues identified in the pending arbitration proceedings, threshold issues raised by the ILECs include: 1) whether Intrado Comm is entitled to 251(c) interconnection; 2) whether the transmission and connectivity services provided to PSAPs are telephone exchange services when provided by Intrado Comm; and 3) whether interconnection under 251(c) is only required for the voice transmission and routing portion of the service to the PSAPs, but not for interconnection with the databases that provide the routing information necessary for the proper delivery of 911 calls to the appropriate PSAP.[6/]

In sum, it is consistent with Commission rulings, state commission findings, and ILEC tariffs that the provision of transmission and connectivity services to PSAPs for the delivery of 911 calls is a telephone exchange service.[7/] When Intrado Comm provides this service to PSAPs, the service is still a telephone exchange service. As the Commission recognizes, the "E911 Network consists of: the Selective Router; the trunk line(s) between the Selective Router and the PSAP; the ALI Database; the Selective Router Database; the trunk line(s) between the ALI database and the PSAP; and the MSAG."[8/] The E911 network is and must be interconnected to

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[4/] *E911 Order* ¶ 14.

[5/] *See, e.g.*, *Public Safety Community Praises Report Recommending '911' Changes*, TR Daily (Mar. 6, 2008) (quoting public safety to say "The 911 system is just not keeping up with the modern technology. . . As we explain, the current communications landscape is a far cry from the one for which the current 911 system was engineered. . . . Accordingly, we believe changes in technology, governance, and funding procedures are necessary in order to meet citizen expectations as well as public safety and homeland security needs.")

[6/] Intrado Comm has responded to these arguments and attaches a selection of filings for the Commission's convenience. *See* Attachment 3.

[7/] *See, e.g.*, *E911 Order* ¶ 38; *Revision of the Commission's Rules To Ensure Compatibility with Enhanced 911 Emergency Calling Systems; Petition of City of Richardson, Texas*, 17 FCC Rcd 24282, ¶ 25 (2002); Case No. 07-1199-TP-ACE, *Application of Intrado Communications, Inc. to Provide Competitive Local Exchange Services in the State of Ohio*, Finding and Order (P.U.C.O. Feb. 5, 2008); Docket No. 00-0769, *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*., Arbitration Decision (I.C.C. Mar. 21, 2001); Decision No. 01-09-048, *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 (C.P.U.C. Sept. 20, 2001); Attachment 2 (providing relevant provisions from ILEC tariffs).

[8/] *E911 Order* ¶ 15; *see also* 47 C.F.R. § 9.3.

the public switched network[9/] and the law does not require that network services be segmented based on whether a CLEC wants "access" to the databases or "interconnection" with the databases. Segmenting the physical routing of 911 calls from the database that provides routing information for such calls would diminish the viability and reliability of 911 services, and these services are not segmented by the ILEC in its provision of service to the PSAP.

AT&T's failure to adhere to merger commitment 7.1 and its response to requests for interconnection generally have erected barriers to Intrado Comm's entry into the local exchange market and its provision of a competitive next-generation E911 system to PSAPs. These barriers are contrary to the goals of this Commission,[10/] Congress,[11/] and the Act.[12/] Intrado Comm therefore requests that the Commission deny AT&T's Petition for Declaratory Ruling and grant any other relief necessary to ensure the Commission's E911 goals are realized.

Respectfully submitted,

Chérie R. Kiser

Counsel for Intrado Communications Inc.

Attachments

cc: Nicholas Alexander, Acting Legal Counsel to the Bureau Chief
Wireline Competition Bureau (via email)

9/ *E911 Order* ¶ 14.

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

11/ One of the primary objectives for the Congressional E911 Caucus for the 110th Congress was "ensuring that 911 systems keep pace with rapid changes in communications technology." *See* Congressional E9-1-1 Caucus Legislative Agenda for the 110th Congress, *available at* http://www.e911institute.org/Caucus/E9-1-1%20Caucus%20110th%20Legislative%20Agenda.pdf. Senator Stevens also indicated that "We must ensure that the public safety community across the country has the technology it needs to receive caller location or other information" and Representative Shimkus also recognized the need for 911 to keep pace with technology. *See id.*

12/ *See, e.g., Implementation of the Local Competition Provisions in the Telecommunications Act 1996; Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, 11 FCC Rcd 15499, ¶ 1 (1996) (finding that the goal of the Telecommunications Act of 1996 was to "remove the outdated barriers that protect monopolies from competition and affirmatively promote efficient competition using tools forged by Congress") (intervening history omitted), *aff'd by AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999).

Attachment 1

Citations to Intrado Comm Arbitration Proceedings with AT&T, Embarq, and Verizon

Docket No. 30708, *Petition of Intrado Communications Inc. for Arbitration Pursuant to Section 252(b) of the Communications Act of 1934, as amended, and to Establish an Interconnection Agreement with BellSouth Telecommunications, Inc. d/b/a AT&T Alabama*, Petition for Arbitration (Ala. P.S.C. filed Dec. 21, 2007)

Docket No. 070736-TP, *Petition of Intrado Communications Inc. for Arbitration Pursuant to Section 252(b) of the Communications Act of 1934, as amended, and Section 364.162, Florida Statutes to Establish an Interconnection Agreement with BellSouth Telecommunications, Inc. d/b/a AT&T Florida*, Petition for Arbitration (Fla. P.S.C. filed Dec. 21, 2007)

Docket No. P-1187, Sub 2, *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 BellSouth Telecommunications, Inc. d/b/a AT&T North Carolina*, Petition for Arbitration (N.C.U.C. filed Dec. 21, 2007)

Case No. 07-1280-TP-ARB, *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*, Petition for Arbitration (filed P.U.C.O. Dec. 21, 2007)

Case No. 07-1216-TP-ARB, *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 United Telephone Company of Ohio and United Telephone Company of Indiana*, Petition for Arbitration (P.U.C.O. filed Nov. 28, 2007)

Docket No. 007699-TP, *Petition of Intrado Communications Inc. for Arbitration Pursuant to Section 252(b) of the Communications Act of 1934, as amended, and Section 364.162, Florida Statutes to Establish an Interconnection Agreement with Embarq Florida Inc.*, Petition for Arbitration (Fla. P.S.C. filed Nov. 27, 2007)

Case No. PUC-2007-00112, *Petition of Intrado Communications of Virginia Inc. for Arbitration to Establish an Interconnection Agreement with Central Telephone Company of Virginia d/b/a Embarq and United Telephone - Southeast, Inc. d/b/a Embarq, under Section 252(b) of the Telecommunications Act of 1996*, Petition for Arbitration (Va. S.C.C. filed Nov. 27, 2007)

Docket No. 08134-TP, *Petition of Intrado Communications Inc. for Arbitration Pursuant to Section 252(b) of the Communications Act of 1934, as amended, and Section 364.162, Florida Statutes, to Establish an Interconnection Agreement with Verizon Florida LLC*, Petition for Arbitration (Fla. P.S.C. filed Mar. 5, 2008)

Docket No. P-1187, Sub 3, *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 Verizon South Inc. d/b/a Verizon North Carolina*, Petition for Arbitration (N.C.U.C. filed Mar. 5, 2008)

Case No. 08-198-TP-ARB, *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 Verizon North Inc.*, Petition for Arbitration (P.U.C.O. filed Mar. 5, 2008)

Docket No. ML# 109698, *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 Verizon Maryland Inc.*, Petition for Arbitration (Md. P.S.C. filed Mar. 5, 2008)

PSC Docket No. 08-61, *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 Verizon Delaware LLC*, Petition for Arbitration (Del. P.S.C. filed Mar. 5, 2008)

Case 08-0298-T-PC, *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 Verizon West Virginia Inc.*, Petition for Arbitration (W. Va. P.S.C. filed Mar. 5, 2008)

Case No. PUC-2008-____, *Petition of Intrado Communications of Virginia Inc. for Arbitration to Establish an Interconnection Agreement with Verizon South Inc. and Verizon Virginia Inc. under Section 252(b) of the Telecommunications Act of 1996*, Petition for Arbitration (Va. S.C.C. filed Mar. 5, 2008)

Attachment 2

A24. EMERGENCY REPORTING SERVICES (T)

A24.1 Universal Emergency Number Service - 911 (Cont'd)

A24.1.2 Rules and Regulations (Cont'd)

Y. General Regulations located in Section A2. of this Tariff will also apply to this service offering.

Z. Where a 911 call is placed by the calling party via interconnection with an interexchange carrier, the Company cannot guarantee the completion of said 911 call, the quality of the call or any features that may otherwise be provided with 911 Service.

AA. The Company will bill "911" local option fees in accordance with Chapter 365, Florida Statutes, as amended. Each customer imposing a "911" local option fee agrees to release, indemnify, defend and hold harmless the Company from any and all loss, claims, demands, suits or other action, or any liability whatsoever, whether suffered, made, instituted or asserted by the customer or by any other party or person, arising out of the Company's good faith complaince with the instructions of the customer concerning the imposition, billing, collection or remittance of the "911" fee, whether or not the act of complying with the customer's instructions is deemed to be negligent.

AB. Basic 911 cannot be provisioned with any Caller ID service arrangements. (N)

A24.1.3 Reserved for Future Use

A24.1.4 Enhanced Universal Emergency Number Service-E911

A. General

1. Enhanced Universal Emergency Number Service, also referred to as Enhanced 911 Service or E911, is a telephone exchange communication service whereby a Public Safety Answering Point (PSAP) designated by the customer may receive telephone calls dialed to the telephone number 911. E911 Service includes lines and equipment necessary for the answering, transferring and dispatching of public emergency telephone calls by persons within the serving area who dial 911.
2. The E911 customer may be a municipality or other county or local governmental unit, or an authorized agent of one or more municipalities or other county or local governmental units to whom authority has been lawfully delegated. The customer must be legally authorized to subscribe to the service and have public safety responsibility by law to respond to telephone calls from the public for emergency police, fire and other emergency services within the telephone central office areas arranged for 911 calling.

B. Definition of Terms

1. Additional E911 Exchange Line

   A line terminating at a PSAP that is in addition to those engineered that may be ordered by the customer as an optional feature.

2. Alternate Routing (AR)

   A feature provided to allow E911 calls to be routed to a designated alternate location if (l) all E911 exchange lines to the primary PSAP (see definition of PSAP below) are busy, or (2) the primary PSAP closes down for a period (night service). This is a standard feature of E911 Service.

3. Automatic Location Identification (ALI)

VERIZON SOUTH INC.
NORTH CAROLINA
ISSUED: November 14, 2005
BY: Vice President
Durham, North Carolina

Fifth Revised Page 1
Cancels Fourth Revised Page 1
EFFECTIVE: November 28, 2005

S24. EMERGENCY REPORTING SERVICE

S24.1 911 Emergency Telephone Service

S24.1.1 General

a. 9-1-1 is the three-digit telephone number designated throughout the United States as the emergency telephone number to be used by the public to obtain law enforcement, medical, fire, rescue, and other emergency services.

(D)
(D)

b. Enhanced Universal Emergency Number Service also referred to as Enhanced 911 Service or E911 is a tele- (T)
phone exchange communication service whereby a Public Safety Answering Point (PSAP) designated by the (C)
customer may receive telephone calls dialed to the telephone number 911. E911 service includes lines and
equipment necessary for the answering, transferring, and dispatching of public emergency telephone calls by
persons within the serving area who dial 911. Enhanced 911 provides Automatic Location Identification (ALI) and (C)
Automatic Number Identification (ANI). These features forward the customer's name, primary service address
(street name and number), and telephone number associated with the calling party's telephone line to the
Enhanced 911 display unit on a per call basis.

c. The 911 customer may be a municipality or other state or local governmental unit or an authorized agent of one or (T)
more municipalities or other state or local governmental units to whom authority has been lawfully delegated. The
customer must be legally authorized to subscribe to the service and have public safety responsibility by law to
respond to telephone calls from the public for emergency police, fire and other emergency services within the
telephone central office areas arranged for 911 calling.

UNIVERSAL EMERGENCY TELEPHONE NUMBER SERVICE (M)

II. ENHANCED 9-1-1 SERVICE (E-9-1-1)

A. Description

1. Enhanced 9-1-1 service (E-9-1-1) is a telephone exchange communications service whereby a public safety answering point (PSAP) designated by the participating local governmental authority may receive and answer calls that have been placed by dialing the number 9-1-1.

2. E-9-1-1 service includes the services provided by the lines and equipment associated with the service arrangement for the answering, transferring and dispatching of public emergency telephone calls dialed to 9-1-1.

3. E-9-1-1 service consists of: (A) automatic number identification (ANI); (B) selective call routing; and (C) automatic location identification (ALI). (M)

a. ANI provides for the telephone number of the calling party to be forwarded to the PSAP. ANI is only available for calls placed from individual lines. (M1)

b. Selective call routing is available when an E-9-1-1 system is served by more than one PSAP. This service routes the call to the correct PSAP based on the caller's telephone number. Selective call routing is available only for calls placed from individual lines.

c. ALI provides the name and address associated with the calling party's telephone number to the PSAP for display. Additional telephones with the same number as the calling party's (secondary locations, off-premises, etc.) will be identified with the address of the telephone number at the main location.

B. General Regulations

1. The service is limited to the use of central office telephone number 9-1-1 as the emergency telephone number. Only one E-9-1-1 service will be provided within any government agency's locality.

2. The service is furnished to the customer only for the purpose of receiving reports of emergencies by the public. (M1)

(M) Material now appearing on this sheet was previously found in Section 41, Second Revised Sheet 4.

(M1) Material now appearing on this sheet was previously found in Section 41, First Revised Sheet 5.

Attachment 3

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

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, and Section 364.162, Florida Statutes, to Establish an Interconnection Agreement with BellSouth Telecommunications, Inc. d/b/a AT&T Florida	)	Docket No. 070736-TP Filed: January 22, 2008

RESPONSE IN OPPOSITION TO MOTION TO DISMISS OR, IN THE ALTERNATIVE, TO HOLD IN ABEYANCE

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Its Attorneys

Dated: January 22, 2008

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

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, and Section 364.162, Florida Statutes, to Establish an Interconnection Agreement with BellSouth Telecommunications, Inc. d/b/a AT&T Florida	)	Docket No. 070736-TP Filed: January 22, 2008

RESPONSE IN OPPOSITION TO MOTION TO DISMISS OR, IN THE ALTERNATIVE, TO HOLD IN ABEYANCE

Intrado Communications Inc. ("Intrado"), through its attorneys and pursuant to Rule 28-106.204, Florida Administrative Code, hereby files this Response in Opposition to the Motion to Dismiss or, in the Alternative, to Hold in Abeyance ("Motion") filed by BellSouth Telecommunications, Inc. d/b/a AT&T Florida ("AT&T") in which AT&T requests that the Florida Public Service Commission ("Commission") dismiss the Petition for Arbitration ("Petition") filed by Intrado in the above-captioned proceeding, or in the alternative, hold the proceeding in abeyance.

AT&T's Motion is untimely filed and should be dismissed for that reason alone. Further, AT&T has failed to demonstrate as a matter of law why its Motion should be granted.[1/] Intrado has fully complied with the requirements of the Communications Act of 1934, as amended ("Act"), governing negotiation and arbitration of interconnection agreements. AT&T's claims that additional negotiations between the Parties are required before the Commission can arbitrate the issues presented in Intrado's Petition are merely a continuation of AT&T's efforts to shield

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[1/] AT&T indicates in a footnote that some of the issues raised by Intrado are not subject to arbitration pursuant to Section 252. *See* AT&T Motion at n.6. AT&T, however, does not elaborate on which issues it refers to or provide any reasoning for this statement. To the extent that such issues were not included in AT&T's Motion, AT&T has waived its right to seek dismissal of those issues at a later date.

from competition its entrenched monopoly over the provision of local exchange services in its Florida service territory. Indeed, Intrado twice attempted in the last month to engage in further negotiations with AT&T, and AT&T has either ignored or rejected both of those attempts. The Commission should deny AT&T's Motion and proceed to resolve the issues identified in Intrado's Petition to ensure Florida consumers and public safety agencies can receive the benefits of Intrado's competitive service offerings as contemplated by the Act and Florida law.

I. AT&T'S MOTION TO DISMISS SHOULD BE REJECTED AS UNTIMELY AND FOR ITS FAILURE TO DEMONSTRATE AS A MATTER OF LAW WHY INTRADO'S PETITION SHOULD BE DISMISSED

Rule 28-106.204(2), Florida Administrative Code, requires that a motion to dismiss a petition shall be filed no later than twenty days after service of the petition on the party. Intrado's Petition was filed with the Commission on December 21, 2007, Document No. 11119, and pursuant to the certificate of service, copies of the Petition were served on AT&T on December 21, 2007, electronically via email and paper copies via overnight delivery (also received by AT&T's representatives on December 21, 2007). Rule 28-106.103, Florida Administrative Code, provides that for the purpose of computing time, one business day shall be added to the response time when service is by overnight courier and no additional time shall be added when service is via electronic mail. Assuming the more generous computation of time for any AT&T motion to dismiss, such a response was due no later than January 11, 2008.

AT&T filed its Motion on January 15, 2008 - *four days past* the twenty-day period specified in the Commission's rules. This Commission has consistently denied motions to dismiss as untimely filed when they have been filed at any time beyond the twenty-day time

period specified in Rule 28-106.204(2).[2/] There are no statutory provisions providing for a different time to file a motion to dismiss and AT&T did not seek an extension of time of the twenty-day deadline. Thus, there is no basis for granting the dismissal requested by AT&T. Accordingly, AT&T's Motion must be denied as untimely filed.

Moreover, this Commission has ruled that, in order to sustain a motion to dismiss, "the moving party must demonstrate that, accepting all allegations in the petition as facially correct, the petition still fails to state a cause of action for which relief can be granted."[3/] When determining the sufficiency of the Petition, the Commission may not look beyond the four corners of the complaint, consider any affirmative defenses raised by the defendant, nor consider any evidence likely to be produced by either side.[4/] In the arguments presented, AT&T's Motion fails to demonstrate as a matter of law any basis for dismissing Intrado's Petition. Accordingly, AT&T's Motion should be denied.

II. INTRADO FULLY COMPLIED WITH THE REQUIREMENTS OF THE ACT TO NEGOTIATE AND ARBITRATE WITH AT&T

AT&T's attempt to evade and further delay its interconnection obligations should be rejected. Intrado's conduct during its negotiations with AT&T and the exercise of its rights

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2/ *See, e.g.*, *Complaint of BellSouth Telecommunications, Inc. against Miami-Dade County for Alleged Operation of a Telecommunications Company in Violation of Florida Statutes and Commission Rules*, Order No. PSC-05-0847-FOF-TL, Docket No. 050257-TL (Aug. 19, 2005) ("Additionally, we find that the County failed to file its Motion within the 20 days required pursuant to Rule 28-106.204(2), Florida Administrative Code. The County was served with BellSouth's Complaint on May 2, 2005. A timely Motion to Dismiss would need to have been filed by May 23. The County filed its Motion on June 2, 2005. Consequently, the Motion to Dismiss shall be denied because it was not timely filed."); *see also* Order No. PSC-99-0488-PCO-WU, Docket No. 960444-WU (Mar. 8, 1999) (motion to dismiss denied); Order No. PSC-98-1160-PCO-WS, Docket No. 971663-WS (Aug. 25, 1998) ("we hereby deny OPC's motion to dismiss as untimely").

3/ *Complaint against KMC Telecom III LLC, KMC Telecom V, Inc. and KMC Data LLC for Alleged Failure to Pay Intrastate Access Charges pursuant to Its Interconnection Agreement and Sprint's Tariffs and for Alleged Violation of Section 364.16(3)(a), F.S., by Sprint-Florida, Incorporated*, Order No. PSC-04-1204-FOF-TP (Dec. 3, 2004) (citing *Application for Amendment of Certificates Nos. 359-W and 290-S to Add Territory in Broward County by South Broward Utility, Inc.*, 95 FPSC 5:339 (1995) and *Varnes v. Dawkins*, 624 So. 2d 349, 350 (Fla. 1st DCA 1993)).

4/ *Id.*

under the Act to file its Petition fully complied with the process envisioned by Congress as outlined in the Act. Dismissing the Petition or holding the arbitration proceeding in abeyance would be inconsistent with the law and contrary to the interests of Florida consumers. Indeed, if AT&T truly wanted additional time to negotiate with Intrado, it would not have rejected Intrado's prior requests to do so. AT&T's delay tactics should not be condoned. AT&T's Motion should be denied.

A. The Section 251/252 Process Was Developed to Address the Uneven Bargaining Power between Incumbents and New Entrants

When Congress amended the Act in 1996 to open local exchange markets to competition,[5/] it established the Section 251/252 negotiation and arbitration process. Recognizing that incumbent local exchange carriers ("ILECs"), such as AT&T, would have the incentive to thwart competition, Congress and the Federal Communications Commission ("FCC") conferred upon competitive carriers not only a right to interconnect with the incumbent, but the right to do so on fair and pro-competitive terms. Interconnection regulations have thus been developed to compensate for the uneven bargaining power that exists between competitors and incumbents, such as Intrado and AT&T. Congress has established varying categories of rights and obligations for different types of carriers and made a deliberate decision in crafting Section 251 to impose certain requirements only on incumbent carriers in order to facilitate the entry of competitors.[6/] The Act requires AT&T, as an ILEC, to negotiate in good faith the terms

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[5/] Telecommunications Act of 1996, Pub. L. 104-104, 110 Stat. 56 (1996) (codified at 47 U.S.C. §§ 151, *et seq.* (1996)).

[6/] *Petition for Commission Assumption of Jurisdiction of Low Tech Designs, Inc.'s Petition for Arbitration with Ameritech Illinois before the Illinois Commerce Commission; et al.*, 13 FCC Rcd 1755, ¶ 3 (1997) ("*Low Tech Preemption Order*"). For example, "telecommunications carriers" are required to interconnect directly or indirectly under Section 251(a), 47 U.S.C. § 251(a), while only "local exchange carriers" are obligated to provide certain services under Section 251(b). 47 U.S.C. § 251(b). Similarly, Section 251(c) imposes additional obligations on "incumbent local exchange carriers." 47 U.S.C. § 251(c).

and conditions of interconnection agreements with competitive carriers to fulfill AT&T's obligations under the Act.[7/]

Section 252 of the Act provides additional benefits to competitors. Recognizing that commercial negotiations would be difficult because the new entrant would have "nothing that the incumbent needs" and so "has little to offer the incumbent in a negotiation,"[8/] Congress also established a procedure for arbitration of any disputes arising from the negotiations between the ILEC and the competitor.[9/] The statutory framework was designed to protect competitive local exchange carriers from experiencing unreasonable delays in entering the marketplace formerly controlled exclusively by the incumbent.[10/] Congress's intent in providing for arbitration was to give competitors more leverage in the negotiation process.[11/] Unlike commercial negotiations where both parties may have an incentive to reach agreement, ILECs have generally demonstrated a reluctance to abide by the law, and thus, arbitration is necessary to ensure that competitors without bargaining power have their rights protected. The language and design of Section 252 thus seeks to address the very unequal bargaining power manifest in negotiations

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[7/] 47 U.S.C. § 251(c)(1). Those obligations include the duty: (1) to provide interconnection; (2) to make available access to unbundled network elements; (3) to offer retail services for resale at wholesale rates; and (4) to provide for the collocation of facilities. 47 U.S.C. §§ 251(c)(2)-(4), (6).

[8/] *Implementation of the Local Competition Provisions in the Telecommunications Act 1996; Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers,* 11 FCC Rcd 15499, ¶ 134 (1996) ("*Local Competition Order*") (intervening history omitted), *aff'd by AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999).

[9/] 47 U.S.C. §§ 251, 252.

[10/] *See Atlantic Alliance Telecommunications, Inc. v. Bell Atlantic*, 2000 U.S. Dist. LEXIS 19649, 99-CV-4915 (ARR) (E.D. Va 2000) (noting that "[t]he tight schedule set out in the Act manifests an intention of Congress to resolve disputes expeditiously" and Congress' desire to open up local exchange markets to competition without undue delay) (quoting *AT&T Communications Sys. v. Pacific Bell*, 203 F.3d 1183, 1186 (9th Cir. 2000)) and that "the legislative history explains that the purpose of the Act is 'to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition'" (quoting H.R. Conf. Rep. No. 104-458, at 113 (1996) reprinted in 1996 U.S.C.C.A.N. 10, 124)).

[11/] *Local Competition Order* ¶ 15 (the "statute addresses this problem [of the ILEC's "superior bargaining power"] by creating an arbitration proceeding in which the new entrant may assert certain rights").

between ILECs and competitors in order to advance Congress's goals of increased competition.[12/]

In Section 252 of the Act, Congress established a specific statutory scheme -- with definitive time frames and deadlines -- for negotiating and arbitrating interconnection agreements. Section 252(b)(4)(C) requires the Commission to conclude the arbitration proceeding no later than nine (9) months after the date on which AT&T received Intrado's request for interconnection pursuant to Section 251(c).[13/] The Commission also has recognized its statutory obligation to complete the arbitration proceeding within nine months from the request for negotiation.[14/] It is well established that statutory deadlines cannot be waived or extended except in very limited circumstances.[15/] Indeed, the legislative history of Section 252 indicates that Congress sought strict adherence to the statutory deadlines[16/] and the FCC has found "that the language of [S]ection 252 suggests that Congress intended that the process of negotiating and, when necessary, arbitrating interconnection agreements would have some definite end."[17/]

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

[13/] 47 U.S.C. § 252(b)(4)(C).

[14/] *See, e.g., Petition by BellSouth Telecommunications, Inc. for Arbitration of Certain Issues in Interconnection Agreement with Supra Telecommunications and Information Systems, Inc.*, Order No. PSC-01-1180-FOF-TI, Docket No. 001305-TI (May 23, 2001).

[15/] *Reuters, Ltd. v. FCC*, 781 F.2d 946, 951 (D.C. Cir. 1986) (citing *Gardner v. FCC*, 530 F.2d 1086 (D.C. Cir. 1976)).

[16/] *Armstrong Communications, Inc. Petition for Relief Pursuant to Section 252(e)(5) of the Telecommunications Act of 1996 and Request for Additional Relief*, 13 FCC Rcd 871, ¶ 11 (1998).

[17/] *Petition of MCI for Preemption Pursuant to Section 252(e)(5) of the Telecommunications Act of 1996*, 12 FCC Rcd 15594, ¶ 29 (1997). For that reason, a state commission "fails to act" if it does not complete arbitration of an interconnection agreement within nine months as set forth in the Act. *See Low Tech Preemption Order* ¶ 5.

It is within this framework that Intrado requested interconnection negotiations, negotiated with AT&T in good faith, and later filed its Petition with the Commission within the statutory window when it became clear that the Parties would be unable to reach a mutually beneficial negotiated agreement. Contrary to the structure established by Congress, AT&T argues that the Commission should support an interconnection approach that would give AT&T ultimate control over the negotiation process.[18/] Intrado cannot offer service without interconnecting to the public switched telephone network ("PSTN") and AT&T is one of the dominant gatekeepers to that network. If Intrado were required to wait until AT&T engaged in effective, constructive negotiations of an agreement that is beneficial to both Parties prior to filing for arbitration, Intrado's rollout likely would be delayed indefinitely. The Act was specifically designed to avoid the abuse of such power on the part of ILECs.

AT&T's citation to *Strand* in support of its dismissal or abeyance request is inapposite.[19/] There is nothing premature or flawed about Intrado's Petition, and Intrado's approach to the arbitration is precisely what Congress envisioned the process would be when it established the Act. While the *Strand* court indicated that the "first instance" of the 251/252 process should be private negotiations, the court made clear that the ability to petition the state commission for arbitration was also an important part of the statutory regime created by Congress.[20/] Denying or delaying resolution of Intrado's Petition would therefore be contrary to the objectives of Congress in creating the statutory time frames of the Act, which were established to ensure Florida consumers receive the benefits of competition in a timely manner as the public interest requires.

[18/] AT&T Motion at 3-4.

[19/] AT&T Motion at 2 (citing *Verizon North, Inc. v. Strand*, 309 F.3d 935 (6th Cir. 2002)).

[20/] *Strand*, 309 F.3d at 939-40.

Intrado cannot be held hostage to AT&T's unwillingness to effectively negotiate, which ultimately dictates the ability of Intrado to deploy its services in Florida.[21/] Intrado is poised to offer competitive local exchange services in Florida that include an alternative, IP-based technology that will "enable the public safety community to focus on future needs rather than requiring more from legacy systems, offer more redundancy and flexibility, and contribute greatly to improving compatibility between public safety systems that operate using different proprietary standards."[22/] AT&T's attempts to game the system and further delay competition should be rejected.

B. Intrado Has Attempted to Negotiate with AT&T in Accordance with the Requirements of Section 252

The facts reflect that Intrado has acted in good faith to negotiate an interconnection agreement with AT&T as required by Section 252. Under the Act and the FCC's rules, both parties to a negotiation are required to negotiate in good faith.[23/] The FCC determined that some minimum requirements of good faith negotiation are needed "to address the balance of the incentives between the bargaining parties" in order to "realize Congress's goal of enabling swift market entry by new competitors."[24/] The decision whether a party has acted in good faith is made largely on a case-by-case basis in light of all of the facts and circumstances underlying the negotiations.[25/] AT&T has not demonstrated that Intrado engaged in such conduct. Rather, there

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[21/] *Cf. Local Competition Order* ¶ 148 (stating that "intentionally obstructing negotiations also would constitute a failure to negotiate in good faith, because it reflects a party's unwillingness to reach agreement").

[22/] *Recommendations of the Independent Panel Reviewing the Impact of Hurricane Katrina on Communications Networks*, 22 FCC Rcd 10541, ¶¶ 74-75, 80-82 (2007).

[23/] 47 U.S.C. § 251(c)(1); 47 C.F.R. § 51.301.

[24/] 47 C.F.R. § 51.301; *Local Competition Order* ¶ 141.

[25/] *Local Competition Order* ¶¶ 142, 150. A carrier violates its duty to negotiate in good faith by, for example, obstructing negotiations, delaying negotiations, refusing unreasonably to provide relevant information, requesting that a competing carrier "attest that the agreement complies with all provisions of the 1996 Act, federal regulations,

is ample evidence indicating that AT&T has not acted in good faith by taking "actions that are deliberately intended to delay competitive entry, in contravention of the statute's goals," which the FCC has determined it "will not condone."[26/]

Intrado's inclusion of issues for the first time in its Petition does not support dismissal or abeyance.[27/] As discussed above, such an approach is consistent with the framework established by the Act and AT&T has been given the opportunity to respond to Intrado's issues in its response to the Petition. There is no merit to AT&T's argument that the Act required Intrado to first seek mediation from the Commission prior to filing its Petition.[28/] Indeed, a closer reading of the *Atlantic Alliance* case cited by AT&T makes clear that Intrado could have sought mediation *or* arbitration under the provisions of the Act:

> Under §252(a)2), plaintiff could have asked the state commission to participate in negotiations at any time after the initial request, thereby forcing defendant to the table. *Alternatively*, plaintiff might have sought arbitration after 135 days, pursuant to § 252(b).[29/]

Intrado's choice to utilize arbitration rather than mediation simply does not support AT&T's request for dismissal or abeyance.

Moreover, when Intrado provided AT&T with its proposed interconnection agreement on December 18, 2007, Intrado gave AT&T some proposed dates for the Parties to discuss Intrado's proposed changes.[30/] As the Commission is well aware from prior arbitrations, it is fairly typical

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and state law," and by failing to comply with reasonable requests for cost data. *See* 47 C.F.R. § 51.301; *Local Competition Order* ¶¶ 148, 149, 152, 155.

[26/] *Local Competition Order* ¶ 154.

[27/] AT&T Motion at 3.

[28/] AT&T Motion at 4.

[29/] *Atlantic Alliance Telecommunications, Inc. v. Bell Atlantic*, No. 99-CV-4915 (ARR), 2000 U.S. Dist. LEXIS 19649, *13-14 (E.D.N.Y. Apr. 17, 2000) (emphasis added).

[30/] Email correspondence from Thomas Hicks, Intrado, to Karon Ferguson, AT&T (Dec. 18, 2007) (attached as Attachment 1).

that as the arbitration process plays out the parties continue to negotiate and resolve issues, which is what Intrado has tried to do and will continue to do. AT&T, however, never responded to Intrado's request for additional negotiations other than to acknowledge that it had received Intrado's correspondence.[31/] Thus, while AT&T argues that negotiation would have determined whether it was "willing to accommodate many of [Intrado's] requests,"[32/] AT&T rejected Intrado's requests to do just that.

Further, inclusion of issues for the first time or newly proposed language in a petition for arbitration is not unique to the instant arbitration. Carriers filing petitions for arbitration are required to identify all issues raised by the interconnection agreement to be arbitrated by the state commission, or lose their right to such arbitration.[33/] As a practical matter, some issues are not put on the table during the negotiation process because they are less critical to the proposed interconnection arrangement or the negotiating parties simply do not have enough time to address them before the arbitration deadline. Under AT&T's approach, competitors like Intrado would be at the mercy of the ILEC to determine which issues should be identified and negotiated before an arbitration petition is filed, which would be contrary to the purposes of the Act.

In addition, the FCC utilizes a similar arbitration method when it assumes the jurisdiction of a state commission pursuant to Section 252(e)(5) of the Act.[34/] Specifically, the FCC has embraced a "best final offer" process as the preferred method for arbitration of interconnection agreements.[35/] Under this style of arbitration, also known as "baseball arbitration," each party

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[31/] Email correspondence from Karon Ferguson, AT&T, to Thomas Hicks, Intrado (Dec. 20, 2007) (attached as Attachment 2).

[32/] AT&T Motion at 3.

[33/] 47 U.S.C. § 252(b)(1).

[34/] 47 U.S.C. § 252(e)(5). This section allows the FCC to step in the shoes of a state commission that has failed to act in response to a petition for arbitration.

[35/] 47 C.F.R. § 51.807(d).

presents the arbitrator its preferred language to be implemented in the interconnection agreement and the arbitrator makes its ruling based on each party's proposals, hearings, and briefs in support. The FCC has recognized that final offer arbitration fosters a situation where "each party has incentives to propose an arrangement that the arbitrator could determine to be fair and equitable."[36/] The FCC also has acknowledged that "parties are more likely to present terms and conditions that approximate the economically efficient outcome, because proposing extreme terms and conditions may result in an unfavorable finding by the arbitrator" under the final offer method.[37/] Accordingly, there is no justification for dismissing the Petition or holding the proceeding in abeyance because Intrado submitted its proposed interconnection agreement language with its Petition.

III. AT&T ONLY SEEKS TO FURTHER DELAY INTRADO'S ENTRY INTO THE MARKET BY CLAIMING ADDITIONAL NEGOTIATIONS ARE NECESSARY

AT&T's claims that the Commission must dismiss Intrado's Petition or hold the proceeding in abeyance so that the Parties may negotiate are specious.[38/] First, AT&T ignored Intrado's suggestion for additional negotiations (including proposed dates) when Intrado transmitted its proposed revisions to the AT&T template interconnection agreement on December 18, 2007. Second, AT&T rejected Intrado's more recent attempt to continue the Parties' negotiations. AT&T does not appear to be interested in engaging in substantive negotiations with Intrado and therefore its request can only be viewed an attempt to further delay the implementation of its interconnection obligations.

[36/] *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 14172, ¶ 268 (1996) ("*Local Competition NPRM*").

[37/] *Local Competition NPRM* ¶ 268. The FCC observed that open-ended arbitration is slower and more difficult to administer than final offer arbitration. *See Local Competition NPRM* ¶ 268.

[38/] *See generally* AT&T Motion.

In addition to Florida, Intrado also filed petitions for arbitration against AT&T ILECs in Ohio, North Carolina, and Alabama, and each of those AT&T ILECs filed a motion similar to the one filed by AT&T here. On January 17, 2008, Intrado and AT&T Ohio agreed to extend the statutory deadline for the Ohio commission to act by thirty days, and agreed to use those thirty days on the front end to engage in negotiations and mediation (with the procedural schedule for arbitration starting immediately after the thirty-day period). AT&T Ohio also agreed to withdraw its motion given that the motion would be "moot" in light of the Parties' agreement to engage in additional negotiations and mediation prior to the initiation of the arbitration proceeding.

As Intrado indicated in its request for negotiation and as AT&T acknowledged,[39/] Intrado seeks to negotiate a multi-state interconnection agreement governing interconnection in each state of AT&T's 22-state operating territory pursuant to the federal merger conditions established by the FCC.[40/] Thus, from a practical standpoint, there will only be one agreement between Intrado and the AT&T ILECs. Consistent with this approach, Intrado has been dealing with one AT&T negotiation team. Consequently, any negotiations that occur in the next thirty days as a result of the agreement reached in Ohio will affect the comprehensive interconnection agreement between Intrado and the AT&T ILECs as well as the issues to be arbitrated in all other states. For this reason, Intrado sought to reach a similar agreement with AT&T for Florida to extend the statutory time frame for Commission action by forty-five days (an additional fifteen days beyond what was agreed to in Ohio) to give the Parties forty-five days to negotiate and/or mediate with

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[39/] *See* Attachment 3 for correspondence between the Parties indicating that both Intrado and AT&T understood that the agreement would be applicable to every state in AT&T's 22-state operating territory.

[40/] *AT&T Inc. and BellSouth Corporation Application for Transfer of Control*, Memorandum Opinion and Order, 22 FCC Rcd 5662, Appendix F (2007) ("*AT&T/BellSouth Merger Order*"); *see also* Intrado Petition at 24-26.

the Commission's assistance thereby making AT&T's Motion moot. AT&T rejected Intrado's offer to enter into the same type of arrangement as that agreed to by its affiliate in Ohio.

While AT&T contends that it has no obligation to negotiate from the AT&T 13-State Agreement in Florida,[41/] this argument is inconsistent with AT&T's requirements under its federal merger conditions.[42/] By allowing the portability of interconnection agreements throughout the AT&T/BellSouth territory, AT&T's merger conditions contemplate that a single interconnection agreement could be used in each state of AT&T's 22-state operating territory (subject to technical feasibility and state-specific pricing and performance plans). Moreover, AT&T's argument is contrary to AT&T's statements and the findings of the FCC and the Commission that the merged entity would operate as a single, integrated entity.[43/]

Throughout the Parties' negotiations, AT&T has indicated that a comprehensive 22-state template agreement would be forthcoming, but never provided such a document to Intrado.[44/] Thus, consistent with AT&T's merger commitments, Intrado modified the 13-State Agreement to apply to AT&T's entire 22-state operating region. AT&T's claims that it needs additional time to synchronize the 9-State and 13-State Agreements[45/] is simply another delay tactic and a violation of AT&T's *voluntary commitment* to the FCC to ensure that interconnection agreements are portable throughout its 22-state territory. AT&T's effort to circumvent its federal obligations should not be condoned.

41/ AT&T Motion at 3.

42/ *AT&T/BellSouth Merger Order*, Appendix F.

43/ *AT&T/BellSouth Merger Order* ¶ 210 (noting operation of AT&T and BellSouth "as a single company"); Docket No. 060308-TP, *Joint Application for Approval of Indirect Transfer of Control of Telecommunications Facilities Resulting from Agreement and Plan of Merger between AT&T Inc. and BellSouth Corporation*, Notice of Proposed Agency Action Order Approving Indirect Transfer of Control (June 23, 2006) (finding that the vertical integration of the companies will result in "more efficient and reliable services" and will "increase efficiency and reduce costs by avoiding the need for inter-networking traffic between companies").

44/ Intrado Petition at 13-17.

45/ AT&T Motion at 3, n.7.

CONCLUSION

For the foregoing reasons, Intrado respectfully requests that the Commission reject the Motion to Dismiss or, in the Alternative, to Hold in Abeyance filed by AT&T and move forward to arbitrate under federal and state law the unresolved issues identified in Intrado's Petition consistent with Intrado's proposed language set forth in Attachment 1 to the Petition.

Respectfully submitted,

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Dated: January 22, 2008

LIST OF ATTACHMENTS

No.	Brief Description
1.	**CONFIDENTIAL** - Email correspondence from Thomas Hicks, Intrado, to Karon Ferguson, AT&T (Dec. 18, 2007) (also Attachment 22 to Intrado Petition)
2.	**CONFIDENTIAL** - Email correspondence from Karon Ferguson, AT&T, to Thomas Hicks, Intrado (Dec. 20, 2007)
3.	**CONFIDENTIAL** - Intrado Negotiation Request (May 18, 2007) (also Attachment 6 to Intrado Petition) **CONFIDENTIAL** - Letter from Karon Ferguson, AT&T, to Thomas Hicks, Intrado (Oct. 23, 2007) (also Attachment 3 to Intrado Petition)

Before the
STATE OF OHIO
PUBLIC UTILITIES COMMISSION

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 United Telephone Company of Ohio and United Telephone Company of Indiana (collectively, "Embarq")	)	Case No. 07-1216-TP-ARB

OPPOSITION TO MOTION TO DISMISS AND MOTION FOR ORAL ARGUMENT

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CERTIFICATE OF SERVICE

Before the
STATE OF OHIO
PUBLIC UTILITIES COMMISSION

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 United Telephone Company of Ohio and United Telephone Company of Indiana (collectively, "Embarq")	)	Case No. 07-1216-TP-ARB

OPPOSITION TO MOTION TO DISMISS AND MOTION FOR ORAL ARGUMENT

Intrado Communications Inc. ("Intrado"), through its attorneys and pursuant to Rule 4901-1-12 of the Ohio Administrative Code, hereby files this Opposition to the Motion to Dismiss ("Motion") filed by United Telephone Company of Ohio and United Telephone Company of Indiana (collectively, "Embarq") in which Embarq requests that the Public Utilities Commission of Ohio ("Commission") dismiss the Petition for Arbitration ("Petition") filed by Intrado in the above-captioned proceeding or, in the alternative, hold the Petition in abeyance until the Commission rules on Intrado's application for certification as a competitive local exchange carrier ("CLEC").[1/] Intrado also respectfully requests that it be granted an opportunity to present oral argument on its Opposition to Embarq's Motion pursuant to Rule 4901-1-32 of the Ohio Administrative Code.

As set forth herein, Embarq has failed to demonstrate as a matter of law why its Motion should be granted. Intrado is entitled to interconnection and arbitration under Sections 251 and

[1/] Under Rule 4901-1-12, Intrado's response to Embarq's Motion is due within fifteen (15) days after service of the Motion. Embarq served its Motion on Intrado via U.S. mail pursuant to a certificate of service dated December 21, 2007. Pursuant to Rule 4901-1-07, three (3) additional days are added to the response time when a document is served via U.S. mail. Thus, Intrado files its Opposition within eighteen (18) days of December 21, 2007, *i.e.*, January 8, 2008.

252 of the Communications Act of 1934, as amended ("Act") and Ohio law. Holding Intrado's Petition in abeyance also is contrary to law and the public interest. The Commission should therefore deny Embarq's Motion and proceed to resolve the issues identified in the Petition for Arbitration to ensure Ohio consumers and public safety agencies can receive the benefits of Intrado's competitive service offerings as contemplated by the Act and Ohio law.

INTRODUCTION AND OVERVIEW

Under Ohio law, the standard for review of a motion to dismiss tests the sufficiency of the cause of action.[2/] To grant the motion to dismiss, the Commission must find beyond doubt that Intrado can prove no set of facts warranting relief after it presumes all factual allegations in Intrado's Petition are true, and construes all reasonable inferences in Intrado's favor.[3/] In the arguments presented, Embarq's Motion fails to demonstrate as a matter of law any basis for dismissing Intrado's Petition.

Embarq cannot have it both ways. During the Parties' five month negotiating period, Embarq entertained Intrado's Section 251(c) interconnection request, provided a template Section 251(c) interconnection agreement for negotiation purposes, acknowledged Intrado's proposed revisions to the interconnection agreement, and asked to extend the Section 252 arbitration deadline, but never fully raised the issue of whether Intrado was in fact eligible for interconnection under Section 251(c) until November 9, 2007. Once Embarq fully confirmed its position to Intrado on November 9, 2007, Intrado realized further "negotiations" without Commission involvement would likely prove to be futile. Intrado had no choice but to file for arbitration in order to secure its rights under the Act and Ohio law to obtain interconnection

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2/ *State ex rel. Hanson v. Guernsey Cty. Bd. of Commrs.*, 65 Ohio St. 3d 545, 548 (1992).

3/ *Williams v. Western Reserve Transit Authority d/b/a WRTA*, 2007 Ohio App. LEXIS 4274, *5 (Sept. 14, 2007).

arrangements with Embarq that mutually benefit both Parties as co-carriers as well as their Ohio customers.

Intrado has fully complied with the requirements of the Act governing negotiation and arbitration of interconnection agreements. Embarq's claims that Intrado has not negotiated in good faith, that its Petition is procedurally deficient under federal and state law, and that Intrado is not entitled to Section 251(c) interconnection are merely a continuation of Embarq's efforts to shield from competition its entrenched monopoly over the provision of local exchange services in its Ohio service territory. Intrado cannot be held hostage to Embarq's unwillingness to effectively negotiate, which ultimately dictates the ability of Intrado to deploy its services in Ohio. Intrado is poised to offer competitive local exchange services in Ohio that include an alternative, IP-based technology that will "enable the public safety community to focus on future needs rather than requiring more from legacy systems, offer more redundancy and flexibility, and contribute greatly to improving compatibility between public safety systems that operate using different proprietary standards."[4/] Accordingly, Embarq's Motion should be denied.

I. INTRADO'S PETITION COMPLIES WITH FEDERAL AND STATE ARBITRATION REQUIREMENTS

Embarq's attempt to evade its interconnection obligations by claiming Intrado's Petition is deficient should be rejected.[5/] Intrado's conduct during its negotiations with Embarq and its Petition fully complied with the process envisioned by Congress as outlined in the Act and restated in the Commission's rules. Intrado negotiated with Embarq in good faith, and when Embarq indicated it was unwilling to enter into a Section 251(c) interconnection agreement with

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[4/] *Recommendations of the Independent Panel Reviewing the Impact of Hurricane Katrina on Communications Networks*, 22 FCC Rcd 10541, ¶¶ 74-75, 80-82 (2007).

[5/] Embarq Motion at 1-2.

Intrado, Intrado elected to exercise its right under the law to file for arbitration. There is nothing premature or flawed about Intrado's Petition, and Intrado's approach to the arbitration is precisely what Congress envisioned the process would be when it established the Act. Embarq is not prejudiced by the Petition or Intrado's proposed interconnection agreement because Embarq has been given ample opportunity to respond to each of the issues raised by the Petition and did so on December 21, 2007. Accordingly, Embarq's Motion should be rejected.

A. The Section 251/252 Process Was Developed to Address the Uneven Bargaining Power between Incumbents and New Entrants

When Congress amended the Act in 1996 to open local exchange markets to competition,[6] it established the Section 251/252 negotiation and arbitration process. Recognizing that incumbent local exchange carriers ("ILECs"), such as Embarq, would have the incentive to thwart competition, Congress and the Federal Communications Commission ("FCC") conferred upon competitive carriers not only a right to interconnect with the incumbent, but the right to do so on fair and pro-competitive terms. Interconnection regulations have thus been developed to compensate for the uneven bargaining power that exists between competitors and incumbents, such as Intrado and Embarq. Congress has established varying categories of rights and obligations for different types of carriers and made a deliberate decision in crafting Section 251 to impose certain requirements only on incumbent carriers in order to facilitate the entry of competitors.[7] The Act requires Embarq, as an ILEC, to negotiate in good faith the

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[6] Telecommunications Act of 1996, Pub. L. 104-104, 110 Stat. 56 (1996) (codified at 47 U.S.C. §§ 151, *et seq.* (1996)).

[7] *Petition for Commission Assumption of Jurisdiction of Low Tech Designs, Inc.'s Petition for Arbitration with Ameritech Illinois before the Illinois Commerce Commission; et al.*, 13 FCC Rcd 1755, ¶ 3 (1997) ("*Low Tech Preemption Order*"), *recon. denied*, 14 FCC Rcd 7024 (1999). For example, "telecommunications carriers" are required to interconnect directly or indirectly under Section 251(a), 47 U.S.C. § 251(a), while only "local exchange carriers" are obligated to provide certain services under Section 251(b). 47 U.S.C. § 251(b). Similarly, Section 251(c) imposes additional obligations on "incumbent local exchange carriers." 47 U.S.C. § 251(c).

terms and conditions of interconnection agreements with competitive carriers to fulfill Embarq's obligations under the Act.[8/]

Section 252 of the Act provides additional benefits to competitors. Recognizing that commercial negotiations would be difficult because the new entrant would have "nothing that the incumbent needs" and so "has little to offer the incumbent in a negotiation,"[9/] Congress also established a procedure for arbitration of any disputes arising from the negotiations between the ILEC and the competitor.[10/] The statutory framework was designed to protect competitive local exchange carriers from experiencing unreasonable delays in entering the marketplace formerly controlled exclusively by the incumbent.[11/] Congress's intent in providing for arbitration was to give competitors more leverage in the negotiation process.[12/] Unlike commercial negotiations where both parties may have an incentive to reach agreement, ILECs have generally demonstrated a reluctance to abide by the law, and thus, arbitration is necessary to ensure that competitors without bargaining power have their rights protected. The language and design of

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[8/] 47 U.S.C. § 251(c)(1). Those obligations include the duty: (1) to provide interconnection; (2) to make available access to unbundled network elements; (3) to offer retail services for resale at wholesale rates; and (4) to provide for the collocation of facilities. 47 U.S.C. §§ 251(c)(2)-(4), (6).

[9/] *Implementation of the Local Competition Provisions in the Telecommunications Act 1996; Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers,* 11 FCC Rcd 15499, ¶ 134 (1996) ("*Local Competition Order*") (intervening history omitted), *aff'd by AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999).

[10/] 47 U.S.C. §§ 251, 252.

[11/] *See Atlantic Alliance Telecommunications, Inc. v. Bell Atlantic*, 2000 U.S. Dist. LEXIS 19649, 99-CV-4915 (ARR) (E.D. Va 2000) (noting that "[t]he tight schedule set out in the Act manifests an intention of Congress to resolve disputes expeditiously," that the strict timelines contained in the Telecommunications Act indicate Congress' desire to open up local exchange markets to competition without undue delay") (quoting *AT&T Communications Sys. v. Pacific Bell*, 203 F.3d 1183, 1186 (9th Cir. 2000) and that "the legislative history explains that the purpose of the Act is 'to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition'" (quoting H.R. Conf. Rep. No. 104-458, at 113 (1996) reprinted in 1996 U.S.C.C.A.N. 10, 124)).

[12/] *Local Competition Order* ¶ 15 (the "statute addresses this problem [of the ILEC's "superior bargaining power"] by creating an arbitration proceeding in which the new entrant may assert certain rights").

Section 252 thus seeks to address the very unequal bargaining power manifest in negotiations between ILECs and competitors in order to advance Congress's goal of increased competition.[13/]

It is within this framework that Intrado requested interconnection negotiations and later filed its Petition with the Commission within the statutory window when it became clear that the Parties would be unable to reach a mutually beneficial negotiated agreement. Contrary to the structure established by Congress, Embarq argues the Commission should support an interconnection approach that would give Embarq ultimate control over the negotiation process.[14/] Intrado cannot offer service without interconnecting to the public switched telephone network ("PSTN") and Embarq is one of the dominant gatekeepers to that network. If Intrado were required to wait until Embarq engaged in effective, constructive negotiations of an agreement that is beneficial to both Parties prior to filing for arbitration, Intrado's rollout of competitive service offerings in Ohio likely would be delayed indefinitely. As discussed above, the Act was specifically designed to avoid the abuse of such power on the part of ILECs like Embarq and its Motion to Dismiss should be denied.

B. Intrado Has Acted in Good Faith as Required by the Act, the FCC's Rules, and Ohio Law

The facts reflect that Intrado has acted in good faith to negotiate an interconnection agreement with Embarq.[15/] Under the Act, the FCC's rules, and Ohio law, both parties to a negotiation are required to negotiate in good faith.[16/] The FCC determined that some minimum

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

[14/] Embarq Motion at 4.

[15/] Embarq Motion at 2.

[16/] 47 U.S.C. § 251(c)(1); 47 C.F.R. § 51.301; O.A.C. § 4901:1-7-08(A).

requirements of good faith negotiation are needed "to address the balance of the incentives between the bargaining parties" in order to "realize Congress's goal of enabling swift market entry by new competitors."[17/] The decision whether a party has acted in good faith is made largely on a case-by-case basis in light of all of the facts and circumstances underlying the negotiations.[18/] A carrier violates its duty to negotiate in good faith by, for example, obstructing negotiations,[19/] delaying negotiations,[20/] conditioning negotiations on a carrier first obtaining state certification,[21/] refusing unreasonably to provide relevant information,[22/] requesting that a competing carrier "attest that the agreement complies with all provisions of the 1996 Act, federal regulations, and state law,"[23/] and by failing to comply with reasonable requests for cost data.[24/]

Embarq has not demonstrated that Intrado engaged in such conduct. Rather, there is ample evidence indicating that Embarq has not acted in good faith by taking "actions that are deliberately intended to delay competitive entry, in contravention of the statute's goals," which the FCC has determined it "will not condone."[25/] The substance of Embarq's Motion fails to support a claim of bad faith by Intrado.

First, Embarq wrongly claims that Intrado delayed the negotiation process after Embarq sent Intrado its "standard terms and conditions for CLEC interconnection."[26/] After receiving Embarq's template agreement, Intrado contacted Embarq on numerous occasions to schedule a

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17/ 47 C.F.R. § 51.301; *Local Competition Order* ¶ 141.

18/ *Local Competition Order* ¶¶ 142, 150.

19/ 47 C.F.R. § 51.301; *Local Competition Order* ¶ 148.

20/ 47 C.F.R. § 51.301; *Local Competition Order* ¶ 149.

21/ 47 C.F.R. § 51.301; *Local Competition Order* ¶ 154.

22/ 47 C.F.R. § 51.301; *Local Competition Order* ¶ 149.

23/ 47 C.F.R. § 51.301; *Local Competition Order* ¶ 152.

24/ 47 C.F.R. § 51.301; *Local Competition Order* ¶ 155.

25/ *Local Competition Order* ¶ 154.

26/ Embarq Motion at 2, 4.

"meet and greet" call between the Parties prior to Intrado providing a mark-up of the Embarq template agreement.[27/] Embarq's "standard" agreement did not represent a logical starting place for Intrado. As a facilities-based carrier, Intrado requires specific network interconnection arrangements to achieve a cost-effective and efficient network that will allow Ohio consumers to reap the benefits of competition. Thus, Intrado sought to discuss its interconnection needs with Embarq first rather than provide a redlined agreement without the underlying rationale as to why Intrado's proposed revisions were made. After numerous email exchanges, Embarq finally agreed to hold an initial call on September 18.[28/] Within *three business days* after the call, Intrado provided its initial mark-up to Embarq reflecting the Parties' discussions on the call.[29/] Embarq's "delay" claims are simply without merit.[30/]

Second, Embarq attempts to condemn Intrado by claiming that Embarq acted in good faith by responding to the issues raised by Intrado in its mark-up of the template agreement.[31/] This claim is untrue. Embarq's so-called "responses" to Intrado's proposed language are more appropriately characterized as delay tactics rather than responses: "We are still discussing internally" (October 3, 2007);[32/] "We are working on a response to you" (October 24, 2007);[33/] "your request for interconnection . . . [may not be] subject to the interconnection obligations of

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27/ Intrado Petition at 12.

28/ Intrado Petition at 12.

29/ Intrado Petition at 12.

30/ *Cf. Local Competition Order* ¶ 149 (stating "parties seeking to avoid a legitimate accusation of breach of the duty of good faith in negotiation will work to provide their negotiating adversary all relevant information").

31/ Embarq Motion at 3-4.

32/ Attachment 7 to Intrado Petition (attached hereto as Attachment 1).

33/ Attachment 10 to Intrado Petition (attached hereto as Attachment 2).

§251(c)(2) of the Act" (November 1, 2007).[34/] These types of delay tactics do not demonstrate Embarq's good faith.[35/]

Third, Intrado's inclusion of issues for the first time in its Petition does not represent a lack of good faith as suggested by Embarq.[36/] As discussed above, such an approach is consistent with the framework established by the Act and Embarq has been given the opportunity to respond to Intrado's issues in its response to the Petition. Moreover, Intrado specifically contacted Embarq *after the Petition was filed* to determine whether additional negotiations might be useful to reduce the number of issues for which Embarq would be required to respond.[37/] As the Commission is well aware from prior arbitrations, it is fairly typical that as the arbitration process plays out, the parties will continue to negotiate and resolve issues, which is what Intrado has tried to do and will continue to do.[38/] In response, however, Embarq refused to engage in additional negotiations unless Intrado withdrew its Petition or agreed to hold the arbitration proceeding in abeyance.[39/] Thus, while Embarq argues that issues raised in Intrado's Petition could have been "voluntarily resolved,"[40/] Embarq rejected Intrado's attempts to do just that. Embarq's refusal to participate in further negotiations with Intrado is a failure to negotiate in good faith as required by the Act.[41/]

[34/] Attachment 11 to Intrado Petition (attached hereto as Attachment 3).

[35/] *Cf. Local Competition Order* ¶ 148 (stating that "intentionally obstructing negotiations also would constitute a failure to negotiate in good faith, because it reflects a party's unwillingness to reach agreement").

[36/] Embarq Motion at 3-4.

[37/] Email correspondence from Thomas Hicks, Intrado, to Various Intrado Personnel (Dec. 13, 2007) (indicating that a message had been left for Embarq regarding ongoing negotiations to reduce the outstanding issues raised in the arbitration filing) (attached hereto as Attachment 4).

[38/] This approach is also consistent with the Act. 47 U.S.C. § 252(b)(5).

[39/] Email correspondence from Kathryn Feeney, Embarq, to Thomas Hicks, Intrado (Dec. 14, 2007) (attached hereto as Attachment 5).

[40/] Embarq Motion at 4.

[41/] 47 U.S.C. § 252(b)(5) ("The refusal of any other party to the negotiation to participate further in the negotiations, to cooperate with the State commission in carrying out its function as an arbitrator, or to continue to

Further, inclusion of issues for the first time in a petition for arbitration is not unique to the instant arbitration. Carriers filing petitions for arbitration are required to identify all issues raised by the interconnection agreement to be arbitrated by the state commission, or lose their right to such arbitration.[42/] As a practical matter, some issues are not put on the table during the negotiation process because they are less critical to the proposed interconnection arrangement or the negotiating parties simply do not have enough time to address them before the arbitration deadline. In this case, however, many of the issues identified by Intrado in its Petition could have been discussed with Embarq prior to the filing of the Petition if Embarq had indicated it was willing to negotiate with Intrado or had otherwise responded to Intrado's initial mark-up. Under Embarq's approach, competitors like Intrado would be at the mercy of the ILEC to determine which issues should be identified and negotiated before an arbitration petition is filed.

In addition, the FCC utilizes a similar arbitration method when it assumes the jurisdiction of a state commission pursuant to Section 252(e)(5) of the Act.[43/] Specifically, the FCC has embraced a "best final offer" process as the preferred method for arbitration of interconnection agreements.[44/] Under this style of arbitration, also known as "baseball arbitration," each party presents to the arbitrator its preferred language to be implemented in the interconnection agreement and the arbitrator makes its ruling based on the each party's proposals, hearings, and briefs in support. The FCC has recognized that final offer arbitration fosters a situation where "each party has incentives to propose an arrangement that the arbitrator could determine to be

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negotiate in good faith in the presence, or with the assistance, of the State commission shall be considered a failure to negotiate in good faith.").

[42/] 47 U.S.C. § 252(b)(1).

[43/] 47 U.S.C. § 252(e)(5). This section allows the FCC to step in the shoes of a state commission that has failed to act in response to a petition for arbitration.

[44/] 47 C.F.R. § 51.807(d).

fair and equitable."[45] The FCC also has acknowledged that "parties are more likely to present terms and conditions that approximate the economically efficient outcome, because proposing extreme terms and conditions may result in an unfavorable finding by the arbitrator" under the final offer method.[46] Accordingly, there is no justification for Embarq's claim that Intrado acted in bad faith by submitting its proposed interconnection agreement language with its Petition.

C. Intrado's Petition Meets the Requirements of Section 252(b) and Ohio Law

Intrado's Petition fully complies with the requirements of Section 252(b) and the Commission's rules.[47] Intrado has set forth the issues presented by Embarq's template interconnection agreement and has explained its position on each issue in detail providing both the operational and legal justification for its proposed language changes. Intrado also provided the precise language needed in the interconnection agreement to effectuate the interconnection arrangement proposed by Intrado. Embarq's refusal to respond to Intrado's proposed revisions to the interconnection agreement language and its continued refusal to negotiate with Intrado made it impossible to describe Embarq's position in detail on each of the unresolved issues.[48] Embarq's argument is also disingenuous given that Embarq has been given the opportunity to set forth its own position on each of the issues in its own words and raise any additional issues it deems necessary as contemplated by the Act.[49] Intrado has complied with the requirements and purpose of Section 252(b) and the Commission's rules, which is to set forth the disputed issues

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[45] *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 14172, ¶ 268 (1996) ("*Local Competition NPRM*").

[46] *Local Competition NPRM* ¶ 268. The FCC observed that open-ended arbitration is slower and more difficult to administer than final offer arbitration. *See Local Competition NPRM* ¶ 268.

[47] 47 U.S.C. § 252(b); O.A.C. § 4901:1-7-09(D).

[48] *Cf.* Embarq Motion at 5.

[49] 47 U.S.C. § 252(b)(3); O.A.C. § 4901:1-7-09(F).

that the Commission is called upon to resolve. Therefore, Embarq's procedural deficiency arguments should be rejected.

II. INTRADO'S INTERCONNECTION REQUEST IS GOVERNED BY SECTION 251 AND THUS ITS ARBITRATION PETITION IS PROPER UNDER SECTION 252

There is no merit to Embarq's claim that Intrado's Petition raises issues that are not subject to arbitration under the Act.[50/] While Embarq may utilize commercial agreements and tariffs for services or arrangements it perceives to be similar to those sought by Intrado,[51/] that does not preclude Intrado from exercising its rights to interconnect with Embarq pursuant to Section 251(c). The interconnection arrangements proposed by Intrado and the issues raised in its Petition are appropriately the subject of a Section 251(c) interconnection agreement and the Section 252(b) arbitration process. Any other approach would be contrary to law.

A. Intrado Offers Telephone Exchange Service and Exchange Access Service

As discussed in detail in Intrado's Petition, Intrado's service offerings constitute telephone exchange service and exchange access service.[52/] Intrado and its affiliates hold authority to provide competitive local telecommunications services in thirty-seven states and have entered into numerous Section 251(c) interconnection agreements with other ILECs, such as Qwest and SBC (now known as AT&T). In 2000, claims similar to those raised by Embarq here were raised by AT&T (then SBC) in response to Intrado's (then known as SCC Communications) request for interconnection in California and Illinois. Both the California Public Utilities Commission and the Illinois Commerce Commission rejected AT&T's attempts

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[50/] Embarq Motion at 5-6.

[51/] Embarq Motion at 6, 7.

[52/] Intrado Petition at 20-24.

to block competition with such claims and found Intrado was entitled to interconnection under Section 251(c) and arbitration under Section 252 because it was acting as a telecommunications carrier and provided telephone exchange service, exchange access, and telecommunications services.[53/] The law continues to support the Commission making a similar finding here with respect to Intrado's status as a CLEC in the state of Ohio and its interconnection negotiation and arbitration rights.

Intrado seeks to offer local exchange services like any other competitor operating in Ohio. There is no merit to the claims made in Intrado's certification proceeding, including those made by Embarq through its trade association, that Intrado does not provide telephone exchange services as a common carrier because it does not provide local dialtone to the general public.[54/] The law is well-established that an entity may be a common carrier even "though the nature of the service rendered is sufficiently specialized as to be of possible use to only a fraction of the total population."[55/]

In addition, Intrado will offer 911 services to Public Safety Answering Points ("PSAPs") located in Ohio similar to the product currently offered by Embarq in Ohio. Interestingly, Embarq's Ohio tariff specifically states that Embarq's 911 service

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[53/] *See generally* Docket No. 00-0769, *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.*, Arbitration Decision (I.C.C. Mar. 21, 2001) ("*Illinois Order*"); Decision No. 01-09-048, *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 (C.P.U.C. Sept. 20, 2001) ("*California Order*").

[54/] *See, e.g.*, Case No. 07-1199-TP-ACE, *Application of Intrado Communications Inc. to Provide CLEC Services in the State of Ohio*, Motion of the Ohio Telecom Association to Intervene and Submission of Statement Detailing the Reasons Why the Application Should Not Be Granted, at 3-4 (filed Dec. 4, 2007). Embarq is a member of the Ohio Telecom Association. *See* http://www.ohiotelecom.com/2members.html.

[55/] *NARUC v. FCC*, 525 F.2d 630, 641 (D.C. Cir. 1975); *see also Illinois Order* at 8 (noting that in the Intrado system "a 911 call is routed to a PSAP, which is a subsection of the general public, and whose duty it is to serve the general public at large").

> is a *telephone exchange communications service* whereby a public safety answering point (PSAP) designated by the participating local governmental authority may receive and answer calls that have been placed by dialing the number 9-1-1 . . . [and] includes the services provided by the lines and equipment associated with the service arrangement for the answering, transferring and dispatching of public emergency telephone calls dialed to 9-1-1.[56]

Embarq cannot credibly argue that Intrado's 911 service offering is not telephone exchange service when it classifies its own service as such. Indeed, the fact that Embarq's 911 service is included in Embarq's tariff is proof that Embarq views that service as a telecommunications service.[57]

Further, the distinctions that Embarq seeks to make between the "voice network" and the "data or information network" portions of the wireline 911 network simply do not exist.[58] While Embarq recognizes that it is required to provide Intrado with access to 911 databases, Embarq attempts to separate 251(c) interconnection obligations from that requirement.[59] The wireline 911 network is interconnected to the PSTN.[60] Interconnection for transmission and routing of 911 traffic and access to 911 databases are functions that are so intertwined that one would be useless without the other.[61] Indeed, segmenting the physical routing of 911 calls from the

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[56] United Telephone Company of Ohio d/b/a Embarq, P.U.C.O. No. 5 General Exchange Tariff, Section 32, Original Sheet 5 (effective Mar. 5, 2007) (emphasis added).

[57] O.A.C. § 4901:1-5-01(BBB) (defining "tariff" as "a schedule of rates, tolls, rentals, charges, classifications, and rules applicable to services and equipment provided by a telecommunications provider that has been filed or posted in such places and in such manner as the commission orders"); *see also id.* § 4901:1-5-01(CCC) (defining "telecommunications provider" as an entity that "provides telecommunications service . . . under the commission's jurisdiction").

[58] Embarq Motion at 6.

[59] Embarq Motion at 7-8.

[60] *E911 Requirements for IP-Enabled Service Providers*, 20 FCC Rcd 10245, ¶ 14 (2005) ("*VoIP E911 Order*") (noting that the 911 network is interconnected with the public switched telephone network).

[61] *VoIP E911 Order* ¶ 15 (finding the Wireline 911 Network consists of the Selective Router, the trunk line(s) between the Selective Router and the PSAP, the ALI database, the SRDB, the trunk line(s) between the ALI database and the PSAP, and the MSAG).

database that provides the routing information for such calls as Embarq suggests[62] would significantly diminish the viability and reliability of 911 services.

The interconnection and trunking facilities that Intrado seeks for the provision of its local exchange services and its competitive 911 services are no different than the interconnection Embarq provides to other competitors in Ohio. Intrado is not asking for "unbundled access to the voice portion of the wireline E9-1-1 Network" as Embarq claims.[63] Rather, Intrado is merely seeking its rights, as recognized by the FCC, to "nondiscriminatory access to, and interconnection with, [Embarq's] networks for the provision of 911 and E911 services"[64] and other local exchange services to end users.

Embarq's claim that 911 interconnection is governed by Section 251(a)[65] is an inaccurate statement of the law. Specifically, the FCC decision cited by Embarq states:

> the [FCC] currently requires [local exchange carriers] to provide access to 911 databases and *interconnection to 911 facilities* to all telecommunications carriers, pursuant to sections 251(a) *and (c)* and section 271(c)(2)(B)(vii) of the Act. We expect that this would include all the elements necessary for telecommunications carriers to provide 911/E911 solutions. . . .[66]

Thus, contrary to Embarq's assertions, Embarq is required by Section 251(c) to make "interconnection to 911 facilities" available to Intrado to the same extent it would provide such interconnection to itself or any other competitor operating in Ohio.

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[62] Embarq Motion at 6.

[63] Embarq Motion at 6.

[64] *Revision of the Commission's Rules To Ensure Compatibility with Enhanced 911 Emergency Calling Systems; Petition of City of Richardson, Texas*, 17 FCC Rcd 24282, ¶ 25 (2002).

[65] Embarq Motion at 6.

[66] *VoIP E911 Order* ¶ 38 (emphasis added).

B. The Items Included in Intrado's Proposed Interconnection Agreement Are within the Purview of Section 251(c)

Embarq wrongly claims that Intrado has "inappropriately" included items in its proposed interconnection agreement that are outside of Section 251(c).[67] Embarq, however, does not specify the items in Intrado's proposed interconnection agreement that it considers beyond the scope of Section 251(c). The interconnection arrangements and language requested by Intrado in its Petition were based on Embarq's template interconnection agreement provided to Intrado as the starting point for negotiations in response to Intrado's Section 251(c) negotiation request. In *Coserv*, the Fifth Circuit expressly held that

> where the parties have voluntarily included in negotiations issues other than those duties required of an ILEC by § 251(b) and (c), those issues are subject to compulsory arbitration under § 252(b)(1). . . . Congress knew that these non-251 issues might be subject to compulsory arbitration if negotiations fail. That is, Congress contemplated that voluntary negotiations might include issues other than those listed in § 251(b) and (c) and still provided that *any issue* left open after unsuccessful negotiation would be subject to arbitration by the [state commission].[68]

Notwithstanding Embarq's argument to the contrary, Intrado has not forced Embarq to arbitrate issues that there were not included in the Parties' negotiation in contravention of *Coserv*.[69] Rather, each and every issue raised in Intrado's Petition flows from revisions to Embarq's own template 251(c) interconnection agreement. Embarq alone decided which terms and arrangements would be included in the template interconnection agreement and which would not. Any provisions set forth in the Embarq template interconnection were therefore the subject

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[67] Embarq Motion at 7-8.

[68] *Coserv Limited Liability Corporation v. Southwestern Bell Telephone Company*, 350 F.3d 482 (5th Cir. 2003) (emphasis in original).

[69] Embarq Motion at 8 (citing *Coserv Limited Liability Corporation v. Southwestern Bell Telephone Company*, 350 F.3d 482 (5th Cir. 2003)).

of the Parties' negotiations, and as such, Embarq cannot now claim that the issues raised by Intrado in its Petition with respect to those items are not subject to compulsory arbitration under Section 252.

Further, the FCC has emphasized that any "agreement that creates an *ongoing* obligation pertaining to resale, number portability, dialing parity, access to rights-of-way, reciprocal compensation, interconnection, unbundled network elements, or collocation is an interconnection agreement" subject to Section 252.[70/] These are just the types of obligations and services Intrado seeks to include in its proposed interconnection agreement with Embarq. Using a non-251 arrangement as Embarq suggests also would violate the Act's requirements that interconnection agreements be filed with state commissions.[71/] The Commission "should have the opportunity to review *all* agreements" to "best promote[] Congress's stated goals of opening up local markets to competition, and permitting interconnection on just, reasonable, and nondiscriminatory terms" and "to ensure that such agreements do not discriminate against third parties."[72/] Embarq cannot use the commercial agreement process to evade its responsibilities under the Act.

III. HOLDING INTRADO'S PETITION IN ABEYANCE WOULD BE CONTRARY TO LAW AND THE PUBLIC INTEREST

As an alternative to its request for dismissal of Intrado's Petition, Embarq asks the Commission to hold Intrado's Petition in abeyance pending resolution of Intrado's certification request,[73/] which is currently pending before the Commission.[74/] Holding the arbitration

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[70/] *Qwest Communications International Inc. Petition for Declaratory Ruling on the Scope of the Duty to File and Obtain Prior Approval of Negotiated Contractual Arrangements under Section 252(a)(1)*, 17 FCC Rcd 19337, ¶ 8 (2002) (emphasis in original).

[71/] 47 U.S.C. §§ 252(e)(1), (h).

[72/] *Local Competition Order* ¶ 167 (emphasis in original).

[73/] Embarq Motion at 8.

proceeding in abeyance would be inconsistent with the law and contrary to the interests of Ohio consumers. The Commission should not condone Embarq's delay tactics and should deny Embarq's request.

In Section 252 of the Act, Congress established a specific statutory scheme -- with definitive timeframes and deadlines -- for negotiating and arbitrating interconnection agreements. Section 252(b)(4)(C) requires the Commission to conclude the arbitration proceeding no later than nine (9) months after the date on which Embarq received Intrado's request for interconnection pursuant to Section 251(c).[75] The Commission's rules also recognize its statutory obligation to complete the arbitration proceeding within nine (9) months from the request for negotiation.[76] It is well established that statutory deadlines cannot be waived or extended except in very limited circumstances.[77] Indeed, the legislative history of Section 252 indicates that Congress sought strict adherence to the statutory deadlines[78] and the FCC has found "that the language of [S]ection 252 suggests that Congress intended that the process of negotiating and, when necessary, arbitrating interconnection agreements would have some definite end."[79] Delaying resolution of Intrado's Petition would therefore be contrary to the objectives of Congress in establishing the statutory timeframes of the Act, which were

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[74] Case No. 07-1199-TP-ACE, *Application of Intrado Communications Inc. to Provide CLEC Services in the State of Ohio* (filed Nov. 19, 2007).

[75] 47 U.S.C. § 252(b)(4)(C).

[76] O.A.C. § 4901:1-7-09(G)(4)(l) (citing to 47 U.S.C. § 252(b)(4)(C)).

[77] *Reuters, Ltd. v. FCC*, 781 F.2d 946, 951 (D.C. Cir. 1986) (citing *Gardner v. FCC*, 530 F.2d 1086 (D.C. Cir. 1976)). And the deadlines in the Commission's rules may be extended only by "mutual agreement of the parties and the arbitration Panel." O.A.C. § 4901:1-7-09(G)(7).

[78] *Armstrong Communications, Inc. Petition for Relief Pursuant to Section 252(e)(5) of the Telecommunications Act of 1996 and Request for Additional Relief*, 13 FCC Rcd 871, ¶ 11 (1998).

[79] *Petition of MCI for Preemption Pursuant to Section 252(e)(5) of the Telecommunications Act of 1996*, 12 FCC Rcd 15594, ¶ 29 (1997). For that reason, a state commission "fails to act" if it does not complete arbitration of an interconnection agreement within nine months as set forth in the Act. *See Low Tech Preemption Order* ¶ 5.

established to ensure Ohio consumers receive the benefits of competition in a timely manner as the public interest requires.

In addition, Embarq's request for abeyance is not supported by the Commission's Carrier-to-Carrier rules. Embarq claims that Intrado must be a "telephone company" to be entitled to negotiate and arbitrate an interconnection agreement and cites various Commission rules to that effect, but Embarq does not address the definition of "telephone company."[80/] Specifically, a "telephone company" is an entity "engaged in the business of transmitting telephonic messages to, from, through, or in [Ohio] and as such is a common carrier," and the definition also includes the definition of "telecommunications carrier" found in the Act.[81/] Nowhere does this definition include a requirement that an entity be certified by the Commission to be considered a "telephone company" under Ohio law. The term "telephone company" applies to Intrado even if it does not yet hold certification from the Commission because Intrado is a common carrier that will transmit telephonic messages to, from, through, and in Ohio.

Moreover, Embarq fails to mention that the provision of the Commission's Carrier-to-Carrier rules regarding the filing of arbitration petitions does not use the "telephone company" terminology. Rather it states that "[t]o petition the commission for arbitration, *a party to the negotiation* shall file" its request with the Commission.[82/] Embarq cannot accept Intrado's negotiation request, treat Intrado as an entity eligible for interconnection throughout the negotiation process, and then argue that Intrado cannot exercise its statutory rights to arbitration. Embarq's attempts to game the system and further delay competition by seeking to hold the arbitration proceeding in abeyance should be rejected.

80/ Embarq Motion at 8-9.

81/ O.A.C. § 4901:1-7-01(S) (defining "telephone company" by citing to R.C. § 4905.03(A)(3), which defines "telephone company"); *see also* 47 U.S.C. § 153(44) (defining "telecommunications carrier").

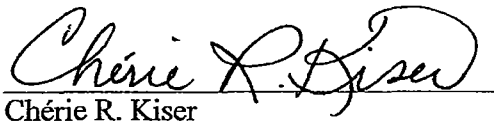
82/ O.A.C. § 4901:1-7-09(C) (emphasis added).

CONCLUSION

For the foregoing reasons, Intrado respectfully requests that the Commission reject the Motion to Dismiss filed by Embarq and move forward to arbitrate the unresolved issues identified in Intrado's Petition consistent with Intrado's proposed language set forth in Attachment 1 to the Petition. Intrado also requests that it be granted an opportunity to present oral argument on its Opposition to Embarq's Motion pursuant to Rule 4901-1-32 of the Ohio Administrative Code.

Respectfully submitted,

INTRADO COMMUNICATIONS INC.



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Dated: January 8, 2008

LIST OF ATTACHMENTS

No.	Brief Description
1.	Attachment 7 to Intrado Petition - Email from Kathryn Feeney, Embarq, to Thomas Hicks, Intrado (Oct. 3, 2007)
2.	Attachment 10 to Intrado Petition - Email from Kathryn Feeney, Embarq, to Thomas Hicks, Intrado (Oct. 24, 2007); Email from Thomas Hicks, Intrado, to Kathryn Feeney, Embarq (Oct. 24, 2007)
3.	Attachment 11 to Intrado Petition - Email from Kathryn Feeney, Embarq, to Thomas Hicks, Intrado (Nov. 1, 2007); Email from Kathryn Feeney, Embarq, to Thomas Hicks, Intrado (Nov. 1, 2007)
4.	Email correspondence from Thomas Hicks, Intrado, to Various Intrado Personnel (Dec. 13, 2007)
5.	Email correspondence from Kathryn Feeney, Embarq, to Thomas Hicks, Intrado (Dec. 14, 2007)

CERTIFICATE OF SERVICE

I, Chérie R. Kiser, hereby certify that a copy of Intrado Communications Inc.'s Opposition to Motion to Dismiss and Motion for Oral Argument was served upon the parties of record this 8th day of January 2008 as indicated below.

Chérie R. Kiser

Joseph R. Stewart
Trial Attorney for Embarq
Embarq
50 West Broad Street
Suite 3600
Columbus, OH 43215
Via hand delivery and electronic mail (without attachments)

Kathryn L. Feeney
Manager - Contract Management
Embarq
9300 Metcalf
Overland Park, KS 66212
Mailstop: KSOPKB0402-4674
Via Federal Express and electronic mail (without attachments)

William Watkins, Esq.
Attorney for Embarq
Embarq
5454 West 110th Street
Overland Park, KS 66211
Mailstop: KSOPKJ0401
Via Federal Express and electronic mail (without attachments)

From: Feeney, Kathryn L [EQ] [mailto:Kathryn.L.Feeney@Embarq.com]
Sent: Wednesday, October 03, 2007 3:05 PM
To: Hicks, Thomas
Subject: ICA

Tom - We are still discussing internally. Day 160 is 10/24/07. We would like to extend the window. I know we won't be ready to sign an agreement by then. Please let me know what you think about that.

Kathryn L. Feeney
Manager - Contract Management
9300 Metcalf
Overland Park, KS 66212
Mailstop: KSOPKB0402-4674
(v) 913-534-2313
(f) 913-534-7833
Kathryn.L.Feeney@embarq.com

From: Hicks, Thomas
Sent: Wednesday, October 24, 2007 8:59 AM
To: Feeney, Kathryn L [EQ]
Cc: Hicks, Thomas
Subject: RE: Intrado-Embarq Negotiations

Thank you Kathryn.

We look forward to your response, and please feel free to call me if you should need any clarification of our proposed edits.

Tom Hicks, ENP
Intrado Inc.
Director-Carrier Relations
Tel: (972) 772-5883
Mob: (972) 342-4482
Email: thomas.hicks@intrado.com

From: Feeney, Kathryn L [EQ] [mailto:Kathryn.L.Feeney@Embarq.com]
Sent: Wednesday, October 24, 2007 8:55 AM
To: Hicks, Thomas
Subject: Negotiations

Tom - I just wanted to touch base with you. We are working on a response to you, but it is taking longer than anticipated. I hope to have something for your review by early next week.

Kathryn L. Feeney
Manager - Contract Management
9300 Metcalf
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(v) 913-534-2313
(f) 913-534-7833
Kathryn.L.Feeney@embarq.com

From: Feeney, Kathryn L [EQ] [mailto:Kathryn.L.Feeney@embarq.com]
Sent: Thursday, November 01, 2007 2:38 PM
To: Hicks, Thomas
Subject: Negotiations

Tom:

Embarq's regulatory policy and legal departments have reviewed your request for interconnection under §251(c)(2) of the Act. The database network arrangements Intrado has requested are for the exchange of data or information, not for the transmission of local telephone exchange and exchange access telecommunications. As such, they are not subject to the interconnection obligations of §251(c)(2) of the Act. However, we may be able to work out an arrangement under a commercial agreement and would like to get some more details from you. We are available for a call November 13th, 14th or 15th from 4 to 5 CST. Does that time on one of those days work for you?

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(f) 913-534-7833
Kathryn.L.Feeney@embarq.com

From: Feeney, Kathryn L [EQ] [mailto:Kathryn.L.Feeney@embarq.com]
Sent: Thursday, November 01, 2007 3:26 PM
To: Hicks, Thomas
Subject:

Tom - I got your vm and am trying to get some times together for a meeting tomorrow or early next week. I have been asked to clarify one point in my earlier email to you. We do believe that parts of the request fall under 251a but not 251b and 251c so arbitration doesn't apply. We take the position that a 251a agreement is a commercial agreement.

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(f) 913-534-7833
Kathryn.L.Feeney@embarq.com

From: Hicks, Thomas
Sent: Thursday, December 13, 2007 11:16 AM
To: Ballesteros, Rebecca; Sorensen, Eric; 'Cindy Clugy (cclugy@comcast.net)'; Kiser, Cherie
Cc: Hicks, Thomas; Spence, Carey
Subject: Embarq 251 Negotiaions

For your records...

Please be advised that I left a callback message this morning for Kathryn Feeney (Embarq) acknowledging that we have filed for arbitration (not sure she is aware) and informing her that we would be happy to participate on any call she may wish to arrange to cooperatively work towards resolution of any of the outstanding issues identified in our filing.

I will advise once/if I hear back from her.

Tom Hicks, ENP
Intrado Inc.
Director-Carrier Relations
Tel: (972) 772-5883
Mob: (972) 342-4482
Email: thomas.hicks@intrado.com

From: Feeney, Kathryn L [EQ] [mailto:Kathryn.L.Feeney@embarq.com]
Sent: Friday, December 14, 2007 8:29 AM
To: Hicks, Thomas
Subject: Intrado Arbitrations

Tom:

I got your voice mail message asking if Embarq would be willing to negotiate some of the issues Intrado raised during negotiation to see if there are any issues we could resolve. I checked with our legal department and we are going to be busy preparing our responses to the filings and won't be available for any continued negotiations until after the first of the year, unless Intrado would be willing to withdraw its petitions and move back the filing date or agree to waive the 270 time frame in the federal act and file a joint motion holding the arbitrations in abeyance to give the parties additional time to negotiate.

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